



# European Union Agency for Fundamental Rights

## ANNUAL REPORT



2009





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## Foreword

This Annual Report 2009 is the second to be produced under the legal basis and mandate of the European Union Agency for Fundamental Rights (FRA), whose founding regulation came into effect in March 2007.

Whereas last year's Annual Report of the FRA, like those of the EUMC before it, covered developments only in the area of racism, xenophobia and related intolerance, this year's Report covers for the first time a much broader range of thematic areas, taking in other fundamental rights issues which now fall within the scope of the FRA's expanded mandate.

Because of its past expertise in the area of racism, xenophobia, anti-Semitism, Islamophobia and related discrimination, these issues still constitute the largest single thematic area in this Report. Nevertheless, as the Agency gains both staff and experience in the various fields of fundamental rights, future Annual Reports will gradually evolve to provide an overview of the diverse areas of its mandate.

For the first time, this Annual Report contains a summary of FRA activities on fundamental rights in the form of research projects, incident reports and opinions produced in 2008. The original research projects commissioned by the FRA aim to play a role in highlighting and analysing important current problem areas in the field of fundamental rights in the EU in ways that are helpful to stakeholders and policy makers. The Agency's work in 2008 on homophobia, discrimination in general, data protection, and children's rights has in different ways contributed to EU policy-making and legislation. For example, the extensive reports on homophobia in EU Member States have provided valuable material to support the Commission's proposal for more comprehensive EU anti-discrimination legislation, and the work on child trafficking has been designed to complement the Commission's work on a policy package combating trafficking in human beings and the sexual exploitation of children. At another level, the EU-MIDIS minorities and discrimination survey provides the kind of data that can facilitate the design of targeted non-discrimination policies regarding criminal victimisation.

The FRA's aim is that its research reports, together with this Annual Report on developments and issues during 2008, will be relevant for all those who are concerned or actively involved with fundamental rights issues in the EU. We hope that this and other reports of the FRA will help to stimulate public debate and play their part in promoting change, as part of the Agency's contribution to making fundamental rights a reality for everyone living in the European Union.

We would like to thank the Management Board for their diligent overseeing of the Annual Report process, and the Scientific Committee of the FRA for the help they provided with earlier drafts of the report.

We also take this opportunity of thanking the staff of the FRA for their commitment and hard work on this and all the other FRA projects during a very busy year.

**Anastasia Crickley**  
Chairperson of the  
Management Board

**Morten Kjærum**  
Director of the FRA

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## List of abbreviations

ADB	<i>AntiDiskriminierungsBüro</i> (German anti-discrimination office)
BME	black and minority ethnic (UK)
CERD	UN Committee on the Elimination of Racial Discrimination
CoE	Council of Europe
CRC	Convention on the Rights of the Child/Committee on the Rights of the Child
DAPHNE	Programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (part of the General Programme “Fundamental Rights and Justice” adopted by the European Parliament and the Council)
DSK	<i>Österreichische Datenschutzkommission</i> (Austrian Data Protection Commission)
ECHR	European Court of Human Rights
ECPAT	End Child Prostitution, Child Pornography and Trafficking of Children for Sexual Purposes
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
EEA	European Economic Area
ETC	Equal Treatment Commission <i>Commissie gelijke behandeling</i> (The Netherlands) Equal Treatment Commission <i>Gleichbehandlungskommission</i> (Austria)
EUMC	European Monitoring Centre on Racism and Xenophobia
EU-MIDIS	European Union Minorities and Discrimination Survey (FRA)
EUROSTAT	Statistical Office of the European Communities
FRA	European Union Agency for Fundamental Rights
FRALEX	Fundamental Rights Agency Legal Experts

FRONTEX	European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union
GARA	The Glasgow Anti Racist Alliance
GROS	General Register Office for Scotland
HALDE	<i>Haute autorité de lutte contre les discriminations et pour l'égalité</i> (independent administrative anti-discrimination/equality authority, France)
HCI	<i>Haut conseil a l'integration</i> (High Council on Integration, France)
ILO	International Labour Organisation
IOM	International Organization for Migration
LGBT	lesbian, gay, bisexual and transgender
MAF	Multi-Annual Framework (FRA)
MRAX	<i>Movement contre le racisme, l'antisémitisme et la xénophobie</i> (Movement against Racism, Antisemitism and Xenophobia, Belgium)
NCCRI	National Consultative Committee on Racism and Interculturalism, Ireland
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OPSC	Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography
OSCE	Organization for Security and Co-operation in Europe
PNR	Passenger Name Record
RAXEN	Racism and Xenophobia Network (FRA)
SCEP	Separated Children in Europe Programme
UNAR	<i>Ufficio Nazionale Antidiscriminazioni Razziali</i> (National Office Against Racial Discrimination, Italy)

UNHCR	UN High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	UN Office on Drugs and Crime
UN OHCHR	UN Office of the High Commissioner for Human Rights
VDAB	<i>Vlaamse Dienst voor Arbeidsbemiddeling en Beroepsopleiding</i> (Flemish Public Employment and Vocational Training Service)
ZARA	<i>Zivilcourage und Anti-Rassismus-Arbeit</i> (anti-racism NGO, Austria)

## Executive Summary

The first section of the Annual Report provides an overview of the state of implementation of the Racial Equality Directive,<sup>1</sup> focusing on the functions of the Equality Bodies, in particular the complaints mechanisms, and noting that most Member States had still not transposed the Directive to the full satisfaction of the Commission.

There is great variation in the function and tasks of Equality Bodies between the Member States. There is also great variation in the number of formal complaints recorded: in three Member States less than ten complaints were registered in 2007, whereas in another three Member States more than 1,500 were recorded. At the time of writing the report, there was no data available on the operation of an Equality Body in four Member States.

The FRA's EU-MIDIS survey, completed in December 2008, found that awareness of the existence of any Equality Body, or similar organisation, is low in the majority of the Member States, and that awareness of anti-discrimination legislation among the migrant and minority groups surveyed across the 27 Member States is minimal. This could, in part, account for the generally low incidence of formal complaints filed.

### Racist violence and crime

The next section outlines the extent and nature of racist violence and related crime in the EU, including emergent trends and responses to the problem, based on latest available data for comparison. It also highlights the continuing problem in many Member States of inadequate official criminal justice data on racist crime, which is symptomatic of a lack of political focus and resource allocation to address the problem.

During the period 2000-2007, 11 out of the 12 Member States which collect sufficient criminal justice data on racist crime experienced a general upward trend in recorded racist crime. However, if we look only at the most recent year - 2006-2007 - just five out of 12 Member States which collect sufficient criminal justice data on racist crime experienced an upward trend in recorded racist crime, while seven of the 12 experienced a downward trend.

In 2007, in 14 of the EU's 27 Member States – the majority - there is either a total absence of any publicly available official criminal justice data on racist crime or simply limited reporting on a few court cases. Nine Member States can be categorised as having a 'good' data collection mechanism on racist crimes, and in three Member States the data collection mechanisms can be considered to be 'comprehensive'.

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<sup>1</sup> Directive 2000/43/EC

## Racism and discrimination in areas of social life

### The employment sector

Given the limitations of data based on official complaints of discrimination, it is necessary to turn to official statistics and surveys to gain some meaningful insight into the problem of labour market discrimination. However, as described in previous FRA/EUMC reports, national practice regarding the collection and use of statistics on ethnic or national origin remains varied across Member States, ranging from their official encouragement to their legal prohibition. Surveys in 2008, as in previous years, identified poorer employment chances for migrants and minorities which cannot be explained by factors such as differences in educational attainment.

In four Member States, directly discriminatory advertisements for jobs were recorded, stipulating, for example, that only nationals of that Member State need apply. The illegality of such advertisements was firmly underlined in 2008 in an important judgement at the EU Court of Justice, the *Feyrn* case, which was the Court's first substantial judgement relating to the interpretation of the Racial Equality Directive.

### The housing sector

As with the employment sector, evidence for discrimination in the access of migrants, Roma, refugees and asylum seekers to the housing market is more convincingly highlighted through specific research projects, household surveys, and investigations by official bodies, rather than through statistics. For example, in three Member States, discrimination testing experiments by researchers showed that people of migrant origin or with 'foreign' names were discriminated against in access to housing.

In August 2008, a UNHCR survey on the situation of asylum seekers and refugees in Central Europe revealed that landlords were asking higher rents and deposits from refugees than from local tenants, that refugees were often not given back their deposits on leaving, and that refugees could be excluded from public housing, and could face other problems such as private landlords refusing to issue official contracts, so as to avoid tax.

With regard to the Roma population, cases of direct and indirect discrimination and forced evictions were reported in 16 Member States during the reporting period.

## The education sector

While on a legal basis most Member States provide open access to education, in practice, vulnerable groups face many difficulties in accessing quality education. Particularly affected by practical barriers to education are children of Roma, Sinti and Travellers and children of asylum seekers and undocumented migrants.

Only in four Member States is there any system for monitoring racist incidents in education. Types of racist incidents and discriminatory practices reported to the FRA in 2008 in ten different Member States include problematic content in schoolbooks and magazines, ethnic profiling during a study trip, segregation of Roma pupils, the unjustified allocation of Roma children into special needs schools, violence and hate speech against minority students by their peers, hate speech by teachers against minority students, language discrimination in access to education, and Islamophobic discrimination.

Available data shows that migrants and minorities are in many EU Member States overrepresented in 'special needs' schools, diminishing their chance to educational and professional success.

## The healthcare sector

As the FRA reported in its previous Annual Report, problems of access to health services affect in particular irregular immigrants, rejected asylum seekers, and Roma. They are also hampered by cultural barriers, such as language, religion or culture from using health services, while in many cases irregular migrants and rejected asylum seekers have only access to emergency health care, defined differently across the EU.

Reports during 2008 described different aspects of the problems that migrants and minorities can face regarding health care, whether these are problems of exclusion, discrimination, or cultural insensitivity. Some reports looked at the specific problems experienced by migrant women in accessing healthcare; others described how services in some Member States are being compromised by a lack of information in different languages, and a lack of training of staff in intercultural competence.

The FRA's 2008 EU-MIDIS survey showed that levels of perceived discrimination in healthcare are in fact rather low amongst migrants and minorities in the EU. However, the exception is the Roma: on average, 17 per cent of the Roma surveyed in seven Member States indicated that they felt they had been discriminated against by healthcare personnel (medical or other) in the last 12 months.



## Fundamental rights developments in the EU

The next part of the Annual Report provides an overview of the developments which took place in the Member States and at EU level in the other areas covered by the Multi-Annual Framework (MAF) of the FRA in the year 2008. It describes developments over the year regarding grounds of discrimination other than 'race' or ethnic origin, namely sex, religion or belief, disability, age, and sexual orientation, and combinations of these. It then addresses developments under the headings of 'the compensation of victims', 'the rights of the child', 'asylum, integration and the integration of immigrants', 'visa and border control', 'participation of citizens of the Union in the Union's democratic functioning', 'information society, respect for private life and the protection of personal data', and 'access to efficient and independent justice'.

At the EU level, one of the more significant developments in 2008 was the publication of the European Commission's Proposal for a Council Directive<sup>2</sup> to extend the protection against discrimination (on grounds of religion, belief, disability, age, and sexual orientation) currently covered by the Employment Framework Directive to areas of social security, healthcare, education and access to and supply of goods and services. This would level up protection to match the Racial Equality Directive.

On some issues there were related developments at national and European level. For example, in a number of Member States measures were improved for compensating victims of violent crime, and at EU level the introduction of the Directive on Compensation of Crime Victims facilitates access to compensation for victims of violent crimes in cross-border situations.

Regarding the rights of the child, some Member States have improved national initiatives to prevent children from sexual exploitation and sex offences, and at the European level the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse is open for ratification.

The 2008 Directive on Common Standards and Procedures for returning illegally staying third country nationals provides for detention for as short a period as possible (and for detention of minors only as a last resort). However, at the same time, in 2008 a number of Member States were the focus of criticisms from human rights bodies regarding detention and general treatment of asylum seekers.

In many Member States there were developments in 2008 regarding the use and abuse of video surveillance and personal data, with some initiatives by national authorities criticised by ombudsmen and human rights bodies. At European level, the European Court of Human Rights delivered two unfavourable judgements against one Member State for failure to provide sufficient independent review or guarantees regarding the implementation of surveillance.

<sup>2</sup> COM(2008)426 final, 2 July 2008.

## Fundamental rights issues covered by Agency activities in 2008

The next section of the Annual Report sets out the work that the FRA has carried out during 2008 in terms of research projects, incident reports and opinions. Whilst most of these were set out in the FRA's Work Programme 2008, some stem from specific requests for data, research or opinions from the European Parliament or from the European Commission.

### Homophobia and discrimination on grounds of sexual orientation and gender identity

The European Parliament in June 2007 asked the FRA to gather broad legal and social data on incidents and manifestations of homophobia and related issues across all 27 Member States. The first part of the project was the legal analysis, published in June 2008. This report identifies wide national differences in the strength of legal protection against discrimination for lesbian, gay, bisexual and transgender (LGBT) people between the EU Member States.

The second report, the analysis of the social situation, published in early 2009 shows that LGBT persons experience discrimination, bullying and harassment in all Member States. However, LGBT persons often adopt a strategy of 'invisibility' because of fear of discrimination, homophobia and transphobia. This contributes to the comparatively low number of cases of discrimination in this area reported across the EU.

The two reports are meant to establish the knowledge base on which to offer recommendations to tackle the problems identified, particularly on the level of EU anti-discrimination legislation.

### EU-MIDIS survey

In its previous Annual Reports the Agency has highlighted the fact that there is a severe lack of robust and comparable data in most countries on vulnerable minorities' experiences of discrimination and victimisation. This lack of data hampers the development of evidence-based policies that can tackle the problems of discrimination and victimisation. In view of this situation, the Agency launched its own data collection exercise in 2008 - the European Union Minorities and Discrimination Survey (EU-MIDIS) - to meet the challenges of inadequate data.

EU-MIDIS is the first EU-wide survey to interview selected immigrant and ethnic minority groups using the same translated questionnaire in all Member States, which means that the results are comparable between different minority groups and across countries. In total, 23,565 people with an immigrant/ethnic minority background were interviewed.

The questionnaire covered experiences of discrimination with respect to employment, education, housing, healthcare and social services, consumer services, experiences of criminal victimisation with respect to property crime, assaults and threats, harassment, corruption, and experiences with law enforcement, customs and border control. It also covered awareness of rights in the field of non-discrimination.

The findings are being released initially as a series of short 'Data in Focus' reports. The Agency intends to publish the full results report at the end of 2009, which will be followed in due course with the release of the survey's full dataset.

## Racism and social marginalisation

In the light of increasing concern over the impact of social marginalisation on Europe's growing Muslim population, the Agency undertook quantitative survey research in 2008 to explore the experiences of and attitudes towards racism, discrimination and social marginalisation amongst young people aged 12 to 18 from Muslim and non-Muslim backgrounds in three EU Member States, France, Spain and the UK. The aim was to explore the links between these attitudes and experiences of Muslim and non-Muslim youth and their attitudes towards, or activities in support of, anti-social behaviour, violence and crime.

The results will look for commonalities and differences in young people's attitudes and experiences, and will seek to draw conclusions for policy interventions that can more effectively address racism and/or social marginalisation and their consequences for young people.

## Addressing discriminatory ethnic profiling

In 2008, the Agency undertook targeted research on the theme of discriminatory ethnic profiling practices by law enforcement, customs and border control. A team of experienced researchers conducted a series of in-depth interviews with law enforcement, customs and border personnel in different EU Member States, covering, amongst other things, good or promising practices that recognise and address discriminatory profiling. From this a Handbook has been developed documenting existing good practices in the EU.

## Indicators for rights of the child

In 2007, the European Commission asked the FRA to develop indicators measuring how child rights are implemented, protected, respected and promoted across the EU. Work started in December 2007 by mapping the literature and research conducted internationally and at EU level in relation to indicators regarding child rights and well-being. This was followed by structured consultation with a

wide interdisciplinary network of experts, together with meetings and interviews with UN, NGO and EU representatives, and staff of international organisations.

The aim is to design a “toolkit” for the assessment of the impact of EU law and policy on children’s status and experience on the ground, going beyond a simple ‘deficit orientation’ towards a more constructive tracking of progressive achievement in child rights.

## Child trafficking

Trafficking of human beings, and especially of children, has been of long-standing concern to the international community. Building on the study carried out by the FRA to develop indicators for children’s rights, the Agency launched this study to examine comparatively the relevant legal instruments at EU and national level, as well as relevant judicial data and case law.

The comparison of the legal provisions and practices regarding child trafficking in the EU Member States shows a very diverse picture. There are wide differences in relevant criminal laws penalising child trafficking, in the training available to relevant professionals, in the availability of specialised shelters for the victims of trafficking, and in data collection on the subject.

The EU legal framework lacks a clear definition of child trafficking, and at Member State level child trafficking is not uniformly defined. The study concludes that the adoption of a clear and unequivocal definition, to be applied in all EU Member States, would present a major step to achieve a common response to child trafficking, both in terms of formulating preventive and repressive policies and data collection.

## Pilot media project

Previous work of the Agency on the mass media had indicated that there was a need for comparative methodologies for analysing media content in different Member States. Therefore, the Pilot Media Project was developed to test and refine methodologies for multinational comparative media analysis. The project analysed four daily newspapers in six Member States: Germany, Spain, France, Hungary, Poland and the UK, scrutinising a total of 43,741 articles.

The analysis describes regularities in the media representation of different groups and in the ways that issues of racism, discrimination, diversity, integration and migration are discussed. The study addresses questions, such as: who is given voice in articles about minority issues? In which contexts are minority actors represented in newspapers? Are predominantly positive, negative, or neutral attributes used in the representation of actors? Is there a significant impact of article authorship, article genre, article content scope, and article size on the representation of minorities?

The full findings will be made available in the second half of 2009.

## Incident reports and opinions

Incident Reports by the FRA are stimulated by situations which require further examination to assess whether fundamental rights have been respected, and to identify relevant information that may lead to future action by the Agency or by EU institutions. Following the violent anti-Roma disturbances which occurred in the Ponticelli district of Naples in May-June 2008, the FRA commissioned an 'Incident Report' from its Italian National Focal Point. The ensuing report *Violent Attacks against Roma in the Ponticelli district of Naples, Italy* was produced in August 2008 and made available to the European Parliament. The FRA's report was drawn upon in the report made by the delegation of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament following their visit to Italy in September 2008.

An Opinion was requested from of the FRA by the Presidency of the European Union on 3 September 2008 regarding the proposed Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes.<sup>3</sup> It was the first request for an opinion on a fundamental rights matter the FRA had received from the presidency of the European Union. The FRA gave its opinion alongside other institutions and bodies which were also consulted: the European Data Protection Supervisor; the Article 29 Working Party and the Working Party on Police and Justice.

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3 COM (2007) 654

## Introduction

This Annual Report of the European Union Agency for Fundamental Rights (FRA) covers information, events and developments in the EU for the year 2008.

This report is now broader in scope than previous Annual Reports of the Agency. As with previous years, the report covers material under the heading of 'racism, xenophobia and related intolerance', based on information provided by the Agency's RAXEN group of National Focal Points in all 27 EU Member States.

However, in February 2008 the first Multi-annual Framework (MAF) of the FRA was adopted, setting out the new thematic areas of the Agency's activities for the next five years, in line with the European Union's priorities in the field of human rights. The MAF continues to include the fight against racism, xenophobia and related intolerance among the thematic areas of the Agency's activity, but adds to this a range of other areas of fundamental rights, including the compensation of victims, the rights of the child, asylum, integration and the integration of immigrants, visa and border control, participation of citizens of the Union in the Union's democratic functioning, information society, respect for private life and the protection of personal data, and access to efficient and independent justice.

In the light of its expanded mandate, the Agency has created FRALEX, a second information-gathering group. FRALEX is a Legal Experts' Group composed of senior legal experts in all Member States who are contracted by the Agency to deliver a variety of data, reports and analyses regarding fundamental rights. For this Annual Report, for the first time, FRALEX has provided information to the Agency on all areas of the Multi-annual Framework from all 27 EU Member States.

Part I of this report covers key developments in the EU during 2008. The first section covers developments in the area of racism and discrimination, drawing on information provided by the RAXEN group. The second section covers information on all the other fundamental rights areas of the MAF, provided by the FRALEX group, looking in turn at developments at national level, and at EU level. Finally, Part II of the report sets out the activities on fundamental rights issues that have been carried out by the Agency during 2008, covering research projects, incident reports and opinions.

# PART I: KEY DEVELOPMENTS IN 2008

## 1. Racism and Discrimination in the EU

### 1.1. Equality Bodies and complaints mechanisms under the Racial Equality Directive

This section provides an overview of the state of implementation of the Racial Equality Directive<sup>4</sup>, focusing on the functions of the equality bodies, in particular the complaints mechanisms. Member States are under a duty to give legally binding effect to directives at the national level, allowing individuals to benefit fully from their rights under Community law. As “Guardian of the Treaties” the Commission is responsible for ensuring Member States’ correct implementation of the Directive. In fulfilling this role the Commission transmitted “reasoned opinions” to 17, and formal notice to four, Member States indicating that transposition of the Directive was unsatisfactory during the course of 2007.<sup>5</sup> If the Commission is unable to secure correct transposition of the legislation voluntarily after a period of negotiation it may ultimately resort to judicial proceedings before the European Court of Justice. In 2008 the Commission closed procedures against Greece, but procedures against other Member States have yet to be officially closed.<sup>6</sup>

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4 Directive 2000/43/EC

5 ‘17 Member States have received a reasoned opinion for incorrect transposition: Belgium, Denmark, France, Greece, Ireland, Italy, Portugal, Sweden, United Kingdom, Latvia, Lithuania, Poland, Estonia, Slovenia, Slovakia, Czech Republic and Finland. A complementary letter of formal notice has been sent to the Netherlands and Malta, while Austria and Germany have received letters of formal notice.’ Commission Staff Working Document, *Situation in the Different Sectors*, SEC(2008) 2854, p. 60. During 2004 and 2005 the Commission obtained declarations of non-conformity from the ECJ under Article 226 relating to Luxembourg (Case C-320/04 delivered 24 February 2004), Austria (Case C-335/04 delivered 4 May 2005), Germany (Case C-329/04 delivered 28 May 2005), and Finland (Case C-327/04 delivered 24 February 2005). None of these cases has yet led the Commission to seek a further judgment from the ECJ under Article 228.

6 See Commission decision number 2005/2356, 18 September 2008.

The European Court of Justice by the end of 2008 had delivered one judgment interpreting the Racial Equality Directive. The *Feryn* decision<sup>7</sup> is of particular significance for its broad reading of ‘direct discrimination’, which may be taken to occur by the mere publication of a discriminatory employment policy even in the absence of an identifiable complainant (for details of this case see section 2.2.2).

It should be highlighted that the majority of Member States (18) have actually followed the Directive’s model - while another four are moving in this direction - by extending the subject matter of prohibited discrimination beyond the employment context with regard to other grounds of discrimination, notably sexual orientation.<sup>8</sup> The majority of Member States have thus already disregarded any artificial “hierarchy” of discrimination grounds. This tendency is reflected in the European Commission proposal for a “horizontal” directive offering the same high level of protection against discrimination equally on all grounds, which was welcomed by the FRA.<sup>9</sup> It should be noted that the proposed multi-ground directive fully respects the principles of subsidiarity and proportionality, leaving decisions regarding the organisation and content of education, recognition of marital or family status, adoption, reproductive rights and other similar questions to be decided at the national level, in so far as these conform to other Community legislation already in place, (for example, regarding free movement).

### 1.1.1. Functions and tasks of Equality Bodies

Equality bodies vary across the European Union, as their tasks may include all or some of the following: (1) promoting equality legislation and good practice, including the preparation of reports or surveys and addressing recommendations to the authorities; (2) assisting victims, *inter alia* by facilitating filing of claims in court; (3) offering mediation, i.e., seeking to arrive at a friendly settlement between the victim and the offender; and/or (4) the quasi-judicial settlement of disputes with the adoption of binding sanctions or orders, subject to review by courts. The first two of these functions must be exercised by equality bodies set up under Article 13 of the Racial Equality Directive. The other functions are equally important and could, ideally, be present in an equality body. However, as a recent FRA report has highlighted, these functions may not be easy to reconcile with one another when exercised by a single body:<sup>10</sup> for example, equality bodies empowered to assist and counsel victims may be perceived by alleged offenders, when mediating, as

7 Case C-54/07 *Feryn*, judgment of 10 July 2008, see: <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Ssubmit=rechercher&numaff=C-54/07>

8 FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation and gender identity in the EU Member States: Part I – Legal Analysis*, FRA 2008, p. 36, available at <http://fra.europa.eu>.

9 European Commission (Brussels, 2.7.2008 COM(2008) 426 final 2008/0140 (CNS)), *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, available at <http://ec.europa.eu/social/BlobServlet?docId=477&langId=en> (15.12.2008)

10 FRA, *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis*, FRA 2008, pp. 38-40, available at <http://fra.europa.eu>.



‘taking sides with the victim’, which can reduce their effectiveness. It is significant to note that the Dutch Equal Treatment Commission, one of the most effective equality bodies in the EU, whose case-law is considered highly authoritative even by courts, does not assist victims of discrimination, since this latter function is seen as contradictory to its main task of impartially hearing and investigating cases of (alleged) discriminatory practices or behaviour. (Although the equal treatment law allows the Commission to take a case to court itself, thus far the Commission has not used this power, but has preferred an active follow-up policy.)

Nevertheless, certain equality bodies combine assistance to victims with the exercise of mediation functions or quasi-adjudicatory functions through the adoption of opinions. In **Latvia**, for example, the *Tiesībsarga birojs* [Ombudsman’s Office] may represent victims of discrimination before courts, yet it may also mediate between the alleged victim and the offender and deliver non-binding opinions on cases of alleged discrimination submitted to it. In **Romania**, the National Council on Combating Discrimination may assist victims, but may also mediate and decide to impose administrative sanctions where it finds discrimination to have occurred, under the supervision of administrative courts. An alternative option is the development of parallel institutions, as in **Austria** where Equal Treatment Commissions (ETCs) coexist with ombuds institutions: the ETCs are essentially independent and impartial bodies, consisting of members of ministries and social partners, with competence to adopt non-binding recommendations through a quasi-judicial process which may allow the parties to avoid the burden of litigation in the courts. The ombudspersons, on the other hand, are entrusted with counselling tasks, and may represent the victims before the ETCs.

### 1.1.2. Complaints data from Equality Bodies

Complaints statistics have been collected by the FRA’s National Focal Points of the RAXEN network from January to September 2008, although efforts were made to collect data up to December 2008. It must be underlined that the data provided are not directly comparable, due to the fact that the reference timeframe for the complaints data varies, in correspondence with the different reporting periods among the Member States. Comparison between Member States is also coloured by variation between the specialised bodies in several respects: their differing areas of competence, methods for recording and reporting complaints, powers to sanction racial/ethnic discrimination and their exercise of these powers in practice. While the Racial Equality Directive establishes minimum standards, it is not intended to fully harmonise relevant legislation and, as the FRA has noted in its previous reports, some Member States have already gone beyond these minimum standards, providing more comprehensive protection against racial/ethnic discrimination.

Since data for 2008 is not always complete, the observations below mainly relate to 2007. No data exists at the time of writing for four Member States: the **Czech Republic** has yet to create an equality body; that of **Luxembourg** was created only in 2008; that of **Spain** is not yet operational; in **Poland** no equality

body as defined under Article 13 of the Directive yet exists and those bodies receiving complaints relating to racist and xenophobic discrimination do not publish statistics. Given the difficulty of comparison, it is only possible to make general remarks relating to complaints received.

There is great variation between the Member States in the number of formal complaints recorded, which is clearly not simply a reflection of the differences in size of population. In three Member States less than ten were registered in 2007: **Estonia, Malta and Slovenia**. In ten Member States between ten and one hundred were registered: **Bulgaria, Denmark, Greece, Hungary, Ireland, Latvia, Lithuania, Portugal, Romania, Slovakia**.<sup>11</sup> In six Member States between one hundred and five hundred were registered: **Austria, Cyprus, Finland, Germany, Italy, Netherlands**. In four Member States significantly higher numbers were registered for 2007: **Belgium** (1691), **France** (1690), **Sweden** (905), **UK** (over 3,500 – this covers more than one year: 2006 -2007).

Although the variations noted above prevent the data from allowing useful comparison of the situation on the ground, the complaints statistics do permit inferences to be drawn regarding the effectiveness of the complaints mechanisms, as was highlighted in the FRA's previous Annual Report. Where fewer registered complaints exist this should not be taken to signal a lower incidence of discrimination; rather it may suggest that victims are unaware of, or unwilling to use, the available procedures.

Over the course of 2008 significant data has become available to support this interpretation. The latest Eurobarometer report on discrimination in the EU, concerning the perceptions of the general population,<sup>12</sup> and the FRA's own major 'EU-MIDIS' survey on migrant and minority groups' perceptions of discrimination,<sup>13</sup> both clearly demonstrate an awareness and information deficit regarding the existence of anti-discrimination legislation and of organisations recording complaints and helping victims.

The Eurobarometer report of July 2008, relating to awareness among the general population, found that only one-third of respondents said that they knew of their rights, should they be a victim of discrimination or harassment. The lowest proportions of those knowing their rights were recorded in Bulgaria (17 per cent) and Austria (18 per cent).<sup>14</sup>

The EU-MIDIS survey, completed in December 2008, found that awareness of anti-discrimination legislation among the migrant and minority groups surveyed

11 No data was available for 2007, however at the date of collecting information in 2008 it appears that 14 complaints had been received.

12 Eurobarometer 296, "Discrimination in the European Union: Perceptions, Experiences and Attitudes", July 2008, available at [http://ec.europa.eu/public\\_opinion/archives/ebs/ebs\\_296\\_en.pdf](http://ec.europa.eu/public_opinion/archives/ebs/ebs_296_en.pdf), p.22

13 The findings of the EU-MIDIS survey will be released as a series of reports over 2009 and 2010. Please consult <http://fra.europa.eu>

14 *Discrimination in the European Union: Perceptions, Experiences and Attitudes* Special Eurobarometer 296, European Commission 2008, p. 22

is equally minimal. Regarding awareness of any law that forbids discrimination against immigrants and ethnic minority people when applying for a job, 39 per cent responded negatively; even more respondents, 46 per cent, responded negatively regarding their awareness of any law that forbids discrimination against immigrants and ethnic minority people when entering or in a shop, restaurant or club; and 44 per cent said that they were not aware of any law that forbids discrimination against immigrants and ethnic minority people when renting or buying a flat. Interestingly, about a quarter of respondents gave no answer or answered 'don't know' suggesting insufficient knowledge of the legislation to respond.

The EU-MIDIS survey also found evidence to suggest that awareness of the existence of any equality body or similar organisation is low in the majority of the Member States, which could, in part, account for the low incidence of formal complaints filed. At least six in ten, respondents in each country were unable to name a single national organisation offering support or advice to people who have been discriminated against on any grounds.

Furthermore, the EU-MIDIS survey highlights non-reporting of discrimination as the norm among the migrant and minority groups surveyed, with few exceptions. Of incidents actually reported (either at the place of the discrimination or elsewhere, e.g. with designated bodies) most occurred either in the workplace or the education system. Both surveys indicate the belief that 'nothing would happen as a result', as the most prominent reason given for failure to formally report incidents of discrimination. (For further information on the EU-MIDIS survey see section 4.1 of this report.)

It may also be considered premature for equality bodies to have received a fully representative number of complaints, particularly in countries where a tradition or culture of addressing public bodies with formal complaints remains undeveloped among victims of discrimination or where ignorance of the existence or the powers of such bodies prevails. In this regard, it remains essential, as the FRA has noted in the past, to develop national awareness-raising campaigns targeting specific groups at risk of discrimination. Further improvements could be made by simplifying the complaints procedures, ensuring special training for staff dealing with discrimination victims and by allowing equality bodies to act on their own initiative.

It should be underlined that in order for individuals to benefit from their rights under EU law and take advantage of their legal heritage they must be made fully aware of these. In this regard, Article 10 of the Racial Equality Directive imposes an obligation on all Member States to ensure that national provisions adopted pursuant to the Directive are 'brought to the attention of the persons concerned by all appropriate means throughout their territory'. Proper transposition of the Directive therefore requires Member States to take appropriate action, such as awareness-raising activities, to give effect to this provision.

## 1.2. Racist violence and crime

- In May 2008 a series of violent attacks against Roma occurred in the Ponticelli district of Naples, including arson attacks on Roma camps, which attracted EU-wide attention and saw the police having to protect Roma from further attacks.<sup>15</sup> (See section 7.1 of this report).
- On 21 June 2008 a young Jewish man was severely beaten in Paris by several people of North African/African origin. The public prosecutor upheld a charge of anti-Semitism as an aggravating factor, given that the victim wore a kippa and therefore was recognisably Jewish.<sup>16</sup>

Racist violence and related crimes serve to illustrate the extent to which discrimination, dislike or hatred towards others can result in substantial harm and even loss of life. This section outlines the extent and nature of racist violence and related crime in the EU, including emergent trends and responses to the problem, based on the fullest and latest available data for comparison. It also highlights the continuing problem in many Member States of inadequate official criminal justice data on racist crime, which is symptomatic of a lack of political focus and resource allocation to address the problem. Where Member States take the issue of racist crime seriously, data is collected and used in the development of evidence-based policy and action to address this social ill.

### 1.2.1. Trends in racist crime

#### 1.2.1.1. General trends

Twelve EU Member States are now recognised by the Agency as collecting sufficiently robust criminal justice data on racist violence and crime to allow for a trend analysis of the problem. This is a slight improvement on previous years when only eleven were recognised as such.

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<sup>15</sup> *Incident Report: Violent attacks against Roma in the Ponticelli district of Naples, Italy* FRA, 2008

<sup>16</sup> <http://www.liberation.fr/france/010183857-un-jeune-juif-entre-la-vie-et-la-mort-apres-avoir-ete-lynche>,

**Table 1.1 – Trends in officially recorded racist crime**

	2000	2001	2002	2003	2004	2005	2006	2007	% change 2006-07	% change 2000-07
<b>Belgium</b>	757 crimes	751	727	848	1021	1224	1359	1289	- 5.2	+ 8.4
<b>Czech Republic</b>	364 crimes	452	473	335	364	253	248	196	- 21.0	- 6.4
<b>Denmark</b>	28 incidents	116	68	53	37	87	96	35	- 63.5	+ 43.2
<b>Germany</b>	-	14725 crimes	12933	11576	12553	15914	18142	17607	- 2.9	+ 3.9 2001-07
<b>France</b>	903 reports	424	1317	833	1574	979	923	707	- 23.4	+ 20.4
<b>Ireland</b>	72 reports	42	100	62	84	94	173	224	+ 29.5	+ 31.3
<b>Austria</b>	450 com- plaints	528	465	436	322	406	419	752	+79.5	+ 11.7
<b>Poland</b>	215 crimes	103	94	111	113	172	150	238	+ 58.7	+ 8.2
<b>Slovakia</b>	35 crimes	40	109	119	79	121	188	155	-17.6	+ 36.2
<b>Finland</b>	495 crimes	448	364	522	558	669	748	698	- 6.7	+ 6.7
<b>Sweden</b>	2703 crimes	2785	2391	2436	2414	2383	2575	2813	+ 9.2	+ 0.8
<b>England &amp; Wales</b>	47614 incidents	52638	54858	47810	53113	56654	59071	61262	+ 3.7	+ 4.0
<b>Scotland</b>			1699	2673	3097	3856	4294	4474	+ 4.2	+ 22.6 2002-07

When looking at official criminal justice data on racist crime, direct comparisons should not be made between data gathered by different Member States. This is because information is reported and recorded differently in each country. However, looking at fluctuations in recorded crime within a Member State can serve to highlight patterns in both manifestations of racist crime and changes in recording practices (while acknowledging that Member States with low absolute figures tend to show the most significant percentage changes from year to year). Bearing this in mind, Table 1.1 offers the following insights.

- During the period 2000-2007, eleven out of 12 Member States which collect sufficient criminal justice data on racist crime experienced a general upward trend in recorded racist crime. Only the **Czech Republic** experienced a downward trend.

- However, if we look only at the most recent year - 2006-2007 - just five out of 12 Member States which collect sufficient criminal justice data on racist crime experienced an upward trend in recorded racist crime: **Ireland, Austria, Poland, Sweden** and the **UK** (for both England and Wales, and for Scotland); while seven of the 12 experienced a downward trend: **Belgium, Czech Republic, Denmark, Germany, France, Slovakia** and **Finland**.

In sum, looking at overall long-term trends in recorded racist crime from 2000 to 2007, a picture emerges of an overall increase. However, if we look only at changes in recorded crime over the last year for which statistics are available, a less negative picture emerges.

### 1.2.1.2. Anti-Semitism

Only six Member States collect sufficiently robust criminal justice data that allows for a comparison in trends in *anti-Semitic* crime.

**Table 1.2 – Trends in recorded anti-Semitic crime<sup>17</sup>**

	2001	2002	2003	2004	2005	2006	2007	% change 2006-07	% change 2001-07
<b>Austria</b>	3	20	9	17	8	8	15	+87.5	+105.9
<b>France</b>	219	936	601	974	508	571	386	- 32.4	+ 47.6
<b>Germany</b>	1629	1594	1226	1346	1682	1662	1561	- 6.1	+ 0.4
<b>Netherlands<sup>18</sup></b>	41	60	50	58	65	108	50	-53.7	+11.7
<b>Sweden</b>	115	131	128	151	111	134	118	- 11.9	+ 2.0
<b>UK</b>	310	350	375	532	455	594	561	- 5.6	+ 12.1

Looking at Table 1.2, a very different picture of trends in recorded anti-Semitic crime emerges if we look at percentage changes between 2006 and 2007 compared to the period 2001-2007.

Between 2006 and 2007 five Member States experienced a downward trend in recorded anti-Semitic crime, while in the period 2001-2007 five experienced a

<sup>17</sup> In addition to the Member States listed here, the Centre for Equal Opportunities and Racism (CEOOR) in Belgium also releases official statistics on complaints of anti-Semitism, but these statistics go beyond addressing just racist crime. For details please see *Anti-Semitism. Summary overview of the situation in the European Union 2001-2008*. FRA 2009.

<sup>18</sup> Statistics of the Dutch Public Prosecution Service: number of discriminatory incidents where anti-Semitism was identified.

general upward trend and one, **Germany**, experienced a stable pattern. The large relative increase in anti-Semitic crime in **Austria** is the result of small overall number of incidents and therefore does not constitute a significant change. The decline in recorded anti-Semitism between 2006 and 2007 could reflect a number of things - including the status of Israeli-Palestinian conflict in this period, which, in countries such as **France**, often manifests itself at the local level as tensions between Jewish and Muslim communities. However, taking the broader trend in the period 2001-2007 it can be seen that France has experienced a significant overall upward trend in recorded anti-Semitism.

### 1.2.1.3. Right-Wing Extremism

Only four Member States collect sufficiently robust criminal justice data that allows for a comparison in trends in crime with an *extremist right-wing* motive.

**Table 1.3 – Trends in recorded crime with an extremist right-wing motive**

	2000	2001	2002	2003	2004	2005	2006	2007	% change 2006-07	% change 2000-07
<b>Austria</b>	291	301	261	264	189	188	204	280	+ 37.3	+ 1.2
<b>Germany</b>	-	10054	10902	10792	12051	15361	17597	17176	- 2.4	+ 9.8 2001-07
<b>France</b>	207	198	179	148	461	419	301	247	- 17.9	- 17.9
<b>Sweden</b>	566	392	324	448	306	292	272	387	+ 42.3	- 1.5

Looking at Table 1.3, a very different picture of trends in recorded crime with an extremist right-wing motive emerges if we look at percentage changes between 2006 and 2007 in comparison to the period 2000-2007.

Between 2006 and 2007 two Member States experienced a significant upward trend in recorded crime – **Austria** and **Sweden** – while two experienced a downward trend – **Germany** and **France**. In comparison, for the period 2000-2007, Austria had a slight upward trend and Germany a notable upward trend, while Sweden had a slight downward trend and France a notable downward trend. A recent development, referred to by the Agency’s RAXEN reporting network in 2007 and 2008, is an increase in right-wing extremist ‘hate’ crime on the internet. To this end, increases in the period 2006-07 might reflect recent efforts by Member States to more effectively record internet hate crime.

### 1.2.1.4. Criminal justice data and its limitations

Working with available criminal justice data on racist crimes, the FRA assesses the quality of Member States’ data collection mechanisms from year to year, and places each state into one of four categories or tiers, with Tier 1 indicating comprehensive data collection and Tier 4 indicating the unavailability of data. This categorisation reflects the overall quality, detail and functioning of data collection mechanisms, and is not a simple count of the volume of recorded incidents.

Table 1.4 shows each Member State’s categorisation with respect to 2007 data (which represents the most complete year for data collection across the EU), and indicates any shifts in categorisation from the previous year.

**Table 1.4: Quality of official criminal justice data collection mechanisms on racist crime/violence in EU27 – indicating shift in Tier Status between the FRA’s 2008 and 2009 Reports**

<b>TIER 1</b> <b>Comprehensive</b> Extensive data collection, with detail about victim and offender characteristics, place of victimisation etc.	<b>TIER 2</b> <b>Good</b> A system exists to register incidents/ crimes, and/or system focuses on <i>right-wing extremism*</i>	<b>TIER 3</b> <b>Limited</b> Limited reporting on investigations and court cases, with detailed information available often only on request, or focus on <i>general discrimination*</i>	<b>TIER 4</b> <b>No official data available</b> No official data collected or made readily available in the public domain
Finland Sweden UK	Austria* <b>Belgium</b> ← Czech Republic Denmark France Germany* Ireland Poland Slovakia	Bulgaria <b>Cyprus</b> ← Estonia Hungary Latvia Lithuania Luxembourg* Netherlands Slovenia	Greece Italy <b>Malta</b> ← <b>Portugal</b> ← Romania Spain

In 2007, in 15 of the EU’s 27 Member States – the majority - there is either a total absence of any publicly available official criminal justice data on racist crime (Tier 4), or there is limited reporting on a few court cases (Tier 3).

In 2007, in nine Member States a ‘good’ data collection mechanism exists to register and report on racist crimes (Tier 2), and in three Member States the data collection mechanisms can be considered to be ‘comprehensive’ (Tier 1).



Comparing this report's findings with those from the Agency's previous 2008 report on racism and xenophobia, which looked at the quality of data collection mechanisms with respect to 2006 data, five countries have changed their tier placement; namely:

- **Belgium** has moved up from Tier 3 to Tier 2 in recognition of the quality and detail of data available for 2007.
- **Cyprus** has moved up from Tier 4 to Tier 3 in recognition of the fact that it has made available some limited data for 2007.
- **Italy, Malta and Portugal** have moved down from Tier 3 to Tier 4 as a reflection of the fact that they have no data collection on racist crime or did not make data available for 2007.
- **Greece and Spain** remain in the lowest category, Tier 1, as they have every year since the Agency began to monitor the quality of each Member State's data collection mechanisms.

In sum, the picture is a mixed one of improvement and also decline in the quality of data collection mechanisms on racist crime in the Member States. Disappointingly, **Italy, Portugal and Malta** all slipped back with respect to improvements they had made in previous years concerning the quality and availability of their data.

### 1.2.1.5. FRA generated data on racist crime - EU-MIDIS

Given the limitations in many Member States in official criminal justice data collection on crime and racially motivated crime against minorities, the FRA launched an EU-wide survey to explore, among other things, selected minorities' experiences of criminal victimisation, including whether they considered their victimisation to be racially/ethnically motivated (see section 4.1 for more information about the Agency's European Union Minorities and Discrimination Survey (EU-MIDIS)). A total of 23,565 minority respondents across all 27 Member States were interviewed face-to-face for the survey, with the fieldwork completed in November 2008.

A full and detailed analysis of EU-MIDIS results will be available as a series of FRA reports during 2009 and 2010. However, Figure 1.1 serves to illustrate the occurrence of crime and racist crime against minorities in Europe, which continues to be under-reported, under-recorded and under-prosecuted by law enforcement and criminal justice agencies. Given that EU-MIDIS only surveyed certain minorities in selected Member States, the figures below paint only a partial picture of an undocumented reality for many vulnerable groups throughout the EU.

**Figure 1.1: EU-MIDIS: Victims of in-person crime**

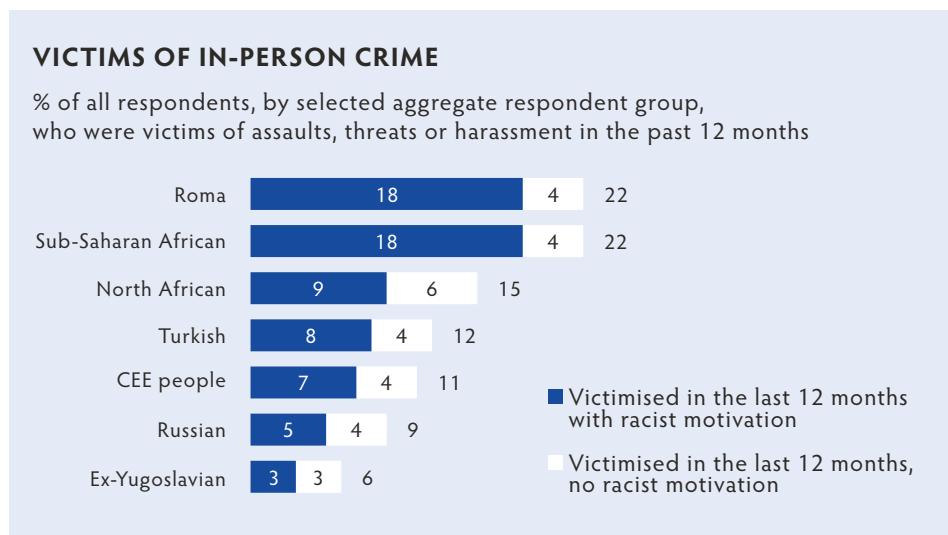


Figure 1.1 shows that 22 per cent of Roma and Sub-Saharan Africans<sup>19</sup> surveyed for EU-MIDIS, on average, were victims of in-person crime (comprising assault, threat and harassment). In other words, one in four Roma and Sub-Saharan African respondents surveyed by EU-MIDIS indicated they had been the victim of an assault, threat or harassment in the last 12 months.

Figure 1.1 also shows that 18 per cent of Roma and Sub-Saharan African respondents surveyed, on average, considered that their experience of victimisation was racially motivated. In other words, one in five Sub-Saharan African/Caribbean respondents and one in five Roma respondents surveyed by EU-MIDIS indicated they had been the victim of racially/ethnically motivated assault, threat or harassment in the last 12 months.

In sum, EU-MIDIS indicates that among the aggregate groups surveyed for the research, Sub-Saharan Africans (including Caribbeans) and Roma are most vulnerable to becoming victims of in-person crime and racially motivated in-person crime (encompassing assaults, threats and harassment).

### 1.2.1.6. Encouraging developments

Against the striking undercount of racist crime throughout much of Europe, as suggested by EU-MIDIS, there are encouraging developments in some Member States with respect to improvements in data collection. Building on its already advanced categorisation of hate crimes (according to their xenophobic, anti-Semitic, Islamophobic or homophobic motivation), Sweden is currently

<sup>19</sup> This category includes 'Black Caribbeans'.

investigating possibilities for including new categories for registering ‘anti-Roma’ and ‘anti-Afro-Swedish’ crimes under its hate crime data collection mechanism. The evidence of EU-MIDIS, as above, would support efforts to include these new categorisations.

Other notable developments include **Finland’s** government-backed research on the progress of racist crimes through the criminal justice system - from reporting through to prosecution and the courts. Information of this nature would allow law enforcement and criminal justice personnel to identify and target barriers to successful prosecution through a better understanding of cases that ‘fail’.

Progress can be noted in relation to the legal protection of victims of hate during the reference period in several Member States. The existence of a racist motive now features as an aggravating circumstance for certain crimes in **Portugal, Greece, and Italy**. Changes to legislation in this direction were further planned in **Lithuania** and **Hungary**. However, legislating in itself may be of limited significance, as illustrated in **Latvia**, where such provisions are reported not to have been applied in any case since the relevant amendment to the Criminal Law in October 2006.

It is apparent from the material submitted to the Agency by its RAXEN network that racist crime, and hate crime in general, is increasingly manifesting itself through the internet. In recognition of this, some countries are proactively developing campaigns to address the problem; for example, in 2008 **Belgium’s** Centre for Equal Opportunities and Opposition to Racism launched a nationwide awareness campaign against ‘cyber hate’. At the same time, new technology is being used as a tool to encourage the reporting of hate crime; for example, in **Denmark** the municipality of Copenhagen established an on-line registration facility for hate crime, which, in its first three months of operation, recorded over 200 complaints, half of which related to homophobic incidents; and in **Portugal** a hotline service, co-funded by the Commission, was launched to identify and block illegal content on the web, including sites with racist and xenophobic content.

The use of the internet as a means of disseminating hate speech is a particular challenge. In **Poland**, according to NIFC Hotline Polska, racist and xenophobic content was revealed in 230 reports on the internet in 2007.<sup>20</sup> Certain Member States show signs of being able to address this phenomenon. In 2008 the **Austrian** NGO ZARA succeeded in bringing its first case of cyber hate to an Austrian criminal court, with the result that the offender was sentenced to nine months in prison. However, as yet there is no EU-wide approach. The Additional Protocol to the Convention on Cybercrime,<sup>21</sup> which entered into force in 2006, has only been ratified to date by five EU Member States (**Cyprus, Denmark, France,**

20 NIFC Hotline Polska, <http://www.dyzurnet.pl/> (17.09.2008).

21 Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of Racist or Xenophobic Nature committed through Computer Systems, 2003.

**Latvia, Lithuania**) and Council Framework Decision 2008/913/JHA on the use of criminal law to combat racism and xenophobia contains no explicit reference to computer systems.<sup>22</sup>

Also at EU level the most significant and encouraging development in the fight against racist crime was the adoption on 28 November 2008 of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. This aims to improve judicial cooperation and ensure the effective implementation of comprehensive legislation to combat racism and xenophobia.<sup>23</sup> The Framework Decision requires punishment of a series of hate crimes directed against a group by reference to their race, colour, religion, descent or national or ethnic origin. These include inciting violence and hatred against such a group or condoning, denying or grossly trivialising genocide, crimes against humanity or war crimes that have taken place against such a group.

The adoption of this Framework Decision sends a clear message out to perpetrators and victims of racist crime, together with criminal justice actors, Member States and EU citizens, that racist crime is not to be tolerated in Member States and should be dealt with seriously. Having secured the adoption of this legislation, action needs to be taken at Member State level to ensure that: (i) victims are encouraged to report racist crime; (ii) mechanisms are in place to accurately record racist crime; and (iii) data collected on racist crime is sufficiently comprehensive to be useful to initiatives such as crime prevention.

Yet, against this backdrop of encouraging developments, the Agency continues to receive reports of Member States' failure to properly acknowledge and respond to racist crime. Most worrying are continuing reports of police violence against vulnerable minorities. For example, in 2008 both **Greece** and **Spain** have been criticised by Amnesty International, once again, with respect to accusations of police brutality against migrants and asylum seekers. In this regard EU level legislation needs to be matched by concerted efforts in practice to address racist crime in all its manifestations.

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<sup>22</sup> OJ L 328, 6.12.2008, p. 55.

<sup>23</sup> Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law. OJ L 328, 6.12.2008, p. 55. Building upon the Council Joint Action 96/443/JHA Action concerning action to combat racism and xenophobia. OJ L 185, 24.7.1996, p. 5.

## 1.3. Racism and discrimination in areas of social life

### 1.3.1. Racism and discrimination in the employment sector

#### 1.3.1.1. Statistics and discrimination

In 2008 in the **UK**,<sup>24</sup> **Ireland**,<sup>25</sup> the **Netherlands**<sup>26</sup> and **Sweden**<sup>27</sup> statistics on discrimination complaints to anti-discrimination agencies and cases brought to courts and tribunals can be found. However, in most Member States there is no accurate recording of official complaints of racial discrimination, and, as discussed in section 1.1.2 of this report, the inferences that can be drawn from such statistics are very limited.

Given the limitations of data on complaints, one option is to turn to broader official statistics and surveys to see if these can throw light on the problem of labour market discrimination, particularly if information is available on relevant variables such as educational attainment. For example, in its 2008 statistical analysis the OECD pointed out that the employment chances of young second generation immigrants in **Germany** are 15 per cent lower than the chances of their native German counterparts. As only half of these disparities can be explained by differences in educational attainment, the OECD assumes that 'labour market discrimination is likely to be a strong explanatory factor'.<sup>28</sup> Similarly, in **Estonia**, an analysis of recent official data showed that in comparison with ethnic Estonians, non-Estonians are characterised by a higher unemployment rate and job insecurity, a tendency to be in lower level jobs, and a larger discrepancy between their level of education and the requirements of their position.<sup>29</sup> Such examples of (indirect) evidence of the problem of discrimination through statistics are similar to those described in Belgium, Germany, the Netherlands and the UK in the FRA's 2008 Annual Report<sup>30</sup>, in France and Sweden in the 2007 report<sup>31</sup>, and in Denmark and Finland in the 2006 report.<sup>32</sup>

24 The number of racial discrimination claims made to the Employment Tribunals Service increased from 3317 during 2004/5 to 3780 during 2006/7. (a 13.9% increase), and in Northern Ireland there were 121 racial discrimination cases in 2007/08 compared to 107 in 2003/04

25 Compiled by the Office of the Director of Equality Investigations (ODEI), more commonly known as the Equality Tribunal), provisional published statistics for the first half of 2008 indicate that 176 complaints regarding 'race' were submitted – an increase of 23% on the same time period of 2007 when 143 referrals were made.

26 1,741 labour market related complaints were submitted to anti-discrimination agencies (ADAs -*anti-discriminatiebureaus*), a rise in relation to 2006

27 The number of complaints of ethnic discrimination in employment filed in 2008 from January to September was 228 - information provided by the Ombudsman against Ethnic Discrimination by email (30.10.2008)

28 OECD (2008) Employment Outlook – Edition 2008. OECD Publishing, available at: [http://cedoc.sirio.regione.lazio.it/DOCUMENTI/24\\_MERCATO.pdf](http://cedoc.sirio.regione.lazio.it/DOCUMENTI/24_MERCATO.pdf) (15.09.2008); quote stems from the summary version Employment Outlook 2008 – How does Germany compare?, available at: <http://www.oecd.org/dataoecd/33/54/40912588.pdf> (15.09.2008)

29 K. Kasesaru, A. Trumm A. (2008) 'The Socio-economic Situation of Non-Estonians', in: M. Heidmets (ed.) Estonian Human Development Report 2007, Tallinn, pp. 34-35. The sociological analysis was based on official statistical data from previous years.

30 EU Agency for Fundamental Rights Annual Report 2008, p. 43

31 EU Agency for Fundamental Rights Report on Racism and Xenophobia in the Member States of the EU 2007 p. 46

32 EUMC Annual Report on the Situation regarding Racism and Xenophobia in the Member States of the EU 2006, p. 43

### 1.3.1.2. Statistics on ethnic and national origin

Statistics which identify ethnic and national origin can get closer to the problem by identifying patterns of structured inequality affecting precisely those groups in society which are vulnerable to racial discrimination, patterns which otherwise may not be seen. However, as described in previous FRA/EUMC reports, national practice regarding the collection and use of statistics on ethnic or national origin remains varied across Member States, ranging from their official encouragement to their legal prohibition.

In 2008, some Member States were in the process of consolidating or refining their use of such statistics, and in others there were new public debates regarding the practice. In the **UK**, which has long used such data, a new Equalities Review emphasised the need to underpin equality measures by collecting data across seven ‘diversity’ categories, including ethnicity and religion,<sup>33</sup> and new guidelines have been produced for local authorities in collecting equality data.<sup>34</sup> At the same time the **Scottish** Executive and the General Register Office for Scotland (GROS) have been working to develop a new ethnicity classification for use in the 2011 Census and other government statistical collections.

In **Belgium**, the Commission for the Protection of Privacy<sup>35</sup> delivered a reasoned opinion on the practice of the Flemish Public Office for Employment (VDAB) of maintaining an internal database registering sensitive personal data (including ethnic origin) with the objective of monitoring diversity among its own personnel. The Commission judged the practice to be lawful as long as the reason for registering sensitive data is beneficial for the worker and if written consent of the worker is received.<sup>36</sup> In 2008, in **Slovakia**, the Parliamentary Committee for Human Rights, Minorities and Status of Women adopted a resolution<sup>37</sup> calling on the government to legalise the gathering of data on ethnic origin in order to improve the monitoring of discrimination based on ‘racial’ or ethnic origin, and in **Germany** the complete lack of statistical data on the ethnic composition of the population or the workforce was criticised in a report in 2008 by CERD.<sup>38</sup>

33 The Equalities Review (2007) *Fairness and Freedom: The Final Report of the Equalities Review* <http://archive.cabinetoffice.gov.uk/equalitiesreview/publications.html>

34 Tuke, A. (2008) *Measuring equality at a local level*, London: Improvement and Development Agency, <http://www.idea.gov.uk/idk/aio/8873228>

35 Commissie voor de bescherming van de persoonlijke levenssfeer / Commission de la protection de la vie privée

36 Avis n°05/2008 du 27.02.2008, available at: [http://www.privacycommission.be/fr/docs/Commission/2008/avis\\_05\\_2008.pdf](http://www.privacycommission.be/fr/docs/Commission/2008/avis_05_2008.pdf) (14.08.2008)

37 Uznesenie Výboru Národnej rady Slovenskej republiky pre ľudské práva, národnosti a postavenie žien k problematike zberu etnických dát: <http://www.nrsr.sk/appbin/xweb/VyboryNR/lpnz/Uznesenia/31.%20schôdza%2030.%2004.%202008/Uznesenie%20LPNZ%20133.doc>

38 Committee on the Elimination of Racial Discrimination (CERD-UN) (2008) *Consideration of Reports Submitted by State Parties Under Article 9 of the Convention. Concluding Observations of CERD. Germany (Seventy-third session)*

### 1.3.1.3. Court cases and exemplary incidents

Only a small minority of discrimination complaints ever culminate in a court case. Examples in 2008 include several in **Ireland** where the Equality Tribunal found two cases in favour of employees who had been discriminated against on grounds of ‘race’ in dismissal<sup>39</sup> and also upheld the case of an British national against an engineering company which had failed to take ‘reasonable and practicable steps’ to prevent his harassment on grounds of ‘race’.<sup>40</sup> In **Portugal**, a case was reported to the Commission for Equality and Against Racial Discrimination<sup>41</sup> of a local authority worker of Cape-Verdean origin who had been suspended, allegedly for accusing the local authority president of racism after he had called her a “nigger”, and also for talking Creole with her sister, contrary to the president’s instructions.<sup>42</sup>

In **Hungary** a company was fined for refusing to employ three applicants as cleaners because of their Roma origin,<sup>43</sup> and in **Slovakia**, a Roma woman continued legal action claiming she had been called a “gypsy”, assigned to the worst jobs, and had been the only employee not to see her contract extended. In **France**, in 2008, there were two cases<sup>44</sup> where a court or tribunal compared the career histories of long-serving employees with African, Maghrebian or Asian names to those of majority workers of comparable length of service or qualification in the companies, and judged that their inferior circumstances had been the result of racial discrimination.

## Discriminatory advertisements

In **Austria**, advertisements asking for ‘Austrians only’ or ‘only people whose native language is German’ remained a problem in 2008,<sup>45</sup> and in **Denmark** three job advertisements, apparently in violation of the Labour Market Discrimination Act, were reported to the Ministry of Labour, and ultimately to the Danish police.<sup>46</sup> In **Estonia**, a firm advertising for a dispatcher ‘with Estonian as a mother tongue’ was exposed by the Legal Information Centre for Human Rights,<sup>47</sup> and in **Finland**, the Office of the Ombudsman for Minorities forwarded 33 job advertisements demanding “Finnish nationality” and/or “perfect Finnish language

39 Ms. Ning Ning Zhang –v- Towner Trading (trading as Spar Drimnagh (DEC-E2008-037); Stratulat –v- M&J Recycling Ltd. (DEC-E2008-037)

40 A Worker –v- An Engineering Company (DEC-E2008-038)

41 Comissão para a Igualdade e Contra a Discriminação Racial: <http://www.cicdr.pt/> (30.09.2008). The case was reported by the NGO ‘SOS Racism’.

42 Cf. <http://ww1.rtp.pt/noticias/index.php?article=356874&visual=26&tema=1> (30.09.2008). See press release at [http://www.esquerda.net/media/panflo\\_benfica\\_be.pdf](http://www.esquerda.net/media/panflo_benfica_be.pdf) (30.09.2008)

43 <http://www.egyenlobanasmod.hu/zanza/94-2008.pdf> (19.09.2008).

44 Breleur, Kotor vs. Renault (02.04.2008); Bosh (20.06.2008) Renault at the Appeal Court of Versailles, and Bosch at an industrial tribunal.

45 ZARA, Rassismus Report 2007, available at: <http://www.zara.or.at/materialien/rassismus-report/Rassismus-Report%202007.pdf> (10.09.2008).

46 Reported by the NGO ‘DACoRD’

47 Database of the Legal Information Centre for Human Rights, Estonia

skills” on to Occupational Safety and Health Inspectorates for guidelines to be given to the employers, and in some cases passed them on to the police.<sup>48</sup>

The illegality of such advertisements was underlined in 2008 in an important judgement at the EU Court of Justice, the *Feyrn* case, described in section 2.2.2 of this report.

## Incidents reported by NGOs and other bodies

NGOs in many countries have reported incidents of racism and xenophobia against various minority and immigrant populations in 2008. In eastern **Germany** several anti-Polish incidents<sup>49</sup> were reported.<sup>50</sup> In **Austria** the NGOs ZARA<sup>51</sup> in Vienna and Helping Hands Graz<sup>52</sup> described incidents of discrimination affecting people from Croatia, Turkey, India, Iran, and Tunisia, including women with headscarves prevented from having direct customer contact,<sup>53</sup> harassment at work by colleagues without superiors intervening, threats or attacks against people working in public places by clients, and one incident where a man of African origin performing his military service was subject to racist harassment by his fellow recruits, sometimes wearing Ku-Klux-Klan white hoods with eye slits.<sup>54</sup>

The **Belgian** NGO MRAX contacted the Mayor’s office of a local authority in the Region of Brussels-Capital after manual workers of Moroccan origin had been the target of harassment and racist abuse for more than a year, with no management response.<sup>55</sup> In **Ireland**, the NCCRI<sup>56</sup> reported the case of a French man of African origin fired on the ground of ‘race’, as well as several incidents of racist abuse: for example, against an African man on a Dublin construction site, by customers against staff at a Dublin supermarket, and by colleagues against an employee of Dublin Bus.<sup>57</sup> The **German** anti-discrimination office ADB Köln registered the case of a man of Nigerian origin, who had suffered harassment and

48 Finland/Vähemmistövaltuutettu, Annual Report 2007, pp. 17-19. Available at: [http://www.ofm.fi/intermin/vvt/home.nsf/files/vuosikertomus\\_en\\_2007/\\$file/vuosikertomus\\_en\\_2007.pdf](http://www.ofm.fi/intermin/vvt/home.nsf/files/vuosikertomus_en_2007/$file/vuosikertomus_en_2007.pdf) (01.10.2008).

49 The national newspaper die tageszeitung reported the increasing number of anti-Polish incidents in Löcknitz, a small town at the German-Polish border with a relatively high inflow of Polish migrants. (S. Schmollack (2008) *Antipolnische Ressentiment in Vorpommern. Bis es knallt*, in: tageszeitung (13.05.2008)). See also G. Glowinski (2008) *Jugendliche wegen Anschlag vor Gericht*, in MZ-WEB.de (27.06.2008): <http://www.tagesspiegel.de/politik/deutschland/rechtsextremismus/Rechtsextremismus;art2647,2522067> (16.09.2008).

50 Online chronology of extreme right-wing attacks in Mecklenburg-Vorpommern, compiled by the victim support organisation LOBBI e.V., available at: <http://www.lobbi-mv.de/html/chrono.php> (16.09.2008).

51 ZARA, *Rassismus Report 2007*, available at: <http://www.zara.or.at/materialien/rassismus-report/Rassismus-Report%202007.pdf> (10.09.2008).

52 Helping Hands Graz, *Jahresbericht 2007*, available at: <http://helpinghands.htu.tugraz.at/2007.pdf> (10.09.2008).

53 See also: J. Sommerbauer/E. Kocina (2008) *Kopftuch als Karrierehindernis aus Stoff*, in: Die Presse (31.05.2008), p. 13 and FATIMA a project to promote the labour market skills of young Muslim women, <http://www.projektfatima.at/> (10.09.2008), which has already been described in earlier reports.

54 Case # 52: ZARA, *Rassismus Report 2007*, p. 44, available at: <http://www.zara.or.at/materialien/rassismus-report/Rassismus-Report%202007.pdf> (10.09.2008).

55 MRAX (2008) *Annual Report 2007*, pp. 40-41.

56 National Consultative Committee on Racism and Interculturalism

57 National Consultative Committee on Racism and Interculturalism (NCCRI), Reported Incidents related to racism and strategic responses from the NCCRI, January-June 2008, p.5. Available at: <http://www.nccri.ie/pdf/RacistIncidentsJan-June08.pdf>



racist insults by some of his colleagues, being told by the management not to cause trouble, otherwise he would be “sent back to the bush”.<sup>58</sup>

### 1.3.1.4. Interview surveys

Interview surveys in 2008 have provided another dimension of evidence of the problem. In **Slovenia**, in a survey<sup>59</sup> of 112 major employers, 31.5 per cent stated that they would prefer to hire Slovenian nationals of Slovenian ethnic origin, and in **Lithuania**, 40.7 per cent of surveyed employers would not hire a Roma.<sup>60</sup> In **Finland** responses varied with the work sector: 65 per cent of employers in the construction sector would be willing to employ (appropriately qualified) Roma, compared to 41 per cent in retail.<sup>61</sup>

Complementary to surveys of employers are those of the experiences of migrant and minority workers themselves. In 2008 the Ombudsman against Ethnic Discrimination in **Sweden** published a report on the experiences of adults of African origin, many of whom had experienced discrimination and racism in their contacts with the labour market.<sup>62</sup> In **France**, the HALDE published the results of a survey showing, amongst other things, that more than a third of those people who felt that they had been discriminated at work did not report it, and that in most cases the perpetrator of discrimination had been the employer or supervisor.<sup>63</sup> Most migrant women interviewed in a **German** survey stated that they experienced discrimination in the labour market or in vocational training, including blatant bullying.<sup>64</sup>

One study in **Ireland** showed that people from non-English speaking countries displayed a consistently higher rate of reported discrimination than others when looking for work,<sup>65</sup> and another found that negative experiences and discrimination at work were reported most by Nigerians and Chinese respondents,

58 Antidiskriminierungsverband Deutschland (advd) (2008) Stellungnahme des Antidiskriminierungsverband Deutschland (advd) zum zweijährigen Bestehen des Allgemeinen Gleichbehandlungsgesetzes (AGG), Berlin

59 *Accepting Diversity – A Step towards a Just Society*, carried out by Zavod za izobraževanje in kulturo Črnomelj [Institute for Education and Culture Črnomelj] between October and December 2007.

60 Vilmorus (2008) *Tolerancija* (6-11.03.2008); Phone survey of companies (10-20.03.2008). The study conducted at the request of the joint-stock company Idea Prima.

61 H. Syrjä & M. Valtakari (2008) *Romanien pitkä matka työn markkinoille. Tutkimus romanien työmarkkinoille sijoittumisen edistämisestä*. Työ- ja elinkeinoministeriön julkaisuja, Työ ja yrittäjyys 22/2008. Available at: [http://www.tem.fi/files/20018/TEMJul\\_22\\_2008\\_tyo\\_ja\\_yrittajyys.pdf](http://www.tem.fi/files/20018/TEMJul_22_2008_tyo_ja_yrittajyys.pdf) (01.20.2008).

62 Sweden/Ombudsmannen mot etnisk diskriminering (2008) *Att färgas av Sverige: Upplevelser av diskriminering och rasism bland vuxna med afrikansk bakgrund i Sverige*, (Coloured by Sweden: Experiences Regarding Discrimination and Racism among Adult People of African Origin in Sweden) Kalonaityte, Kawesa & Tedros (2007) (Forthcoming November 2008).

63 HALDE/CSA, *Les discriminations dans le monde du travail*, February 2008 [http://www.halde.fr/IMG/pdf/CSA\\_HALDE\\_Discrimination\\_dans\\_le\\_monde\\_du\\_travail-2-3.pdf](http://www.halde.fr/IMG/pdf/CSA_HALDE_Discrimination_dans_le_monde_du_travail-2-3.pdf)

64 Ch. Färber, N. Arslan, M. Köhnen, R. Parlar (2008) *Migration, Geschlecht und Arbeit. Probleme und Potentiale von Migratinnen auf dem Arbeitsmarkt*, Opladen & Farmington Hills: Budrich UniPress Ltd.

65 H. Russell; E. Quinn; King O’Riain; F. McGinnity (2008) *The Experience of Discrimination in Ireland: Analysis of the QNHS Equality Module*. Available at [http://www.esri.ie/publications/search\\_for\\_a\\_publication/search\\_results/view/index.xml?id=2554](http://www.esri.ie/publications/search_for_a_publication/search_results/view/index.xml?id=2554) (21.10.2008); O’Connell; F. McGinnity (2008) *Immigrants at Work: Ethnicity and Nationality in the Irish Labour Market*. Available at [http://www.esri.ie/publications/search\\_for\\_a\\_publication/search\\_results/view/index.xml?id=2608](http://www.esri.ie/publications/search_for_a_publication/search_results/view/index.xml?id=2608) and <http://www.equality.ie/index.asp?docID=737> (21.10.2008).

with levels of bullying or harassment by co-workers highest for Nigerian respondents.<sup>66</sup> A UK study found that racial discrimination was perceived to have been a barrier to career progression for a third of Asian and 20 per cent of black managers.<sup>67</sup>

A survey by the University of Hasselt, **Belgium**,<sup>68</sup> found that most graduates of Turkish or Moroccan origin felt that they had to make more efforts than native Belgians because of prejudices towards ethnic minority job applicants. Indeed, the survey found that graduates of Turkish or Moroccan origin found employment on average three months and 28 days after their graduation, whereas native Belgians took only two months and five days.

Not all such surveys in 2008 identified feelings of discrimination. For example, Ukrainian migrants working in **Poland** told researchers that they generally do not feel discriminated against,<sup>69</sup> and in **Bulgarian** research, only one per cent of female immigrants felt that they had been victims of discrimination in access to the labour market.<sup>70</sup> However, in some countries it is not the 'immigrants' who are most likely to experience exclusion, but the indigenous Roma. In 2008, the European Roma Rights Centre issued a report<sup>71</sup> based on a survey carried out in several countries including **Bulgaria**, the **Czech Republic**, **Romania** and **Slovakia**, where over 60 per cent of the Roma interviewees in nearly all the countries said they had personal experiences with discrimination. Similarly in two new **Spanish** studies, most Roma interviewees reported they had felt discriminated against at least once, particularly when looking for a job.<sup>72</sup>

### 1.3.1.5. Discrimination testing

Victims of discrimination often do not recognise the problem, not least because discrimination at the recruitment stage is often invisible to the victim. Discrimination testing is method designed to expose this problem. In 2008, Animo-Antwerp, the youth section of the Flemish socialist party in **Belgium**,

66 Immigrant Council of Ireland; Migration & Citizenship Research Unit, University College Dublin (2008) *Getting On: From Migration to Integration*. Available at: [http://www.immigrantcouncil.ie/images/5115\\_gettingon.pdf](http://www.immigrantcouncil.ie/images/5115_gettingon.pdf) (21.10.2008).

67 Hooker, H., Jagger, N. and Baldwin, S. (2008) *Recruitment of Under-Represented Groups into the Senior Civil Service*, Department for Work and Pensions, ISBN 978 1 84763 477 1

68 G. Vandevenne & S. Lenaers (2007) *Allochtoon talent aan het werk*, Diepenbeek: Expertisecentrum Gelijke Onderwijskansen, available at: <http://uhdspace.uhasselt.be/dspace/bitstream/1942/7776/1/Allochtoon%20talent%20aan%20het%20werk.pdf> (10.09.2008)

69 International Organization for Migration (2008) *Ukrainians Migrants on the Polish Labour Market*

70 A. Krasteva (2008) *Immigration, Gender, Labour* in: P. Spasova, Y. Georgiev (eds.) *The Implications of EU Membership on Immigration Trends and Immigrant Integration Policies for the Bulgarian Labour Market*, Sofia: Economic Policy Institute, available at [http://epi-bg.org/dmdocuments/book-GMF-EPI\\_all.pdf](http://epi-bg.org/dmdocuments/book-GMF-EPI_all.pdf) (17.09.2008).

71 European Centre for Rights of the Roma issued a report titled *The Glass Box: Exclusion of Roma from Employment 2007*, available at: <http://www.errc.org/db/02/14/m00000214.pdf>

72 Fundación Secretariado Gitano (sd) *El empleo en la población gitana de la Comunidad de Madrid. Un estudio comparado*, available at: <http://www.gitanos.org/publicaciones/estudioempleo/madrid/index.html> (11.07.2008). Fundación Secretariado Gitano (sd) *El empleo en la población gitana de Castilla y León. Un estudio comparado*, available at: <http://www.gitanos.org/publicaciones/estudioempleo/castillayleon/index.html> (11.07.2008).

published the results of a test it had carried out, sending pairs of similar CV's to 50 employers. Each employer received two CV's that were identical in every aspect except the ethnic origin of the job applicant. Native Belgian applicants were invited to an interview in 60 per cent of the cases, whereas ethnic minority applicants had a probability of success of 25 per cent.<sup>73</sup>

### 1.3.1.6. Religion, culture and diversity

Towards the end of 2008 a new EU report on diversity management was published, surveying companies across all 27 Member States, and providing new information on the benefits and challenges of a diversity approach. The study came to the conclusion that although the majority of European companies are aware of diversity issues, "most have yet to embark upon their diversity journeys".<sup>74</sup>

One element of a diversity management approach is the positive recognition of and allowance for religious and cultural differences within the workforce. Previous reports of the FRA/EUMC have suggested that there is a wide variation in the readiness of employers to recognise and allow for such differences. In **Denmark** a survey of private and public sector workplaces found that 9 out of 10 would try to facilitate days off for minority religious holidays, and would allow women to wear a headscarf,<sup>75</sup> and in **Sweden** a collective wage agreement made in 2007 allows, when reasonable, employees to choose holidays in accordance with their religious beliefs.<sup>76</sup> In contrast, in a **Slovenian** survey<sup>77</sup> of 112 major employers, just 34 per cent asserted that it would be fair that all employees could have a day off to celebrate their biggest religious holidays,<sup>78</sup> and most thought that it was not sensible to express religious beliefs by wearing certain clothing at the workplace.<sup>79</sup> According to a survey of the human resources managers of 130 companies in **Belgium**,<sup>80</sup> 71 per cent of the large companies and 55 per cent of the average-size companies felt that recruitment of an employee with a headscarf for positions involving contact with clients would be problematic.

73 One can consult the results at: <http://www.minderhedenforum.be/2pers/200801opinieanoniemsolliciteren.htm> (10.09.2008)

74 *Continuing the Diversity Journey: Business practices, perspectives and benefits*, European Commission 2008, available at: <http://ec.europa.eu/social/main.jsp?catId=88&langId=en&eventsId=125>

75 LG Insight for The Ministry of refugee, immigrants and Integration: *Undersøgelse af religion på det danske arbejdsmarked*, available at: [http://wk.die.dk/filarkiv/lginsight.die.dk/file/PDF\\_filer/LGinsight\\_rap\\_13lk\\_low.pdf](http://wk.die.dk/filarkiv/lginsight.die.dk/file/PDF_filer/LGinsight_rap_13lk_low.pdf)

76 Agreement between Svensk Teknik och Design [the Swedish Federation of Consulting Engineers and Architects] and Sif [Sif], Sveriges Ingenjörer [the Swedish Association of Graduate Engineers] and Sveriges Arkitekter [the Swedish Association of Architects]; Almega (2007) *Röd dag efter egen tro*, available at: [http://www.almega.se/Templates/T\\_2.asp?PN=7480392](http://www.almega.se/Templates/T_2.asp?PN=7480392) (10.10.2007).

77 *Accepting Diversity – A Step towards a Just Society*, carried out by Zavod za izobraževanje in kulturo Črnomelj [Institute for Education and Culture Črnomelj] between October and December 2007.

78 Currently, the *Act on Holidays and Work Free Days* recognises five religious holidays of the Roman Catholic Church and one of the Protestant Church as work-free days.

79 Nine point one per cent of the responses were classified into the category 'other'. N. Žagar (ed.) (2007) *Sprejemanje različnosti – korak do pravične družbe, Črnomelj: Zavod za izobraževanje in kulturo*, pp. 62-63, 66, 113-115.

80 A summary in English is available at: <http://www.ffw.com/feature/discrimination-at-work-survey.aspx> (14.08.2008)

A diversity approach argues that making flexible allowances for religion and culture is good for business. The other side of the coin is that if employers fail to make reasonable accommodation they may be subject to legal challenge. For example, in **Slovenia** in May 2008, an employee of Muslim faith lodged a complaint with the *Advocate of the Principle of Equality* that an employer who provided meals for employees during work time refused a request for food without pork or lard. The *Advocate* issued an opinion that the person in question had been subject to indirect discrimination on the basis of religion.<sup>81</sup> Also in **Sweden** the Ombudsman against ethnic discrimination (DO) took action against a cleaning company for dismissing a Muslim woman from Somalia for her “failure to dress appropriately” for the job.<sup>82</sup>

However, it is clear that accommodation to religious or cultural wishes must be ‘reasonable’, and not all such requests are seen as reasonable by courts. For example, in the **Netherlands** in 2008 a court ruled that an employer was within his rights when he denied a job to a man who, for religious reasons, refused to shake hands with women.<sup>83</sup>

## 1.3.2. Racism and discrimination in the area of housing

### 1.3.2.1. Official and unofficial statistical data on incidents of discrimination and racism in housing

Just as in the area of employment, complaints data collected by official or unofficial organisations cannot be said to reflect accurately the real extent of discrimination in the area of housing. The collection of complaints data by official and unofficial organisations still remains very diverse and uneven in the Member States. Most Member States still have not in place a centralised system of reporting complaints. Besides, in a number of countries the National Equality Bodies still do not collect disaggregated data according to ethnicity in the area of housing.

### 1.3.2.2. Research findings

Also, as with the area of the labour market, evidence for discrimination in the access of migrants, Roma, refugees and asylum seekers to the housing market is more convincingly highlighted through specific research projects and household surveys, as well as investigations by official bodies. Several of these could be identified in 2008.

<sup>81</sup> Data submitted by the Office for Equal Opportunities upon request.

<sup>82</sup> [http://www.do.se/upload/rattsfall/eda\\_ad\\_do/dnr1416-2007.pdf](http://www.do.se/upload/rattsfall/eda_ad_do/dnr1416-2007.pdf) (In Swedish)

<sup>83</sup> A similar decision was later reaffirmed by the Central Appeals tribunal when it upheld the dismissal of a female employee of a state school who had refused to shake hands with men. See LjN: B112440 <http://www.rechtspraak.nl/ljn.asp?ljn=B112440>

In **Spain**, according to the 2007 annual report<sup>84</sup> of the Oficina per la No Discriminació [Agency for Non-Discrimination], the Fiscalía Superior de Justicia de Catalunya [Office for the Public Prosecution in Catalonia] investigated nine housing agencies in July 2007 for alleged swindles related to flat renting, mostly affecting immigrants. In **Finland**, in 2008, the Ministry of the Interior published a study on migrants and Roma in housing.<sup>85</sup> Both groups reported experiences of discrimination when seeking housing, notably 50 per cent of the Roma.

Few countries carried out discrimination tests in order to identify discrimination in access of migrant and ethnic minority groups to the housing market. In **Spain**, the SOS Racismo Vizcaya survey<sup>86</sup> revealed significant differences regarding the total number of flats offered to migrants in comparison with the flats that were given to natives. In **Sweden**, the Swedish Union of Tenants conducted discrimination testing with telephone calls to roughly 100 landlords, both public and private, all over Sweden<sup>87</sup> using foreign and Swedish names. In 37 per cent of the cases there were indications of ethnic discrimination. The foreign-named applicants often received negative responses while their Swedish colleagues, who called the same landlord a couple of minutes later, were often welcomed and had no problem in being offered a flat. And in **France**, in January 2008, *le Haut Conseil à l'Intégration* [High Council for Integration – HCI] presented a report to the French Prime Minister.<sup>88</sup> showing that migrants have been victims of systemic discrimination in access to social housing, and that findings of several discrimination tests showed that migrants have been discriminated against in access to private housing.

In **Ireland**, a study<sup>89</sup> showed that racially-motivated anti-social behaviour was identified as an issue in local authority social housing and private housing developments, particularly in the low-income areas. The Third ECRI report on **Malta**<sup>90</sup> noted 'that migrants released from detention are accommodated in open centres and it is very difficult for them to access the private housing market' and strongly recommended that the 'Maltese authorities should take steps to address racial discrimination in access to private housing market'. In **Portugal**, research pointed to some degree of discrimination against immigrants applying for housing loans.<sup>91</sup>

84 Oficina per la No Discriminació, *Memòria 2007*, available at: <http://www.oficinadiscriminacio.com/images/stories/documents/OND-exterior.pdf> and *Barcelona 2007 Situacions de discriminació denunciades*, available at: <http://www.oficinadiscriminacio.com/images/stories/documents/OND-interior.pdf> (23.07.2008).

85 The report is available at: [http://www.intermin.fi/intermin/biblio.nsf/F37BCBA4EF7973FAC22574D6002493F9/\\$file/302008.pdf](http://www.intermin.fi/intermin/biblio.nsf/F37BCBA4EF7973FAC22574D6002493F9/$file/302008.pdf)

86 SOS Racismo – Bizkaiko (2008), *Conductas discriminatorias hacia el colectivo inmigrante en el acceso a la vivienda en la ciudad de Bilbao*.

87 Source: the Swedish Union of Tenants (Hyresgästföreningen) - available at: [http://www.hyresgastforeningen.se/eprise/main/hemhyra/data/2007/02/article/article20070202\\_132021737/article20070202\\_132021737?orgId=](http://www.hyresgastforeningen.se/eprise/main/hemhyra/data/2007/02/article/article20070202_132021737/article20070202_132021737?orgId=)

88 Haut Conseil à l'intégration (2008), *Le logement des personnes immigrées* [http://www.hci.gouv.fr/IMG/pdf/Avis\\_logement\\_immigres.pdf](http://www.hci.gouv.fr/IMG/pdf/Avis_logement_immigres.pdf) The report was based mainly on the results of the *Enquête nationale du Logement [National Housing Survey]*, which was conducted in 2001-2002.

89 D. Silke; M. Norris; F. Kane; B. Portley (2008) *Building Integrated Neighborhoods, Towards an Intercultural Approach to Housing Policy and Practice in Ireland*. Available at <http://www.nccri.ie>.

90 European Commission against Racism and Intolerance (2007) Third report on Malta, adopted on 14 December 2007 and made public on 29 April 2008, 29.04.2008, available at: [http://www.coe.int/t/e/human\\_rights/ecri/1-ECRI/2-Country-by-country\\_approach/Malta/Malta\\_CBC\\_3\\_.asp#TopOfPage](http://www.coe.int/t/e/human_rights/ecri/1-ECRI/2-Country-by-country_approach/Malta/Malta_CBC_3_.asp#TopOfPage) (24.09.2008).

91 INVIP research Details of the project can be found at: <http://www.numena.org.pt/conteudo.asp?lingua=ENG&idEstrut=7&idPag=177>

In August 2008, the *UNHCR Regional Representation for Central Europe* launched a survey on the situation of asylum seekers and refugees in Central Europe.<sup>92</sup> The report revealed that in **Bulgaria**, landlords asked higher rents and deposits from refugees than from local tenants, and refugees were often not given back their deposits on leaving. The same report disclosed that refugees in **Slovenia** were not entitled to public housing, and faced other problems such as private landlords refusing to issue official contracts, so as to avoid tax.

In the **United Kingdom** research identified a more positive development. The Citizenship Survey: April 2007 - March 2008, England and Wales showed that the proportion of people from minority ethnic groups who feel that they would be treated worse than other races by the housing departments was lower in 2007-08 (11 per cent) than it was in 2001 (13 per cent).<sup>93</sup>

According to the 2008 Eurobarometer Survey,<sup>94</sup> the average European is comfortable with having someone from a different ethnic origin than theirs as a neighbour. However, the same survey found that around a quarter of Europeans would feel uncomfortable having a Roma neighbour.

### 1.3.2.3. The housing situation of the Roma communities

Roma, Sinti and Travellers are among the most vulnerable groups with regards to access to housing. Cases of direct and indirect discrimination and forced evictions have been reported in **Bulgaria**, the **Czech Republic**, **Spain**, **Finland**, **France**, **Hungary**, **Ireland**, **Italy**, **Lithuania**, **Poland**, **Portugal**, **Romania**, **Slovenia**, **Slovakia**, **Sweden** and the **United Kingdom**. Just a few exemplary cases are highlighted in this chapter.

In **Bulgaria**, a planned forced eviction of Romani families from the Batalova Vodenitsa, a neighbourhood of Sofia, authorised by the District Mayor, was to have affected around 180 Roma.<sup>95</sup> However, the decision of the European Court of Human Rights in July 2008 indicating to the Government of Bulgaria interim measures under Rule 39 of the Rules of Court, caused the District Mayor to suspend the enforcement of the removal order “pending the resolution of the housing problems of the Batalova Vodenitsa residents”.<sup>96</sup>

92 UNHCR Regional Representation for Central Europe (2008) *Being a Refugee: Age, Gender and Diversity Mainstreaming Report 2007*, available at: [http://www.unhcr-budapest.org/images/stories/2008/agdm/UNHCR-AGDM\\_report\\_2007-ENfinal.pdf](http://www.unhcr-budapest.org/images/stories/2008/agdm/UNHCR-AGDM_report_2007-ENfinal.pdf) (30.09.2008)

93 Citizenship Survey: April 2007 - March 2008, England and Wales, 26 June 2008, available at: <http://www.communities.gov.uk/publications/communities/citizenshipsurveyaprmar08>

94 European Commission (2008) *Discrimination in the European Union: Perceptions, Experiences and Attitudes*, July 2008.

95 European Roma Rights Centre (2008) *Letter to the President of the Republic of Bulgaria and to the Mayor of Sofia of 2 July 2008*, available at: <http://www.errc.org/db/03/0B/m0000030B.pdf> (29.09.2008).

96 European Court of Human Rights, Fifth Section (2008) Application No 25446/06, *Statements of Facts and Questions to the Parties*, available at: <http://cmiskp.echr.coe.int/tkp197/viewbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=72608&sessionId=14190232&skin=hudoc-cc-en&attachment=true> (29.09.2008).

In **Hungary**, the Budapest Court, imposed a fine of 100,000 HUF (approximately 400 EUR) per capita to the local government of the 2nd district of Budapest after nearly 40 Roma, including two pregnant women and 20 children, were evicted without proper legal proceedings from the flats they inhabited without entitlement.<sup>97</sup>

In **Lithuania**, a court case continued concerning the demolition of a Roma settlement in Kirtimai in 2007.<sup>98</sup> In September 2008, the Supreme Administrative Court sent the case back to the lower court for proceedings on the assessment of non-pecuniary damages.<sup>99</sup>

In **Finland**, the National Discrimination Tribunal in January 2008 issued a ban on discrimination and imposed a conditional fine of 2,000 EUR to a property company in the city of Raahe. The property company agreed to rent an apartment to a Roma applicant on the condition that the Social Services of the city of Raahe act as a guarantor for the lease. The Tribunal found that this was not a standard procedure with regards to members of the majority population in similar situations. Accordingly, the Tribunal found that the property company had treated the applicant in a discriminatory manner on grounds of ethnic origin.<sup>100</sup>

### 1.3.2.4. Legal restrictions in access to housing

Social housing for migrants, refugees and asylum seekers is still subject to legal restrictions in some Member States. Just a few exemplary cases are highlighted in this chapter.

The UN Committee on the Elimination of Racial Discrimination (CERD)<sup>101</sup> expressed its concerns about the Flemish Housing Code in **Belgium** conditioning access to social housing units by requiring claimants and tenants to know Dutch, or formally engage in learning it. In July 2008, the Constitutional Court ruled that this did not violate the principle of prohibition of discrimination and the right to housing as provided by Articles 10, 11 and 23 of the Belgian Constitution, nor European neither international treaties.<sup>102</sup> In **Italy** the National Office against Racial Discrimination (UNAR) issued an opinion<sup>103</sup> defining as unlawfully discriminatory

97 Hungary/Fővárosi Bíróság/26.P.24.502/2006/10 (04.07.2008). Source: NEKI: Fehér Füzet 2007, manuscript provided to the Hungarian NFP by NEKI.

98 Lithuania/Vilniaus apygardos administracinis teismas/ No. I-8136-17/2007.

99 Communication of the NFP- Lithuania (Centre of Ethnic Studies at the Institute for Social Research) to the Supreme Administrative Court of Lithuania (26.09.2008).

100 The decision is available at: <http://www.intermin.fi/intermin/hankkeet/sltk/home.nsf/PFBD/A85FDCAD7E5D1774C22573DA004918F0?opendocument>

101 Committee on the Elimination of Racial Discrimination, Concluding Observations for Belgium, (07.03.2008).

102 Belgium/Grondwettelijk Hof-Cour constitutionnelle/Arrest nr. 101/2008 (10.07.2008), available at: <http://www.arbitrage.be/> (16.09.2008).

103 Italy / Presidenza del Consiglio dei Ministri, Dipartimento per i Diritti e le Pari Opportunità, Ufficio Nazionale Antidiscriminazioni Razziali / Parere UNAR –Prot. 97/UNAR (18.02.2008), available at: <http://www.asgi.it/index.php?page=nws.home&idint=cn08022104&mode=detail&imm=> (15.09.2008).

the ordinances<sup>104</sup> issued by the housing department of the municipality of Verona that assigned a higher score for the assignment of low rent public housing to residents for more than 10 years and to Italian citizens.

In February 2008, the European Committee of Social Rights adopted two decisions finding that **France** violated the right to housing,<sup>105</sup> one on stopping places for Travellers and one on the arrangements for allocating social housing to the poorest members of the community and of the inadequacy of the means of appeal in the event of excessively long waits for housing.<sup>106</sup>

In January 2008 the **German** Federal Administrative Court<sup>107</sup> ruled against an attempt by several federal states to implement a nationwide harmonised provision according to which recognised refugees or those with a subsidiary protection status were prohibited to take up residence in another federal state, another region or even another municipality if they receive social benefits.<sup>108</sup>

### 1.3.2.5. Good practices

On 19.05.2008, the **Romanian** government issued an Act for the approval of the Pilot Programme “Social Housing for Roma Communities”.<sup>109</sup> The Programme set up the implementation of local housing programs in the 8 Development Regions of Romania, through the National Agency for Housing in partnership with National Agency for Roma and Local Authorities. The new housing units will be administered and allocated by the Local Councils to Roma families with small income. Accordingly, on 01.10.2008, the Romanian Government approved the building of 300 social houses for Roma families.

In **France**, the Haute Autorité de Lutte Contre les Discriminations et pour l'Égalité (HALDE), the Ministère du logement et de la ville, [the Ministry for Housing and for Urban Policy] and the Délégué interministériel pour l'égalité des chances des Français d'outre-mer [the Interdepartmental deputy for equal opportunity for French of overseas territories] signed on 03.07.2008 the Charte portant lutte contre les pratiques de discrimination au logement à l'égard des

104 AGECE / Delibera n. 4 (04.09.2007) e n. 23 (25.09.2007).

105 European Committee of Social Rights - Complaint n°39/2006 [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC39Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC39Merits_en.pdf). European Committee of Social Rights- Complaint n°33/2006 [http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC33Merits\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/CC33Merits_en.pdf)

106 Council of Europe, Committee of Ministers / ResChS(2008)8, Collective Complaint No. 39/2006 by the European Federation of National Organisations working with the homeless (FEANTSA) against France, 2 July 2008, and Council of Europe, Committee of Ministers / ResChS(2008)7 Collective Complaint No. 33/2006 by the International Movement ATD Fourth World against France, 2 July 2008.

107 UNHCR (2007) UNHCR-Stellungnahme zu Maßnahmen zur Beschränkung der Wohnsitzfreiheit von Flüchtlingen und subsidiär geschützten Personen, Available at: [http://www.unhcr.de/fileadmin/unhcr\\_data/pdfs/rechtsinformationen/4.2.\\_D-Stellungnahmen/UNHCR\\_Wohnsitzauflage.pdf](http://www.unhcr.de/fileadmin/unhcr_data/pdfs/rechtsinformationen/4.2._D-Stellungnahmen/UNHCR_Wohnsitzauflage.pdf) (15.09.2008)

108 Germany/Bundesverwaltungsgericht (15.01.2008) 1 C 17.07.

109 Guvernul României, Hotărâre privind aprobarea Programului-pilot, Locuințe sociale pentru comunitățile de romi”, 19.05.2008, Available at: [http://www.mie.ro/\\_documente/transparenta/consultari\\_publice/consultare44/hg.pdf](http://www.mie.ro/_documente/transparenta/consultari_publice/consultare44/hg.pdf)



français originaires d'outre-mer<sup>110</sup> [Charter on the fight against discrimination practices towards French people from overseas territories in the housing sector]. The signatory parties of the Charter committed themselves to: a) inform people on their rights having regard to the law of the 6th July 1989, whose aim is to improve rental relations, b) inform people on the possibility of lodging a complaint to the Prosecuting Attorney and of referring to the HALDE through a mere letter or via its website, c) make HALDE's information documents available to prospective tenants and to landlords in estate agencies and to d) urge the estate agents holding a professional card or a group of real estate agencies to inform the public and their potential clients on their commitment to this Charter.

### 1.3.3. Racism and discrimination in the education sector

Across the Member States, a number of different social, national, ethnic and religious groups are at risk of being directly or indirectly discriminated against in education. Particularly affected by discrimination in education are Roma, Sinti and Travellers as well as children of asylum seekers and undocumented migrants. Also children with a migrant background from non-EU countries as well as ethnic minorities, language minorities and religious minorities are reported as being exposed to discriminatory structures and practices.

This section examines available indicators and information on racism, discrimination and inequality in the education sphere. Several themes of particular interest are discussed from the perspective of the policies and debates in the 27 EU Member States.

#### 1.3.3.1. Access to education

While on a legal basis most Member States provide open access to education, in practice, vulnerable groups face many difficulties in accessing quality education. In some EU Member States, refugee children and children of asylum seeker are not subject to compulsory schooling. There are Member States in which school authorities are obliged to collect information and report about the legal status of students, putting migrants without a legal status at risk of being reported and deported. Further obstacles to access to quality education are: (a) discriminatory enrolment procedures and access testing, (b) unavailability or inaccessibility of pre-school facilities, (c) long distances to schools. Particularly affected by practical barriers to education are children of Roma, Sinti and Travellers and children of asylum seekers and undocumented migrants.

<sup>110</sup> The Charter is available at: [http://www.halde.fr/spip.php?page=article&id\\_article=12316](http://www.halde.fr/spip.php?page=article&id_article=12316)

## Examples of access problems of refugees, asylum seekers, migrants and minorities

In **Italy**, the Municipality of Milan issued a circular<sup>111</sup> on the enrolment of children up to five years old in nursery schools. According to the circular, non-EU babies whose parents could not present their stay permits by 28 February 2008, were not to be enrolled in the municipality's nurseries. A Moroccan woman, whose baby was refused enrolment in the nursery because she lost her job and, as a result, could not renew her stay permit, sued the Municipality for discriminatory treatment.<sup>112</sup> In February 2008, the Tribunal in Milan ruled that the above mentioned clause was discriminatory and ordered the municipality to enrol the child.<sup>113</sup> In **Latvia**, state-guaranteed education is provided only for immigrants and their children who hold a permanent residence permit. It is not provided for the children of third country nationals with a temporary residence permit. These families have to make a contract with the school to attend it and have to pay a defined tuition fee which can differ, depending on the local government.<sup>114</sup> In **Sweden**, education is not compulsory for asylum-seeking children.<sup>115</sup> The number of asylum-seeking children attending compulsory school is decreasing.<sup>116</sup>

## Efforts for better and fairer access to education

In **Germany**, in Saarland, all children have been obliged to go to school since 1 August 2008, when an amendment to the state school law came into force abolishing the previous restrictions for non-recognised refugee children with a (short-term) toleration certificate. In NRW, the state ministry of education issued a decree on 27 March 2008 pointing out that the students' residence status is not to be documented by schools and that the head office of the school must not be requested to provide registration certificates or copies of the passport of the students' parents.<sup>117</sup>

111 Italy / Comune di Milano / Circular no. 20 (17.12.2007)

112 T. Monestiroli (2008) 'Asili, primo ricorso contro la Moratti', in: La Repubblica – Milano (15.01.2008).

113 Tribunale di Milano, Sezione I Civile, N. 2380/08 R. G.

114 Information provided by the Ministry of Education and Science on 24.09.2008.

115 Sweden/Statens Offentliga Utredningar (2007) Skolgång för barn som skall avvisas eller utvisas SOU 2007:34.

116 Skolor och elever läsårerna 2001/02-2006/07, available at: [http://www.skolverket.se/content/1/c4/90/53/Grund\\_Elever\\_Riks\\_Tab2A.xls](http://www.skolverket.se/content/1/c4/90/53/Grund_Elever_Riks_Tab2A.xls) (08.07.2007) and *Skolor och elever läsåret 2006/07, medelvärden för kommungrupper (kommunala skolor)*, available at: [http://www.skolverket.se/content/1/c4/90/53/Grund\\_Elever\\_Riks\\_Tab2A.xls](http://www.skolverket.se/content/1/c4/90/53/Grund_Elever_Riks_Tab2A.xls) (08.07.2007).

117 Forum Menschenrechte (2008) Menschenrechte für Menschen ohne Papiere realisieren!, available at: [http://forum-menschenrechte.de/cms/upload/PDF/ab\\_05-2008/FMR\\_menschenrechte\\_fuer\\_menschen-ohne-papiere.pdf](http://forum-menschenrechte.de/cms/upload/PDF/ab_05-2008/FMR_menschenrechte_fuer_menschen-ohne-papiere.pdf) (16.09.2008)

### 1.3.3.2. Racist incidents and discriminatory practices

Only **France**<sup>118</sup> and the **Netherlands** have nationwide systems of monitoring racist incidents in education. In **Germany**, some Federal States monitor right-wing extremism in schools and in the **UK** all schools have a mandatory obligation to locally collect and keep annual records of racist incidents in schools. No other Member States have systematic monitoring of racist incidents in education currently in place.

Types of racist incidents and discriminatory practices reported to the FRA in 2008 include problematic content in schoolbooks in **Belgium**<sup>119</sup> and in school magazines in **Slovenia**,<sup>120</sup> ethnic profiling during a study trip in **Denmark**,<sup>121</sup> segregation of Roma pupils in **Hungary** and **Poland**,<sup>122</sup> the unjustified allocation of Roma children into special needs schools in **Slovakia**,<sup>123</sup> violence and hate speech against minority students by their peers in **Italy**<sup>124</sup> and in **Denmark**,<sup>125</sup> hate speech by teachers against minority students in **Romania** and **Belgium**,<sup>126</sup> language discrimination in access to education in **Estonia**,<sup>127</sup> and Islamophobic discrimination in **Austria**<sup>128</sup> and Denmark.<sup>129</sup>

118 No data available due to transition from the SIGNA (*Signalement des actes de violence par les établissements du second degré*) data collection software to SIVIS (*Système d'Information et de Vigilance sur la Sécurité scolaire - Vigilance and Information system on school Safety*).

119 Verstraete, Eva (2006) Vlaamse leermiddelen onder de loep. Op zoek naar het interculturele gehalte, Universiteit Gent: Steunpunt Diversiteit & Leren, available at: <http://www.steunpuntico.be/main.asp?lan=1&typ=102> (01.09.2008)

120 In 2008, a school magazine featured an article seen as offensive for students with non-Slovene background. The Inspectorate sent the case to the competent district attorney on suspicion of a criminal offence.

121 During a study trip Danish school teachers disproportionately focused on the luggage of students of ethnic minority origin when searching for weapons. The case has been forwarded to the public prosecutor. Letter, 4 August 2008, Journal no SA2-2008-5129-0077

122 In a case in Hungary, six Roma children were prohibited from attending school, referring to disciplinary problems.. <http://nol.hu/cikk/505878/> (19.09.2008). In a case in Poland, the Roma students were physically separated from the rest of the school. In 2008, the Commissioner of the Sejm National and Ethnic Minorities Commission recognised the case as one of discrimination.

123 In 2008, Amnesty International Slovakia (AI) observed that Romany children from the village of Pavlovce nad Uhom made up 99.5 per cent of pupils in the local special school. Almost two in three Romany children that were of school age in March 2008 attended the special school

124 In Italy, a student insulted and attacked a classmate of Venezuelan origin, wounding him seriously.

125 In Denmark, a father made a complaint that a group of students had on several occasions harassed ethnic minority students in his son's school, and that his son had also experienced hate speech because his mother is from Thailand.

126 In Romania, a teacher had shouted at sixth grade students, 'Go into the classroom, stinky Gypsies; you make the hallway stink. I have had enough of you, may you drop dead.' A case was filed with the National Council for Combating Discrimination, which found the teacher guilty. In Belgium, in January 2008, a teacher of Dutch uttered racist remarks to a teenager of Algerian origin.

127 In Estonia a kindergarten with Estonian as language of education had a rule that "speakers of Russian and other languages" could be enrolled "only if there are vacant places". After being contacted by the Chancellor of Justice the municipality withdrew the rule and apologised.

128 In Austria, a woman who had registered her two-year-old daughter for day care with a child minder was told later that her daughter could not be accepted as the other parents did not want their children to mix with a Muslim child, and that there would not have been a problem if she had dressed "normally", i.e. without a headscarf.

129 In Denmark, several cases were reported of female students harassed by other students or by teachers because they wear headscarves. In one case, a teacher asked the student to remove her scarf, and pulled it off when the girl refused to do so. This case was reported to DACoRD as part of a focus group interview in a survey which DACoRD conducted on mother tongue teaching (29.08.08)

### 1.3.3.3. Inequality in education

In many EU Member States, there is a considerable performance gap between students with a majority background and students with a migrant or minority background. These performance gaps can partly be explained through school systems that do not counterbalance socioeconomic differences and differences in language knowledge. Differences in performance can, however, also be the result of segregation in education and from discriminatory practices of school authorities and within schools.

### Effects of early tracking systems

Evaluations of student performance and distribution in school systems that put children at an early age into different educational tracks have already in the past years shown that such school systems put students with a migrant or minority background at a systematic disadvantage. This is reaffirmed by the figures the FRA receives on the distribution of students in different educational tracks.<sup>130</sup>

### Overrepresentation of minorities in special needs schools

Available data shows that migrants and minorities are in many EU Member States overrepresented in 'special needs' schools, diminishing their chance to educational and professional success. According to a study by the **Austrian** Labour Market Service,<sup>131</sup> children of Turkish and Serbian-Montenegrin are highly over-represented in special needs schools. In the **Czech Republic**, research results confirm the overrepresentation of Roma in special needs schools.<sup>132</sup> In **Slovakia**, a 2008 report by the Open Society Institute indicates that segregation of Roma pupils within education lingers on, particularly through the practice of placing Roma pupils into special schools or classes.<sup>133</sup>

130 For example, statistical data for Austria reveal a segregative tendency after elementary school according to the ethnic and/or national background of children. See: Austria/Bundesministerium für Unterricht, Kunst und Kultur, Statistical Guide 2007: Key Facts and figures about schools and adult education in Austria, available at: [http://www.bmukk.gv.at/medienpool/16282/zahlenspiegel\\_2007\\_e.pdf](http://www.bmukk.gv.at/medienpool/16282/zahlenspiegel_2007_e.pdf) (24.09.2008).

131 Institut für Bildungsforschung der Wirtschaft (ibw), Österreichisches Institut für Berufsbildungsforschung (öibf) (2008) *Bildungs- und Berufsberatung für Jugendliche mit Migrationshintergrund gegen Ende der Schulpflicht*, Wien: AMS Österreich, available at: [http://www.forschungsnetzwerk.at/downloadpub/Berufsberatung\\_Jugendliche\\_Migrationshintergrund\\_Endbericht.pdf](http://www.forschungsnetzwerk.at/downloadpub/Berufsberatung_Jugendliche_Migrationshintergrund_Endbericht.pdf) (24.09.2008).

132 GAC (2007) Analysis of Attitudes and Educational Needs of Roma Children and Youth, available at: [http://www.gac.cz/documents/nase\\_prace\\_vystupy/GAC\\_ROMSKOLY\\_analyza\\_vzdelavacich\\_potreb\\_romskych\\_deti\\_FINAL.pdf](http://www.gac.cz/documents/nase_prace_vystupy/GAC_ROMSKOLY_analyza_vzdelavacich_potreb_romskych_deti_FINAL.pdf) (17.09.2008)

133 OSI (2007) *Rovnaký prístup Rómov ku kvalitnému vzdelávaniu* [Equal Access to Quality Education for Roma], Budapest: OSI, pp. 80 – 82

### 1.3.3.4. Issues and debates concerning discrimination and exclusion in education

#### Segregation

Research studies have pointed to the fact that segregation in education produces and reproduces inequality. In EU Member States, different forms of segregation are in place: there are schools with only or predominantly migrant or minority pupils due to socio-economic or housing factors, admission policies, discriminatory attitudes and/or language of instruction; there are Roma-only classes or units within schools; there is an overrepresentation of migrants and minorities in special needs schools; and there is an overrepresentation of migrants and minorities in lower educational tracks,

#### Religious symbols

The question of permitting or prohibiting the display of religious symbols in education has led to recurring debates and legislative measures in the past years. Current policies range from nationwide prohibition on displaying any religious symbol in public school to complete freedom of pupils and/or teachers to wearing any religious symbol.

In **Belgium**, from the academic year 2008-2009 on, only four secondary schools situated in the Brussels-Capital Region will still allow headscarves at school, and 75 per cent of the schools managed by the French Community ban headscarves and other headcovering.<sup>134</sup> The Dutch government announced in September 2008 that it intends to introduce a ban, not on headscarves, but on face-covering clothing on all schools in the **Netherlands**, with the exception of higher education. The ban applies to everyone within school premises such as pupils, teaching staff and parents who are bringing their children to school. The government aims to present a White Paper to Parliament mid-2009.<sup>135</sup>

### 1.3.3.5. Support measures and good practice activities

In 2008, a range of support measures and good practice activities in the education sector were initiated by governmental institutions and civil society organisations in Member States. Measures and activities included in 2008:

<sup>134</sup> Official figures from the French Community are only available for schools belonging to its own network (the so-called 'network of the French Community').

<sup>135</sup> Ministry of Education (2008) Gelaatsbedekkende kleding op scholen. Brief aan de Voorzitter van de Staten-Generaal, available at: <http://www.minocw.nl/documenten/43005.pdf> (10.09.08)

- attempts to overcome the disadvantage of early tracking systems (**Austria**)<sup>136</sup>
- attempts to overcome unequal selection procedures in secondary schools by introducing new enrolment regulations (e.g. **Belgium**)<sup>137</sup>
- attempts to increase the school attendance of pupils with an immigrant background (e.g. **Belgium**)<sup>138</sup>
- attempts to improve educational pathways and a better social and professional integration of young immigrants or young persons from immigrant origin (e.g. **France**)<sup>139</sup>
- desegregation projects (e.g. **Belgium**<sup>140</sup>, **Bulgaria**<sup>141</sup>, **Denmark**<sup>142</sup>, **Netherlands**)<sup>143</sup>
- training for teachers on interculturality and multilingualism (e.g. **Austria**<sup>144</sup>, **Bulgaria**<sup>145</sup>, **Denmark**<sup>146</sup>, **Germany**<sup>147</sup>, **Latvia**<sup>148</sup>, **Malta**<sup>149</sup>, **Poland**<sup>150</sup>, **Slovakia**)<sup>151</sup>
- training of volunteer students as “peer educators” in order to solve conflicts among youth, mobilising and educating young people on racism, intolerance and xenophobia (e.g. **Belgium**<sup>152</sup>, **Slovakia**)<sup>153</sup>,
- scholarships, grants, awards and competition aimed at students with language problems, with minority background or with socioeconomic difficulties, and competitions broaching the issues of racism, discrimination, multiculturalism etc.

136 For details see: <http://www.neuemittelschule.at/> (16.04.2009).

137 For details see: [http://www.pcf.be/ROOT/PCF\\_2006/public/agenda/seances\\_ordre\\_du\\_jour/session\\_2007\\_2008/17\\_juillet\\_2008.html](http://www.pcf.be/ROOT/PCF_2006/public/agenda/seances_ordre_du_jour/session_2007_2008/17_juillet_2008.html); (16.04.2009) [http://www.mrax.be/article.php3?id\\_article=657](http://www.mrax.be/article.php3?id_article=657) (16.04.2009)

138 <http://www.ond.vlaanderen.be/nieuws/2008p/0409-Brussel.htm> (16.04.2009) <http://www.telebruxelles.net/portail/content/view/3737/306/> (16.04.2009)

139 <http://i.ville.gouv.fr/divbib/doc/convcadreeducationDEC2007.pdf> (16.04.2009)

140 <http://www.buurt-in-zicht.be/school-in-zicht.html> (16.04.2009)

141 [http://romaeducationfund.hu/documents/List\\_of\\_Approved\\_projects\\_updated\\_April\\_2008.doc](http://romaeducationfund.hu/documents/List_of_Approved_projects_updated_April_2008.doc) (16.04.2009)

142 <http://www.rollemodelerne.minisite.dk/> (16.04.2009)

143 <http://www.minocw.nl/documenten/10911.pdf> (16.04.2009)

144 <http://www.zara.or.at/index.php/trainings/lehrgang-fuer-paedagoginnen> (16.04.2009); [http://www.uni-graz.at/en/weit2www/weit2www\\_programm-2/weit2www\\_uk/weit2www\\_ikea.htm](http://www.uni-graz.at/en/weit2www/weit2www_programm-2/weit2www_uk/weit2www_ikea.htm); (spaeter nochmal versuchen, Serverprobleme) <http://www.okay-line.at/php/downloads/media/files/mehrsprache.pdf> (16.04.2009)

145 [http://romaeducationfund.hu/documents/List\\_of\\_Approved\\_projects\\_updated\\_April\\_2008.doc](http://romaeducationfund.hu/documents/List_of_Approved_projects_updated_April_2008.doc) (16.04.2009) ; Ministry of Education and Science, National Pedagogy Center

146 <http://www.uvm.dk/08/taskforce.htm?menuid=6410> (16.04.2009)

147 [http://www.fu-berlin.de/presse/fup/2008/fup\\_08\\_053/index.html](http://www.fu-berlin.de/presse/fup/2008/fup_08_053/index.html) (16.04.2009) <http://www.berlin.de/sen/bwf/presse/pressemitteilungen/anwendung/pressemitteilung.aspx?presseid=2334> (press release 26.02.2008) (16.04.2009)

148 [http://www.integracija.gov.lv/doc\\_upl/valsts\\_programma\\_Cigani\\_\(romi\)\\_Latvija.pdf](http://www.integracija.gov.lv/doc_upl/valsts_programma_Cigani_(romi)_Latvija.pdf), (16.04.2009) [http://www.iic.lv/lv/projekti/ciganilatvija\\_2008.html](http://www.iic.lv/lv/projekti/ciganilatvija_2008.html) (16.04.2009)

149 <http://ec.europa.eu/education/trainingdatabase/index.cfm?fuseaction=DisplayCourse&cid=7537> (17.04.2009)

150 Polish Humanitarian Organisation (PHO)

151 [http://www.clovekvohrozeni.sk/index.php?option=com\\_content&task=view&id=465&Itemid=385](http://www.clovekvohrozeni.sk/index.php?option=com_content&task=view&id=465&Itemid=385) (17.04.2009)

152 [http://www.evensfoundation.be/nl/whatwedo\\_ice\\_project\\_03.html](http://www.evensfoundation.be/nl/whatwedo_ice_project_03.html) (17.04.2009)

153 People against Racism

(e.g. **Belgium**<sup>154</sup>, **Czech Republic**<sup>155</sup>, **Denmark**<sup>156</sup>, **Germany**<sup>157</sup>, **Netherlands**<sup>158</sup>, **Estonia**<sup>159</sup>, **Ireland**<sup>160</sup>, **Italy**<sup>161</sup>, **Hungary**<sup>162</sup>);

- provision of free language support (e.g. **Belgium**<sup>163</sup>, **Bulgaria**<sup>164</sup>, **Estonia**<sup>165</sup>, **Germany**<sup>166</sup>, **Ireland**<sup>167</sup>);
- support measures for vulnerable groups like Roma or asylum seekers (e.g. **Germany**<sup>168</sup>, **Malta**<sup>169</sup>, **Poland**<sup>170</sup>, **Romania**<sup>171</sup>),
- support measures to facilitate integration of immigrant children and adolescents as well as to ensure their equal opportunities to participate in basic education (e.g. **Finland**<sup>172</sup>)
- development of new school material and teaching methods (e.g. **Belgium**<sup>173</sup>, **France**<sup>174</sup>, **Germany**<sup>175</sup>, **Poland**<sup>176</sup>, **Slovakia**<sup>177</sup>, **Sweden**<sup>178</sup>, **Finland**<sup>179</sup>, **Ireland**<sup>180</sup>)

154 <http://www.kifkif.be/page?&orl=1&ssn=&lng=1&page=indemedia&are=696> (17.04.2009)

155 <http://www.msmt.cz/mladez/vyhlaseni-programu-podpora-romskych-zaku-strednich-skol-na-rok-2008-2-kolo> (17.04.2009)

156 <http://www.efterskoleforeningen.dk/Indsatsomr%C3%A5der/Integrationsprojekt.aspx> (17.04.2009)

157 [www.sptg.de/portal/alias\\_\\_sptg/lang\\_\\_de-DE/tabid\\_\\_5174/ItemID\\_\\_17/mID\\_\\_11312/default.aspx](http://www.sptg.de/portal/alias__sptg/lang__de-DE/tabid__5174/ItemID__17/mID__11312/default.aspx) (17.04.2009) [http://www.sptg.de/\\_sptg/diesterweg\\_broschuere.pdf](http://www.sptg.de/_sptg/diesterweg_broschuere.pdf) (17.04.2009), <http://www.dsj.de/cgi-bin/showcontent.asp?ThemaID=175>, (17.04.2009) <http://www.muenchen.de/Rathaus/dir/antidiskriminierung/221486/projektjahr.html>; (17.04.2009) [http://www.berlin.de/imperia/md/content/sen-bildung/besondere\\_paedagogische\\_konzepte/wettbewerbe/wettbewerb\\_migranten.pdf](http://www.berlin.de/imperia/md/content/sen-bildung/besondere_paedagogische_konzepte/wettbewerbe/wettbewerb_migranten.pdf) (17.04.2009)

158 <http://www.minocw.nl/documenten/19785.pdf> (17.04.2009)

159 <http://nagi.ee/contest/17/> (17.04.2009)

160 [www.dlrco.ie/photo](http://www.dlrco.ie/photo) (17.04.2009)

161 <http://www.pariopportunita.gov.it/DefaultDesktop.aspx?doc=1757> (17.04.2009)

162 [http://www.mnb.hu/engine.aspx?page=mnbnh\\_pressreleases\\_2008&ContentID=11235](http://www.mnb.hu/engine.aspx?page=mnbnh_pressreleases_2008&ContentID=11235) (17.04.2009)

163 <http://www.binnenland.vlaanderen.be/inburgering/nieuws.htm> (17.04.2009)

164 Ministry of Education and Science

165 <http://www.meis.ee> (17.04.2009)

166 <http://www.bayern.de/Anlage19986/PressemitteilungNr42,29012008.pdf>; (17.04.2009) [http://www.bmbf.de/pub/qualifizierungsinitiative\\_breg.pdf](http://www.bmbf.de/pub/qualifizierungsinitiative_breg.pdf) (17.04.2009)

167 <http://www.dicp.ie/pdfs/Evaluation%20Report%20final%20draft%20june%202008.doc> (17.04.2009)

168 <http://www.schlau-net.de/> (17.04.2009); <http://www.aktion-zusammen-wachsen.de/> (17.04.2009)

169 <http://www.equalmalta.org/mfssequal/projects.aspx?id=57372> (17.04.2009) <http://www.ppcd.gov.mt/file.aspx?f=325> (17.04.2009)

170 Polska Akcja Humanitarna (PAH)

171 <http://www.romacenter.ro/noutati/index.php?page=15> (17.04.2009)

172 <http://217.71.145.20/TRIPviewer/show.asp?tunniste=HE+118/2008&base=erhe&palvelin=www.eduskunta.fi&f=WORD> (17.04.2009)

173 <http://www.jenesuisparaciste.be/malikamadi.htm> (17.04.2009); <http://www.ond.vlaanderen.be/nieuws/2008p/0228-Breendonk.htm> (17.04.2009)

174 <http://www.halde.fr/Sensibilisation-des-jeunes,12320.html> (17.04.2009) <http://ouvertatous.skyrock.com> (17.04.2009)

175 <http://www.annefrank.de/> (17.04.2009)

176 Polska Akcja Humanitarna (PAH); The Commune Office of Lesznowola

177 [http://www.clovekvohrozeni.sk/index.php?option=com\\_content&task=view&id=465&Itemid=385](http://www.clovekvohrozeni.sk/index.php?option=com_content&task=view&id=465&Itemid=385) (17.04.2009)

178 [www.geteducated.se](http://www.geteducated.se) (17.04.2009)

179 <http://www.kivakoulu.fi/> (17.04.2009)

180 <http://www.nccri.ie/training-resources.html> (17.04.2009)

- awareness raising activities (e.g. **Czech Republic**<sup>181</sup>, **Ireland**<sup>182</sup>, **Italy**<sup>183</sup>, **Lithuania**<sup>184</sup>, **Malta**<sup>185</sup>, **Netherlands**<sup>186</sup>, **Portugal**<sup>187</sup>, **Slovenia**<sup>188</sup>)

It should be noted that the impact of support measures and good practice activities has in many cases been a limited one, due to the fact that they were not accompanied by broader improvements of the education system as a whole. In addition, many government programmes contain only very general guidelines and are only marginally translated into concrete long-term initiatives. Moreover, many programmes suffer from a lack of adequate funding and in many cases there is no evaluation of effectiveness and impact of measures.

### 1.3.4. Racism and discrimination in healthcare

Access to healthcare is protected, as a fundamental human right, under Article 35 of the EU's Charter of Fundamental Rights. As the FRA reported last year, problems of access to health services affect particularly irregular immigrants, rejected asylum seekers, and Roma. They are also hampered by cultural barriers, such as language, religion or culture from using health services, while in many cases irregular migrants and rejected asylum seekers have access only to emergency health care, defined differently across the EU.

#### 1.3.4.1. The situation in the Member States

Data for 2008, until September, show that only ten national or regional equality bodies (in **Bulgaria, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Poland, Slovenia, and Sweden**) received complaints regarding discrimination in healthcare on grounds of racial or ethnic origin. The highest number of such complaints, 18, was recorded in **Sweden**. Equality bodies in the other Member States do not compile discrimination data for healthcare separately or do not separate complaints on healthcare related discrimination according to different grounds, or have not recorded any complaints.

In **Bulgaria** the Sofia City Court found on 2 June 2008 a maternity clinic guilty of discriminating against a Roma woman. The clinic had refused emergency medical aid to the woman after a miscarriage asking for payment despite regulations for emergencies. The victim was granted the symbolic remedy of 50 Leva (25

181 <http://www.ghettout.cz/> (17.04.2009), <http://tadyated.org/html/projekty.php#08> (17.04.2009)

182 <http://www.nccri.ie/news/EUyear08.html>; [http://www.nascireland.org/pages/policy/family\\_reun\\_film.htm](http://www.nascireland.org/pages/policy/family_reun_film.htm) (17.04.2009)

183 <http://www.pariopportunita.gov.it/DefaultDesktop.aspx?doc=1757> (17.04.2009)

184 [http://www.priesrasizma.lt/?page\\_id=10](http://www.priesrasizma.lt/?page_id=10) (17.04.2009)

185 <http://www.mosaic.gov.mt/home> (17.04.2009)

186 <http://www.dagvanrespect.nl> (17.04.2009)

187 <http://www.imigrante.pt/campanha.htm> (17.04.2009)

188 Union of Associations of Pensioners, Racio Social, the Institute for African Studies, the Association for the Development of Voluntary Work Novo mesto, the Slovene Philanthropy and Women's Counselling Service



Euro), as she had demanded, but the court acknowledged that she deserved a more substantial remedy.<sup>189</sup>

### 1.3.4.2. Other data, reports and studies

However, as argued in section 1.1.2, complaints data do not present a meaningful picture of the extent or nature of the problems of discrimination and exclusion. In the health sector some insight into various categories of problems has been shown by specific reports or research covering the sector in 2007-2008.

Several reports have covered the issue of asylum seekers and detention centres. In **Austria**, the independent Human Rights Advisory Board, *Menschenrechtsbeirat*, mandated to monitor the activities of security services and Interior Ministry authorities, published a report<sup>190</sup> criticising the standards applied in establishing a person's fitness to remain in detention, and in the curative treatment of people in detention pending deportation. In **Denmark** long waiting periods in detention centres were noted in the European Parliament's Committee on Civil Liberties, Justice and Home Affairs report published in August 2008,<sup>191</sup> and the NGO *Support Group for Refugees in Danger* reported a series of discriminatory incidents concerning the health of asylum seekers.<sup>192</sup> And in **Greece**, the international humanitarian organisation, *Médicins Sans Frontières*, ended<sup>193</sup> its medical support in the detention centre for undocumented immigrants and asylum seekers on the island of Lesbos, protesting against the extremely poor living conditions in the detention centre.

Some reports have covered the circumstances of the Roma population. In **Bulgaria**, the March 2008 report of the Department of Ethnic and Demographic Issues on Interethnic Relations and Intercultural Dialogue concluded that the majority of Roma have no access to the public health care system due to lack of identity documents and health insurance.<sup>194</sup> In **Italy**, a *Save the Children Fund* survey<sup>195</sup> of Roma mothers and children living in a camp in Rome found that about

189 Български хелзинкски комитет (2008) Press release of 2 June 2008: Sofia City Court finds maternity clinic guilty of discriminating Romani woman, available at: <http://www.bghelsinki.org/index.php?module=news&lg=en&id=1341> (18.09.2008).

190 Menschenrechtsbeirat (2007) Gesundheitsversorgung in Schubhaft, available at: [http://www.menschenrechtsbeirat.at/cms/mrb\\_pdf/thematische\\_berichte/2007\\_Gesundheitsversorgung\\_%20in\\_%20Schubhaft.pdf](http://www.menschenrechtsbeirat.at/cms/mrb_pdf/thematische_berichte/2007_Gesundheitsversorgung_%20in_%20Schubhaft.pdf) (11.09.2008).

191 European Parliament: Final Report of the Committee on Civil Liberties, Justice and Home Affairs from the delegation to Denmark: DV\731861EN.doc P. 4 + p10: <http://www.europarl.europa.eu/document/activities/cont/200808/20080819ATT35296/20080819ATT35296EN.pdf>

192 Flygtninge i fare, Livet for sygdomsramte asylsøgere i Danmark: <http://www.stoettekredsen.dk/syge.html>

193 [http://www.msfg.gr/index.php?option=com\\_content&task=view&id=1895&Itemid=236](http://www.msfg.gr/index.php?option=com_content&task=view&id=1895&Itemid=236) (25.11.2008).

194 Bulgaria/Дирекция 'Етнически и демографски въпроси' към Администрацията на Министерски съвет (2008) Доклад за състоянието на междуетническите отношения и интеркултурния диалог, противодействието на проявите на расизъм и ксенофобия и развитието на демографските процеси в Република България, p. 20, available at: [http://www.nccedi.government.bg/upload/docs/DEDI\\_2paper\\_2008.pdf](http://www.nccedi.government.bg/upload/docs/DEDI_2paper_2008.pdf) (18.09.2008).

195 Save the Children (2008) Studio sulla salute materno infantile nelle comunità rom. Il caso di Roma (Survey on the health conditions of mothers and children in the Roma community. The case of Rome), *Rome: Save the Children*, available at: [http://www.savethechildren.it/2003/download/Pubblicazioni/Save\\_rapporto\\_mamme\\_rom.pdf](http://www.savethechildren.it/2003/download/Pubblicazioni/Save_rapporto_mamme_rom.pdf) (25.09.2008)

70 per cent of those interviewed had no access to any form of health care. And in the **Slovak Republic**, the government's evaluation report<sup>196</sup> of the Program to Support Health of Disadvantaged Roma Community noted structural problems, for example lack of running water, sewage and waste facilities.

Reports described different aspects of the problems that migrants can face regarding health care, whether these are problems of exclusion, discrimination, or cultural insensitivity. For example, in **France**, the Monitoring Centre of Health Right for Foreign People published in June 2008 a report<sup>197</sup> criticising the poor application by the Prefectures of the 1998 law, which allows third country nationals requiring treatment to remain legally in France. In **Spain**, the first report of the Barcelona Agency for Public Health<sup>198</sup> on the health status of migrants noted that migrant women from developing countries in low-skilled jobs have frequently felt discriminated against in receiving health care.

The research study *Migration, Geschlecht und Arbeit* carried out in **Germany** within the framework of the EQUAL integration project MigraNet examined the specific problems of migrant women in the labour market through a programme of qualitative interviews with migrant women. One interviewee stated that her dark-skinned daughter had been rejected when applying for a job as a nurse in a hospital, because "patients don't want to be treated by black nurses".<sup>199</sup> Also in Germany, the 2008 *Robert Koch Institute* report "Migration and Health" published under the Federal Health Monitoring<sup>200</sup> found that the health system lacks intercultural competence and multi-lingual information.

In **Ireland**, the 2008 study 'Health, Faith and Equality' warned that standards and services are being compromised by a lack of inter-cultural training. The study identified various problems related to persons belonging to different faiths, like the use of medications with animal derivatives and different approaches to medical interventions such as circumcision, blood transfusions, organ transplantations and post mortems.<sup>201</sup>

196 Slovakia/Vláda SR (2008) Hodnotiaca správa o výsledkoch I. etapy Programu podpory zdravia znevýhodnenej rómskej komunity [Evaluation Report on Results of the 1st Stage of the Program to Support Health of Disadvantaged Romany Community]; available at: <http://www.rokovania.sk/appl/material.nsf/0/DE2E4006AFCBA169C12574B2003E75C1?OpenDocument> (15.09.2008)

197 ODSE (2008) *La régularisation pour raison médicale en France : un bilan de santé alarmant (1998-2008 : dix ans d'application du droit au séjour des étrangers malades)* [http://www.medecinsdumonde.org/fr/publications/les\\_rapports/les\\_dix\\_ans\\_de\\_la\\_regularisation\\_pour\\_raison\\_medicale\\_un\\_bilan\\_de\\_sante\\_alarant](http://www.medecinsdumonde.org/fr/publications/les_rapports/les_dix_ans_de_la_regularisation_pour_raison_medicale_un_bilan_de_sante_alarant) and <http://www.odse.eu.org/> (01.12.2008)

198 Agència de Salut Pública de Barcelona (2008) La salut de la població immigrant de Barcelona, available at: [http://www.aspb.es/quefem/docs/salut\\_immigrants\\_BCN.pdf](http://www.aspb.es/quefem/docs/salut_immigrants_BCN.pdf) (13.08.2008).

199 Ch. Färber, N. Arslan, M. Köhnen, R. Parlar (2008) *Migration, Geschlecht und Arbeit. Probleme und Potentiale von Migratinnen auf dem Arbeitsmarkt*, Opladen & Farmington Hills: Budrich UniPress Ltd

200 Robert-Koch-Institut.(2008) *Schwerpunktbericht der Gesundheitsberichterstattung des Bundes. Migration und Gesundheit*.

201 <http://www.tcd.ie/ise/news/articles/2008/10-06-radford-report.php>

In the **United Kingdom**, the first national statistics report of the Department of Health on experiences of black and minority ethnic (BME) patients<sup>202</sup> in health care show a range of variations between BME groups and their white British counterparts indicating that they are less likely to report a positive experience. The Glasgow Anti Racist Alliance (GARA) published its ‘State of the Nation – Race and Racism in Scotland 2008’ report, highlighting the limited ethnic monitoring by the National Health Service in Scotland and higher percentages of BME children in care.<sup>203</sup>

### 1.3.4.3. EU-MIDIS results

The FRA’s EU-MIDIS survey, carried out in 2008,<sup>204</sup> shows that levels of perceived discrimination in health care are generally low amongst migrants and minorities in the EU. However, the exception is the Roma: on average, 17 per cent of the Roma surveyed<sup>205</sup> indicated that they felt they had been discriminated against by healthcare personnel (medical or other) in the last 12 months, with those in **Greece** (23 per cent) and **Poland** (22 per cent) reporting the highest rates. In **Italy**, North African migrants reported to have experienced relatively higher discrimination rates in healthcare (24 per cent) compared to an average 8 per cent.<sup>206</sup>

### 1.3.4.4. EU action to reduce health inequalities

EU Member States have under the Racial Equality Directive the obligation to ensure the equal treatment of persons irrespective of racial or ethnic origin in regard to “social protection, including social security and health care”. However, as the FRA noted<sup>207</sup> “... the main issue seems to be not so much direct, but indirect discrimination”. This was also noted in General Comment No. 14 (2000)<sup>208</sup> of the UN Committee on Economic, Social and Cultural Rights: “Inappropriate health resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive curative health services which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population.”

202 [http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH\\_084921](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_084921) Author: Department of Health, Healthcare Commission, Copyright holder: Crown.

203 [http://www.gara.org.uk/index.php?option=com\\_content&view=article&id=255&Itemid=108](http://www.gara.org.uk/index.php?option=com_content&view=article&id=255&Itemid=108)

204 See also Section 4.1 of this report.

205 In Bulgaria, Greece, Czech Republic, Hungary, Poland, Slovakia and Romania

206 In Belgium, France, Italy, the Netherlands, and Spain.

207 FRA, Annual Report 2008, FRA, p. 82

208 UN Committee on Economic, Social and Cultural Rights General Comment No. 14 (2000), *Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights*, available at <http://www.unhcr.org/refworld/publisher,CESCR,GENERAL,,4538838d0,0.html> (11.01.2009)

The Council's 2008 Joint Report on Social Protection and Social Inclusion<sup>209</sup> noted that "...there remain striking differences in health outcomes... Few [Member States] have begun to address health inequalities systematically and comprehensively by reducing social differences, preventing the ensuing health differences, or addressing the poor health that results." In 2008 the European Commission launched the second Community Action Programme<sup>210</sup> (2008-13) aiming inter alia to "help identify the causes of health inequalities" and "to promote health, including the reduction of health inequalities".

### 1.3.4.5. Positive policy and practical initiatives

In **Denmark**, the National Health Board implements measures<sup>211</sup> to improve information available to ethnic minorities on serious diseases. **Hungary** adopted a 2007-2010 Action Plan<sup>212</sup> in the context of its wider national strategy 'Make the world better for the children (2007-2032)' to improve the health and social care of Roma children living in segregated areas. In **Ireland**, the Transformation Programme of the Health Service Executive recognises the distinct health and care needs of persons from diverse cultures and ethnic backgrounds in developing the National Intercultural Health Strategy.<sup>213</sup> **Malta** is currently developing a new health policy for immigrants<sup>214</sup>. In **Italy**, the Ministry of Health<sup>215</sup> granted EU citizens without health insurance access to 'all services concerning children's health, maternity and voluntary interruption of pregnancy', which can impact positively on Romanian Roma. In **Slovenia**, the National Assembly adopted in 2008 the Act on Patients Rights,<sup>216</sup> which explicitly outlaws discrimination and establishes Representatives of Patients Rights at regional level.

There are also many important practical initiatives, for instance, in **Estonia**, the Tallinn Social and Health Care Board decided to translate instructions and prescriptions for the most widely-used medications into Russian; in **Bulgaria**, 111 health mediators worked in 55 municipalities during 2008; in **Austria**, a pilot project<sup>217</sup> implemented by the Diabetes Association at the Vienna *Wilhelminenspital* aims to help migrant women with gestational diabetes by training them to face the

209 Available at <http://register.consilium.europa.eu/pdf/en/08/st07/st07274.en08.pdf> (23.12.2008)

210 Decision No 1350/2007/EC of the European Parliament and of the Council of 23 October 2007 establishing a second programme of Community action in the field of health (2008-13), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:301:0003:0013:EN:PDF> (12.12.2008)

211 The National Board of Health, [http://www.sst.dk/Forebyggelse/Maalgrupper\\_og\\_forebyggelsesmiljoer/Etniske\\_minoriteter.aspx?lang=da](http://www.sst.dk/Forebyggelse/Maalgrupper_og_forebyggelsesmiljoer/Etniske_minoriteter.aspx?lang=da) (20.11.2008)

212 Hungary/Government Decree No. 1092/2007. (XI. 29.), available at [http://net.jogtar.hu/jr/gen/hjegy\\_doc.cgi?docid=A07H1092.KOR&kif=jobb#xcel](http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A07H1092.KOR&kif=jobb#xcel) (19.09.2008)

213 Health Service Executive, Ireland (2008) 'National Intercultural Health Strategy 2007-2012'; pp. 6-7. Available at [http://www.hse.ie/eng/Publications/Social\\_Inclusion,\\_Asylum\\_Seekers,\\_Travellers/National\\_Intercultural\\_Health\\_Strategy\\_2007\\_-\\_2012.pdf](http://www.hse.ie/eng/Publications/Social_Inclusion,_Asylum_Seekers,_Travellers/National_Intercultural_Health_Strategy_2007_-_2012.pdf) (24.09.2008).

214 Government of Malta (2008) Pre-Budget 2009 Document, Chapter eight, Health, the elderly and community care, p.5, available at: [http://finance.gov.mt/image.aspx?site=MFIN&ref=2009\\_chapter8-pdf](http://finance.gov.mt/image.aspx?site=MFIN&ref=2009_chapter8-pdf) (23.09.2008)

215 Italy / Ministero della Salute / Nota informativa prot. n. DG/RUER/II/3152-P/I.3.b/1 (19.02.2008).

216 Slovenia/SOP: 2008-01-0455, (29.01.2008)

217 Österreichische Diabetes Gesellschaft (2008) *Migration: neuer Themenschwerpunkt in der Diabetesbehandlung*, available at: [http://www.oedg.org/pdf/Presseinformation\\_OEDG\\_0801.pdf](http://www.oedg.org/pdf/Presseinformation_OEDG_0801.pdf) (10.09.2008).

disease in their native language; in **Belgium**, the project *Santé en exil*<sup>218</sup> provides refugees and migrants with free mental health care services and conducts awareness raising and information seminars for health care providers about the needs of ethnic minority patients; in **Germany**, the municipal health department in Bremen set up together with around 50 other local health institutions the Intercultural Health Network<sup>219</sup> to promote equal opportunities for migrants in the access to health and psycho-social care; in **Sweden**, *Rosengrenska*<sup>220</sup>, a local network of health professionals working with undocumented migrants and asylum seekers, especially children operates a hotline to facilitate access to the emergency and other health services offered by the Sahlgrenska University Hospital.

Despite many outstanding ‘good practice’ examples of policies and practical measures that Member States and civil society organisations implement throughout the EU, long-term structural changes requires a more coordinated action by government, health authorities and medical practitioners, as well as immigrants and the minority ethnic groups themselves, representatives of whom should ideally be directly involved in the implementation and also the design of policies.

218 More information available at [http://www.ceraic.be/integration\\_personnes\\_etrangeres/lutte\\_racisme/sante\\_mentale.htm](http://www.ceraic.be/integration_personnes_etrangeres/lutte_racisme/sante_mentale.htm) (26.08.2008)

219 More information available at <http://www.gesundheitsamt.bremen.de/sixcms/detail.php?gsid=bremen125.c.2699.de> (12.12.2008)

220 More information available at <http://www.rosengrenska.org> (4.10.2008)

## 2. Developments regarding Fundamental Rights Issues in the EU

### 2.1. Developments at a national level

#### 2.1.1. Introduction

This section offers a comparison of some of the developments which took place in the EU Member States in the areas covered by the Multi-Annual Framework (MAF)<sup>221</sup> of the EU Agency for Fundamental Rights, in the year 2008, inasmuch as it is related to Community law, (apart from the area of ‘Racism, xenophobia and related intolerance’, which is covered in the preceding section.) The comparison is based on information collected in national situation reports, prepared by the country teams. Those reports were delivered on 31 October 2008. Developments after that date could not be included systematically, although all efforts have been made to ensure that the information provided is as up to date as possible.

The section offers an overview of the state of affairs in the EU Member States, in the areas covered by the MAF and of relevant legal developments, within the framework of actual or proposed Community legislation and implementation thereof.

#### 2.1.2. Discrimination<sup>222</sup>

Although the Gender (Recast) Equality Directive<sup>223</sup> (implementation deadline of 15 August 2008) mostly reproduces pre-existing provisions, a number of Member States adopted significant legislative acts, including **Denmark, Estonia, Luxembourg, Malta** and the **UK**. Although the transposition deadline of the Racial Equality (2000/43/EC) and Employment Equality (2000/78/EC) Directives has now passed, a number of Member States were still introducing measures of implementation during 2008. Notably, **Sweden** introduced legislation against discrimination covering several areas of society, going beyond the scope of the Directive. The protected grounds of discrimination are equally covered by the law.<sup>224</sup> Several Member States amended existing legislation in order to ensure

221 [http://intrafra/directorate/Important%20Documents/Multi-annual%20Framework/MAF\\_EN.pdf](http://intrafra/directorate/Important%20Documents/Multi-annual%20Framework/MAF_EN.pdf); [http://intrafra/directorate/Important%20Documents/Multi-annual%20Framework/MAF\\_FR.pdf](http://intrafra/directorate/Important%20Documents/Multi-annual%20Framework/MAF_FR.pdf)

222 Discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds

223 Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 80, 19.3.2008, p. 1.

224 Anti-Discrimination Act (Diskrimineringslagen SFS 2008:567), entry into force 1 January 2009 (prop. 2007/08:95 Ett starkare skydd mot diskriminering).

proper conformity with the Directives, often in response to criticism from the Commission, including **Cyprus, France, Italy, Lithuania, Portugal** and the **UK**. Legislative projects were afoot but still pending in the **Czech Republic, Finland** and **Latvia**, and in **Estonia** the act implementing the two Equality Directives entered into force on 1 January 2009.

Attention is now shifting towards questions of interpretation of new legislation. For instance, after an ex officio review the **Austrian** Ombudsman Board<sup>225</sup> made a declaration of administrative defect and recommended that governmental authorities endeavour to ensure the proper implementation of the prohibition of racist discrimination in administrative procedures, including discriminatory advertising in the context of jobs and housing. The review also suggested certain positive measures such as greater efforts to include migrants in the national labour market.

Noteworthy decisions relating to discrimination include a substantial award against the bank MBNA by **Ireland's** Equality Tribunal where it found that failure to promote an individual, and deteriorating treatment by her employer, was owed to absences attributable to pregnancy and maternity leave.<sup>226</sup> Finally, the Equal Treatment Commission (ETC) (Commissie gelijke behandeling) of the **Netherlands** made a finding that refusal to employ civil servants who refuse to conduct a marriage between two people of the same sex for conscientious/religious objections, does not necessarily constitute a breach of the Dutch Equal Treatment Act.<sup>227</sup> In another case, the ETC found that *Opzij*, a feminist magazine, had discriminated on grounds of sex through its policy to accept only female candidates for the position of (chief) editor.<sup>228</sup>

### 2.1.3. Compensation of victims

Any restriction to the right of victims to seek compensation for damage suffered as a result of the commission of a crime must be justified by proportionate measures in the pursuit of a legitimate objective. Certain clauses of the domestic regulations implementing Directive 2004/80/EC raise specific concerns. **Maltese** legislation permits the restriction of compensation on the basis of the 'conduct of the victim, his character or his way of life'.<sup>229</sup> This risks arbitrary restrictions of compensation where the Claims Officer disagrees with certain 'lifestyles' based on prohibited grounds of discrimination (such as sexual orientation) and raises questions of compatibility with the right to respect for private life.

225 BGBl 50/1991, last amended 2008.

226 See Press Release of the Equality Authority, available on <http://www.equality.ie/index.asp?locID=135&docID=738>, accessed 09/10/08.

227 Press release on the website of ETC of 15 April 2008, online at: [http://www.cgb.nl/pressrelease.php?pr\\_id=52](http://www.cgb.nl/pressrelease.php?pr_id=52).

228 Decision of the Equal Treatment Commission of 15 April 2008, no. 2008-39, available at: <http://www.cgb.nl/opinion.php?id=453056853>.

229 Article 16 of L.N. 190 of 2007; [www.doi.gov.mt](http://www.doi.gov.mt)

A number of EU Member States provide for mechanisms to achieve a friendly settlement between the author of a criminal act and the victim. Thus, in **Austria**, with the consent of the victim, an agreement to compensate and reform may be made with the perpetrator of an offence.<sup>230</sup>

A number of noteworthy developments took place during the reference period. **Austria** is in the process of adopting legislation permitting interim measures against the perpetrator. Psychosocial and legal assistance may also be offered to the victim during the civil process who may be questioned without the presence of the perpetrator. A new offence called 'Persistent Violence' will be introduced into the Criminal Code. A prosecutor can postpone the questioning of a witness for up to half a year if the witness is not ready to talk about the violence suffered. Sexual offenders can be ordered to undergo therapy, stay away from certain places, such as schools or prevented from carrying out certain professions. Information relating to sexual offenders is now accessible to higher numbers of officials, such as youth welfare authorities. Persons caring for minors, such as teachers and medical practitioners will be obliged to report any suspected infringement. In **Spain**, women victims of domestic violence are now entitled to certain benefits including the right to public compensation.<sup>231</sup>

The disbursement of compensation has been facilitated in certain Member States (**Austria** and the **Czech Republic**) by the establishment of predefined compensation rates for certain types of harm, supported by public funds in cases of insolvency of the offender.

In a noteworthy case the **UK** House of Lords held that the courts had discretion to waive the six year statute of limitations in cases of serious assault, allowing a victim of attempted rape to seek compensation from the perpetrator who won the national lottery over a decade after the event.<sup>232</sup>

Further support for victims can be found in recent legislation in **France** and the **Netherlands** allowing the State to pay advances of compensation to victims where the perpetrator fails to cooperate to make payment. Steps were also taken in this direction in **Hungary**. **Malta** and **Bulgaria** have also seen the establishment of support organisations to provide help to victims through the provision of medical, legal or information services.

230 Austria/BGB1 631/1975 (30.12.1975), amended by Austria/BGB1 I 109/2007 (01.01.2008).

231 Official Journal of the State of 30 May 2008, number 131, page 25174.

232 *A v Hoare*, 30 January 2008, [2008] UKHL 6.



### 2.1.4. The rights of the child, including the protection of children

A number of developments in child protection should be noted. With regard to combating sexual exploitation, the **Greek** authorities have made use of legislation permitting the publication of names of individuals involved in child pornography. Similarly, **Slovenia** has established a registry of perpetrators against the bodily and sexual integrity of children, and the **UK** has piloted schemes permitting parents, carers and guardians to seek information from the police on whether a person with unrestricted contact with children has a record for child sex offences. Furthermore it has become an offence in the UK merely to possess pornographic images of children. This is in line with the recent Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which provide that the States parties should criminalise ‘possessing’ child pornography and ‘knowingly obtaining access, through information and communication technologies, to child pornography’. At the same time a report from **Romania** indicates a fall in instances of sexual exploitation of children, though certain discrepancies were noted between official recorded numbers and unofficial surveys in that much exploitation has become ‘hidden’ (e.g. over the internet, phone, or in private clubs).<sup>233</sup>

A highly significant development during the reference period also relates to children seeking asylum. Council Regulation 343/2003 codifies the rule that, in the context of determining which Member State is responsible for dealing with an asylum application, no person can be removed to a territory where he or she would be facing a serious risk of a violation of human rights.<sup>234</sup> **Denmark**<sup>235</sup> has discontinued the practice of returning unaccompanied asylum seeking children to **Greece**, since doubt has been raised as to whether Greece respects the 1951 Geneva Convention on the status of refugees.<sup>236</sup> **Ireland’s** Ombudsman for Children has urged the introduction into legislation of an alternative status, distinct from refugee status or subsidiary protection, which would be available to children on humanitarian grounds who did not fall within the other established categories.<sup>237</sup>

Unreliability of the data relating to the incidence of unaccompanied children seeking asylum makes determination of the general situation difficult. In **Italy**, the official number of foreign non-accompanied minors registered at the Ministry of Social Solidarity (Ministero della solidarietà sociale) is about 7,700. However, child victims of trafficking who might not satisfy the conditions for

233 Salvați Copiii – România (2008), *Exploitation of Children for Commercial Sex*. A summary of the findings is available at: <http://www.salvaticopiii.ro/index.html> (17.09.2008)

234 OJ L 50 of 25.2.2003, p. 1. See also Commission Regulation (EC) No 1560/2003, OJ L 222 of 5.9.2003, p. 3.

235 [http://www.synigoros.gr/pdfs/\\_deltio\\_paidiou\\_8\\_2.pdf](http://www.synigoros.gr/pdfs/_deltio_paidiou_8_2.pdf) <http://www.syn.gr/gr/keimeno.php?id=9639>.

236 Significant progress has been achieved during the reference period with regard to asylum. Greece has incorporated Asylum Directives into its national law, thus complying with European standards in this respect. Furthermore, the competence of the decision on asylum applications in 2nd degree has been conferred to an independent Committee of Appeals (Article 26 Presidential Decree 90/2008 - OJ 138/A’).

237 Bill No 2 of 2008. Available at <http://www.oireachtas.ie/viewdoc.asp?DocID=8701&&CatID=59>, accessed 09/10/08.

refugee status or subsidiary protection but are nonetheless in need of special assistance and protection might still escape any recording. Also, according to a report released in April 2008<sup>238</sup> a large number of minors without parents or relatives become undetectable after leaving accommodation centres.<sup>239</sup>

One of the concerns raised when the Council Framework Decision of 13 June 2002 on the European arrest warrant<sup>240</sup> was adopted, was that it could result in certain Member States being obliged to surrender a child to other Member States even when the age for criminal responsibility is considered excessively low in the issuing State, or where the minor would not be sufficiently protected in criminal procedures. The **Italian** courts have taken steps to safeguard minors in such cases, asserting the jurisdiction of the specialised juvenile courts in these procedures in order to uphold the best interests of the child.<sup>241</sup>

### 2.1.5. Asylum, immigration and integration of migrants

Particular problems have arisen relating to the detention of asylum seekers as permitted by the ‘Minimum Standards Directive’ establishing minimum standards for the reception of asylum seekers.<sup>242</sup> **Austria’s Menschenrechtsbeirat** [Human Rights Advisory Board] has<sup>243</sup> recommended the abolishment of provisions envisaging detention for asylum-seekers because of the possibility of abuses. The **UK’s** Independent Asylum Commission has also found that standards of treatment fell below those expected of a humane society, criticising the adversarial system and the lack of access to legal advice.<sup>244</sup> Apart from the use of detention centres, the handling of removals and the use of destitution as a tool to drive claimants out of the UK were singled out as specific concerns.

The Qualification Directive provides that asylum-seekers should have access to employment during the examination of their application, subject to rules laid down by the Member States. **Cypriot** rules providing that asylum seekers may only seek work after six months from filing their asylum application, and exclusively in the sector of farming and agriculture, have been heavily criticised by the National

238 <http://www.anci.it/Contenuti/Allegati/Secondo%20Rapporto.pdf> (09.10.2008).

239 A *National Program for the Protection of Unaccompanied Foreign Minors*, has been developed, and with regard to unaccompanied minors seeking asylum, the *National Protection System for Asylum Seekers and Refugees* was created in 2007.

240 OJ L 190, 18.7.2002, p. 1.

241 Italy/Corte di Cassazione, Sez. VI Pen, n. 21005/2008 (26.05.2008). Italy/Corte costituzionale, n. 310/2008 (30.07.2008).

242 Council Directive laying down minimum standards for the reception of asylum seekers 2003/9/EC, OJ L 31 of 6.2.2003, p. 18. See also the Commission Report on the Directive’s implementation (COM(2007) 745 final of 26.11.2007).

243 This ‘package’ consists of the Asylum Act, Aliens Police Act and Settlement and Residence Act 2005 and entered into force on 01 January 2006.

244 See Independent Asylum Commission (2008) *Fit for Purpose yet? The Independent Asylum Commission’s Interim Findings*, available at: <http://www.independentasylumcommission.org.uk/files/Fit%20for%20Purpose%20Yet.pdf> (08.10.2008); and *Deserving Dignity. The Independent Asylum Commission’s Third and Final Report of Conclusions and Recommendations*, available at: <http://www.independentasylumcommission.org.uk/files/10.07.08.pdf> (08.10.2008).

Equality Body. In particular the measure was found to actively discourage rising asylum applications, by selecting the area of the economy with the worst working conditions and the lowest salaries. In seeking to discourage asylum applications the measure was found not to pursue a legitimate aim and to be discriminatory since no other Cypriot worker would accept these particular conditions of work.<sup>245</sup> Following the intervention of the National Equality Body the Ministry of Labour and Social Insurance, in collaboration with the Ministry of the Interior, decided to expand the sectors in which asylum seekers can be employed.<sup>246</sup>

The **Luxembourg** Consultative Commission on Human Rights raised concerns over government action which would de facto expel Kosovars who had requested political asylum from 2004. Notice of withdrawal of temporary residence status was accompanied by a financial incentive for prompt voluntary repatriation. Failure to leave would result in expulsion under future legislation.<sup>247</sup> In its defence the government has pointed to an agreement with the International Organization for Migration (IOM) to facilitate voluntary returns and noted that the financial incentive offered is 50 per cent greater than that provided to individuals who voluntarily return to other countries of origin.<sup>248</sup>

Reform of the **British** immigration system towards 'selective immigration' mirrors European developments in the same vein.<sup>249</sup> A points-based system based on categories of immigrants (workers with varying degrees of skill or fulfilling particular demands, and types of youth mobility) is being progressively implemented.<sup>250</sup> Points are awarded on criteria such as age, experience, previous salary or prospective salary and qualifications as well as on the level of need in any given sector.

The Qualification Directive<sup>251</sup> defines persons eligible for subsidiary protection, i.e., who cannot be returned to their country of origin while not qualifying for refugee status. The Directive does not include those whose removal would interfere with respect for family life within subsidiary protection. However, the **Austrian** courts have struck down domestic law which prevents third country nationals from applying

245 Article 6 of the preamble to Council Directive 2003/9/EC.

246 Decision on 2.10.08, according to Regulation 2 (12) of 2005 of the Refugees Laws of 2000-2007.

247 CCDH Commniqué 3/2008 « Risque de refoulements susceptibles de porter atteinte aux droits fondamentaux » <http://www.gouvernement.lu/dossiers/justice/droitshom/communique110708.doc> (29.07.2008). See also Advisory opinion on expulsions and "refoulement" of foreigners with irregular immigration status (2003 Annual Report).

248 *Article d'actualité: Nicolas Schmit fait le point sur les rapatriements de demandeurs d'asile déboutés vers Kosovo*, 05-08-2008 (News article : Nicolas Schmit on the repatriation to Kosovo of unadmitted asylum seekers, 05-08-2008) [http://www.gouvernement.lu/salle\\_presse/actualite/2008/08-aout/05-schmit-immigration/index.html](http://www.gouvernement.lu/salle_presse/actualite/2008/08-aout/05-schmit-immigration/index.html) (07.08.2008).

249 See Proposal for a Council Directive of 23 October 2007 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, COM(2007) 637 final.

250 Home Office (2006) *A Points-Based System: Making Migration Work for Britain*, p.15, available at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/pbsdocs/apointsbasedsystem/pbscommandpaper.pdf?view=Binary> (07.10.2008).

251 Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted. OJ L 304, 30.9.2004, p. 12.

for humanitarian permits where the individual has ‘strong relations with Austria.’<sup>252</sup> The former rule allowing this to be granted only ex officio was found to conflict with Article 8 of the ECHR on the right to family life.

Council Directive 2003/86/EC on the right to family reunification<sup>253</sup> harmonises to a certain extent the right to family reunification across the EU. A number of problems were identified during the reference period. The courts in **Belgium** annulled, on grounds of discrimination, legislation limiting the rights of children born in a polygamous marriage between two non-EU citizens where only one of the parents is authorised to remain and the child is not of that parent.<sup>254</sup> In **Ireland**, it has been noted<sup>255</sup> that refugees applying for family reunification face numerous obstacles, in particular a lack of clear and comprehensible information. However, in this case the Directive does not apply to Ireland, which has not ‘opted in’ to this instrument. Issues reported are therefore not linked to the implementation of the Directive.

The **Dutch** courts took opposing views on whether an income requirement imposed on the sponsor applying for family formation – as opposed to reunification<sup>256</sup> – of 120 per cent of the minimum wage is in conformity with the Family Reunification Directive 2003/86/EC. The Directive requires stable resources to maintain oneself and dependents without recourse to social assistance. The courts differed in their interpretation of ‘social assistance system’, with one interpreting this to refer to nationally-provided benefits only and the other to refer to both national and additional (such as local) benefits. Under the narrower interpretation an individual would be considered to be in conformity with the Directive for as long as they do not access nationally-provided benefits, but they may access other additional benefits. The government has appealed against the judgment offering the narrower interpretation.<sup>257</sup> The Dutch *Raad van Staate* referred this question for a preliminary ruling to the ECJ at the end of 2008.

The use of integration tests for third-country nationals as a condition for permanent residency or for the acquisition of citizenship is still contentious in a number of States. **Germany** has made obligatory tests which assess civic knowledge of the basic values, history and culture of German society and political and ethical attitudes.<sup>258</sup> Criticism of the tests has included that the topics covered may be very

252 BGBl I 157/2005, last amended by BGBl I 4/2008 (04.01.2008). The words “von Amts wegen” [ex officio] in Secs. 72 para. 1, 73 para. 2 and 73 para. 3 were abolished.

253 OJ L 251 of 3/10/2003, p. 12.

254 Belgium/Constitutional Court, no. 95/2008 (26.06.2008), available at: <http://www.arbitrage.be/public/n/2008/2008-095n.pdf> (05.11.2008) (Dutch); <http://www.arbitrage.be/public/f/2008/2008-095f.pdf> (05.11.2008) (French).

255 Refugee Information Service, *The Family Reunification Application Process for Refugees in Ireland*, by Louise Galvin. Available on <http://www.ris.ie/progressreport/>, last accessed 08/10/08.

256 The Dutch law distinguishes between family reunification and family formation. Family formation refers to family ties which develop while the sponsor resides in the Netherlands; reunification refers to situations where family ties already exist in the country of origin.

257 District Court The Hague, location Roermond, judgment of 4 July 2008, *LJN* BD6637 and District Court The Hague, location Middelburg, judgment of 3 July 2008, *LJN* BD9291, both to be found on [www.rechtspraak.nl](http://www.rechtspraak.nl)

258 <http://spiel.tagesschau.de/quiz/index.php?id=258> (23.10.08); <http://www.goethe.de/ges/pok/thm/idd/de3721957.htm> (23.10.08); [http://www.bundesregierung.de/nn\\_774/Content/DE/Pressemitteilungen/BPA/2008/07/2008-07-23-b\\_C3\\_B6hmer-einb\\_C3\\_BCrgungstest.html](http://www.bundesregierung.de/nn_774/Content/DE/Pressemitteilungen/BPA/2008/07/2008-07-23-b_C3_B6hmer-einb_C3_BCrgungstest.html) (23.10.08).

sensitive and the questions partially misleading. The observation that some questions may be discriminatory has been made by the UN Committee on the Elimination of Racial Discrimination as well as in a study of the Max Plank Institute.<sup>259</sup> In a similar vein **French** legislation conditions the issue of visas to spouses of French nationals on attainment of French language requirements.<sup>260</sup> According to the French Equality Body (HALDE) if this is not to prove a disproportionate interference with the right to family life and conflict with the prohibition on discrimination it must be accompanied by provision of affordable language courses.<sup>261</sup>

An alternative approach has been the introduction (in parts of **Spain**)<sup>262</sup> or proposal (in **Sweden**)<sup>263</sup> of voluntary programmes of study or financial incentives for study in order to facilitate integration. In the **Netherlands**, it is reported that the integration test has resulted in a fall in applications from migrants.<sup>264</sup> Human Rights Watch has further criticised this as discriminatory practice.<sup>265</sup>

In Italy the central government granted powers to the local authorities of Lombardia, Lazio and Campania to carry out an identification operation in both legal and illegal nomad camps, which has involved the identification of all residents, many of whom were Roma, through measures such as fingerprinting, in cases where it was impossible to identify them through other means.<sup>266</sup> Following the intervention of the European Commission, the government adopted guidelines regulating the modalities of the identification, in particular as regards the non-discriminatory nature of the process, the data protection requirements, and the identification of children.<sup>267</sup>

## 2.1.6. Visa and border control

In the **Czech Republic**, the rules relating to interviews held by the Czech embassies in the process of granting a visa or residence permit have been criticised by the Public Defender of Rights. Particular problems related to the fact that the

259 [http://www.welt.de/politik/article2090292/Opposition\\_kritisieret\\_Einbuengerungstest\\_heftig.html](http://www.welt.de/politik/article2090292/Opposition_kritisieret_Einbuengerungstest_heftig.html) (23.10.08); <http://www2.ohchr.org/english/bodies/cerd/docs/co/CERD.C.DEU.CO.18.pdf> (23.10.08). See also study of the Max Plank Institute: <http://www.heidelberg.de/servlet/PB/menu/1149605/index.html> (23.10.08) ;

260 France/ Loi n° 2007-1631 (20.11.2007), loi relative à la maîtrise de l'immigration, à l'intégration et à l'asile, NOR: IM1X0756368L.

261 France/HALDE/Délibération/2007-370 (17/12/2007.)

262 [http://www.cic.gva.es/images/stories/dgi/ley\\_de\\_integracin/uinmigracionmara\\_josproyecto\\_de\\_ley\\_de\\_integracin\\_texto\\_definitivo\\_consell\\_04-08-2008.doc/proyecto\\_de\\_ley\\_de\\_integracin\\_texto\\_definitivo\\_consell\\_04-08-2008.doc](http://www.cic.gva.es/images/stories/dgi/ley_de_integracin/uinmigracionmara_josproyecto_de_ley_de_integracin_texto_definitivo_consell_04-08-2008.doc/proyecto_de_ley_de_integracin_texto_definitivo_consell_04-08-2008.doc) (01.12.2008)

263 The Swedish government has proposed financial incentives for newly arrived immigrants to learn Swedish quickly. The pilot project will be implemented in a selected number of municipalities: [http://www.riksdagen.se/Webbnav/index.aspx?nid=3271&dok\\_id=GWB419](http://www.riksdagen.se/Webbnav/index.aspx?nid=3271&dok_id=GWB419)

264 *Parliamentary Documents Dutch Lower Chamber of the States-General* 2007-2008, 30573, no. 8.

265 *Human Rights Watch* May 2008, 'The Netherlands: Discrimination in the Name of Integration. Migrants' Rights under the Integration Abroad Act', online at <http://www.hrw.org/backgrounder/2008/netherlands0508/>

266 Italy/ordinanza del Presidente del Consiglio dei Ministri n. 3676, 3677, 3678, 30/05/2008.

267 <http://www.asgi.it/index.php?page=app.home&idint=cn08072300> (26.10.2008). For an NGO report on this situation see: Collective NGO report, *Security a la Italiana*, available at <http://www.romadecade.org/portal/downloads/General%20Resources/Italy%20Report%20July%202008%20FINAL.pdf>. (02.08.2008). See also Alianța Civică a Romilor, press release [http://www.acrr.ro/index.php?page=raport&id\\_raport=4](http://www.acrr.ro/index.php?page=raport&id_raport=4) (02.08.2008).

applicant has no opportunity to disprove facts on which the authorities base their decision; that no record is kept of interviews for short term visas.

It should be noted that Member States require applicants to submit certain documentation in support of their application for a short stay visa based on the rules set out in the CCI<sup>268</sup> and the applicant may be called for an interview to provide additional information. Member States' consular authorities are responsible for applying the rules of the CCI and assessing individual applications on the basis of the information provided by the applicant. Currently Community law does not require Member States to motivate the refusal of a visa, except for the case of family members of EU citizens where detailed grounds for the refusal must be notified to the person concerned.<sup>269</sup>

With regard to the Czech case, another problem is that applicants do not have the opportunity to agree to the accuracy of records of interviews for long term visas or residence permits.

### 2.1.7. Participation of the citizens of the Union in the Union's democratic functioning

According to Article 19(1) of the EC Treaty every Union citizen residing in a Member State of which he or she does not have the nationality has the right to vote and to stand as a candidate at municipal elections and at elections to the European Parliament in their Member State of residence, under the same conditions as nationals of that State.<sup>270</sup>

In the **Netherlands**, legislative proposals have been under consideration for the extension of the right to vote for the European Parliament to all Dutch nationals who reside in the Netherlands Antilles and Aruba, following domestic legal proceedings involving a preliminary reference ruling from the ECJ which found that existing law violated the principle of equality.<sup>271</sup>

<sup>268</sup> the Common Consular Instructions on visas for diplomatic missions and consular posts

<sup>269</sup> In April 2009, Council and European Parliament reached agreement on the Visa Code, a recast of the existing rules governing the issuance of uniform visas, which introduces mandatory motivation of refusals and right of appeal of such negative decisions. (The Visa Code is likely to be finally adopted in June 2009 and the provisions referred to above will apply 18 months after the entry into force of the Code). The lack of detailed motivation of refusals has been a source of considerable frustration among the persons concerned. However, with the introduction of the new legislation in relation to short stay visa, part of the concerns expressed will be met.

<sup>270</sup> As implemented by Directive 94/80/EC, OJ L 368 of 31/12/1994 p.38-47 for municipal elections and Directive 93/109/EC, OJ L 329 of 30/12/1993, p. 34 for European elections.

<sup>271</sup> Preliminary ruling of the European Court of Justice of 12 September 2006, C 300/04, *Eman-Sevinger*. Judgment of the Administrative Jurisdiction Division of the Council of State of 21 November 2006, nos. 200404446/1 and 200404450/1, online at [www.rechtspraak.nl](http://www.rechtspraak.nl). Draft bill of 31 March 2008. *Parliamentary Documents Dutch Lower Chamber of the States-Genera 2007-2008*, 31 392, no. 1 et seq., online at [www.overheid.nl/op](http://www.overheid.nl/op). *Netherlands Juristenblad 2008*, no. 31, not publicly available online.

### 2.1.8. Information society and, in particular, respect for private life and protection of personal data

The issue of video-surveillance has arisen across several Member States. In **Cyprus** debate was prompted after the authorities issued a call for tender for the installation of cameras for monitoring traffic offences at crossroads, traffic lights and highways. In the **Czech Republic**, Public Defender of Rights (Czech Ombudsman) [Veřejný ochránce práv] noted that the monitoring of patients through video-surveillance in psychiatric facilities may be incompatible with the Constitution as well as with the ECHR. In **Greece**, legislation was introduced regulating the use of cameras by the police force following a finding by the courts that existing practice conflicted with Data Protection rules. The legislation regulates their use under the authorisation of representatives of the Prosecution Authority, in order to use the material on the commission of criminal acts as evidence in front of any investigating, prosecuting authority or court.<sup>272</sup>

In **Romania**, public debate has centred around a proposal regarding the use of personal data in the context of surveillance.<sup>273</sup> In **Austria**, the *Österreichische Datenschutzkommission* (DSK) [Austrian Data Protection Commission] rejected plans for video-surveillance in Austrian schools, to address vandalism and violence, finding that this role was part of the pedagogical role of teachers.<sup>274</sup> Against this background note should be made of a Council of Europe report which recommended the encoding of images gathered from video-surveillance as a means of protecting privacy.<sup>275</sup>

The safeguarding of personal data is also a concern in relation to marketing exercises. After the **Danish** data protection body found a violation of data protection rules by the Defence Staff Service for providing information on 15,000 employees to a private insurance company the data were erased.<sup>276</sup> The **Belgian** data protection body has established guidance on the rights and duties of direct marketers under data protection legislation.<sup>277</sup> In particular the consumer must give their

272 Article 8, par. 2b Law 3625/2007, which amends article 3, par. 2 Law on personal data protection – 2472/1997.

273 Romania/ Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal comunicat de presa available at [http://www.dataprotection.ro/?page=stire\\_19082008&lang=ro](http://www.dataprotection.ro/?page=stire_19082008&lang=ro) (28.09.2008).

274 Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, Decisions K600.54-001/0002-DVR/2008 and K600.55-001/0002-DVR/2008, available at: <http://www.ris2.bka.gv.at/Dsk/> (09.10.2008).

275 Doc. 11478, 4 January 2008.

276 The Danish Data Protection Agency: Date of letter: 19.08.2008 Journal No.: 2008-632-0034 [http://www.datatilsynet.dk/afgoerelser/seneste-afgoerelser/artikel/forsvarets-videregivelse-af-personaleoplysninger-til-brug-for-markedsfoering-1/?no\\_cache=1&cHash=562841b1f1f](http://www.datatilsynet.dk/afgoerelser/seneste-afgoerelser/artikel/forsvarets-videregivelse-af-personaleoplysninger-til-brug-for-markedsfoering-1/?no_cache=1&cHash=562841b1f1f) (16.10.2008).

277 Belgium/Wet tot bescherming van de persoonlijke levensfeer ten opzichte van de verwerking van persoonsgegevens (8.12.1992), available at <http://www.ejustice.just.fgov.be/wet/wet.htm> (Moniteur belge of 08.12.1992) (05.11.2008) (Dutch); Belgium/Loi relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel (8.12.1992), available at <http://www.ejustice.just.fgov.be/loi/loi.htm> (Moniteur belge of 08.12.1992) (05.11.2008) (French).

consent to be the addressee of direct marketing.<sup>278</sup> Similarly, the **Irish** data protection authorities published guidelines on data protection for the insurance sector;<sup>279</sup> and the **Latvian** data protection body has elaborated and published a thorough informative recommendation on sending of commercial announcements.<sup>280</sup>

In **Bulgaria**, legislative measures have been adopted regarding the types of internet data to be gathered or recorded for the needs of national security or combating crimes. Although the national ombudsman has criticised this for conflicting with the right to private life<sup>281</sup> the courts have upheld indiscriminate monitoring of individuals over the internet.<sup>282</sup>

A **French** law allowing security authorities to collect and store personal data of anyone over the age of 13 (the 'EDVIGE' file) provoked strong criticism from many sides.<sup>283</sup> National bodies monitoring data protection and human rights protection as well as the United National Human Rights Committee issued recommendations to the French government.<sup>284</sup> However the *Conseil d'Etat* (Council of State) refused an application for the suspension of the Decree and the destruction of the EDVIGE file.<sup>285</sup> The legislation has been withdrawn and new proposals exclude specific sensitive data from the file.

**Austrian** legislation has introduced greater powers for security services to use data obtained via electronic communications. A new duty of disclosure imposed on service providers may help to improve protection of victims of abuse over the internet.

In an important decision, the **German** courts found a law permitting 'online searches' consisting in secret infiltration of information systems to be unconstitutional.<sup>286</sup> Such action would only be permitted with judicial approval in order to safeguard a legally protected interest of paramount importance that is concretely jeopardised.

278 Belgium/Commission for the Protection of Private Life, *Nota 'Direct marketing en bescherming van persoonsgegevens'* (05.06.2008), available at <http://www.privacycommission.be/nl/static/pdf/direct-marketing/20080605-nota-direct-marketing-nl-finale-versie.pdf> (05.11.2008) (Dutch); Note 'Marketing direct et protection des données à caractère personnel', (05.06.2008), available at <http://www.privacycommission.be/fr/static/pdf/direct-marketing/20080605-nota-direct-marketing-fr-version-finale.pdf> (05.11.2008) (French).

279 *Code of Practice on Data Protection for the Insurance Sector*, available on <http://www.dataprotection.ie/view-doc.asp?DocID=841>, accessed 09/10/08.

280 Available at [http://www.dvi.gov.lv/files/Rekomendacija\\_komericials\\_pazinojums.doc..](http://www.dvi.gov.lv/files/Rekomendacija_komericials_pazinojums.doc..)

281 Bulgaria/Омбудсман на Република България/Годишен доклад за 2007 "Доброто управление, правата на хората и органите на властта" [Annual Report of the Ombudsman of the Republic of Bulgaria 'Good governance, rights of the people and institutions of power' 2007], p.126, available at: [http://ombudsman.bg/annual\\_report\\_2007.pdf](http://ombudsman.bg/annual_report_2007.pdf) (6.10.2008).

282 <http://www.bghelsinki.org/index.php?module=news&lg=en&id=1455> (6.10.2008).

283 France/Décret n° 2008-632 (27.06.2008) portant création d'un traitement automatisé de données à caractère personnel dénommé « EDVIGE », NOR: IOCC0815681D,

284 <http://www.service-public.fr/actualites/00930.html> (27/10/2008); France/CNIL n°2008-174 (16/06/2008); France/Avis de la CNCDH sur le fichier EDVIGE et les traitements automatisés de données à caractère personnel (25.09.2008); [http://www.cncdh.fr/article.php3?id\\_article=580](http://www.cncdh.fr/article.php3?id_article=580) (27/10/2008); UN Doc. HRC/CCPR/C/FRA/CO/4 (31/072008).

285 France/Conseil d'Etat/320024 (26/08/2008).

286 Germany/Bundesverfassungsgericht/1 BvR 370/07 (27.02.2008).



A recurrent question in this area concerns the protection of personal data in the context of prohibiting discrimination. Particular decisions from national authorities illustrate this relationship. In the **Netherlands**, the introduction of a database recording those among the Antillean youth without work or education and with criminal records was held by the Dutch Data Protection Authority and the courts to be justified in the public interest in view of the high rates of social deprivation and criminality among this group.<sup>287</sup> However, the government later announced that the separate databases on Antillean youths will be discontinued, following the introduction of a database comprising all youths facing serious problems, without regard to their ethnic background.<sup>288</sup> In **Greece**, the decision of an insurer to refuse life insurance based on illegal access to the individual's military service record indicating his homosexuality resulted in a substantial fine imposed by Greek Data Protection Authority.

### 2.1.9. Access to efficient and independent justice

The **Cypriot** courts recently found national rules transposing Directive 2003/8/EC on access to legal aid for cross-border disputes to be unconstitutional for denying access to legal aid in criminal cases where the prescribed punishment falls below one year.<sup>289</sup> This would apply to a number of offences including those created under the EU anti-discrimination directives for which the maximum penalty is six months.

## 2.2. Developments at an EU level

### 2.2.1. Introduction

This section offers an overview of the developments which took place at EU and international levels in the areas covered by the Multi-Annual Framework (MAF) of the EU Agency for Fundamental Rights in the year 2008 (apart from the area of 'Racism, xenophobia and related intolerance', which is covered in section 1.). It describes for this year the main developments related to the protection of fundamental rights in the EU and the Council of Europe.

287 District Court The Hague, 26 April 2007, LJN BB0711 and Administrative Jurisdiction Division of the Council of State 3 September 2008, case no. 200706325/1, LJN BE9698, at: [www.rechtspraak.nl](http://www.rechtspraak.nl)

288 Kamerstukken II 2008/09, 26 283, nr. 49, available at [www.overheid.nl](http://www.overheid.nl)

289 *Andreas Constantinou v. The Police*, Case No. 243/2006, 25.01.2008.

## 2.2.2. Discrimination

In July 2008 the European Commission published a Proposal for a Council Directive<sup>290</sup> to extend the protection against discrimination (on grounds of religion, belief, disability, age, and sexual orientation) currently covered by the Employment Framework Directive to areas of social security, healthcare, education and access to and supply of goods and services. This would level up protection to match the Racial Equality Directive. By providing the same level of protection, the Directive, once adopted, will make it possible to challenge discrimination which takes place outside the workplace and is based on several grounds, which was not the case previously. The Gender (Recast) Equality Directive<sup>291</sup> was to be transposed by 15 August 2008 and largely reproduces pre-existing provisions from earlier instruments which Member States had already transposed.

It is possible to remark on the increased role of the Council of Europe monitoring bodies. The European Committee on Social Rights held that **Bulgaria** had not complied with its obligations under the European Social Charter (revised) by failing to ensure access to education for children with mental disabilities who live in institutions.<sup>292</sup> The European Court of Human Rights delivered several noteworthy decisions.

In *Sampanis and Others v. Greece*<sup>293</sup> the European Court of Human Rights found that **Greece** had violated the Convention's provisions relating to non-discrimination and the right to education. The applicants, Greek nationals of Roma origin, were refused permission to enrol their children in local primary schools, excluding them for a year from the education system. The following year, after parental protests, the school provided preparatory schooling at a separate site for the Roma children. The authorities had deemed it necessary for educational reasons that Roma pupils should attend preparatory classes before their participation in primary grade classes. The Court found discriminatory treatment, in that the government had established no criteria or means of determining whether the children in fact displayed learning difficulties.<sup>294</sup> In *Yordanova and Others v. Bulgaria*, the Court granted interim measures in an application concerning the eviction of Roma inhabitants from Batalova Vodenitsa ghetto in Sofia. In *E.B. v. France* the Court found that refusal by the **French** authorities to grant a request of a lesbian women to adopt a child amounted to discrimination on grounds of sexual orientation.<sup>295</sup>

In the *Maruko* case the European Court of Justice (ECJ) found that no differentiation concerning survivor's pension is permissible under the Employment

290 COM(2008)426 final, 2 July 2008.

291 Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 80, 19.3.2008, p. 1.

292 Collective Complaint No. 41/2007, *MDAC v. Bulgaria*.

293 Application No. 32526/05, 5 June 2008.

294 Subsequently more resources were made available for the school in question and incentives were provided to attract more staff.

295 Application No. 43546/02, 22 January 2008 .

Framework Directive, if national law treats same sex partnerships comparably to marriage.<sup>296</sup> The *Coleman* case saw the ECJ's first major discussion of disability discrimination under the Employment Framework Directive.<sup>297</sup> The applicant at national level, who had given birth to a child with a disability, alleged constructive dismissal from her post following refusal of her employer to reinstate her to her former post after maternity leave, and receiving less favourable treatment than her colleagues. The ECJ applied a wide interpretation of discrimination on the basis of disability to find that it would include someone subject to differential treatment arising as a result of being the primary carer of their disabled child. It found, likewise, that harassment on the basis of disability could include situations where the direct victim was not themselves disabled, where the treatment remains based on the association of the victim to the disabled person.

In the *Feryn* case the ECJ delivered its first substantial judgment relating to the interpretation of the Racial Equality Directive.<sup>298</sup> The EUMC Annual Report of 2006 had reported the case of a **Belgian** company which had announced that only white employees would be recruited, on the grounds that "customers would prefer this". At the national level the Belgian national equality body claimed that this company had acted in breach of legislation by publicly adopting a recruitment statement refusing to employ individuals from certain racial or ethnic backgrounds. However, the Labour Court of Brussels had ruled that such statements could not amount to discrimination since no individual had suffered. On a request for a preliminary reference the ECJ found that while it could not be shown that there was an actual victim of discrimination these statements amounted to direct discrimination in the area of employment because they were 'likely to strongly dissuade certain candidates from submitting their candidature'. The ECJ found that the burden of proof in such a situation created a presumption of discrimination to be rebutted by the employer. The judgement clarifies the concept of direct discrimination under Article 2 (2)(a) of the Racial Equality Directive and sets an international precedent in anti-discrimination law.

In the *Age Concern* case, the ECJ was asked if **UK** law breaches the prohibition on age discrimination under the Employment Framework Directive by allowing employers, under certain conditions, to set a default mandatory retirement age of 65.<sup>299</sup> In its judgment, handed down on 5 March 2009, the ECJ has confirmed that such an arrangement is permissible if it pursues a legitimate aim relating to employment policy and the labour market and the means are appropriate and necessary for this purpose.<sup>300</sup>

296 Case C-267/06, *Maruko v. Versorgungsanstalt der deutschen Bühnen*, 1 April 2008.

297 Case C-303/06 *Coleman v. Attridge Law and Steve Law*, 17 July 2008,

298 Case C-54/07 *Centrum voor gelijkheid van kansen en voor racismebestrijding v. Firma Feryn* NY, 10 July 2008.

299 Case C-388/07 *The Queen on the application of Age Concern England, v Secretary of State for Business, Enterprise and Regulatory Reform*. AG Opinion delivered 23 September 2008.

300 R (Incorporated Trustees of the National Council on Ageing (Age Concern England)) v Secretary of State for Business, Enterprise and Regulatory Reform (Case C-388/07) [2009] WLR (D) 82 (<http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-388/07>)

### 2.2.3. Compensation of victims

On the question of compensation the European Court of Human Rights found that where a large number of claimants bring a collective application for compensation it was possible to award a total sum which, once divided, amounted to less than what might otherwise be awarded on an individual basis. In this regard the Court took into account that the primary aim of proceedings at the national level had been to set aside an administrative decision rather than obtain the payment of compensation.<sup>301</sup>

The Council of Europe Convention against Trafficking has now entered into force which includes a right for a victim of trafficking to compensation from the perpetrators as well as the establishment of a compensation fund.<sup>302</sup>

The Directive on Compensation of Crime Victims<sup>303</sup> establishes a system of cooperation to facilitate access to compensation for victims of intentional violent crimes in cross-border situations, to operate on the basis of Member States' existing schemes. This builds upon the 1983 European Convention on the Compensation of Victims of Violent Crimes,<sup>304</sup> which is yet to be ratified by 10 EU Member States. This Convention requires compensation to include, at a minimum, loss of earnings, medical and hospitalisation expenses and funeral expenses, and, as regards dependants, loss of maintenance. This should serve as guidance to Member States implementing the Directive which requires a scheme to ensure 'fair and appropriate compensation to victims'. A number of Member States have taken the opportunity to go beyond the minimum requirements, such as **Poland**, which extends the scheme to victims of both intentional and non-intentional crimes.<sup>305</sup>

### 2.2.4. The rights of the child, including the protection of children

One of the key concerns in this area is the situation of children who are victims of trafficking. Problems surrounding this issue will not be dealt with here since the FRA's study on child trafficking is summarised in this report.<sup>306</sup> (see section 5.2)

The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse is currently open for ratification.<sup>307</sup> This treaty takes into account EU legislation including the Council Decision on

301 *Arvanitaki-Roboti and Others v. Greece*, Application No. 27278/03, 15 February 2008.

302 Council of Europe Convention on Action against Trafficking in Human Beings. CETS No. 197.

303 OJ 2004 L 261, p. 15. Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

304 CETS No.116.

305 <http://www.ms.gov.pl/projekty/projekty.php#content>

306 The issue has attracted considerable attention from NGOs. See e.g. report of coordinated ECPAT Austria: <http://www.ecpat.at> (09.10.2008).

307 CETS No. 201. No ratifications.

combating the sexual exploitation of children and child pornography of 2003.<sup>308</sup> One of the most debated provisions includes an obligation to ensure those whose work involves regular contact with children are screened to verify the absence of existing convictions for sexual exploitation or abuse of children.

The EU Council of Ministers Justice and Home Affairs Council of 27 and 28 November 2008 adopted the Conclusions on “Child Alert” on the basis of the guide on good practices developed by the Commission. The Conclusions of the Council invite all Member States to establish and develop national mechanisms to alert the public in criminal cases of abduction of children, to define modalities for the implementation of a cross-border system, and to use as basis for the establishment and development of these systems the best practices established by the European Commission.

Significant progress has been achieved in respect to the establishment of the European Financial Coalition. This organisation will have an objective of addressing the commercial sexual exploitation and abuse of children online by implementing a monitoring system with the support of parties involved in internet payment systems and hampering the merchant side of this growing business, and assisting internet service providers and internet payment systems providers to combat the abuse of their systems for the purchase of child exploitation or abuse images and hampering the consumer side of the problem.

The new Safer Internet Programme covering the period 2009-2013 was proposed by the European Commission on 28 February 2008 and was adopted on 9 December 2008 to protect children in the ever-more sophisticated online world, and empower them to safely use web services such as social networking, blogging and instant messaging.

A current issue of concern is the conditions of detention for children while awaiting decisions on asylum applications or removal. The Directive on Common Standards and Procedures for third country nationals,<sup>309</sup> in line with existing Council of Europe guidelines,<sup>310</sup> provides for detention of minors only as a last resort and for as short a time period as possible, with the best interests of the child as the primary consideration. Families shall be guaranteed adequate privacy and separate accommodation and minors should have access to leisure and educational facilities. Authorities should endeavour to provide personnel and facilities to meet the needs of unaccompanied minors.

308 Council Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography OJ L 13, 20.01.2004, 44. See COM(2007) 716 final, 16.11.2007 for a recent overview of national implementing measures.

309 Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 243, 24.12.08, p. 101.

310 Committee of Ministers, Twenty Guidelines on Forced Return, 26 May 2005. CM(2005)40 final and Addendum final and CM/Del/Dec(2005)924/10.1.

Member States may benefit from clarification of the requirements to be met for conditions for children to be considered 'adequate'. Guidance can be sought from Council of Europe and UN bodies, such as the Committee on the Elimination of Racial Discrimination, particularly where the latter have had occasion to address a Member State in the context of monitoring existing international commitments.<sup>311</sup>

### 2.2.5. Asylum, immigration and integration of migrants

As stated in the previous section, the Convention against Trafficking has now entered into force. However, national implementation measures are required to give it full effect. The treaty has 23 state parties; 25 Member States have signed, but only 14 Member States have gone on to ratify it.

Much debate on immigration in the EU has centred around the adoption of the Directive on Common Standards and Procedures (see above). Consistently with Council of Europe guidelines (noted above), the Directive provides that on issuance of a decision to return, the individual may leave voluntarily before being expelled. If the removal order is issued by a judicial authority the individual may be placed in custody to avoid flight.

The greatest contention revolved around the conditions under which detention pending removal is justified. According to the Directive, a third-country national subject to return procedures may only be detained where there is a risk of absconding or the individual avoids or hampers the preparation of return or the removal process. Detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence. Detention ordered by administrative authorities shall be subject to prompt judicial review and immediate release ordered where detention is found to be unlawful and there is no reasonable prospect of removal. Detention shall be reviewed at reasonable intervals of time either on application by the third-country national concerned or ex officio. In the case of prolonged detention periods, reviews shall be subject to the supervision of a judicial authority. The maximum period of detention of 6 months may only be extended to 12 months where delay is due to a lack of co-operation by the individual, or due to delays in obtaining necessary documentation from third countries.

The Directive imposes common safeguards, but the EU Member States may provide for a higher degree of protection of the rights of illegally staying migrants in their domestic legislation. The **UK** and **Ireland** have not opted to join the Directive. This is regrettable, since the United Kingdom has in fact one of the most restrictive regimes as regards the matters covered by the Directive.

<sup>311</sup> Concluding Observations on Germany of the CERD, UN Doc. CERD/C/DEU/CO/18.

In implementing the Directive, Member States must take account of the case-law of the European Court of Human Rights. The Court recently confirmed its case-law in underlining the right of an individual to challenge a decision to deport him/her where this interferes with their human rights. The invocation of national security by the State should not prevent an individual from challenging the decision in adversarial proceedings before an independent body or court, which should verify that the State's claim is not arbitrary.<sup>312</sup> This is pertinent to situations such as in **Denmark** where two Tunisians and a Dane of Moroccan origin were expelled after being declared a threat to security by the intelligence services. This was based on suspicion of their involvement in a plot to kill a cartoonist who contributed to the publication in 2005 of 12 cartoons related to the prophet Muhammad. Public debate of the affair centred around the fact that such a decision is confidential which prevented independent verification of the evidence. The government has since been involved in consultation over reforms to ensure that concerns of national security are met, while fully respecting its international obligations.

The regulation of employers engaging third country nationals staying illegally in the territory of a Member State continues to be debated at EU level in the context of a proposal for a directive.<sup>313</sup> While a 2002 Framework Decision criminalises trafficking for labour or sexual exploitation the current proposal has further reach.<sup>314</sup> The current proposal attempts to reduce one of the "pull factors" of illegal migration, covering the situation where there is no coercion or deceit. A particularly contentious issue, raised by the opinion of the European Economic and Social Committee, is whether a main contractor should always be held (jointly) liable for illegal employment by subcontractors, even where this has taken place without the knowledge of the former.<sup>315</sup>

In the case of *Saadi v. Italy* the European Court of Human Rights reinforced the absolute nature of the prohibition of deportation where there is a 'substantial risk' of torture or ill-treatment being committed (under Article 3 of the Convention), refusing to weigh the risk of ill-treatment against his dangerousness to the community if not sent back.<sup>316</sup> In contrast in *N. v. UK* the Court found no violation of Article 3 in the expulsion of an Ugandan national to her country of origin, even though the condition of the applicant, suffering from AIDS, would rapidly deteriorate causing discomfort, pain and death within a few years if she were to be deprived of her present medication, which might not be available in Uganda.<sup>317</sup>

312 See previously, *Al-Nashif v. Bulgaria*, Application No. 50963/99 20 June 2002.

313 Proposal for a Directive providing for sanctions against employers of illegally staying third-country nationals, COM(2007) 249 final, 16.5.2007.

314 Council Framework Decision 2002/629/JHA, OJ L 203, 1.8.2002, p. 1. See also Council Recommendation of 22 December 1995 on harmonising means of combating illegal immigration and illegal employment, OJ C 5, 10.1.1996, p. 1; and Council Recommendation of 27 September 1996 on combating the illegal employment of third-country nationals, OJ C 304, 14.10.1996, p. 1.

315 OJ C 204, 09.08.2008, p. 70.

316 Application No. 37201/06, 28 February 2008.

317 Application No. 26565/05, 27 May 2008.

In *European Parliament v the Council*<sup>318</sup> the ECJ annulled elements of the Refugee Status Directive.<sup>319</sup> While the provisions at issue permitted the Council to establish ‘safe country’ lists through the consultation procedure, the ECJ felt that the co-decision procedure (giving Parliament equal input with the Council) was required.

## 2.2.6. Free Movement

The Free Movement Directive permits Union citizens and their family members the right of free movement to and temporary residence in other Member States.<sup>320</sup> In this regard the *Metock* case should be noted. The European Court of Justice recently found **Irish** law to be incompatible where it required that non EEA family members of an EU citizen who applied for a residence card were required to provide evidence showing that they had prior lawful residence in another EU Member State.<sup>321</sup> The Irish government has since revoked the requirement and is reviewing applications refused on this basis.

## 2.2.7. Visa and border control

In the international law area, a 2008 report of the Council of Europe expresses its concern regarding the treatment of migrants at sea (“boat people”) both in relation to non-compliance by Member States with search and rescue obligations, leading to increased risk of loss of life, and poor conditions of detention.<sup>322</sup>

Two Commission communications<sup>323</sup> proposing new tools to improve external border controls have received criticism from the European Data Protection Supervisor<sup>324</sup> for their heavy reliance on biometrical data and databanks to ensure better management of migration into the EU.

During the reference period, the Commission submitted its political evaluation of FRONTEX, the Agency responsible for facilitating the management of the external borders of the EU.<sup>325</sup> Within this, one recommendation is that

318 Case C-133/06, 6 May 2008..

319 Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. OJ L 326, 13.12.2005, p. 13.

320 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. OJ L 158, 30.4.2004, p. 77.

321 Case C-127/08 *Metock and Others v. Minister for Justice, Equality and Law Reform*, of 25 July 2008... Statutory Instrument No. 656 of 2006 European Communities (Free Movement of Persons) (No. 2) Regulations 2006, available at <http://www.inis.gov.ie/en/INIS/SI656of2006.pdf/Files/SI656of2006.pdf>, accessed 08/10/08.

322 Committee on Migration, Refugees and Population of the Parliamentary Assembly. Doc. 11688, 11 July 2008.

323 COM(2008) 68 final (noted above); and Preparing the next steps in border management in the European Union, COM(2008) 69 final 13 February 2008.

324 See:[http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2008/EDPS-2008-01-FR\\_Border%20package.pdf](http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/PressNews/Press/2008/EDPS-2008-01-FR_Border%20package.pdf)

325 Commission Communication Report on the evaluation and future development of the FRONTEX Agency, COM(2008) 67 final, 13 February 2008.



FRONTEX should introduce training on fundamental rights and asylum issues. The FRA is planning a joint training programme with FRONTEX, and a project on Schengen Border Control is also planned. It is therefore likely that Visa and Border control issues will figure more prominently in the FRA's next Annual Report.

### 2.2.8. Information society and, in particular, respect for private life and protection of personal data

The European Court of Human Rights delivered two unfavourable judgments finding **Bulgarian** law in violation of Article 8 of the European Convention on Human Rights. Failure to provide any independent review of the implementation of secret surveillance or guarantees to ensure the rule of law meant that such interference in private life could not be justified.<sup>326</sup>

The existence of an obligation of disclosure on communications service providers will contribute to the protection of victims of abuse via in the internet. In this regard the case of *K.U. v. Finland*, should be noted.<sup>327</sup> In this case, data protection rules prevented a service provider from revealing the identity of an individual who had posted an advert of a sexual nature involving a minor on a dating website. The European Court of Human Rights considered that Finland had failed to discharge its duty under Article 8 ECHR to protect the right to respect for private life, under which children were entitled to protection from grave forms of interference.<sup>328</sup>

The European Court of Justice (ECJ) rendered a preliminary ruling on the relationship between the protection of personal tax data and the freedom of the press. According to the court, if personal data is contained in documents in the public domain and is processed with the sole object of disclosing information, opinions or ideas to the public, such processing is to be considered “solely for journalistic purposes”.<sup>329</sup>

Concerning a centralised register which contains personal data relating to foreign nationals who are resident in Germany, the European Court of Justice concluded that such a system for processing personal data complies with Community law if it contains only the data which are necessary for the application of the legislation related to the right of residence. Its centralised nature would be justified if it enables that this legislation would be more effectively applied as regards the right of residence of Union citizens who are not nationals of that State. Furthermore the Court holds that the use of data contained in this register for the purposes of fighting crime is contrary to the principle of non-discrimination and hence contrary to Community

326 *AEIHR and Ekimdzhiev v. Bulgaria* Application No. 62540/00, 28 June 2007; *Kirov v. Bulgaria* Application No 5182/02, 22 May 2008.

327 *KU v. Finland*, Application No 2872/02, 2 December 2008.

328 Eur. Ct. HR (4<sup>th</sup> sect.), *K.U. v. Finland* (Appl. No 2872/02), 2 December 2008.

329 the *Satamedia* case (ECJ), 16.12.2008, Case C-73/07

law, since it does not contain personal data relating to German nationals.<sup>330</sup>

In the ‘Marper case’ v. the United Kingdom, the European Court of Human Rights found that the blanket and indiscriminate power of retention of fingerprints, cellular samples and DNA profiles by the police of persons suspected but not convicted of offences, failed to strike a fair balance between the competing public and private interests and constituted a disproportionate interference within the applicants’ right to respect for private life.<sup>331</sup>

The case of “Liberty and Other Organisations v. the United Kingdom” the European Court of Human Rights hold that the interception of their telephone, facsimile and data communications by an electronic test facility operated by the British Ministry of Defence had been in violation of the right to respect for private and family life and correspondence.<sup>332</sup>

### 2.2.9. Access to efficient and independent justice

An urgent preliminary ruling procedure before the ECJ relating to the area of freedom, security and justice has now come into force.<sup>333</sup>

A Council of Europe comparative report on the funding and organisation of States’ parties legal systems should be noted.<sup>334</sup>

The ECJ’s remarkable judgment in the *Kadi* case has momentous implications for the relationship between Community Law and general international law, as well as representing a more general safeguard of the right of access to justice. In particular the ECJ found that international agreements, even of the nature of the UN Charter, could not prejudice constitutional principles of the EC, including the obligation to respect fundamental rights. The contested Council Regulation 881/2002 of 27 May 2002 implementing a freezing order of the UN Sanctions Committee was annulled for failure to adopt guarantee of effective judicial protection of rights.<sup>335</sup>

330 the Huber case (ECJ, 16.12.2008, Case C-524/06).

331 the Marper case (ECHR, 4.12.2008, Application No 30562 and 30566/04)

332 the Liberty case (ECHR, 1.7.2008, Application No 58243/00)

333 OJ L 24, 29.1.2008, p. 39).

334 Commission for the Efficiency of Justice, *European Judicial Systems*, Council of Europe, 2008, Belgium.

335 Case-402/05 P *Kadi v Council and Commission* 3 September 2008. See also Cases T-229/02, 3 April 2003, *PKK v Council* and T-253/04, 3 April 2008, *Kongra-Gel v Council*

# PART II: FUNDAMENTAL RIGHTS ISSUES COVERED BY AGENCY ACTIVITIES IN 2008

This section of the Annual Report sets out the work that the FRA has carried out during 2008 in terms of research projects, incident reports and opinions. This covers projects that began in 2008, as well as projects that continue from previous years. Some of these activities were not set out in the FRA's Work Programme 2008, but stem from specific requests for data, research or opinions from the European Parliament or from the European Commission.

### 3. Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States

The European Union's legislation to fight discrimination, adopted in 2000, employed two main legal instruments: the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC). These differ in two important aspects:

- First, discrimination on grounds of race and ethnic origin is prohibited in a wider number of fields (including education, housing, goods and services, social protection etc.) than discrimination on other grounds like sexual orientation (concerning all lesbian, gay and bisexual people), religion, disability and age (which enjoy mandatory protection from discrimination only in the field of employment).
- Second, only the Racial Equality Directive provides for a mandatory equality body in each Member State to engage in the fight against ethnic discrimination, whereas such a body is not mandatory for all the other discrimination grounds.

Thus, the legislation adopted by the EU seemingly established a hierarchy of discrimination grounds, which did not seem to correspond to the general principle of non-discrimination heralded in the Charter of Fundamental Rights of the European Union. This perceived hierarchy of discrimination grounds has been criticised since the adoption of these two instruments.

This was the background context for the research activity of the EU Agency for Fundamental Rights on homophobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States. However, more specifically, in 2007 a series of events in EU Member States, such as the banning of Gay Pride marches, hate speech from politicians and a number of intolerant pronouncements from senior religious leaders sent alarm signals, and sparked a new debate about the extent of homophobia, transphobia and discrimination based on sexual orientation in Europe.

The European Parliament in June 2007 therefore asked the FRA to gather broad legal and social data on incidents and manifestations of homophobia and related issues across all 27 Member States. The first part of the project was the legal analysis, published in June 2008. The second report, the analysis of the social situation, was published in early 2009 and is complementary to the legal analysis.

The two reports are meant to establish the knowledge base on which to offer recommendations to tackle the problems identified, particularly on the level of EU anti-discrimination legislation.

### 3.1. Part I – Legal Analysis

The work for the report “Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part I – Legal Analysis” was carried out in the first half of 2008. The analysis draws on 27 national contributions by country-based legal experts, conforming to guidelines drawn up by the FRA.<sup>336</sup> The full report<sup>337</sup> can be found on the FRA’s website. Just a few examples of the findings are provided below.

The report looks at the current legal situation in the EU Member States, identifying national differences in the strength of protection against discrimination for LGBT people. For example, although the Racial Equality Directive provides wide protection only on grounds of ‘race’ and ethnicity, a significant number of countries have decided that all groups liable to discrimination should enjoy similar levels of legal protection. In total, there are 18 Member States where the protection of LGBT people from discrimination goes beyond work and employment and where they benefit from some or all of the same rights as members of ethnic minorities in other fields such as social protection, social advantages, education, or access to and supply of goods and services available to the public.

Similarly, although EU law only requires governments to set up an equality body to guarantee protection on grounds of race or ethnicity, there is a general move in the direction of a single equality body able to deal with all forms of discrimination. Eighteen Member States have already set up bodies with such a broad mandate

This means that nine Member States offer legal protection from discrimination on the ground of sexual orientation only in the field of work and employment, and nine Member States currently have no equality body competent in the area of sexual orientation discrimination.

Among other issues examined are those related to the Free Movement Directive (2004/38/EC) which defines the conditions under which EU citizens and their family members may move and reside freely within the territory of the Member States. Three Member States (Belgium, the Netherlands and Spain) allow same sex marriage with the same rights as different sex marriage, which in theory should allow them unconditional right of entry and residence into another Member State. Yet at least 11 Member States do not seem to recognise same-sex marriages

336 All national contributions are available on the FRA website: <http://fra.europa.eu>.

337 European Union Agency for Fundamental Rights *Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States: Part I – Legal Analysis*, FRA 2008

concluded abroad, and might refuse to consider same-sex married partners as 'spouses', for the purposes of freedom of movement. The report notes that the Free Movement Directive (as well as the Family Reunification Directive 2003/86/EC and the Qualification Directive 2004/83/EC) needs to be interpreted in the light of fundamental rights principles in the context of LGBT issues, and that it would be useful to provide further clarification in this respect to ensure legal certainty and equal treatment.

There are varying approaches between Member States in their approach to hate crime and hate speech. In 10 Member States homophobia and/or transphobia may be seen as aggravating factors in criminal behaviour, making common offences more serious. Twelve Member States have laws making it a criminal offence to incite hatred, violence or discrimination on grounds of sexual orientation. In others, hate speech against LGBT people is not specifically defined as a criminal offence, but general wording could cover them. Yet four countries – Austria, Bulgaria, Italy and Malta – explicitly restrict criminal sanctions against hate speech to other groups, not including LGBT people.

Transgender people suffer from discrimination, and need protection. However, the report identified a wide variety of approaches to the treatment of transgender people, so that their treatment under EU anti-discrimination law is not clear. In 13 Member States it is treated as a form of sex discrimination, in two it is treated as sexual orientation discrimination, and in one case (Hungary) a special ground of discrimination, 'gender identity' is created to cover transgender people. In the remaining 11 Member States there is a situation of legal uncertainty, meaning that there is a lower level of protection for transgender people.

Based on the findings of the report, the FRA has provided a number of opinions. For example, the FRA is of the opinion that the principle of non-discrimination demands that rights and advantages reserved for married couples in EU law should be made available in some way for same-sex couples, either via same sex marriage or equivalent registered partnership or in some other manner.

The FRA is also of the opinion that the EU could envisage approximation of criminal law combating homophobia (homophobic hate speech, homophobic hate crime) in the Member States following the model of the Framework Decision on racism and xenophobia adopted in 2008. The analysis by the FRA of the legislation of Member States in this respect demonstrated a wide variety of approaches and the total absence of relevant legislation in some Member States.

Finally, the FRA is of the opinion that the EU should clarify that discrimination of transgender people constitutes discrimination on the ground of gender following the relevant case law of the European Court of Justice.

This report constituted the first report of the FRA on homophobia and discrimination on the grounds of sexual orientation.

## 3.2. Part II – The Social Situation

For Part II of the project, the FRA commissioned a comparative report<sup>338</sup> on the social situation concerning homophobia and discrimination on grounds of sexual orientation in the EU.<sup>339</sup> The report brings together data based on 27 sociological national reports, field trips encompassing meetings with LGBT NGOs, National Equality Bodies and Public Authorities in all 27 EU Member States, and drawing on the results of an electronic questionnaire sent out to stakeholders. This new data was combined with information and opinions from the Council of Europe,<sup>340</sup> selected material from existing academic studies, and Eurobarometer surveys.

The report describes the central social aspects of the situation regarding rights and protection against discrimination and whether and in what ways LGBT persons experience homophobia, transphobia and discrimination, and how it affects their lives. The report has a thematic structure covering the following areas:

- Attitudes towards LGBT Persons
- Criminal Law: Hate Crime and Hate Speech
- Freedom of Assembly
- The labour market
- Education
- Health
- Religious figures and institutions
- Sports
- Media
- Immigration and asylum
- Multiple discrimination

<sup>338</sup> European Union Agency for Fundamental Rights *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II – the Social Situation*, FRA 2009

<sup>339</sup> The work was carried out by *The Danish Institute for Human Rights*, the Danish National Equality Body, and the international consultancy firm COWI.

<sup>340</sup> The Council of Europe Commissioner for Human Rights, Thomas Hammarberg was also interviewed for the project.

Transphobia and discrimination on grounds of gender identity and gender expression are mainstreamed throughout the report and specific issues are discussed in a separate chapter.

### 3.2.1. The overall findings of the report

The report shows that LGBT persons in all Member States experience discrimination, bullying and harassment. This often takes the form of demeaning statements, name calling and insults or the use of abusive language. The occurrence of verbal and physical attacks against LGBT persons has been detected in all the Member States.

Discrimination, homophobia and transphobia are found to affect the lives and choices of LGBT persons in all areas of society. From the earliest years, derogative words for gays and lesbians are used at schools. At the workplace, harassment can be an everyday occurrence. Relationships often lack the ability to secure one another as full legal partners. At retirement homes, awareness of LGBT persons' needs can be nonexistent.

Fear of discrimination, homophobia and transphobia contributes to the present 'invisibility' of LGBT persons in many parts of Europe and in many social settings. LGBT persons often adopt a strategy of invisibility because of the perceived risks of being exposed to discrimination. This contributes to the comparatively low number of cases of discrimination on grounds of sexual orientation, gender identity or gender expression reported across the EU compared to discrimination cases on other grounds, such as 'race', ethnicity or gender.

Other problems regarding rights have been detected in relation to freedom of assembly in several Member States, where this right has been obstructed by public authorities or by attacks by counter-demonstrators. Incidents of both obstructions and counter-demonstrations have been seen in Bulgaria, Estonia, Latvia, Poland and Romania. Furthermore, in these, and six additional Member States (Bulgaria, Czech Republic, Cyprus, Hungary, Italy and Malta), calls for improving the rights of LGBT persons are met with negative statements from prominent politicians and representatives from religious institutions or groups.

Besides highlighting some common features on how LGBT persons experience discrimination in the areas of education and the labour market, the report shows a number of key areas with major differences between the EU Member States. For example, countries that have more recently joined the EU are overrepresented in surveys among the Member States with the most negative attitudes toward LGBT people. Perhaps not surprisingly, there is a correlation between the countries with the most negative attitudes towards LGBT people and the countries that do not grant LGBT persons access to marriage or legally-recognised partnership.



While many of the findings emphasise the differences between the Member States, it is also worth mentioning the differences within the Member States detected in this report. These differences entail tendencies in terms of: (1) those who are most homophobic (for example, older people more than young, men more than women, the less-educated more than the more-educated); (2) those who tend to be regarded most negatively (LGBT persons in public spaces, homosexuals caring for or teaching children and homosexuals as close relatives generate more hostile reactions than homosexuals as friends or doctors) and (3) those who are most subjected to hate crime and bullying (for example, young people more than older).

The report concludes with a number of opinions on how to combat homophobia and transphobia and provide protection against discrimination on grounds of sexual orientation and gender identity, including the need for more research, data collection and monitoring, the need for training and education initiatives, particularly regarding public sector staff and in schools, and the need for information campaigns to tackle negative and prejudiced attitudes towards LGBT persons.

## 4. Ethnic Discrimination and Victimisation

### 4.1. EU-MIDIS: European Union Minorities and Discrimination Survey

In each of its previous Annual Reports on the situation of racism and xenophobia in the Member States, the Agency has highlighted the fact that there is a severe lack of robust, comprehensive and comparable data in most countries on vulnerable minorities' experiences of discrimination and victimisation. This lack of data hampers the development of evidence-based policies that can tackle the problems of discrimination and victimisation.

In view of this situation, and given its mandate to provide European stakeholders with assistance and expertise in the field of fundamental rights, the Agency launched its own data collection exercise in 2008 - the European Union Minorities and Discrimination Survey (EU-MIDIS) - to meet the challenges of inadequate data.

#### 4.1.1. EU-MIDIS: background information

EU-MIDIS is the first EU-wide survey to interview selected immigrant and ethnic minority groups using the same translated questionnaire in all Member States; which means that the results are comparable between different minority groups and across countries. Before the launch of the full survey in 2008, the Agency conducted a pilot in six Member States to test different sampling approaches, the questionnaire, and mode of delivery. The lessons from this exercise informed the development of the full survey.

##### 4.1.1.1. Groups and locations surveyed

Groups were identified to take part in the survey on the basis of their immigrant or ethnic minority status, and their potential vulnerability to discrimination and victimisation. The Agency's RAXEN network clarified suitable groups for researching, with consideration being given to the size of each group to allow for the application of a random sampling approach. In other words, vulnerable groups that were sparsely and widely dispersed in the population could not be selected for interviewing using random sampling.

Between one and three groups were selected in each country for surveying, with a minimum of 500 respondents per group. Looking at results for 'aggregate' respondent groups - for example, for all Roma or all those with a North African background who were surveyed - allows the research to report on the situation for a larger respondent group across several Member States.

In total - 23,565 people with an immigrant/ethnic minority background were interviewed for EU-MIDIS. A further 5,000 people from the majority population were interviewed in order to compare selected responses between minority and majority population respondents living in the same areas.

Given that immigrants and ethnic minorities are primarily concentrated in urban centres in Europe, the research focused on capitals and those cities where selected minority groups live. For those minority groups that are not concentrated in urban centres, the research adopted a broader sampling approach to include rural areas.

The detailed results from EU-MIDIS contextualise the findings with respect to the location of the research, and the technical report clarifies how locations within cities were selected for sampling purposes.

#### 4.1.1.2. Questionnaire and mode of delivery

Questionnaire interviews were conducted face-to-face in people's homes, with each interview lasting between 20 and 50 minutes depending on the number of incidents of discrimination and victimisation experienced by respondents in the last twelve months. The questionnaire asked respondents a series of questions under the following themes:

##### **EU-MIDIS questionnaire themes:**

- general experiences of discrimination, including multiple discrimination;
- awareness of rights in the field of non-discrimination;
- experiences of discrimination, firstly in the last 5 years and secondly in the last 12 months, based on immigrant/ethnic background with respect to nine areas under the themes of: employment; education; housing; health care and social services; consumer services;
- experiences of criminal victimisation, in the last 5 years and in the last 12 months, including whether this was perceived to be ethnically/racially motivated, with respect to: property crime; assaults and threats; harassment; and corruption.
- contact with law enforcement, and the nature and outcome of this contact.
- contact with customs and border control.

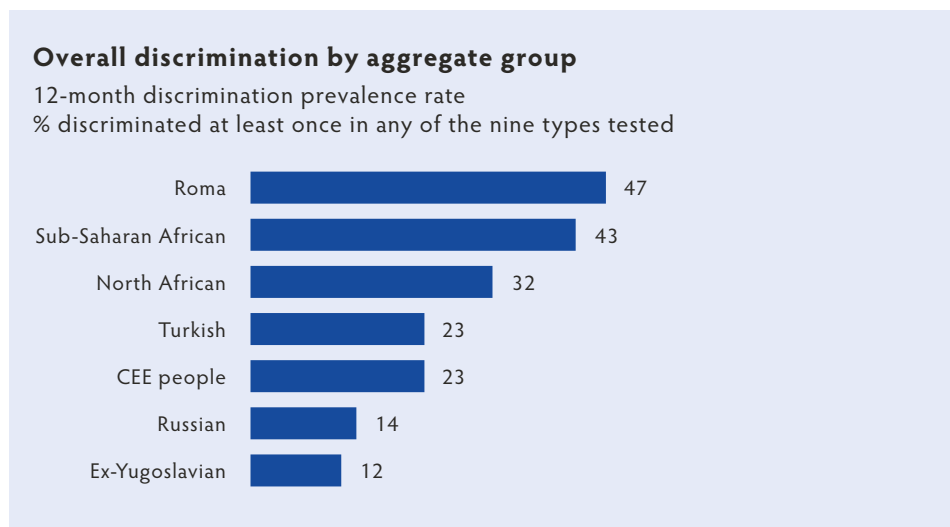
Respondents' characteristics were collected in order to compare results according to a range of variables such as gender, age, level of education, occupation, religion, length of residence in the country, and so on. All responses were made anonymous for statistical purposes, and respondents (rather than interviewers) self-identified their immigrant/ethnic background.

### 4.1.2. Some examples

In order to manage the volume and range of results from EU-MIDIS, the findings are being released initially as a series of short ‘Data in Focus’ reports. The Agency intends to publish the full results report at the end of 2009, which will be followed in due course with the release of the survey’s dataset.

Figures 4.1, 4.2 and 4.3 offer selected examples of findings based on ‘aggregate groups’; that is, based on an average for a particular group - such as the ‘Roma’ or those with a ‘Turkish’ immigrant background - that was surveyed in more than one Member State. When looking at these selected results from EU-MIDIS it should be remembered that the figures do not represent an EU-average, as all groups were not surveyed in all Member States; therefore the figures reported here only represent results for those Member States where particular groups were interviewed. The on-line technical report from the survey indicates which groups were interviewed in which Member States; see: <http://fra.europa.eu/eu-midis>

**Figure 4.1: Example 1– Overall discrimination by aggregate group**

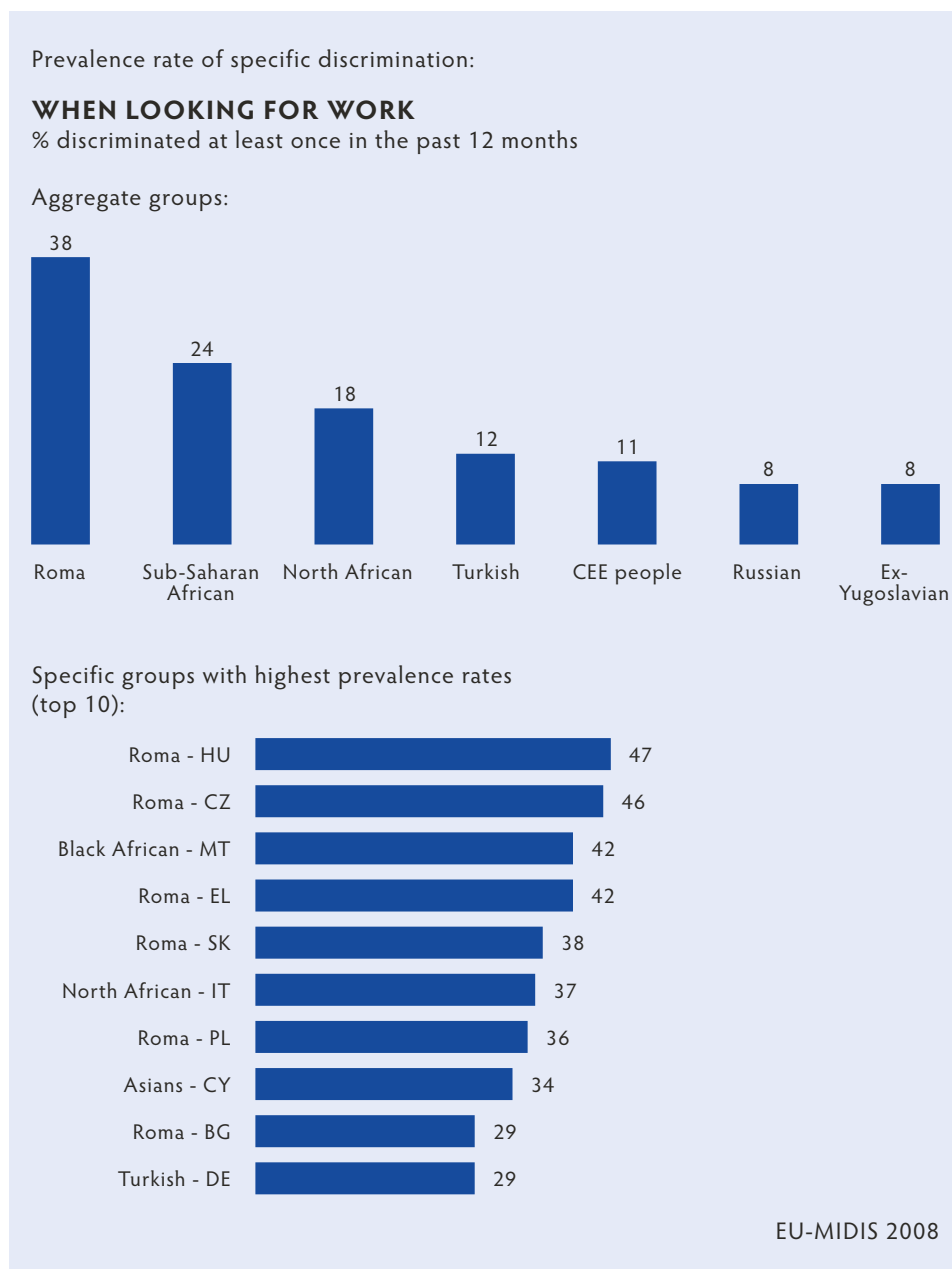


The survey asked a series of questions about discrimination *on the basis of a respondent’s immigrant and/or ethnic minority background* with respect to nine different areas of life. Figure 4.1 indicates the percentage who indicated they were discriminated against at least once in the last 12 months in any one of the nine areas that were tested – employment, housing, social services etc. The percentage is calculated as an average for each aggregate group surveyed; for example, in the case of the Roma, as an average for all Roma respondents in the seven Member States where they were surveyed. A EU-MIDIS ‘Data in Focus’ report on the Roma provides more detailed results and a comparison of findings between the Member States.<sup>341</sup>

<sup>341</sup> Published in April 2009

As the figure shows, reported rates of discrimination on the basis of respondents' immigrant or ethnic minority background are particularly high among the Roma and those with a Sub-Saharan<sup>342</sup> background. Among those with a North African background it is also pointedly high.

**Figure 4.2: Example 2 – Discrimination when looking for work**



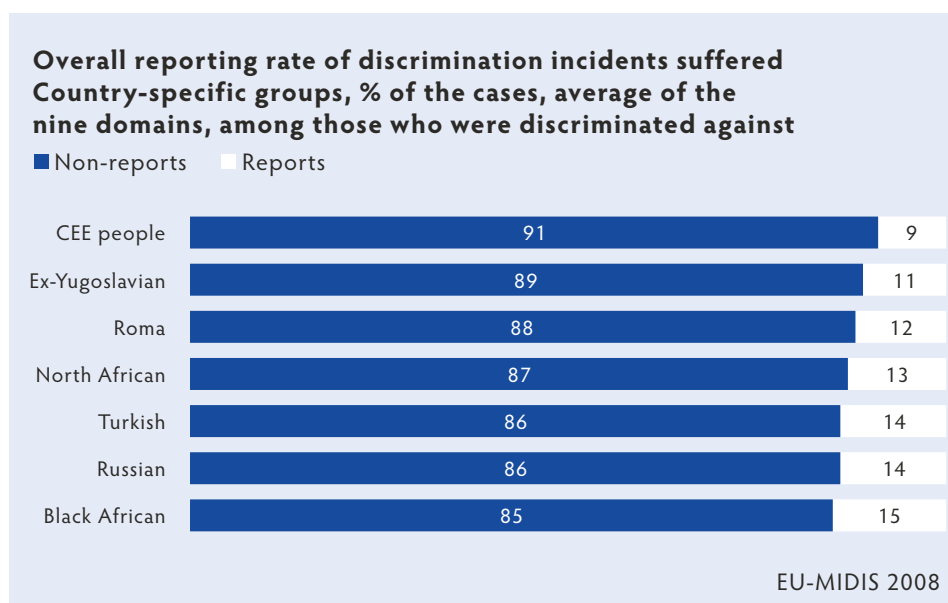
<sup>342</sup> This category includes 'Black Caribbean'.

The first question people were asked with respect to the nine areas is whether they considered they were discriminated against in the last 12 months when looking for paid work.

Figure 4.2 shows (i) averages of responses to the question for aggregate respondent groups, and (ii) a list of the ‘top ten’ groups by Member States who reported the highest rates of discrimination when looking for work amongst all the groups surveyed in different Member States.

As indicated in the figure, an average of 38 per cent of Roma experienced discrimination when looking for paid work, followed by 24 percent of those with a Sub-Saharan African background and 18 per cent of those with a North African background. When we look at the experiences of different groups within Member States it is notable that six of the ‘top ten’ groups with the highest levels of discrimination when looking for work are Roma.

**Figure 4.3 Example 3 – Non-reporting of discrimination**



The survey also asked people whether they had reported any incident of discrimination they had experienced in the last 12 months, either at an office where complaints could be made or at the place where the discrimination occurred.

Figure 4.3 shows non-reporting and reporting averages in the last 12 months for aggregate respondent groups.

As indicated, according to the average response rate for aggregate respondent groups, between 85 and 91 per cent of respondents, did not report their discrimination. If we look at the breakdown of responses for each group surveyed

in each Member State, rather than at the aggregate average shown above, the rate of non-reporting ranges from 68 per cent through to 100 per cent depending on the group surveyed and the country in question.

When we go on to look at the reasons for non-reporting, the main response given for all groups surveyed – 57 per cent – was ‘nothing would happen’. In this regard there appears to be a real sense of ‘hopelessness’ about the outcome of reporting discrimination. This evidence, together with other findings from the survey, would appear to indicate that much needs to be done to encourage reporting by vulnerable minorities.

### 4.1.3. Contextualising the survey's results

The results from EU-MIDIS need to be contextualised with respect to the past and present circumstances of the different groups surveyed in each Member State, as well as their experiences of, and State responses to discrimination, conflict and integration. At the same time, the mainstay of results will focus on comparisons of responses within aggregate groups; that is, between groups from the same broad ‘backgrounds’ that were surveyed in different Member States. The Agency’s other work, particular its in-depth qualitative research, will serve to complement the survey’s findings and contextualise the results. In this way EU-MIDIS will offer a set of indicators for the groups surveyed that can be built on and further understood in the light of other research undertaken by the Agency.

## 4.2. Racism and Social Marginalisation

### 4.2.1. Background to the research

European, regional and local policy makers are increasingly turning their attention to problems of integration, racism, social marginalisation and the potential for social conflict with regard to the Union’s immigrant and ethnic minority populations.

Particular attention has been paid in recent years to the impact of social marginalisation on Europe’s growing Muslim population, and the potential consequences of this with respect to potential problems between Muslim and non-Muslim groups living in European cities.

With these concerns in mind, and to find out more about the attitudes and activities of young people from diverse backgrounds, the Agency undertook **quantitative survey research** in 2008 with two aims:

- To explore the experiences of and attitudes towards racism, discrimination and social marginalisation amongst young people aged 12 to 18 from Muslim and non-Muslim backgrounds in three EU Member States.

- To explore the links between the above attitudes and experiences of Muslim and non-Muslim youth and their attitudes towards, or activities in support of anti-social behaviour, violence and crime.

The project draws on a number of the Agency's thematic areas for research in the period 2007 to 2011 – including racism, xenophobia and related intolerance; discrimination based on 'race' or ethnic origin, religion of belief; the rights of the child, including the protection of children, and the integration of migrants.

The results of the project should assist policy makers with respect to knowledge about young people's attitudes and experiences in consideration of racism and social marginalisation, and will alert them to particular themes that need attention if problem areas are to be effectively identified and combated.

#### 4.2.2. Surveying young people

Research was carried out in three Member States – France, Spain and the UK – during 2008. In total, 3,000 young people were surveyed, one thousand in each Member State. The following themes were addressed in the questionnaire:

- age, sex, nationality, languages spoken; having someone to confide in; description of neighbourhood and time spent hanging around, family structure; parental nationality; parental working status; quality time spent with parents; parental conflict.
- nature and strength of cultural identity; experience of discrimination; perception of cultural integration.
- number, sex and cultural background of friends; parental approval of friends; membership of a 'gang' and its activities; experience of adult discrimination.
- experiences of bullying and violence and whether these are discriminatory.
- instances of involvement in bullying and violence to others that may be discriminatory.
- religious beliefs
- attitudes and opinions: general satisfaction with life; perceptions of alienation; priorities in life; justification of violence; degree of trust in individuals and institutions.
- concern about the state of the world and social issues; whether war or terrorism is justified; interest in local politics; civic involvement and commitment.
- time: time spent on the internet; nature of internet sites visited; key influences in life; amount and nature of quality time spent with friends.



- attitudes to school; perceptions of achievement; school meal entitlement (proxy for individual deprivation); experience of exclusion; experience of discrimination at school

All questionnaires were completed in schools in different locations in the three Member States, and each child's anonymity was assured in the research process.

### 4.2.3. Research results

The research presents the first initiative by the Agency to systematically incorporate the attitudes and experiences of young people in survey research.

The full results from the project will be made available in the second half of 2009, and will be presented in a variety of ways; for example:

- Comparison between each of the Member States with respect to different themes covered in the survey;
- Comparison between Muslim and non-Muslim youth with a view to identifying key similarities and differences in their experiences of everyday life;
- Comparison between youth on the basis of their age and gender.

The results will look for commonalities and differences in young people's attitudes and experiences, and will seek to draw conclusions for policy interventions that can more effectively address the forces of racism and/or social marginalisation, and the social consequences of this with respect to anti-social attitudes and behaviour, for both present and future generations in Europe.

The outcome of the project will alert policy makers to whether further research with young people is needed in other Member States on the same themes.

## 4.3. Addressing Discriminatory Ethnic Profiling: An EU Good Practices Handbook

### 4.3.1. Research background and aims

In 2008, the Agency undertook targeted research on the theme of discriminatory ethnic profiling practices by law enforcement, customs and border control.<sup>343</sup> In line with the Agency's mandate to identify 'good practices' in the field of non-discrimination and fundamental rights, the research has developed a Handbook documenting existing good practices in the EU that recognise and respond to the problem of discriminatory ethnic profiling and its negative consequences for individuals, communities and law enforcement agencies that work with populations that are subject to profiling. These issues are particularly pertinent in the light of on-going concerns about the impact of stringent law enforcement, border and customs activities that can have a disproportionate impact on certain communities. In this regard, the project is not looking at legitimate and proportionate profiling practices, but is focusing on discriminatory practices.

- The Handbook focuses on positive initiatives that serve to combat discriminatory ethnic profiling practices
- The Handbook presents the most comprehensive report to date identifying good practices to combat discriminatory profiling in the EU.

In addition to its focus on discrimination based on race or ethnic origin, the project cuts across a number of the Agency's thematic research areas – including: asylum, immigration and the integration of migrants; visa and border control; information society and, in particular, respect for private life and protection of personal data. To this end the Handbook is of relevance to a number of different stakeholders, and should assist policy makers and practitioners by identifying a range of existing good practices relevant to discriminatory ethnic profiling. In this regard lessons can be learned between Member States and agencies that share particular practices or face similar problems.

### 4.3.2. How was the research done?

A team of experienced researchers conducted a series of in-depth interviews with law enforcement, customs and border personnel in different EU Member States. These interviews sought to identify good and promising practices that recognise and address discriminatory profiling.

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<sup>343</sup> For the purposes of the research a 'working definition' of ethnic profiling was employed to encompass the use by the police and other law enforcement agents, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality, or national or ethnic origin, in control, surveillance or investigation activities.

The researchers identified different good practice examples with respect to key themes – as below – that need to be explored when looking to address discriminatory profiling.

### 4.3.3. What does the research address?

Under the umbrella of non-discriminatory profiling, the Handbook addresses a number of themes which encompass areas of law enforcement, customs and border control:

Themes addressed in the Handbook:

- Operational guidelines and other practical guidance addressing discriminatory ethnic profiling;
- The existence and practices of oversight bodies and complaints mechanisms to address discriminatory profiling;
- Exploring the role of ethnic monitoring and data gathering to identify and combat discriminatory law enforcement practices;
- Reducing disproportionate law enforcement practices that have a negative impact on over-policed communities;
- Enhancing training to improve the quality of encounters between law enforcement and minority communities;
- Changing institutional cultures to combat discriminatory practices, including profiling;
- Developing community and law enforcement outreach programmes.

#### 4.3.4. Good practices

The core content of the Handbook is a wide range of existing ‘good practice’ examples, which are examined alongside general principles of what ‘good practices’ should encompass.

The Handbook is written in the context of the need to develop a ‘holistic’ approach to addressing discriminatory ethnic profiling. This seeks to understand the various dimensions of the problem, and to develop both general and targeted responses as part of a ‘joined-up’ approach.

The full results from the project will be made available in the second half of 2009.

##### **EU-MIDIS: Findings on profiling**

The results of the Handbook should also be read alongside the findings of the Agency’s EU-MIDIS project (see section 4.1). As part of this first EU-wide questionnaire survey of selected immigrant and ethnic minority groups in all Member States, there are questions about their experiences of law enforcement and border stops, including the ‘quality’ of their encounters with law enforcement, and whether they consider they were profiled.

## 5. Rights of the Child

### 5.1. Indicators for Rights of the Child

The rights of the child are guaranteed by Article 24 of the EU Charter of Fundamental Rights:

- (1). Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
- (2). In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
- (3) Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

#### 5.1.1. Background

In 2007 the European Commission asked the FRA to develop indicators measuring how child rights are implemented, protected, respected and promoted across the EU. As the FRA is neither a standard setting nor a treaty monitoring body, these indicators are not intended to monitor compliance with international standards and conventions, but to guide the FRA's own data collection and research that will allow it to develop evidence based opinions supporting the Community's institutions and its Member States when they take measures or formulate actions.

#### 5.1.2. Developing child rights indicators: a “learning” process

The FRA approaches the development of child rights indicators as a long-term endeavour involving several interlinked projects that span throughout its multi-annual framework perspective, guided by constantly evolving legal and social developments. Work started<sup>344</sup> in December 2007 by mapping the extensive body of

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<sup>344</sup> The FRA commissioned for this through an international tender the Centre for the Study of the Child the Family and the Law of Liverpool University in collaboration with the Ludwig Boltzmann Institute of Human Rights.

indicators' research and literature conducted internationally,<sup>345</sup> at EU level,<sup>346</sup> and specifically in relation to child rights and well-being.<sup>347</sup> It was accompanied by an analysis of relevant legal, methodological, ideological and ethical issues. This was followed up by the key aspect of this project, an intensive structured consultation with a wide interdisciplinary network of experts, made up of an online discussion forum,<sup>348</sup> an online survey, a meeting of UN, NGO and EU representatives, and personal interviews with EU officials, staff of international organisations, NGOs, and experts.

The aim of the Agency's work in this respect is to design gradually a "toolkit" for the assessment of the impact of EU law and policy on children's status and experience on the ground, going beyond simple deficit orientation towards a more constructive tracking of progressive achievement in child rights. In developing the indicators the FRA follows a cautious and pragmatic approach respecting the current boundaries of EU competence and acknowledging the respective and discrete roles of the international, European and national authorities in addressing different aspects of children's rights.

### 5.1.3. An illustration of the work in two key starting areas

#### The family

The family is a central component of children's lives. The importance of family life is 'fleshed out' by various General Comments of the CRC and, additionally, Articles 2, 3 and 8 ECHR, as well as the 1996 European Convention on the Exercise of Children's Rights provide notable examples of the Council of Europe's endorsement of the family. Indeed, Article 8 has been the subject of substantial judicial scrutiny regarding the conceptualisation of the family beyond the traditional nuclear, heterosexual model.<sup>349</sup> EU regulation of family life is apparent in two main contexts: first cross-national divorce and parental responsibility and, secondly, parental employment.<sup>350</sup> Indicators regarding reconciliation of work and

<sup>345</sup> Including the Millennium Development Goals ('MDGs'), the International Labour Organisation, the UN Development Project, the UNICEF State of the World's Children Reports (which endorse the Multiple Indicator Clusters (MICS), and the OECD. Many of the goals and targets set by these indicator programmes, although framed in general, global terms, bear relevance to child-related issues (see, for example, MDG 2 (education) and MDG 4 (child health)).

<sup>346</sup> EU Social Protection Committee Indicators Subgroup, *Child Poverty and Well-Being in the EU - Current status and way forward* (January 2008); *Report on Indicators in the field of poverty and social exclusion* (October 2001)

<sup>347</sup> Ennew et al, 1996; Save the Children, 2004; UNICEF (including work carried out by the Innocenti Research Centre); Bradshaw, 2007; Ben-Arieh et al, 2001; Ben-Arieh 2008, Council of Europe, to name but a few

<sup>348</sup> Hosted by the Centre for the Study of the Child the Family and the Law of the University of Liverpool. More information available at <http://www.liv.ac.uk/law/cscf/EUChild/index.htm> (02.02.2009)

<sup>349</sup> The FRA's recent report 'Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part I – Legal Analysis' (30-06-2008) raised similar concerns.

<sup>350</sup> Developed also in the context of the EU Social Inclusion Strategy and the Laeken Indicators, primarily through the Open Method of Co-ordination.

family life have already been developed by the Council of Europe<sup>351</sup> and OECD.<sup>352</sup> Indicators cover three main domains, namely the impact of international divorce and parental separation on children, children separated from parents as a result of migration, and children and family reunification processes. The table below is an illustration for *child participation* indicators.

<b>Table 5.1: Cluster – International divorce and parental separation on children</b>			
<i>Child participation</i>			
<b>Structural Indicators</b>	<b>Process Indicators</b>	<b>Outcome Indicators</b>	<b>Data Sources<sup>353</sup></b>
<b>STR-FAM-1:</b> Legal obligation to consult with children in family law proceedings	<b>PRO-FAM-1:</b> Specific provisions for specialist child representation in family proceedings  <b>PRO-FAM-2:</b> Specific provisions for involvement of children in alternative forms of dispute resolution (mediation/conciliation processes)	<b>OUT-FAM-1:</b> Proportion of custody and access cases in which children were represented separately  <b>OUT-FAM-2:</b> Proportion of custody and access cases in which children were directly consulted  <b>OUT-FAM-3:</b> Proportion of child abduction cases in which children's objections are considered in determining return/non-return	<b>International level:</b> EUROSTAT and European Commission (DG JLS); The Hague Conference on Private International law (parental child abduction statistics) <sup>354</sup> ; European Judicial Network; UN Committee on the Rights of the Child State Reports and concluding observations; NGO "shadow reports".  <b>National level:</b> Statistical Offices; Ministries of Justice, Interior, Social Affairs, etc; Bar associations; Specialised agencies.

351 See the CoE Social Cohesion Indicators relating to children, accessible at: [http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/source/Indicators/Cdrom2/site/page\\_12342.html#](http://www.coe.int/t/dg3/socialpolicies/socialcohesiondev/source/Indicators/Cdrom2/site/page_12342.html#) (20.01.2009)

352 See the OECD indicators relating to families and children, accessible at: [http://www.oecd.org/department/0,3355,en\\_2649\\_34819\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/department/0,3355,en_2649_34819_1_1_1_1_1,00.html) (21.01.2009)

353 The examples of data sources here refer both to actual resources containing data and to authorities/organisations that may have collected additional data in reports and/or other documents or databases.

354 There are no disaggregated statistics available on "cross-border" divorces and cases of parental responsibility in the EU. The 2006 ECEC Impact assessment (Commission, 2006) is the most coherent attempt to provide such data. It is also difficult to obtain information from family law courts on cases brought under Brussels II, as these are often conducted as private proceedings and there is no consistent method for collecting and storing such data.

## Child protection

Child protection should address effectively situations of violence, neglect or exploitation of children. The indicators developed here draw from work already carried out,<sup>355</sup> but focus more on stronger child involvement in support interventions and policy development, and also a stronger accountability of Member States starting with identifying children at risk and those already affected by violence, abuse, sexual and economic exploitation and trafficking to providing the appropriate, child-centred services of care. The indicators cover three main domains, namely child trafficking, sexual and economic exploitation, and violence against children. Furthermore, as in the other areas of indicators certain cross-cutting dimensions are addressed through data disaggregation requirements like age, gender child participation and issues related to specific groups of children, for example children of Roma origin or separated migrant and asylum-seeking children.

Regarding development of child protection indicators the FRA will liaise closely with the Council of Europe (CoE) Group of Experts on action against trafficking and the CoE's programme to eliminate violence against children<sup>356</sup> based on its 2009-2011 strategy "Provision, Protection and Participation for Children in Europe" adopted by the Committee of Ministers on 27 November 2008, where the FRA is specifically mentioned under partnerships with key international stakeholders. The table below is an illustration for *child best interests and accountability* indicators.

<sup>355</sup> For example, *Measuring Responses to Trafficking in Human beings in the European Union: an Assessment Manual*, by Mike Dottridge in consultation with the EU Experts Group on Trafficking in Human Beings, October 2007; OSCE/ODIHR *Handbook on National Referral Mechanisms (NRM) – Joining Efforts to Protect the Rights of Trafficked Persons*, 2004; UNICEF Reference Guide on protecting the rights of child victims of trafficking in Europe, 2006; UNHCR *Guidelines on Formal Determination of the Best Interests of the Child*, May 2008; IOM *Guidelines for the Collection of Data on Trafficking in Human Beings, including comparable indicators*, expected in 2009, etc.

<sup>356</sup> More information available at [www.coe.int/children](http://www.coe.int/children) (30.01.2009)



**Table 5.2: Cluster – Child Trafficking***Child best interests and accountability*

Structural Indicators	Process Indicators	Outcome Indicators	Data Sources
<p><b>STR-EXV-1:</b> Existence of data collection mechanism(s) based on a comprehensive definition of trafficking (including child trafficking for sexual and economic exploitation, trafficking for criminal activities, trafficking for forced marriages of children, trafficking for adoption of children, and organ trafficking).</p> <p><b>STR-EXV-2:</b> Existence of legal provisions for appointment of legal guardian for separated children.</p> <p><b>STR-EXV-3:</b> Existence of National Referral Mechanism (or other systematic, formalised and standardised instrument for identification of trafficked children, cooperation with and referral to other competent agencies)</p>	<p><b>PRO-EXV-1:</b> Existence of age assessment policies and procedures, with presumption of status as ‘child’ in case of doubt.</p> <p><b>PRO-EXV-2:</b> Existence of specific personal data protection measures for trafficked children</p> <p><b>PRO-EXV-3:</b> Measures to ensure awareness of specific personal data protection measures for trafficked children for relevant officials.</p>	<p><b>OUT-EXV-1:</b> Identification of trafficked children, disaggregated<sup>357</sup></p> <p><b>OUT-EXV-2:</b> Law enforcement: Number of arrests for child trafficking related cases per year (broken down by months) with disaggregated data for victims and perpetrators.</p> <p><b>OUT-EXV-3:</b> Criminal justice - Number of child trafficking convictions per year, in relation to cases reported to the police, with disaggregated data for victims and perpetrators.</p> <p><b>OUT-EXV-4:</b> Criminal justice - Number of cases and amounts for compensation to trafficked children per year, with disaggregation</p>	<p><b>International level:</b> UN OHCHR Treaty bodies database; CRC/OPSC State reporting procedure; NGO “shadow” reports; ECPAT International Database; SCEP. Reports; Databases and reports from UNODC, UNICEF, ILO, UNHCR, IOM, OSCE, UNICEF IRC Trafficking Research Hub; EU Trafficking Framework Decision Reports; DAPHNE best practices reports;</p> <p><b>National level:</b> Statistical Offices (police and criminal justice statistics); Ministries of Justice, Interior, Social Affairs, etc; Bar associations; Specialised agencies, National Rapporteur reports to Treaty Bodies; National trafficking databases; ECPAT national reports.</p>

357 By age; gender; disability/special needs; separation status; nationality; ethnic origin; countries of transit and destination; exploitation purpose; location (urban/rural).

## 5.2. Child Trafficking

### 5.2.1. Background to the research

Trafficking of human beings, and especially of children, has been of long standing concern to the international community. In 1989 the United Nations adopted the 'Convention on the Rights of the Child' with explicit protection provisions regarding exploitation of children. In 2000 the United Nations adopted the 'Convention Against Transnational Crime' ("The Palermo Convention") with its two protocols, of which the first addresses 'prevention, suppression and punishing of trafficking in human beings, especially women and children'. In the context of the EU and Europe, several decisions and instruments have been adopted: Council Framework Decision 2002 on Combating Trafficking in Human Beings, and 2003 on Combating Sexual Exploitation of Children and Child Pornography; European Council Directive 2004/81/EC on Residence Permits issued to Victims of Trafficking; Council of Europe 2005 Convention on Action Against Trafficking in Human Beings.

By its very nature, trafficking of human beings and child trafficking is hard to quantify. It often involves a complex series of events in different countries, evidence may be difficult to obtain, and victims are often deterred from cooperating with the authorities. In addition to these more or less unavoidable difficulties, further obstacles are of a legal and organisational nature: the fact that different definitions of trafficking co-exist, that different methods of data collection are used, and that some authorities simply fail to give adequate priority to the fight against child trafficking.

The Multiannual Framework of the Agency lists the rights of the child, including the protection of children as one of the thematic priorities of the FRA. The European Commission asked the Fundamental Rights Agency on July 15, 2007 to develop indicators for measuring how children's rights are implemented, protected, respected and promoted in the Member States of the EU and to map the available data and sources at national and EU level.

Building on the generic study carried out by FRA in 2008 to develop indicators for children's rights, the Agency launched this study to examine comparatively the relevant legal instruments at EU and national level, as well as relevant judicial data and case law, with the aim of developing a robust body of evidence regarding the situation across the European Union. The study was carried out by the FRALEX, the legal expert network of the FRA.

## 5.2.2. Selected findings of the study

The comparison of the legal provisions and practices regarding child trafficking in the EU Member States shows a very diverse picture. Some of the main points of the comparison are described below; the full report is available on the FRA website

- First, the criminal laws of the EU Member States differ when it comes to the penalisation of child trafficking; there is no uniform definition of trafficking in human beings as a criminal offence, and prison sentences that may be imposed differ widely between Member States.
- In nearly all EU Member States some form of data collection takes place, but often this is not formalised, nor coordinated at governmental level. As a result, in several Member States different relevant state departments keep their own statistics, thereby using their own methodology and with their own focus. In a small group of Member States, a specific data collection mechanism on trafficking in human beings, or even child trafficking in particular, is in place.
- Some sort of coordination body comprised of representatives from (a combination of) Ministries, National Police, Prosecution Services, judiciary and NGOs relevant for anti-trafficking efforts is in place in the majority of Member States. Due to the number of agencies and institutions involved however, the division of tasks and its coordination can become somewhat problematic. In a large group of Member States, certain groups of professionals, mostly the police, do receive specific training on trafficking in human beings.
- The overall impression given by the comparison of the 27 national reports is that the concept of a 'legal guardian' is not uniformly defined in all EU Member States. While the person of the legal guardian and his or her tasks may differ, in a great number of Member States a legal guardian is appointed to all unaccompanied minor aliens that arrive or are found in the country's territory.
- Specialised shelters for child victims of trafficking are not provided for in most Member States. Child victims may be placed in shelters for adult victims of trafficking, in specialised shelters for unaccompanied minors, or in other facilities for (vulnerable) children. Despite the fact that disappearances from shelters are widely acknowledged to be a serious problem, particularly because of the risk of children becoming victim of trafficking, hardly any statistics of children who leave shelters with unknown destination are existent, and hardly any policies to prevent such disappearances are developed in the Member States.
- The vast majority of Member States provide for access to basic psychological and medical services, for access to education and for access to legal assistance for victims of trafficking under most types of residency permits.

- The national laws of almost all Member States provide for some form of child sensitive procedures such as interviewing child witnesses in court proceedings without the presence of the accused. In only a handful of Member States are statistics on final convictions based on child trafficking available.
- In all Member States some form of awareness-raising activities takes place. These campaigns however are primarily targeted at adults and (possible) adult victims of trafficking in human beings, although there are initiatives targeted at children too.

It is impossible to make even remotely accurate statements concerning the actual prevalence of trafficking in human beings, be it in individual EU Member States, or at EU or world level. No institution or NGO has thus far been able to give a complete picture of this phenomenon. In the absence of solid data it is obviously difficult to formulate effective counter-trafficking policies. Common definitions and standards are therefore needed. Several international organisations and NGOs have called for the appointment of national rapporteurs on child trafficking in every EU Member State in combination with the appointment of an EU rapporteur on this topic. However, to date only very few EU Member States have taken this step.

Various critics argue that there is a need to improve the protection offered by Directive 2004/81. Recurring elements are: (a) the fact that the granting of residence permits only to victims who co-operate with authorities could discriminate against victims who may not be able to co-operate through no fault of their own and (b) the fact that under the Directive, the residence permit can be withdrawn in cases where the competent authorities decide to discontinue proceedings for whatever reason. In 2004 the Experts Group on Trafficking in Human Beings tabled elaborate proposals for improvement.

The EU legal framework lacks a clear definition of child trafficking. Also at Member State level child trafficking is not uniformly defined. There is a strong case to up-date the 2002 Framework Decision on combating trafficking in human beings. The adoption of a clear and unequivocal definition, to be applied in all EU Member States, would present a major step to achieve a common response to child trafficking, both in terms of formulating preventive and repressive policies and data collection.

According to the CoE *Convention on Action against Trafficking in Human Beings*,<sup>358</sup> (Warsaw, 2005) 'trafficking in children' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons under 18 years of age, for the purpose of exploitation. 'Exploitation' includes sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

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<sup>358</sup> <http://conventions.coe.int/Treaty/EN/Treaties/Word/197.doc>

In this connection it is immaterial whether or not the child consents to be exploited. Child trafficking may, but does not have to involve the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Concerning the definition of trafficking, the Palermo Protocol and the Council of Europe *Convention on Action against Trafficking in Human Beings* offer the most comprehensive definition and therefore constitute best practice in this respect.

## 6. Pilot Media Project

### 6.1. Project background

Mass media have an unequivocal position in society when it comes to establishing and disseminating common cultural references. Mass media both build up on people's attitudes and influence them, and create models of perception that are particularly sensitive when it comes to ethnic, cultural and religious relations in society. Previous work of the Agency on the mass media<sup>359</sup> had indicated that there was a need for further research, and for further development of adequate comparative methodologies for analysing media content in different Member States. Therefore, the Pilot Media Project was developed in 2007 and implemented in 2008 as a part of the 2007 work programme.

### 6.2. Project objectives and methodology

The aim of the FRA Pilot Media Project was to study the prevalence and portrayal of minority groups and issues, such as racism, discrimination, diversity, integration and migration, in the press. More concrete, the study focused on:

- the extent to which minority related content is integrated into the overall structure and content of newspapers
- the characteristics of minority content in newspapers
- potential biases in media reporting about minority groups or issues

The project was carried out in six EU Member States (**Germany, Spain, France, Hungary, Poland** and the **UK**).<sup>360</sup> In each country four daily newspapers were analysed during four non-consecutive weeks. In order to ensure the highest possible level of comparability between country results, the same methodology was applied in all participating countries combining quantitative and qualitative analysis.

The project had a pilot character, that is, besides producing valuable findings, it was intended to serve the testing and refinement of methodologies for analysing media content on a multinational level. It should be noted that the degree of representativeness of results allows for drawing important conclusions about major tendencies of media reporting about minority issues and minority actors, but does *not* allow for the construction of a final ranking of countries or newspapers.

<sup>359</sup> For example, *Racism and Cultural Diversity in the Mass Media*, EUMC 2002

<sup>360</sup> Depending on the outcome of the Pilot Media Project, the project may be expanded to a full study of the 27 Member States of the EU.

### 6.3. Project findings

A total of 43,741 articles were scrutinised by the research teams in the six countries; 30,421 articles were used for detailed content analysis; 2,145 articles (of the 30,421) contained minority related content (i.e. these articles were dealing with minority groups and/or with issues related to diversity, migration or discrimination). In all, 18,680 individual references to actors or issues were coded.

The analysis produced a range of findings on the regularities and variations observed in the representation of different groups and viewpoints in mass media coverage of issues related to ethnicity, and on how issues of racism, discrimination, diversity, integration and migration are discussed in the different newspapers.

The full findings will be made available in the second half of 2009. The results will address questions such as:

- Who is given voice in articles about minority issues?
- In which contexts are minority actors represented in newspapers?
- Are predominantly positive, negative, or neutral attributes used in the representation of actors?
- Is there a significant impact of article authorship, article genre, article content scope, and article size on the representation of minorities?

The output of the pilot project will be used for awareness raising among political actors, the broader public, and the media itself. In addition, the FRA would like to contribute to training programmes for journalists and to media education in schools.

## 7. Incident Reports and Opinions

Incident Reports by the FRA are stimulated by situations which require further examination to assess whether fundamental rights have not been respected, for whatever reason, and to identify relevant information that may lead to future action by the Agency or by EU institutions. Following the violent anti-Roma disturbances which occurred in the Ponticelli district of Naples in May-June 2008, the FRA commissioned an 'Incident Report' from its Italian National Focal Point. The ensuing report *Violent Attacks against Roma in the Ponticelli district of Naples, Italy*<sup>361</sup> was produced in August 2008 and made available to the European Parliament. The FRA's report was drawn upon in the report made by the delegation of the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament following their visit to Italy in September 2008.

An Opinion was requested from of the FRA by the Presidency of the European Union on 3 September 2008 regarding the proposed Council Framework Decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, COM (2007) 654. It was the first request for an opinion on a fundamental rights matter the FRA had received from the presidency of the European Union. This request was also noteworthy because it concerned the third pillar of the EU – police and judicial cooperation in criminal matters. Another aspect of the request concerned its topic: counterterrorism and fight against organised crime. These topics are not mentioned in the Multi-Annual Framework, and therefore FRA could only deal with these topics because of this request.

### 7.1. Violent attacks against Roma in the Ponticelli District of Naples, Italy: Incident report, August 2008

This Incident Report report brings together the basic facts on these violent attacks, as well as providing background information regarding the situation of Roma in Italy. It presents a summary of the incidents of aggression against Roma which began in May, with physical attacks on individual Roma, arson attacks on Roma homes, and violent assaults on Roma camps by crowds of local residents. The report illustrates the climate of intolerance generated by the events in Ponticelli and the generally negative subsequent political discourse. It describes the responses of the Italian authorities in the form of legal measures, and also presents examples of the critical reactions of civil society and international bodies to the events and to the responses of the Italian authorities.

The events which occurred in Italy are seen as a reflection of the wider problems faced by Roma communities all over Europe. Despite measures and policies promoting Roma integration and inclusion by Member States throughout the EU and at EU level by the European Commission, and despite efforts of the Council of Europe and of other international organisations, progress in implementing them is

<sup>361</sup> [http://fra.europa.eu/fraWebsite/material/pub/ROMA/Incid-Report-Italy-08\\_en.pdf](http://fra.europa.eu/fraWebsite/material/pub/ROMA/Incid-Report-Italy-08_en.pdf)



slow. As previous reports by the Agency have repeatedly pointed out, Roma, Sinti and Traveller groups are the most vulnerable groups in Europe, suffering problems such as poor and segregated housing conditions, and forced evictions in more than half of the Member States of the EU. Systematic discrimination against Roma also exists in access to employment, and in the fields of health and education. However, even without this extra burden of discrimination, the appalling housing conditions of the Roma make it difficult to make progress in these other spheres of social life.

The report highlights the significance of the fact that so many of the Roma camps in the areas where the incidents in Italy took place were unauthorised camps. It concludes that it is therefore important that in all Member States, unauthorised camps are replaced as soon as possible with authorised sites equipped with adequate hygienic facilities providing water, sanitation, electricity and access to public transport. However, all over the EU there are cases where local authorities fail to assist Roma groups in improving their accommodation, even though, as the Council of Europe Commissioner for Human Rights emphasised, human rights laws and standards bind regional or local authorities as much as they bind central authorities.<sup>362</sup>

The events in Ponticelli show that protecting fundamental rights in the European Union requires that governments comply with the duty to respect, protect and promote fundamental rights not only by providing the necessary legal safeguards, but also by ensuring that these are applied effectively in practice by public authorities at national, regional and local level.

Following this Incident Report, the FRA recognised that a longer period of information gathering is necessary in order to monitor further developments in this area in Italy and across the European Union. The Agency will continue to collect data and information in relation to the circumstances of Roma, Sinti and Traveller communities, and will publish them in future reports.

## 7.2. PNR Opinion

The request for an Opinion of the FRA concerned the proposal for a Council Framework Decision, COM (2007) 654, on the use of Passenger Name Record (PNR) data for law enforcement purposes submitted by the European Commission. The FRA gave its opinion alongside other institutions and bodies which were also consulted: the European Data Protection Supervisor; the Article 29 Working Party and the Working Party on Police and Justice.

<sup>362</sup> <https://wcd.coe.int/ViewDoc.jsp?id=1272387&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679>

The FRA Opinion focused on three fundamental rights:

- The right to respect for private life according to Article 8 of the European Convention of Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union;
- The right to data protection according to Article 8 of the Charter of Fundamental Rights of the EU;
- The prohibition of discrimination according to Article 21 of the Charter of Fundamental Rights of the European Union.

After an analysis of the proposal, the FRA reached the following conclusions:

The proposal contains open-ended and imprecise formulations (e.g. “general remarks”, “associates”, “terrorist offences”, “organised crime”). The data processing operations to be undertaken by authorities should be defined and specified precisely in order to ensure that data processing operations on the basis of PNR data are foreseeable by data subjects. This requirement of precision constitutes an essential guarantee against arbitrariness in the imposition of restrictive measures, and such protection is even more important as regards secret surveillance measures, due to the heightened risks of arbitrariness in such circumstances.

More explanation and evidence is needed to demonstrate beyond doubt that the collection and use of PNR data for law enforcement purposes is necessary and adds value to the fight against terrorism and organised crime in order to meet the requirement of proportionality inherent in the right to respect for private life.

Before adoption of this measure to create a system to collect and use PNR data for law enforcement purposes, a detailed review of the already existing measures (Visa Information System, Schengen Information System, Directive 2004/82/EC) should be completed with a view to determining why these existing measures do not suffice to provide the additional intelligence required.

The proposal should contain sufficient procedural safeguards. As it stands, the proposal provides neither for mandatory rights of data subjects according to Article 8 of the Charter of Fundamental Rights (right of access, right of rectification), nor for control by an independent authority. A general reference to another data protection instrument will not suffice in this regard. Effective exercise of rights of data subjects requires that the data subject be clearly informed about the applicable procedures.

Article 8 of the proposal should ensure that data transfers to third countries are only possible if an adequate level of protection of PNR data is ensured and monitored in the recipient country.

Wording should be added which ensures that profiling based on PNR data is intelligence-led, based on more specific individual, preferably behavioural, factual parameters. Profiling based on stereotypical generalisations about ethnic, national or religious groups should be explicitly banned and there is a need to closely monitor who in fact becomes targeted by the proposed risk assessment to ensure compatibility with the prohibition of discrimination.

## 8. Conclusions

This year's Annual Report has covered a wider range of issues of equality and human rights than in previous years. Among these, a few themes in particular stand out for attention in these concluding remarks.

### Awareness of rights and the law

Previous Annual Reports have described various national studies that have indicated an apparently low level of complaints to Equality Bodies by victims of discrimination. Often such studies have speculated on what the reasons might be for this. The current Annual Report quotes two EU-wide surveys from 2008 whose findings suggest that one of the factors at work here is a lack of public awareness, both of the law and of the existence of victim support organisations.

The Eurobarometer report of July 2008, relating to awareness among the general population, found that only one-third of respondents said that they knew of their rights, should they be a victim of discrimination or harassment. The FRA's own EU-MIDIS survey similarly found evidence to suggest that, among the migrants and minorities surveyed, awareness of the existence of any equality body or similar organisation is extremely low in the majority of the Member States, and that awareness of anti-discrimination legislation is equally minimal. This could, at least in part, account for the low incidence of formal complaints filed.

In this context, it would seem to be important for there to be national campaigns raising awareness of the legal instruments available, perhaps targeting specific groups at risk of discrimination. Article 10 of the Racial Equality Directive imposes an obligation on all Member States to ensure that national provisions adopted pursuant to the Directive are 'brought to the attention of the persons concerned by all appropriate means throughout their territory'. Therefore:

- as part of the proper transposition of the Racial Equality Directive, Member States should engage in awareness-raising activities about the Directive, so that individuals are better able to benefit from their rights under EU law.

### Sexual orientation discrimination

During 2008 the FRA carried out two major studies on homophobia and discrimination on grounds of sexual orientation in the EU. The two analyses demonstrated an enormous difference in social attitudes, national policies, and legal approaches to this issue between Member States, and highlighted the total absence of relevant legislation in some Member States. This may create obstacles for the free movement of the persons concerned.

The report also suggested the approximation of criminal law combating homophobic hate speech and homophobic hate crime in the Member States following the model of the Framework Decision on racism and xenophobia adopted in November 2008. In addition,

- the EU could clarify that gender reassignment discrimination/-discrimination against transgender people constitutes discrimination on the ground of sex following the relevant case law of the European Court of Justice.

The second report identifies a number of measures needed to combat homophobia and transphobia and provide protection against discrimination on grounds of sexual orientation and gender identity, including more research, data collection and monitoring. In particular, the report concludes that:

- there is a real need for training and education initiatives, particularly regarding public sector staff and in schools, as well as a need for information and awareness-raising campaigns to tackle negative and prejudiced attitudes in the general population towards LGBT persons.

## Evidence-based social policy

There is an increasingly recognised need for policy-making to be rooted in hard evidence, whether from reliable official statistics, or from the findings of scientific research. A 2008 report by the European Commission<sup>363</sup> stresses the importance of policy-making to be based on scientific evidence, and urges a strengthened dialogue between policy makers and researchers. This year, as in previous years, it seems that much of the insight into the four areas of social life covered by the racial discrimination sections of this report – employment, housing, education and healthcare – has been provided by research, often in the context of rather poor national official data.

There is great variety between Member States in the degree to which their official data is able to contribute meaningfully to evidence-based social policy. For example, taking the area of criminal justice data on racist violence and crime, twelve EU Member States are now recognised by the Agency as collecting sufficiently robust data to allow for a trend analysis of the problem, a slight improvement on previous years when eleven were recognised as such. Yet some Member States also slipped back with respect to improvements they had made in previous years concerning the quality and availability of their data.

Encouragement for better official data in this area came at EU level from the adoption in November 2008 of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law. The adoption of this Framework Decision could help raise awareness

<sup>363</sup> *Scientific Evidence for Policy-Making* European Commission, Directorate General for Research, Brussels 2008

and encourage action at Member State level so that victims are encouraged to report racist crime, and that mechanisms are put in place to accurately record racist crime in ways that will make it useful for initiatives such as crime prevention.

Another area where the reporting of hate crimes has been shown to be particularly low is when the victims are lesbian, gay, bisexual or transgender persons. When only a small minority of homophobic incidents get officially reported, there is little pressure on police or public authorities to respond, and policies of preventive action are hindered in their development. The reports on sexual orientation discrimination show that fear of discrimination, a reluctance to acknowledge their sexual orientation in public, or even a fear of the police, can be enough to dissuade victims from officially reporting attacks.

- Member States can produce improvements in the reporting of homophobic hate crimes by introducing, for example, self-reporting forms, or possibilities for assisted or anonymous reporting by victims.

## The internet and hate crime

The section of this report on racist violence and crime describes how hate crime is increasingly manifesting itself through the internet, something which is said to be a particular challenge in some Member States. However, the Additional Protocol to the Convention on Cybercrime,<sup>364</sup> which entered into force in 2006, had still, in 2008, been ratified only by five EU Member States.

## The 'Horizontal Directive'

The two EC Equality Directives from 2000 in effect set out a 'hierarchy' of grounds of discrimination. Only the Racial Equality Directive gave protection against discrimination in a range of areas, namely social security, healthcare, education and access to and supply of goods and services, whilst the Employment Framework Directive outlawed other grounds of discrimination only in the area of employment and work. The overview of legislation across Member States in section 1 of this report highlights the fact that the majority of Member States have in fact extended the subject matter of prohibited discrimination beyond the employment context with regard to other grounds of discrimination, notably sexual orientation. They have thus already disregarded any artificial hierarchy of discrimination grounds. However, this still leaves many Member States where such protection is absent. Indeed, the FRA's report published in 2008 on homophobia and discrimination on grounds of sexual orientation pointed out that in nine Member States the Equality Body has no mandate to assist victims of sexual orientation discrimination.

<sup>364</sup> Additional Protocol to the Convention on Cybercrime concerning the Criminalisation of Acts of Racist or Xenophobic Nature committed through Computer Systems, 2003.

In July 2008 the European Commission published a Proposal for a Council Directive<sup>365</sup> to extend the protection against discrimination currently covered by the Employment Framework Directive to areas of social security, healthcare, education and access to and supply of goods and services.

- The FRA supports this Proposal for a ‘Horizontal’ Directive. This would ‘level up’ protection relating to religion, belief, disability, age, and sexual orientation to match the Racial Equality Directive.

## Returning third country nationals

One issue of concern mentioned more than once in the Annual Report is the conditions of detention for those awaiting decisions on asylum applications or removal. In 2008 the Directive on Common Standards and Procedures in Member States for returning illegally staying third-country nationals,<sup>366</sup> states that third-country nationals subject to return procedures may only be detained where there is a risk of absconding or the individual avoids or hampers the preparation of return or the removal process. It also sets out a number of safeguards of review and supervision by judicial authorities, and provides for detention of minors only as a last resort and for as short a time period as possible, with the best interests of the child as the primary consideration.

EU Member States may themselves provide for a higher degree of protection of the rights of illegally staying migrants in their domestic legislation. However, not all Member States have yet opted to join the Directive. This is seen as regrettable, since in 2008 a number of Member States were criticised by human rights bodies regarding their practices and policies in this area.

## Equality Bodies

Previous Annual Reports have reported that in some Member States the powers that have been given to Equality Bodies are too limited to be effective in terms of supporting victims of discrimination or applying dissuasive sanctions to those who unlawfully discriminate. The current report notes that even in 2008, in four Member States an Equality Body was still either not yet in operation, or had not even been established.

- Member States should ensure that Equality Bodies are empowered to assist complainants in proceedings which lead to sanctions, and be sufficiently independent and well-resourced so as to be able to perform their victim support functions effectively and in a way that invites trust by the victims. In many cases further improvements could be made by simplifying the complaints procedures,

<sup>365</sup> COM(2008)426 final, 2 July 2008.

<sup>366</sup> Directive 2008/115/EC. OJ L 243, 24.12.08, p. 101.

ensuring special training for staff dealing with discrimination victims and by allowing Equality Bodies to act on their own initiative.

## Research activities

This year's Annual Report contains a summary of research projects carried out by the FRA during 2008. Following on from the extension of the mandate of the Agency in 2007, these research activities now cover a scope which is much broader than the previous areas of focus of racism, xenophobia and related intolerances. The data and information produced in this expanded programme of research is intended to assist stakeholders and policy makers in their work to combat abuse of human rights and prevent unlawful discrimination.

For example, the project on developing indicators related to the rights of the child, and the report on child trafficking, were both produced to complement and assist the work of the Commission regarding its launch of a new policy package on combating trafficking in human beings, and the sexual abuse and sexual exploitation of children. Ultimately the aim of the FRA's work on indicators is to develop a 'toolkit' for assessing the impact of EU law and policy on children's experiences.

The aim of the EU-MIDIS survey has been to make available a set of data that will assist policy makers to design targeted non-discrimination policies regarding criminal victimisation. To maximise the impact of the survey in this direction, a strategy has been developed to disseminate the findings to the relevant stakeholders. And the aim of the Pilot Media Project has been not only to test methodological tools for future comparative analyses of media output, but also to use the findings as a basis for entering into a dialogue with those working in the media on how to avoid discriminatory content and challenge existing stereotypes.

The reports on homophobia and discrimination against LGBT persons had been originally commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs as a basis for discussion about the 'Horizontal Directive' extending the scope of non-discrimination. The evidence on EU-wide attitudes and practices of homophobia and discrimination gathered by the agency was presented to the European Parliament in March 2009, and the proposal for the Council Directive extending the protection against discrimination was agreed by the Parliament shortly afterwards in April.

For some of the research described in the final 'activities' part of this report it was too early to report on their results and conclusions. These findings, and their implications for anti-discrimination and human rights policy and practice in the EU, will be described in next year's FRA Annual Report. All of the reports mentioned in this Annual Report are, or will be, available on the FRA's website.







# **European Union Agency for Fundamental Rights**

## **Annual Report**

**2009**

Design & Typesetting: red hot 'n' cool, Vienna

2009 - 124 pp, - 21 x 29.7 cm

ISBN-13: 978-92-9192-342-7

DOI: 10.2811/80218

A great deal of information on the European Union Agency for Fundamental Rights is available on the Internet. It can be accessed through the FRA website (<http://fra.europa.eu>).

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