

ANNUAL REPORT 2011



Fundamental rights: challenges and achievements in 2011



FRA

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS









Acronyms

ECHR	European Convention on Human Rights
CJEU	Court of Justice of the European Union (CJEU is also used for the time predating the entry into force of the Lisbon Treaty in December 2009)
EASO	European Asylum Support Office
ECRI	European Commission against Racism and Intolerance
ECTHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EU-MIDIS	European Union Minorities and Discrimination Survey
FRA	European Union Agency for Fundamental Rights
FRANET	Network of Legal and Social Science Experts (FRA)
LGBT	Lesbian, gay, bisexual and transgender
NHRI	National Human Rights Institute
NGO	Non-governmental organisation
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU
UN	United Nations

Note: A list of international and regional human rights conventions and their abbreviations can be found in Chapter 10.

The FRA highlights the titles of the EU Charter of Fundamental Rights by using the following colour code:

	Dignity
	Freedoms
	Equality
	Solidarity
	Citizens' rights
	Justice



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Cataloguing data can be found at the end of this publication.

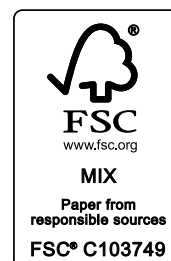
Luxembourg: Publications Office of the European Union, 2012

ISBN 978-92-9192-919-1
doi:10.2811/62303

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Printed in Luxembourg

PRINTED ON PROCESS CHLORINE-FREE RECYCLED PAPER (PCF)





Fundamental rights: challenges and achievements in 2011

Foreword

The year 2011 witnessed important developments in the area of fundamental rights. The European Union (EU) adopted key legislation and policy documents in areas such as the protection of victims, human trafficking, the fight against sexual exploitation of children, the use of body scanners and the integration of Roma and third-country nationals. The Court of Justice of the European Union delivered landmark judgments in a variety of fields, including asylum and citizenship. EU Member States pressed forward with a number of initiatives. Various EU Member States reformed their child protection systems, took steps to fight violence against women, extended considerable effort in shortening the length of court proceedings, made progress in implementing the European citizens' initiative and recognised that the phenomenon of multiple discrimination required more attention.

Despite these and other important positive developments, this Annual report by the European Union Agency for Fundamental Rights (FRA) also identifies many challenges that must be recognised, analysed and efficiently addressed. The annual report further highlights promising practices. This, however, should not disguise the fact that much of what is reported is less than promising and requires the attention and concerted effort of all those within the European Union who are concerned about the robust fulfilment of fundamental rights for all.

Many challenges facing the European Union and its Member States today are likely to persist in the near future. The year 2012 will be a crucial year for the finalisation of the Common European Asylum System and debate on the new EU data protection framework. In the area of child protection, EU Member States will need to introduce changes to legislation and practice. The areas of racism, equality and non-discrimination are likely to remain core concerns. Steps will be taken to implement the United Nations Convention on the Rights of Persons with Disabilities – the first international human rights treaty to which the European Union has become a Party.

We would like to thank the FRA Management Board for its diligent oversight of the annual report from draft stage through publication as well as the FRA Scientific Committee for its invaluable advice and expert support, which helps guarantee that this important FRA report is scientifically sound, robust and well-founded. Special thanks go to the National Liaison Officers for their comments on the draft, thereby improving the quality and accuracy of EU Member State information. We are also grateful to various institutions and mechanisms, such as those established by the Council of Europe, which continue to provide valuable sources of information for this report.

Ilze Brands Kehris
Chairperson of the Management Board

Morten Kjaerum
Director

The FRA Annual report covers several titles of the Charter of Fundamental Rights of the European Union, colour coded as follows:

FREEDOMS

- ▶ Asylum, immigration and integration
- ▶ Border control and visa policy
- ▶ Information society and data protection

EQUALITY

- ▶ The rights of the child and protection of children
- ▶ Equality and non-discrimination
- ▶ Racism and ethnic discrimination

CITIZENS' RIGHTS

- ▶ Participation of EU citizens in the Union's democratic functioning

JUSTICE

- ▶ Access to efficient and independent justice
- ▶ Rights of crime victims

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Introduction



The FRA Annual report identifies achievements and challenges in the field of fundamental rights in the 27 European Union (EU) Member States and Croatia in 2011. Its first nine chapters cover each of the areas identified by the agency's Multi-annual Framework 2007–2012. Chapter 10 provides an overview of international obligations relevant to the areas of EU law covered in this report. This year's focus section deals with the overall fundamental rights landscape in the EU. For each area, the report identifies 'key developments', 'promising practices' and details on 'FRA activities'. The 'outlook' section notes the challenges ahead. The report is drafted in consultation with a variety of stakeholders and undergoes internal and external quality checks.

In line with its founding regulation, the European Union Agency for Fundamental Rights (FRA) is required to “publish an annual report on fundamental rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice”.¹ This annual report thus focuses on fundamental rights developments in the European Union (EU) and its 27 Member States and not on the work of the FRA itself.

Examples of ‘good practice’ in the fundamental rights field are highlighted in blue boxes entitled ‘promising practices’. They are deliberately called ‘promising’ rather than ‘good’ practices, since the FRA does not directly scrutinise or evaluate them. Still, they are intended to encourage stakeholders to consider and emulate initiatives, where appropriate, and to allow for an exchange of experiences.

The report's main ambition is to provide a relevant, timely, objective and comparative overview of key developments in the area of fundamental rights. It looks at the EU and the 27 EU Member States while also including developments at the Council of Europe or the United Nations (UN) level where these affect the EU and its Member States. To briefly highlight the agency's contributions, the report includes yellow

boxes entitled ‘FRA activity’ which sketch out some of its 2011 work in each field.

Areas covered by the report, including the focus section

The agency's founding regulation requires the annual report to deal with the areas the FRA is focusing on as per the five-year Multi-Annual Framework determined by the Council of the European Union. The first framework covers the years 2007–2012 and tasks the FRA with work in the following nine areas: “(a) racism, xenophobia and related intolerance; (b) 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 (multiple discrimination); (c) compensation of victims; (d) the rights of the child, including the protection of children; (e) asylum, immigration and integration of migrants; (f) visa and border control; (g) participation of the citizens of the Union in the Union's democratic functioning; (h) information society and, in particular, respect for private life and protection of personal data; (i) access to efficient and independent justice.”²

¹ Art. 4 (1) (e) of the Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2007 L 53, pp. 1–14.

² Art. 2 of the Council Decision of 28 February 2008 implementing Regulation (EC) No. 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007–2012, OJ 2008 L 63, pp. 14–15.

These nine areas translate, for the purpose of the FRA Annual report, into nine chapters grouped into four sections that reflect different ‘titles’ of the European Union Charter of Fundamental Rights. To differentiate the Charter titles – **Freedom** (Title II); **Equality** (Title III); **Solidarity** (Title IV); **Citizens’ Rights** (Title V) and **Justice** (Title VI) – the FRA uses a colour code. The annual report chapters, covering several titles of the Charter, are therefore colour coded as follows:

1. Asylum, immigration and integration
2. Border control and visa policy
3. Information society and data protection
4. The rights of the child and protection of children
5. Equality and non-discrimination
6. Racism and ethnic discrimination
7. Participation of EU citizens in the Union’s democratic functioning
8. Access to efficient and independent justice
9. Rights of crime victims
10. EU Member States and international obligations

Chapter 10 was introduced in last year’s annual report, following positive feedback from the European Parliament on the former annex on international obligations.³ The chapter is part of an effort to underline the multi-level relevance of fundamental rights: an efficient protection of fundamental rights is only possible if local, national, European and international norms and administrations all efficiently interact. In order to raise awareness of the international dimension of fundamental rights, this chapter is updated in each annual report, making it a regular feature compared with the other chapters which might change with the adoption of a new Multi-annual Framework.⁴

With the current Multi-annual Framework drawing to a close, the annual report takes a step back in this year’s focus section and looks at the overall picture of the protection of fundamental rights. So, after last year’s focus section on ‘Roma in the EU – a question of fundamental rights

implementation’, this year’s is on ‘Bringing rights to life: the fundamental rights landscape in the European Union’. The focus examines a dynamic period for the protection of fundamental rights within the European Union. It describes, in an accessible manner, how the overall ‘landscape’ looks and describes how the different layers, rights, procedures and institutions interact and where the FRA adds value.

A multi-modular approach

Fundamental rights cover all areas of human life. Different groups of rights are of interest to different groups of persons. This report, therefore, applies a multi-modular approach allowing single chapters to stand alone. Every chapter has a separate introduction, which summarises the key developments over the past year in that field, as well as an outlook, which outlines the major fundamental rights challenges to be expected in the immediate future, in 2012 and just beyond. As in the past, emphasis is placed on properly substantiating and referencing all the statements in the report. Each chapter also has a separate and full bibliography. This is important because 90 % of the non-governmental organisations (NGOs), which answered the 2011 consultation with civil society on the FRA Annual report, said that they use the report as a reference for further analysis.

This multi-modular approach does not, however, change the fact that the chapters are interlinked and that many of them should be read in combination with others. The chapter on access to justice looks at a cross-cutting topic which is of relevance to all fundamental rights, while the chapter on racism and the one on equality are, of course, tightly interwoven. Other chapters are to be read in tandem with others because certain elements are covered in both but to a different degree or from a different angle. This is the case, for instance, with the chapter on the rights of the child and the chapter on the rights of crime victims, both of which look at human trafficking. Another example is the integration of third-country nationals, which is examined in the chapter on asylum, immigration and integration, while the integration of Roma and other disadvantaged groups is analysed in the chapter on racism and ethnic discrimination. The chapters all make reference to international agreements. A full overview of progress as regards ratification and signatures of the relevant international instruments is given in the chapter on EU Member States and international obligations. And, of course, the focus section on the EU’s fundamental rights landscape complements all the other chapters of the annual report.

The annual report is accompanied by a stand-alone summary – *Highlights 2011* – entitled *Fundamental rights: key legal and policy developments in 2011*. It reproduces the key developments of each area covered, which introduce every chapter in the annual report

³ European Parliament, *Report on the situation of fundamental rights in the European Union (2009) – effective implementation after the entry into force of the Treaty of Lisbon*, (2009/2161(INI)), A7-0344/2010, para. 32.

⁴ European Commission, Proposal for a Council decision establishing a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2013–2017, COM(2011) 880 final, 13 December 2011.



and are supplemented by issues and events of special importance for the year 2011. The 'Highlights 2011' also contains yellow boxes, entitled 'FRA Publications', which reference 2011 FRA reports of relevance to the topic. The Annual report 2011 and Highlights 2011 are published in English, French and German.

FRA Annual report 2011: drafting, scope and timeframe

The report draws on data and information from in-house research and from the agency's Franet network, a multi-disciplinary research network composed of National Focal Points in each EU Member State and the acceding country Croatia. Franet supplies the FRA with objective, reliable and comparable socio-legal data on fundamental rights issues to facilitate the agency's comparative analyses. FRA 2011 research projects are referred to only when the findings are directly relevant to the thematic area covered. A first draft of the report is sent to the 27 liaison officers from the governments of each EU Member State to check the information provided for factual accuracy. The draft subsequently undergoes an internal quality review at the FRA and is submitted to the FRA Scientific Committee for evaluation. As a general rule, the rapporteur within the Scientific Committee responsible for the annual report is the Committee Chair. After incorporating stakeholder comments, including those of FRA's Management Board, that Board adopted the report on 16 May 2012.

The report focuses on developments, events and debates in the area of fundamental rights that took place between 1 January 2011 and 31 December 2011. Where relevant, the FRA Annual report also takes into consideration key events that took place between October and December 2010 or in early 2012. Geographically speaking, the report covers developments that took place in the EU and in its 27 EU Member States and the acceding country Croatia. In May 2010, the EU Croatia Stabilisation and Association Council gave Croatia observer status at the FRA, making it possible to cover 2011 developments.⁵

The FRA is committed to further improving this report. The annual report is evolving, with the aim to produce a central reference document which offers an annual update on the situation of fundamental rights in the EU. This is why the FRA consults a wide spectrum of stakeholders, including the 350 NGOs that participate in the Fundamental Rights Platform, and why it welcomes any feedback (annualreport@fra.europa.eu).

⁵ See Decision No. 1/2010 of 25 May on the participation of Croatia as an observer in the European Union Agency for Fundamental Rights' work and the respective modalities thereof, OJ 2010 L 279, pp. 68-70. Compare with Art. 28 of Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

Bringing rights to life: The fundamental rights landscape of the European Union

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Bringing rights to life: The fundamental rights landscape of the European Union



An intricate web of national, Council of Europe, European Union (EU) and international institutions has arisen to secure and safeguard the fundamental rights of everyone in the EU. The fundamental rights landscape evolved further in 2011 with the complex interplay among multiple protective layers increasingly taking centre stage. For instance, more EU Member States established National Human Rights Institutions, the European Union Agency for Fundamental Rights (FRA) approached its fifth year of existence and, for the first time, the EU itself was directly bound to an international human rights treaty – the UN Convention on the Rights of Persons with Disabilities (CRPD). In light of this, the UN Regional Office for Europe recommended that all these various institutions enhance their cooperation to minimise the risk of gaps in fundamental rights protection. Meeting this challenge is essential to making fundamental rights a reality in the daily lives of all those who live in the EU. A closer look at the existing fundamental rights landscape also reveals that it is increasingly important not only to consider the duty bearers – that is, states – but also the rights holders – that is, individuals. Their experiences and perceptions must be taken into account to guarantee that the European fundamental rights structure makes a difference on the ground and does not become an end in itself.

At the end of 2011, the European Union Agency for Fundamental Rights (FRA), created in March 2007, was approaching its fifth anniversary. The establishment of this EU agency, entrusted specifically with the protection of fundamental rights, reflects a broader trend within the EU and its Member States towards ‘institutionalising’ and mainstreaming fundamental rights within law and policy.

During those five years, fundamental rights have become increasingly visible within the EU, marked by important developments such as the 2009 entry into force of the Lisbon Treaty and the 2010 designation of the European Commission’s Vice-President Viviane Reding as Commissioner of Justice, Fundamental Rights and Citizenship. The Council of the European Union also created in 2010 a permanent Working Group devoted to fundamental rights. In 2011, work continued apace, with negotiations on the EU’s accession to the European Convention on Human Rights (ECHR) and the entry into force for the EU of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD, 22 January 2011) – the

first core international human rights treaty to which the EU has become a Party.

These recent steps are only part of a wider picture. At national, European and international levels, a variety of bodies exist with diverse mandates and powers, which are responsible for protecting, promoting or monitoring fundamental rights. They also offer guidance to EU Member States on how to improve rights protection and ensure that fundamental rights form an integral part of law and policy making. Collectively, these multiple and interactive layers, geared towards promoting the implementation of rights, can be referred to as a ‘fundamental rights landscape’.

This focus section aims to describe this landscape. It starts at the national level since long before human rights were protected at international level, they were guaranteed in the laws and constitutions of a number of states. As new international human rights instruments came into existence and EU Member States became Party to them, the states went

on to reflect or replicate also these human rights standards within their national legislation and constitutions. There has been a continuous reciprocal influence between nationally enshrined rights and those of European and international human rights instruments.¹ Similarly, the EU's own fundamental rights regime was based on Council of Europe and UN standards, and Member States' common constitutional traditions. The EU started only in the 1960s to develop fundamental rights standards through the case law of the Court of Justice of the European Union (CJEU), which drew inspiration from such standards and traditions.

Figure 1: Four layers of the fundamental rights landscape



Source: FRA, 2011

The different layers of the landscape connect, formally and informally, with each other. For example, an individual wishing to make a complaint about a fundamental rights violation will first try to have their case resolved in the national courts. If the complaint relates to an area of EU law, the national court may refer the case to the CJEU. If the complaint falls outside EU law, and the individual does not get a favourable outcome from the national court system – or if the EU-system does not offer a satisfactory conclusion – they may then have the option of taking the case to the European Court of Human Rights (ECtHR), or alternatively, to one of the UN treaty bodies, where these have an individual complaint mechanism.

The landscape's various layers are not only linked through complaints by individuals, which generally will be lodged first at the national level and then brought to a higher level. The interrelationship between the layers also becomes evident in certain monitoring mechanisms. When a state takes part in a reporting procedure before a UN treaty body, for example by submitting a report on their national human rights situation, that state's National Human Rights Institution (NHRI) may also contribute an independent perspective to the state's report or submit its own report to the UN. Certain international conventions even require the establishment of

¹ While not covered here, the Organization for Security and Co-operation in Europe (OSCE) also contributes to the region's overall fundamental rights landscape, for example, through the work of the OSCE High Commissioner on National Minorities (HCNM, The Hague) or the Office for Democratic Institutions and Human Rights (ODIHR, Warsaw).

monitoring bodies at national level, as is the case for the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT-OP) and the CRPD. This requirement is a new development showing that the layers of governance are increasingly interwoven. It is also reflected in the EU's accession to the CRPD which obliges the EU to establish a monitoring framework.

In addition to these structural and procedural links, the landscape's layers also influence each other when it comes to shaping and interpreting fundamental rights. The influence works in both directions: from the national layer towards the European and international layers, and vice versa.

As a result, a relatively complex landscape emerges, both from the perspective of individuals wishing to enforce their rights through the courts as well as for observers wishing to understand how the system fits together. The fact that fundamental rights implementation is far from perfect highlights the need for greater efforts to put these rights into practice. In the first section, this Focus outlines the rights, bodies and procedures relevant at each governance level. With this picture as a backdrop, it then positions the FRA within this landscape and identifies the added value that the agency offers ('A joined-up approach to fundamental rights').

The landscape: rights, bodies and procedures

National level

International law recognises that the state has primary responsibility for ensuring the respect, protection, promotion and fulfilment of fundamental rights. The state has both the authority and the responsibility to put rights into practice on a day-to-day basis. Local and national public authorities, for example, are responsible for: ensuring public safety and order through a police force and courts; organising public services, such as healthcare and education; organising elections; and regulating many aspects of daily life, such as employment relations or consumer rights. Moreover, fundamental rights developed originally at the national level and were only later recognised and further developed at European and international level. Therefore, this Focus sets out its description of the overall landscape – composed of rights, institutions and procedures at national, European and international levels – by first looking at the national level. The national level also comprises different sublevels, including regions and municipalities.

Figure 2: Relevant institutions at national level

Source: FRA, 2011

Rights and complaint mechanisms

The way fundamental rights are protected in the national systems across the EU depends on the historical experience of each Member State. One common thread is that fundamental rights in EU Member States enjoy a status that tends to be superior to other legal norms in the national system. In some countries, a constitution may contain a specific list of rights, while in others a constitution may refer to a separate document. Alternatively, there may be a provision in national law that accords European and international human rights treaties some form of status that is superior to national law. Moreover, the types of rights guaranteed under national regimes may be affected by historical circumstances. Despite these differences, a strong common core of fundamental rights exists across the EU, reflected in the fact that all EU Member States are Parties to the ECHR and other Council of Europe treaties, as well as to a number of UN human rights treaties. This consensus finds also a strong expression in the Charter of Fundamental Rights of the European Union. The protection of fundamental rights within the EU is an expression of unity among diversity.

When it comes to complaint mechanisms, EU Member States use various national structures to ensure that rights protected by national, European and international law are implemented in practice. All Member States have functioning court systems which allow individuals to settle cases alleging rights violations. Apart from courts, which are usually well-known and are therefore not dealt with in this Focus in any great detail, many states have implemented additional independent mechanisms at the national level to offer guidance, assistance or even recourse. Such mechanisms are for instance Ombudsmen, Data Protection Authorities (DPAs), national equality bodies or NHRIs. In EU Member States where these bodies have no power to settle disputes, they may have the authority to assist an individual in taking a case to court – limited by financial and human resources.

All these bodies can be placed at the national level and equally also at either the local or regional levels. In fact, when rights complaints are made, they should reasonably be settled as close to the victim's home as possible.

This proximity is to ensure that violations can be put to an end quickly, and that local and national authorities have the opportunity to address the complaint, as well as any problems in how rights are implemented.

Bodies responsible for promoting rights

All EU Member States have one or more bodies responsible for promoting the implementation of fundamental rights. The mandates of these bodies may be restricted to particular fundamental rights issues or the bodies may offer a range of different functions. While this section will concentrate on three types of bodies – national equality bodies, DPAs and NHRIs – EU Member States have also put in place other bodies. For example, some EU Member States have bodies responsible for promoting specific rights, such as the rights of the child, gender equality or the prohibition of torture. Such specialised bodies are often created to help promote the implementation of fundamental rights protected by specific EU instruments, such as non-discrimination and gender equality directives, and UN treaties, such as the Convention on the Rights of the Child (CRC), the CAT or the CRPD. Some states have ombudsmen of various kinds, such as supervising government administration. Often these bodies coincide with the NHRI (see Chapter 8).

Thus, the fundamental rights structures vary between EU Member States. Some Member States consolidate all fundamental rights issues under the mandate of a single NHRI; in others, several bodies exist with responsibility for different issues with varying degrees of power. In those EU Member States that are organised along federal lines, such as Austria, bodies have divided mandates and are set up at both the national and regional levels. No matter how the national architecture is structured, it is important to avoid overlaps and gaps between mandates in order to help minimise confusion for individuals who are seeking assistance or recourse to a complaint mechanism.²

These bodies usually have the power to advise or make recommendations to national authorities on how national legislation and policy could be developed and reformed so as to ensure more effective long-term rights implementation. This way of proceeding may take place systematically where legislative proposals are screened during the law-making process to ensure that they comply with human rights obligations. This falls within the mandate, for example, of the Danish Institute for Human Rights, the German Institute for Human Rights and the Greek National Commission for Human Rights – all 'accredited' NHRIs. In addition to such external and independent expert advice, specialised parliamentary committees (for example, in Finland and the United

² FRA (2010a).

Kingdom) or services of national parliaments providing independent legal opinions (for example in Greece) or national ministries (for example in Austria, Germany and the Netherlands) also often carry out systematic checks of compliance with fundamental rights. Although such internal procedures cannot replace external input from an independent expert body, they are an important mechanism for preventing potential or future violations that could occur on a large scale if laws conflicting with fundamental rights were to be brought into effect.

Under EU law, in the area of non-discrimination and gender equality, all Member States have an obligation to establish and have, in fact, established, national equality bodies responsible for promoting equal treatment in the areas of racial or ethnic equality and gender equality. Many EU Member States have also established bodies dealing with discrimination on other grounds, such as sexual orientation, disability, age and religion or belief. In some EU Member States, one single body is responsible for dealing with equality across all these areas while in others separate institutions exist. In some countries, the existence of such bodies pre-dates EU legislation (such as Belgium, Ireland, the Netherlands, Sweden and the United Kingdom), while others have established new bodies (such as in France, Germany, Italy and Spain) or expanded the mandates of existing bodies (such as in Cyprus, Greece or Latvia).

These national equality bodies have two main tasks under EU law. The first is to offer assistance to victims in pursuing their complaints. To provide this assistance, national equality bodies were either given the power to issue decisions on individual complaints themselves or empowered to take cases to court on behalf of a victim or provide the victim with legal representation. National equality bodies also have the power to undertake surveys, publish reports and make recommendations. This allows equality bodies to collect information that identifies barriers to equality or shows the extent to which discrimination occurs in an EU Member State. It means that they can provide national and local authorities with guidance on how to improve the promotion of equality through policy and legislation. In addition, national equality bodies may carry out awareness-raising on discrimination and equality, which could include conducting campaigns to make people aware of their rights or offering guidance and training on non-discrimination law to civil servants or employers.

Similarly, all EU Member States have established bodies at the national level to monitor the application of, and ensure respect for, data protection legislation. In some Member States, one body has been put in place while in others these are divided among several bodies in particular sectors, such as healthcare, postal systems or telecommunications. EU law requires these data protection authorities to dispose of a range of powers, including the ability to advise national authorities during the legislative

process, investigate potential violations, participate in legal proceedings and hear individual complaints.

A number of EU Member States have bodies with a mandate to promote fundamental rights in general, going beyond the area of discrimination law and covering all rights. No explicit obligation exists under international law to establish such institutions, called NHRIs. The UN, however, has urged all states to do so and, at least at a political level, all UN member states have agreed.³ International criteria, known as the 'Paris Principles', have been established to guide states and provide some regulation of NHRIs.⁴ National bodies may apply to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) – an organisation of NHRIs, which determines the extent to which a national body meets ICC criteria. Bodies that are in full compliance are accredited with 'A-status'. Those in partial compliance are accredited with 'B-status', while those not in compliance receive 'C-status'. The main criteria can be summarised as:

- a mandate that covers all human rights;
- independence from government guaranteed by the constitution or legislation;
- adequate human and financial resources;
- pluralism, including through membership and/or effective cooperation;
- adequate powers of reporting, monitoring, advising, and investigating (not established as an obligatory requirement) including the power, capacity and staff to submit recommendations on any matter concerning human rights and proposals in relation to legislative and administrative measures.

NHRIs thus have similar tasks to those of the equality bodies established under EU law, including some or all of the following:

- providing advice on various human rights issues to national authorities;
- raising human rights awareness, including human rights education, publication of reports, training and capacity-building activities;

3 UN, Human Rights Council Resolution (2011), *National institutions for the promotion and protection of human rights*, A/HRC/RES/17/9, 6 July 2011; UN, General Assembly (1993), *Vienna Declaration and Programme of Action*, UN Doc. A/CONF.157/23, 12 July 1993, part I, para. 36.

4 For a thorough outline of the requirements set out in the Paris Principles, including how they may be achieved, see Chapter III.A, pp. 31-43 of: UN Office of the High Commissioner for Human Rights (2010).



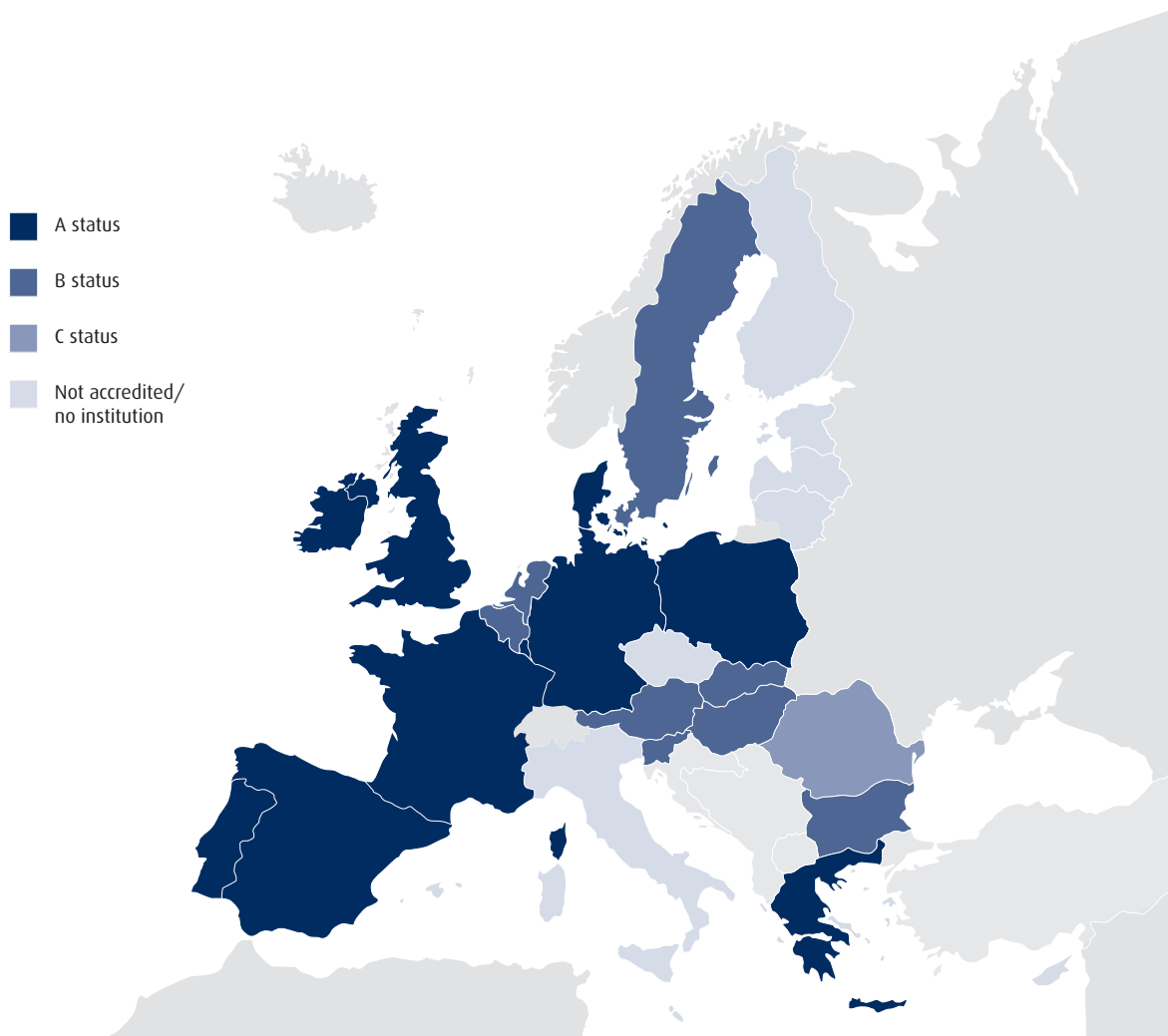
- monitoring of human rights violations and making recommendations;
- receiving, investigating and resolving complaints from individuals.

Seventeen of the 27 EU Member States have NHRIs that are accredited through the ICC; only 12 NHRIs in 10 EU Member States have been accredited with 'A-status'. In some EU Member States, the equality body and the NHRI are actually the same entity, such as the United Kingdom's Equality and Human Rights Commission, which has a mandate covering human rights in general, including non-discrimination law. Developments during 2011 in the EU Member States regarding NHRIs are described in Chapter 8 on 'Access to justice'.

Remarks on the landscape

When it comes to courts, evidence shows⁵ that many barriers are in place threatening the efficient enforcement of rights through them. Such barriers relate, amongst others, to the cost of court proceedings and the adequacy of financial assistance (such as legal aid) to cover the financial burden, as well as to significant delays with court proceedings in some EU Member States, both of which discourage individuals from bringing cases to court. Moreover, victims of human rights violations are reluctant to bring their cases to the courts because they fear victimisation and often lack awareness of their substantive and procedural rights, in particular those rights guaranteed in EU and/or international law.

Figure 3: National Human Rights Institutes in EU Member States and Croatia, by accreditation status



Note: While under EU law all EU Member States are required to establish equality bodies and DPAs, no comparable obligation exists to establish NHRIs. Consequently, the situation differs across EU Member States as illustrated in this map.

Source: FRA, 2011

5 FRA (2011a).

Problems such as these can be addressed through certain rules available under procedural law, including the shifting of the burden of proof to the respondent in certain circumstances. Another solution might be to give additional bodies the power to decide on individual complaints. This is the case for some of the bodies, such as the NHRIs and national equality bodies in certain EU Member States like Belgium, France, Sweden and the United Kingdom. However, even where these bodies have the power to settle complaints from individuals, they may not have the authority to impose a binding legal remedy, like awarding compensation. In addition, there appear to be particular factors that undermine the effectiveness of these bodies. These factors include: a lack of awareness among individuals about their rights and that these complaint procedures or even the respective bodies exist, as well as a lack of confidence that filing a complaint can actually make a difference.⁶ These factors may explain to a certain extent why equality bodies in some EU Member States, so mandated, receive high numbers of complaints a year (sometimes numbering in the thousands like in France), while the volume is low in others (sometimes even only a handful, like in Estonia). Since many people who experience discrimination do not actually lodge a formal complaint, the volume of recorded cases does not reflect the frequency with which violations of fundamental rights occur.

The extent to which the bodies discussed are able to promote fundamental rights implementation depends on the human and financial resources available, as well as the scope of the powers that they possess, which often vary considerably among EU Member States. Concerns have also been raised in some Member States about the independence of these bodies, since they may have a close relationship with a government ministry. This may be physical (where a body shares its premises with a ministry), financial (where a ministry determines the level of funding) or organisational (where, for example, the body's director is appointed by a minister or attached to a ministry). While these issues may not affect the independence of these bodies in practice, they can give rise to unfavourable perceptions, undermining individuals' confidence in approaching them.

European Union level

The EU contributes to the region's fundamental rights landscape in three main ways: it establishes bodies and procedures to ensure that the EU itself respects fundamental rights; it disposes over procedures which help to ensure that EU Member States implement EU law in conformity with such rights; and it provides for harmonisation in certain specific fields of fundamental rights protection.

⁶ FRA (2010b).

Bodies such as the FRA, the European Data Protection Supervisor (EDPS) and the European Ombudsman provide a framework aimed at ensuring that the EU itself respects fundamental rights. In addition, the three key players in producing EU legislation – namely the European Commission, the European Parliament and the Council of the European Union – have introduced compliance checks with fundamental rights standards as part of the process of formulating and negotiating legislation and policy. The European Commission's 2010 Strategy on the effective implementation of the Charter⁷ sets as an objective that the EU is exemplary as regards the respect of fundamental rights, in particular when it legislates. The European Commission further committed to preparing annual reports to better inform citizens on the application of the Charter and to measure progress in its implementation.⁸ Furthermore, the EU has institutions, such as the CJEU and the European Ombudsman, which are empowered to various extents to hear complaints from individuals who feel the EU itself has violated their rights.

The EU has established a range of mechanisms to help ensure that EU Member States, as required, implement EU law in compliance with fundamental rights. The EU has the authority to create legislation across a range of policy areas, but the powers to put this legislation and policies into effect – through public administrations, courts and law enforcement bodies – lie at the national and local levels. When implementing EU legislation or policies, EU Member States must comply with fundamental rights. If, however, EU Member States fail to meet their obligations, the European Commission may initiate proceedings against them.

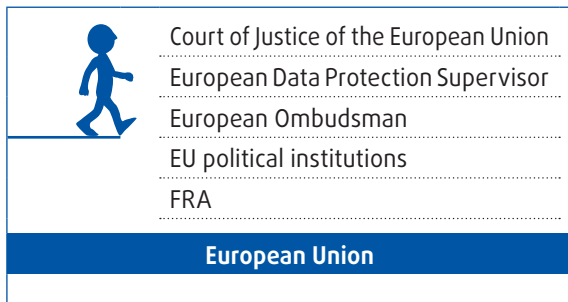
In certain limited areas, the EU holds the authority to create policy and legislation on specific fundamental rights issues, such as discrimination or data protection. This authority includes establishing common rules for all EU Member States in these areas, for instance, EU law requiring procedures or bodies, such as equality bodies and data protection authorities, to be established at the national level to ensure that rights are protected and promoted. The EU can, however, only act within the limits of the competences conferred upon it by the Member States through EU treaties. Moreover, EU law obliges Member States only to respect fundamental rights when they act within the scope of EU law.

⁷ European Commission (2010b) and European Commission (2011b).

⁸ European Commission (2012a).



Figure 4: Relevant institutions at EU level



Source: FRA, 2011

Protected rights

The protection of fundamental rights within EU law has evolved considerably over time. CJEU decisions on cases have elaborated on which rights are protected under the ‘general principles’ of EU law. The Court has thus developed a catalogue of fundamental rights. Although this catalogue is not formally written down, the EU and its institutions, as well as all of the EU Member States, must respect it whenever they are “acting within the scope of Union law”, as defined by the CJEU. With regard

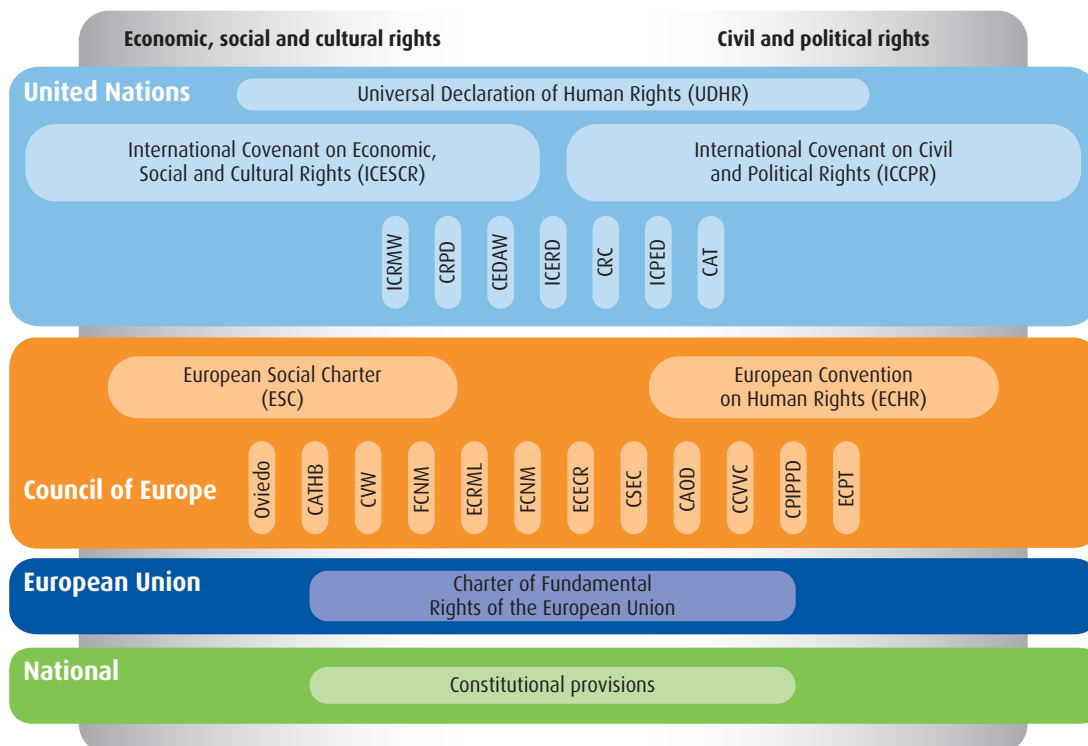
to the content of these unwritten rights, the CJEU used two sources of inspiration, namely:

- the constitutional traditions common to the EU Member States;
- the rights guaranteed by international human rights treaties.

While the latter includes UN human rights treaties, the CJEU relied in practice mostly on the ECHR. In 1992, the EU made express reference to the ECHR in the Treaty on European Union (TEU), led to a clear-cut treaty obligation to ensure respect for fundamental rights as contained in the ECHR and the common constitutional traditions.

In 2000, the EU created the Charter of Fundamental Rights of the European Union, as a formal body of rights protected under EU law. The Charter became a legally binding document once the Lisbon Treaty came into effect on 1 December 2009. The list of rights contained in the Charter is based on written EU law, EU general principles and common constitutional traditions, as well as the rights in the ECHR and other Council of Europe treaties and in the UN human rights treaties.

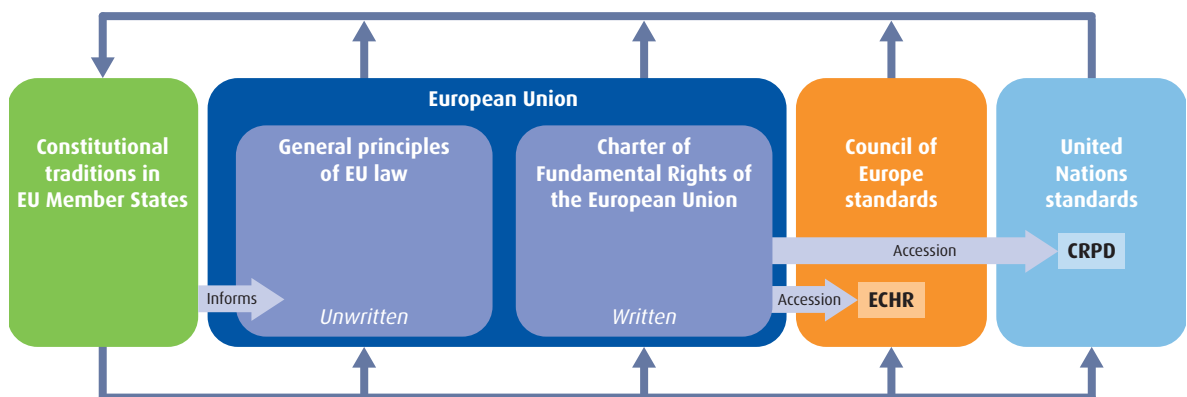
Figure 5: Coverage of rights and main instruments at the four levels



Notes: The relative length of the horizontal bars represents a comparative reflection of the spectrum of rights covered. However, no hierarchy between different instruments exists. Blurred borders of the constitutional provisions indicate the wide diversity of explicit constitutional rights between EU Member States. For the full names of the conventions, see the list of acronyms at the end of this Focus.

Source: FRA, 2011

Figure 6: Interaction of fundamental rights in EU law



Source: FRA, 2011

The Charter sets limits on the way the EU exercises its authority: the EU may not take action in a way that violates the rights in the Charter. According to its Article 51, the Charter does not “establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties”. Thus, the Charter does not give the EU the right to create new legislation where it did not have the power to do so before the Charter became legally binding. At the same time, the legally binding nature of the Charter implies the obligation and the task to ensure that EU institutions and EU Member States do not violate the Charter when implementing EU law.

In addition to these internal rules of EU law – the general principles and the Charter of Fundamental Rights – the EU itself is also directly bound to the CRPD and is in the process of joining the ECHR, as required by the Lisbon Treaty. Generally speaking, such European and international treaties have been aimed at states and, in the past, made little or no provision to allow international organisations to join them directly. Although the CRPD and ECHR are notable exceptions to this practice, the heads of state and government of all Member States of the Council of Europe, hence also all of 27 EU Member States, agreed in May 2005 that the accession of the EU to other Council of Europe conventions should be considered.

So, according to EU law, the EU and its Member States, when acting in the scope of EU law, are bound by fundamental rights in three ways:

- the general principles of law as developed by the CJEU;
- the fundamental rights as listed and defined in the Charter of Fundamental Rights of the European Union;
- the fundamental rights as guaranteed by the Council of Europe’s ECHR, to which the EU is now also bound to accede.

EU law puts Member States under a fundamental rights obligation only when acting in the scope of the EU treaties. As the European Commission frequently underlines, this is often misunderstood. In 2011, of those citizens’ letters to the Commission on fundamental rights, 55 % concerned issues outside the remit of EU competences.⁹ Therefore, it is important to underline that the reach of fundamental rights protection under EU law depends on the concrete context:

- when a legislative competence is available, the EU can harmonise fundamental rights protection in a specific field (compare for example the Data Protection Directive 95/46/EC);
- when EU Member States act in the scope of EU law, the CJEU can impose limits by referring to fundamental rights, for example, with regard to the right to family (see for example the *Zambrano* case, where the CJEU held that parents of a child who is a national of a Member State must be granted the rights to reside and work there);
- when a situation falls outside an EU-law context, the violation cannot be addressed by means of EU law (an example could be the mistreatment of soldiers of an EU Member State in a military barrack of that state).

At a more general level, Article 2 of the TEU provides for the EU to be “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities”. According to Article 7 of the TEU, the EU can determine that there is a “clear risk of a serious breach by a Member State” or even determine “the existence of a serious and persistent breach” of the values as stipulated in Article 2. The first procedure – identifying the risk of

⁹ European Commission (2012a), p. 8.

a breach – can be activated by a proposal submitted by a third of the EU Member States, the European Parliament or the European Commission. The second procedure – identifying the qualified breach – can be initiated by a third of the EU Member States or the European Commission. Whereas the Parliament cannot initiate the procedure that aims to determine a breach of the Article 2 values, the final decision determining a breach has to be taken by the European Council following consent of the Parliament.

Article 7 of the TEU even offers the possibility to impose sanctions on an EU Member State by suspending “certain of the rights deriving from the application of the Treaties to the Member States in question, including the voting rights of the representative of the government of that Member State in the Council”. Interestingly, Article 7 procedures allow the EU to address under certain restricted conditions breaches in areas falling outside the scope of EU law, that is, in areas “where the Member States act autonomously”.¹⁰ It is, however, important to underline that these procedures are in the hand of the political institutions of the EU, whereas the role of the CJEU to

review these procedures is limited. Such judicial review may concern “solely [...] the procedural stipulations” of Article 7 of the TEU (Article 269 of the TFEU).

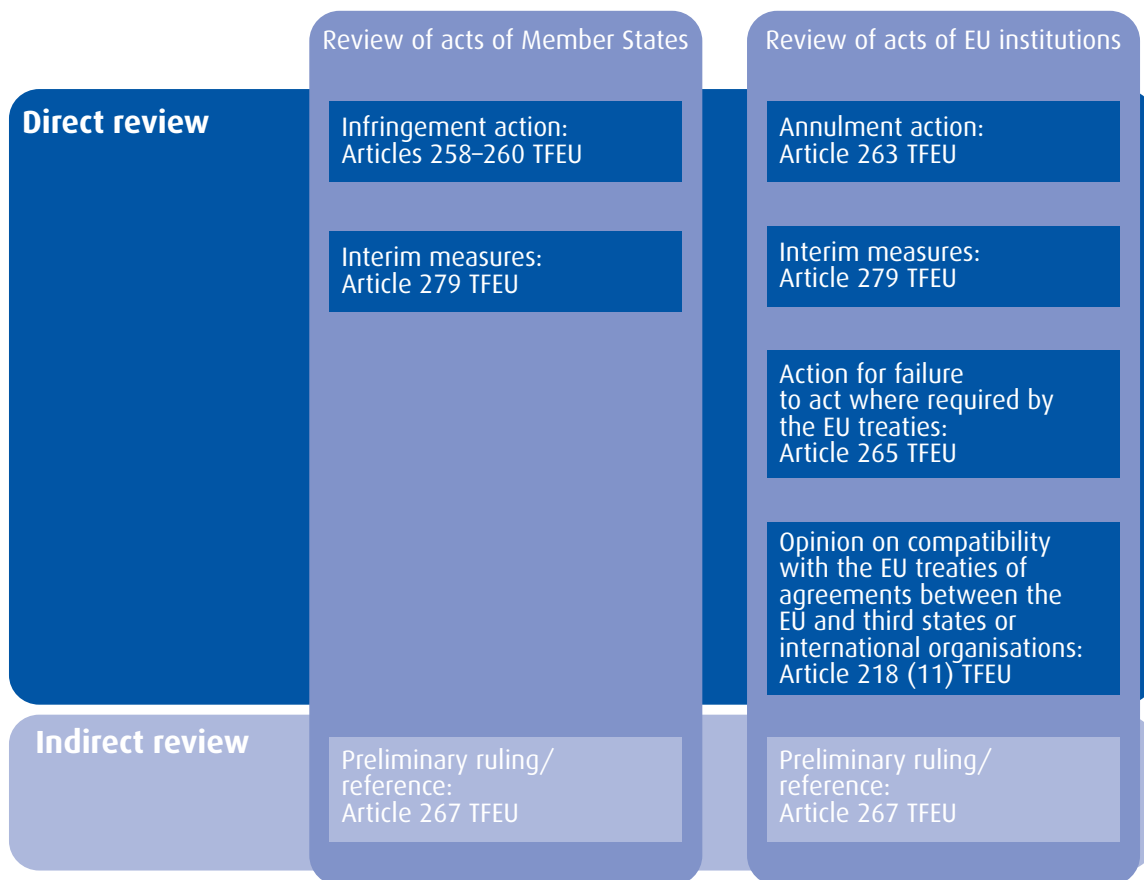
In some instances, Members of the European Parliament have suggested having recourse to Article 7, for example, in the context of the involvement of Romania and Poland in so-called CIA flights in 2007 or in the context of the changes made to Hungarian law in 2011 and 2012. So far, however, since its inception in 1999 the EU has never applied Article 7 of the TEU in practice.

Complaint mechanisms: the Court of Justice of the European Union

Within the scope of EU law, a more regular fundamental rights control is offered through the standard procedures before the CJEU as laid down in the Treaty on the Functioning of the European Union (TFEU).

The CJEU is responsible for dealing with cases alleging a violation of the Charter of Fundamental Rights by the EU or by a Member State when it is implementing

Figure 7: Judicial enforcement routes in the EU



Source: European Parliament, 2011; based on The evolution of fundamental rights Charters and case law by the European Parliament Directorate-General Internal Policies, Policy Department C ‘Citizens’ rights and constitutional affairs’, p. 78

10 European Commission (2003)

EU law. The CJEU is not primarily designed as a human rights court to deal with individual complaints. Its role is to judge whether the EU institutions themselves have failed to comply with EU law or to offer guidance to national courts on how to interpret the meaning of EU law. The Charter of Fundamental Rights is gaining prominence in this context. In 2011, the number of decisions quoting the Charter in its reasoning rose by more than 50 % against the year-earlier, to 42 from 27.¹¹

In principle, an individual has the possibility to directly lodge a complaint with the CJEU if the EU fails to comply with the EU Charter of Fundamental Rights. An individual can, however, only institute proceedings against an individual EU act directed at him or her or which is of direct and individual concern to him or her, and against an EU regulatory act, if this act does not entail implementing measures and is of direct concern to the individual. These limitations make it very difficult for an individual to complain about a piece of legislation because, by its nature, legislation establishes general rules that apply to everyone or to large groups of people. Thus, an individual is unlikely to satisfy the rules for legal standing before the CJEU unless they are specifically named by a piece of legislation, such as by being placed on a list of people suspected of involvement with terrorism. Furthermore, an individual may claim damages in cases of EU contractual and non-contractual liability (Article 340 TFEU).

Therefore, it is more common for an individual to reach the CJEU indirectly. This may happen when an individual brings a complaint to the national courts and questions arise in the case as regards the interpretation of the relevant EU legislation and its compatibility with the Charter. In such cases, the national court may opt to refer these questions to the CJEU for its opinion (preliminary reference according to Article 267 TFEU). When doing so, national courts also increasingly make reference to the Charter, with the number of such explicit references up 50 % in 2011 over the year earlier.¹² It is important to underline that last instance courts at national level are obliged to make recourse to the preliminary procedure in cases in which a question of EU law must be clarified.

Whereas direct access for individuals to the CJEU is limited in annulment procedures, the preliminary procedure allows for a unique and efficient dialogue between

the national courts and the CJEU. It should be noted, nevertheless, that the national court decides – and not the individuals involved in the case – whether to refer the case to the CJEU. The CJEU may give its opinion on the interpretation or the validity of EU legislation, thereby enabling the national court to apply the correct interpretation of EU law in a specific case. It will also review whether a Member State is complying with the Charter of Fundamental Rights and general principles of EU law when implementing EU law or acting within the scope of EU law.

In its important role as the ‘guardian’ of EU treaties, the European Commission also has the power to launch an ‘infringement’ procedure against a Member State. This option represents a significant mechanism to protect fundamental rights in the EU and can be used when:

- a Member State fails to implement a piece of EU human rights-related legislation;
- a Member State implements EU legislation in a way that conflicts with fundamental rights.

The aim of an infringement procedure launched by the European Commission is different in character from that of a complaint lodged by an individual whose rights have been violated. Although the European Commission’s interest in a particular case might result from information received by individuals, the infringement procedure is brought forward in the name of the European Commission as the guardian of the treaties. Its objective is to secure compliance with EU law by a Member State rather than to obtain some form of remedy for individuals. In this case, the European Commission, and not the individuals who may have had their rights violated, will decide whether to open a procedure. However, an individual whose fundamental rights guaranteed by EU law have been violated by a Member State may inform the Commission – which could again trigger infringement proceedings.

Such an infringement procedure is preceded by informal consultations between the state and the European Commission, during which potential problems are often addressed. This was, for example, the case in 2010, when the European Commission announced its intention

Figure 8: Stages leading to infringement proceedings



Source: FRA, 2011

¹¹ European Commission (2012b), p. 6.

¹² *Ibid.*, p. 5.

to open formal proceedings against France concerning a possible breach of its obligations under the Free Movement Directive¹³ due to the repatriation of Roma who were not French nationals. Since the European Commission was satisfied with the commitments and legislative amendments made by France to correctly implement the directive, it did not open an infringement procedure against France.

If, however, problems cannot be resolved through informal consultations, the European Commission sends a 'letter of notice' to a Member State explaining its position. Such a 'letter of formal notice' to a Member State opens the formal procedure. At this stage, negotiations can still resolve the issue. If the European Commission is not satisfied with the outcome of negotiations, it will deliver a 'reasoned opinion' explaining why it does not consider a Member State to be in compliance with EU law. Following the reasoned opinion, the European Commission will begin proceedings before the CJEU. Issues are often settled during the formal negotiation phase after the European Commission delivers a letter of notice, but before it issues a reasoned opinion.

The Racial Equality Directive provides an example where various Member States were found in violation of their obligations under the treaties (non-implementation). The European Commission began proceedings against almost all EU Member States because they had not transposed, or had only partially transposed, the Racial Equality Directive,¹⁴ which obliges Member States to prohibit discrimination on the basis of race or ethnicity.¹⁵ However, only five cases ended up before the CJEU, while other EU Member States resolved the issue through negotiation.¹⁶

A more recent example in this regard relates to Hungary. In 2011, the European Commission considered launching proceedings against Hungary in the context of Hungary's new constitution and corresponding legislation. Given that Hungary did not comply with the concerns expressed by the European Commission, it sent three letters of formal notice to Hungary. The letters argue that Hungarian legislation conflicts with EU law by putting into question the independence of the country's central bank and data protection authorities, and by the measures affecting its judiciary. The latter include measures forcing more than 200 judges to retire.

Complaint mechanisms: the Ombudsman, the EDPS and the petitions committee of the Parliament

In addition to formal court proceedings before the CJEU, there are a number of quasi-judicial mechanisms where an individual can have their complaint investigated by an EU body, which may then make recommendations. Although the outcome of these quasi-judicial mechanisms is not legally binding, three relevant bodies exist in the EU:

- the European Ombudsman may investigate complaints alleging maladministration in the institutions and bodies of the EU. These may include alleged violations of fundamental rights, such as discrimination or the right of access to information, which are often due to a refusal to grant access to official documents. The Ombudsman may conduct inquiries either on its own initiative, or on the basis of complaints submitted to it directly or through a Member of the European Parliament. Any EU citizen, or any natural or legal person residing or registered in a Member State, can make a complaint. It is important to note that the right to complain to the European Ombudsman is enshrined in Article 43 of the EU Charter of Fundamental Rights. It is a basic right of EU citizenship in accordance with Article 24 of the TFEU. In 2010, the European Ombudsman registered 2,667 complaints and processed 2,727, 27 % of which fell within his mandate;¹⁷
- similar to the European Ombudsman, under Article 227 of the TFEU, the European Parliament's Committee on Petitions may take up a complaint from an individual on any subject that falls within the EU's areas of competence. Unlike the European Ombudsman, however, the complaint can relate to the behaviour of a national or local authority and not merely EU institutions;
- the EDPS is responsible for ensuring that EU institutions and bodies respect the right to privacy. Its powers include conducting inquiries on its own initiative or dealing with the complaints lodged by individuals who feel their personal data has been mishandled by a European institution or body.

Other bodies responsible for fundamental rights

The EU institutions, particularly the European Parliament or the European Commission, often carry out activities to promote fundamental rights. The European Parliament frequently urges other institutions and EU Member States to consider addressing particular fundamental rights challenges through policy and legislation. In addition to its role to ensure compliance with EU law, the

¹³ Directive 2004/38/EC.

¹⁴ Council Directive 2000/43/EC. FRA (2012a).

¹⁵ See European Commission (2005); European Commission (2009).

¹⁶ CJEU, C-327/04, *Commission v. Finland*, 24 February 2005; CJEU, C-329/04, *Commission v. Germany*, 28 April 2005; CJEU, C-335/04, *Commission v. Austria*, 4 May 2005; CJEU, C 320/04, *Commission v. Luxembourg*, 24 February 2005; CJEU, C-326/04, *Commission v. Greece*, 25 September 2004.

¹⁷ European Ombudsman (2010), p. 21.

European Commission may promote fundamental rights through coordinating or funding particular programmes or projects including research. For example, the European Commission programme entitled 'Fundamental rights and citizenship' offers around €95 million in funding for projects that promote fundamental rights and covers the period from 1 January 2007 to 31 December 2013.

As explained in its Strategy for the effective implementation of the Charter of Fundamental Rights by the EU, the European Commission has established methods to mainstream fundamental rights considerations into legislation across policy areas, also covering the rights of the child and the rights of persons with disabilities.¹⁸ In cases where legislation may have an impact on data protection, the European Commission is obliged to consult the EDPS.¹⁹ In addition, the Council of the EU²⁰ and the European Parliament²¹ have introduced internal procedures to ensure that policy and legislative proposals comply with the EU Charter of Fundamental Rights.

In the case of the European Commission, upcoming legislation is tested against the following check-list:²²

- What fundamental rights are affected?
- Are the rights in question absolute rights (which may not be subject to limitations, like human dignity and the ban on torture)?
- What impact do the various policies under consideration have on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?
- Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?
- Would any limitation of fundamental rights be formulated in a clear and predictable manner?
- Would any limitation of fundamental rights:
 - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others?
 - be proportionate to the desired aim?

¹⁸ European Commission (2011a); European Commission (2010a).

¹⁹ Regulation (EC) No. 45/2001, OJ 2001 L 8, p. 1, Article 28 (2).

²⁰ Council of the European Union (2011a).

²¹ A change introduced to the European Parliament's rules of procedure in December 2009. See Rule 36 of the current Rules of Procedure, adopted September 2011, available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20110926+0+DOC+PDF+Vo//EN&language=EN.

²² European Commission (2010b), p. 5.

- preserve the essence of the fundamental rights concerned?

In this framework, the FRA plays a key role. Its objective is to provide the relevant institutions, bodies, offices and agencies of the EU and its Member States when implementing EU law "with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights."²³ The FRA does this by:

- collecting and analysing evidence and data from across EU Member States to inform EU institutions and Member States about the situation of fundamental rights throughout the EU. In particular, it informs on the degree to which rights are in practice being enjoyed by individuals in their daily life. This includes analyses of EU and national legislation, as well as analyses of sociological data and information gathered through large-scale surveys and in-depth interviews;
- providing assistance and expertise based on the evidence gathered. The FRA therefore issues opinions and conclusions to EU institutions and Member States on specific thematic topics. Moreover, the European Parliament, the Council of the European Union or the European Commission can request the agency to deliver opinions on EU legislative proposals "as far as their compatibility with fundamental rights are concerned".²⁴ This specific task contributes to the agency's overall objective to support EU institutions and Member States to fully respect fundamental rights. Such opinions on legislative proposals do not concern the legality of EU acts in the sense of annulment procedures (Article 263 of the TFEU) nor the question whether an EU Member State has failed a treaty obligation in the sense of infringement procedures (Article 258 of the TFEU).²⁵ In 2011, for example, the FRA delivered two such opinions on draft legislation concerning the European Investigation Order and Passenger Name Record (PNR) data;
- engaging in awareness-raising to increase understanding of fundamental rights among the general public, as well as specific target groups. The FRA has close relations with other international organisations working in the field of fundamental rights, in particular with the Council of Europe, to ensure the pooling of expertise and resources where appropriate. The FRA's Fundamental Rights Platform (FRP) and the collaboration with NHRIs enable

²³ Council Regulation (EC) No. 168/2007, Art. 2, p. 4.

²⁴ Council Regulation (EC) No. 168/2007, Consideration No. 13.

²⁵ Council Regulation (EC) No. 168/2007, Art. 4 (2).



the FRA to gather the views and expertise of non-governmental organisations (NGOs) and NHRIs in a structured manner.

Decision makers from both EU institutions and Member States can draw on the work of the FRA when making policies and laws. FRA's substantial body of evidence is also used by other international bodies, such as the Council of Europe, to inform their work.

Remarks on the landscape

The EU layer in the fundamental rights landscape provides EU Member States with a unique opportunity. Unlike rules developed by other international organisations, EU law automatically penetrates the national system, displacing national law that contradicts it. National courts therefore apply EU law; national administrations carry it out. In contrast, treaties, judicial decisions and guidance offered by the Council of Europe and UN bodies do not automatically take effect at the national level in all Member States. The state must instead actively take measures to implement them. The EU has made important use of the unique nature of EU law to strengthen the implementation of fundamental rights, in particular in the areas of data protection and non-discrimination and gender equality. In these two areas, EU Member States were required to create national data protection authorities and equality bodies. Given the potential impact of EU law at national level, the EU must be particularly vigilant in ensuring the compliance of its laws with fundamental rights.

In practice, the fundamental rights landscape at EU level is geared towards ensuring respect for fundamental rights through promotional activities. Moreover, the EU does play an important role in compliance enforcement through the infringement procedure of the CJEU. Even though the European Commission may not take this procedure to its final stages, the mere possibility that it could do so appears to help secure EU Member State compliance with EU law in the field of fundamental rights. Moreover, key elements of the fundamental rights landscape allowing for complaints at national level, namely the equality bodies and data protection authorities, have been introduced or further developed as a result of obligations under EU law. However, it remains a challenge and a shared responsibility for all players at all levels to better inform the Member States' populations where EU law applies and where not and which are, consequently, the right authorities to address in cases of fundamental rights violations.²⁶

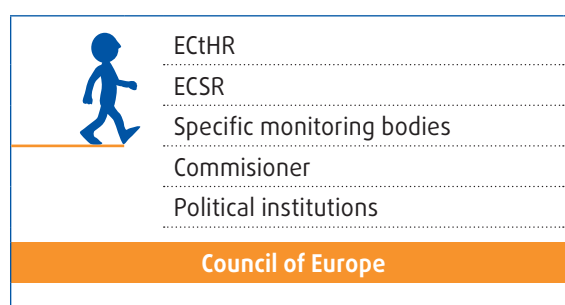
As regards external judicial control, the EU is not yet Party to the ECHR and thus as such not subject to external judicial scrutiny. This gap will be addressed by the EU's accession to the ECHR. The extent of the resulting obligations will, however, depend on the accession agreement as finally ratified.

When it comes to legislation, the impact assessment exercise as provided for within the European Commission looks at the impact on fundamental rights. Such an exercise is a promising step in the right direction. Since such mechanisms are based on expertise within the respective political institution, they can benefit from external opinions of independent expert bodies.

Council of Europe level

All EU Member States are members of the Council of Europe. Over the last 60 years, the Council of Europe has played a significant role in expanding and improving the protection of fundamental rights in Europe, as well as in fostering and safeguarding the principle of the rule of law. These improvements comprise norms linked, for example, with civil and political rights, social rights, rights of persons belonging to minorities as well as action against racism and trafficking in human beings as set out in conventions, recommendations and other legal instruments adopted by the Committee of Ministers. They also include the active supervision of compliance with these norms, carried out by means of several specialised mechanisms. This includes judicial or quasi-judicial bodies with the authority to hear complaints of human rights violations and rule on the conformity of legislation and practice in the States Parties, such as the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR), as well as non-judicial bodies monitoring the implementation of human rights standards in member states, discerning cases of non-compliance with such standards, proposing solutions or addressing recommendations to the member states.

Figure 9: Relevant institutions at the Council of Europe level



Source: FRA, 2011

²⁶ See: <https://e-justice.europa.eu/home.do?action=home> or www.ombudsman.europa.eu/atyourservice/interactiveguide.faces.

Protected rights

States that have ratified the European Convention on Human Rights have undertaken to secure and guarantee to everyone within their jurisdiction, not only their nationals, the fundamental civil and political rights defined in the convention.

The rights and freedoms secured by the convention include, for instance, the right to life (Article 2), the right to a fair trial (Article 6) and to an effective remedy (Article 13), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), and the protection of property. The convention prohibits, in particular, torture and inhuman or degrading treatment or punishment (Article 3), forced labour (Article 4), arbitrary and unlawful detention (Article 5), and discrimination in the enjoyment of the rights and freedoms secured by the convention (Article 14). Other rights and freedoms, such as a general prohibition of discrimination, have been set out in additional protocols.

All EU Member States have ratified the ECHR and its Protocol No. 1, enshrining the rights to property, education and elections, and No. 6, abolishing the death penalty. Ratification of the ECHR has been an explicit precondition for accession to the EU since the 1999 Amsterdam Treaty (see Articles 49 and 2 of the TEU).

The European Social Charter (ESC, adopted in 1961 and revised in 1996), is the natural complement to the ECHR, setting out fundamental rights in the social and economic field. It safeguards rights regarding employment, social and legal protection, housing, health, education, free movement and non-discrimination. All EU Member States are parties either to the 1961 Charter or to the revised Charter.

There are a total of more than 200 treaties created under the Council of Europe's aegis, many of which cover specific fundamental rights issues including data protection,²⁷ torture,²⁸ victims' rights,²⁹ children's rights³⁰ and the protection of minorities.³¹

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- 27 Council of Europe, Convention for the protection of individuals with regard to automatic processing of personal data, CETS No. 108, 1981 and its protocol, CETS No. 181, 2001.
- 28 Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CETS No. 126, 1987.
- 29 Council of Europe, Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, 1983.
- 30 Council of Europe, European Convention on the Exercise of Children's Rights, CETS No. 160, 1996; Council of Europe, Convention on the Protection of Children against sexual exploitation and sexual abuse, CETS No. 201, 2007.
- 31 Council of Europe, Framework Convention for the Protection of National Minorities, CETS No. 157, 1995.

Complaint mechanisms

The ECtHR is responsible for handling applications from individuals, as well as from groups of individuals, companies, NGOs or even States Parties, alleging violations by a State Party of their rights protected by the ECHR. Once the EU itself becomes Party to the ECHR, individuals will be able to make complaints about EU violations of the convention directly to the ECtHR.

In keeping with the principle that States Parties are primarily responsible for the implementation of human rights, cases can only be brought to the court after domestic remedies have been exhausted; in other words, individuals complaining of violations of their rights defined in the convention must first have taken their case through the courts of the country concerned, up through the highest possible level of jurisdiction. This gives the state itself the first opportunity to provide redress for the alleged violation at national level. The applicant must be, personally and directly, a victim of a violation of the convention, and must have suffered a significant disadvantage as a result. Applications must be lodged with the court within six months following the last judicial decision in the case, which will usually be a judgment by the highest court in the country concerned.

The ECtHR judgments on individual cases finding violations are legally binding. The States Parties concerned are obliged to carry them out, by paying the pecuniary compensation awarded and also, where necessary, by adopting other individual measures to restore the applicant's rights, or even by adopting general measures, especially amendments to legislation, to prevent similar violations from occurring in the future. The correct execution of the ECtHR judgments is supervised by the Committee of Ministers of the Council of Europe, which is composed of representatives of its 47 member states.

Perhaps the most significant challenge facing the ECtHR is the volume of complaints it receives, which far outweighs its capacity to issue judgments (see Chapters 8 and 10). This is due in part to the fact that the large majority of cases registered with the ECtHR are generally found to be inadmissible – that is, they do not conform to the basic requirements of a complaint, such as the requirement to exhaust domestic remedies or for the complaint to relate to a right covered by the ECHR. Many cases are also caused by identical problems – that is, the same rule or practice in national law is responsible for generating a large number of cases.

Several steps have been taken towards addressing these issues. Protocol No. 11 to the ECHR, which entered into force in 1998, made the ECtHR a full-time body. In addition, the ECtHR developed a 'pilot-judgment' procedure, applied for the first time in 2004. Under this procedure, where an application reveals a structural



or systemic problem which has given rise or may give rise to similar applications, the ECtHR may decide one or more cases while adjourning other similar applications until the remedial measures required by the pilot judgment – a domestic remedy and a procedure to deal with similar applications – are adopted. Then, in 2010, Protocol No. 14 entered into effect and brought further reforms aiming at guaranteeing the long-term efficiency of the court by optimising the filtering and processing of applications. It allows, among other measures, single judges to deal with the simplest cases, principally admissibility decisions, and for a new admissibility criterion, of ‘significant disadvantage’. The Council of Europe Committee of Ministers was also given the right to bring infringement proceedings against states which refused to comply with judgments (Article 46 (4) ECHR). It is not yet possible to assess fully the effects of the entry into force of Protocol No. 14. By the end of 2011, the ECtHR had over 150,000 applications pending and the reform of the control mechanism remained on the agenda. A high level conference on the future of the European Court of Human Rights was held in Brighton from 18 to 20 April 2012 and agreed on a package of concrete reforms to ensure that the court can be most effective for all 800 million citizens of Council of Europe member states.

The European Committee of Social Rights (ECSR) is an independent quasi-judicial body which interprets the rights enshrined in the ESC and rules on the conformity of legislation and practice in the States Parties with it. The monitoring procedure is twofold: a reporting procedure enables the ECSR to consider reports submitted by the States Parties and to issue conclusions as to their respect of the rights enshrined in the ESC; for the Parties who accepted the additional protocol to the ESC, there is also a collective complaint procedure. By the beginning of 2012, 12 EU Member States had become Parties to the Additional Protocol to the ESC (see Chapter 10 on international obligations).³² Under this protocol, national and international organisations such as trade unions, employers’ organisations and international NGOs may lodge complaints; individuals may not do so directly. The ECSR examines the complaint and, if the latter is declared admissible, it then takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report which is made public. Finally, on the basis of information provided by the State Party concerned as to remedial action taken in response to the decision, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state concerned take specific measures to bring the situation into line with the ESC.

³² Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No. 158, 1995.

Bodies responsible for promoting and protecting fundamental rights

The Council of Europe Commissioner for Human Rights (Commissioner) is an independent, non-judicial institution mandated to promote awareness and respect for human rights in the member states. As a non-judicial institution, the Commissioner’s Office cannot act on individual complaints. The activities of the Commissioner focus on three areas: a system of country visits and dialogue with national authorities and civil society leading to recommendations and dialogue on their implementation; thematic work and awareness-raising activities on specific human rights issues to provide guidance for the improvement of rights implementation; cooperation with other Council of Europe and international human rights bodies, as well as with national human rights structures, NGOs and other relevant stakeholders.

A range of bodies exist within the Council of Europe with responsibility for promoting the implementation of fundamental rights. Some of these bodies are established pursuant to or in view of the monitoring of the implementation of specific Council of Europe conventions by the respective contracting parties, such as:

- European Committee for the Prevention of Torture (CPT);
- Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM);
- Committee of Experts of the European Charter for Regional or Minority Languages (CAHLR);
- Group of Experts on Action Against Trafficking in Human Beings (GRETA);
- Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;
- Group of Experts on Action against Violence against Women and Domestic Violence (as from the entry into force of the Convention on Preventing and Combating Violence Against Women and Domestic Violence).

Others have a more thematic approach and are addressed to all Council of Europe member states (and even beyond) monitoring their compliance and/or providing advice. This category includes, among others:

- the European Commission against Racism and Intolerance (ECRI), which focuses on the areas of discrimination on the grounds of race, ethnicity,

citizenship, colour, religion and language, as well as xenophobia, antisemitism and intolerance;³³

- the European Commission for Democracy through Law (Venice Commission), the Council of Europe's advisory body on constitutional matters;
- the European Commission for the Efficiency of Justice (CEPEJ), which aims at the improvement of the efficiency and functioning of justice in the member states, and the development of the implementation of the instruments adopted by the Council of Europe to this end.

Monitoring is generally carried out by observing the situation in a particular state and then issuing recommendations on how the situation could be improved. The reports and recommendations are directly addressed by the monitoring body to the state concerned or transmitted to the Committee of Ministers, such as in the case of the FCNM, or to a Committee of the Parties to the Convention, such as in the case of GRETA, which may then adopt a recommendation addressed to the state in question. Some of these mechanisms, such as ECRI, may also elaborate general policy recommendations addressed to all member states. As a rule, the monitoring bodies comprise independent experts in the relevant human rights field, appointed by the member states or by the Committee of Ministers on the basis of their moral authority and recognised expertise.

Information is gathered in various ways. Some bodies, such as the CPT, collect first-hand information through country visits to key places, such as detention facilities, meeting with authorities and persons concerned, such as persons deprived of their liberty. Other bodies rely primarily on information provided by the state itself through a reporting procedure and information collected by themselves through on-site visits and contacts with authorities and civil society. Many bodies combine these approaches.

Moreover, the role of the Council of Europe's political organs should be noted. As mentioned, the Committee of Ministers, which is made up of states' representatives, plays a role in overseeing or following up on the implementation of recommendations and guidance issued by most monitoring bodies, and has a key role in the supervision of the execution of judgments, decisions and recommendations by the ECtHR and the ECSR. The Committee of Ministers is also responsible for the adoption of new human rights standards, be they legally binding, such as a convention, or recommendations that elaborate on the content and meaning of states' human rights obligations. Some recommendations may also

foresee 'light' follow-up mechanisms, such as periodical revisions of their implementation by member States.

In addition, the Parliamentary Assembly, composed of representatives of national parliaments, has several committees (such as the committee on Legal Affairs and Human Rights, the committee on Migration, Refugees and Displaced Persons, the Committee on Equality and Non-Discrimination and the Honouring of Obligations and Commitments by member states of the Council of Europe) which examine particular human rights issues. This often includes gathering information on particular human rights themes through country visits, secondary research, and the consultation of experts or NGOs. A report based on this information is then compiled and may then lead to the adoption of a resolution or recommendation. Although such instruments have a mainly political value and are not legally binding, they have often provided the foundation for the launch of new standard-setting activities in the human rights field by the Committee of Ministers.

Remarks on the landscape

The Council of Europe uses a rich variety of bodies to protect and promote the implementation of fundamental rights. These include judicial or quasi-judicial procedures that deal with complaints alleging rights violations, as well as a range of bodies that monitor the implementation of rights and issue guidance to states on how to improve implementation. To become more effective on the ground, it will be helpful if the Council of Europe and the EU can increase their inter-operationality. When EU Member States apply EU law, they remain responsible for implementing human rights under Council of Europe treaties. The ECtHR has, for instance, found EU Member States in violation of the ECHR for failing to implement it properly when enforcing EU rules related to asylum.³⁴ Similarly, the ECSR has found an EU Member State in violation of the ESC while implementing EU rules related to freedom of movement.³⁵

Against this background, it is important to make positive use of the EU layer of governance to ensure that all branches of EU government – judiciary, legislature and administration – can contribute to the flowering of the Council of Europe standards, and to ensure full compliance with EU legal instruments that affect the fundamental rights of EU citizens. Already the 'Guidelines on the relations between the Council of Europe and the European Union' issued by the Council of Europe Committee of Ministers in 2005 referred to the need to further develop legal cooperation and complementarity between legal texts elaborated by the EU and the Council of Europe.³⁶

³³ Council of Europe, Committee of Ministers (2002); Council of Europe, ECRI (2009).

³⁴ ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011.

³⁵ Council of Europe, European Committee on Social Rights (2011).

³⁶ Council of Europe, Committee of Ministers (2005).



This principle was then expressed in the 23 May 2007 Memorandum of Understanding between the Council of Europe and the EU, which constitutes the legal and political reference for cooperation. Under this memorandum, the Council of Europe is regarded as the ‘Europe-wide reference source for human rights’. The EU is called upon, among other matters, to cite Council of Europe norms as a reference in its documents, to take into account the decisions and conclusions of the Council of Europe monitoring structures and to ensure coherence of its law with the relevant Council of Europe conventions. The memorandum also requires both the EU and the Council of Europe, when preparing new initiatives in the field of human rights, to draw on their respective expertise as appropriate through consultations. The 2005 document already identified the FRA, though not yet established, as an institution through which to further increase cooperation, coherence and complementarity between the fundamental rights work of the Council of Europe and the EU.

The Council of Europe’s standards and procedures are addressed mainly to states. The EU’s competencies allow for accession only to selected Council of Europe conventions, allowing its full participation only in those instruments’ monitoring mechanisms, and the EU has not acceded to all these instruments. Thus, there remains a need for EU-specific procedures and institutions as already described. Moreover, the large array of mechanisms available under the Council of Europe system cannot hide the fact that not all the Council of Europe instruments bind all 27 EU Member States. Those instruments that are binding for the EU27 do not provide a comparative assessment across all participating states at one single moment – rather, groups of states are monitored at various moments in time, depending on the respective monitoring cycles. Finally, the monitoring procedures established under the Council of Europe rarely provide for the collection of primary data.

United Nations level

The United Nations (UN) Universal Declaration of Human Rights (UDHR), adopted in 1948, first elaborated the concept of ‘human rights’ in an international document. Although it was a declaration and not a legally binding treaty, the UDHR has served as starting point for a range of human rights treaties. These include general treaties covering a range of civil, political, economic and social rights as well as treaties designed to deal with specific issues, such as torture, or the position of particularly vulnerable groups, such as racial or ethnic minorities, women, children and persons with disabilities. The creation of human rights treaties remains an on-going process, with the CRPD and ICPED among the latest to be adopted. All EU Member States are members of the UN and parties to the majority of UN human rights treaties.

To promote the implementation of human rights, a variety of bodies with different types of powers have been created at the UN level. Each UN human rights treaty includes a provision for the creation of a committee of independent experts, referred to as a ‘treaty body’. Treaty bodies are often given power to act in a similar way as a court, such as by deciding on complaints made by individual victims about violations. Although a state may be Party to a treaty, states have the option to consent to the corresponding complaint procedure. These bodies also review the performance of states through a reporting procedure, where, usually every three to five years, a state is expected to report on what action it has undertaken to implement the rights under the relevant treaty. On the basis of this procedure, the treaty body then adopts ‘concluding observations’ that offer guidance and advice to the state on where improvement is needed. The treaty bodies also offer more general guidance to states on the meaning of the rights in the treaties.³⁷

States have the option to become Party to a UN human rights treaty, but they are not obligated to do so just because they are a UN member. All states that have joined the UN do undergo, however, some form of supervision from the UN Human Rights Council, under the so-called ‘Universal Periodic Review’ (UPR) procedure. Under this review, all UN Member States are examined by the Council, which then issues recommendations on how to improve the implementation of human rights at the national level. In 2011, nine EU Member States participated in the UPR (see Chapter 10).

Figure 10: Relevant institutions at the UN level



Source: FRA, 2011

Protected rights

Since the adoption of the UDHR in 1948, the UN Member States have cooperated on the creation of a range of human rights treaties. There is no obligation on states to become Party to one or more of these treaties. Six core treaties have been ratified by all 27 EU Member States and by the acceding country Croatia (for the status of

³⁷ See Chapter 10 of this *Annual Report on Fundamental rights challenges and developments in 2011*, outlining to which treaties EU Member States are Party and whether they have been monitored in 2011.

ratification of UN conventions see Chapter 10). These six treaties cover the following areas:

- protection against racial discrimination (International Covenant on the Elimination of Racial Discrimination, ICERD, 1965);
- economic, social and cultural rights (International Covenant on Economic Social and Cultural Rights, ICESCR, 1966);
- civil and political rights (International Covenant on Civil and Political Rights, ICCPR, 1966);
- elimination of discrimination against women (Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, 1979);
- protection against torture (CAT, 1984);
- protection of children's rights (CRC, 1989).

In addition to the obligations that flow from becoming Party to these treaties, a state also falls under the obligation to implement fundamental rights standards simply through its membership in the UN. Under Articles 55 and 56 of the UN Charter, all members "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [...] universal respect for, and observance of, human rights". Over the past 60 years, the UN has developed a practice of monitoring the implementation of rights through the UN's specialised human rights body, the Human Rights Council, which is composed of representatives from 47 states. These mechanisms apply to all states and exist alongside the monitoring procedures that exist under the separate human rights treaties. When considering state compliance with the UN Charter and human rights, the Human Rights Council will apply the UDHR, as well as any other human rights treaty that may be relevant.

While all EU Member States are parties to various UN treaties, the EU itself is only Party to the CRPD. This is primarily due to the fact that international human rights treaties have been directed towards states as states have the legal authority and administrative capacity to fulfil the obligations that the treaties require. The evolution of the EU and its gradual expansion of authority over different policy areas have also raised the question of whether the EU itself should become Party to international treaties. In regard to the CRPD, it was recognised that the EU holds a range of powers that can affect the rights of persons with disabilities. Therefore, this treaty specifically has a provision allowing for the EU to become Party to it.

Importantly, UN treaties tend to cover more rights than those listed in national constitutions or in the Charter of Fundamental Rights of the European Union. The CRC, for

example, contains a list of around 40 specific rights of the child; the EU Charter, in contrast, contains one general provision. Similarly, some rights are not contained in the EU Charter, such as the rights of minorities, which can be found in the ICCPR (Article 27) or the right to food described in the ICESCR (Article 11). While the right to health and housing are featured in the EU Charter of Fundamental Rights, they are phrased in more limited terms than in the ICESCR (Articles 11 and 12). At the same time, the EU Charter contains an express right to data protection (Article 8), which does not appear in UN treaties. Data protection is, however, generally considered to form an integral part of the right to privacy, which is protected by the ICCPR (Article 17). Another example where a UN obligation in a sense goes further than EU law relates to the notion of equality. International law accepts that the obligation to treat everyone equally might *require* positive legal measures of protection. EU law is more limited in this respect: so far, it only establishes that the principle of equal treatment *shall not prevent* any EU Member State from maintaining or adopting measures providing for specific advantages to reach a specific gender balance, or to prevent or compensate for disadvantages linked to racial or ethnic origin.

Complaint mechanisms

The UN Charter imposes human rights obligations on states, and all states in the world are Party to at least one human rights treaty. Due to this situation, there are, broadly speaking, two sets of bodies responsible for monitoring states: those established under the UN Charter and those established under the various UN human rights treaties.

Each of the core UN human rights treaties mentioned provides for a monitoring body composed of independent experts, referred to as 'treaty bodies'. Most although not all of these bodies may receive complaints from individuals alleging a violation of their rights (see Table 1). However, to activate this function, a state must give its consent. To lodge a complaint, an individual must satisfy 'admissibility' requirements similar to those imposed by the ECtHR, such as the requirement to exhaust local remedies. When a treaty body issues its decision on a complaint, it will call for a specific course of action, such as the release of an individual from prison where this is found to be unlawful; it may also instruct payment of compensation. The decisions adopted are not legally binding. Nevertheless, they can carry great weight.

Under the UN Charter, opportunities for individuals to make complaints are more limited. The Human Rights Council has established 'special procedures', comprised of an independent expert or a group of experts with a mandate to investigate human rights in a particular state or, more commonly, to examine a particular human rights theme, such as the right to education or



Table 1: UN treaty bodies – existence and acceptance of individual complaint procedures and number of cases

	ICERD	ICESCR	ICCPR	CEDAW	CAT	CRC	ICRMW	CRPD	ICPED
Year (into force)	1965 (1969)	1966 (1976)	1966 (1976)	1979 (1981)	1984 (1987)	1989 (1990)	1990 (2003)	2006 (2008)	2006 (2010)
Total number of state parties (EU Member States and Croatia)	175 (28)	160 (28)	167 (28)	187 (28)	150 (28)	193 (28)	45 (0)	109 (20)	30 (5)
Individual complaints (provision)	Yes (Article 14)	No (OP 2008 (not yet in force))	Yes (OP (1976))	Yes (OP (1999 (2000))	Yes (Article 22)	No (OP 2011 (not yet in force))	No (Article 77 (not yet in force))	Yes (OP (2006 (2008))	Yes (Article 31)
Total number of states accepted individual complaints (EU Member States and Croatia)	54 (23)	7 (1)	114 (27)	104 (25)	66 (23)	0 (0)	2 (0)	65 (17)	13 (4)
Total number of communications/cases where a violation was concluded (violations concluded for EU Member States and Croatia)	49 / 12 (9)	n/a	2133 / 745 (104)	39 / 9 (5)	484 / 67 (30)	n/a	n/a	0 (0)	0 (0)

Notes: Information on cases since inception of mechanisms until March 2012. For the acronyms, see bullet list at beginning of section on 'Protected rights' or Chapter 10. Treaties in which individual complaint procedures are provided are in green, yellow squares represent those which do not have individual complaint procedures. For the full names of the conventions see the list of acronyms at the end of this focus.

Source: FRA, 2012; based on data provided by the Office of the High Commissioner for Human Rights (OHCHR)

torture. An individual may contact such a specialised body with his or her complaint against a state if it falls within the mandate of one of these 'special procedures'. With a few exceptions, the relevant expert may then take up this case with the state in question. However, this procedure is usually limited to reminding the state of its international obligations and requesting further information on the case. There is nevertheless evidence that this procedure does result in improvements in particular cases, even if the extent of the success of this largely diplomatic exercise is unclear.

An additional complaint mechanism, the 'former 1503-procedure', accepts complaints from any individual in any state, if the complaint meets certain basic criteria. The complaints must concern "consistent patterns of gross and reliably attested violations".

Bodies responsible for promoting fundamental rights

In addition to their complaint function, the UN treaty bodies exercise an important two-pronged promotional function through 'state reporting' and 'general comments'. Under 'state reporting', states are required to periodically report to each treaty body on the status of rights implementation and what the state has done to implement the relevant treaty. Following a dialogue with state representatives, the relevant treaty body then issues its concluding observations and comments,

and explains where improvements need to be made. In its 'general comments', each treaty body offers its opinion on what is required in order to fully implement a particular right. The Committee against Torture also features a Subcommittee on Prevention of Torture, mandated to visit detention facilities. The Optional Protocol to the Convention on Torture (OP-CAT) allows for such visits and also requires states to set up 'national preventive mechanisms' (see Chapter 8), effectively devolving monitoring according to international standards to the national level. While the views of the treaty bodies are not legally binding, they do offer a rich source of guidance for legislators and policy makers. One limitation to their potential impact is, however, the extent to which their findings are disseminated among national ministries and inform national policy making.

Parallel to the monitoring undertaken by the treaty bodies, the Human Rights Council conducts a UPR review, as mentioned earlier, on the human rights implementation of each UN member every four years. The Human Rights Council examines a state-submitted report, along with a report compiled by the OHCHR (including information about the human rights situation of that state gathered from the treaty bodies and the 'special procedures'), and a report, drafted by OHCHR based on information received from 'other relevant stakeholders' including NGOs, NHRIs, human rights defenders, academic institutions and research institutes, regional organisations and civil society representatives. The Council then issues

recommendations for improvement which the state basically is free to accept or reject. Generally, states accept a majority of the recommendations.

The 'special procedures' operating under the Human Rights Council, aside from dealing with individual complaints, also and predominantly engage in monitoring work, which can be based on country visits as well as other information, such as reports from NGOs. Recommendations on how implementation can be improved are made on the basis of these reports. The special procedures may result in texts that later can be used as political guidance or legal standards on particular issues. Developing legal standards is the main task of the Advisory Committee of the Human Rights Council, which is a body of independent experts.

Remarks on the landscape

The UN-level mechanisms for promoting the implementation of fundamental rights at the national level could be considered as weaker than those in place at the national, EU or Council of Europe level. This is primarily related to the fact that the UN has limited enforcement powers and the decisions of its mechanisms are generally not legally binding, although UN treaties themselves are legally binding. The combination of weakness in terms of implementation powers but richness in terms of substantial standards suggests that there is a potential for increased inter-operationality between the UN and the EU levels of the overall fundamental rights landscape.

Similar to Council of Europe bodies, UN mechanisms do not directly monitor or engage with the EU but rather with individual Member States. The one exception to this is the CRPD, to which the EU is Party. This does not mean, however, that individual complaints handled by the treaty bodies, or guidance issued by various bodies, are not to be taken into account by the EU's bodies and institutions. While the CJEU relies less on UN documents than on Council of Europe materials, the political institutions have increasingly looked to guidance issued by UN bodies when formulating law and policy. Perhaps the best examples of where the two systems meet, apart from the area of disability,³⁸ are rights of the child and in the area of asylum. In these areas, UN standards are particularly detailed. As regards asylum, the EU has considerable powers and frequently consults with the UN High Commissioner for Refugees (UNHCR). More generally, the European Commission has access to UN standards and guidance when interpreting the EU Charter of Fundamental Rights to ensure the compatibility of legislative and policy proposals. The FRA also refers to these UN documents in its collection and analysis of data.

³⁸ European Commission (2010a).

A joined-up approach to fundamental rights

Challenges

A wide variety of institutions protecting fundamental rights exists within the overall fundamental rights landscape. Some institutions protect fundamental rights in individual cases, such as court procedures and quasi-judicial mechanisms; others deal with the overall fundamental rights system using mechanisms, such as impact assessments, mainstreaming and monitoring of rights, guidance and evidence-based advice. These mechanisms have promotional qualities, which support states in implementing fundamental rights in their policies and laws, thereby preventing future violations. One of the challenges for the European fundamental rights landscape is to guarantee that all levels of the system are efficient, and use a variety of mechanisms to protect and promote rights and inform each other (horizontal dimension).

Another challenge is how to foster interaction among the different levels of the fundamental rights landscape (vertical dimension). Fundamental rights can only be efficiently protected if the levels are well connected. Fundamental rights must be protected where they matter, that is, in the daily lives of individuals. The implementation of rights is carried out through the courts and administrations of a state at the national and local levels. Therefore, the process of translating treaties, judgments and guidance from the international level to the national and local levels is key to improving rights implementation in practice. At the same time, it is essential that the situation on the ground informs the development of standards and policies at all governance levels.

Role of the FRA

The FRA has been established as an independent expert body. In a sense, the FRA is to the EU what the NHRIs are to the Member States: it is a Human Rights Institution for the EU. In fact, the agency's founding regulation refers to "the principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the Paris Principles)".³⁹ Its role is to advise EU institutions and Member States on fundamental rights-related issues when implementing EU law. This function allows the FRA to offer added value to the EU's institutional and political reality.

Looking back at the past five years of FRA's existence, from 2007 to 2012, the agency's approach can be described as follows, namely its:

³⁹ Council Regulation No. 168/2007, Consideration No. 20.



- EU-wide socio-legal research focusing on the situation on the ground;
- focus on rights holders (individuals), as opposed to duty bearers (states);
- outreach to civil society and to all governance levels;
- role as an independent expert body within the EU;
- contribution to a joined-up approach to the protection of fundamental rights in the EU.

Raising rights awareness and providing assistance through pan-EU socio-legal research

A lack of rights awareness remains at national level. At the same time, the EU sometimes faces criticism at the international level due to its alleged focus on human rights beyond its borders, while it appears to not take them seriously enough domestically. One way of addressing these shortcomings is to increase awareness about the fundamental rights situation within the EU. Consequently, there is a need for providing data and information from a comparative EU-wide perspective. However, due to differences in the way data are collected, existing secondary data are rarely comparable among EU Member States. For example, different definitions in studies of gender-based violence lead to some surveys covering violence against women focusing only on women of child-bearing age while others look at domestic violence only. To ensure better comparability, the FRA collects its own primary data. It conducts field research through quantitative and/or qualitative research. FRA experts design and draft surveys, which are applied in a variety of ways – including through face-to-face interviews or online questionnaires.

This type of research helps to address the lack of comparable and reliable information and data. In addition, FRA complements social research with legal research, thereby looking at legislation in the context of people living in the EU. The agency collects information about the protection of fundamental rights in the legal framework of the EU Member States through country-level experts who draw information from sources including legislative instruments, court judgments and academic commentary. This combined socio-legal approach is enriched with the identification of ‘promising practices’ within the EU that show promise in their adherence, promotion and respect for fundamental rights. This approach also identifies areas where work remains to be done in order for internationally accepted standards to be met. Proceeding in this way allows for an increasing exchange of know-how across the EU.

Looking at experiences and perceptions of rights holders instead of focusing on duty bearers

Within the European fundamental rights landscape, monitoring efforts focus on the performance of states. Even if some instruments include the possibility to also consult civil society representatives of the relevant state, traditional monitoring focuses on the legislation, policies or case law of the duty bearers under the respective convention, namely the states. In addition, it is important to assess how fundamental rights obligations change the situation on the ground, that is, in the daily life of those entitled to have their fundamental rights protected by the state, namely the rights holders. In fact, by applying the ‘structure – process – outcome’ approach to indicators as developed by the UN,⁴⁰ the need for looking at the perceptions and experiences of rights holders becomes obvious – that is, to see what the actual outcome is on the ground as opposed to on paper. At national level, various surveys and participatory studies are carried out by research institutions, NHRIs and governmental institutions. Also needed are comparable data allowing comparisons across the EU. Whereas the agency is not a monitoring body, it offers extensive data collection.

Building on its experience of delivering one of the most encompassing surveys done so far in the area of discrimination of persons belonging to minorities – the European Union Minorities and Discrimination Survey (EU-MIDIS) – the FRA is currently working on surveys in other fields, including a survey on violence against women and one on experiences of discrimination, hate crime and victimisation of self-identified lesbian, gay, bisexual and/or transgender persons (LGBT). Another set of EU-wide surveys will be delivered on National Roma Integration Strategies. Up to 2020, the FRA is supposed to run a regular Roma survey to measure progress on the ground, working together with relevant bodies to collect data on the situation of Roma with respect to access to employment, education, healthcare and housing. The agency will offer primary statistical data derived from surveying a large random sample of the target population, which will be as representative as possible. This method allows the collection of data that are comparable since the same methodology is applied in every EU Member State simultaneously.

Involving civil society across all fundamental rights topics

The degree to which civil society is involved in programming, policymaking and the general debate on fundamental rights protection differs from EU Member State to EU Member State. Civil society actors active in the field of fundamental rights can engage in FRA’s

⁴⁰ UN (2008), p. 6.

Fundamental Rights Platform (FRP).⁴¹ This platform brings together over 350 civil society organisations. Its uniqueness lies in the direct partnership between civil society and an EU agency, as well as in the cross-cutting approach to the different fundamental rights issues, creating dialogue between the different sectors. FRP participants can contribute to the work of the FRA.⁴² The FRP also gives the FRA direct grass-roots input, which is crucial to addressing relevant issues and providing evidence-based advice.

FRP participants meet once a year at the FRP meeting, which allows direct interaction between the FRA and civil society organisations. Each annual meeting highlights several specific fundamental rights themes and provides a space for the exchange of ideas and promising practice, and networking. In 2011, the FRP annual meeting focused on access to justice and participation of civil society in the implementation of the UN CRPD. The use of engaging and fully participatory open space discussions between FRA project managers and civil society representatives created a rich information flow on a range of FRA work areas – ideas were exchanged and common concerns shared. Such a direct involvement of, and interaction with civil society, by an international player is unique and might serve as an example for future development in this direction.⁴³

Providing evidence-based expert advice

The three EU institutions functioning as co-legislators – the European Commission, the European Parliament and the Council of the European Union – all have recently stepped up their efforts to ensure that potential conflicts and tension with fundamental rights are detected and avoided as early as possible in the policy cycle. Internal assessments of this kind benefit from complementary input delivered by independent and specialised institutions, such as the FRA. The European Council⁴⁴ and the European Parliament⁴⁵ explicitly recognised this benefit.

In 2011, at the request of the European Parliament the FRA provided an opinion on the draft Directive regarding the European Investigation Order (EIO) in criminal matters. The draft directive, aimed at mutual recognition of warrants for both existing and new evidence, is intended to replace an existing ‘fragmented regime’ with a more comprehensive legislative instrument. The agency’s analysis identified the applicable fundamental rights standards by extensively drawing on the case law of the ECtHR and the CJEU as well as the EU Charter of

Fundamental Rights. Based on this, it dedicated special attention to the review by the state executing an EIO and argued for the introduction of a qualified fundamental rights-based refusal ground. FRA’s analysis also took practical concerns into consideration, in particular their possible impact on the overall effectiveness of cooperation in cross-border investigation.

Moreover, in 2011 the FRA delivered – again at the request of the European Parliament – an opinion on the proposed Directive on the use of Passenger Name Record (PNR) data. This opinion took earlier opinions of the EDPS and the Article 29 Working Group on the proposed directive as a point of departure. FRA then designed its 2011 opinion to complement these previous opinions. The added value of an expert institution is to raise fundamental rights concerns from a broader fundamental rights perspective. In the case of the PNR directive, fundamental rights concerns included the prohibition of discrimination, the requirements of necessity and proportionality for compliance with fundamental rights, effective supervision to ensure the rights of passengers and the need for data collection.

The FRA further offers expert advice to EU Member States. Member States may ask the FRA to supply information or data that would assist them in improving the respect of fundamental rights in areas falling within the EU’s competence. The advice can take the form of access to specific data and evidence collected by the agency in its research or by facilitating the exchange of information among EU Member States. By acting as facilitator, the FRA brings together relevant players from the different Member States to help the spread of promising practices and experiences to improve rights implementation nationally and locally. For instance, in 2011 at the request of the European Commission the FRA launched a project aiming at the identification of promising practices in the field of victim support services. Promising practices allow for an exchange of know-how. This is also reflected in the European Commission’s *Roadmap for strengthening the rights and protection of victims*, which makes provision for a future recommendation to EU Member States based on existing promising practices among the Member States.⁴⁶

In addition, FRA’s evidence-based advice can serve EU Member States through tailor-made tools for specific stakeholders. These include training and other forms of guidance to address the challenges identified through the agency’s work. For example, in 2011 the FRA published a *Handbook on European non-discrimination law*, which was produced together with the ECtHR in Strasbourg. It guides legal practitioners through discrimination law. Other examples include: training materials and curricula, such as handbooks on human rights-based

41 Council Regulation (EC) No. 168/2007, Art. 10.

42 The results from the 2011 consultations are available on the FRA website and e-FRP.

43 See, for example, Art. 51 (‘Consultative forum’) of Regulation (EU) 439/2010, OJ 2010 L 132, pp. 1-28.

44 European Council (2010), p. 8.

45 European Parliament (2009), para. 38.

46 Council of the European Union (2011b), p. 1.



policing, manuals for legal practitioners; training sessions on fundamental rights or diversity training for border guards or journalists; fundamental rights indicators on Roma inclusion and the rights of the child; and guidelines or codes of conduct.

Contributing to joined-up governance in the area of fundamental rights protection

Already back in 2005, the heads of states and government of the Member States of the Council of Europe agreed in Warsaw on an Action Plan to foster cooperation with other international (UN) and European organisations and institutions.⁴⁷ The Action Plan calls for taking the achievements and future standard-setting work of the other institutions into account. For example, it identified that FRA – the creation of which was at that point of time still under negotiation – has “an opportunity to further increase cooperation with the Council of Europe, and contribute to greater coherence and enhanced complementarity”.⁴⁸

The FRA is raising awareness about UN and Council of Europe standards across its work. In its annual report, for example, an entire chapter is dedicated to the international human rights obligations of the EU and its Member States and acceding country Croatia (see Chapter 10). With this integrated approach, the FRA interacts more visibly between different governance layers. The agency is itself an example of a solid link between the national and the European level, since its steering body, the management board, is composed of independent experts who ideally head an NHRI or hold at least ‘high-level responsibilities’ in a national fundamental rights body. Other examples of such institutional links between the different levels – national, EU, Council of Europe – are the OP-CAT or the UN CRPD, both of which show that monitoring mechanisms increasingly build on direct links between the national and international levels. Examples such as these illustrate a development, which indeed justifies reference to the overarching fundamental rights landscape.

The FRA’s integrative approach is not limited to the UN and the Council of Europe but also includes the regional and local governance levels. For example, the regular annual dialogue that the FRA holds with the Committee of the Regions reflects this cross-cutting approach. The same holds true for the agency’s ‘joined-up governance’ project seeking to pool knowledge and experience on effective multi-level cooperation in implementing fundamental rights-related policies and measures across various government levels.⁴⁹ Such a joined-up approach

to the protection of fundamental rights can contribute to making the overall landscape more efficient. Only permanent interaction of all the layers and players in the fundamental rights landscape will transform laws on paper into a living reality for all.

Outlook

This focus section of the annual report looked at the fundamental rights landscape within the EU. It explored fundamental rights and how they are respected, protected and promoted at three levels: national (states), European (EU and Council of Europe) and international (UN). It described the rights, bodies and procedures involved at the various layers of governance.

The section shows – without aiming to be exhaustive – that Europe’s reality is indeed a complex one, the inter-linking layers of fundamental rights protection require a joined-up approach to be efficient. Enhanced interaction and coordination provide potential for further improvements to the overall fundamental rights landscape.

Shortcomings persist, however. Rights awareness is lacking at all layers of governance. People do not know enough about their fundamental rights or about the relevant bodies and procedures that can assist them.

This lack of awareness underscores the need for complaint procedures and courts – crucial pillars of every system – to be complemented by additional mechanisms and policies. Rights must be actively promoted at all layers of governance. To do so, public authorities need evidence-based advice provided by independent expert institutions. At EU level there is also a need for relevant, objective and reliable data which are comparable across the different realities of all EU Member States. This requires data collection mechanisms different from traditional monitoring procedures.

In this context, the FRA – with its specific mandate, working procedures, expertise and experience – contributes to the EU’s fundamental rights landscape.

The following nine chapters of the annual report look at the fundamental rights situation in 2011 in the following thematic areas: asylum, immigration and integration; border control and visa policy; information society and data protection; rights of the child and protection of children; equality and non-discrimination; racism and ethnic discrimination; participation of EU citizens in the EU’s democratic functioning; access to efficient and independent justice; and the rights of victims of crime. An analysis of respect for fundamental rights in these areas points to the urgent need for an efficient joined-up fundamental rights landscape in the EU and beyond.

47 Council of Europe, Committee of Ministers (2005), Part IV.

48 Council of Europe, Committee of Ministers (2005), Appendix I (8).

49 Committee of the Regions and FRA (2011).

Acronyms

CAHLR	Committee of Experts of the European Charter for Regional or Minority Languages
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT OP	Inhuman or Degrading Treatment or Punishment Optional Protocol to the CAT
CCVVC	Convention on the Compensation of Victims of Violent Crimes
CATHB	Convention on Action against Trafficking in Human Beings
CAOD	Convention on Access to Official Documents
CDDH	Steering Committee for Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEPEJ	European Commission for the Efficiency of Justice
CPIPPD	Convention for the Protection of Individuals with regard to automatic Processing of Personal Data.
CPIPPD Additional Protocol	Additional Protocol to the CPIPPD, on supervisory authorities and transborder data flows
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSEC	Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
CVW	Convention on Preventing and Combating Violence against Women and Domestic Violence ('Istanbul Convention')
ECECR	European Convention on the Exercise of Children's Rights
ECHR (as amended by Protocol 14)	European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
ESC (1996)	European Social Charter (1996 revised)
CCVVC	European Convention on the Compensation of Victims of Violent Crimes
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECRML	European Charter for Regional or Minority Languages
ECtHR	European Court of Human Rights
FCNM	Framework Convention for the Protection of National Minorities
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
Oviedo Convention	Convention on Human Rights and Biomedicine
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Venice Commission	European Commission for Democracy through Law



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Asylum, immigration and integration

Border control and visa policy

Information society and data protection



Freedom Equity

UN & CoE

21 January – European Court of Human Rights Grand Chamber delivers its judgment on transfers to Greece under the Dublin II Regulation in the *M.S.S. v. Belgium and Greece* case

January

February

March

April

May

June

16 July – International Labour Organization adopts a convention and a recommendation on domestic workers

July

August

September

October

November

December

EU

January

23 February – European Commission presents an evaluation of existing and pending EU readmission agreements

February

8 March – Court of Justice of the European Union finds in the *Zambrano* case that Article 20 of the Treaty on the Functioning of the European Union (TFEU) implies a right to stay for irregular migrant parents of a child who holds EU citizenship

March

28 April – Court of Justice of the European Union finds in the *El Dridi* judgment that persons in return procedures may not be subject to criminal imprisonment for their unlawful stay

April

4 May – European Commission adopts a Communication on migration

5 May – Court of Justice of the European Union, building on the *Zambrano* judgment, finds in the *McCarthy* case that an EU citizen is not deprived of her rights by the refusal of a residency permit to her third-country national spouse

11 May – Long Term Residents Directive is revised and its application extended to beneficiaries of international protection

May

1 June – European Commission presents amended proposals for the revision of the Reception Conditions and Asylum Procedures Directives

19 June – European Asylum Support Office (EASO) becomes operational

20 June – European Commission and Eurostat publish the Zaragoza pilot study on indicators of immigrant integration

June

20 July – European Commission presents the European Agenda for the Integration of Third-Country Nationals

28 July – Court of Justice of the European Union delivers a judgment in the *Samba Diouf* case on the absence of a remedy in the context of an accelerated asylum procedure

July

August / September / October

15 November – Court of Justice of the European Union clarifies *Zambrano* in *Dereci*, introducing a strict test for family reunification under Article 20 of the TFEU

15 November – European Commission publishes Green Paper on the right to family reunification of third-country nationals living in the European Union

November

2 December – European Commission publishes a Communication on enhanced intra-EU solidarity in the field of asylum

7 December – Court of Justice of the European Union clarifies in the *Achughbabian* case when criminal imprisonment for persons in return procedures is exceptionally allowed

13 December – The European Parliament and the Council of the European Union adopt a directive on a single work and residence permit and common rights for third-country workers

13 December – The European Parliament and the Council of the European Union adopt a revised Qualification Directive

21 December – Court of Justice of the European Union clarifies in *N.S. and others* the need to respect fundamental rights in the context of Dublin II transfers

December

1

Asylum, immigration and integration



2011 witnessed concerns about certain transfers of asylum seekers under the Dublin II Regulation which were articulated before the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). Various EU Member States carried out reforms in the area of asylum procedures. While there was increased recognition at European Union (EU) level of the special situation of asylum-seeking children, evidence remains of general shortcomings in asylum procedures, including the lack of efficient remedies. In the context of return proceedings, a large number of EU Member States had not yet established efficient and independent monitoring systems by the end of 2011. Concerning legally resident migrants, a new European agenda for the integration of third-country nationals was adopted. Whereas integration is defined as a shared responsibility requiring engagement from both the receiving society and migrants, evidence from 2011 shows that shortcomings persist in various areas, including healthcare, education, employment and housing.

This chapter covers 2011 developments in EU and Member State policies and practices in the areas of asylum, immigration and integration of migrants. It should be read together with Chapter 2 on border control and visa policy.

1.1. Asylum

In 2011, 301,000 asylum applications were lodged in 27 EU Member States. Compared with the 2010 figure, this corresponds to an increase of 42,000 applications. Eurostat estimates – on the basis of the share of repeat applicants available for 21 EU Member States – that around 90 % of these were new applicants and around 10 % were repeat applicants. The main countries of citizenship from which the applicants came were: Afghanistan (28,000 or 9 % of the total number of applicants), Russia (18,200 or 6 %), Pakistan (15,700 or 5 %), Iraq (15,200 or 5 %) and Serbia (13,900 or 5 %). The highest number of applications was lodged in France (56,300 applications), followed by Germany (53,300), Italy (34,100), Belgium (31,900), Sweden (29,700), the United Kingdom (26,400), the Netherlands (14,600), Austria (14,400), Greece (9,300) and

Key developments in the area of asylum, immigration and integration:

- the CJEU delivers important judgments in the context of family reunification, criminal imprisonment of migrants in return proceedings, right to an effective remedy in the context of an accelerated asylum procedure and the transfers of asylum seekers under the Dublin II Regulation;
- the ECtHR Grand Chamber delivers its judgment in the case of *M.S.S. v. Belgium and Greece* on the application of the Dublin II Regulation;
- the application of the Long-Term Residents Directive is extended to refugees and beneficiaries of subsidiary protection;
- detention remains the most frequent tool used to prevent migrants from absconding, although most EU Member States have introduced alternatives to detention in their legislation;
- the rights of migrants in an irregular situation win greater visibility, for instance the International Labour Organization (ILO) adopts a convention and a recommendation on domestic workers, including those in an irregular situation;
- the European Commission presents new plans for EU funding in the area of home affairs aiming at more effective use of funds for emergencies at borders;
- the European Commission issues the European Agenda for the integration of third-country nationals contributing to the debate on how to understand and better support integration.

Poland (6,900). These 10 EU Member States accounted for more than 90 % of applicants registered in the EU 27 in 2011. When compared with the population of each Member State, the highest rates of applicants registered were recorded in Malta (4,500 applications per million inhabitants), Luxembourg (4,200), Sweden (3,200), Belgium (2,900) and Cyprus (2,200).¹

Population movements from North Africa to Europe, particularly following the Arab spring, and the ECtHR judgment in the case of *M.S.S. v. Belgium and Greece* on Dublin II regulation transfers to Greece fueled debates on EU asylum policies in 2011. Negotiations on the EU asylum package continued. The amending of four asylum instruments, however, was still pending at the end of 2011, leaving only 12 months to reach agreement on a Common European Asylum System (CEAS) by the end-2012 deadline stipulated in The Hague and the Stockholm Programmes.

In this chapter, the FRA will provide highlights on four topics: Dublin II, or Council Regulation (EC) 343/2003; arrivals from North Africa; the asylum-package negotiations; and the fact that the European Asylum Support Office (EASO) became fully operational. This focus will be complementary to the EASO's Annual Report, which gives a detailed overview of asylum-related issues at EU level.²

Reflecting the importance of the ECtHR judgment in the *M.S.S.* case as well as the CJEU's ruling on Dublin II, the chapter will also examine asylum procedures and, more specifically, the right to an effective remedy against a negative asylum decision, across the EU Member States. It also touches upon controversial provisions of the recast Asylum Procedures Directive and Dublin II Regulation relating to effective remedies.³

1.1.1. Key developments

In January 2011, the ECtHR Grand Chamber delivered its judgment in the case of *M.S.S. v. Belgium and Greece*. The case concerned the return by **Belgium** of an Afghan asylum seeker to **Greece** in application of the Dublin II Regulation. The ECtHR found both **Belgium** and **Greece** in violation of Article 3, which prohibits degrading or inhuman treatment, and Article 13, which ensures the right to an effective remedy, of the European Convention on Human Rights (ECHR). As a result of this judgment, returns to **Greece** under the Dublin II Regulation decreased substantially in 2011.⁴

1 Eurostat (2011).

2 For more information, see: EASO, *Annual Report for 2011* (forthcoming).

3 European Commission (2011a).

4 According to the Ministry of Citizens Protection, in 2011, 55 persons were returned to Greece, mainly from Bulgaria (43), Switzerland (5) and Hungary (3).

The CJEU also scrutinised Member States' responsibilities under the Dublin Regulation, ruling in December on two similar cases submitted by **Ireland** and the **United Kingdom**. The court concluded that Member States must refrain from transferring asylum seekers under the Dublin II Regulation to a country where there are substantial grounds for believing that they would face a real risk of inhuman or degrading treatment.⁵ The court clarified that under EU law it was not possible to presume that a Member State observes fundamental rights. In its ruling, the court makes extensive reference to the Charter of Fundamental Rights. The Hessen Administrative Court⁶ as well as the Sofia Administrative Court submitted two other cases with a broader set of questions relating to Dublin II in January and October 2011, respectively. By the end of 2011 no hearing had yet been organised on either of these two cases.

The European Commission had, in 2008, already proposed a formal mechanism for suspending Dublin transfers to Member States where asylum applications could not be properly assessed and the level of protection granted was inadequate.⁷ At the end of 2011, a political agreement was reached to establish an early warning, preparedness and crisis management mechanism replacing the former emergency mechanism that would trigger a formal suspension of Dublin II transfers in case of serious deficiencies in the asylum system.

Arrivals in connection with the events and conflicts in North Africa were at the heart of public debate on asylum (for arrival figures, see Chapter 2). The United Nations High Commissioner for Refugees (UNHCR) has stressed that although many of the 60,000 arrivals from Tunisia and Libya are economic migrants, there is a sizeable group of individuals among them in need of protection.⁸ The EU did not, however, characterise the North African arrivals as a 'mass influx of displaced persons from third countries', a designation that would have triggered the activation of an EU tool, the Temporary Protection Directive,⁹ developed to deal with large numbers of displaced persons. Work continued in 2011 towards the creation of a CEAS. Some progress was achieved on the legislative front. First, the personal scope of the Long-term Residents Directive (2011/51/EU) was extended in May 2011¹⁰ to beneficiaries of international protection. Second, on 13 December,

5 Joint Cases: UK, C-411/10 and Ireland C-493/10, Court of Appeal (England and Wales) *NS v. Secretary of State for the Home Department* and Ireland *M. E. a. v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011.

6 CJEU, *Kaveh Puid v. Bundesamt für Migration und Flüchtlinge*, Case C-4/11, reference for a preliminary ruling submitted on 5 January 2011.

7 European Commission (2008), Art. 31.

8 UNHCR (2011a).

9 Council Directive 2001/55/EC, OJ 2001 L212/12.

10 Directive 2011/51/EU, OJ 2011 L 132/1.



the amended Asylum Qualification Directive was published, which defines who is entitled to international protection and sets forth their rights and duties.¹¹ The amended Directive shows a stronger commitment to the best interests of the child and pays greater attention to gender-specific forms of persecution. It requires that gender-related aspects, including gender identity be given due consideration, when determining a person's membership in a particular social group. It thereby provides for better protection for lesbian, gay, bisexual and transgender (LGBT) persons seeking asylum in the EU, at a time when LGBT people often face stereotyping and discrimination during the asylum process, as evidenced by a study released in 2011, *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe* – funded by the European Refugee Fund and the Dutch Ministry of the Interior and Kingdom Relations. The amended directive also approximates the content of rights granted to beneficiaries of subsidiary protection and refugees with regard to family unity, healthcare and employment.

The European Commission also submitted two modified proposals for the amendment of the Reception Conditions and the Asylum Procedure Directives based on feedback received during the negotiations of its recast proposals tabled in 2009.¹² Negotiations on these two instruments as well as on the recast proposals for the amendments to Dublin II and the Eurodac Regulations,¹³ however, were still pending at the end of the reporting period.

The Greek government sent a letter of request for assistance to the EASO Executive Director. An agreement was reached on 1 April for the deployment of Asylum Support Teams to Greece.¹⁴ The European Commission Communication on enhanced intra-EU solidarity in the field of asylum issued at the end of the reporting period foresees an important role for the EASO.¹⁵ In line with its Founding Regulation EASO's role is to: facilitate and coordinate practical cooperation measures among Member States, contribute to the implementation of the Common European Asylum System, provide Emergency Support to Member States under particular pressure through, amongst other measures, coordination of Asylum Support Teams (a pool of experts, case workers and interpreters from Member States) that can be mobilised at short notice in crisis situations, facilitate resettlement, relocation and support the external dimension of asylum policies. The EASO, which became fully operational on 19 June,¹⁶ held its first Consultative Forum with civil society organisations in December.

1.1.2. Asylum procedures: access to an effective remedy

In 2011 in the 27 EU Member States, 237,400 first instance decisions were made on asylum applications. Three quarters of first instance decisions in 2011 (177,900) were rejections. 29,000 applicants (12 %) were granted refugee status, 21,400 (9 %) subsidiary protection and 9,100 (4 %) authorisation to stay for humanitarian reasons.¹⁷

Six EU Member States¹⁸ amended their asylum procedures between November 2010 and December 2011. Five of them introduced changes to the appeals process, in some cases extending, and in other cases limiting, procedural safeguards. **Greece** reintroduced an appeals procedure and granted standing to the UN High Commissioner for Refugees to intervene in refugee and asylum seeker cases before administrative courts. **Slovenia** extended timelines for appeals. **Hungary** introduced more exceptions to the automatic protection from removal after an appeal is lodged. **Bulgaria** changed other elements of the review process. In addition, Denmark streamlined its first instance procedure with the purpose of reducing processing times without undermining the quality of decisions.

Concerning asylum and expulsion cases, the ECtHR has repeatedly stressed that in view of the irreversible damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy under Article 13 requires independent and rigorous scrutiny.¹⁹ It also requires, as the court specified, that the person concerned should in principle have access to a remedy which, while it is on-going, automatically protects them from removal.²⁰

Noting the repercussions of the *M.S.S. judgment*, this subsection points to possible gaps between ECtHR requirements and EU Member State practices concerning the right to an effective remedy. It therefore reviews applicable timelines to lodge an appeal and provisions for the right to stay in the host country during the appeals process. The analysis covers regular asylum procedures, accelerated procedures as well as transfer decisions taken under the Dublin II Regulation.

¹⁷ Eurostat (2012).

¹⁸ Austria, Amending Act to the Law Relating to Aliens, 2011; Bulgaria, amendment of the Asylum and Refugees Act, 20 May 2011; Greece, Presidential Decree 114/2010 (OG A' 195/22.11.2010), Act 3900/2010 (OG A 213/17.12.2010); Hungary, Act No. LXXX of 2007 on Asylum amended by Act No. CXXXV of 2010; Italy, Legislative Decree, 1 September 2011; Slovenia, the Act amending the International Protection Act, 23 November 2010.

¹⁹ ECtHR, *Shamayev and Others v. Georgia and Russia*, No. 36378/02, 12 April 2005; ECtHR, *Jabari v. Turkey*, No. 40035/98, 11 July 2000.

²⁰ ECtHR, *Čonka v. Belgium*, No. 51564/99, 5 February 2002, *Gebremedhin [Gaberamadhien] v. France*, No. 25389/05, 26 April 2007; ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011.

¹¹ Directive 2011/95/EU, OJ 2011 L 337/9.

¹² European Commission (2011a); European Commission (2011b).

¹³ Council of the European Union (2011).

¹⁴ Malmström, C. (2011).

¹⁵ European Commission (2011c).

¹⁶ Regulation (EU) No. 439/2010, OJ 2010 L 132, Art. 54.

1.1.3. Regular deadlines for appeal

Limited changes took place in 2011 as regards regular asylum procedures. Deadlines to submit an appeal continued to range from five days for applicants in detention in the **United Kingdom** to two months in **Spain**. **Greece** reintroduced an appeals procedure at the end of 2010, which stipulated that appeals must be filed within 30 days. At the end of the reporting period half of the countries listed in Figure 1.1 had appeal timelines of approximately two weeks. Seven EU Member States gave one month as the timeframe between the notification of a negative decision and the deadline by which applicants must lodge an appeal. Three countries (**Belgium, Italy, and the United Kingdom**) set shorter timelines for applicants in detention. Such short timelines can be challenging for detained applicants seeking a review of the asylum decision, as they typically face greater than average difficulties in accessing information, legal aid and language assistance. Figure 1.1 provides an overview of timelines to appeal as of 31 December 2011.

In the countries shown in Figure 1.1, with the exception of **Estonia, Italy, Slovakia and Spain**, an applicant rejected in the regular procedure is automatically protected from removal until the court or tribunal reviews the appeal or, if no appeal has been lodged, until the deadline for lodging one has expired.²¹ In **Estonia and Spain** the appeal lodged against a negative decision does not suspend its execution, which must be requested separately.²² In **Italy**, appeals submitted by *applicants apprehended when entering or staying in the territory in an irregular manner* do not prevent the enforcement of the removal order, which must be requested separately and is granted on a case-by-case basis.²³ In **Slovakia** no automatic suspension of removal is envisaged, for example, when the applicant has been convicted of a particularly serious crime or can reasonably be considered a danger to the security of the country.²⁴

21 See references for national legal provisions relating to the automatic right to stay in regular asylum procedures.

22 In Estonia, the appeal lodged against a decision rejecting the asylum application does not have suspensive effect. An order to leave the territory accompanies a decision rejecting the asylum application (Act on Granting International Protection to Aliens, Art. 25 (2)). After the 17th day of issuance of the order, the authorities proceed with its execution (Obligation to Leave and Prohibition on Entry Act, Art. 8), unless the administrative court has suspended its execution (Act on Granting International Protection to Aliens, Art. 26). In Spain, Art. 29 (2) of Act 12/2009 envisages a request for suspensive effect to be lodged together with the appeal. Such request will automatically be dealt with as a request for an urgent precautionary measure (under Art. 135 of the Law on the Contentious Administrative Jurisdiction). A decision to grant suspensive effect is taken within 3 days.

23 Italy, Decreto Legislativo 28 gennaio 2008, No. 25, Art. 35 as amended by Art. 19 (4) of the Legislative Decree 1 September 2011.

24 Slovak Act on Asylum, Art. 21. See also Poland, Art. 108 and 130 (3) of the Code of Administrative Procedure.

1.1.4. Accelerated procedures

In 2011, most asylum systems in the EU continued to provide for certain applications to be processed in accelerated procedures. Such procedures are generally intended for fraudulent or manifestly unfounded applications, although they are sometimes used more broadly. Accelerated procedures are characterised by reduced safeguards, including typically shorter deadlines for appeal. At the end of the reporting period, half of the EU Member States provided for accelerated procedures with shorter deadlines for appeal (see states listed in Figure 1.2). In three of them (**Germany, Slovakia and in part in the Czech Republic**),²⁵ applicants did not have an automatic right to stay in the host country during the appeals procedure, which could be granted on a case-by-case basis only, usually upon application (see Figure 1.2).

In four other countries (**Estonia, Finland, France and Sweden**) the deadline to appeal a decision in the accelerated procedure is the same as in the regular procedure, but the right to stay in the country during the appeals process is not granted automatically, but rather on a case-by-case basis by the reviewing court or tribunal. In addition, shortly after the reporting period, the ECtHR reviewed the case of an asylum seeker from Darfur who was removed from **France** before the conclusion of the appeals process. It found a violation of Article 13 (right to an effective remedy) taken together with Article 3, which prohibits torture, inhuman and degrading treatment.²⁶

In **Austria, Hungary** and the **Netherlands** all applications are first subject to a preliminary assessment procedure. Those applications which cannot be decided during this first review are channelled into an extended asylum procedure. Deadlines to submit appeals against decisions taken in the first review phase are relatively short, ranging from 3 to 14 days.²⁷ Only in Hungary is the right to stay automatically granted.²⁸ In the **Netherlands**, the individual must request a provisional measure to suspend removal. In **Austria**, the Asylum Office can withdraw the right to stay if it deems it appropriate for the case at hand; if deprived of the right to stay, the individual can ask the Asylum Court to review the withdrawal and allow him/her to stay.²⁹

25 In the Czech Republic there is no automatic suspensive effect according to Art. 32 (3) (3) of the Asylum Act for safe country or origin and safe third-country decisions (but automatic suspensive effect exists in case of other manifestly unfounded cases listed in Art. 16).

26 ECtHR, *I. M. v. France*, 2 February 2012, No. 9152/09.

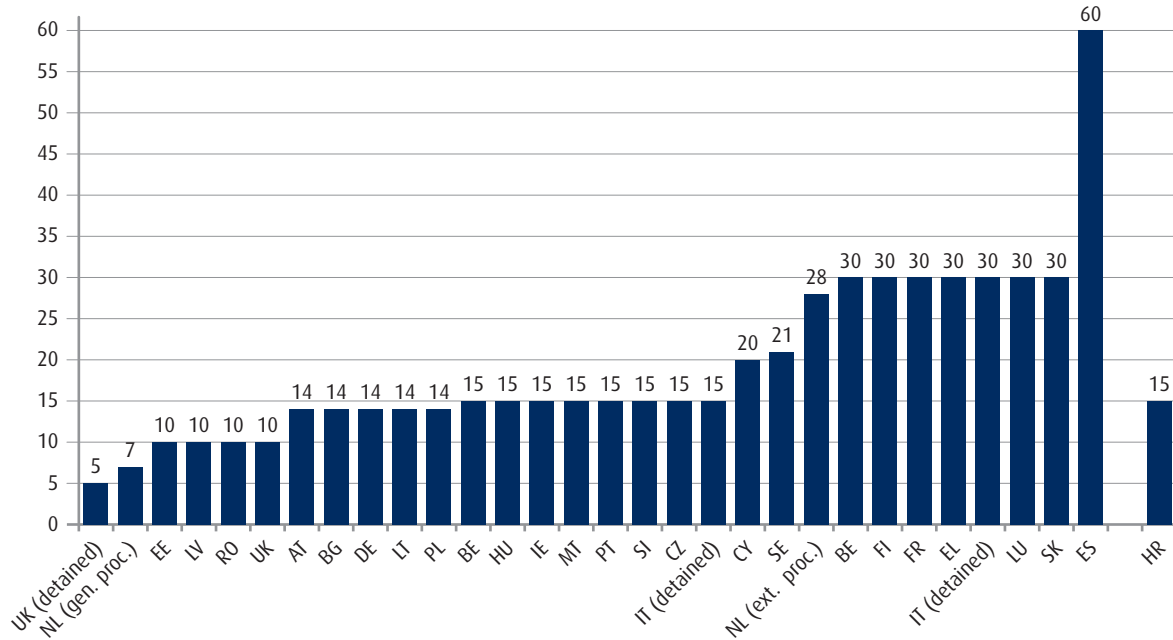
27 Austria, General Administrative Law, Section 63 (5); Hungary, Act No. LXXX of 2007 on Asylum, Art. 53 (3); Netherlands, Aliens Act, Art. 69 (2).

28 Hungary, Act No. LXXX of 2007 on Asylum, Art. 53 (3).

29 Austria, Asylum Act, Section 36 (1) and 36 (2) as well as Section 38; Netherlands, Aliens Act, Art. 82 (2); Netherlands, General Administrative Act, Art. 8 (81).



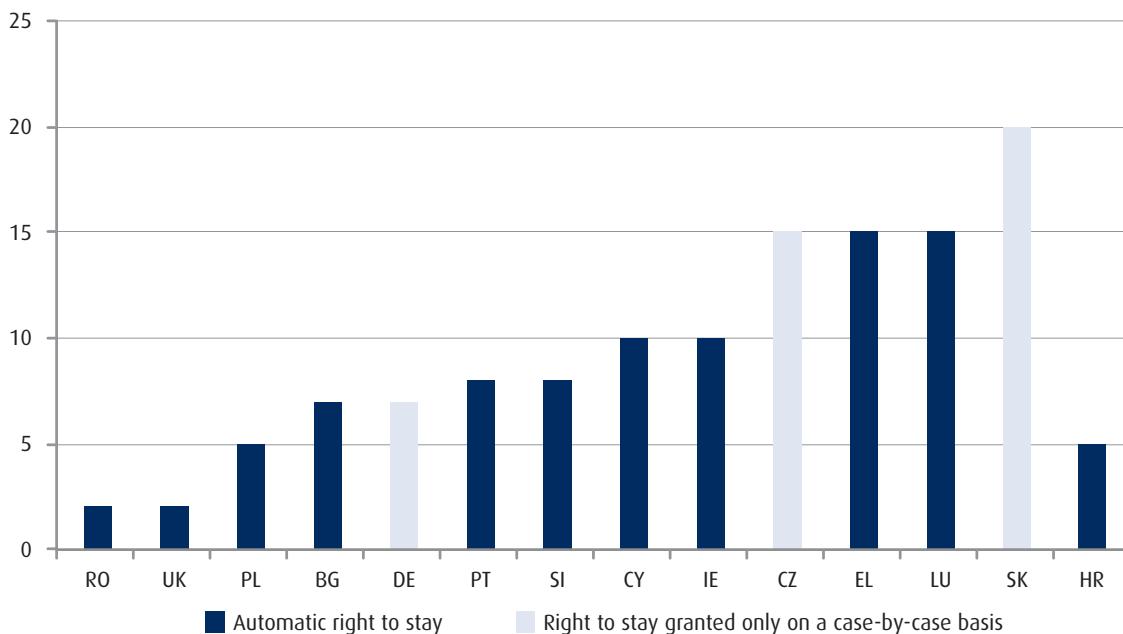
Figure 1.1: Timelines to appeal (regular asylum procedure), in days, by country



Notes: Time limits expressed in weeks or months have been converted into days – seven and 30 days, respectively. Not all details, however, are reflected in the table, such as whether ‘days’ refers to working or effective days. Denmark is not included, as all negative decisions are automatically submitted for review (Aliens Act, Section 53a(1)). In Belgium, Italy and the UK there are different deadlines for detained applicants. The Netherlands also has two different time limits: one for general procedures (gen. proc.) and one for extended procedures (ext. proc.).

Source: National legislation as of 31 December 2011; see references for national legal provisions relating to timelines to appeal (regular asylum procedure)

Figure 1.2: Timelines to appeal and right to stay (accelerated procedure), in days, 13 EU Member States and Croatia



Notes: Time limits expressed in weeks or months have been converted into days – seven and 30 days, respectively. Not all details are reflected, such as whether ‘days’ refers to working or effective days.

Source: National legislation as of 31 December 2011; see references for national legal provisions relating to timelines to appeal and right to stay (accelerated procedure)

1.1.5. Dublin II

Dublin II procedures tend to have the fewest safeguards and the shortest timelines to appeal. Five countries (**Belgium, France, Greece, Italy** and **Slovenia**) made changes to their Dublin II procedures in 2011. For instance, following the *M.S.S. judgment*, **Belgium** introduced a mechanism to file a request for suspension of removal in order to deal with cases of extreme urgency.

At the end of 2011, legislation in five EU Member States did not provide for the possibility for the reviewing court or tribunal to suspend the transfer (see Figure 1.3). Moreover, in **Denmark**, a Dublin II decision could not be appealed to a court; in the **United Kingdom**, an in-country appeal against Dublin II decisions was not possible.

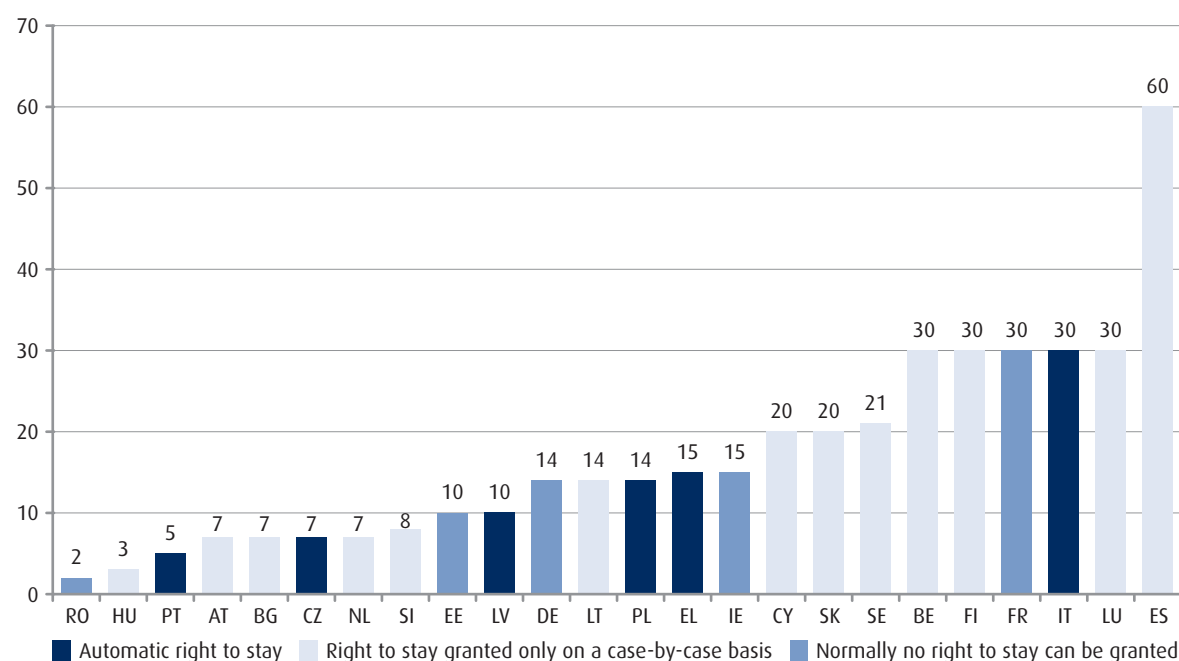
In some cases, deadlines for appeal remained extremely short, such as in **Romania** (two days) or **Hungary** (three days). With the exception of six Member States, an appeal does not automatically suspend the transfer, which must be requested on a case-by-case basis.

Proposed revised EU legislation on Dublin II and Asylum Procedures, which is pending, offers an opportunity to

address some of the procedural shortcomings described above. Articles 19 (2) and 20 (1) of the Dublin II Regulation provides that decisions to transfer an applicant to the responsible Member State can be subject to a review. The right to stay during appeal is not granted automatically, but courts may decide to suspend implementation on a case-by-case basis, if national legislation allows for this. In its 2009 proposal to amend the Dublin Regulation, the European Commission suggests strengthening the effectiveness of remedies against negative transfer decisions, establishing a duty by the reviewing court to decide within seven days whether the transfer should be suspended.³⁰

Proposed amendments to the Asylum Procedures Directive³¹ also concern the right to an effective remedy (Article 39 of the current directive). Among other things, the European Commission proposes that time limits should be “reasonable” and that they “shall not render impossible or excessively difficult the access of applicants to an effective remedy”. Furthermore, the right to remain in the host country during the appeals procedure should normally be automatic. Exceptions to the automatic right to remain can be made for accelerated procedures or certain inadmissibility decisions, provided the court or tribunal has the power to grant the

Figure 1.3: Timelines to appeal and right to stay (Dublin procedure) in days, by country



Notes: Time limits expressed in weeks or months have been converted into days – seven and 30 days, respectively. No (in-country) appeal exists for Dublin II decisions in Denmark and the United Kingdom. In Malta, all Dublin II decisions are reviewed automatically.

Source: National legislation; see references for national legal provisions relating to timelines to appeal and right to stay (Dublin procedure)

30 Commission of the European Communities (2008).
 31 Commission of the European Communities (2009).

right to stay on a case by case basis. No exceptions are allowed in case of border procedures. An amended proposal which was tabled by the Commission in July keeps most of these amendments, but also allows for more situations in which an application can be processed in an accelerated procedure, and thus without an automatic right to stay during the appeals process. In addition, it also permits the possibility of no automatic right to stay when a normal procedure is used, provided a ground for accelerating the procedure applies.³²

Short appeal timelines undermine the quality of the appeals submission. They may, alternatively, make it difficult or even impossible to appeal at all. In the past, constitutional courts in **Austria** and in the **Czech Republic** have found deadlines of two and seven days too short.³³ Conversely, the CJEU found that a 15-day time limit to appeal in an accelerated procedure “does not seem, generally, to be insufficient in practical terms to prepare and bring an effective action and appears reasonable and proportionate in relation to the rights and interests involved.”³⁴ While it is difficult to establish a minimum time frame beyond which any right to appeal would be pointless, it is questionable whether timelines of a few days only can be considered acceptable under Article 13 of the ECHR and Article 47 of the Charter of Fundamental Rights, which both grant the right to an effective remedy. This is particularly the case if gaps exist in the provision of legal and language assistance to prepare an appeal in time. A similar conclusion can be reached when it is impossible or unrealistic to obtain a right to stay until the court or tribunal has reviewed the appeal.

1.2. Immigration

In 2011, the Commission tabled three communications, including a communication about migration,³⁵ one on dialogue with southern Mediterranean countries concerning migration, mobility and security³⁶ and a third one on a global approach to migration and mobility.³⁷ The package proposed strengthening border controls, completion of the Common European Asylum System (CEAS), the exchange of best practices for successful integration of migrants³⁸ and a strategic approach to relations with third-countries on migration, including dialogues on mobility partnerships.

³² European Commission (2011a).

³³ Austria, Austrian Constitutional Court (*Österreichische Verfassungsgerichtshof*), decision G31/98, G79/98, G82/98, G108/98 of 24 June 1998 abolishing a two-day deadline; Czech Republic, Czech Constitutional Court (*Ústavní soud České republiky*) decision No. 9/2010 Coll. which came into effect in January 2010, abolishing a seven-day deadline.

³⁴ CJEU, Case C-69/10, *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*.

³⁵ European Commission (2011d).

³⁶ European Commission (2011e).

³⁷ European Commission (2011f).

³⁸ European Commission (2011g).

EU institutions showed growing concern relating to the demographic challenges facing the EU in the medium term and the use of legal migration to address them.³⁹ On 14 October, the European Parliament adopted a report on demographic change and its consequences for the future cohesion policy of the EU.⁴⁰

Given such concerns, this section will first analyse the progress made in promoting legal migration to the Union. It will then touch upon the rights of migrants in an irregular situation, an area in which the FRA produced substantial work in 2011. Finally, it will provide an overview of the implementation of two protective provisions included in the Return Directive (2008/115/EC),⁴¹ namely the introduction of alternatives to detention and effective forced return monitoring systems one year after the transposition period expired.

1.2.1. Legal migration

The increasing recognition that Europe's economies need migrant workers brought some developments concerning EU legislation in this field. At the end of the year, the so-called Single Permit Directive was formally adopted.⁴² The directive will simplify migration procedures and ensure that workers from countries outside the EU, legally residing in a Member State, will enjoy a common set of rights on an equal footing with nationals, such as the recognition of professional qualifications and access to social security. The directive represents a small but important step towards a common European policy on economic migration. In addition, Regulation 1231/2010 was adopted, extending the scope of EU citizens' social security schemes to third-country nationals moving within the EU.⁴³

Negotiations continued during the reporting period on the proposals for a Directive on Seasonal Workers and a Directive on Intra-corporate Transfers.⁴⁴ By providing for the possibility of regular low-skilled labour migration the Seasonal Workers Directive, once adopted, has the potential to reduce irregularity at work and thus, indirectly reduce the risk of fundamental rights violations. The proposal on intra-corporate transferees contains a set of clear procedural rights, as well as guarantees in terms of remuneration, working conditions and other rights aiming to protect future ICTs against unfair/low labour standards and securing their fair treatment.

³⁹ European Commission (2011d), pp. 3 and 16.

⁴⁰ European Parliament (2011a).

⁴¹ Directive 2008/115/EC of the European Parliament and of the Council, L348/98, 16 December 2008.

⁴² Directive 2011/98/EU of the European Parliament and of the Council, OJ 2011 L 343, 13 December 2011.

⁴³ Regulation (EU) No. 1231/2010 of the European Parliament and of the Council, OJ 2010 L 344/1, 24 November 2010.

⁴⁴ European Commission (2010).

FRA ACTIVITY

Lack of work and residence permits increases risk of exploitation

A 2011 FRA report on the situation of migrant domestic workers in 10 EU Member States shows that the absence of a work and residence permit heightens their risk of exploitation. Chilling accounts of the abuse of domestic workers' fundamental rights have surfaced. Through interviews with migrants and representatives of organisations who may come to their aid, the report explores the heightened risks of abuse and exploitation faced by these workers, overwhelmingly female, whose fears of detection and deportation hinder their ability to access rights, from healthcare to claiming unpaid wages.

For more information, see: FRA (2011d)

European Commission reports on three existing directives revealed a number of gaps, some of which relate to fundamental rights. The report on the application of Council Directive 2004/114/EC,⁴⁵ which concerns the admission of third-country nationals in order to study, pupil exchange, unremunerated training or voluntary service, pointed out the need for Member States to apply procedural guarantees and transparency principles. A second report, on the application of Council Directive 2003/109/EC on the status of third-country nationals who are long-term residents, raised concerns about the "restrictive interpretation of the scope of the directive, additional conditions for admission, such as high fees, illegal obstacles to intra-EU mobility, watering down of the right of equal treatment and protection against expulsion."⁴⁶ A report on the application of Council Directive 2005/71/EC,⁴⁷ concerning the admission of researchers, notes that a definition of "researcher" in line with the directive exists in less than half of the Member States. This is likely to have implications on a uniform implementation of the Directive, including fundamental rights relevant provisions, which have not yet been fully transposed in relation to equal treatment with nationals, intra-EU mobility, transparency of the conditions of admission as well as the duration of residence permits granted to family members.

In the *Zambrano* case, the CJEU delivered an important judgment on the right to family reunification of third-country nationals living irregularly in the EU. The case concerned the irregularly residing Colombian parents of two children who were born

in Belgium, had Belgian nationality, and had never left the country. The court clarified that Article 20 of the TFEU on EU citizenship prevents a Member State from refusing residence to a third-country national who has a dependent minor child holding EU citizenship. A refusal of a residence and work permit is not allowed if it would deprive such children of the genuine enjoyment of the substance of the rights attached to EU citizenship.⁴⁸

In two subsequent judgments (*McCarthy and Dereci and others*)⁴⁹ regarding spouses, adult children and other relatives, the CJEU concluded that no deprivation of such enjoyment occurs in cases where the EU national concerned can move to another EU country and reunite with his/her family there, as per Directive 2004/38/EC.

Further to the Directive on Family reunification (Directive 2003/86/EC) the European Commission, in its *Green Paper on the right to family reunification of third-country nationals living in the European Union* and published on 15 November 2011, examines the issue and asks stakeholders what steps should be taken to have more effective rules on family reunification at EU level.⁵⁰

1.2.2. Rights of migrants in an irregular situation

A number of events in 2011 have put the rights of migrants in an irregular situation on the agenda of policy makers. While Member States can decide who can enter and stay in their territory, once a person is physically present in the country, basic human rights cannot be denied to him or her. The Fundamental Rights Conference organised by the Polish Presidency together with the FRA in November 2011 was entirely devoted to this category of persons.⁵¹

For the first time, the European Parliament and the Committee of the Regions drew attention to the rights of migrants in an irregular situation⁵² and the ILO adopted a convention and a recommendation on domestic workers, with many provisions applying to all workers, including those in an irregular situation.⁵³ In addition, in July 2011 the deadline to transpose the Employers Sanctions Directive expired.⁵⁴ According to Article 6, EU Member States must make

48 CJEU, C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm)*, 8 March 2011, para. 64.

49 CJEU, C-434/09, *Shirley McCarthy v. Secretary of State for the Home Department*, 5 May 2011; CJEU, C-256/11, *Dereci and others v. Bundesministerium für Inneres*, 15 November 2011.

50 European Commission (2011k).

51 FRA (2011a).

52 European Parliament (2011b).

53 International Labour Convention (ILO) (2011).

54 Directive 2009/52/EC, OJ L168/24, 18 June 2009.

mechanisms available to ensure that migrant workers in an irregular situation may either introduce a claim against an employer for any remuneration due or may call on a competent authority of the EU Member State concerned, in order to start recovery procedures.

FRA ACTIVITY

Irregular migrants face hurdles in accessing basic rights

The FRA documented the legal and practical obstacles migrants in an irregular situation face when accessing basic rights in three reports published in 2011. Access to healthcare, for example, is limited to emergency treatment in 19 EU Member States; in 11 of these countries migrants may be billed for such services. This can prove unaffordable: giving birth in a hospital in **Sweden**, for example, can cost more than €2,500. Migrants also face hurdles in accessing the right to education. In most EU Member States, primary schools require birth certificates, identification or other papers which migrants in an irregular situation are not able to produce; as a result, schools may not admit their children. Apprehensions near schools and hospitals as well as reporting and data exchange practices between service providers and courts on the one hand, and the immigration police on the other, impact disproportionately on the migrants' ability to access basic rights. Fear of detection and deportation not only discourages migrants from accessing basic services it also keeps them from reporting cases of abuse and exploitation to the authorities.

For more information, see: The fundamental rights of migrants in an irregular situation in the European Union (FRA, 2011b); Migrants in an irregular situation: access to healthcare in 10 European Union Member States (FRA, 2011c); and Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States (FRA, 2011d)

The FRA research also revealed that a considerable number of migrants in return procedures cannot be removed. Removal may be suspended, postponed or not enforced for a variety of reasons, for example due to legal, humanitarian or technical obstacles. Persons in return procedures who are not removed often end up in a situation of legal limbo, with limited or no access to basic human rights. This can last for a protracted period of time. While authorities acknowledge their presence de facto or formally, persons who are not removed are usually not provided with an explicit right to stay. Given the great divergence of existing national practices concerning the rights of non-removed persons as well as the possibility to provide a residence permit if, over

time, the removal cannot be enforced, the EU might play a harmonising role.

The European Commission published in February an evaluation of the readmission agreements⁵⁵ – designed to facilitate the readmission of third-country nationals to their country of origin – signed by the EU up to that point. It stressed the need to respect fundamental rights when implementing the agreements, in particular Article 18 of the Charter of Fundamental Rights regarding the right to asylum and the prohibition of refoulement.

Pre-removal detention continued to remain a controversial topic in many Member States. On several occasions, the ECtHR delivered judgment on claims of violation of Article 5 (1), the right to liberty and security of the person, of the ECHR and in particular on whether or not detention was arbitrary.⁵⁶

In the *El Dridi* case,⁵⁷ the CJEU scrutinised the use of detention as a response to irregular immigration. The court ruled that Articles 15 and 16 of the Return Directive forbid Member States from requiring the imposition of a sentence of imprisonment on a third-country national staying irregularly on the sole ground that she or he remains on its territory contrary to a removal order. In *Achughbabian*, the CJEU clarified that the sole exceptions to this rule occur when the person concerned remains on Member State territory despite a removal order for which there is no justified ground for non-return and when the 18-month maximum period of deprivation of liberty foreseen by the Return Directive has expired, as long as the exceptions take place in full compliance with the ECHR.⁵⁸

EU Member States continued to use immigration detention widely to facilitate removal. Deprivation of liberty also affected families with children, sometimes detained in facilities which were inadequate to cater to their needs. Enforcing a return decision poses challenges for immigration law enforcement bodies. Typically, migrants are confronted with a return decision at the end of the immigration process, when they have exhausted avenues for legal stay in the country. If the migrant perceives the immigration or asylum procedures as unfair, he or she will be less inclined to cooperate with the authorities when faced with removal at the end of the process.

⁵⁵ European Commission (2011), pp. 10–11.

⁵⁶ For relevant cases, see references.

⁵⁷ CJEU, C-61/11 PPU, *Hassen El Dridi, alias Karim Soufi*, 28 April 2011.

⁵⁸ CJEU, C329/11, *Alexandre Achughbabian v. Préfet du Val-de-Marne*, 6 December 2011, para. 48 and 49; A similar case is still pending: CJEU, Case C-187/11, Reference for a preliminary ruling from the Tribunale di Treviso (Italy) lodged on 20 April 2011 – *Criminal proceedings against Elena Vermisheva*.

Promising practice

Increasing migrants' confidence in the system

A pilot project in Solihull, **United Kingdom**, attempted to engage migrants in immigration or asylum procedures from the beginning. The 2007–2008 pilot showed that early engagement resulted in a number of benefits, including: higher case conclusion rates in a six-month period, higher refugee status grants at first instance, fewer appeals and fewer allowed appeals.

Building on this experience, the Midlands and East Region of the United Kingdom initiated in November 2010 the early legal advice project, which aims to improve the quality of initial decisions by providing legal advice at an early stage as well as representation. The objective of the project is not only to get more cases right the first time around, but also to identify those who are in need of protection earlier, manage public funds effectively and increase confidence in the system. So far, reaction to the project has been positive overall.

For more information, see: www.ukba.homeoffice.gov.uk/aboutus/your-region/midlands-east/controlling-migration/early-legal-advice-project. For the evaluation of the Solihull Pilot, see the independent evaluator's report, available at: www.asylumaid.org.uk/data/files/publications/137/Solihull_Pilot.pdf

1.2.3. Alternatives to detention

There is growing concern about the use of immigration detention in Europe. Alternatives to detention are increasingly seen as a practical tool to reduce the need for unpopular and costly custodial measures. The International Detention Coalition published a handbook in early 2011 documenting successful programmes for the prevention of unnecessary detention.⁵⁹

EU law allows for the detention of a person in an irregular situation in order to implement a return decision, provided certain conditions are fulfilled. According to Article 15 of the Return Directive, deprivation of liberty is only lawful when there is a risk of absconding or fear that the migrant would otherwise jeopardise his or her removal. In cases where no such risk exists, migrants should be allowed to continue to stay and live in the community, without any restrictions imposed on their freedom of movement.

Where a risk of absconding or otherwise jeopardising the removal has been found to exist, the Return Directive requires the authorities to examine whether such a risk can be effectively mitigated by resorting

to non-custodial measures, before issuing a detention order.⁶⁰ Such measures are referred to as alternatives to detention. This sub-section provides an overview of the status of Member States on the introduction of alternatives to detention at the end of 2011 – one year after the expiry of the period for transposing the Return Directive.⁶¹

Alternatives to detention include a wide set of non-custodial measures. These may imply restrictions to fundamental rights, mostly to freedom of movement, which are less intrusive than deprivation of liberty. Typical measures include residence restrictions, the duty to report regularly to the police or release on bail.

Traditionally used in the criminal justice system, alternatives to detention have acquired increasing importance in the context of return procedures. In November 2010, only two-thirds of EU Member States provided for alternatives to detention in their national legislation.⁶² Over the reporting period this proportion increased and at the end of 2011 only two countries, **Cyprus** and **Malta**, had yet to introduce such alternatives⁶³ (see Figure 1.4). This development can be explained in two ways – the need to transpose the Return Directive and the desire to reduce immigration detention. No alternatives are provided for in the Croatian legislation, except for Article 100 of the Aliens Act, which provides for the possibility of placing foreigners in an open facility if they cannot be detained for health or other justified needs or reasons.

The inclusion of alternatives to detention in national immigration or foreigners legislation is not itself a guarantee that alternatives are used in practice.

In many EU Member States, statistics on alternatives to detention are not systematically collected, which makes it difficult to assess the extent to which alternatives are applied. It appears, however, that in several Member States alternatives are imposed substantially less frequently than detention. In **Bulgaria**, for example, in 2011 alternative measures to detention were applied to 42 foreigners, whereas 1,057 persons were detained.⁶⁴ In **Lithuania**, during the same time span,

⁶⁰ The Return Directive stipulates in Art. 15 (1) that deprivation of liberty may be ordered “unless other sufficient but less coercive measures can be applied effectively in a specific case”. Read in conjunction with Recital 16 (quoted in the above box), Art. 15 (1) establishes a duty to examine in each individual case whether alternatives to detention would suffice before resorting to deprivation of liberty.

⁶¹ Art. 20 of Directive 2008/115/EC sets the transposition deadline as 24 December 2010.

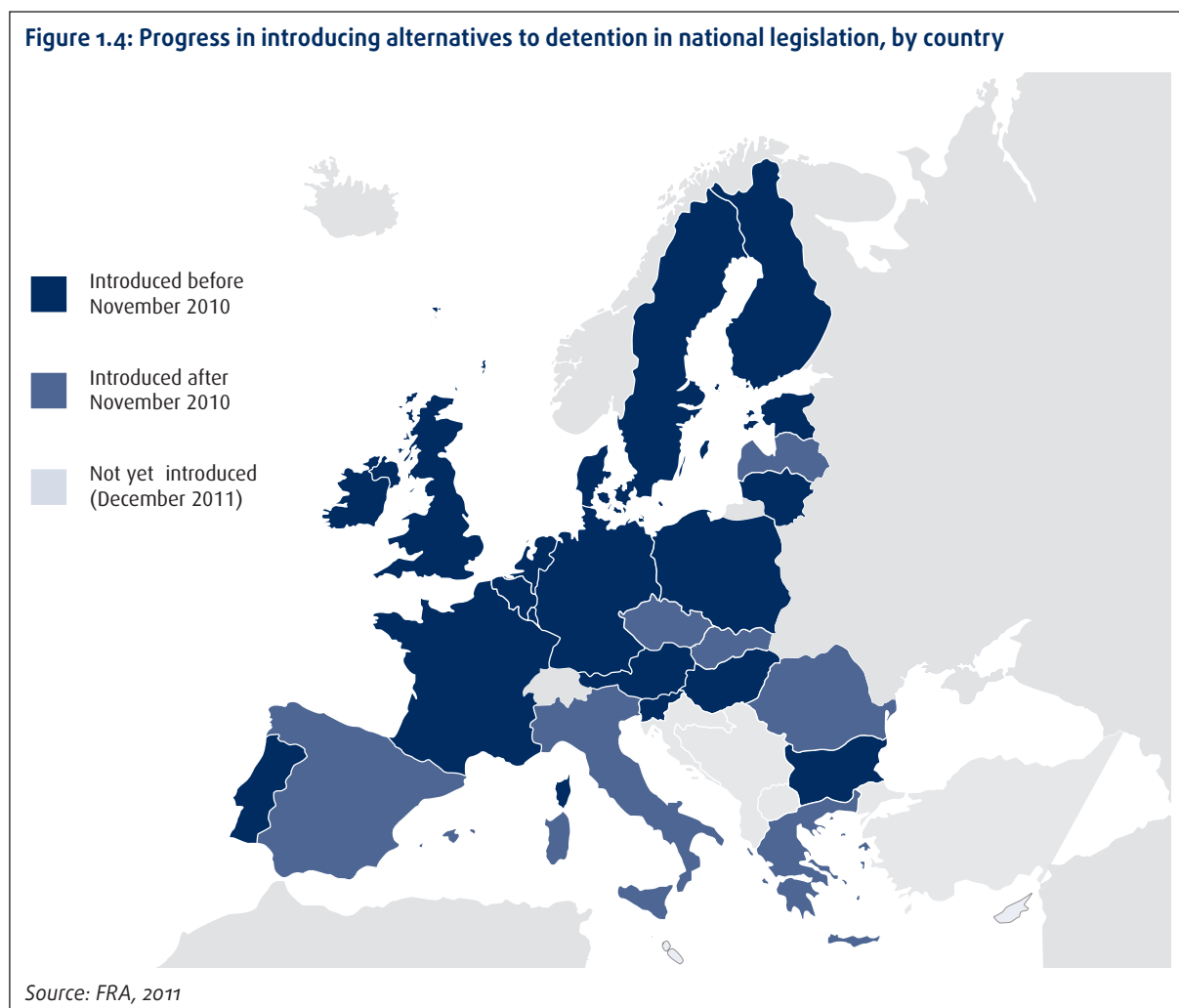
⁶² FRA (2010), p. 50, Figure 6.

⁶³ In Malta, Art. 25A(13) of the Immigration Act provides for the possibility to impose reporting duties, but only for individuals who have been released from detention.

⁶⁴ Information provided to the FRA by the Bulgarian Ministry of Interior in February 2012.

⁵⁹ International Detention Coalition (2011); UNHCR (2011b).





alternatives to detention were applied to 11 foreigners whereas detention was applied to 473 foreigners (232 of them were detained for up to 48 hours only).⁶⁵ Amnesty International **Netherlands** (*Vreemdelingen-detentie in Nederland*) stated that the Dutch government hardly uses alternatives to detention in cases pending deportation and in cases concerning highly vulnerable individuals.⁶⁶ In **Slovenia**, in the first six months of 2011, more lenient measures were ordered in only two cases, allowing unauthorised migrants' accommodation outside the Aliens Centre under Article 59 of the old Aliens Act.⁶⁷

In a few countries alternatives are used more frequently, such as for example in **Austria**, where, during

the reporting period, alternatives were applied in 1,012 cases compared to 5,152 cases of detention.⁶⁸

Turning to the types of alternatives provided for in national law, traditional forms have a tendency to prevail. Regular reporting to the police (23 EU Member States) and residence restrictions (19 EU Member States) are the alternatives most commonly found in national legislation. Residence restrictions include the duty to stay at a particular place or the obligation to reside in a specific area of the country. Residence restrictions are often combined with other restrictions, for example, in France,⁶⁹ with the surrender of documents. Designated places can be open or semi-open facilities run by the government or NGOs, hotels or hostels as well as private quarters provided by the person concerned. The regime imposed can vary, but usually requires persons to stay at the designated location at certain times with absence only allowed if duly accounted for.

65 Information provided to the FRA by the Lithuanian State Border Guard Service in March 2012.

66 Amnesty International, Netherlands (2010). See also two court cases which concluded that alternatives to detention would have been appropriate: Netherlands, District Court The Hague (*Rechtbank's-Gravenhage*) Case No. AWB 11/523, LJN BR3477, 24 February 2011 and Case No. AWB 10/43573, LJN BP0328, 4 January 2011.

67 Information provided by the Border Police Division to the Franet focal point for Slovenia in October 2011.

68 Austria, Ministry of Interior, official monthly statistics, available at: www.bmi.gv.at/cms/BMI_Niederlassung/statistiken.

69 France, Code de l'entrée et du séjour des étrangers et du droit d'asile, Art. 552-4.

Table 1.1: Types of alternatives applied, by country

Country	Duty to surrender documents	Bail/sureties	Regular reporting	Designated residence	Designated residence and counselling	Electronic monitoring
AT		X	X	X		
BE					X	
BG			X			
CZ		X	X			
DE			X	X	X	
DK	X	X	X	X		X
EE	X		X	X		
EL	X	X	X	X		
ES	X		X	X		
FI	X	X	X			
FR	X		X	X		X
HU	X		X	X		
IE	X		X	X		
IT	X		X	X		
LT		X*	X	X		
LU			X	X		
LV	X		X			
NL	X	X*	X	X		
PL			X	X		
PT			X	X		X
RO			X	X		
SE	X		X	X		
SI	X	X	X	X		
SK		X	X			
UK	X**	X	X	X	X	X

Notes: * Concerns minors whose guardianship is entrusted to an agency or an individual (Article 115.2.3, Lithuanian law on legal status of aliens, Dutch Aliens Circular paragraph A6/5.3.3.3); ** In the United Kingdom, the duty to surrender documents is imposed on all individuals who do not have permission to stay. It is therefore not regarded as an alternative to detention per se.

Source: National legislation as of 31 December 2011; see references for national legal provisions relating to types of alternatives applied

In the context of criminal law, it is not uncommon to allow for the release of a detained person against pledges of money which are forfeit should the person fail to report to the authorities. One third of the EU Member States also apply this alternative in pre-removal proceedings (see Table 1.1). Four countries have also established the use of electronic monitoring; this alternative, however, is rarely if ever applied.⁷⁰ It is costly and implies substantial restrictions on other rights, such as freedom of movement and privacy. As electronic tagging is primarily used for criminal offenders, it has associations

with criminality, a further argument against its use in immigration procedures.

Half of EU Member States include as an alternative the duty to surrender documents (see Table 1.1). This measure ensures that valid identity and travel documents are not lost or destroyed during the return and removal process.

In addition to traditional forms of alternatives to detention, more innovative projects have been piloted which combine social work elements with time spent at designated residences. The open houses project for families with children in **Belgium** and the Glasgow family return project in the **United Kingdom** move beyond residence restrictions by providing migrants with information and counselling which focuses either on return

⁷⁰ According to information received from the competent authorities, no cases of electronic monitoring were recorded in 2011 (until mid-October) in Denmark and Portugal. In the United Kingdom, between 1 January 2011 and 16 October 2011 electronic monitoring was imposed on 50 persons compared to the more than 50,000 residence restrictions ordered. In France electronic monitoring only concerns parents who are caring for a child. This alternative was introduced in 2011 and no figures on its application are available.



(**United Kingdom**, but also initiatives in **Germany**⁷¹) or on a broader range of options (**Belgium**). Results from the Belgian project have been positive: after three years in total some 250 families, including some 450 children, were accommodated in these open houses. Absconding rates remained low at 20-25 %.⁷²

The alternatives to detention listed in the table are not exhaustive, as other forms can be found. In **Denmark**, for example, the authorities can opt to reduce the financial benefits of rejected asylum seekers who refuse to assist with departure arrangements.⁷³ In **Estonia**, the foreigner must inform the police of changes of residence and of his or her prolonged absence from the place of residence.⁷⁴ In **Spain**, the judge can impose “any other precautionary measure” that is considered appropriate and sufficient.⁷⁵

1.2.4. Forced return monitoring

Despite efforts to increase voluntary returns, forced returns remain a reality in the EU. Figures, available for 2009 only, show the forced return of 173,370 persons in 26 EU Member States.⁷⁶

The Return Directive obliges EU Member States to establish an effective system for the monitoring of forced returns (Article 8 (6)). Effective monitoring of forced returns benefits both the person to be removed as well as the removing agency. It reduces the risk of ill-treatment, provides feedback on the operation, increases accountability, improves public acceptance of returns, helps to de-escalate tensions, identifies and verifies possible infringements immediately and can thus reduce the need for litigation. Costs may be co-funded with the EU Returns Fund. This sub-section provides an overview of Member States introducing effective monitoring systems as per Article 8 (6) of the Return Directive.

In 2011, 2,059 persons were forcibly returned in 42 Frontex joint operations, most of which were also co-financed by Frontex, the EU agency which coordinates the operational cooperation between Member States in the field of border control.⁷⁷ According to the revised Frontex Regulation, the “Agency shall

develop a Code of Conduct [... which shall] assure return in a humane manner and with full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, the right to liberty and security and the rights to the protection of personal data and non-discrimination” (Article 9 (1a)). In April, Frontex published a code of conduct, which also applies to return operations. The duty to ensure an effective return monitoring system deriving from Article 8 (6) of the Return Directive also applies to Frontex co-ordinated returns (Article 9 (1b)). In practice, however, only four states (**Austria**, **Denmark**, **Luxembourg** and the **Netherlands**) provided monitors for Frontex-coordinated return flights in 2011, three of which had already been monitoring flights in 2010. In the case of serious violations of fundamental rights, Frontex may suspend or terminate a joint operation (Article 3 (1a)).

The European Commission sponsored a study on the implementation of Article 8 (6) of the Return Directive in 2011.⁷⁸ This sub-section builds on the results of this study and reflects on the results as of 31 December. At least 13 Member States bound by the directive had not established an effective monitoring system by the end of 2011. This includes countries: with no monitoring system yet in place (**Cyprus**, **France**, **Italy**, **Malta**, **Poland** and **Slovenia**); where law enforcement authorities responsible for implementing the return operation carry out the monitoring (**Belgium** and **Romania**) or where it covers only specific cases (monitoring by the judiciary of certain expulsion cases in **Spain**); and where monitoring systems are not operational (**Bulgaria**, **Finland**, **Greece** and **Sweden**).

Scope of monitoring

The structure of the Common Guidelines for Joint Removal, mentioned in Article 8 (5) of the Return Directive, as well as the safeguards concerning procedures and detention pending removal in chapters three and four of the directive, clearly set out the scope of return monitoring. According to these guidelines, all phases of the removal process should be covered. This includes pre-return and pre-departure phases, in-flight procedures, transit, arrival and reception phases. Additional fundamental rights standards to be monitored relate to coercive measures. Such measures, according to the directive, should only be used as a last resort in case of resistance to removal. In this case and in accordance with fundamental rights, with respect for dignity and physical integrity (Article 8 (4)), reasonable force should not be exceeded. The implementation of returns must take into account the best interests of the child, family

71 Some German Federal States (*Länder*) installed ‘return institutions’ with personal support and advice in order to foster voluntary returns.

72 Jesuit Refugee Service (2011).

73 Art. 42a (11) (ii) in the Danish Aliens Act, between 1 January 2011 and 10 October 2011, the Danish Immigration Service made 276 such decisions.

74 Estonia, Obligation to Leave and Prohibition on Entry Act, Section 10.

75 Spain, Organic Law 4/2000 (as amended), Art. 61 (1).

76 Calculations by the FRA based on the figures in Matrix (2011), p. 23. No figures are available for Ireland.

77 Information provided by Frontex to the FRA on 16 January 2012.

78 Matrix Insight (2011).

life and the person's state of health while respecting the principle of non-refoulement (Article 5).

Most EU Member States concentrate on monitoring the pre-return and pre-departure phases of forced returns, although some also cover the physical removal, including accompanying flights.⁷⁹ Only a few Member States (for example, **Luxembourg** or the **Netherlands**) also include the arrival phase when monitoring forced returns.⁸⁰

Independence

The effectiveness of monitoring cannot be ensured without the independence of the authorities which enforce return. The FRA considers that this independence is not granted in cases when the monitoring organisation belongs to or is bound to the branch of government responsible for the management of return. Based on these criteria, by the end of 2011, only 12 Member States had a system of effective return monitoring in place. This excludes systems which are not operational, pending legislative implementation (**Belgium** and **Greece**)⁸¹ as well as those with internal control mechanisms operated by the authorities implementing return⁸² or monitoring through the judiciary.⁸³

Where independent monitoring mechanisms exist – which are either explicitly designated or act on the organisations' own initiative – they are carried out by three broad categories of actors:

- National preventive mechanisms under the Optional Protocol to the Convention against Torture, e.g. Ombudspersons, human rights commissions, justice chancellors. These mechanisms, in use in four countries,⁸⁴ typically have a broad remit and may face capacity problems when trying to monitor forced returns systematically.

⁷⁹ Matrix Insight (2011), p. 26.

⁸⁰ Matrix Insight (2011), p. 45.

⁸¹ In Belgium, police currently carry out monitoring, pending the implementation of a legislative proposal that Parliament passed on 21 November 2011 to have an independent instance appointed (Art. 22, §3 proposal 1825/008). In Greece, the mechanism was set up by law 3907/2011. The joint Ministerial Decision necessary for implementing the law which also regulates the structure and operation of the monitoring system had not been issued by the end of 2011. Ministerial Decision 801/2011 (OG B 3027 2011) provided for the preparations for opening the relevant service.

⁸² In Romania, the Office for Immigration monitors returns. Similarly, in Belgium until the adoption of the abovementioned legislative proposal, the police monitor returns.

⁸³ In France and Spain, the only monitoring available is general judicial control over action by law enforcement authorities.

⁸⁴ Austria (Commissions of the Human Rights Advisory Board); the Czech Republic (Ombudsman); Denmark (Ombudsman) and Latvia (Ombudsman). In Finland, the task is assigned to the Ombudsman and the Chancellor of Justice, who in practice does not have the capacity to monitor forced returns.

- Other independent governmental institutions, such as commissions established specifically to monitor forced returns (Supervisory Committee on Repatriation, *SCR*; *Commissie Integraal Toezicht Terugkeer*, CITT in the **Netherlands**), migration oversight bodies (Portuguese High Commission for Immigration and Intercultural Dialogue) or the Prosecutor's Office (**Hungary**).
- Non-governmental organisations (NGOs), such as the Red Cross (six EU Member States).⁸⁵ While government funding may raise questions concerning the independence of NGOs, they are marked as independent in Figure 5 provided their independence is secured by law and they are not bound by orders from the ministry responsible for returns.

There are a number of further factors which determine the independence and effectiveness of monitoring mechanisms. These can relate to the frequency of observations, the monitoring organisation's capacity to determine which returns it monitors, sufficient funding as opposed to severe budgetary constraints or control and the ability of monitors to form an independent opinion.

Promising practice

Inspecting independently

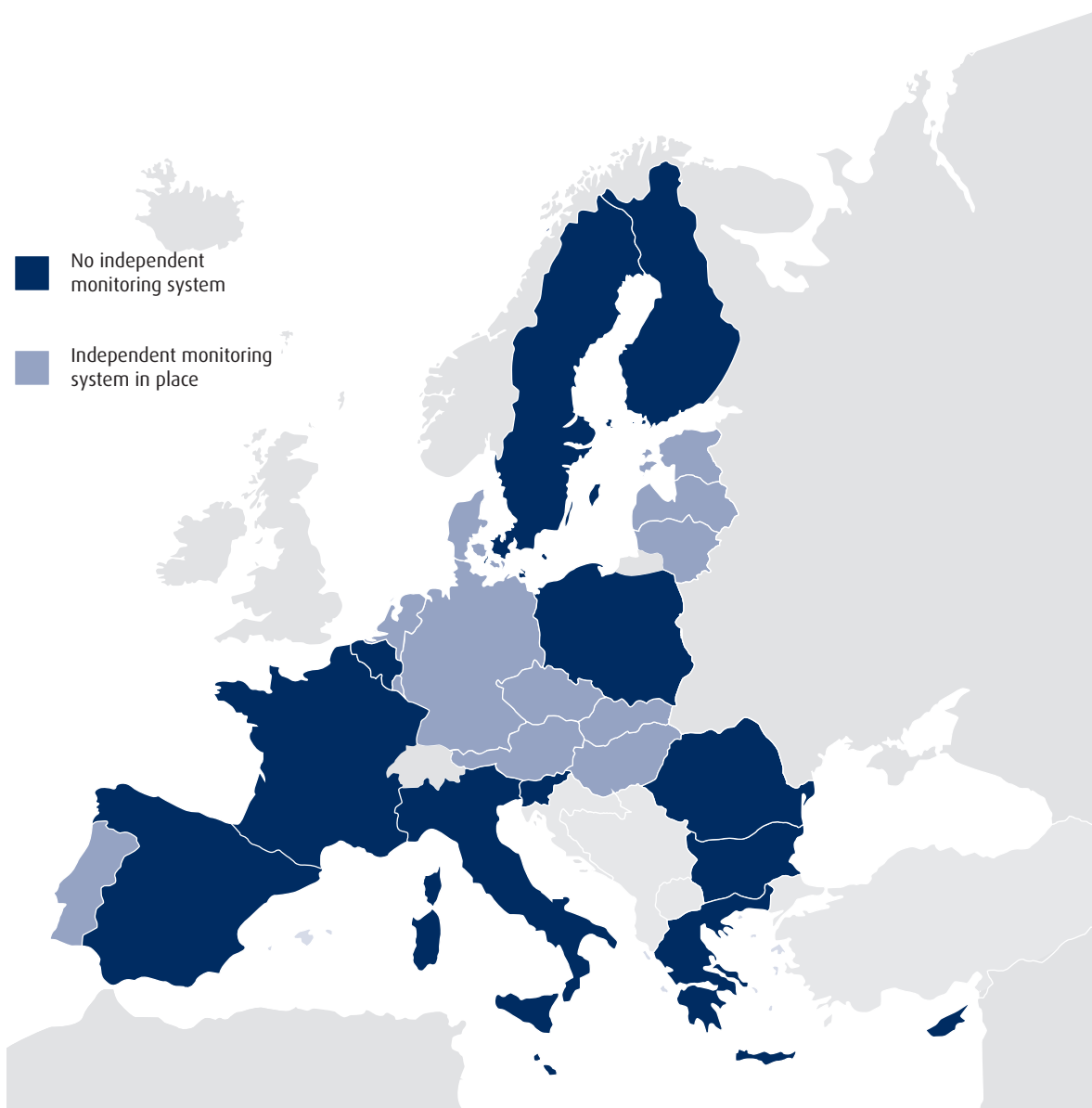
The Supervisory Committee on Repatriation (*Commissie Integraal Toezicht Terugkeer*, CITT) is an independent 'watch dog' responsible for monitoring returns in the **Netherlands**. The committee can inspect and accompany individual and collective return operations or inspect the return process as a whole, including the procedures and working methods of the Repatriation and Departure Service (*Dienst Terugkeer & Vertrek*). It also advises the government on how to improve the integrated process of return. The committee is independent in choosing when and how often forced return operations are monitored. It pays particular attention to the deportations of vulnerable groups and deportations that attract public interest, such as deportations of groups in organised charter flights. It also focuses on cases in which the necessity to apply means of coercion is foreseen, when, for example, aliens with a criminal and/or violent history are deported. A physician and a psychologist are part of the committee team. They can be deployed to survey deportations of minors or cases with medical aspects.

For more information, see: www.commissieterugkeer.nl

⁸⁵ Austria (NGO *Verein Menschenrechte Österreich*); Estonia (Red Cross); Germany (different NGOs in at least three airports); Lithuania (Red Cross). In addition, NGOs can be involved in monitoring in Slovakia.



Figure 1.5: Independent forced return monitoring systems, by country



Note: The map illustrates the independence of monitoring bodies from the authorities managing return. Other possible deficiencies such as limitations in the scope or capacity of monitors are not considered. At the end of 2011, Belgium and Greece were in the process of introducing monitoring mechanisms. In Germany, return monitoring mechanisms exist at some airports but not nationwide. Ireland and the United Kingdom are not included as they are not bound by the Return Directive.

Source: FRA, 2011; based on Matrix/ICMPD and information collected from Franet

Reporting

Reporting on findings is key to an effective monitoring system as it ensures the accountability of government agencies and the credibility of the monitoring organisation. Only eight of the 12 Member States (**Austria, the Czech Republic, Denmark, Germany, Latvia, Lithuania, the Netherlands and Slovakia**) with operating and independent monitoring organisations publish the findings of the monitoring missions at least in part. While some Member States publish the reports in full, the majority produce case specific reports and analyses for internal

use only, while publishing summaries, statistics or the resulting recommendations to authorities.

In **Austria**, the Human Rights Advisory Board publishes annual reports including recommendations to the Federal Ministry of the Interior, but does not report on each monitored return.⁸⁶ In its Annual Report 2010, for example, it said that fundamental rights issues should be kept in mind at all stages of forced returns. In **Lithuania**, after

⁸⁶ Austria, Human Rights Advisory Board (*Menschenrechtsbeirat*) (2010), p. 20.

each monitored return, observers submit a short report, describing and assessing the entire return process and making recommendations to improve the procedure of return and expulsion. These documents are submitted to their project coordinator at the Red Cross and are not published, although the recommendations are presented to state officials and representatives of NGOs at a conference.

1.3. Integration

This section deals with the integration of migrants, including legally resident third-country nationals as well as their children. The European Council's Common Basic Principles for Immigration Integration Policy in the EU from November 2004⁸⁷ say that "integration is a dynamic, two-way process of mutual accommodation by all immigrants and residents of the Member States". Whereas these common principles refer to various migrant groups residing in the EU, EU communications and directives focus particularly on legally resident third-country nationals.

In 2011, the European Commission issued the *European Agenda for the Integration of Third-Country Nationals*.⁸⁸ Integration is understood as a long-term, multidimensional process, requiring engagement by the receiving society in accommodating the migrants, respecting their rights and cultures and informing them about their obligations. At the same time, migrants need to show a willingness to integrate and respect the rules and values of the society in which they live. This communication highlights European integration challenges and provides recommendations and suggests areas for action.

The integration of third-country nationals should be based on strong guarantees for fundamental rights and equal treatment, building on the mutual respect of different cultures and traditions. Under EU law, the set of rights granted to a person depends on his or her status. On one end of the spectrum, migrants in an irregular situation are afforded only minimal rights, while, on the other end, asylum seekers are addressed through targeted legislation (e.g. the Reception Conditions Directive). Third-country long-term residents are given rights which are commensurate with those of EU nationals. Other categories of persons fall in between these extremes: students, researchers, persons joining their family members, highly qualified migrant workers, refugees and subsidiary protection status holders all have specific rights attached to their status. The more likely or desirable it is that one category or another stays long-term in the country, the broader the set of rights that group enjoys.

Such fragmentation of rights does not, however, take into account the fact that individuals often move between categories. Asylum-seekers may become long-term residents. Persons who are not removed may obtain temporary residence permits and, with time, also become part of the resident population. Experiences of detention or deprivation lived through in the first months and years in the host country may create considerable psychological obstacles for successful integration later. The *European Agenda for the Integration of Third-Country Nationals* does not address the issue that the reception experiences of migrants arriving in an irregular manner may undermine their ability to integrate at a later stage when they have legal resident status.

As reported by the FRA in its 2010 Annual Report – in a number of EU Member States migrants must satisfy pre-entry requirements to be granted a residence permit, requirements which are seen as necessary pre-requisites for integration. Such pre-arrival measures are also addressed in the *Green Paper on the right to family reunification*, which asks how such measures serve the purpose of integration, how they can be assessed in practice and which ones are most effective. Some Member States require family members to pass a test – on language or knowledge of the host culture, say – as a condition of admission to the territory. To facilitate integration and better prepare new migrants, a more promising practice would be to provide pre-arrival information about life in the new country of residence within the EU.

As stated in the *European Agenda*, integration is achieved through the active participation of migrants in the receiving societies. In a pilot study published in June 2011 by Eurostat,⁸⁹ the data required to calculate indicators of immigrant integration have been presented in four policy areas proposed to measure and monitor results of integration policies: employment; education; social inclusion; and active citizenship. Figures for different immigrant groups are provided, broken down by country of birth as well as country of citizenship including long-term third-country residents as well as third-country nationals who have acquired citizenship. Those policy areas can be viewed in parallel with the *EU Framework for National Roma Integration Strategies*⁹⁰ to improve the situation of Roma in Member States with regard to education, employment, housing, healthcare and essential services. The statistical information draws less from issues such as political, social and cultural participation. A closer look at those areas reveals clear differences in access and participation rates between different migrant groups and the majority population but also promising practices of integration.

⁸⁷ Council of the European Union (2004), p. 19.

⁸⁸ European Commission (2011g), reference or comment on the resulting JHA Council conclusions of December 2011 could also be made.

⁸⁹ Eurostat (2011).

⁹⁰ European Commission (2011m).



FRA ACTIVITY

Respect for and protection of persons belonging to minorities

In September 2011, the FRA published a report on *Respect for and protection of persons belonging to minorities*. This report examines what the Treaty of Lisbon means for the protection of minorities, and policies the EU has recently adopted in this field. It provides evidence of persisting discrimination found in many areas of life, including employment, housing, healthcare and education.

1.3.1. Health

Legislative and policy developments in healthcare affecting migrants

Several legal provisions exist which guarantee equality of treatment between EU citizens and third-country nationals who are long-term residents⁹¹ and those who benefit from international protection⁹² in a wide range of economic and social matters, including healthcare. In addition, Article 30 of the Qualifications Directive⁹³ guarantees access to healthcare to refugees and to those who benefit from subsidiary protection under the same conditions as Member State nationals. With the publication of the recast, a previously existing limitation for persons granted subsidiary protection was removed.

However, some EU Member States instituted measures that could potentially raise economic barriers, thereby limiting migrants' access to healthcare. Rules introduced in June 2011 in **Denmark**, for instance, require that patients with more than seven years of residence cover the costs of any language interpretation they need when seeking medical assistance. In contrast, those who have resided there for less than seven years continue to enjoy this service free of charge.⁹⁴

Some EU Member States also implemented changes that have increased the cost of health insurance for third-country nationals. This was the case in the **Czech Republic**, where legislative changes led to a doubling of the level of insurance coverage for third-country nationals who apply for residence permits valid beyond 90 days. Since January 2011, they have been required to subscribe to insurance policies

that cover costs of up to €60,000, whereas the previous threshold was €30,000.⁹⁵

Some EU Member States have adopted national integration strategies for migrant populations that include a healthcare component. This includes **Cyprus**, which adopted its first action plan for the integration of immigrants who reside there legally.⁹⁶ In the area of health, the action plan aims to provide easier access to information and health treatment and to improve the way health service providers handle immigrants. All legal immigrants are covered by healthcare insurance.

Although healthcare is free of charge in **Cyprus** for asylum seekers whose salaries fall below a certain threshold, the European Commission against Racism and Intolerance (ECRI) reports⁹⁷ that the standard policy appears to be to refuse this benefit to those who are entitled to it. Governmental and non-governmental organisations, ECRI adds, express concerns that refugees are consistently refused special treatment abroad when the medical treatment or procedure required cannot be provided in Cyprus, although they are entitled to free healthcare on the same footing as Cypriots and other EU nationals.

Similarly to the Cypriot action plan, the **Czech** Government adopted its *Foreigners Integration Concept*, which required the ministers of health and of the interior to submit a proposal for improving the healthcare situation of foreigners by the end of 2011.

Another example is that of **Austria**, whose national action plan on integration includes specific recommendations relating to healthcare. This plan, which is coordinated by the Ministry of the Interior (*Bundesministerium für Inneres*), includes raising awareness among disadvantaged groups of persons with a migration background and facilitating the use of preventive healthcare by these groups. As part of improving access to healthcare, medical staff will be encouraged to diversify their language skills and efforts will be made to increase the number of medical staff with a migration background.⁹⁸

In March, the Ministry of Labour, Social Affairs and Family (*Ministerstvo práce, sociálnych vecí a rodiny Slovenskej republiky*) of the **Slovak Republic** amended the concept for the integration of foreigners (*Koncepcia integrácie cudzincov v. Slovenskej republiky*) that was

91 Council Directive 2003/109/EC, OJ 2004 L 16, p. 44.

92 Directive 2011/51/EU, OJ 2011 L 132, p. 1.

93 Directive 2011/95/EU, OJ 2011 L 337, p. 9.

94 Denmark, Administrative order No. 446 of 12 May 2011.

95 Czech Republic, *Zákon o pobytu cizinců* (Residence Act), No. 326/1999, January 1, 2000, last modified by law 427/2010, 1 January 2011.

96 Cyprus, *Σχέδιο Δράσης για την Ένταξη των μεταναστών που διαμένουν νόμιμα στη Κύπρο 2010-2012*.

97 ECRI (2011a).

98 Austria, BMI (2011), pp. 29-32.

adopted in May 2009.⁹⁹ This policy relates to the integration of third-country nationals residing legally in Slovakia. The policy introduces a number of measures that could lead to better health outcomes for third-country nationals, mainly through facilitating their independent access to the healthcare system.

Promising practice

Capturing migrant status in health databases

In 2011, the **Slovakian** Ministry of Health (*Ministrstvo za zdravje*) produced a draft proposal for a Healthcare Databases Act (*Predlog Zakona o zbirkah podatkov v zdravstvu*). This bill defines the rights, obligations and duties of healthcare providers and other operators in processing personal data and managing databases in the field of healthcare. It stipulates that several databases include data disaggregated by migrant status, including the chronic diseases registry; the preventive healthcare of children and youth registry; the preventive healthcare of adults registry; the reproductive healthcare registry; the database on treatment in hospitals and other stationary facilities; and the database on the health of the economically active population, work-related injuries and occupational disease and eligible sickness absence of employees.

Two main trends can be identified among the few Member States where data on health inequalities between the majority population and migrant communities were published in 2011: migrant communities make less use of preventive healthcare services (**Austria**,¹⁰⁰ **Denmark**¹⁰¹ and **Germany**¹⁰²) and have poorer health outcomes (**Denmark**¹⁰³ and the **Netherlands**¹⁰⁴) compared to members of the majority population.

Refugees, as well as asylum seekers, are especially at risk of poor health and mental health problems. According to the Equality and Human Rights Commission (EHRC) in the **United Kingdom**, refugees and asylum seekers have particular health concerns due to the impact of relocation and possible past experiences of trauma.¹⁰⁵

1.3.2. Education

In its report on **Malta**, CERD expressed concerns about difficulties faced by immigrant women, in

99 Slovakia, Ministry of Labour, Social Affairs and Family (2011).

100 Austria, Statistics Austria (2011), p. 66.

101 Kjølner M. *et al.* (2007).

102 Germany, Federal Office for Migration and Refugees (BAMF) (2011).

103 Kjølner M. *et al.* (2007).

104 Can, M. (2011).

105 United Kingdom, Equality and Human Rights Commission (EHRC) (2010).

particular refugees and asylum seekers, in effectively accessing education.¹⁰⁶

Residence requirements can also act as barriers preventing migrants and third-country nationals from having equal access to pre-school education and educational grants. For instance, in the **Czech Republic**, municipalities often require that applicants who wish to register their children for pre-school education must be permanent residents in that municipality. The Public Defender of Rights (*Veřejný ochránce práv*) considered this practice to be discriminatory and found the requirement to be contrary to the national School Act (*školský zákon*).¹⁰⁷ It also issued a recommendation to guarantee the right of everyone to equal treatment in access to pre-school education.¹⁰⁸

Access to pre-school education and to educational grants and scholarships for third-country nationals and EU citizens in some municipalities in **Italy** are hindered by restrictive residence requirements imposed by local authorities. For some municipalities a residence permit and registration in the municipal registry of residents is required. In other municipalities a minimum number of years of residence is also required before social services can be accessed (up to 15 years in some regions), which has acted as a barrier even for long-term stay migrants. In its 2011 annual report, the National Office Against Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali*, UNAR) referred to administrative acts aimed at limiting access to pre-primary education or education grants or scholarships as institutional discrimination.¹⁰⁹ Similar restrictive criteria have been adopted by some municipalities in Italy for long-term migrants wishing to access public housing and rental subsidies (for more information, see the upcoming section on Housing).

In **Austria**, the Compulsory Schooling Act (*Schulpflichtgesetz*)¹¹⁰ introduced in 2011 provides that education is compulsory for children who reside permanently in Austria, but it does not provide compulsory schooling for children with temporary residence status.

The initial findings of the Trajectories and Origins (TeO) Survey on Population Diversity in France, which sampled 21,000 persons in metropolitan **France** between September 2008 and February 2009, were published at

106 UN, Committee on the Elimination of Racial Discrimination (CERD) (2011), p. 4.

107 Czech Republic, Law on Pre-School, Basic, Secondary, Tertiary, Professional and Other Education (School Act), Nr. 561/2004, 1 January 2005, last modified by law Nr. 73/2011, 25 March 2011.

108 Czech Republic, *Veřejný ochránce práv* (2010).

109 Italy, National Office Against Racial Discrimination (UNAR) (2011).

110 Austria, Compulsory Schooling Act 2011 (*Bundesgesetz über die Schulpflicht*) BGBl. 76/1985, last modified by BGBl. I 113/2006.

the end of 2010.¹¹¹ The respondents were immigrants, descendants of immigrants and people from the majority population. The aim of the survey was to examine access to resources by immigrants and their children who were born in France. The survey:

- shows that, concerning education, significantly smaller proportions of persons with an immigrant background access higher education compared to the mainstream population. While 53 % of the mainstream population access higher education, only 25 % of descendants of immigrants from Turkey do, compared to 41 % of descendants of Algerian origin, 43 % of Portuguese origin and 44 % of sub-Saharan African origin. These “differences stem from differences in the tracks followed in secondary school, which in turn partly reflect differences in social origin between sub-groups.”¹¹²
- results also show that differences in career tracks between the majority population and minority populations may be due to discriminatory treatment in educational advisory services. On average, 14 % of descendants of immigrants reported “having been less well treated” when offered advice on which educational path to follow, which is about three times as much as the rate for the general population. This is particularly marked among descendants of immigrants from Sahelian Africa (24 %), Morocco and Tunisia (23 %), Turkey (22 %), Algeria (20 %) and west and central Africa (20 %). The main motives given as a possible reason for this unfavourable treatment are ‘origin’ and ‘skin colour’.¹¹³
- findings suggest that de facto segregation in education may be the result of residential segregation and avoidance strategies by parents. “Avoidance strategies are most common in mainstream population families,” with 30 % of children in this group attending schools outside of their catchment area. Descendants with an immigrant background, in contrast, are less likely to avoid schools in their catchment area: 16 % of respondents with a Turkish background, 18 % of those with a Sahelian African background, 20 % of those with a west and central African background and 21 % of those with an Algerian background attend schools outside of their catchment area.
- also shows in its initial findings that children with a minority background are more likely to “go to schools with high proportions of immigrant children (51 % on average compared to 17 % for the

mainstream population).¹¹⁴ This may stem from residential segregation, which makes it less likely for children with an immigrant background to attend schools attended by those from the majority population.

Evidence of segregation leading to avoidance strategies is confirmed by research conducted in eight Member States (**France, Germany, Hungary, Italy, Netherlands, Poland, Portugal** and the **United Kingdom**¹¹⁵). In its 2011 publication *Intolerance, Prejudice and Discrimination: a European Report*, the Friedrich Ebert Foundation (*Friedrich Ebert Stiftung*) analysed “survey data collected in telephone interviews of a representative sample of 1,000 persons aged 16 and above per country in autumn 2008 in the scope of the Group-based Enmity in Europe study,” conducted by the University of Bielefeld.¹¹⁶ The analysis of the survey results shows that “41 % of all European respondents agree ‘somewhat or strongly’ that they would not send their child to a school where a majority of the pupils are immigrants. In the Netherlands, Germany and Great Britain more than half of respondents share this opinion; in France, Poland and Italy the figure is about one third. In Portugal the figure is one in four.”¹¹⁷

1.3.3. Employment

Migrants and the labour market

Evidence shows that a number of migrant groups often find themselves in less favourable positions on the labour market in EU Member States than members of the majority population. This can manifest itself in lower rates of employment, in over-qualification for the work carried out, or in over- and under-representation of migrants and ethnic minorities in economic sectors compared to the majority population.¹¹⁸

Data published by the Observatory of Inequalities (*Observatoire des inégalités*) in December 2010 suggest that people with a migration background have a different profile on the labour market in **France** than the majority population.¹¹⁹ The data, concerning the year 2007, show that while the occupation of 23 % of native French people was in the category of ‘labourers’ (*ouvriers*), this was much higher for other groups: Algerians (43 %), Moroccans (52 %), Tunisians (49 %), Turkish nationals (66 %) and other African nationals (35 %).

¹¹⁴ *Ibid.*, p. 51.

¹¹⁵ The survey was conducted in England, Wales and Scotland but not in Northern Ireland.

¹¹⁶ Zick, A. et al. (2011), p. 18.

¹¹⁷ *Ibid.*

¹¹⁸ European Centre for the Development of Vocational Training (Cedefop) (2011).

¹¹⁹ Observatory of inequalities (*Observatoire des inégalités*) (2010).

¹¹¹ Brinbaum, Y. et al. (2010), p. 50.

¹¹² *Ibid.*, p. 49.

¹¹³ *Ibid.*, pp. 45-51.

Larger proportions of members of migrant groups and ethnic minorities are unemployed compared to the majority white population in the **United Kingdom**.¹²⁰ In the last quarter of 2010, the overall unemployment rate in Great Britain was 4.9 %, with that of the white population at 4.5 %. The average unemployment rate for minority ethnic groups was 8.5 %. Within that group, the population with the highest rates of unemployment were those of a mixed ethnic background (12.8 %), followed by the 'Black or Black British' population (11.5 %). The "Asian or British Asian" population fared relatively better, with an unemployment rate of 6.8 %.

FRA ACTIVITY

Migrants, minorities and employment

In July 2011, the FRA published a 2003–2008 update on the exclusion and discrimination of migrants, minorities and their employment in the 27 EU Member States. The report provides a comparative overview and analysis of data and information documenting discrimination in the workplace and labour markets across the EU. It highlights persistent patterns of inequality between the situation of foreigners, immigrants and minority groups in the labour market and that of the overall majority populations.

The most recent data available from **Austria** show that, in 2008, 15 % of second generation migrants (and 29 % of first generation migrants) were over-qualified for the work they carried out, compared to 10 % for persons without a migration background.¹²¹ Data from 2010 show that the trade or manufacturing sectors employed the largest proportions of people in Austria and people with a migration background tended to work more in these sectors than those without a migration background.¹²²

Data released by the Federal Service Employment, Labour and Social Dialogue in **Belgium** (*Federale Overheidsdienst Werkgelegenheid, Arbeid en Sociaal Overleg*) show that the employment rate of native Belgians was 63.2 % in 2009.¹²³ For migrants from within the EU, the rate was 52.2 % compared to 47.1 % for migrants from outside the EU. Similar differences can be observed in unemployment rates, with that of native Belgians at 6.6 %, compared to 16.2 % for migrants from within the EU and 21.9 % for migrants from outside the EU.

120 United Kingdom, Office for National Statistics (2011).

121 Austria, Statistics Austria (2011), p. 57.

122 Austria, Statistics Austria (2011).

123 Belgium, Federal Public Service Employment, Labour and Social Dialogue (2011).

Statistics from the trade union for commercial and clerical employees (*Handels- og Kontorfunktionærernes Forbund, HK*) show that the unemployment rate in 2010 for people with a migration background in **Denmark** was 9.2 %, compared to 4.1 % among ethnic Danes.¹²⁴ Furthermore, the latest available national statistical data show that while the employment rate of persons of Danish origin was 74.1 % in 2010 the rate for descendants of migrants was 58 %. Within that group, the employment rate of descendants from Western countries was 66.7 %, compared to 56 % for descendants from non-Western countries.¹²⁵ 'Western countries' were defined to include the Nordic countries, EU countries, Andorra, Liechtenstein, Monaco, San Marino, Switzerland, Vatican City, Canada, the United States, Australia and New Zealand. Non-Western countries include all others.¹²⁶

The occupational attainment of people with a migration background in **Germany** remains behind that of native Germans. The latest available data, covering the year 2009, show that, at 13 %, the unemployment rate for persons with a migration background was higher than the 6.5 % rate for persons without a migration background.¹²⁷ The proportion of manual workers among persons with a migration background was also much higher than that for those without a migration background: 40.8 % compared to 23.1 %.

The unemployment rate among persons with a non-Western migration background in the **Netherlands** in 2010 was 12.6 %, compared to 4.5 % among persons with no migration background.¹²⁸ The net labour participation rate among persons with a non-Western migration background was 52.8 % compared to 69.4 % among persons with no migratory background. For the purposes of this research "people with a non-western foreign background comprise people from Turkey or countries in Africa, Latin America and Asia, with the exception of Former Dutch East Indies/Indonesia and Japan. The first generation consists of men and women born outside the Netherlands. The second generation are men and women born in the Netherlands of whom at least one parent was born abroad."¹²⁹

"Asylum seekers, migrant workers, non-white and Muslim Cypriots continue to face widespread discrimination in employment [in Cyprus] often attributed to a deep-rooted attitude of protectionism."

ECRI (2011a), p. 22

124 Denmark, Trade union for commercial and clerical employees (2011).

125 Denmark, Statistics Denmark (2011a).

126 Denmark, Statistics Denmark (2011b).

127 Germany, Federal Office for Migration and Refugees (2011).

128 Netherlands, Statistics Netherlands (2011a).

129 Netherlands, Statistics Netherlands (2011b).

Removing barriers

While the statistical data and cases presented above suggest that barriers to the labour market persist for migrants in the EU, some EU Member States adopted policy and legislation that removed such barriers. In the long run, this removal could lead to the more successful integration into the labour market of first- and second-generation migrants from within and outside the EU.

Legislation on the employment of non-nationals in **Austria** (*Ausländerbeschäftigungsgesetz*) was amended in April 2011, removing a provision requiring employers to prioritise non-national workers for dismissal when making staff cuts.¹³⁰ In **Germany**, legislation adopted in July 2011 now makes it easier for professional qualifications gained abroad to be recognised by introducing a single procedure.¹³¹

1.3.4. Housing

The **Bulgarian** Refugee Council (*Българският съвет за бежанци и мигранти*) in its 2008–2010 report on the integration of refugees reported that they still face obstacles and difficulties in accessing municipal and private housing. These obstacles result from eligibility requirements, such as registration in a municipality; a length of residence requirement set by the municipalities themselves; and discriminatory attitudes and reluctance among property owners to let to non-nationals with refugee or humanitarian status.¹³²

The President of the Veneto region in **Italy** proposed a bill – yet to be adopted – requiring that migrants should have resided in the region for 15 years before they can access local social services, including access to public housing and rental subsidies.¹³³ If they are to be registered in the municipal registry of residents (*iscrizione anagrafica*), migrants are required to meet ‘specific housing standards’ not asked of Italian citizens. One requirement is certification from a municipality or local health unit that the accommodation is of a minimum area of habitable space relative to the number of residents. As social services are usually granted on the basis of this registration, third-country nationals who are not able to comply with these standards could be excluded from access to social housing and rent subsidies. The National Office Against Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali*, UNAR) issued an opinion stating that requiring Italian citizenship or many years of residence for access

to public services consists of discrimination on the ground of the status of citizenship.¹³⁴ In April 2011 the European Commission began infringement proceedings against Italy with regard to laws in the Friuli Venezia Giulia region that make access to public housing dependent on the number of years of residence or which in other ways give preferential treatment to Italian citizens compared to third-country nationals who are long-term residents under Directive 2003/109/EC.¹³⁵

In its 2011 report on **Spain**, ECRI noted that “the new Law on the Rights of Freedom of Foreigners and their social integration has opened a possibility for discriminatory restrictions by guaranteeing the right to housing aid on equal terms with Spanish nationals only to ‘long-term’ foreign residents and leaving decisions in other cases to the discretion of the autonomous communities with responsibility in this area.”¹³⁶

Non-EU nationals can also be excluded from non-profit housing schemes. The Housing Act adopted in 2003 in **Slovenia**, for instance, stipulates that only Slovenian and EU citizens with permanent resident status have the right to apply for non-profit rental housing, rental subsidies and housing loans, upon fulfilment of the principle of reciprocity, that is, if Slovenian nationals have access to similar schemes in other EU Member States.¹³⁷

The aforementioned Trajectories and Origins Survey on Population Diversity in **France** provides an analysis of inequalities in access to housing.¹³⁸ The initial findings of the survey show that “immigrants and their children are less frequently homeowners and more frequently occupy social housing than the mainstream population. This is particularly the case for people originating from North and sub-Saharan Africa and Turkey. One-fifth of the respondents from Algeria and sub-Saharan Africa report that they have been discriminated against, regarding access to housing. The feeling of segregation is strongest among social housing tenants, particularly immigrants and *départements d’outre-mer* (DOM) native French.”¹³⁹ Drawing on the findings of the survey, the National Institute for Demographic Studies (*Institut national d’études démographiques*, INED) published a report on the residential segregation of immigrants in France in April 2011.¹⁴⁰ This report shows that 42 % of population groups from North Africa, sub-Saharan Africa and Turkey live in the 10 % of neighbourhoods

¹³⁴ Italy, UNAR (2010).

¹³⁵ Italy, Infringement procedure No. 2009/2011 on Wrong application of Directive 2003/109 by the commune of Verona and by the region of Friuli-Venezia-Giulia.

¹³⁶ Council of Europe, ECRI (2011b), p. 7.

¹³⁷ Slovenia, the Housing Act, 19 June 2003.

¹³⁸ Pan KéShon, J.-L. and Robello, S. (2010).

¹³⁹ *Ibid.*, p. 93.

¹⁴⁰ Pan KéShon, J.-L. and Robello, S. (2011).

¹³⁰ Austria, Parliament (2011).

¹³¹ Germany, Federal Ministry of Education and Research (2011a); Germany, Federal Ministry of Education and Research (2011b).

¹³² Bulgaria, Bulgarian Council of Refugees (2009).

¹³³ Italy, Veneto Regional Council (2011).

with the highest unemployment rates, as compared to 10 % of the majority population living in the same neighbourhoods.

In **Germany**, the survey carried out by the Friedrich Ebert Foundation, mentioned earlier, shows that 50 % of German respondents would prefer not to “move to an area where many immigrants live” and “find such residential areas problematic.”¹⁴¹

The Federal Integration Commissioner (*Beauftragte der Bundesregierung für Migration, Flüchtlinge und Integration*) in **Germany** remarks that migrants are often victims of discrimination in the residential market.¹⁴² It called upon real estate agents and associations to develop new ways of preventing this discrimination, by raising awareness and training their employees. The Institute of Ethnic Studies at the **Lithuanian** Social Research Centre conducted a public opinion survey in 2010 on social distance between various social groups and attitudes towards immigration. In total, 1,008 respondents aged 15 to 74 were interviewed. The results of the survey, which were made available in December 2010, show that 63.8 % of respondents would not support the allocation of social housing to immigrants.¹⁴³

The results of a survey published in December 2010 in **Spain** by the Basque Immigration Observatory (*Ikuspegi*) among 1,200 individuals with a migration background and native Spaniards show that 56.2 % of migrant respondents reported having particular difficulties in renting a flat.¹⁴⁴ Another attitude survey conducted by the **Catalan** government on the basis of 1,600 face-to-face interviews with native Spaniards reveals that only 48.5 % of the respondents would rent a flat to a migrant family.¹⁴⁵

Homelessness

In September 2011, the European Parliament adopted a *Resolution on an EU Homelessness Strategy*. The resolution calls for the development of an ambitious, integrated EU strategy, underpinned by national and regional strategies with the long-term aim of ending homelessness within the broader framework of social inclusion.¹⁴⁶ The significance of this resolution rests partly on the fact that migrants, whether third-country nationals or EU citizens, form a significant and increasing proportion of clients using services for homeless people in some EU Member States.¹⁴⁷

141 Zick, A. *et al.* (2011).

142 Germany, Migazin (2011).

143 Lithuania, Žibas Karolis (2010) p. 7.

144 Ikuspegi (2010).

145 Generalitat de Catalunya, Centre d'Estudis d'Opinió (2010).

146 European Parliament (2011c).

147 European Federation of National Organisations working with the Homeless (FEANTSA) (2011a).

A study published in late 2010 mapping the situation of non-national homeless people in Copenhagen, **Denmark**, shows that these people stem from three main groups: central and eastern European EU citizens; ethnic groups from African countries; citizens of Scandinavian countries.¹⁴⁸ The first two groups have grown in number over the past year. One of the most visible subgroups consists of Romanian citizens of Roma origin, who often find themselves in situations of extreme poverty.

The Housing Finance and Development Centre (*Asumisen rahoittamis- ja kehittämisskeskus, ARA/finansierings- och utvecklingscentralen för boendet*) in **Finland** reveals that homelessness among immigrants has increased even though the total number of homeless people in the country fell significantly in the period 2000–2010. In 2010, about 9 % of single homeless persons were immigrants, while over 40 % of all homeless families were migrants.¹⁴⁹ The Social Report series published annually by the National Board of Health and Welfare (*Socialstyrelsen*) in **Sweden** also indicate that homelessness among migrants is increasing. It also highlights the vulnerability of migrant groups and the prevalence of ethnic segregation in housing.¹⁵⁰

In November 2010, the Polish Institute of Public Affairs published a report from a pilot study on homelessness among refugees in **Poland**. The study was conducted on behalf of UNHCR in 2010 and is based on in-depth interviews with refugees from Chechnya. The main factors behind homelessness were shown to be the lack of communal and social housing, the poor economic situation of refugees and the reluctance of landlords to rent to non-nationals, particularly single mothers and families with many children, and the fact that some landlords demand higher fees from refugees than from Poles.¹⁵¹

Hungary provides an example of some of the relevant legislative developments at the national level. Amended legislation, which came into force in December 2011, makes it possible for a fine of approximately €500 (HUF 150,000) or 60 days of imprisonment to be imposed on individuals “habitually residing in public places.”¹⁵² According to the analyses of several international and national civil society actors, this could have a severe impact in future on ethnic minorities and refugees.¹⁵³

148 Denmark, Københavns Kommune (2010).

149 Finland, Housing Finance and Development Centre (2010).

150 Sweden, National Board of Health and Welfare (*Socialstyrelsen*) (2010).

151 Wysińska, K. and Ryabińska, N. (2010).

152 Hungary, Act CLIII/2011 on the amendment of the Act on Offences (LXIX/1999).

153 FEANTSA (2011b); Győri, P. and Vecsei, M. (2011); A Város Mindenkié (2011); UNHCR (2010).



Political participation

Political participation of third-country nationals remained an important topic for discussion in some EU Member States. In its 2011 Communication on integration, mentioned earlier, the European Commission stressed the importance of migrants' participation in the democratic process and suggested that obstacles to migrants' political participation should be removed. Similarly, at the Council of Europe level, the Congress of Local and Regional authorities asked the Committee of Ministers to invite Member States "to ensure that all forms of democratic participation at local level are open to all people, regardless of citizenship or nationality".¹⁵⁴ In its 2010 Annual Report, the FRA reported that the majority of EU Member States grant, under certain conditions, the right to vote in municipal or local elections to resident third-country nationals. No other country extended the right to vote to non-EU nationals in 2011. In **Cyprus** on 13 October, the House of Representatives rejected two bills regarding the extension of the right to vote in municipal and community elections to long-term immigrants who are non EU-citizens. In Berlin, a symbolic election was organised for non-EU foreigners in parallel to the Berlin election in order to highlight the number of Berliners who are paying taxes but are excluded from elections in **Germany**.¹⁵⁵ In **Belgium**, a proposal to abolish the right to vote for non-EU nationals was introduced in the House of Representatives in 2010 and in the Senate in 2011 by parliamentarians from a minority member party of the opposition.¹⁵⁶

Promising practice

Engaging migrants in political participation

The Finnish Immigrant Parliament, a project funded by the Ministry of the Interior, is designed to influence public opinion on relevant issues and give a voice to immigrants in the Finnish immigration debate. It will not have official status. The first Immigrant Parliament elections will be held in 2012 in tandem with municipal elections. Altogether 50 parliamentary representatives will be voted in. Foreign-born Finnish citizens, foreigners with at least a year of residence in Finland and the children of immigrants are eligible to vote.

For more information, see: www.ipf.fi

¹⁵⁴ Council of Europe, Congress of Local and Regional Authorities (2011).

¹⁵⁵ Citizens of Europe, *Jede Stimme* (2011).

¹⁵⁶ Belgium, Proposition to abolish the municipal right to vote for non-EU nationals (2010).

Outlook

The EU will need to have established a Common European Asylum System by the end of 2012. The European Asylum Support Office will play an increasingly important role at the practical level, supporting national asylum systems with information and tools.

The finalisation of the recast asylum package will remain a challenge, given the persistent diversity of views among the European Commission, the Council of the European Union and the European Parliament.

A mechanism will be required to assess whether the fundamental rights of asylum seekers who are transferred to another EU Member State in accordance with the Dublin II Regulation are at risk.

The exposure of migrants in an irregular situation to exploitation and abuse will remain a cause for concern and policy makers, including at EU level, are likely to pay particular attention to the situation of those who are not removed for legal, humanitarian or practical reasons.

With respect to the rights of migrants in an irregular situation, experience gained from the implementation of the Employers Sanctions Directive will show whether existing mechanisms are effective, at least as regards the right to claim withheld wages.

The adoption of the Seasonal Workers Directive would facilitate non-skilled labour migration into the EU. This instrument could reduce the demand for the labour force of persons staying illegally on the territory of EU Member States who typically are at risk of being exploited.

With regard to the integration of migrants in the societies of EU Member States, a future challenge will be to ensure that integration continues to be seen as a two-way process, combating discrimination while also recognising the benefits of diversity for the receiving society.

Continuous monitoring, based on agreed indicators of integration, including in the areas of political, cultural and social participation, is required to promote further the integration of legally-resident third-country nationals.

The modernisation of the Professional Qualifications Directive announced in a European Commission green paper could allow for greater mobility of certain third-country nationals who obtained their qualifications within the EU: family members of EU citizens, long-term residents, refugees and blue card holders.

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- Bulgaria, Asylum and Refugees Act, Article 87.
- Croatia, 2007 Asylum Act, Official Gazette (*Narodne novine*), No. 79/07, 30 July 2007, Article 67.
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Figure 1.2 – Timelines to appeal and right to stay (accelerated procedure)

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Figure 1.3 – Timelines to appeal and right to stay (Dublin procedure)

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UN & CoE

EU

January

January

February

February

March

2 March – Frontex brings its Rapid Border Intervention Team (Rabit) operation in Greece to an end

April

10 March – European Commission proposes amendments to the Schengen Borders Code, including on how to deal with asylum applications during joint border controls

May

31 March – Frontex adopts its fundamental rights strategy

June

March

July

August

5 April – The provision on the right to appeal visa rejections of the Community Code on Visas enters into force

September

April

October

24 May – European Commission proposes suspending visa-free travel in cases of abuse of asylum systems

November

May

December

June

July

August

16 September – European Commission proposes a mechanism for the temporary reintroduction of border controls

September

11 October – The EU Visa Information System (VIS) becomes operational in North Africa

25 October – European Commission adopts a Communication on smart borders

25 October – Council of the European Union establishes an information technology (IT) agency in Tallinn to manage the operation of large-scale IT systems

25 October – European Parliament and Council of the European Union amend the founding regulation of Frontex and strengthen its fundamental rights language

October

15 November – European Commission proposes financial solidarity instrument to support EU Member States in the external borders and visa fields

November

12 December – European Commission tables proposal for a European external border surveillance system (Eurosir)

December



2

Border control and visa policy



The migration pressure on European Union (EU) Member States bordering the Mediterranean Sea dominated debates on borders and asylum in the EU in 2011. The Arab spring and the Libyan uprising led to a surge in new arrivals to these Member States, fuelling public debate. These new arrivals often travelled onwards to other EU Member States, prompting some of them to intensify police checks at internal Schengen borders. This influx, and the response to it, thrust the Schengen Agreements to the centre of many of these debates. Core to the Schengen discussions were the respect for the agreements, cooperation between Member States and delays in new accessions. The situation of persons entering the EU irregularly through its external borders amounts to a fundamental rights emergency.

This chapter covers the developments in the EU and its Member States on policies and practices in the areas of border control and visa policy in 2011. It looks at the fundamental rights challenges facing the EU, in particular those arising from the added pressure of migration on its southern Mediterranean borders, and the legislative proposals the EU has made over the year. It then turns to the Visa Code, focusing on refused visa applicants' right to appeal. In order to gain a comprehensive overview of this area, this chapter should be read together with Chapter 1 on asylum, immigration and integration.

2.1. Border control

The adoption of a new regulation for Frontex, the EU agency that coordinates Member State cooperation on border security, represented a significant step towards a fundamental rights framework for sensitive border-control issues.¹ Some of its provisions are designed to strengthen the compliance of Frontex's activities with fundamental rights. Under Article 26, Frontex is to: set up an effective mechanism to monitor respect for fundamental rights; establish a consultative forum to assist in fundamental rights matters, to which FRA and other actors will be invited; and appoint a fundamental rights officer.

Key developments in the area of border control and visa policy:

- the emergency situation at the EU's external borders and the large number of new arrivals in EU Member States bordering the Mediterranean Sea, combined with their onward movement to other Member States, triggers a discussion on whether the reintroduction of Schengen border controls calls into question the right to free movement within the EU;
- some EU Member States face increased numbers of asylum applications following the visa waivers, leading the European Commission to propose a clause that would allow suspension of visa-free movement where this has led to significant increases of irregular migration flows or asylum applications;
- an EU Agency for the operational management of large-scale information technology systems in the area of freedom, security and justice is established in Tallinn, Estonia;
- the European Commission proposes a common framework for cooperation and information exchange between Member States and Frontex;
- the founding regulation of Frontex is amended, putting more emphasis on fundamental rights.

¹ Regulation (EU) No. 1168/2011, OJ 2011 L 304/1.

FRA ACTIVITY

Embedding fundamental rights in EU border management activities

In 2011, FRA and Frontex collaborated on the implementation of the cooperation arrangement signed on 26 May 2010, which is designed to strengthen respect for fundamental rights in the field of border management. The arrangement addresses cooperation on joint operations (Article 3), risk analysis (Article 4), training on fundamental rights for border guards and Frontex staff (Articles 5 and 8), research (Article 6), returns (Article 7), work programmes and action plans (Article 9).

Among the work accomplished, FRA contributed to the development of the Frontex Fundamental Rights Strategy, which the Frontex Management Board adopted on 31 March. FRA also participated in the formulation of the plan to implement the strategy, or the Fundamental Rights Action Plan. The FRA provided pre-deployment briefings for two joint operations (Minerva and Hammer) concerning sea and air borders. In the context of its project on the treatment of third-country nationals at the EU's external borders, the FRA observed joint patrols at sea off the coasts of **Greece** and **Spain**. Together, the two agencies agreed upon a plan for training Frontex staff on fundamental rights.

For more information, see: http://fra.europa.eu/fraWebsite/media/mr-270510_en.htm

2.1.1. Emergencies at the EU's external borders

The situation of persons irregularly entering the EU's external border between **Greece** and Turkey amounted to a fundamental rights emergency. Other EU Member States suspended transfers of asylum seekers to **Greece** under the Dublin cooperation.

Upon **Greece's** request, Frontex deployed Rapid Border Intervention Teams (Rabit) at the land border with Turkey from 2 November 2010 to 2 March 2011. During that time, the teams detected a total of 11,809 migrants entering the border in an irregular manner, or some 58 migrants per day on average.² Migrants continued to arrive later in 2011, though their numbers dwindled. As a follow-up to the Rabit deployment, Frontex launched Joint Operation Poseidon Land. At the Turkish border, Poseidon apprehended 3,781 migrants in December, or 121 per day on average. The total number of irregular migrants intercepted crossing the Greek-Turkish land border reached 55,017 in 2011 according to Frontex, a 14 % increase over the year earlier.

2 Frontex (2011a).

As part of its Rabit operation, Frontex deployed substantial resources to improve the treatment of individuals subject to procedures at the border with Turkey. This has reduced the risk that migrants who have crossed irregularly into **Greece** are immediately pushed back to Turkey without any formal procedures. The EU's operational assistance through Frontex, however, covers only initial processing and does not address the most critical fundamental rights concern – the inhuman conditions in which persons are held in facilities near the border.³ Frontex's mandate does not extend to the reception of persons crossing borders irregularly. Human Rights Watch, in a September report, expressed concerns over Frontex's role which it characterised as facilitator of the transfer of migrants to inhuman and degrading conditions in detention centres in Greece.⁴ The report referred to the European Court of Human Rights' (ECtHR) judgment in the *M.S.S. v. Belgium and Greece*⁵ case, which found that Greek detention practices violated Article 3 of the European Convention on Human Rights (ECHR). At the request of four Members of the European Parliament representing the Greens, European Free Alliance faction, a study – *FRONTEx Agency: Which guarantees for Human Rights?*⁶ – was commissioned. It advocates a more vigilant Frontex stance on fundamental rights compliance.

The Greek Minister of Citizen Protection presented the Comprehensive Programme of Border Management for Combating Irregular Migration to the cabinet on 6 September.⁷ The programme includes plans for erecting a wall along the 12-kilometre Greek-Turkish land border in the Evros region near Orestiada. Critics consider the wall plan inappropriate and suggest it will prove ineffective.

Although no reliable statistics document the number of fatalities at sea, civil society organisations have tried to estimate the size of the tragedy using indirect sources, such as incidents reported in the press and accounts provided by eyewitnesses. Fortress Europe, an NGO based in **Italy**, has compiled the most comprehensive estimates based on a systematic review of press articles. According to it, 2011 recorded the largest number of migrant deaths in the Mediterranean since 1994: by early December, 2,251 migrants had died or gone missing in the Sicily Channel alone.

The most severe incident took place on 6 April when more than 220 Somali, Eritrean and Ivorians drowned after their boat capsized 39 miles (63 kilometres) to the south of Lampedusa, Italy.⁸ Another tragedy occurred on 31 July, when 25 migrants died after their boat

3 FRA (2011).

4 Human Rights Watch (2011).

5 ECtHR, GC, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011.

6 Keller, S. et al. (2011).

7 Greece, Ministry of Citizen Protection (2011).

8 UNHCR (2011a).

had docked at the Lampedusa Port.⁹ Following these deaths,¹⁰ the United Nations High Commissioner for Refugees (UNHCR) issued a statement urging improvements in rescue at sea mechanisms.¹¹

FRA ACTIVITY

Getting to the root of the situation at the Greek border

The FRA produced a thematic situation report *Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner* in 2011. The report identifies the factors contributing to the situation in Greece's Evros region and pinpoints, as the chief concern, the difficulties in coordinating local responses. Responsibilities for migration management are divided among four ministries, making the allocation of responsibilities at local level unclear. One way forward would be to develop a specific coordination mechanism at the local operational level, an approach which has proven effective in other EU Member States.

For more information, see: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2011/pub_greek-border-situation_en.htm

In the wake of the Arab Spring, **Italy** and **Malta** received a large number of arrivals over a short period of time. In 2011, nearly 63,000 persons crossed the Mediterranean as a result of the Tunisian revolution and the war in Libya, according to Frontex information provided to the FRA. Half of the arrivals were Tunisians, 25,000 were Libyans and the others were from sub-Saharan Africa and Asia.

The large majority arrived between February and April, with some 51,000 persons landing on the small island of Lampedusa, Italy and 1,579 persons reaching Malta. On the night from 4 to 5 April alone, 840 migrants arrived at Lampedusa, 627 of whom were first rescued by the Italian coastguard.¹² In March, the UNHCR called for a quick transfer to mainland Italy of the 5,000 migrants hosted at Lampedusa, whose reception facility has a maximum capacity of only 850 persons.¹³ It took several weeks for transfers to begin.

Disagreement among EU Member States on the nearest safe port delayed the disembarkation of rescued migrants. In July, more than 100 migrants were stranded on a vessel under NATO command for several days, due to a disagreement between **Italy**, **Malta** and **Spain** over where to take the migrants.¹⁴ In another incident,

104 of 112 Tunisian migrants were accompanied back to Tunisian territorial waters after Italian vessels rescued them on 22 August.¹⁵

A riot against forced returns to Tunisia broke out at the Lampedusa reception facility at the end of September, severely damaging it. As a result, **Italy** opted to declare the port unsafe. In a joint press release, the UNHCR, the International Organization for Migration (IOM) and the British non-governmental organisation Save the children commented that this decision "undermined the entire rescue at sea system for migrants and asylum seekers and at the same time could make rescue operations more hazardous and complex".¹⁶ The facilities in Lampedusa remained unused at the end of the reporting period.

The European Commission's 2011 proposal to amend the Schengen Borders Code (see 2.1.2. on Schengen cooperation) includes provisions on improved border guard training in order to detect situations of particular vulnerability involving unaccompanied minors and victims of trafficking (Article 15).

At the end of the reporting period, the Commission published a proposal for the establishment of a European Border Surveillance System, Eurosur.¹⁷ The proposal aims to reinforce control of Schengen's external borders, by establishing a system for the exchange of surveillance information among EU Member States and with Frontex envisages the establishment of a framework for information exchange and cooperation between Member States and Frontex. The draft regulation states that the aim of Eurosur is to prevent irregular migration and cross-border crime at the Schengen external land and maritime borders as well as to reduce the loss of lives at sea. The proposal refers to the need for EU Member States and Frontex to respect European fundamental rights and data protection rules. The draft regulation also envisages the possibility of cooperation with third countries, although it prohibits exchange of data with a third country that could use such information to identify persons or groups of persons who are at serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights. The development of Eurosur needs close monitoring. While the system rests on already existing national or European instruments and tools, Eurosur is likely to create a synergy that may have an impact on fundamental rights, especially in relation to asylum and data protection.

⁹ Italy, Camera dei deputati, Assemblea (2011).

¹⁰ The Guardian (2011).

¹¹ United Nations News Centre (2011).

¹² ASCA (*Agenzia Stampa Quotidiana Nazionale*), (2011); Frontex (2011b).

¹³ UNHCR (2011b).

¹⁴ Times of Malta (2011).

¹⁵ TM News (2011).

¹⁶ UNHCR et al. (2011).

¹⁷ European Commission (2011a).

FRA ACTIVITY

Identifying gaps and promising practices for migration management at borders

The FRA interviewed migrants, border authorities, fishermen and other actors in 2011 to collect information on the interception of migrants, rescue at sea, disembarkation and first reception procedures at the southern Mediterranean border. The interviews identified deficits regarding the search for migrants lost at sea but also documented positive rescue practices. Communication barriers exacerbated by the need to act quickly makes it difficult to identify groups at risk, such as separated children, asylum seekers or victims of trafficking. The FRA discussed the preliminary results of the research with stakeholders in **Greece, Italy, Malta and Spain**.

Civil society actors play an important role in providing assistance and protection to newly arrived migrants. A number – including the Spanish NGO Accem, the Italian Council for Refugees Foundation, the European Council on Refugees and Exiles, the Jesuit Refugee Service Malta, Praxis in Greece and Save the Children Italy – have cooperated within the Commission’s co-funded DRIVE project led by the International Catholic Migration Commission (ICMC). The project report pinpoints gaps and formulates practical recommendations for first-contact procedures following disembarkation that are sensitive to individual needs, called protection-sensitive measures.¹⁸

2.1.2. Schengen cooperation

Freedom of movement within the EU was put to the test in 2011. The arrival of Tunisian migrants in the wake of the Arab Spring prompted **France** to intensify police checks at its internal border crossing points with **Italy**. In order to avoid breaching the Schengen Borders Code, the checks at each location were limited to no more than six consecutive hours and did not involve a systematic monitoring of all those present.

Some criticism was levelled at the Italian authorities for allegedly attempting to encourage some of the migrants to travel to other EU Member States and for contravening the spirit of the Schengen agreement. The issue prompted discussion at EU level regarding a mechanism for temporary reinstatement of controls at internal borders. The **Danish** government announced stricter customs controls at the country’s main land border crossing points in order to combat cross-border crime, such as drug smuggling. The European Commission was scrutinising these plans when the new Danish government decided not to follow through on them.

¹⁸ ICMC (2011).

The **Netherlands** changed its legislation on mobile patrolling, which the Council of State, a body which advises on proposed legislation,¹⁹ had previously ruled incompatible with EU law. In a related decision, the District Court of The Hague ruled that the border checks governed by this new law were no different from border control as prohibited by the Schengen Borders Code (Article 21). The practice and law were thus both found in violation of Article 21 of the Schengen Code.²⁰

At EU level, the Council of the European Union called for the reintroduction of border checks “only as a very last resort” in response to exceptional circumstances that put Schengen cooperation at risk. Alongside a proposal amending the Schengen Border Code’s mechanism for temporarily reintroducing internal border controls in exceptional circumstances,²¹ the European Commission also presented a proposal to establish an evaluation mechanism to verify the application of the Schengen *acquis*.²²

The European Commission proposed replacing the External Borders Fund with an Internal Security Fund designed to reinforce the work of EU Member States at external borders, provide emergency assistance in exceptional cases, aid the development of the smart border package and support the introduction and operation of Eurosur. The fund will also be used for Schengen governance and the evaluation and monitoring mechanism, which will verify the application of Schengen *acquis*.

On 25 October, the Commission issued a communication on smart borders which presents an appraisal of the use of new systems for border surveillance. It has two components: the proposed entry/exit system, an information technology system which monitors third-country nationals to ensure that they do not overstay; and the registered travellers’ programme which is designed to speed registered travellers with electronic identification tokens across borders and trace those whose visas have expired. Given the potential impact on privacy, the technologies presented raise issues of necessity and proportionality, with respect to the extent of the data collected and stored.²³

In 2011, EU Member States prepared national components for launching the Schengen Information System II (SIS II). According to the legal instruments underpinning the system, SIS II alerts on persons and objects can be accessed by border control authorities, police and customs officials, visa issuing authorities and national judicial authorities. Such authorities have

¹⁹ Netherlands, Council of State (2010).

²⁰ Netherlands (2011).

²¹ European Commission (2011b); European Commission (2011c).

²² European Commission (2010e).

²³ European Commission (2011d).

access to data only within their area of legal competence.²⁴ SIS II is scheduled to become operational in the first quarter of 2013. The European Commission is currently developing and testing the central elements and communication infrastructure of SIS II.

2.1.3. The Schengen evaluation system and fundamental rights

The rules governing the Schengen evaluation mechanism are currently under review.²⁵ In September, the European Commission proposed replacing the existing intergovernmental approach with a new system that gives the Commission itself more responsibility. The proposal recognises the need to evaluate all areas of the Schengen *acquis* and to pay particular attention to fundamental rights, including data protection, when the *acquis* is applied.²⁶ In accordance with the ordinary legislative procedure, the proposal would empower the European Commission to:

- lead teams of experts during on-site visits (announced and unannounced);
- adopt reports (following consultation of a committee of Member State experts) containing recommendations for remedying deficiencies identified in the course of inspections, and requiring concrete follow-up by the Member State concerned;
- provide appropriate support to the Member State concerned and assistance from EU agencies in cases of serious deficiencies;
- request Frontex to provide its expertise to recommend where unannounced visits should be conducted; this could also be triggered by fundamental rights concerns;
- in case of serious deficiencies, propose to temporarily close a specific border crossing point.²⁷

Under the current rules, an intergovernmental peer review mechanism verifies the correct application of the Schengen arrangements by EU Member State and candidate or acceding country, evaluating each EU Member State at least once every five years. The Schengen Evaluation Working Party, which consists of Member State experts assisted by a representative of the Secretariat of the Council of the European Union and an observer from the European Commission, carries

out the evaluations. The evaluations are structured by sector: control over land borders, sea borders and air borders, police cooperation, visas and consular cooperation, data protection and SIS-Sirene system. The Member State evaluated follows up with a report or an action plan detailing how it plans to address any weaknesses identified and regularly reports on progress until all weaknesses are remedied.

The Schengen Borders Code is the centrepiece of the Schengen evaluation process. It contains a number of references to fundamental rights. Yet there is little information to conclude that Schengen evaluators also evaluate adherence to fundamental rights. The FRA consulted EU Member States to determine whether evaluators raise such concerns during, or as a result of, the evaluations. Feedback from the Member States was, however, limited due to the confidential nature of the reports.

During 2010 and 2011, some 14 evaluations took place in seven EU Member States. The high number of evaluations reflects the planned Schengen accession of **Bulgaria** and **Romania**. Three of the seven Member States reviewed did not provide any information on the results. Another three countries (**Austria**, **Portugal** and **Romania**) indicated that the recommendations they received related solely to technical and organisational issues, and not to fundamental rights concerns. Only one Member State, Bulgaria, reported recommendations, subsequently implemented, related to fundamental rights. These concerned the need to build custodial premises for migrants in an irregular situation who were apprehended at or near the border.

Although basic rights are mentioned explicitly in the Schengen Borders Code and come into play at various stages of border control, it seems safe to assume that evaluations so far have not focused on fundamental rights issues, at least not systematically. Future evaluations could consider, respond to and be triggered by specific fundamental rights concerns. Human dignity, non-discrimination, proportionality between measures and objectives, the rights of persons seeking international protection, children and victims of trafficking and non-refoulement, which prohibits the return of migrants to places where their lives or freedoms might be threatened, are some of the key rights guaranteed in the Schengen Borders Code. They should therefore be taken into consideration in evaluations of the implementation of Schengen rules at different stages of the border control process, such as conduct and procedures related to risk analysis, first and second-line checks, interviews with suspects and at-risk passengers, referral, non-admission, return and restriction of

²⁴ For more information on the Schengen Information System, see: [www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-\(jai\)/sirene-schengen-information-system?lang=en#?lang=en](http://www.consilium.europa.eu/policies/council-configurations/justice-et-affaires-interieures-(jai)/sirene-schengen-information-system?lang=en#?lang=en).

²⁵ European Commission (2011c).

²⁶ *Ibid.*

²⁷ *Ibid.*

movement, as well as training curricula for border guards on these issues.

2.1.4. The external dimension of EU's border control policies

The external dimension of EU's border control policies further developed in 2011. The revised Frontex regulation strengthens the agency's cooperation with third countries. Frontex can deploy liaison officers to establish and maintain contacts with relevant third-country authorities in order to prevent illegal immigration and to facilitate the return of migrants in an irregular situation.²⁸

The European Commission proposal to amend the Schengen Borders Code includes a provision allowing for bilateral agreements with non-EU authorities on joint border controls, either on third-country territory or on the territory of a Member State.²⁹ The situation of persons requesting international protection is dealt with in both cases (Annex VI). According to the proposal, a third-country national submitting a request for international protection to border guards of an EU Member State exercising their functions in a third country, is permitted to launch an asylum procedure in the EU Member State concerned. When asylum requests are presented to border guards in a Member State, they should be channelled into that state's asylum procedures, even if the asylum seeker has not yet passed the exit checks of third-country border guards.

2.2. A common visa policy

The Community Code on Visas (Regulation (EC) No. 810/2009, also known as the Visa Code) establishes the procedures and conditions for issuing visas for transit through, or stays in, the territory of an EU Member State which do not exceed three months in any six-month period.³⁰ The Visa Code says that the fundamental rights enshrined in the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union must be guaranteed to any person applying for a visa.³¹

"The reception arrangements for applicants should be made with due respect for human dignity. Processing of visa applications should be conducted in a professional and respectful manner and be proportionate to the objectives pursued."

Recital 6 of the Community Code on Visas, Regulation (EC) No. 810/2009

²⁸ Revised Frontex Regulation, Art. 14.

²⁹ European Commission (2011e).

³⁰ Regulation (EC) No. 810/2009, OJ 2009 L243/3, Art. 58, p. 26.

³¹ *Ibid.*, Recital 29.

The Code also addresses the conduct of staff, such as consular staff, (Article 39) saying that applicants should be received courteously. In its on-going efforts to support the harmonisation of practices, the European Commission amended the 2010 handbook for the processing of visa applications and the modification of issued visas.³² The handbook clearly states that the processing of visa applications should be conducted by staff in a professional and respectful manner and in full compliance with the prohibition of inhuman and degrading treatment and the prohibition of discrimination enshrined respectively in Articles 3 and 14 of the ECHR and Articles 4 and 21 of the EU Charter of Fundamental Rights.

Promising practice

Combating corruption in visa issuing procedures

From the perspective of the applicant and of the public, the visa issuing process may perhaps be perceived as lacking in sufficient transparency. To tackle the issue, the **Czech Republic** introduced an anti-corruption helpline available in both Czech and English. The aim of the helpline is to register and record any cases of corruption that immigrants and other foreigners may encounter when dealing with immigration offices and their staff, such as when applying for a visa or a residence permit.

2.2.1. External service providers

In order to cope with rising numbers of applications and additional technical requirements, such as the collection of biometric identifiers, many EU Member States cooperate with external service providers. Annex X of the Visa Code establishes the minimum requirements for such cooperation and, among other matters, extends the requirements for staff conduct to external service providers.

The **French** Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés*, CNIL), in evaluating the outsourcing of biometric data collection, referred to "serious risks to privacy and individual liberties". The authority expressed "serious reservations" in view of the "possible use of these data by service providers as well as the local authorities".³³

2.2.2. The Visa Information System (VIS)

The Visa Information System (VIS),³⁴ which contains data on admissible applications for short-stay visas, became operational in North Africa (Algeria, Egypt,

³² European Commission (2010); European Commission (2011f).

³³ France, French Data Protection Agency (2009; 2010).

³⁴ Regulation (EC) No. 767/2008, OJ 2008, L 218/60.

Libya, Mauritania, Morocco and Tunisia) on 11 October 2011. The VIS will subsequently be deployed in the Near East (Israel, Jordan, Lebanon and Syria) followed by the Gulf region (Afghanistan, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen).³⁵ The VIS will be gradually deployed, region by region, until all Schengen States' consulates worldwide are connected.

Both the Visa Code (Article 43, on cooperation with external service providers) as well as the VIS Regulation (Articles 31, 37, 39, 41 on communication of data, right of information, cooperation on data protection and supervision, respectively) make reference to the Data Protection Directive (Directive 95/46/EC).³⁶ Data are kept in the VIS for a maximum of five years, dating either from the visa expiry or from the rejection of the visa request. Those entered into the VIS have the right to obtain a copy of their data from the relevant Schengen state. They may also request that inaccurate data be corrected and any data unlawfully recorded be deleted. In each Schengen state, national supervisory authorities independently monitor the processing of personal data registered in the VIS. The European Data Protection Supervisor monitors the data processing activities conducted by the VIS management authority. It is as yet unclear how provisions on data protection will be implemented.

To manage the information systems Eurodac, VIS and SIS II, on 25 October 2011 the EU established an agency responsible for the operational management of large-scale information technology (IT) systems in the area of freedom, security and justice.³⁷ In recital 21 of the regulation, the Estonia-based agency is requested to cooperate with other agencies of the Union, in particular with the FRA, in the area of freedom, security and justice. The tasks relating to technical development and the preparation for the operational management of SIS II and VIS are carried out in Strasbourg, France and a backup site for those IT systems has been installed in Sankt Johann im Pongau, Austria.

2.2.3. Suspending the visa waiver

The EU process of visa liberalisation faced challenges in 2010 and 2011, as the numbers of asylum seekers from Serbia and the former Yugoslav Republic of Macedonia (FYROM) rose following the introduction of visa waivers for these two countries in 2009. The increase in applications chiefly affected **Belgium, Germany and Sweden**.³⁸ In 2011, 4,245 Serbian nationals applied for

asylum in **Germany**, 2,635 in **Sweden** and 1,415 in **Belgium**. In **Germany**, the number of applications dropped between May and July; however, numbers increased again substantially later in the year. A large majority of the applicants were of Roma origin. In Germany, one of the few EU countries that record the ethnicity of asylum applicants, Roma represented 95 % of all Serbian asylum seekers in 2010, and 86 % of all nationals from FYROM in the same year. In **Sweden**, almost all asylum seekers from Serbia and FYROM were Roma. In **Belgium**, the ethnic composition of the Serbian and Macedonian asylum seekers was roughly half Roma, half Albanian.³⁹

Applicants from FYROM and Serbia were rarely granted protection in 2010. The EU27 overall protection rate amounted to 2.46 % for Serbians in first instance decisions and 7.77 % in final decisions. The rates were even lower for applicants from FYROM, where the overall protection rate of first instance decisions in the EU27 was 1.32 % and in final decisions 1.85 %.⁴⁰ Available figures for 2011 show a similar trend: 2.75 % Serbians and 1.23 % FYROM nationals received protection in first instance decisions.⁴¹ 2011 statistics on final decisions were not yet available when this report was drafted.

In reaction to this increase in asylum seekers, at the end of 2010, **France** and the **Netherlands** requested the introduction of a safeguard clause suspending the visa waiver in the event of an emergency. The European Commission proposed a clause in the Visa Regulation (539/2001) that would allow temporary suspensions of the visa waiver for third countries in exceptional and well-defined circumstances.⁴² The clause provides a general framework for the future, without being related to specific third countries. Under the proposal, the European Commission would assess Member State information and statistics and adopt, with the assistance of committees composed of representatives from EU countries, known as the comitology procedure, a decision temporarily suspending the visa waiver for one or more third countries. On 13 December 2011, the Justice and Home Affairs Council adopted a general approach on certain elements of the amendment to the Visa Regulation, thus allowing for negotiations with the European Parliament to start. Seventeen NGOs reacted by sending a letter of concern in October to the relevant member of the European Commission that EU Member States were thereby discouraging western Balkan countries from allowing the departures of ethnic groups, particularly Roma, risking violations of everyone's fundamental right to leave any country including his/her own. The measures targeted mainly those persons seeking asylum, including Roma.

35 European Commission (2009).

36 Directive 95/46/EC, OJ 2005 L 281.

37 Council Regulation (EU) No. 1077/2011 L286/1.

38 For further information on asylum application numbers in 2011, see: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-048/EN/KS-SF-11-048-EN.PDF.

39 European Stability Initiative (2011).

40 Eurostat, all data extracted on 16 December 2011.

41 Eurostat, all data extracted on 21 March 2012.

42 European Commission (2011g).

2.2.4. The right to appeal negative visa decisions

The provisions in the Visa Code on the right to appeal entered into force on 5 April 2011, making it mandatory for EU Member States to introduce appeal procedures for persons whose application for a Schengen visa has been refused. A negative decision on a visa application, the annulment or the revocation of a visa (Article 32 (3), Article 34 (7)) can be appealed according to the procedures provided for in national law.

The Visa Code contains a standard form in Annex VI for authorities to explain the reasons for their refusal, annulment or revocation of a visa. Individuals are entitled to a copy of the filled-out form, which also includes information for the applicant on the appeal procedure.

All EU Member States and associated states taking part in the Schengen cooperation⁴³ have established a procedure to appeal the refusal of a Schengen visa.

EU Member States without a consulate in a third country or in a certain region of a third country may conclude representation arrangements with other Member States. The main rule is that the representing consulate shall, when contemplating refusing a visa, submit the application to the relevant authorities of the represented Member State in order for them to take the final decision on the application (Article 8 (2)). The representing consulate shall in turn inform the applicant of the decision taken by the represented Member State (Article 32 (4)). A more common arrangement is, however, that the Member State represented authorises the representing Member State to refuse to issue a visa after examination of the application. Appeals of negative decisions shall be conducted against the Member State that took the final decision on the application.

The Visa Code does not prescribe standards for the independence of the appellate body. Figure 2.1 provides an overview of solutions for which EU Member States have opted when the visa has been refused at a diplomatic or consular representation. Existing appeals body can broadly be categorised into three groups: judicial bodies, quasi-judicial bodies and public authorities. The following Member States have opted for judicial bodies as the appeals body: in **Bulgaria, Greece, Italy**⁴⁴ and **Lithuania** the applicant may appeal directly to the Administrative Courts. In **Luxembourg** decisions may be appealed to the Administrative Tribu-

nal and further to the Administrative Court. In **Austria** a decision on a refused visa may be appealed to the Administrative Court and/or the Constitutional Court. In **Cyprus** there is a right to appeal to the Supreme Court. In **Latvia, Slovenia** and **Sweden** the applicant has the right to appeal to the consulate to reconsider the decision and also has the right to further appeal to the Administrative Court. In **Germany**, the refused applicant may request that the consulate reconsider the decision and may also submit a further appeal to the Administrative Court in Berlin. **Spain** applies the same system of appeal and the designated body is the High Court of Madrid.

Other Member States designate appeals body within their administrations. In **Estonia, Finland, Hungary** and **Poland** a refused visa can be appealed to the Ministry of Foreign Affairs. After **Romania** accedes to the Schengen area, the Ministry of Foreign Affairs will examine appeals there.⁴⁵ In **Denmark** a refused visa may be appealed to the Ministry of Justice, in the **Netherlands** to the Ministry of the Interior and Kingdom Relations and in **Portugal** to the Foreigners and Borders Service (*Serviço de Estrangeiros e Fronteiras*, SEF).

In a number of Member States the appeals body is of a quasi-judicial nature. In **Belgium**, the appeals body is the Council for Alien Law Litigation, in **France** the Appeals Commission on Visa Refusals, in **Malta** the Immigration Appeals Board and in **Slovakia** the Remonstrance Commission. In the **Czech Republic**, the appeals body is the Appeals Commission on Residence of Foreign Nationals, although the consulate has the possibility to reconsider its decision before the formal appeal procedure starts.

The following two **German** cases illustrate how the state balances the objectives of facilitating legitimate travel and tackling illegal immigration. In a case weighing the public interest in the prevention of irregular immigration against the special protection of family ties, the Federal Administrative Court upheld a visa rejection, arguing that there were justified doubts about the applicant's intent to return to her home country. She had made clear that she wanted to stay in **Germany** permanently because of her children.⁴⁶ In another case, however, the Berlin Administrative Court argued that the extension of a visa during a previous stay was insufficient grounds to conclude that a person is unwilling to return to his/her home country. The court decided for the complainant, ruling that persons who extend a Schengen visa are not automatically excluded from the receipt of another visa.⁴⁷

43 For more information on Schengen cooperation Member States, see: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm.

44 In Italy, only one court has this competence: the Lazio Regional Administrative Court.

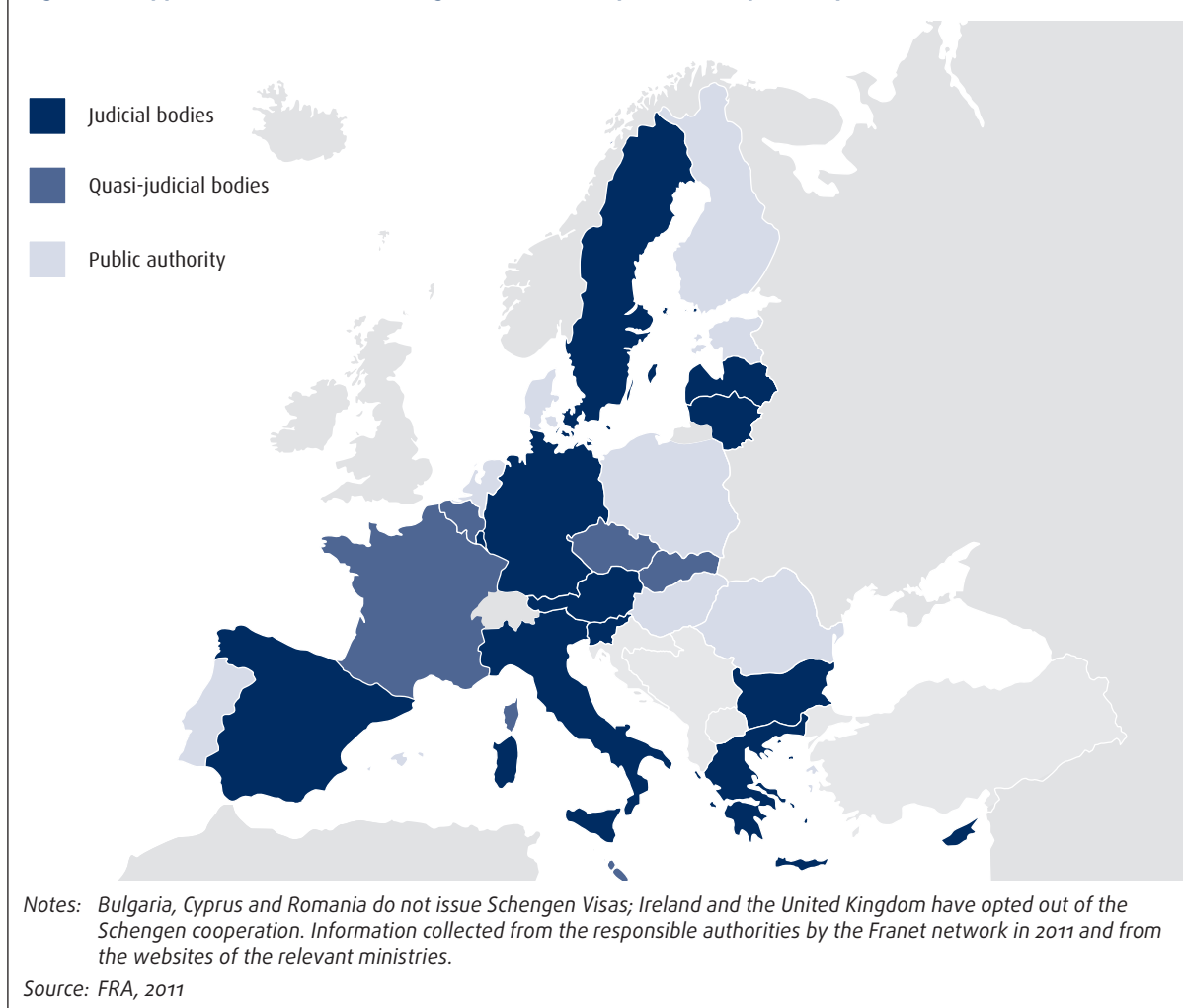
45 Romania, Law No. 157/2011.

46 Germany, Federal Administrative Court, 1 C 1.10.

47 Germany, Berlin Administrative Court, 3rd Chamber, 3 K 301.09 V.



Figure 2.1: Appellate bodies and the degree of their independence, by country



In 2011, the FRA collected statistics on the number of appeals against visa decisions and on the number of reversed decisions, in order to determine whether remedies for visa decisions are in place. Among the EU Member States participating in the Schengen

cooperation, only five could provide relevant figures for 2011. As illustrated in Table 2.1, appeals against visa decisions can be successful, although the number of reversed decisions varies substantially among the five countries reviewed.⁴⁸

Table 2.1: Number of visa appeals lodged and decisions not upheld, by country

Country	Number of issued short-term Schengen visas (C) in the same time period	Number of appeals	Time period	Decision reversed/ to be re-examined
DK	95,453	932	2011	39*
EE	72,616	81	5 April–27 September 2011	15
HU	150,893	121	5 April–31 August 2011	41
LV	166,239	34	2011	1
PL	389,484	683	5 April–31 August 2011	123
PT	90,689	421	5 April–31 October 2011	236

Note: * In Denmark appeals decided in 2011 also include appeals lodged in 2010.

Source: FRA, 2012; based on information collected from the responsible authorities by the Franet network in 2011

⁴⁸ The numbers indicated in the table may not be limited to Schengen visas but may also include visas with limited territorial validity as well as national visas.

Outlook

There is a clear risk that the challenges the EU faced in 2011 will persist in years to come. Unless changes are implemented, the arrival of large numbers of persons at the EU's external borders will continue to pose a real test regarding respect for fundamental rights. Such arrivals expose existing gaps in national reception capacities and highlight the complexity of guaranteeing protection at borders and providing efficient referral mechanisms.

Political will and decisive measures alone will improve organisational capacities. Accessing EU funding and using it effectively to strengthen reception capacities in line with fundamental rights will be essential in this regard.

Fundamental rights principles covered by the Schengen Borders Code and the Visa Code will need to be implemented in practice. Future evaluations of the Schengen agreements will need to devote adequate attention to the application of these principles. The revised Frontex regulation and the implementation of its fundamental rights strategy are likely to raise expectations in the field.

Fundamental rights concerns related to data protection and privacy will remain in focus in the visa policy field. New technologies for border surveillance and for storing personal data are either already in use or under continued development: VIS is being implemented; SIS II is under preparation; the European Commission has tabled its proposal for Eurosur; and smart border concepts are under discussion. Such technological advances in the field will continue to raise concerns about issues of necessity and proportionality with respect to the data collected and stored, as well as about how they affect the privacy of persons whose personal data are collected and stored.



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UN & CoE

January

February

March

April

May

21 June – The Bureau of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of the Council of Europe issues a report on the consultation on the modernisation of Convention 108 for the protection of individuals with regard to automatic processing of personal data

June

July

August

September

October

November

December

EU

January

2 February – European Commission adopts a proposal for a directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

February

16 March – European Commission report on the joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program

March

18 April – Evaluation report from the European Commission to the Council and the European Parliament on the Data Retention Directive

April

May

16 June – Publication of Special Eurobarometer survey 359 on attitudes on data protection and electronic identity in the European Union

June

13 July – European Commission adopts a Communication on a European terrorist finance tracking system: available options

July

August

26 September – The Council of Ministers of the European Union gives its consent to the European Commission's proposals regarding the use of body scanners at EU airports

29 September – Signature of the EU-Australia agreement on Passenger Name Records (PNR)

September

25 October – Regulation of the European Parliament and of the Council establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice

27 October – European Parliament adopts a legislative Resolution on the draft Council decision on the conclusion of the Agreement between the European Union and Australia on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the Australian Customs and Border Protection Service

October

10 November – European Commission adopts a Regulation amending the regulation supplementing the common basic standards on civil aviation security as regards the use of security scanners at EU airports

11 November – European Commission adopts an implementing Regulation concerning the common basic standards on civil aviation security as regards the use of security scanners at EU airports

24 November – The Court of Justice of the European Union issues judgments in two cases relevant to data protection and information society: *ASNEF and FECEMD v. Administración del Estado* and *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs*

November

13 December – European Council gives the green light for the EU-US PNR agreement

December

3

Information society and data protection



Two themes – security and technology – dominated debate in the field of the information society and data protection in 2011, a year which marked 10 years since the terrorist attacks of September 11 in the United States. The anniversary stoked debate on how to find the right balance between security, rights to privacy and data protection and centred on topical issues such as the retention of telecommunications data; the collection and analysis of passenger data; the creation of a terrorist finance tracking system; and the use of body scanners. Another concern was how to update the data protection framework to cope with technological advances, with interest focusing particularly on social networking sites.

This chapter explores key changes in European Union (EU) and Member State legislation, policies and practices in the area of data protection in 2011. The chapter will first look at the main developments at European level and then turn to the year's high-profile topics: data retention, Passenger Name Record (PNR) data, terrorist finance tracking systems, the use of body scanners and social networking sites.

3.1. General overview

In November 2010, the European Commission presented its plans in the area of data protection.¹ The communication outlines the Commission's approach to the review of the EU system for the protection of personal data in all areas of EU activities, taking into account the challenges resulting from globalisation and new technologies. Several objectives are set out including: strengthening individuals' rights, increasing transparency and the level of awareness of data protection rights, enhancing individual control over one's data, ensuring free and informed consent, updating the protection for sensitive data and making remedies and sanctions more effective. In his opinion on the communication, the European Data Protection Supervisor called for more ambitious solutions giving citizens better control over their personal data to make the system more effective. He highlighted that the inclusion of police and

Key developments in the area of information society and data protection:

- courts and parliaments in some EU Member States raise concerns about national legislation implementing the Data Retention Directive; the European Commission adopts, in late 2010, an evaluation report on the directive;
- in the context of Passenger Name Records (PNR), the European Parliament endorses the EU-Australia PNR agreement, while parliamentary approval is pending on the EU-US PNR agreement; the European Commission proposes a directive to exchange PNR data amongst EU Member States for law enforcement purposes;
- the EU institutes new rules on the use of body scanners at European airports. Meanwhile, a number of EU Member States test and evaluate the practical use of these scanners;
- the European Commission presents options for a European terrorist finance tracking system, while the implementation of the existing EU-US cooperation, known as the terrorist finance tracking programme, undergoes two reviews, both calling for more transparency.

¹ European Commission (2010a).

justice cooperation in the legal framework was a condition for effective data protection.²

The Eurobarometer survey on *Attitudes on Data Protection and Electronic Identity* was published in 2011.³ One of the key findings of the survey – in which 26,574 Europeans aged 15 and over were surveyed in the 27 Member States – is that three out of four Europeans accept that revealing personal data is part of everyday life, but they are also worried about how companies – including search engines and social networks – use their information. The report reveals that 62 % of people in the EU give the minimum information required so as to protect their identity, while 75 % want to be able to delete personal information online whenever they want to – the so-called ‘right to be forgotten’. There is also strong support for EU action: 90 % want to have the same data protection rights across the EU. The survey was conducted between the end of November and mid-December 2010. All interviews were conducted face-to-face in people’s homes in the appropriate national languages.

“Over half of the Europeans surveyed say a fine should be imposed on [...] companies (that use people’s personal data without their knowledge) (51 %). Four out of ten think such companies should be banned from using such data in the future (40 %), or compelled to compensate the victims (39 %).”

Eurobarometer 359, Attitudes on Data Protection and Electronic Identity in the European Union, Special Brussels, June 2011, p. 190

In *The Evolving Privacy Landscape: 30 years after the OECD Privacy Guidelines*,⁴ the OECD described current trends in the processing of personal data and the corresponding privacy risks. It highlighted initiatives and innovative approaches to privacy, with a primary focus on economic activities. The OECD also published an economic paper on the regulation of trans-border data flows to address the growing risk to individual privacy posed by the increasing number of Internet-based data transfers in a globalising world economy. The paper took a systematic inventory of regulation at a global level and examined the policies underlying the regulation,⁵ aiming to contribute to the debate on future regulation of the trans-border data flow.

At the Council of Europe, the debate on the revision of its Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) continued.⁶ In the Council of Europe report on the corresponding consultation,⁷ respondents pointed to the impor-

ance of ensuring consistency with the EU’s protection rules. Moreover, the Council of Europe’s Committee of Ministers adopted in late November 2010 a Recommendation on the protection of individuals with regard to automatic processing of personal data in the context of profiling.⁸ It aims at defining fair and lawful profiling in full respect of fundamental rights, notably the right to privacy and to the protection of personal data and the principle of non-discrimination. The Council of Europe also published on 20 September 2011 a draft Strategy on Internet Governance (2012-2015) – adopted on 15 March 2012 – mentioning the advancing of data protection and privacy as one of its main objectives. Finally, a review was launched in 2011 of the Committee of Ministers’ Recommendations (87) 15 regulating the use of personal data in the police sector and (89) 2 on the protection of personal data used for employment purposes.

At EU level, the role of data protection in the Area of Freedom, Security and Justice prompted interest. A study prepared for the European Parliament addressed the new challenges stemming from data protection policies and systems falling within the scope of police and judicial cooperation in criminal matters.⁹ It identified a set of common basic principles and standards for the genuine assurance of data protection in all phases of EU policy making and for the effective implementation of this fundamental right.

The European Data Protection Commissioners’ Conference adopted a resolution stressing the need for a comprehensive data protection framework that covers the law enforcement sector.¹⁰

The Regulation establishing the agency for the operational management of large-scale information technology (IT) systems in the area of freedom, security and justice was adopted on 25 October 2011.¹¹ The new agency will act as the management authority for large-scale IT systems in the area of freedom, security and justice: the next generation of an EU database that maintains and distributes information on persons and property of interest to national security, border control and law enforcement (SIS II); a visa-data exchange system (VIS); and a European fingerprint database designed to identify asylum seekers and those who are crossing borders irregularly (Eurodac).

On a more general level, the independence of data protection authorities (see Table 3.1 for listing of national Data Protection Authorities) remained a concern. As reported in last year’s annual report the Court of Justice of the European Union (CJEU) handed down

2 European Data Protection Supervisor (2011a).

3 European Commission (2011a).

4 Organisation of Economic Co-operation and Development (OECD) (2011a).

5 OECD (2011b).

6 Council of Europe (2011a).

7 Council of Europe (2011b).

8 Council of Europe (2010).

9 Bigo, D. *et al.* (2011).

10 European Data Protection Commissioners’ Conference (2011).

11 Regulation (EU) No. 1077/2011, OJ 2011 L 286.



Table 3.1: Bodies required under EU law – data protection authorities, by country

Country	Name of body in English	Name of body in national (alternative) language
AT	Austrian Data Protection Commission	Österreichische Datenschutzkommission
BE	Commission for the protection of privacy	Commission de la protection de la vie privée/Commissie voor de bescherming van de persoonlijke levenssfeer/Ausschuss für den Schutz des Privatlebens
BG	Commission for Personal Data Protection	Комисията за защита на личните данни
CY	Commissioner for Personal Data Protection	Γραφείο Επιτρόπου Προστασίας Δεδομένων Προσωπικού Χαρακτήρα
CZ	The Office for Personal Data Protection	Úřad pro ochranu osobních údajů
DE	The Federal Commissioner for Data Protection and Freedom of Information	Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit
DK	Danish Data Protection Agency	Datatilsynet
EE	Estonian Data Protection Inspectorate	Andmekaitse Inspektsioon
EL	Hellenic Data Protection Authority	Αρχή Προστασίας Δεδομένων Προσωπικού Χαρακτήρα
ES	Spanish Data Protection Authority	Agencia Española de Protección de Datos, AEPD
FI	Office of the Data Protection Ombudsman	Tietosuojavaltuutetun toimisto, Dataombudsmannens byrå
FR	National Commission for information technology and freedoms	Commission Nationale de l'Informatique et des Libertés
HU	Authority for Data Protection and Freedom of Information	Nemzeti Adatvédelmi és Információszabadság Hatóság
IE	Data Protection Commissioner	An Coimisinéir Cosanta Sonraí
IT	Data Protection Authority	Garante per la protezione dei dati personali
LT	State Data Protection	Valstybinė duomenų apsaugos inspekcija
LU	National Commission for the Protection of Data	Commission nationale pour la protection des données
LV	Data State Inspectorate	Datu valsts inspekcija
MT	Office of the Data Protection Commissioner	
NL	Dutch Data Protection Authority	College bescherming persoonsgegevens
PL	The Bureau of the Inspector General for the Protection of Personal Data	Generalny Inspektor Ochrony Danych Osobowych
PT	Portuguese Data Protection Authority	Comissão Nacional de Protecção de Dados
RO	The National Supervisory Authority for Personal Data Processing	Autoritatea Națională de Supraveghere a Prelucrării Datelor cu Caracter Personal
SE	The Swedish Data Inspection Board	Datainspektionen
SI	Information Commissioner	Informacijski pooblaščenec
SK	Office for Personal Data Protection of the Slovak Republic	Úrad na ochranu osobných údajov
UK	The Office of the Information Commissioner	Swyddfa'r Comisiynydd Gwybodaeth

Source: http://ec.europa.eu/justice/data-protection/bodies/authorities/eu/index_en.htm as of 31 December 2011

a judgment¹² on the lack of sufficient independence of German data protection authorities at federal state (*Länder*) level and the European Commission referred Austria to the CJEU for a lack of independence of its data protection authority.¹³ Discussions on the new Hungarian constitution, which entered into force at the beginning of 2012, centred on the independence of the Hungarian data protection authority. The European Commission launched accelerated infringement proceedings against Hungary on 17 January 2012 over this issue.¹⁴

"The independence of data protection supervisors is guaranteed under Article 16 of the Treaty on the Functioning of the EU and Article 8 of the Charter of Fundamental Rights. In addition, EU rules on data protection (Directive 95/46/EC) require Member States to establish a supervisory body to monitor the application of the Directive acting in complete independence. [...] The mere risk of political influence through state scrutiny is sufficient to hinder the independent performance of the supervisory authority's tasks [...]"

European Commission, Press release IP/12/24, Brussels, 17 January 2012

¹² CJEU, C-518/07, *Commission v. Germany*, 9 March 2010.

¹³ European Commission (2010b).

¹⁴ European Commission (2012).

3.2. Data retention

The EU has a directive in place which requires internet service providers and telephone operators to retain comprehensive traffic data about non-content-related Internet and telephone use. This EU **Data Retention Directive**¹⁵ has been the subject of fundamental rights concerns ever since its adoption in 2006. In April 2011 the European Commission published a report evaluating its implementation and application.¹⁶ The directive itself, according to the report, does not guarantee that retained data are being stored, retrieved and used in full compliance with the right to privacy and protection of personal data. The Commission says that the directive only sought partial harmonisation of approaches to data retention. It is therefore unsurprising that EU Member States do not share a common approach, even in fields covered by the directive such as retention periods, let alone on issues not covered by the directive, such as who ultimately covers the cost of the obligatory data retention.¹⁷ The Commission concluded that historic communications data were important in criminal investigations, and that therefore the EU should continue to support and regulate data retention as a security measure.

The Commission consulted stakeholders on options for changing the data retention framework. The European Data Protection Supervisor, in his opinion on the *Evaluation Report* of the Directive, concluded that the directive does not meet the requirements imposed by the fundamental rights to privacy and data protection.¹⁸

“[The Data Retention Directive] is without doubt the most privacy invasive instrument ever adopted by the EU in terms of scale and the number of people it affects”.

European Data Protection Supervisor, ‘The moment of truth for the Data Retention Directive’, Speech given in Brussels on 3 December 2010

At the national level, Cyprus, the Czech Republic, Germany, the Netherlands, Sweden and Romania also criticised the Data Retention Directive. On 22 March, the Constitutional Court of the **Czech Republic** declared certain national provisions¹⁹ implementing the directive unconstitutional,²⁰ in proceedings initiated by a group of 51 deputies of the Czech parliament. The Court referred, for example, to a lack of: proportionality in the national provisions’ interference with the right to privacy; a clear definition of the purpose of the data retention; an explicit list of institutions authorised to access the data;

an obligation to inform affected persons; and appropriate judicial review. In **Cyprus**, the Supreme Court also declared certain national provisions implementing the Data Retention Directive unconstitutional.²¹ The case concerned the access of police officers to telecommunications data on the basis of court orders. The court held that the data retention directive does not oblige Member States to enact legislation enabling police access to such data, as this falls outside the scope of the directive. The court also noted that the relevant court orders were issued prior to a constitutional amendment which provides for exceptions to the right to confidentiality of communications.

Two committees of the Senate in the **Netherlands** expressed their disappointment with the European Commission’s evaluation of the Data Retention Directive, in a letter to the Minister of Security and Justice on 31 May.²² The committees took issue with several points. They said that the evaluation was not satisfactory, because it failed to establish the need for the directive and because it paid insufficient attention to the proportionality of data retention. The committees also raised questions about the methodology used and suggested withdrawing the directive.²³

Germany plans to transpose the Data Retention Directive into German law in line with the directive itself as well as the conditions laid down in a 2010 German Constitutional Court judgment.²⁴ To date, however, no consensus on a new legislative proposal has been reached. The Research Service of the House of Representatives (*Bundestag*) said that the Data Retention Directive cannot be implemented in a way that is, beyond all doubt, compatible with the Charter on Fundamental Rights in Europe.²⁵ These doubts centre on the freedom to conduct business since the directive obliges private enterprises to create and maintain cost-intensive structures for the retention of communication data. Another German House of Representatives’ (*Bundestag*) study came to the conclusion that data retention has not significantly increased the rate of crimes solved in any EU country.²⁶ The study pointed out, however, that there are no statistical data available to assess the directive’s effect on the crime clearance rate. The Federal Commissioner on Data Protection and Freedom of Information also argued that there is no proof that data retention has significantly increased crime detection rates.²⁷ The Ger-

15 Directive 2006/24/EC, OJ 2006 L 105.

16 European Commission (2011b).

17 *Ibid.*, p. 31.

18 European Data Protection Supervisor (2010).

19 Czech Republic, Electronic Communication Act No. 127/2005 Coll., Section 97, subsections 3 and 4; the decree implementing the Data Retention Directive.

20 Czech Republic, Constitutional Court, Decision File No. Pl ÚS 24/10, 22 March 2011.

21 Cyprus, Supreme Court, *Christos Matsias and Others*, Apps. 65/2009, 78/2009, 82/2009, 15-22/2010, Decision of 1 February 2011.

22 Netherlands, Senate (2011a).

23 Netherlands, Senate (2011b).

24 Germany, German Constitutional Court, *BVerfG, 1 BvR 256/08 vom 2.3.2010*, 2 March 2010.

25 Derksen, R. (2011).

26 Becher, J. (2011).

27 Germany, Federal Commissioner on Data Protection and Freedom of Information (2011).

man federal police have, however, published evidence of the negative impact the absence of data retention has on criminal investigations.²⁸ The results of a study commissioned by the Ministry of Justice and carried out by the Max Planck Institute for Foreign and International Criminal Law questioned the value added by data retention. The results of this large-scale empirical research were presented to the Committee on Legal Affairs of the German Bundestag on 27 January 2012.²⁹

To implement the Data Retention Directive, **Sweden** presented a bill in late 2010 on the retention of traffic data for law enforcement purposes.³⁰ The Green party, Sweden Democrats and the Left Party, however, pushed through a minority vote, further delaying the directive's transposition. The Parliament will not now consider it before 17 March 2012. Similarly, in **Romania**, the plenum of the Senate unanimously dismissed the new legislative proposal on 21 December 2011, following a 2009 Constitutional Court ruling that the national implementing legislation was unconstitutional.³¹

3.3. Passenger Name Record data

Passenger Name Record (PNR) data is information provided by passengers, and collected by and held in the carriers' reservation and departure control systems. Soon after the terrorist attacks of 11 September 2001, countries outside the EU adopted legislation requiring air carriers operating flights to, from or through their territory to provide their authorities with PNR data stored in their automated reservation systems. Sent well in advance of a flight's departure, PNR data should help law enforcement authorities screen passengers for potential links to terrorism and other forms of serious crime.³²

EU institutions discussed agreements with various countries on the exchange of PNR data in 2011. The European Parliament endorsed the EU-Australia PNR agreement,³³ while parliamentary approval is pending on the EU-US PNR agreement.³⁴ These PNR agreements will replace previous agreements from 2008 and 2007, respectively. The European Parliament requested a modification of the draft agreement with the US to reduce the length of data storage and to ensure EU citizens have a right to

appeal travel bans linked to PNR data.³⁵ The European Data Protection Supervisor released opinions in relation to both agreements,³⁶ welcoming the safeguards on data security and oversight foreseen in both agreements, but expressed some concern regarding general fundamental rights principles such as necessity and proportionality.

The European Commission introduced in February a new proposal for a directive to exchange PNR data amongst EU Member States for law enforcement purposes.³⁷ The proposed PNR directive picks up a legislative proposal of 2007, namely the PNR Framework Decision,³⁸ introduced before the Lisbon Treaty entered into force. Several EU bodies questioned the proportionality of the proposal in view of its impact on the right to respect for privacy and the right to protection of personal data (Articles 7, 8 and 52 of the Charter of Fundamental Rights of the EU). The European Data Protection Supervisor pointed out that the necessity and proportionality of this system – which involves large-scale collection of PNR data for the purpose of a systematic assessment of all passengers – must be clearly demonstrated.³⁹ It made recommendations regarding various aspects of the proposal including: limiting the scope of application; the length of data retention; the list of PNR data stored; enhancing data protection principles; and ensuring an exhaustive evaluation of the system. The Article 29 working party also questioned the necessity and proportionality of PNR systems and requested further clarification as regards the scope of the proposal.⁴⁰ The European Economic and Social Committee (EESC) considered the proposal disproportionate because it lacked sufficient justification of the need for the indiscriminate use of the PNR data of all citizens travelling on international flights.⁴¹

“Before submitting new measures, applicable measures on the collection of personal data for law enforcement and migration control purposes should be evaluated and ‘security gaps’ identified. Any new draft on the transfer of PNR data should include an extended impact assessment with reliable and up-to-date information on the efficiency, financial costs, and consequences with regard to the aforementioned fundamental rights.”

A letter from the Standing committee of experts on international immigration, refugee and criminal law (Meijers Committee) to Commissioner Cecilia Malström, Reference CM1108, 21 June 2011, available at: www.commissie-meijers.nl

28 Germany, Ministry of the Interior (2011a).

29 Max Planck Institut für Ausländisches und Internationales Strafrecht (2012).

30 Sweden, Government Offices of Sweden (2010).

31 Romania, Constitutional Court of Romania, decision No. 1258, 8 October 2009.

32 European Commission (2011c), p. 3.

33 European Parliament (2011a).

34 Council of the European Union (2011).

35 European Commission (2011d).

36 European Data Protection Supervisor (2011a); European Data Protection Supervisor (2011b).

37 European Commission (2011c).

38 European Commission (2007).

39 European Data Protection Supervisor (2011a).

40 Article 29 Data Protection Working Party (2011).

41 EESC (2011a).

FRA ACTIVITY

Second opinion on the fundamental rights compliance of a proposal for a PNR data directive

Upon the European Parliament's request, the FRA presented an opinion on the fundamental rights compliance of the European Commission's new proposal for a PNR directive.⁴² The FRA had earlier presented a first opinion related to the PNR in October 2008 at the invitation of the Council of the European Union.

This second opinion raises fundamental rights concerns focusing on the risks of indirect discrimination in relation to profiling and the importance of the collection of appropriate statistics to detect this type of indirect discrimination, the requirements of necessity and proportionality for fundamental rights compliance and effective proactive supervision to ensure the rights of passengers. The opinion will feed into the discussions taking place at the Council of the European Union and the European Parliament.

The **United Kingdom** is in support of an EU PNR Directive that includes provision for intra-EU flights. The government believes that "clear Passenger Name Records (PNR) agreements between the EU and third countries play a vital role in removing legal uncertainty for air carriers flying to those countries, and help ensure that PNR information can be shared quickly and securely, with all necessary data protection safeguards in place".⁴³ The House of Lords European Union Committee (Home Affairs Sub-Committee) said the case for EU-wide legislation is compelling. It is of the opinion that a single legislative measure should cover the collection of PNR data on flights into all the Member States, and the sharing of those data with the authorities of other Member States.⁴⁴ Concerns in relation to PNR were addressed in a statement given to the House of Commons by the UK Immigration Minister on 10 May, questioning whether PNR are necessary and proportionate.⁴⁵

In **France**, the Ministry of the Interior indicated that it "actively [supports] the creation of a European PNR", and announced that an "interministerial team had been set up to consider the establishing" of a system "capable of handling PNR data and covering all the countries outside the Schengen area".⁴⁶ But critical voices also registered their views. The French data protection authority issued an opinion on 17 February 2011, stressing that despite

four years of testing a national precursor to a PNR system, the effectiveness of the system had not yet been clearly demonstrated. It added that "the rate of false alarms remains abnormally high". The French data protection authority, however, expressed its willingness to carry on with the current testing as preparation for a future French platform for PNR data processing in the context of an EU-wide PNR system.⁴⁷

In other Member States, notably Austria, the Czech Republic and Romania, parliaments have expressed doubts with regard to an EU system of PNR data collection and analysis.

Austria takes a skeptical view of the use of PNR data within the EU as an additional tool in the fight against terrorism, an opinion underscored by Members of Parliament from all political parties in April. According to the then Federal Minister of the Interior three conditions needed to be fulfilled before Austria would support such a system: solutions must be in conformity with human rights; the use of PNR data must be of significant added value to the fight against terrorism; and financial and personal resources have to be proportionate to the value of the system.⁴⁸ The Austrian Data Protection Board (*Datenschutzrat*) issued a statement on the EU proposal for a PNR Directive in February 2011, saying that storing personal data of all passengers independent of any suspicion constitutes an interference with the right to privacy. In such cases, the legislator needs to substantiate the adequacy and necessity of such infringements. The EU proposal does not prove such adequacy and necessity, the Data Protection Board added.⁴⁹

In the first half of 2011, the Senate⁵⁰ and the Chamber of Deputies of the **Czech Republic**⁵¹ called on the government to adhere carefully to constitutional guarantees on the right to privacy when drafting the PNR proposal. In the opinion of both legislative Chambers, crimes related to the use of Passenger Name Record data should be defined in more detail to ensure proportionality. They also pointed out the absence of further regulation related to the form in which the data are retained and said that the retention period was inappropriate. The two chambers also declined to extend the obligation to store and transmit data on flights between EU countries.

The **Romanian** Senate (*Senatul*) issued an opinion regarding the proposed PNR Directive,⁵² finding it in compliance with the principle of subsidiarity but not

42 European Commission (2011c).

43 United Kingdom, Home Office (2011a).

44 United Kingdom, House of Lords (2011), p. 7.

45 United Kingdom, Home Office (2011b).

46 France, Le Fur (2010).

47 France, Data Protection Authority (2011).

48 Austria, Parliament (2011).

49 Austria, Data Protection Board (2011).

50 Czech Republic, Senate, Resolution No. 207, 28 April 2011.

51 Czech Republic, Chamber of Deputies, Resolution No. 446, 28 April 2011.

52 European Commission (2011c).

with that of proportionality. The Senate based the latter opinion on its view that the definitions of some of the data types requested for collection are unclear and that any decision with a serious impact should not be taken based on automatic processing of PNR data.⁵³ Similar concerns were also voiced in Lithuania,⁵⁴ Portugal⁵⁵ and Germany.⁵⁶

The debate on the fundamental rights compliance of the proposed EU PNR system is likely to continue in 2012.

3.4. Terrorist Finance Tracking Programme

The Terrorist Finance Tracking Programme (TFTP) has unleashed another important EU debate that requires a balance to be found between data protection and security concerns. These plans concern the provision to security services of financial transaction data from certain financial messaging services, which are secure platforms developed for intra- and inter-bank applications. The basic idea is to fight terrorism by following the money trail via common messaging data standards developed for financial transactions worldwide. The Terrorist Finance Tracking Program was originally a US government programme and part of its 'Global War on Terrorism'.

The EU-US TFTP Agreement,⁵⁷ which entered into force in 2010, tasks Europol with verifying whether the US requests are proportionate and necessary according to conditions laid down in the agreement. The agreement sets up a periodic joint review mechanism entrusted with the task of monitoring the implementation and effectiveness of the agreement, including Europol's role under the latter.⁵⁸ In November 2010 Europol's Joint Supervisory Body (JSB) carried out an inspection and found that the written requests Europol received were not specific enough to allow it to decide whether to approve or deny them. Nevertheless, Europol approved every request received.

"Europol advised that orally-provided information plays a role in its verification of each request. [...] The significant involvement of oral information renders proper internal and external audit, by Europol's Data Protection Office and the JSB respectively, impossible."

The president of the Joint Supervisory Body (JSB) on 2 March 2011

When discussing the JSB's report on 16 March in the European Parliament Committee on Civil Liberties, Justice and Home Affairs, Members of the European Parliament raised serious data protection concerns. The committee's reaction was one of "dissatisfaction, unrest and discomfort" said the committee chair adding that "the EP [European Parliament] has to exert control on the implementation of this agreement".⁵⁹ According to the Federal Data Protection Authority in **Germany** most financial messaging data transmitted to the US authorities, where they are stored for many years, are unrelated to international terrorism, and risk being used for other purposes. In the view of the Federal Data Protection Authority Europol, the monitoring authority of the data exchange with the US according to the agreement, is not an appropriate guarantor as it also profits from the data exchange.⁶⁰

The European Commission published the first joint EU-US review of the TFTP carried out according to the agreement in March.⁶¹ The joint review report concluded that Europol had taken its tasks most seriously, and had put in place the necessary procedures to execute them in a professional manner and in accordance with the agreement. It, however, concurred with the JSB that "there seems to be scope to provide more detailed and targeted justifications for the requests" in order to enable Europol "to perform its functions even more effectively".⁶² The joint report also issued several recommendations in order to further improve the application of the agreement, concluding in particular that more transparency on the added value of the programme to the fight against terrorism, on the overall volumes of data concerned and on other relevant aspects would go a long way toward convincing a wider audience of the real benefits of the TFTP and the agreement, as well as raise the level of trust towards the programme, and that such transparency should be sought wherever possible without endangering the effectiveness of the programme.

In response to an invitation by the European Parliament and the Council of the European Union, the European Commission presented different options for a European Terrorist Finance Tracking System in July.⁶³ The Commission's communication was discussed once briefly in the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, but not dealt with further. The Council of the European Union held several rounds of discussions, including at ministerial level, with key considerations being the costs of a future EU TFTP and its compatibility with the existing agreement with the US.

53 Romania, Senate of the Romanian Parliament (2011).

54 Lithuania, Committee on European Affairs of the Seimas (2011).

55 Portugal, Data Protection Authority (2011).

56 Germany, Federal Commissioner on Data Protection and Freedom of Information (2011), p. 145.

57 European Union, United States of America (2010).

58 Europol Joint Supervisory Body (2011).

59 European Parliament (2011b).

60 Germany, German Federal Commissioner on Data Protection and Freedom of Information (2011).

61 European Commission (2011e).

62 *Ibid.*, p. 12.

63 European Commission (2011f).

The Communication stresses the need to fully comply with fundamental rights, namely the right to data protection. At EU Member State level, there is no consensus yet on the issue. The government of the **United Kingdom** stressed that it is committed to engaging fully with the existing TFTP, but considers that the fundamental question of the reason for establishing an EU TFTP is yet to be adequately answered. According to the Federal Data Protection Authority in **Germany**, the European Commission proposal would follow similar principles as the EU-US agreement and would lead to a mass storage of data of mostly unsuspecting persons.⁶⁴

3.5. Body scanners

The use of body scanners (or ‘security scanners’ – the term used by the European Commission in its 2010 Communication *on the Use of Security Scanners at EU airports*)⁶⁵ was a controversial topic in 2011 due to the implications of their use for human dignity and privacy. The European Parliament⁶⁶ and the European Economic and Social Committee⁶⁷ held hearings on the matter. At the end of 2011, the European Commission adopted legislation on the use of body scanners at EU airports.⁶⁸ The European Data Protection Supervisor criticised the adoption of the new legislation via a regulatory procedure, because the proposals are not merely technical but have an impact on fundamental rights.⁶⁹

FRA ACTIVITY

Body scanners and fundamental rights

The FRA presented its paper *The use of body scanners: 10 questions and answers* at a European Economic and Social Committee hearing in January 2011. The paper suggested the following practical steps to safeguard passengers’ fundamental rights: consulting images by a screener remote from the person under examination, with no storage or archiving of pictures; blurring the face of the person screened to render the images obtained anonymous; using mimic boards to display results instead of images. Passengers should be given a choice, the paper suggested, between being screened by body scanners or more conventional security checks like pat downs. Passengers should also receive full information in advance to enable them to make an informed choice.

64 Germany, Federal Commissioner on Data Protection and Freedom of Information (2011).

65 European Commission (2010c).

66 Committee on Civil Liberties, Justice and Home Affairs (LIBE) (2010).

67 EESC (2011b).

68 Commission Regulation (EU) No. 1141/2011; Commission Implementing Regulation (EU) No. 1147/2011.

69 European Data Protection Supervisor (2011c).

The legislation allows EU Member States and airports to deploy and use body scanners as one possible method to screen passengers at EU security checkpoints under specific conditions that address fundamental rights concerns. Security scanners should not, for instance, store, retain, copy, print or retrieve images; any unauthorised access and use of the image is prohibited and shall be prevented; the human reviewer analysing the image should be in a separate location and the image should not be linked to the screened person and others. Passengers must be informed about conditions under which the security scanner checks take place. In addition, passengers are given the right to opt out of a scanner check and choose an alternative method of screening.⁷⁰

“Security scanners are not a panacea, but they do offer a real possibility to reinforce passenger security. Security scanners are a valuable alternative to existing screening methods and are very efficient in detecting both metallic and non-metallic objects. It is still for each Member State or airport to decide whether or not to deploy security scanners, but these new rules ensure that where this new technology is used, it will be covered by EU wide standards on detection capability as well as strict safeguards to protect health and fundamental rights.”

Vice-President Siim Kallas, EU Commissioner responsible for transport, Press release IP/11/1343, 14 November 2011

EU Member States approaches are expected to continue to differ. In **Italy**, for instance, a second testing phase was launched at the beginning of 2011 in three airports (Rome Fiumicino, Milan Malpensa and Venice) using a new technology,⁷¹ but it had only been implemented, as of May, in two of the three (Rome and Milan).⁷² The first testing phase took place in 2010 (Rome Fiumicino, Milan Malpensa, Venice and Palermo). According to the National Body for Civil Aviation,⁷³ the “tested security scanners do not have any impact on health and ensure the respect of privacy for passengers.” But the results produced were only partially those that had been expected, it said, given false alarms and long check-in times. The **German** Federal Minister of the Interior decided that, based on field testing, full-body scanners would not be used at airports in Germany for now. It became apparent during the field testing of two full-body scanners at Hamburg Airport, that the technology was not yet at a stage where the available devices were suitable for everyday use.⁷⁴ Body scanners, according to the Data Protection Commissioner, may lawfully be used only under the condition that the data are not stored, and that the image of the body contours is not visible on the screen.⁷⁵

70 European Commission (2011g).

71 Italy, National Body for Civil Aviation (2010).

72 Italy, National Body for Civil Aviation (2011).

73 *Ibid.*

74 Germany, Ministry of the Interior (2011b).

75 Germany, German Federal Commissioner on Data Protection and Freedom of Information (2011).

Concerns relating to the right of privacy, data protection, dignity and possible health risks were also voiced in Sweden⁷⁶ and in Slovenia.⁷⁷

3.6. Social networking services

The use, retention and transfer of personal information by social networking services has become another key issue in the public debate given the personal nature of the information involved and the resulting implications for the right to privacy.

Data protection authorities in the Nordic countries sent some 40 questions to Facebook about how the company handles personal data. Facebook responded in September.⁷⁸ Facebook confirmed that the company could use information from users' status updates and 'like' buttons to display targeted advertising. The company said, however, that it does not disclose any personal information to other companies, other than the data the user agrees to supply in the process of installing apps. Facebook considers that by having its European headquarters in Ireland the company is subject to European data protection laws.⁷⁹

An Austrian group called 'Europe versus Facebook', seeing their right to privacy violated, lodged 22 complaints against Facebook Ireland, which is responsible for all Facebook activities outside the US and Canada, with the Irish Data Protection Commissioner in August. The complaints include the following allegations: the 'like' button creates data that can be used to track users; tags can be applied without the consent of the user; and 'pokes', posts, pictures and messages can still be seen after deletion.⁸⁰ In September, the Irish Data Protection Commissioner announced plans to conduct an investigation into these complaints.⁸¹ Given that Facebook's International Headquarters are in Ireland, the Irish Data Commissioner will examine all activities which are subject to Irish and European Data Protection laws. Any decision it takes could have implications for millions of users worldwide.

The following issues led to concern in the EU Member States with regard to social networking services: uncertainty about the private or public status of statements made on social networking sites; the creation of profiles and tracking of users by social networking sites; the lack of protection of children by social networking sites.

76 Sweden, Committee of Justice, Swedish parliament (2010).

77 Slovenia, Ministry of the Interior (2010); Slovenia, Information Commissioner (2011).

78 Norway, Data Inspection Board (2011).

79 Sweden, Data Inspection Board (2011).

80 For more information, see: www.europe-v-facebook.org.

81 See also: <http://m.zdnet.com/blog/facebook/irish-data-protection-commissioner-to-begin-facebook-audit/4262>, accessed on 14 October 2011.

In **France**, the industrial tribunal in Boulogne-Billancourt ruled on 19 November 2010 in a case about the public nature of statements made on social network sites. The case concerned three employees who were dismissed for having criticised their managers on Facebook.⁸² The court considered that the comments posted on the social networking site were available to the public as they were accessible to 'friends of friends'. The posts were no longer private as they were accessible to persons not involved in the discussion. Therefore, the dismissal was deemed founded. There is, however, some uncertainty with relation to the case law in this matter. The prosecutor of Périgueux, for example, handled a similar case differently. The prosecutor felt that the statements made by two employees about their superiors were sufficiently protected to be viewed as private, visible only to the employee's contacts, and not the 'second circle of contacts'.⁸³ In response to this legal uncertainty, sector operators reacted quickly. On 30 June, Google launched the Google+ network, another social networking service, where messages carry different levels of privacy depending on various 'circles', as defined by the user. On 13 September, Facebook launched new tools allowing users to organise their lists of 'friends' to better manage what information is shared.⁸⁴ Nevertheless, the public or private nature of messages posted on social networking sites remains relatively uncertain.

German websites based in the province of Schleswig-Holstein had until the end of September to remove Facebook's 'like' button or face a fine of up to €50,000 following an intervention by the Independent Centre for Data Protection Schleswig-Holstein. The concern was that this service was used to track users and create user profiles.⁸⁵

"The wording in the conditions of use and privacy statements of Facebook does not begin to meet the legal requirements relevant for compliance of legal notice, privacy consent and general terms of use."⁸⁸

Germany, Independent Centre for Data Protection Schleswig-Holstein

The **Spanish** data protection authority expressed its concern about the increased number of reported violations of privacy in social networks, in particular with regard to children (40 in 2010 against 32 in 2009). To address the issue, the Spanish data protection authority met with important social networks, such as Tuenti and Facebook, to improve their privacy policies and to prevent children under 14 years of age from joining

82 France, Boulogne-Billancourt Industrial Tribunal, 19 November 2010, *Mme. B. v. SAS Alten Sir; Mme. S. v. SAS Alten Sir*.

83 *Le Monde* (2011a).

84 *Le Monde* (2011b).

85 Germany, Data Protection Commissioner Schleswig-Holstein (2010).

them. Tuenti responded by saying it would review up to 300,000 profiles a year, taking out the profiles of children under the age of 14. Facebook, at the Spanish data protection authority's request, announced that it would increase the minimum age to join its network from Spain to 14. In addition, Facebook also promised to develop better controls and to consider several options to implement an age-verification system along with a parental consent system.⁸⁷

Outlook

Striking a balance between fundamental rights obligations and security concerns will continue to pose a challenge for EU institutions and EU Member States. The on-going discussion on the Data Retention Directive will be one facet of this wider debate.

EU institutions will also continue to debate the EU framework in the area of data protection. The European Commission tabled proposals in January 2012 to reform the existing framework. They consist of a proposal for a regulation replacing the 1995 data protection directive and a proposal for a new directive setting out rules on the protection of personal data processed for the purposes of the prevention, detection, investigation or prosecution of criminal offences and related judicial activities.

The attitude towards data protection of both users and providers of social platforms and other online tools will continue to fuel public debate and is likely to increasingly become the subject of court deliberations. The availability and uptake of redress mechanisms will need to be examined closely to ensure that fundamental rights are fully respected in the use of new information and communication technologies.

The CJEU is likely to once more address another area of concern, the independence of data protection authorities.

⁸⁶ *Ibid.*

⁸⁷ Spain, Spanish Data Protection Agency (2011a), p. 28.



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The rights of the child and protection of children

Equality and non-discrimination

Racism and ethnic discrimination



Equality
EDINBURGH

UN & CoE

January

February

March

7 April – Council of Europe Committee of Ministers adopts the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

7 April – UN Committee on the Rights of the Child issues its Concluding observations on Denmark

18 April – UN Committee on the Rights of the Child issues General comment No. 13 on the right of the child to freedom from all forms of violence

April

11 May – Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) opens for signature and is signed by 11 member states on the same day

May

20 June – UN Committee on the Rights of the Child issues its Concluding observations on Finland

June

July

4 August – UN Committee on the Rights of the Child issues its Concluding observations on the Czech Republic

August

21 September – Council of Europe Committee of Ministers adopts Guidelines on child-friendly healthcare

September

7 October – UN Committee on the Rights of the Child issues its Concluding observations on Sweden regarding the Optional Protocol on the sale of children, child prostitution and child pornography

31 October – UN Committee on the Rights of the Child issues its Concluding observations on Italy

October

16 November – Council of Europe Committee of Ministers adopts Recommendation on children's rights and social services friendly to children and families

November

19 December – UN General Assembly approves the third optional protocol to the Convention on the Rights of the Child

December

EU

January

15 February – European Commission presents the EU Agenda for the rights of the child

February

March

5 April – European Parliament and the Council of the European Union adopt a Directive on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

April

18 May – European Commission adopts a proposal for a directive of the European Parliament and of the Council on establishing minimum standards on the rights, support and protection of victims of crime

May

June

July

August

September

October

November

13-14 December – Council conclusions on combating sexual exploitation of children and child pornography in the Internet – strengthening the effectiveness of police activities in Member States and third countries

13-14 December – European Parliament and Council of the European Union adopt a Directive on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

December

4

The rights of the child and protection of children



The year 2011 witnessed important progress in European Union (EU) law and policy towards better protection of the rights of the child. These developments at EU level will affect how EU Member States ensure the prevention of the crimes of child trafficking, sexual abuse, sexual exploitation and child pornography, the protection of children who fall victim to such crimes and the prosecution of offenders. The new EU Agenda for the Rights of the Child establishes priority areas, including increasing knowledge about the situation and needs of the most vulnerable groups of children. Accompanied and unaccompanied migrant children continue to arrive in EU Member States, which requires adequate responses by public authorities, social and other services.

This chapter analyses the main developments and trends in the area of rights of the child that occurred in the EU and EU Member States, focusing particularly on violence against children; sexual abuse and exploitation of children; child trafficking; children and migration; child-friendly justice; developments regarding cross-national divorce and parental separation; participation of children; and data collection.

The EU Agenda for the Rights of the Child has contributed to defining further target areas of work where the EU and its Member States can act. The agenda lists 11 specific actions, among which are:

- promoting the use of the Council of Europe Guidelines of 17 November 2010 on child-friendly justice and taking them into account in future legal instruments in the field of civil and criminal justice;
- supporting the exchange of best practices and the improvement of training for guardians, public authorities and other actors who are in close contact with unaccompanied children (2011-2014);
- paying particular attention to children in the context of the EU Framework for National Roma Integration Strategies, and supporting Member States to ensure the swift introduction and full functioning of the 116 000 hotline for missing children and the child alert mechanisms (2011-2012).¹

¹ See further European Commission (2011a).

Key developments in the area of children's rights:

- the EU Agenda for the rights of the child, the directive on preventing and combating trafficking in human beings and protecting its victims and the directive on combating the sexual abuse and sexual exploitation of children and child pornography form a new frame of reference at EU level;
- nine EU Member States are reforming their child protection systems, following reviews of national legislation in the area of child protection. Many EU Member States are also in the process of reforming their family justice systems;
- 11 EU Member States sign the Council of Europe Convention on preventing and combating violence against women and domestic violence which also covers girls; five EU Member States and Croatia ratify the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse.
- in the asylum and migration context issues like constraints relating to age assessment at national level are discussed and the European Commission establishes an expert group on unaccompanied minors.

The United Nations (UN) Convention on the Rights of the Child (CRC) provides the backdrop against which many developments in the field can be measured. All EU Member States – and Croatia – have ratified the CRC. In December 2011, the UN General Assembly approved a third additional

protocol to the CRC, establishing a communication procedure (that is, a complaints procedure),² which it previously lacked. This procedure allows individuals, groups or their representatives who claim that their rights have been violated under the CRC to bring a complaint before its monitoring body, the Committee on the Rights of the Child. The adoption of this protocol will allow children, whether as individuals or as part of a group, to submit complaints directly to the Committee, thereby contributing to the enforcement of the international recognition of children as subjects of law and as rights holders.

4.1. Violence against children

In April 2011, the Committee of Ministers of the Council of Europe adopted the Convention on preventing and

combating violence against women and domestic violence, which also includes girls.³ Eleven EU Member States signed the convention, although none had ratified it at the time of publication (see Chapter 10 on international obligations). Given the general lack of comparable data on violence against children in Europe, the European Union Agency for Fundamental Rights (FRA) EU-wide survey on violence against women will provide much-needed information, looking at adult women’s experiences of violence during childhood and at the issue of children witnessing violence against their mothers.

“With the Lisbon Treaty and the legally binding Charter of Fundamental Rights, the Rights of the Child are at the heart of the EU’s objectives. They give us the means to act for children, and the duty to make use of these means.”

EU Commission Vice-President Reding, sixth Forum for the Rights of the Child, 23 November 2011

Table 4.1: Prohibitions against corporal punishment, by country

Country	Prohibited in the home	Prohibited in schools	Prohibited in penal system as disciplinary measure	Prohibited in alternative care settings
AT	YES	YES	YES	YES
BE	NO	YES	YES	SOME
BG	YES	YES	YES	YES
CY	YES	YES	YES	YES
CZ	NO	YES	YES	NO
DE	YES	YES	YES	YES
DK	YES	YES	YES	YES
EE	NO	YES	YES	NO
EL	YES	YES	YES	YES
ES	YES	YES	YES	YES
FI	YES	YES	YES	YES
FR	NO	YES	YES	NO
HU	YES	YES	YES	YES
IE	NO	YES	YES	SOME
IT	NO	YES	YES	YES
LT	NO	YES	YES	NO
LU	YES	YES	YES	YES
LV	YES	YES	YES	YES
MT	NO	YES	YES	NO
NL	YES	YES	YES	YES
PL	YES	YES	YES	YES
PT	YES	YES	YES	YES
RO	YES	YES	YES	YES
SE	YES	YES	YES	YES
SI	NO	YES	YES	SOME
SK	NO	YES	YES	YES
UK	NO	YES	YES	SOME
HR	YES	YES	YES	YES

Source: *Global initiative to end all corporal punishment of children, Global progress towards prohibiting all corporal punishment, October 2011*

² UN, CRC (2011), Optional protocol to the CRC on a communications procedure.

³ Council of Europe, Convention on preventing and combating violence against women and domestic violence.



Whereas all EU Member States have prohibited corporal punishment against children in schools and penal institutions, as of October 2011 only 16 EU Member States had prohibited all forms of corporal punishment including against children at home and in alternative care settings: **Austria, Bulgaria, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Poland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Spain and Sweden.**⁴

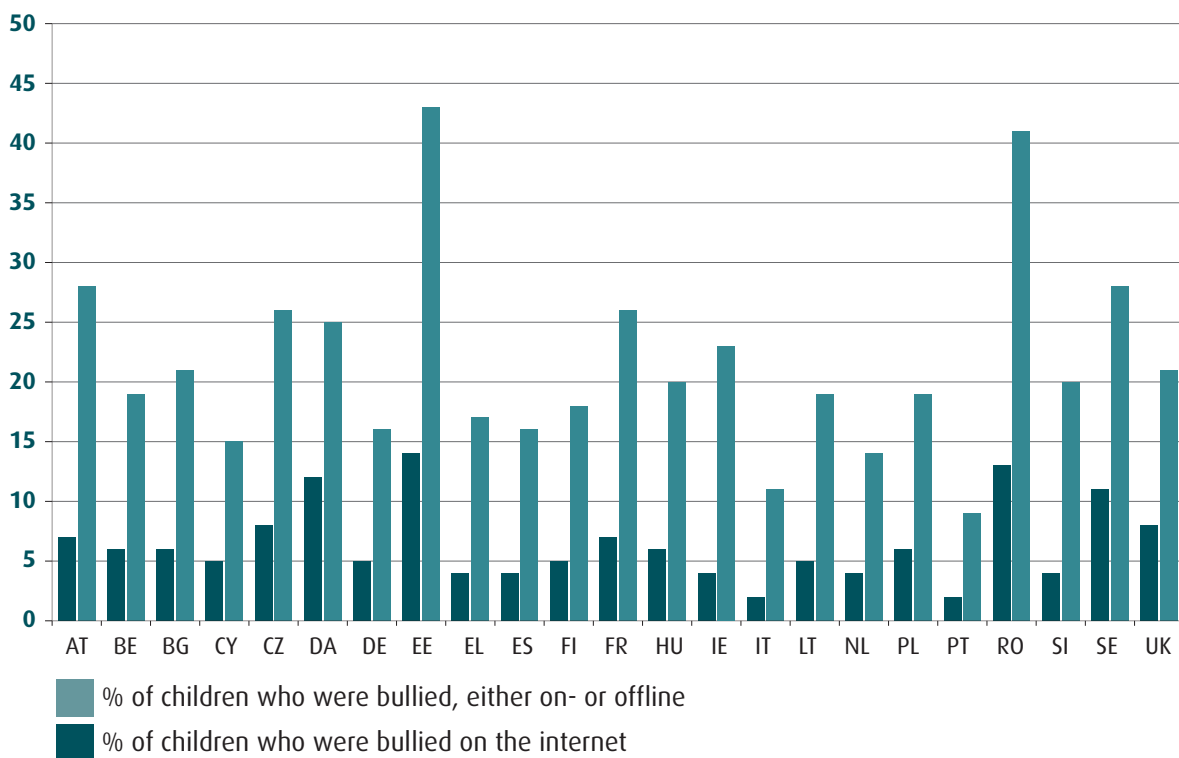
In 2011, a number of EU Member States were in the process of carrying out partial or general reforms of their child protection systems, aiming to address existing failings – and their deeply harmful consequences for some children. The reviews – in **Bulgaria, Denmark, Estonia, Germany, Lithuania, the Netherlands, Portugal, Romania, Slovenia** and the **United Kingdom (England and Wales)** – have looked not only at how social services deal with cases of children in need of protection but also at how officials in the education and health sectors are required to respond to cases of alleged and reported cases of violence against children.

In October 2011, a draft Federal Act on Child Protection (*Bundeskinderschutzgesetz*) was approved in **Germany**, which includes, among other measures, the set-up of

a network of institutions, professionals and social support services for child protection services at the level of the *Länder*; criminal records checks of staff working with children; and the enlargement of the mandate of youth welfare offices. With a strong focus on cooperation, the law aims at improving communication among different types of child professionals by creating a network and encouraging information sharing among agencies. Although the far-reaching proposal has been well received, experts consider that current underfunding makes it difficult to implement.⁵

Although national legislation and policies often address violence against children within the family, the identification and support of child victims remains a challenge. The lack of coordination between municipal social services has been identified as an important weakness. In **Denmark**, for instance, the Hjørring District Court (*Hjørring Byret*) found a husband and wife guilty of abusing their children and step-children, with offences including assault, incest and forcible restraint. Once the court learned that the municipality of former residence had withheld information from the municipality to which the family later moved about possible abuse within the family, it ordered the former to repay the costs of foster care of the child victims of abuse.⁶

Figure 4.1: Children aged nine to 16 who self-report having suffered bullying over the past 12 months, by country (%)



Note: Latvia, Luxembourg, Malta, Slovakia and Croatia were not included in this study.

Source: Livingstone et al., 2011, EU kids online survey, p. 25

4 Global Initiative to end all corporal punishment of children (2011).

5 German Women Lawyers Association (2011).

6 Denmark, Court of Denmark (2011), *Anklagemyndigheden v. TEJ og HAL*, RAFD-585/2011, 21 June 2011.

Reports regarding violence in schools or institutions continued to emerge. For instance, in Vienna, **Austria**, over 300 cases of child abuse in public institutions emerged during 2011, dating from the 1950s onwards. Some claims included very serious allegations, such as gang rape. The Vienna City Council established a committee to investigate the cases and provide assistance to the victims, including economic compensation. A final report on this issue is expected by the end of 2012. The city also created an Ombudsperson for children in institutions. The office is due to take up its duties in the spring of 2012.⁷

A pan-European hotline for children in need of advice is available at: 116,111. To assess awareness of the service, the European Commission carried out a survey in May 2011, finding that hotline awareness seldom rises above 1 % and never exceeds 7 %. These results underline the need for enhanced efforts to provide information on the helpline.⁸ Plan International and Child Helpline International have called on EU Member States to improve the access of children affected by abuse in institutional settings to child helplines.⁹

The EU Kids Online study carried out by the London School of Economics found that bullying among children, defined in the report as treating others in a hurtful or nasty way, occurs both on- and offline, although more frequently offline (see Figure 4.1).¹⁰ The survey was carried out in 25 countries (including the 27 EU Member States except Latvia, Luxembourg, Malta and Slovakia) between 2009 and 2011 among 25,000 children between the ages of nine and 16.

4.1.1. Deinstitutionalisation of children

Institutionalisation of children can result in difficult and problematic situations, as highlighted, for instance, by the French Ombudsperson in a 2011 report on France.¹¹ However, deinstitutionalisation efforts have continued in EU Member States, particularly in **Bulgaria**, to deal with the large numbers of children who are placed in institutions and consequently do not receive family, or family-type care.

As highlighted in the FRA annual report *Fundamental rights: challenges and achievements in 2010*, inquiries ordered jointly by the Chief Prosecutor and the Helsinki Committee in Bulgaria were made into the deaths and bodily injuries of children with disabilities in childcare institutions in Bulgaria.¹² The Chief prosecutor's inquiries revealed substantial deficits in his offices' investiga-

tions into these deaths and injuries, as well as a failure to follow up court cases which they had launched.¹³ Nevertheless, as part of Bulgaria's efforts towards the deinstitutionalisation of children, the Health Act was amended in December 2010, requiring that an autopsy be made into the death of children placed outside their own families. The amendment also provides for establishing a specialised department within the Prosecutors Office to handle such cases.

Whereas institutionalisation is not necessarily linked to violence, it does interfere with the right to liberty and security – an interference that is not always justified. In the judgment *A. and others v. Bulgaria* published in November, the European Court of Human Rights (ECtHR) addressed the right to liberty and security of children in a young offenders' institution who displayed antisocial behaviour. The ECtHR ruled that given the stringent conditions they were faced with in the young offenders' institution and the length of time they had spent there, the applicants' right to liberty had been violated. The ECtHR noted that Bulgarian law failed to define 'antisocial behaviour' nor did it contain an exhaustive list of the acts characterised as such. It also observed that, in Bulgarian judicial practice, running away from home, vagrancy and prostitution were considered antisocial acts liable to result in various measures, including placement in a specialised institution.¹⁴

Promising practice

Setting standards for guardians of separated children in Europe

The non-governmental organisation Defence for Children devised *Core standards for guardians of separated children* in line with the CRC, EU Directives, the UN Guidelines for the Alternative Care of Children and the Quality4Children standards for children in out-of-home care, under the framework of the DAPHNE programme which combats violence against women and children. The core standards focus on qualifications and responsibilities of the guardian in relation to reception, return, legal procedures and a durable solution for the child. Proper guardianship systems are essential to finding lasting solutions for separated children, whether that be return to their country of origin, transfer to another country – for instance for family reunification – or integration into the receiving country. The guidelines were developed on the basis of the views of children in eight member States regarding the ideal characteristics of a guardian. The countries covered were: Belgium, Denmark, Germany, Ireland, Italy, the Netherlands, Slovenia and Sweden.

For more information, see: www.defenceforchildren.nl

7 For more information, see: www.wien.gv.at/menschen-gesellschaft/kinderheime.html.

8 European Commission (2011b).

9 Bazan, C. (2011).

10 Livingstone, S. et al. (2011).

11 France, Le Défenseur des droits (2011).

12 FRA (2011a), p. 72.

13 Bulgaria, Bulgarian Helsinki Committee (2011).

14 ECtHR, *Affaire A. et Autres v. Bulgarie*, 29 November 2011.



The European Network of Ombudspersons for Children (ENOC) issued a report in December 2011 on *Respect of the rights of children and young people living in institutional care: state of play*.¹⁵ The report is based on a survey of ENOC offices located across EU Member States and deals with children's rights and the reality they face in institutional care settings, excluding institutions for juvenile delinquency, mental health or foster care. The main findings of the report are that the wording of most legislation describing reasons for placement is vague, leaving the judiciary or other competent authorities (such as child protection services or social welfare offices) room for discretion. In cases of voluntary placement, a systematic review of placement decisions is not always provided for; and, while many countries have complaints procedures in place, it is not always clear how accessible these are for children and how much they make use of them.

In **Spain**, public attention focused on the 'stolen children' who, between the 1940s and 1980s, were given up for adoption at hospitals with neither their mothers' knowledge nor consent. This allegedly constituted a systematic practice in some hospitals, involving doctors, nurses and nuns. In June 2011, the general public prosecutor said that of the 849 investigations launched, evidence of a crime had been found in 162 cases and in those cases charges had been filed.¹⁶ There are growing indications, however, that the practice may have involved hundreds of children. Complaints by various organisations – such as the National Association of the Victims of Irregular Adoptions (*Asociación Nacional de Afectados por Adopciones Irregulares*) and SOS Stolen Babies (*SOS Bebés Robados*) – over state delays in opening registries to enable the search for lost relatives¹⁷ prompted the general public prosecutor to point out that the investigations would take time because they need to be coordinated with all the autonomous communities of Spain as it was believed that various networks had been involved.

4.2. Sexual abuse and exploitation

This section discusses the issues of sexual abuse and exploitation of children primarily through the prism of the Directive of the European Parliament and of the Council of the European Union on combating the sexual abuse, sexual exploitation of children and child pornography, adopted in November 2011, which replaced Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography.

Although EU Member States are allowed two years to transpose the directive into national law, **Austria**, the **Czech Republic**, **Estonia**, **France**, **Lithuania**, **Luxembourg**, **Malta**, the **Netherlands**, **Poland**, **Slovenia**, **Spain** as well as **Croatia** began amending their criminal codes in 2011 by criminalising different forms of violence on the internet or forms of sexual violence.

The directive introduces EU-wide requirements on the prevention of all forms of sexual abuse and exploitation of children, prosecution of offenders and protection for victims. It enhances the existing international framework, in particular the Optional Protocol of the CRC concerning the sale of children, child prostitution and child pornography (see also Chapter 10 on international obligations). The directive defines offences concerning not only sexual abuse, sexual exploitation of children and child pornography but also the solicitation of children for sexual purposes, and the incitement, aiding and abetting and attempt of these practices. It leaves EU Member States the discretion to decide whether or not some practices apply to consensual sexual activities between peers who are close in age and degree of psychological and physical maturity, as long as the acts do not involve any abuse.

In drafting the directive, a balance was sought between children's right to protection and the right to freedom of expression. As a result, the directive clarifies in its preamble that child pornography is a specific type of content that cannot be construed as the expression of an opinion.¹⁸ EU Member States must therefore ensure the prompt removal of web pages hosted in their territory that contain or disseminate child pornography. They must also endeavour to secure the removal of such pages if hosted outside their territory, through, for example, cooperation with other states. Since the removal of child pornography content at source is often not possible, the directive authorises Member States to take measures to block access to those pages for internet users in their territory, provided that the measures are set by transparent procedures and provide adequate safeguards to ensure that the restriction is limited to what is necessary and proportionate, and that users are informed of the reason for the restriction. The safeguards also need to include the possibility of judicial redress.

In all these respects, the directive also supplements the 2007 Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, which by March 2012 had been ratified by a total of 11 EU Member States, including ratifications in 2011 by **Austria**, **Bulgaria**, **Finland**, **Luxembourg**, **Romania** as well as **Croatia** (see also Chapter 10 on international obligations).

¹⁵ ENOC (2011).

¹⁶ Agencia EFE (2011a).

¹⁷ Agencia EFE (2011b).

¹⁸ Directive 2011/93/EU, preamble para. 46.

In some EU Member States, public debates surfaced over the balance to be struck between the blocking or deleting of websites containing child pornography and freedom of expression. The Human Rights Defender in **Poland** organised a debate in February 2011, where children's rights organisations generally supported blocking websites, while other civil society organisations argued that doing so could be used to prohibit any other unwanted, politically sensitive content on internet pages.¹⁹

The directive also includes aggravating circumstances, such as when offences are committed against children in particularly vulnerable situations, such as children with mental or physical disabilities, in situations of dependence or in states of physical or mental incapacity due to substance abuse. Other aggravating circumstances include when the offences are committed by a member of the child's family, a cohabiting person, or a person abusing a recognised position of trust or authority, such as guardians or teachers, or, finally, by a repeat offender.

In order to avoid repeat offences, the directive requires that those previously convicted be prevented from exercising professional activities involving direct and regular contact with children. Employers involved in activities that bring (potential) employees into such contact with children are entitled to request information on their criminal convictions, as provided for in the directive, and on whether they have been disqualified from such work. Since January 2011, employers in **Denmark** are obliged to check the criminal records of staff in direct contact with children under the age of 15.

The directive also envisages intervention programmes or measures to prevent and minimise the risk of repeated offences of a sexual nature against children. Related to this, the directive criminalises the online 'grooming' of children or the solicitation of children for sexual purposes through the use of information and communication technologies, as well as child sex tourism, including where the offence is committed on a Member State's territory or by one of its nationals abroad. **Austria** and **Slovenia** amended their penal codes in 2011, introducing the criminalisation of grooming and defining various activities under the offence of child pornography.

In December 2011, the EU's Justice Home and Affairs Council adopted Conclusions on combating the sexual exploitation of children and child pornography on the Internet.²⁰ The conclusions require EU Member States to ensure the broadest and speediest possible cooperation to facilitate an effective investigation and prosecution of such offences. Moreover, they request the European

Commission to, amongst other actions, explore ways to improve removal of child pornography. They ask EU Member States to consider the use of Europol to combat child sexual abuse online, including the exchange of information on webpages containing child pornography, leading to the pages' removal or the blocking of their content.²¹ The Executive Director of the UN Office on Drugs and Crime underlined the international dimension of this phenomenon when, in April, he called for concerted global action to combat online child abuse, one of the most common forms of cybercrime.²²

According to the EU Kids online report mentioned above, children spend an average of 88 minutes per day online and the average age of first internet use is nine.²³ Against the background of the extensive and early use of the internet and social networks and notorious cases of abuse, the European Commission's report *Protecting Children in the Digital World*²⁴ found that all EU Member States are conscious of these challenges and are increasing their efforts to respond to them. They are actively participating in the EU Safer Internet Programme, which runs between 2009 and 2013. This programme is designed to promote the safer use of the internet and other communication technologies, particularly for children and young people; to educate users, particularly children, parents, carers, teachers and educators; and to fight against illegal content and harmful conduct online. The Commission's report identified, however, divergences in Member State responses and concluded that further action at European level was needed to build on the best Member State practices.

In some EU Member States efforts have been made to tackle the sexual abuse and exploitation of children from within the Catholic Church. The Catholic Church in **Germany**, for instance, has taken a number of concrete steps to address the rising number of sexual abuse claims against it. First, it has commissioned two research projects, one on sexual abuse of children by Catholic priests and members of religious orders, and another on sexual assaults from a psychiatric-psychological perspective. Second, it has established two hotlines, one for victims of sexual abuse generally, and another which specifically addresses cases which occurred in Catholic children's homes during the 1950s and 1960s.²⁵ During Pope Benedict XVI's September 2011 visit to Germany, he received a group of victims and underlined that the Catholic Church is interested in uncovering the full extent of the abuse that took place at its institutions.²⁶

19 For more information, see: <http://brpo.gov.pl/index.php?md=8841>.

20 Council of the European Union (2011).

21 *Ibid.*

22 For more information on the Executive Director's statement, see: www.un.org/apps/news/story.asp?NewsID=38069&Cr=internet&Cr1.

23 O'Neill, B. *et al.* (2011).

24 European Commission (2011b).

25 For more information, see: www.hilfe-missbrauch.de and www.heimkinder-hotline.de.

26 Holy See (2011).



In **Ireland**, when launching the report *In Plain Sight*²⁷ commissioned by Amnesty International, the Minister for Children and Youth Affairs acknowledged state failures and announced a number of reforms. The Amnesty report explores the reasons why the abuse and exploitation of thousands of Irish children in state-funded institutions, previously revealed by the Ferns, Ryan, Murphy and Cloyne reports on child abuse in Ireland, were able to take place. Amnesty International's report argues that the root of the problem was the state's "deferential attitude to the hierarchy of the Roman Catholic Church",²⁸ which prevented the investigation and prosecution of abuse and lent the law's protection to the powerful instead of the powerless. It held that children were abandoned to a dysfunctional, chaotic and unregulated child protection system in which no one was held to account for its failure to protect and care for its charges.

4.3. Child trafficking

In April 2011, the EU adopted a directive on preventing and combating trafficking in human beings and protecting its victims,²⁹ replacing Council Framework Decision 2002/629/JHA on combating trafficking in human beings. EU Member States are required to comply with the directive by 6 April 2013.

This new directive includes a strong child protection component, addressing the issue in its definition of trafficking. It establishes that in the specific case of child trafficking, requirements normally necessary to determine the existence of an offence, such as the threat or use of force or other forms of coercion, are no longer necessary – which is also in line with the Council of Europe Convention on Action against Trafficking in Human Beings. The directive devotes several articles to the protection of child victims of trafficking, specifically including children in criminal investigations and proceedings and unaccompanied children. It recognises children's greater vulnerability and higher risk of falling victim to trafficking and stipulates that, in such cases of particular vulnerability, the penalty for a trafficking offence should be more severe. The directive incorporates key child protection principles such as the best interest of the child and contains concrete requirements for child protection, such as free legal counselling, appointment of a guardian and, to limit the risk of secondary victimisation, limits to the number of interviews, which should be performed by trained professionals. The directive establishes the possibility of video recording interviews, and specialised education programmes for children "aimed at raising awareness and

reducing the risk of people, especially children, becoming victims of trafficking in human beings".

The European Commission is preparing a strategy on combating trafficking of human beings, which is expected to be approved in May 2012 and which aims to complement the various measures envisaged under the directive. A number of EU Member States also continued to develop legislation and policies to combat trafficking in 2011. These were **Austria, Bulgaria, the Czech Republic, Denmark, Greece, Ireland, Malta, Romania, Slovakia, Slovenia, Spain,** and the **United Kingdom**.

In February, for instance, **Slovakia** adopted a national programme to combat trafficking covering the prevention, protection and prosecution of trafficking from 2011 to 2014. In other EU Member States, legal reforms involved expanding legal definitions of trafficking to include new forms of exploitation: **Romania**, for instance, added child begging to the definition of trafficking in its revised Anti-trafficking law.

According to the US Department of State's annual *Trafficking in persons* report, **Estonia** remains the only EU Member State without a trafficking law. The Estonian government has taken steps to address this, presenting a proposal in August 2011 to review the Penal Code in this regard.³⁰

As in recent years, the lack of data on the number of victims of trafficking and the inconsistent gathering of information from different data sources remained a challenge in most EU Member States. The **Romanian** legislative review mandated the General Inspectorate of Romanian Police to build a national database which will contain collated data on victims of trafficking and traffickers collected by different organisations, including NGOs. The Inspectorate is required to publish a statistical report every semester.

The new directive also requires the appointment of a National Rapporteur or a similar mechanism in all EU Member States. Some Member States have already established National Rapporteurs, and an informal network of rapporteurs was set up following a decision of the Council of the European Union adopted in June 2009.³¹ In July 2011, the fourth meeting of the informal network of EU National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings was held in Brussels under the Polish Presidency and the direction of the EU Coordinator on Human Trafficking. The meeting focused on the issue of assistance and support for the victims of human trafficking.³² According to Articles 19 and 20 of the directive, the National Rapporteurs are

27 Holohan, C. (2011).

28 *Ibid.*, p. 8.

29 Directive 2011/36/EU, OJ 2011 L101, p. 1.

30 US Department of State (2011), p. 156.

31 Council of the European Union (2009).

32 Poland, Ministry of the Interior (2011).

expected to make assessments, measure the results of anti-trafficking actions, including by gathering statistics, and transmit this information to the EU Anti-Trafficking Coordinator.³³ The Coordinator should channel this information into the European Commission's biennial report, which is intended to provide a common comparative basis upon which to evaluate the progress made in the fight against trafficking in human beings.

FRA ACTIVITY

Joining forces to identify and protect child victims of trafficking at European borders

The FRA, together with other international players, contributed to a briefing for border guards attempting to identify child victims of trafficking during an operation by Frontex, which coordinates EU Member State cooperation in the field of border security. Frontex carried out its joint operation 'Hammer' between 5 October and 15 November in 24 European airports. The FRA also provided Frontex with input for the drafting of operational guidelines on how to protect the rights of children crossing European air borders.

4.4. Children and migration

4.4.1. Separated children in a migration or asylum context

Following the European Commission's adoption in May 2010 of the Action Plan on unaccompanied minors 2010–2014 and related conclusions of the Justice and Home Affairs Council in June 2010,³⁴ the European Commission established an expert group on unaccompanied minors in the migration process in 2011. The group, which is expected to meet twice a year, consists of government experts nominated by EU Member States as well as stakeholders and private experts, who are invited depending on the topics discussed.

The first meeting of the expert group was held in June 2011 and focused on the question of guardianship, which is an important element for the protection of unaccompanied minors. In its Action Plan, the European Commission says it will evaluate the necessity of either introducing targeted amendments of the concept of guardianship or a specific instrument setting down common standards on reception and assistance for all unaccompanied minors. The Action Plan invites Member States to consider introducing review mechanisms to monitor the quality of guardianship in order to ensure that the best interests of the child are represented

³³ See also Chapter 7 of this report.

³⁴ FRA (2011a), p. 74; see also FRA (2010), pp. 19–20.

throughout the decision making process and, in particular, to prevent abuse.³⁵ Other aspects highlighted include legal representation, access to accommodation and care, initial interviews, education services and appropriate healthcare.

The ECtHR addressed many of these aspects of child protection in the *Rahimi v. Greece* case. In a judgment handed down in April, the ECtHR found violations of Article 3 (prohibition of inhuman and degrading treatment), Article 5 (right to liberty and security: in particular paragraphs 1 and 4) and Article 13 (right to an effective remedy) of the ECHR. The case concerned Eivas Rahimi, a 16-year old Afghan who arrived on the Greek island of Lesbos in 2007 without the required travel documents. Greek authorities arrested him and gave him an expulsion order as an accompanied minor. Mr Rahimi, then still a child, subsequently filed an application for asylum. The ECtHR found that Greece had failed to prove that he was indeed accompanied. He had not been assigned a tutor nor provided with legal representation while in detention, the ruling said. And, while Mr Rahimi had informed the authorities that he spoke only Farsi, a statement the authorities never challenged, the ECtHR noted that his appeals procedures information form was in Arabic. Mr Rahimi had complained about the fact that he had been detained together with adults. The detention centre's lack of leisure activities and the inability to communicate from it with the outside world also drew the ECtHR's notice. Mr Rahimi was in a situation of extreme vulnerability, given his age and personal situation, the ECtHR found.³⁶

The methods used to determine the age of a person applying for asylum or protection remain controversial in several EU Member States. According to the Commission's Action Plan on Unaccompanied Minors,³⁷ the Council Conclusions on Unaccompanied Minors,³⁸ and General Comment No. 6 of the UN Committee on the Rights of the Child,³⁹ in case of uncertainty regarding the age of a person and when there is a possibility that the person is a child, she or he should be treated as such until proven otherwise – and therefore granted the relevant and necessary protection.

In addition, the Separated Children in Europe Programme published a *Review of current laws, policies and practices relating to age assessment in 16 European Countries* in May, covering 15 EU Member States (**Austria, Belgium, Denmark, Estonia, Finland, Hungary, Ireland, Italy, Malta, the Netherlands, Poland, Portugal, Slovenia, Spain and the United Kingdom**) and Norway.⁴⁰ The report

³⁵ European Commission (2010), para. 4.1.

³⁶ ECtHR, *Affaire Rahimi v. Grèce*, No. 8687/08, 5 April 2011. For related aspects concerning the protection of separated, asylum seeking children, see FRA (2010) and FRA (2011b).

³⁷ European Commission (2010), para. 4.2.

³⁸ Council of the European Union (2010), para.11.

³⁹ UN Committee on the Rights of the Child (2005), para. 31 (i).

⁴⁰ Save the Children (2011a).

documents some of the serious constraints that keep children from accessing effective mechanisms to appeal the results of age assessments. The main obstacles to appeal identified by the study are that “1) age assessment results are often not made through a specific (e.g. administrative) decision, but are either part of a broader procedure (typically the asylum determination procedure) or simply form the basis for other decisions (e.g. expulsion; placement in accommodation with adults, etc.) that can be appealed; 2) the child in several countries is not sufficiently informed about its possibility to appeal; 3) in addition there is often a lack of adequate support for the child in order to appeal age assessment results; 3) in one instance the law does not allow individuals to request age assessment.”⁴¹

At the national level, the **Spanish** Ombudsperson (*Defensor del Pueblo*) published a report regarding procedures to determine the age of migrant persons.⁴² The report argues that there is consensus among the scientific community that age-determination techniques based on bone maturity or dental mineralisation are subject to large margins of error. Similarly, the report highlights the inadequacy of techniques that require children’s exposure to radiation for non-therapeutic use. The scientific community, the report notes, insists that any study of age determination take into account the influence of the specific pathological, nutritional, hygienic-sanitary factors and physical activity involved, while ethnic factors are still under debate. The report concludes that there is growing support for a more holistic approach to age determination, with medical examinations yielding to psycho-social assessments, although there is as yet no consensus among the scientific community on the elements of this holistic method.

The **British** government announced that it would halt the detention of children for immigration purposes as of December 2010. Civil society organisations have, however, reported that such detentions continue despite the policy change. Between May and August 2011, 697 children were held at Greater London and South East ports, almost a third of whom were unaccompanied.⁴³ Her Majesty’s Inspector of Prisons also expressed concerns regarding the monitoring of those detained at ports, following the results of its unannounced inspections at three Heathrow Terminals. Among these was the lack of staff awareness on how to refer child victims of trafficking to the responsible authorities.⁴⁴

The situation of migrant children at the Lampedusa reception centre in **Italy** raised serious concerns. The United Nations High Commissioner for Refugees

(UNHCR), in a call to alleviate the situation, noted that the centre was hosting some 2,000 persons in March, while it was originally designed to accommodate 850 people.⁴⁵ In a similar call, Save the Children asked for the immediate transfer of 530 children, mostly the unaccompanied, out of Lampedusa.⁴⁶

The International Organization for Migration (IOM) published a report in December 2011, noting that in the **Czech Republic**, in accordance with section 178 of the Residence of Aliens Act, foreigners older than 15 years of age, who are capable of expressing their will and acting independently, are deemed legally competent persons. As a result, unaccompanied minors who are older than 15 years of age may be detained under the same conditions as adults, although adults may be held for a maximum of 180 days, while detention for under 18-year old foreigners must not exceed 90 days.⁴⁷

In **Greece**, the President of the Administrative Court of First Instance of Piraeus held that the detention of the complainant, an unaccompanied child, was contrary to the child’s interests and his/her need for special protection and support and violated the CRC.⁴⁸

Local authorities often lack the resources to provide adequate services to separated children, an issue that was highlighted by the actions taken in September 2011 by the president of the General Council of Seine-Saint-Denis department (*Département*) in **France**. This department is an important entry point into France, as Charles de Gaulle international airport is located there. Of the nearly 6,000 unaccompanied minors who arrived in France in 2010, 934 arrived at Charles de Gaulle airport. The cost of supporting these unaccompanied minors fell upon the Seine-Saint-Denis department, which at €35 million represented about 20 % of its total child welfare budget; for 2011, the estimated cost of supporting unaccompanied minors was €42 million.⁴⁹ As a result, in September 2011, the president of the general council refused to host any more newcomers, leaving 80 unaccompanied minors without shelter, in an attempt to call the government’s attention to the need for a more equal distribution among departments of the burden of providing support for unaccompanied minors. Reception of newcomers was resumed in October 2011, after the signing of an agreement with the Ministry of Justice to ensure the distribution of new arrivals among departments in the Paris region: for each child hosted in Seine-Saint-Denis, the Paris prosecutor’s office agreed to assign responsibility to other departments for nine others.

41 Save the Children (2011a), p. 30.

42 Spain, Acting Ombudsman (2011).

43 The Children’s Society (2011).

44 United Kingdom, Her Majesty’s Inspectorate of Prisons (2011).

45 UNHCR (2011).

46 Save the Children (2011b).

47 Hancilova, B. and Knauder, B. (2011), p. 89.

48 Greece, Administrative Court of First Instance of Piraeus, Decision 229/2011, 21 March 2011.

49 France, Seine-Saint-Denis Département (2011).

Burden sharing was also in evidence in **Spain**, where the national government agreed to give subsidies to the Canary Islands regional government to cover the costs of reception and transfer of unaccompanied children. The national government approved Royal Decree 724/2011 of 20 May 2011 on the concession of a direct subsidy to the Autonomous Community of the Canary Islands for the reception and transfer of unaccompanied alien minors (*Real Decreto 724/2011, de 20 de mayo de 2011, por el que se regula la concesión de una subvención directa a la Comunidad Autónoma de Canarias para el traslado y acogida de menores extranjeros no acompañados*).⁵⁰ This subsidy will finance the transfer of these minors to other autonomous communities and their accommodation on the Canary Islands while their transfers are prepared.

4.4.2. Children with an irregular migration status

Children with an irregular migration status face difficulties in accessing their rights. In October 2011, the Council of Europe Parliamentary Assembly approved a recommendation on undocumented migrant children in an irregular situation.⁵¹ This recommendation covers the areas of education, healthcare and housing as well as detention and exploitation. The EU *acquis* also grants rights to children in an irregular situation, such as the right to education, for instance.

At the national level, EU Member States have undertaken legal reforms relevant to undocumented children. In **Spain**, for example, the new Organic Act 10/2011 allows illegally residing women who report being victims of gender-based violence to request a residence permit for their under-age or disabled children or if they are unable to provide for their own needs. This provisional residence permit is granted automatically. Similarly, the Supreme Court granted asylum to an Algerian woman and her children who fled the husband/father's repeated physical and psychological violence. This decision followed the Asylum and Refugee Office's (*Oficina de Asilo y Refugio*) initial rejection of their asylum application and the granting instead of a residence permit based on humanitarian reasons. The woman and her children appealed this decision and the National Audience Court (*Audiencia Nacional*) recognised their right to asylum in Spain – a decision the Supreme Court endorsed.⁵²

In the **Netherlands**, the Administrative High Court delivered a landmark judgment on the provision of child allowances to children of migrant parents in an irregular situation. Under Dutch law, residents alone are entitled to child allowances. The court argued that

although the Dutch State did not admit these persons to its territory it had knowingly accepted their stay in the Netherlands for a sustained period of time. Apart from the obligation in Article 8 of the ECHR to protect the right to private and family life, the court considered that the Netherlands had also knowingly accepted to a certain degree the duty, flowing from the CRC, to care for the children of these persons. The lack of a residence status, as required by Article (2) of the Child Allowance Act, was therefore judged not to be a valid reason to exclude this group from child allowance.⁵³

As concerns developments in case law, the ECtHR found a violation of Article 3 (prohibition of inhuman or degrading treatment) and Article 5 (1) (right to liberty and security) of the ECHR in the case of *Kanagaratnam and others v. Belgium* in December 2011. A Tamil family comprising a mother and her three children was detained for almost four months in a centre whose detention conditions the ECtHR had already deemed inappropriate for children's needs. The children's situation amounted to inhuman and degrading treatment and represented a violation of Article 3. The ECtHR also considered that by placing the children in a closed centre designed for adult illegal aliens, in conditions which were ill-suited for their extreme vulnerability as minors, the Belgian authorities had not sufficiently secured the children's right to liberty guaranteed under Article 5 (1).⁵⁴

In March 2011, the Court of Justice of the European Union (CJEU) issued a milestone ruling related to the rights of children who are EU citizens but whose parents lack regularised status in an EU Member State.⁵⁵ The *Zambrano* case concerns the granting of residence and work permits to a Colombian citizen residing irregularly in **Belgium** with two dependent children of Belgian nationality. According to the CJEU's Grand Chamber, the refusal of the right of residence or a work permit to the parent of the children would mean that the children would be forced to leave the EU to accompany their parents. Similarly, if a work permit were not granted to the parent, he might have insufficient resources to provide for himself and his family, which would also result in the children, EU citizens, having to leave EU territory. The children would therefore be unable to exercise their rights as EU citizens. The Court concluded that Article 20 of the Treaty on the Functioning of the European Union (TFEU) precludes a Member State from refusing a third-country national a residence or work permit in the Member State of residence and

⁵⁰ Spain, Royal Decree 724/2011 of 20 May 2011.

⁵¹ Council of Europe, PACE (2011a).

⁵² Spain, Decision 4013/2011 of the Supreme Court of Spain, 15 June 2011.

⁵³ Netherlands, Administrative High Court, LJN: BR1905, No. 08/659515, July 2011.

⁵⁴ ECtHR, *Affaire Kanagaratnam et Autres v. Belgique*, No. 15297/09.

⁵⁵ The case originated from a reference for a preliminary ruling from the Tribunal du travail de Bruxelles (Belgium). See also, CJEU, C-34/09, *Ruiz Zambrano v. Office national de l'emploi*, Grand Chamber, 8 March 2011.



nationality of his/her children, if such decisions deprive those children of the genuine enjoyment of the substance of the rights attached to their status as EU citizens. This case is therefore key to the recognition of the rights of children as EU citizens and to the definition of the right to family life under EU law more generally.

4.5. Child-friendly justice

Making justice accessible to children is a goal embedded in a number of policy documents adopted in 2011, such as the EU Agenda for the rights of the child or EU directives, such as those on trafficking, and on sexual abuse and exploitation and child pornography,⁵⁶ and the new proposed Victims Directive⁵⁷ (see Chapter 9 on 'Rights of crime victims').

The *Guidelines on child-friendly justice*, approved by the Council of Europe Committee of Ministers in November 2010, has become a key document in the field.⁵⁸ The guidelines deal with the place and role, views, rights and needs of the child in judicial proceedings, as well as in alternatives to such proceedings. They concern the provision of access to justice for children including also in cases where children are accused of crimes. The European Commission and the FRA have initiated two complementary studies in order to gather statistical data, develop indicators, as well as collect qualitative data on the involvement of children in the justice system.

A number of reforms in family laws and criminal codes have taken these Council of Europe guidelines and other relevant international instruments, into consideration. In the **Czech Republic**, for instance, the proposal for the amendment of the civil code reinforces the need to obtain the child's opinion in all proceedings and consider the child's wishes when deciding a case.

Legislation came into force in **Poland** in August, improving the enforcement of court orders establishing contact between children and their non-resident parent.⁵⁹ The law establishes a two-stage enforcement mechanism in the Civil Procedure Code. If one parent prevents the other's contact with a child or children, breaking a contact order, the court can issue a warning notice. If the breach continues, the court can impose financial penalties on the breaching parent, taking into account the scale of the breach and the financial situation of the person concerned. The court can order the parent preventing contact to reimburse the costs incurred as

a result of the breach. The Polish Ministry of Justice has also recommended a special protocol for interviewing children in criminal proceedings and published information leaflets for children about their rights in courts, such as: "I will be a witness in court".⁶⁰

Promising practice

Interviewing in child-friendly rooms

As part of its 2008-2011 Crime Prevention Strategy, the **Czech Republic's** Ministry of the Interior established 30 rooms across the country specifically for interviewing child victims of crime. The ambition is to allow police officers to interview children in a comfortable and child-friendly atmosphere, contributing to the child's feeling of safety during the police investigation. The rooms are decorated with child-friendly furniture, painted in bright colours and equipped with books, toys and drawing materials. The rooms also have all the equipment necessary to video record statements.

Similar provisions exist in **Bulgaria**, where children are interviewed in especially equipped rooms, so-called blue rooms. In August, Bulgaria also adopted a policy concept in the area of child justice which envisages an overall human-rights-driven reform of the system of juvenile justice, in order to better guarantee the best interest of the child.

Czech Republic, Ministry of the Interior (2011), The standard equipment of special interview rooms for minors involved in the criminal proceeding. See: www.mvcr.cz/clang/standard-vybaveni-specialni-vyslechove-mistnosti-pro-detskeho-ucastnika-trestniho-rizeni.aspx

Bulgaria, Council of Ministers (2011) Concept for state policy in the area of child justice (Концепция за държавна политика в областта на правосъдието на детето). See: www.strategy.bg/Publications/View.aspx?lang=bg-BG&Id=117

4.5.1. Child-friendly justice in the context of child trafficking, child sexual abuse, exploitation and pornography

The EU directives on trafficking and on the sexual abuse and exploitation of children and child pornography both provide specific instructions on how to ensure access to child-friendly justice. According to the Trafficking Directive, child victims of trafficking should have access to free legal counselling and representation, and, in case of a conflict of interest between the parents and the child, a representative should be appointed. The hearing should take place behind closed doors. According to the directive on sexual abuse, interviews should be conducted in purpose-built rooms by professionals trained in interviewing children. The number of interviews should be kept to as few as possible.

60 For more information, see: <http://fdn.pl/bede-swiadkiem-w-sadzie>.

56 Directive No. 2011/36/EU; Directive 2011/93/EU.

57 Proposal for a directive of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime.

58 Council of Europe, Committee of Ministers (2010).

59 Poland, Act of 26.05.2011 amending the Code of Civil Procedure, Official Gazette 2011 No. 144, item 854.

The way in which children are granted access to justice, when and by whom they are provided with information regarding court proceedings, as well as the timing of their involvement varies among EU Member States, as well as within regions or among specific courts. The transposition of both directives in 2013 should ensure a more standardised approach to the protection of children in criminal investigations and proceedings.

4.6. Developments regarding cross-national divorce and parental separation

EU Council Regulation No. 2201/2003, also known as Brussels II bis, continues to influence the way in which EU Member States deal with children in the context of cross-national divorce and parental separation cases, particularly on aspects related to parental responsibility. These aspects include: rights of custody and rights of access, guardianship and similar institutions, the placement of the child in a foster family or in institutional care. They also concern measures for the protection of the child, visiting rights and child abduction cases.⁶¹ In Article 11, the regulation establishes that in order to obtain the return of children who were wrongfully removed or retained in a Member State in which they are not habitually resident, children must be given the opportunity to be heard during the proceedings unless this appears inappropriate given their age or degree of maturity.

In the *Aguirre Zarraga v. Pelz* case,⁶² a German court asked the CJEU whether it could exceptionally oppose the enforcement of a Spanish court judgment ordering the return of a child, because the Spanish court had certified that it had fulfilled its obligation to hear the child before ruling on custody rights although this hearing had not actually taken place. The CJEU held that the right of the child to be heard, enshrined in Article 24 of the Charter of Fundamental Rights, requires that the legal procedures and conditions which enable children to express their views freely be made available to them, and that those views be obtained by the court. The CJEU stated that Article 24 of the Charter and Article 42 (2)(a) of Regulation No. 2201/2003 require the court to take all appropriate measures to arrange such hearings, with regard to the children's best interests and the circumstances of each individual case. Under these provisions, children must also be offered a genuine and effective opportunity to express their views. Nevertheless, the CJEU ruled that the German court could not oppose

the enforcement of a certified judgment, ordering the return of a child who was wrongfully removed, since the assessment of whether there was an infringement of these provisions fell exclusively within the jurisdiction of the Spanish courts.

A key issue under the Brussels II bis Regulation is the determination of the habitual residence of the child. In *Mercredi v. Chaffe*, the Court of Appeal of **England and Wales** referred to the CJEU a case concerning the removal of a two-month-old child from the United Kingdom to the island of Réunion, **France**. The CJEU ruled that the concept of habitual residence, for the purposes of Articles 8 and 10 of Council Regulation (EC) No. 2201/2003, implies some degree of integration in a social and family environment. The factors which must be taken into consideration include: the duration, regularity, conditions and reasons for the stay in the territory of that EU Member State and for the mother's move to that state; and, with particular reference to the child's age, the mother's geographic and family origins and the family and social connections which the mother and child have with that Member State.⁶³

EU Council Regulation No. 4/2009, which regulates a number of cross-border matters related to maintenance obligations, has been fully applicable since June 2011.⁶⁴ The Regulation's main objective is to allow a maintenance creditor to easily obtain in one Member State a decision which will automatically be enforceable in another Member State without further formalities, such as registration. It applies to maintenance between parents and children. It remains to be seen how effective this regulation will prove in practice.

EU Member States, such as **Austria, Belgium, the Czech Republic, Ireland, Poland, Slovenia** and the **United Kingdom**, are in the process of undertaking partial or general reforms of their family justice systems.

The Chamber of Representatives in **Belgium**, for example, approved a proposal in July for a Law creating a Family and Youth Tribunal. The main aim of this law is to regroup the competent judicial authorities for topics related to family and youth law, creating one specialised court competent in all these areas. It is expected that the 'one-court concept' will improve the coherence of jurisprudence and accessibility to the court as well as simplify procedures for citizens. The Ministry of Justice in **Austria** proposed amending the law on custody and visiting rights with the aim of balancing the interests of mothers, fathers and

61 Council Regulation (EC) No. 2201/2003 of 27 November 2003, Art. 1.

62 CJEU, C 491/10 PPU, *Joseba Adoni Aguirre Zarraga v. Simone Pelz*, 22 December 2010.

63 CJEU, C/947/10 PPU, *Barbara Mercredi v. Richard Chaffe*, 22 December 2010.

64 Council Regulation (EC) No. 4/2009, OJ 2009 L 7/1.



the best interest of the child.⁶⁵ During 2012 several federal courts in Austria will pilot test the work of assistance bodies in court dedicated to family issues (*Familiengerichtshilfe*).⁶⁶ Under this new system, social workers and psychologists will provide parents and children, as well as judges, with specialised assistance during case proceedings.

4.7. Participation of children

Article 24 (1) of the Charter of Fundamental Rights of the European Union recognises the right of children to express their views freely and requests EU Member States to take those views into consideration in accordance with the child's age and maturity.

While the question of children's participation in decisions which affect them is gaining prominence at the international level, as illustrated by the Council of Europe's Strategy for the Rights of the Child and the EU Commission Agenda for the Rights of the Child, practice at EU Member State level varies widely, dependent upon the specific sector concerned and the age of the child.

In December, the United Nations Children's Fund (UNICEF) and Save the Children published *Every child's right to be heard – a resource guide on the Committee on the Rights of the Child General Comment No. 12*. This resource guide, recommended by the Committee on the Rights of the Child, elaborates on the General Comment and provides practical help on implementation through examples of legislation and policy, guidelines for practitioners, evidence from research and examples of meaningful participation in practice.⁶⁷

Austria sent a strong signal in this direction, inserting into the constitution a reference to the right of children to participate in their personal affairs. This change was part of a broader constitutional reform encompassing references to the right to protection and care, the right to personal relationships with both parents, the prohibition of child labour, the prohibition of corporal punishment, the right to education free from violence, and the right of children with disabilities to protection and care according to their needs.⁶⁸ Critics complain, however, that the constitutional reform incorporates only some of the rights enshrined in the UN CRC and should have been more comprehensive.⁶⁹

The family justice system review in **England and Wales**, established in 2010 and sponsored by the Ministry of Justice, the Department for Education and the Welsh Government is a response to the increasing pressure on the family justice system and concerns about delays and effectiveness. Since its appointment, the experts' panel has taken steps to ensure the participation of children, consulting them on their experiences in family law proceedings and seeking their recommendations for a new family justice system. The panel published its first interim report in March 2011 and its final report in November 2011,⁷⁰ as well as a guide to facilitate the involvement of young children. This guide included an age-appropriate explanation of the current system, the possible changes envisaged and a tool for children to give their opinions.⁷¹ The Office of the Children's Rights Director for England organised a number of consultations. It published a child-friendly version of its final report, which highlights how children's suggestions fed into the recommendations of the final report.⁷²

Several national Ombudspersons, such as those in **Estonia** and **Sweden**, consulted children when planning their work. Other Ombudsperson offices, such as those in **Croatia**, **Greece** and **Ireland**, established youth advisory panels. The Ombudsman for the Rights of the Child in **Greece**, for example, set up a panel of 20-to-30 girls and boys, aged 13 to 17. The panel, which is appointed for a term of two years, meets four times a year with the Ombudsperson. At the July 2011 meeting, children discussed the rights of the child on the internet, the economic and social crisis, the right to education and health and questions of violence.

In **Slovakia**, promotion of participation of children and young people in policy making has been emphasised in the work of the newly established Committee for Children and Youth (the expert body to the Government's Council for Human Rights, National Minorities and Gender Equality, the permanent advisory body to the Slovak Government). At its first session in August 2011, the Committee established a task force mandated to design a mechanism of direct participation and involvement of children and young people in the work of the Committee. Steps were taken to involve representatives of children and youth themselves in designing the proposed participation mechanism from the first stages of its creation, with a view to create a child-friendly mechanism capable of reflecting their specific needs, language and perspective.⁷³

The Opinion of the European Economic and Social Committee on the Communication on the EU Agenda for

65 Austria, *Entwurf eines Bundesgesetzes, mit dem das Kindschaftsrecht im Allgemeinen Bürgerlichen Gesetzbuch und das Ausserstreitgesetz sowie das Ehegesetz geändert werden* (2011).

66 Austria, Judicial System (2011).

67 Lansdown, G. (2011).

68 Austria, Bill on Constitutional Rights of Children.

69 Ludwig Boltzmann Institute for Human Rights (2011).

70 See: www.justice.gov.uk/downloads/publications/moj/2011/family-justice-review-final-report.pdf.

71 United Kingdom, Ministry of Justice (2011a).

72 United Kingdom, Ministry of Justice (2011b).

73 Slovakia, Ministry of Labour, Social Affairs and Family (2011).

the Rights of the Child adopted in December emphasised the need to promote child participation.⁷⁴ It called, among other measures, for protected hearings for child victims of sexual abuse and for those involved in their parents' divorce proceedings. The Committee noted that to spare children additional trauma their testimonies should be heard by specially trained professional experts, and conducted in neutral places rather than in court.⁷⁵

The Constitutional Tribunal in **Poland** analysed the Act on the protection of mental health at the request of the Human Rights Defender, who was challenging the requirement that only children aged 16 and above must consent to psychiatric treatment. The Defender argued that civil law recognises limited legal capacity for children from the age of 13. Accordingly, several health-related laws should also provide children with the right to express their opinions to such vital questions as medical intervention, depending on their individual maturity and development. The Tribunal did not find sufficient grounds in the Constitution or the CRC to justify that claim. It ruled that the Act violates neither the Constitution nor the CRC with respect to the minimum age for consultation.⁷⁶ Due to lack of competency, the Tribunal did not, however, review age-of-consent discrepancies in other laws, such as in terminations of pregnancy and bone marrow transplants, where one need only be 13 years or age, or for participation in medical experiments, which hinges on an individual's 'personal development'.

4.8. Data collection

The lack of coordinated collection of data on the implementation of children's rights remains a concern in a majority of EU Member States. Typically, each country has several governmental departments – such as justice, interior and social welfare – and non-governmental organisations that collect data on victims, covering various categories such as victims of trafficking, domestic violence, sexual abuse or the number of unaccompanied children applying for asylum. What is missing is a centralised, focused data collection mechanism. The directive on trafficking devotes specific attention to this issue, assigning the European Commission the role of producing a report every two years on such data collection and analysis.

⁷⁴ European Economic and Social Committee (2011).

⁷⁵ *Ibid.*, para. 1.13.

⁷⁶ Poland, Judgment of the Constitutional Tribunal, 11 October 2011, K 16/10.

Promising practice

Centralising data collection on children at risk

The 2007 law reforming the child protection system (*loi réformant la protection de l'enfance*)⁷⁷ in **France** required all departments (*départements*) to develop a centralised system for the collection, evaluation and analysis of 'information that raises concerns' (*informations préoccupantes*) on children in danger or at risk of being in danger. In October 2011, the National Observatory for Children at Risk (*Observatoire national de l'enfance en danger*) published a report detailing the procedures in place in the field to collect these data. The report responds to the creation of departmental observatories on the protection of childhood (*observatoires départementaux de la protection de l'enfance*) and the transmission of anonymous data established by decree 2011-222, which was adopted in March 2011.

See: *Observatoire national de l'enfance en danger (2011), Enquête nationale informations préoccupantes*, available at: http://oned.gouv.fr/docs/production-interne/chiffres/enquete_ip_v15.pdf

Outlook

The prompt EU Member State ratification of the Convention on preventing and combating violence against women and domestic violence, also known as the Istanbul Convention, would ensure better protection for girls as victims of gender-based violence and children witnessing domestic violence. Similarly, on-going reforms of child protection systems in several EU Member States should improve both the access to social services for children and the response to reports of violence against children.

The effect of the new directive on combating the sexual abuse, sexual exploitation of children and child pornography will begin to be felt as soon as it is transposed into national legislation. It should improve the protection of children against sexual abuse and exploitation and lead to more effective prosecution of offenders.

In parallel, efforts to combat the sexual exploitation of children and child pornography on the internet will continue to require the full attention and vigilance of EU institutions and bodies and of EU Member States.

Children who are the victims of trafficking should benefit from higher levels of protection as the new Directive on preventing and combating trafficking in human beings and protecting its victims gains influence and extends its reach in EU Member States over time.

⁷⁷ France, Law No. 2007-293 reforming child protection, SANX0600056L 2007-293, 5 March 2007.



The EU Council Regulation concerning jurisdiction as well as the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility will continue to influence the way in which EU Member States deal with children in the context of cross-national divorce and parental separation cases. It will also continue to bear on the right of children to be heard in these and other judicial matters. As a result, on-going developments in rendering justice more child-friendly will be of particular interest. Research on child-friendly justice carried out by the EU Commission and the FRA will provide relevant information for national authorities when transposing the Directives on trafficking and on sexual abuse and exploitation.

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UN & CoE

20 January – Committee of Ministers of the Council of Europe issues declaration on religious freedom

January

February

March

7 April – Council of Europe Committee of Ministers adopts the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

April

11 May – Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) opens for signature and is signed by 11 Member States on the same day

May

17 June – United Nations Human Rights Council adopts Resolution on human rights, sexual orientation and gender identity

June

July

August

September

October

November

December

EU

January

February

8 March – European Parliament adopts a Resolution on equality between women and men in the European Union

9 March – European Parliament adopts a Resolution on the EU strategy on Roma inclusion

March

April

12 May – European Parliament adopts a Resolution on the proposed ILO convention supplemented by a recommendation on domestic workers

May

8 June – European Parliament adopts a Resolution on the external dimension of social policy, promoting labour and social standards and European corporate social responsibility

17 June – Council of the European Union issues conclusions on the support of the implementation of the European Disability Strategy 2010–2020

June

July

August

13 September – European Parliament Resolution on the situation of women approaching retirement age

28 September – European Parliament Resolution on human rights, sexual orientation and gender identity

September

26 October – European Parliament Resolution on the agenda for new skills and jobs

October

28 November – European Commission holds its third conference on 'Ageing in dignity: designing effective strategies for tackling elder abuse'

November

December

5

Equality and non-discrimination



In 2011, the European Union (EU) and EU Member States took a significant number of legal and policy steps to address issues of equality and non-discrimination. These developments were of particular interest to lesbian, gay, bisexual and transgender (LGBT) persons as well as persons with disabilities. Recognition of the reality of multiple and intersectional discrimination grew. Debates also centred on the permissibility of restricting freedom of religion and belief, both at the level of case law and at that of national legislation.

This chapter analyses developments in legislation, policies and practices that occurred in the areas of equality and non-discrimination at the supranational and national levels in 2011. It begins by providing an outline of issues relating to non-discrimination legislation and policy as a whole and on developments relating to equality bodies. The chapter then moves on to explore developments in relation to the following grounds of discrimination: multiple discrimination; sex; sexual orientation and gender identity; disability; age; and religion or belief. The chapter should be read together with Chapter 6 on racism and ethnic discrimination.

5.1. Cross-cutting developments

The Council of the European Union continued to discuss the European Commission's proposal for a horizontal directive prohibiting discrimination beyond employment on the grounds of sexual orientation, age, disability and religion or belief (Horizontal Directive).¹

At the national level, some EU Member States adopted non-discrimination legislation transposing EU laws on equality. New legislation, for instance, implementing the Equal Treatment Directive,² the Racial Equality

Key developments in the area of equality and non-discrimination:

- equality bodies and legal practitioners in EU Member States begin to frame cases in terms of multiple discrimination and to collect data on cases alleging discrimination on a number of grounds in combination;
- various EU Member States launch legislative, institutional and policy initiatives aimed at tackling discrimination based on sex; the gender pay gap in the labour market, however, is decreasing in just half of EU Member States;
- EU Member States make significant efforts to collect data on the situation of lesbian, gay, bisexual and transgender persons and a number of Member States decide to include same-sex partners in the definition of "family member" for the purposes of free movement and family reunification;
- the European Commission clarifies how the EU is to implement the UN Convention on the Rights of Persons with Disabilities and three more EU Member States ratify the convention;
- preparations for the 2012 European Year of Active Ageing begin. Case law provides an important contribution, especially in combating discrimination against older persons, while employment rates for young persons continue to lag behind those of older persons;
- case law clarifies where restrictions on religious freedom are justified and where they may be considered discriminatory, while some national legislative proposals and their impact on various religious practices of Jews and Muslims remain open to discussion.

¹ European Commission (2008).

² Council Directive 2000/78/EC, OJ 2000 L 303, p. 16.

Directive³ and the Gender Equality Directives⁴ came into force on 1 January in **Poland**.⁵ The legislation implements anti-discrimination provisions concerning gender equality, sexual orientation, racial and ethnic origin, age, disability, religion or belief, creed and nationality. It includes references to various forms of discrimination, such as direct discrimination, indirect discrimination, unequal treatment understood as direct discrimination, and when instructions are given to discriminate against persons (for example in the context of employment or housing) on grounds protected by law. The legislation also incorporates the concepts of harassment and sexual harassment, as well as discrimination resulting from less favourable treatment based on a person's rejection of or submission to harassment. According to the new law, any physical or legal person subjected to unequal treatment is entitled to compensation.

Similarly, the Council of Ministers in **Spain** approved the Comprehensive Act on Equality of Treatment and Non-Discrimination (*Proyecto de Ley Integral de Igualdad de Trato y no Discriminación*) in May.⁶

Promising practice

Awareness raising: combating discrimination, campaigning for equality

The Federal Anti-discrimination Agency in **Germany** (*Antidiskriminierungsstelle des Bundes*) launched a poster campaign in November 2011 to encourage people to seek advice if they feel they are discriminated against. The slogan of the campaign was 'No one should be put in a box', or literally 'No one fits in a drawer!' (*Kein Mensch passt in eine Schublade!*). It ran through January 2012 and covered six grounds of discrimination: age, disability, ethnic origin, sex, religion or creed and sexual identity. All these grounds are protected under Germany's General Equality Law (*Allgemeines Gleichbehandlungsgesetz*).

Federal Anti-discrimination Agency, (*Antidiskriminierungsstelle des Bundes*): http://www.antidiskriminierungsstelle.de/DE/Service/Kampagne2011/kampagne_node.html;jsessionid=A4E5BC69CEA897F8E2EFA12A8A5DAC4B.2_cid103

By 2010, all EU Member States had established or designated one or more bodies responsible for promoting equality ('equality bodies'), thereby meeting obligations set out under the terms of the Gender Equality and

Racial Equality Directives (Table 5.1). Important institutional changes took place in **France** in this respect in 2011, where the constitutionally independent Rights Defender (*Défenseur des Droits*) was established under Fundamental Law No. 2011-333 and Ordinary law No. 2011-334 of 29 March 2011 and took effect in May. The functions of the Rights Defender incorporate those previously covered by the Ombudsman of the Republic (*Médiateur de la République*), the Advocate for Children (*Défenseur des enfants*), the National Commission of Security Ethics (*Commission Nationale de Déontologie de la Sécurité*), and the High Authority for the Fight against Discrimination and for Equality (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité, Halde*) – which was the former equality body.

5.2. Multiple discrimination

This section covers developments that occurred in 2011 in the field of multiple discrimination. It is a relatively new concept in the equality field but awareness of it is on the rise. It does not yet have a distinct legal status, but EU political institutions and civil society organisations are devoting ever greater attention to it. It begins with an overview of the relevant EU and national legislation and policies before discussing how multiple discrimination featured in cases investigated or decided in some EU Member States, whether through the courts or equality bodies.

First though, the concept of multiple discrimination must be defined: it describes situations where discrimination takes place on the basis of more than one protected ground. It can be characterised as either additive or intersectional.⁷

Additive multiple discrimination refers to situations where the role of different grounds of discrimination can be distinguished from one another. This would cover a situation, for instance, where an elderly woman faces discrimination on the grounds of sex at the workplace and discrimination on the grounds of age when accessing healthcare.

Intersectional discrimination refers to situations where discriminatory treatment can be attributed to a combination (or intersection) of two or more grounds. For example, this would cover a situation where a Roma woman may be sterilised against her will (see Chapter 6 for case law covering such situations). This discriminatory treatment would not be based only on her sex (since not all women face this treatment), but neither would it be based only on her being a Roma (since Roma men may not face this treatment). The discriminatory treatment is based specifically on the combination of her gender and origin.

3 Council Directive 2000/43/EC, OJ 2000 L 180, p. 22.

4 Council Directive 2004/113/EC, OJ 2004 L 373, p. 37; Directive 2006/54/EC, OJ 2006 L 204, p. 23.

5 Poland, Law on Equal Treatment.

6 Spain, Comprehensive Act on Equality of Treatment and Non-Discrimination (2011).

7 FRA (2012).



Table 5.1: Bodies required under EU law: national equality bodies and their respective mandates, by country

Country	Name of body in English	Name of body in national language	Employment						Beyond employment (education, goods and services, housing, etc.)						Quasi-judicial	Promotion		
			Gender	Race and ethnic origin	Age	Disability	Sexual orientation	Religion and belief	Other grounds	Gender	Race and ethnic origin	Age	Disability	Sexual orientation			Religion and belief	Other grounds
AT	The Austrian Ombud for Equal Treatment	Anwaltschaft für Gleichbehandlung	√	√	√		√	√		√	√							√
BE	Centre for equal opportunities and opposition to racism	Centrum voor gelijkheid van kansen en voor racismebestrijding/Centre pour l'égalité des chances et la lutte contre le racisme		√	√	√	√	√		√	√	√	√	√	√			√
	Institute for the equality for women and men	Instituut voor de Gelijkheid van Vrouwen en Mannen/ Institut pour l'Égalité des Femmes et des Hommes)	√						√	√					√			√
BG	Commission for Protection against Discrimination	Комисия за защита от дискриминация	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	
CY	The Office of the Commissioner for Administration (Ombudsman)	Επίτροπος Διοικήσεως	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	
CZ	The Public Defender of Rights (Ombudsman)	Veřejný ochránce práv	√	√	√	√	√	√	√**	√	√	√	√	√	√	√	√**	√
DE	The Federal Anti-Discrimination Agency	Antidiskriminierungsstelle des Bundes	√	√	√	√	√	√		√	√	√	√	√	√			√
DK	The Danish Institute for Human Rights	Institut for Menneskerettigheder	√	√	√*	√*	√*	√*		√	√							√
	Board of Equal Treatment	Ligebehandlingsnævnet	√	√	√	√	√	√	√	√	√					√	√	
EE	Gender Equality and Equal Treatment Commissioner	Soolise võrdõiguslikkuse ja võrdse kohtlemise volinik	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
EL	Greek Ombudsman	Συνήγορος του Πολίτη	√	√	√	√	√	√		√	√				√			
ES	Race and Ethnic Equality Council	Consejo para la Promoción de la Igualdad de Trato y No Discriminación de las Personas por el Origen Racial o Étnico		√						√								√
FI	The Ombudsman for Equality	Tasa-Arvovaltuutettu	√					√										√
	The Ombudsman for Minorities	Vähemmistövaltuutettu		√						√								√
FR	Defender of Rights	Défenseur des droits	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
HU	The Commissioner for Fundamental Rights	Alapvető Jogok Biztosa	√	√	√	√	√	√		√	√	√	√	√	√		√	
	The Hungarian Equal Treatment Authority	Egyenlő Bánásmód Hatóság	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
IE	Equality Authority	An tÚdarás Comhionannais	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
IT	National Office against Racial Discrimination	Ufficio Nazionale Antidiscriminazioni Razziali (UNAR)		√	√	√	√	√		√	√	√	√	√	√	√	√	√
LT	Office of the Equal Opportunities Ombudsman	Lygių galimybių kontrolieriaus tarnyba	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
LU	Centre for Equal treatment	Centre pour l'égalité de traitement	√	√	√	√	√	√		√	√	√	√	√	√			√

Table 5.1: (continued)

Country	Name of body in English	Name of body in national language	Employment						Beyond employment (education, goods and services, housing, etc.)						Quasi-judicial	Promotion	
			Gender	Race and ethnic origin	Age	Disability	Sexual orientation	Religion and belief	Other grounds	Gender	Race and ethnic origin	Age	Disability	Sexual orientation			Religion and belief
LV	Office of the Ombudsman	Tiesibsarga Birojs	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
MT	National Commission for the Promotion of Equality (NCPE)	Il-Kummissjoni Naz-zjonali għall-Promozzjoni tal-Ugwaljanza	√							√	√						-
	Director of Industrial and Employment Relations (DIER)	Dipartiment tar-Relazzjonijiet Industrijali u tal-Impieg	√							√	√						-
NL	The Dutch Equal Treatment Commission (ETC)	Commissie Gelijke Behandeling (CGB)	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
PL	Human Rights Defender/ Commissioner for Civil Rights Protection	Rzecznik Praw Obywatelskich	√	√	√	√	√	√	√	√	√				√		√
PT	The Commission for Citizenship and Gender Equality	Comissão para a Cidadania e a Igualdade de Género (CIG)								√			√		√		√
	Commission for equality in labour and employment - CITE	Comissão para a Igualdade no Trabalho e no Emprego	√														√
	High Commission for Immigration and Intercultural Dialogue	Alto Comissariado para a Imigração e Diálogo Intercultural (ACIDI)	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
RO	The National Council for Combating Discrimination (NCCD)	Consiliul National pentru Combaterea Discriminarii - CNCD	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
SE	Equality Ombudsman	Diskrimineringsombudsmannen (DO)	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
SI	The Office for Equal Opportunities / Advocate of the Principle of Equal Treatment	Urad za Enake Možnosti	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√*
SK	National Centre for Human Rights	Slovenské národné stre-disko pre ľudské práva	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
UK	Equality and Human Rights Commission	Equality and Human Rights Commission	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	Equality Commission for Northern Ireland	Equality Commission for Northern Ireland	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
HR	Office of the Ombudsman	Uredu pučkog pravobranitelja		√	√				√	√				√	√		√

Notes: * Not exclusively; **Nationality/parental status; - Information not available at time of printing

Source: Equinet, 2012

5.2.1. Overview of the situation in 2011

Although the concept of multiple discrimination has not yet achieved a distinct legal status, the challenges it poses to civil society are recognised among political institutions and civil society organisations in the EU.

While existing EU directives relating to equality do not expressly oblige EU Member States to treat multiple discrimination as a distinct category of discrimination, the concept is covered by secondary EU law. The Racial Equality Directive and the Employment Equality Directive recognise it as a conceptual and factual reality. Furthermore, a legal definition of multiple

discrimination would enter into EU law should the European Parliament accept proposed amendments to the draft Horizontal Directive.

The European Parliament also referred to the concept of multiple discrimination in six resolutions it adopted in 2011:

- European Parliament Resolution of 8 March 2011 on equality between women and men in the European Union – 2010/2138(INI)
- European Parliament Resolution of 9 March 2011 on the EU strategy on Roma inclusion (2010/2276(INI))



- European Parliament Resolution of 12 May 2011 on the proposed ILO convention supplemented by a recommendation on domestic workers
- European Parliament Resolution of 8 June 2011 on the external dimension of social policy, promoting labour and social standards and European corporate social responsibility (2010/2205(INI))
- European Parliament Resolution of 13 September 2011 on the situation of women approaching retirement age (2011/2091(INI))
- European Parliament Resolution of 26 October 2011 on the Agenda for New Skills and Jobs (2011/2067(INI))

In June 2011, the Council of the European Union acknowledged the importance of addressing multiple discrimination in the context of the European Disability Strategy 2010–2020.⁸ In May 2011, the Council had also called for a greater focus on the difficulties faced by Roma women and girls who are at risk of multiple discrimination.⁹

Multiple discrimination also features in the work of pan-European non-governmental organisations (NGOs) operating in the area of fundamental rights, such as the European Network Against Racism (ENAR).¹⁰

At the level of national legislation, multiple discrimination is covered by six Member States: **Austria**,¹¹ **Bulgaria**,¹² **Germany**,¹³ **Greece**,¹⁴ **Italy**¹⁵ and **Romania**.¹⁶ It is, however, not always defined as such in the legislation, which tends to be limited to 'dual' discrimination covering two grounds. In Austria (through legislation) and Germany (through official guidelines), courts and equality bodies are directed to award higher levels of compensation where victims have suffered discrimination on multiple grounds.

In practice, when national equality bodies record data relating to complaints of discrimination that are lodged with them, they do not systematically register all of the grounds of discrimination that could be relevant to these cases; they often only categorise a complaint under one ground of discrimination. When they do report more than one ground, equality bodies usually report cases that

combine only two grounds. More evidence is needed to understand whether this is due to the registering practices of equality bodies – in that they only register a maximum of two grounds – or whether multiple discrimination in practice tends to involve just two grounds.

Equality bodies in seven EU Member States (**Austria, Belgium, Hungary, Luxembourg, Portugal, Slovenia and the United Kingdom**) record cases involving more than one ground of discrimination as a distinct category, thereby giving an indication of the number of cases where multiple discrimination is alleged. The equality bodies in Hungary, Luxembourg, Slovenia and the United Kingdom collect specific data on multiple discrimination, despite a lack of national legal provisions prohibiting it.

Equality bodies in six other EU Member States (**Bulgaria, Germany, Greece, Italy, Poland, Romania**) do not collect data on multiple discrimination, although legislation on multiple discrimination is in place in these Member States. In Greece, the law transposing the non-discrimination directives does not explicitly prohibit multiple-discrimination; however, labour inspectors, who monitor the application of this law in the private sector, are required to take such cases into account.

In terms of prevalence, the **German** equality body published research relating to multiple discrimination in late 2010.¹⁷ The report shows that 7.8 % or 357 of all the complaints lodged with it between August 2006 and November 2010 concerned multiple discrimination cases. Of these cases, the largest proportion related to the intersection between gender and age (21 %), followed by disability and age (17 %), ethnic origin combined with other grounds (8 %), disability and gender (8 %), sexual identity and disability (3.5 %), and ethnic origin, religion and gender (3.5 %).

5.2.2. Acknowledgement of multiple discrimination in case law

A number of cases dealt with by national courts in 2011 could have been analysed through the prism of multiple discrimination, although this was not done. Most of the following cases were decided on the basis of one ground of discrimination.

Several court judgments relating to cases of women wearing headscarves in public were handed down in **Belgium** in 2011 by the Court of First Instance of Brussels, the Police Court in Brussels, the Court of Appeal of Liège and the Criminal Court of Dendermonde. All of these cases, address a combination of discrimination based on sex and discrimination based on religion or belief.

⁸ Council of the European Union, Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) (2011a).

⁹ EPSCO (2011b).

¹⁰ European Network Against Racism (ENAR) (2011).

¹¹ Austria, Federal Disabled Persons Equality Act, para. 11; Austria, Federal Disabled Persons Employment Act, Art. 2, para. 70; Art. 3, para. 24e; Austria, Equal Treatment Act, Art. 1, para. 12 (13); Art. 1, para. 51 (1); Art. 1, para. 26 (13); para. 19a.

¹² Bulgaria, Protection against Discrimination Act, Art. 4, para. 1.

¹³ Germany, General Equal Treatment Act, Art. 4, 9 (1), 25 (5) AGG; Germany, Law on Equal Treatment of Soldiers.

¹⁴ Greece, Law 3996/2011, Art. 2, para. 1 (h).

¹⁵ Italy, Legislative decree 215/2003 Art. 1; Italy, Legislative Decree 216/2003, Art. 1.

¹⁶ Romania, Anti-discrimination Law, Art. 2.

¹⁷ Germany, Federal Anti-Discrimination Agency (2010).

In January 2011, the Court of First Instance of Brussels ruled that wearing a headscarf on a bowling track is not a proven safety risk.¹⁸ The court concluded that the principle of non-discrimination is violated when a person wearing a headscarf is refused entry into a bowling track only because she is wearing a headscarf. The court found that this constitutes indirect discrimination, in that a neutral measure placed a specific burden on women wearing headscarves.

The Police Court in Brussels also rendered a judgment in January 2011. It ruled that a municipal regulation prohibiting the wearing of all clothing hiding totally or in great part the face of persons violates freedom of religion.

The case presided over by the Court of Appeal of Liège related to a woman who was wearing headgear to cover the effects of her chemotherapy; she was denied access to a restaurant attached to a bowling alley because she refused to remove her head covering. In February 2011, the Court of Appeal of Liège reversed the judgment that was delivered by the Court of First Instance of Huy in May 2010, which decided that the refusal to let persons enter a restaurant attached to a bowling hall for the sole reason that they wore headgear was indirectly discriminating to those who wear headgear for religious or health reasons. This case is currently before the Court of Cassation.

In another judgment rendered in February 2011, the Criminal Court in Dendermonde found that a real estate agent did not act in a discriminatory manner by telling a woman wearing a headscarf that a piece of real estate was unavailable, although it was available. The court judged that there was no proof that the estate agent had discriminated against her on the basis of religion, because it could not be established that the headscarf was the sole reason why the estate agent did not want to cooperate with the applicant.¹⁹

The Equality Ombudsman (*Diskrimineringsombudsmannen*) in **Sweden** reached a settlement with a school in Stockholm that had banned a female student from wearing a headscarf during classes.²⁰ The Equality Ombudsman brought an action against the school for discrimination on the grounds of religion and sex. The parties reached an agreement that awarded the student SEK 40,000 (about €4,500). The school's new president abolished the clothing rules in August 2011. In a similar case, a high school student who wore a headscarf to an introductory meeting for summer internships was subsequently denied an internship. The Equality Ombudsman began proceedings alleging discrimination on the grounds of sex and religion, but the case was dismissed for procedural reasons.

18 Belgium, Court of First Instance, Brussels, 25 January 2011.
19 Belgium, Criminal Court of Dendermonde, 14 February 2011.
20 Sweden, Equality Ombudsman (2011a), Case NB 2009/1224.

FRA ACTIVITY

Proving multiple discrimination in court

FRA research examining multiple discrimination in the context of access to healthcare finds that discrimination on multiple grounds often does not feature strongly among arguments presented by legal practitioners before the courts. One of the main reasons for this is that legal counsels tend to prefer consolidating their arguments around one ground only. Focusing on the one ground that creates the strongest case is a tactical decision designed to maximise the likelihood of a successful outcome.

FRA, Inequalities and Multiple Discrimination in Access to Health, forthcoming

The **Austrian** Equal Treatment Commission (*Gleichbehandlungskommission*) delivered a finding of discrimination on several grounds in 2011 in a case brought by a woman of Columbian origin who claimed that she was sexually harassed by a co-worker because of her ethnic origin. After repeatedly refusing her co-worker's advances, the woman filed a complaint with the police. She was eventually dismissed from her post on the grounds of poor German-language knowledge. The commission made a finding of sexual harassment and harassment due to ethnic origin, as well as gender discrimination and discrimination based on ethnic origin regarding the termination of her employment. In this case, the grounds of discrimination were analysed in a 'parallel' manner, each in isolation from the other, rather than in combination.²¹

In **Portugal**, an elderly couple with disabilities living on the third floor of a building without a lift requested the installation of a stair-lift. Since the co-owners refused, the couple filed a complaint before the Court of First Instance. The court issued a protective order and ordered the installation of the stair-lift. The co-owners lodged an appeal, but the Lisbon Court of Appeal dismissed their application. While the Court of Appeal's judgment does not expressly use the term "multiple or intersectional discrimination", it is nevertheless grounded on the intersection of two grounds: age and disability.

5.3. Discrimination on the grounds of sex

This section addresses discrimination on the grounds of sex. It begins by presenting institutional and legal developments, including the establishment of equality bodies covering discrimination on the grounds of sex. It then considers evidence of indirect discrimination in the labour market. Finally, it discusses the protection of

21 Austria, Equality Commission (2011), Case GBK I/230/09-M, 1 February 2011.

pregnant workers and those on maternity leave from an anti-discrimination perspective.

5.3.1. Institutional and legal developments in relation to discrimination on the grounds of sex

The United Nations (UN) Entity for Gender Equality and the Empowerment of Women (UN Women) which became operational in January 2011 is responsible for promoting gender equality. UN Women merged and built upon four previously separate parts of the UN system: the Division for the Advancement of Women; the International Research and Training Institute for the Advancement of Women; the Office of the Special Adviser on Gender Issues and Advancement of Women; and the UN Development Fund for Women. The main tasks of UN Women are to support intergovernmental bodies in their formulation of policies and standards; to provide assistance in the implementation of these standards; and to hold the UN system accountable for its own commitments on gender equality.

Several EU Member States reformed their bodies promoting gender equality. In March 2011, the **Danish** Institute for Human Rights (DIHR) was designated as the body responsible for the promotion, analysis, monitoring and support of equal treatment of all persons, including concerning discrimination on the grounds of gender. This new mandate empowers the DIHR to provide assistance to victims of discrimination, conduct surveys, publish reports and make recommendations on any issue relating to discrimination on the grounds of sex.

The Council for Gender Equality (*Rada vlády SR pre rodovú rovnosť*) in **Slovakia** terminated its activities, and its mandate was transferred to the newly created Council for Human Rights, National Minorities and Gender Equality (*Rada vlády SR pre ľudské práva, národnostné menšiny a rodovú rovnosť*). The council supervises several committees, including the Committee for Gender Equality (*Výbor pre rodovú rovnosť*).²²

The Act on Equality between Women and Men (*Laki naisten ja miesten välisestä tasa-arvosta*) in **Finland** was amended by law 488/2011 in May 2011.²³ The reform pertains to penal provisions regarding the prohibition of discriminatory announcements, when advertising education or training places. The act now provides that anyone violating this prohibition shall be sentenced to a fine for a discriminatory announcement. The public prosecutor is, however, only allowed to bring charges concerning a discriminatory announcement if

it has been notified of the case by the Ombudsman for Equality (*Tasa-arvovaltuutettu*).

Concerning developments in case law, the Karlsruhe Court of Appeals (*Oberlandesgericht Karlsruhe*), in **Germany**, ruled that a job advertisement for a business manager was not gender neutral – the advertisement only used the masculine form *Geschäftsführer* – and, as such, constituted a violation of the prohibition of discrimination under the provisions of non-discrimination legislation. In its September 2011 judgment, the court awarded financial compensation of €13,000 to the claimant, a woman whose job application had been rejected.²⁴

5.3.2. Evidence of indirect discrimination in the labour market: the gender pay gap and the glass ceiling

Large differences in pay between women and men – the so-called gender pay gap – remain a reality throughout the EU, as data published annually by Eurostat show (Figure 5.1). The latest available data show that although the gender pay gap decreased by 1 % in the EU as a whole between 2008 and 2010, women were still paid, on average, 16.4 % less than were men. The lowest gender pay gaps in 2010 are found in **Slovenia** (4.4 %), **Italy** (5.5 %) and **Malta** (6.1 %), and the highest in **Austria** (25.5 %), the **Czech Republic** (25.5 %) and **Germany** (23.1 %).

The gender pay gap decreased in 15 Member States between 2008 and 2010, generally modestly. The largest decreases were observed in **Lithuania** (-7 %), **Slovenia** (-4.1 %), **Malta** (-2.5 %) and the **United Kingdom** (-1.9 %). The gender pay gap increased in seven Member States between 2008 and 2010, with the highest variations observed in **Latvia** (+4.2 %), **Portugal** (+3.6 %), **Romania** (+3.5 %) and **Bulgaria** (+2.1 %).

At the national level, the Institute for the Equality of Women and Men in **Belgium**, one of the country's equality bodies, found that women earn on average 10 % less per hour than men do.²⁵

Although **Finland's** gender pay gap is above the EU27 average, the *Global gender gap report* published in late 2010 by the World Economic Forum rates it as the third-best country in the world when it comes to equality between women and men.²⁶ Finland initiated an equal pay programme with the aim of narrowing the gender pay gap to a maximum of 15 % by 2015.²⁷ The means taken to achieve this goal include: a transparent policy regarding

22 Slovakia, Slovak Government's Council for Human Rights, National Minorities and Gender Equality (2011a).

23 Finland, Finlex (2012).

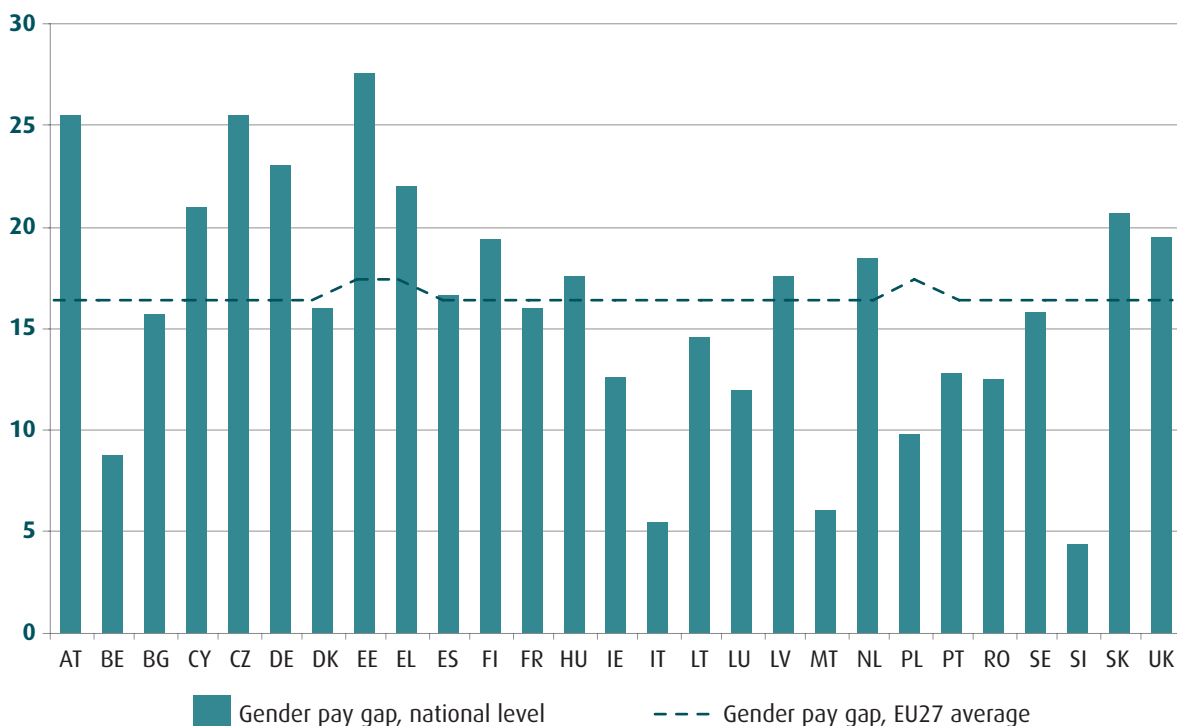
24 Germany, Higher Regional Court Karlsruhe (2011).

25 Belgium, Institute for the Equality of Women and Men (2011).

26 World Economic Forum (2010).

27 Finland, Ministry of Social Affairs and Health (2011).

Figure 5.1: Gender pay gap, by country in 2010 (%)



Notes: Data for Estonia (EE) and Greece (EL) cover the year 2008. Data for Poland (PL) cover the year 2009. Industry, construction and services (except public administration, defence, compulsory social security). For information on how the gender pay gap is calculated, see: http://epp.eurostat.ec.europa.eu/cache/ITY_SDDS/de/earn_grpgg2_esms.htm.

Source: Eurostat, 2011

contracted pay; decreasing occupational segregation in the labour market by encouraging women to take up jobs in more traditionally male sectors and vice versa; decreasing gender-based segregation of occupations; and support for women’s career development.

A reform of the pension system that came into force in **Lithuania** in January 2012 standardised pension ages for men and women. The Law on the State Social Insurance Pension (*Valstybinių socialinio draudimo pensijų įstatymas*) was amended in June 2011, introducing an equal pension age of 65 for women and men.²⁸

In addition to the gender pay gap, women in the EU also face a glass ceiling when it comes to attaining certain positions on the labour market, such as high-ranking economic and political posts.

In March 2011, Viviane Reding, Vice-President of the European Commission, announced that she was inviting publicly listed companies in the EU to sign the *Women on the Board Pledge for Europe*, which includes a voluntary commitment to increase women’s presence on corporate boards to 30 % by 2015 and to 40 % by 2020. According to the European Commission, women currently

represent only 12 % of the board members of Europe’s largest companies.²⁹

“Closing the gender gap at the top of the business world is a win-win situation. Only by working together will we be able to succeed. High level commitment and more effective measures from governments, social partners and businesses are crucial to speed up progress. The EU can play an important role in proposing solutions to a challenge, which is common to all Member States.”

Commissioner Viviane Reding speaking at the Bertelsmann Women in Leadership Conference in Berlin on 22 September

The Equality and Human Rights Commission’s (EHRC) 2011 report on *Sex and Power* shows that women in the **United Kingdom** held 17.4 % of Cabinet posts and that the number of female editors of national newspapers declined to two from a peak of four in 2011. The report argues that, at the current rate with no policy change, it would “take another 70 years to achieve an equal number of women directors in the FTSE 100 (the index of 100 most capitalised British companies on the London Stock Exchange) and another 45 years to achieve an equal number of women in the senior judiciary”. The report also estimates that it would require another 14 general

²⁸ Lithuania, Seimas (2011).

²⁹ European Commission (2011a).

elections – or 70 years – to achieve an equal number of women MPs.³⁰

On Women's Day in 2011, the **French** Association for Executive Employment (*Association Pour l'Emploi des Cadres*) published a statistical survey, *Female Managers and Male Managers: persistence of professional inequalities*. The study shows that large variations in remuneration persist and that women still face the glass ceiling: after 40 years of employment, 11 % of women occupy a senior management post compared to 23 % of men.³¹

5.3.3. Protection against discrimination for pregnant workers and those on maternity leave

Negotiations on the proposed revision of the Pregnant Workers Directive³² continued without conclusion in the Council of the European Union in 2011. The progress report submitted by the Hungarian Presidency to the Permanent Representatives Committee and to the Council of the European Union in June 2011 highlights divergences between the European Parliament's position and the views of EU Member States.³³

While some EU Member States encouraged the Council to consider discontinuing its work on the issue, others stressed that it should continue. In general, delegations considered that the Pregnant Workers Directive should cover maternity leave only. Many delegations stressed that the proposal should essentially remain focused on health and safety at work and not address additional issues. Only a few delegations showed flexibility on the issues of adoption and paternity leave.

A number of relevant developments in legislation and case law took place at the national level. In July 2011, the National Council of the **Slovak Republic** (*Národná rada Slovenskej republiky*) enacted changes to the Labour Code to improve labour market protection for pregnant women, mothers and also fathers. The amended Labour Code now reads: "The employer may terminate probation employment of a pregnant woman, a mother within nine months of giving birth or a nursing mother only in writing and only in exceptional cases that are not related to the pregnancy or motherhood, and must justify it duly in writing, otherwise it shall be deemed null and void."³⁴ A similar provision was incorporated into Law No. 346/2005 Coll. on Civil Service of Professional Soldiers of the Slovak Armed Forces (Article 1, Paragraph 112).

The Protection of Maternity Law (100(I), 2007) in **Cyprus** was amended in 2011 to enhance the protection against dismissal on grounds of pregnancy and maternity.³⁵ One amendment stipulates that should an employer dismiss an employee while she is unaware of being pregnant, she would still be entitled to inform the employer of her pregnancy at a later stage via a valid medical certificate. This would force the employer to repeal the dismissal or the notice for dismissal.

In **Malta**, the uninterrupted period of maternity leave was extended from 14 to 16 weeks as of January 2012 and will be further extended to 18 weeks as from 1 January 2013. However, this extension does not come along with an entitlement to full pay during these additional weeks (amendment to the Employment and Industrial Relations Act, Cap. 452).³⁶

Pregnant workers sometimes face discrimination in employment because of their pregnancy, as the cases reported below illustrate. Cases arising at the national level also point to where protection against discrimination for pregnant workers could be improved.

The **Hungarian** Equality Treatment Authority (*Egyenlő Bánásmód Hatóság*, EBA) represented an employee, who had been repeatedly humiliated at the workplace since her employer had discovered that he could not dismiss her because she was undergoing an assisted reproductive procedure. The EBA imposed a fine of HUF 500,000 (about €1,700). The employer appealed and the case is still pending.³⁷

The Equality Tribunal in **Ireland** ruled in favour of a complainant who had been dismissed from her telesales job. Once her pregnancy became known, the director of the company she worked for began to openly denigrate her sales ability and terminated her contract. This was found to constitute discrimination and harassment contrary to Sections 8(6)(c) and 14A of the Employment Equality Acts 1998-2008. The respondent was ordered to pay the complainant €18,200 in compensation for the discriminatory dismissal – the equivalent of a year's salary – and €10,000 for the effects of harassment.³⁸

The Equality Ombudsman (*Diskrimineringsombudsmannen*) in **Sweden** reached a settlement with a complainant's employer, awarding her SEK 85,000 (about €9,300).³⁹ The employer had changed the complainant's conditions of employment when he found out

30 United Kingdom, Equality and Human Rights Commission (EHRC) (2011), pp. 2-3.

31 Association for Executive Employment (2011).

32 Council Directive 92/85/EEC, OJ 1992 L 348.

33 Council of the European Union (2011).

34 Slovakia, Law No. 257/2011.

35 Cyprus, Protection of Maternity Law (2011).

36 Malta (2011), Employment and Industrial Relations Act (Cap. 452).

37 Hungary, *Egyenlő Bánásmód Hatóság*, Resolution Case 301/2011, Budapest.

38 Ireland, Equality Tribunal (2011a) *B. Farrell v. Irish Youth Promotions Ltd.* (in liquidation) DEC-E2011-002.

39 Sweden, Equality Ombudsman (2011b) Case ANM 2011/66.

that she was pregnant. In another case, the Equality Ombudsman reached a settlement with an employer awarding the complainant SEK 100,000 (about €10,950). Here, the complainant who had been offered a job was dismissed from the recruitment process after she told the employer about her pregnancy.⁴⁰

5.4. Discrimination on the grounds of sexual orientation and gender identity

This section examines developments in legislation, policy, practice and case law relating to lesbian, gay, bisexual and transgender (LGBT) persons in 2011. It begins with a general examination of questions of discrimination and violence against LGBT persons and then moves on to discuss policy developments relating to promoting equality for, and combating discrimination against, LGBT persons. Next, the section considers developments in relation to free movement and the legal recognition of transgender persons.

5.4.1. Discrimination and violence against LGBT persons

In June 2011, the UN Human Rights Council adopted a Resolution on human rights, sexual orientation and gender identity.⁴¹ The resolution highlights concerns about acts of violence and discrimination based on sexual orientation and gender identity.

At the EU level, the European Parliament adopted a resolution in September 2011 calling for the full implementation of the rights of LGBT persons in the EU and for the systematic defence of such rights in the EU's external relations. The European Parliament also called on the European Commission and EU Member States to implement to the greatest extent possible the relevant opinions of the European Union Agency for Fundamental Rights (FRA) on LGBT rights.⁴²

At the national level, some EU Member States introduced changes to equal treatment legislation. **Greece** included gender reassignment as a protected characteristic in anti-discrimination legislation.⁴³ The equality bodies in **Poland** and **Denmark** took over coverage of sexual orientation discrimination and gender identity discrimination, respectively. In Poland, the Human Rights Defender (*Rzecznik Praw Obywatelskich*) and the Government Plenipotentiary for Equal Treatment

(*Pełnomocnik Rządu ds Równego Traktowania*) were granted extended competencies in the field of equality and non-discrimination to cover discrimination on the grounds of sexual orientation. In Denmark, the Danish Institute for Human Rights was appointed to promote, evaluate, monitor and support equal opportunities for all, regardless of gender identity.

The Ombudsman for Minorities in **Finland**, in light of the lack of explicit provisions ensuring protection against discrimination of transgender persons, called for an amendment of gender equality legislation to include the "protection of gender minorities".⁴⁴

Finland also adopted criminal legislation prohibiting incitement to hatred on grounds of sexual orientation and introduced an aggravating circumstance for crimes committed on the grounds of bias against LGBT persons. Through an amendment of the Criminal Code by law 511/2010, incitement to hatred is prohibited also on the grounds of sexual orientation. The provision on aggravating circumstances for increasing the punishment also covers sexual orientation.⁴⁵

In **Denmark**, the government published a political programme in October 2011 that included LGBT rights. Under the slogan 'Equality and diversity makes Denmark strong', the programme mentions efforts to improve the registration, investigation and prevention of hate crimes against LGBT people and other minority groups.

The **Polish** Parliament debated legislation amending the criminal code.⁴⁶ If adopted the legislation would extend criminal protection against hate speech and hate crimes motivated by a victim's sexual orientation, gender identity, disability, age or gender.

In terms of case law, the Court of Justice of the European Union (CJEU) clarified the terms of the Employment Equality Directive in a May 2011 ruling on the *Römer* case. The CJEU held that a supplementary retirement pension paid to a partner in a civil partnership, which is lower than that granted in a marriage, may constitute discrimination on the grounds of sexual orientation, which the directive prohibits.⁴⁷

In *Hannon v. First Direct Logistics Limited*,⁴⁸ the Equality Tribunal in **Ireland** awarded a transsexual worker over €35,000 in compensation for discrimination she

40 Sweden, Equality Ombudsman (2011c) Case No. A 158/10.

41 United Nations, Human Rights Council (2011).

42 European Parliament (2011a).

43 Greece, Law 3896/2010, Art. 3, para. 2.

44 Finland, Ombudsman for Equality (2011).

45 Finland, Parliament of Finland, Act Amending the Criminal Code (511/2011).

46 Poland, Draft law amending the Polish Criminal Code.

47 Court of Justice of the European Union (CJEU) *Römer v. Freie und Hansestadt Hamburg* C-147/08, 10 May 2011.

48 Ireland, Equality Tribunal (2011b) *Hannon v. First Direct Logistics Limited*, File No. EE/2008/04, 29 March 2011.



endured on the grounds of sex and disability. The tribunal found that the deterioration in her conditions of work – which occurred after she had informed her employer of her true identity and need to live in this identity – amounted to constructive dismissal resulting from her transition to female from male.

Some EU Member States increased efforts to collect data on the situation of LGBT persons. For example, the national statistical offices in the **Czech Republic** and in **Italy** began gathering data on same-sex households as part of their national censuses. In spring 2011, the Czech Statistical Office conducted a Population and Housing Census that contained a question on a registered partnership between persons of the same sex.⁴⁹ Similarly, the census questionnaire used by the Italian National Institute for Statistics aimed to collect data for the first time on the number of same-sex households present in the country.⁵⁰

In November 2011, the UN High Commissioner for Human Rights delivered a report on *Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*. The report reviewed the applicable international standards, recalling that all people, including LGBT persons, are entitled to enjoy the protection provided for by international human rights law. It documented homophobic and transphobic violence and discrimination in all regions of the world, while emphasising that “quantifying homophobic and transphobic violence is complicated by the fact that few States have systems in place for monitoring, recording and reporting these incidents” (paragraph 23).⁵¹

The Council of Europe Commissioner for Human Rights published a report in June 2011 on discrimination on the grounds of sexual orientation and gender identity in Europe.⁵² The report finds that homophobic and transphobic attitudes persist in all 47 Member States, but that attitudes vary significantly among and within countries. Its recommendations are especially useful to support ongoing efforts among the Member States to implement the Recommendation of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity.⁵³

“Millions of people in Europe are discriminated [against], stigmatised and even [become] victims of violence because of their actual or perceived sexual orientation or gender identity. They cannot fully enjoy their universal human rights. There is an urgent need for all European governments to remedy this situation and take policy and legislative measures to combat homophobia and transphobia.”

Council of Europe Commissioner for Human Rights, Thomas Hammarberg, 23 June at the launch of his report on discrimination on grounds of sexual orientation and gender identity. Press release available at: www.coe.int/t/commissioner/News/2011/110623LGBTStudy_en.asp

Studies carried out in some EU Member States show that the position of LGBT people continues to be problematic. Research carried out by the **Cyprus** Family Planning Association and accept-LGBT Cyprus illustrates that LGBT people in the country experience violence, psychological harassment, lack of acceptance or discrimination in the context of access to employment, housing, health, education and other services, as well as within faith communities, family, relationships and social attitudes.⁵⁴

Discrimination and bullying among young people belonging to ‘sexual and gender minorities’ have been shown to be common phenomena in **Finland**. In a survey of 636 respondents belonging to a ‘sexual or gender minority’ relating to discrimination in the context of education and leisure time, 36 % said that they have, at some point in their school life, been the target of bullying on the basis of their sexual orientation or gender identity.⁵⁵

In a survey of 478 respondents at the University of Warsaw in **Poland**, 30 % were of the opinion that being openly non-heterosexual could be a reason for feeling uncomfortable. According to the report, 35 % of all respondents had witnessed acts of harassment of non-heterosexual fellow students.⁵⁶

49 Czech Republic, Czech Statistical Office (2011).

50 Dardanelli, S. *et al.* (2009), pp. 37-38.

51 United Nations General Assembly (2011).

52 Council of Europe, Commissioner for Human Rights (2011).

53 Council of Europe, Committee of Ministers (2010).

54 Cyprus, Cyprus Family Planning Association and accept-LGBT Cyprus (2011).

55 Finland, Huotari, K. *et al.* (2011), pp. 45, 129.

56 Poland, Queer Uniwersytecie Warszawskim (2011).

FRA ACTIVITY

Online European LGBT survey kicks off

The FRA initiated research for an EU-wide online survey – the first of its kind on such a scale. The survey will collect comparable data on the experiences of violence and discrimination of LGBT persons, as well as their level of awareness about their rights, among other issues. The survey will also cover Croatia. In addition, the FRA will conduct research in 2012 with public authorities and key service providers to identify barriers to promoting and fulfilling LGBT rights at all levels of government, and to collect promising practices.

For more information, see: <http://lgbtsurvey.eu>

5.4.2. Promoting equality and combating discrimination through mainstreaming

Some EU Member States are in the process of developing systematic action plans to promote equality for LGBT persons. For instance, the Home Office in the **United Kingdom** launched an action plan for delivering equality for LGBT people,⁵⁷ as well as a distinct transgender equality action plan, highlighting where different measures are required.⁵⁸

The **Estonian** Ministry of Social Affairs included the goal of increasing of awareness and tolerance regarding LGBT issues as an area for further activity in its development plans for 2011–2014 and 2012–2015.⁵⁹

A Task Force for People with Non-Heterosexual Orientation (*Pracovná skupiny pre ľudí s neheterosexuálnou orientáciou*) was established in **Slovakia**. This task force will serve as an advisory body under the government's Council for Human Rights, National Minorities and Gender Equality.⁶⁰

⁵⁷ United Kingdom, Home Office (2011a).

⁵⁸ United Kingdom, Home Office (2011b).

⁵⁹ Estonia, Ministry of Social Affairs (2011a, 2011b).

⁶⁰ Slovakia, Slovak Government's Council for Human Rights, National Minorities and Gender Equality (2011b); Slovakia, Slovak Government's Office (2011).

Promising practice

National Action Plans on violence and discrimination offer specific support to LGBT citizens

In Portugal, the Fourth National Action Plan against Domestic Violence (*IV Plano Nacional contra a Violência Doméstica*) has found that LGBT persons are particularly vulnerable to domestic violence. The plan proposes targeted measures to protect this group, although these have not yet been specified. In the Fourth National Action Plan for Equality, Gender Citizenship and Non-Discrimination (*IV Plano Nacional para a Igualdade, Género, Cidadania e não Discriminação*), 'sexual orientation and gender identity' is listed as a strategic domain, under which awareness-raising measures are planned, targeting the public in general, but also strategically important professions (politicians, civil servants, professionals in various sectors such as health, education, social work, security and defence, justice, the media and among NGOs) and young people.

For more information, see: http://195.23.38.178/cig/portalcig/bo/documentos/IV_PNI.pdf

5.4.3. Free movement and civil justice for LGBT persons

Individuals are given certain rights to move to and reside in EU Member States other than their own by virtue of EU legislation relating to freedom of movement. People who are considered to be family members, such as spouses or registered partners, of an individual exercising their right to free movement may be entitled to certain rights. According to the terms of the Free Movement Directive,⁶¹ however, a Member State is not obliged to recognise the validity of same-sex marriages or registered partnerships unless these are recognised under national law.

The greatest number of developments at national level concerned changes to the definition of 'family member' to include same-sex partners for the purposes of free movement and family reunification. **Austria, Estonia, Greece, Latvia, Malta, Romania, Slovakia** and **Slovenia** all instituted this change.

Draft amendments to existing legislation in **Lithuania** would apply the concept of 'family member' to include "a partner, with whom the citizen of a Member State has a durable relationship" and to others who were dependant or managed a common household in the country of origin, if family ties can be proven.⁶²

⁶¹ Directive 2004/38/EC, OJ 2004 L 158, p. 77.

⁶² Lithuania, Law amending the Law on the Legal Status of Aliens, No. XIP-2360(2) 21 June 2011.

In contrast, new legislation in **Romania** prohibits the transcription/registration of civil status certificates or extracts issued by foreign authorities for same-sex marriages or same-sex civil partnerships concluded abroad.⁶³ This transcription is a requirement for obtaining entry and residence into Romania for spouses or partners, which necessarily only recognise partnerships between men and women.

The European Commission presented a proposal in March 2011 for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships.⁶⁴ This proposal was accompanied by a separate proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes.⁶⁵ Both proposals would apply to opposite-sex and same-sex marriages as well as to registered partnerships. According to its 2012 work programme, the Commission is scheduled to make two legislative proposals to facilitate the cross-border recognition of civil status documents.⁶⁶

Certain rights or obligations in relation to property may result from entering a registered partnership or marriage. These may become difficult to exercise in a cross-border context, particularly with regard to same-sex spouses or partnerships that are not recognised in EU Member States. European citizens exercising their right to free movement may encounter practical barriers in needing to provide official documentation, such as birth or marriage certificates, in their host state in order to receive certain benefits. Different, sometimes burdensome, rules exist across the EU Member States. The European Parliament strongly supported plans to enable the mutual recognition of civil status documents, which would include marriage certificates, and called for further efforts to reduce barriers for citizens who exercise their rights of free movement.⁶⁷

5.4.4. Legal recognition of transgender people

Developments relating to legal recognition of transgender persons occurred in legislation, case law, policy and medical practice in some EU Member States.

⁶³ Romania, Government Emergency Ordinance No. 80/2011, Article I. (20), Part I, No. 694. Article 277 of the new Civil Code does not recognise same-sex marriages or civil partnerships lawfully concluded abroad. While there is an exception concerning legal provisions regulating freedom of movement of the EU and EEA citizens, it is unclear what the impact of this contradiction will be in practice.

⁶⁴ European Commission (2011b).

⁶⁵ European Commission (2011c).

⁶⁶ European Commission (2011d), p. 8.

⁶⁷ European Parliament (2011a), para. 40.

As regards the rectification of official documents following gender reassignment, legislative developments with an impact on the legal gender recognition of transgender and transsexual persons took place in **Portugal**, where a new law was adopted to simplify the procedure and remove requirements deemed to be disproportionate.⁶⁸

The **Croatian** Ministry of Health and Social Welfare adopted an Ordinance on the Procedure of Collecting Medical Documentation on Sex Change in October 2011.⁶⁹ It identifies the opinion of the National Health Council as the document needed in order to change information on sex in birth records. This opinion is based on a request form by the applicant and on accompanying opinions of health and other professionals.

Developments in three EU Member States suggest a possible evolution in legislation in the future. In the **Netherlands**, a bill to amend Article 1:28 of the Civil Code relating to transsexuality and changes to the birth certificate was presented to parliament in September 2011. The bill is pending at parliament.

Denmark has announced a review of regulations on gender reassignment treatment. Among other matters, this will examine the possibility for individuals to obtain legal gender reassignment without having to satisfy the precondition of undergoing surgical treatment.

The National Board of Health and Welfare in **Sweden** presented the results of an inquiry on care and support for transgender people.⁷⁰ According to current legislation, to undergo gender reassignment surgery a person must be older than 18 years of age, a Swedish citizen, sterilised and unmarried. The report called for an end to the requirement that all those seeking gender reassignment must be unmarried and sterilised.

“The permanent nature and irreversibility of transsexual persons’ perceived gender cannot be assessed against the degree of the surgical adaptation of their external genitals but rather against the consistency with which they live in their perceived gender. The unconditional prerequisite of a surgical gender reassignment according to § 8:1 no. 4 TSG [relating to statutory recognition of transsexuals] constituted an excessive requirement because it requires of transsexual persons to undergo surgery and to tolerate health detriments even if this is not indicated in the respective case and if it is not necessary for ascertaining the permanent nature of the transsexuality.”

German Federal Constitutional Court, Press release No. 7/2011, 28 January 2011

Judicial decisions in some EU Member States have also led to an evolution in national law. In **Germany**,

⁶⁸ Portugal, Law 7/2011.

⁶⁹ Croatia, Ministry of Health and Social Welfare (2011).

⁷⁰ Sweden, National Board of Health and Welfare (2010).

Section 8 of the 1980 Transsexuals Act had required permanent infertility and surgery as a precondition to obtaining legal recognition of a person's preferred gender under the law of civil status. In January 2011, the Federal Constitutional Court declared these requirements unconstitutional.⁷¹

The Constitutional Court in **Malta** found in November 2010 that the impossibility of a transgender woman to marry a person of her choice violated Article 12 of the European Convention on Human Rights (ECHR), which protects the right to marry and establish a family. This judgment was overturned on appeal in May 2011. The court ruled that the applicant could not be considered a woman under the Marriage Act, even though an annotation had been made in her birth certificate as early as 2006 to reflect her preferred female gender.⁷²

Other EU Member States witnessed changes to the terminology or methodology of medical diagnoses relating to gender identity. In **Finland**, the National Institute for Health and Welfare (*Terveyden ja hyvinvoinnin laitos/ Institutet för hälsa och välfärd*) updated the national version of the World Health Organisation's International Classification of Diseases in 2011. Accordingly, dual-role transvestism, fetishism, fetishistic transvestism, sado-masochism or multiple disorders of sexual preference are no longer classified as diseases.⁷³

The National Institute for Forensic Medicine (*Institutul Național de Medicină Legală "Mina Minovici"*, NIFM) in **Romania** adopted a new methodology for evaluating cases of so-called 'sexual identity disorder'. According to LGBT organisations several components of this methodology may, however, encroach upon the right to private life, as they have an impact on the physical and mental integrity of the person and their dignity.

Under the new Romanian methodology, it takes three years of evaluations (three phases) to certify whether a person is transgender. The NIFM can interrupt the evaluation if the person does not comply with its recommendations and requests at any moment. The person is expected to avail him- or herself of a battery of tests, hospitalisations and mandatory psychotherapy for at least two years. A social investigation is also foreseen, usually performed by the local authorities from the person's residence who may, as part of the enquiry, interview family members, work colleagues and neighbours. The applicant is also required to carry out activities in an environment predominated by persons belonging to the preferred sex and to have direct

relations with people that suffered sex reassignment surgery and people that chose not to subject themselves to sex reassignment surgery.

FRA ACTIVITY

Transgender rights to personal safety and equality

The FRA and the Office of the Council of Europe Commissioner for Human Rights jointly hosted a roundtable discussion on the rights of transgender persons in Vienna on 22 and 23 September 2011. The wide-ranging discussions revolved around issues including legal certainty with respect to 'gender identity', visibility of transgender persons and experiences (and lack thereof), the role and interconnections of different players and good practices. The group's conclusions included the need for more engagement by authorities, equality bodies and other actors in collecting reliable data and the need to respect the privacy of respondents. The discussions addressed the issues of: how to gather data on transgender rights, such as by making use of official national statistics, employment surveys, household surveys; what type of data is needed, such as experiences in schools, number of transgender persons going to medical clinics; and of which tools can be useful for collecting data, such as third-party reporting, ensuring anonymity of reports, including questions in existing EU-wide surveys.

For more information, see: http://fra.europa.eu/fraWebsite/lgbt-rights/infocus11_2709_en.htm

5.5. Discrimination on the grounds of disability

This section provides an overview of legal and policy developments in the field of discrimination on the grounds of disability, with a particular focus on the United Nations Convention on the Rights of Persons with Disabilities (CRPD). The section begins with an update on the ratification and implementation of the CRPD. It then considers legal developments at the level of Member States, before moving on to discuss issues of accessibility, participation in the labour market, inclusive education and independent living, all from the perspective of discrimination against persons with disabilities.

5.5.1. Ratification and implementation of the CRPD

The CRPD entered into force for the EU as a whole in January 2011. Under Article 33 (2) of the CRPD, the EU is obliged to establish a framework, including one or more independent mechanisms, with responsibility for promoting, protecting and monitoring the implementation

71 Germany, Federal Constitutional Court, Order of 11 January 2011 – 1 BvR 3295/07, Press release No. 7/2011, 28 January 2011.

72 Malta, Constitutional Court, Civil appeal 43/2008/2, *Joanne Cassar v. Director of Public Policy*, 23 May 2011.

73 Finland, National Institute for Health and Welfare (2011).

Table 5.2: Ratification of the UN Convention on the Rights of Persons with Disabilities (CRPD), by country

Country	Year of ratification	Optional Protocol
AT	2008	Yes
BE	2009	Yes
CY	2011	Yes
CZ	2009	No
DE	2009	Yes
DK	2009	No
ES	2007	Yes
FR	2010	Yes
HU	2007	Yes
IT	2009	Yes
LT	2010	Yes
LU	2011	Yes
LV	2010	Yes
PT	2009	Yes
RO	2011	No
SE	2008	Yes
SI	2008	Yes
SK	2010	Yes
UK	2009	Yes
HR	2007	Yes

Note: Data as of 31 December 2011.

Source: FRA, 2011; see http://fra.europa.eu/fraWebsite/disability/disability_en.htm

of the CRPD. In 2011, the European Commission identified four bodies that would together form the EU framework. The four bodies are: the European Parliament's Petitions Committee, the European Ombudsman, the European Commission and the FRA. To ensure the involvement of persons with disabilities and their representative organisations, the Commission has also invited the EU-wide representative organisation of persons with disabilities, the European Disability Forum (EDF), as an observer. Within the framework, the FRA is expected to contribute to promoting the CRPD; to collect and analyse data within the limits of its mandate; and, in cooperation with the Commission, to develop indicators and benchmarks to support the monitoring process.

Cyprus, Luxembourg and Romania ratified the CRPD in 2011, with Cyprus and Luxembourg also ratifying its Optional Protocol. This brings the number of EU Member States that have ratified the treaty to 19, with 16 of these also having ratified its Optional Protocol, as Table 5.2 shows.

Discussions and preparatory work regarding implementation remain ongoing in the remaining eight EU Member States. Croatia ratified the CRPD and its Optional Protocol in 2007.

Some EU Member States developed national action plans in the area of disability designed to implement the CRPD and achieve the objectives outlined in the European Commission's European Disability Strategy 2010–2020,⁷⁴ including **Germany**⁷⁵ and **Sweden**.⁷⁶ **Spain** adopted new legislation in August 2011 to bring national law and policy into line with the requirements of the CRPD.⁷⁷ The legislation includes the regulation of transport, information society and civil protection.

5.5.2. Legal developments relevant to discrimination against persons with disabilities at the level of Member States

The issue of reasonable accommodation of persons with disabilities was the subject of legislative changes

⁷⁴ European Commission (2010).

⁷⁵ Germany, Federal Ministry of Labour and Social Affairs (2011).

⁷⁶ Sweden, Ministry of Health and Social Affairs (2011).

⁷⁷ Spain, Act for the full legal adaptation to the Convention on the Rights of Persons with Disabilities; Spain, Royal Decree (2011).

in **Poland**⁷⁸ and **Slovenia**.⁷⁹ The European Commission brought legal proceedings against **Italy** in June 2011 for having incorrectly transposed Article 5 of the Employment Equality Directive. According to the Commission, Italian law fails to place all employers under an obligation to provide reasonable accommodation for persons with disabilities.

FRA ACTIVITY

Providing reasonable accommodation for those with mental health problems

The FRA issued a report examining how disability is addressed in international and European law and exploring the obligation to provide reasonable accommodation as contained in international and European standards. The report – *The legal protection of persons with mental health problems under non-discrimination law; understanding disability as defined by law and the duty to provide reasonable accommodation in European Union Member States* – found that non-discrimination legislation does indeed protect persons with mental health problems in almost all EU Member States. In most cases persons with mental health problems also benefit from reasonable accommodation measures, or other protection measures, in the employment context. The report concludes by presenting examples of where legislation extends the duty to provide reasonable accommodation beyond employment, such as in the areas of education, housing and access to goods and services.

Croatia introduced new legislation in 2011 explicitly prohibiting direct and indirect discrimination against those accessing social assistance,⁸⁰ abolishing pre-conditions requiring severe health impairments of claimants to have occurred before the age of 18. Persons with a disability or severe health impairments will now qualify for this benefit irrespective of the age at which their impairment occurred.

5.5.3. Accessibility

Accessibility is a necessary precondition for the social, economic and political inclusion of people with disabilities, the elderly and those with reduced mobility or other temporary functional limitations. As announced in the European Disability Strategy 2010–2020, the European Commission is exploring the merits to propose a European Accessibility Act by the end of 2012.

78 Poland, Law on Equal Treatment.

79 Slovenia, Law Amending the Law on Vocational Rehabilitation and Employment of Disabled Persons.

80 Croatia, Social Assistance Act (SAA).

The Commission contemplates “a business-friendly proposal” aiming to improve the market of goods and services that are accessible for persons with disabilities and elderly persons, based on a “design for all” approach using harmonised standards.

“[T]here is a strong relationship between mobility, disability and social inclusion, especially with regard to freedom and access to communication (including Braille and sign languages and other alternative forms of communication), freedom of movement in all fields of life and access to services; whereas full participation in all aspects of society needs to be promoted, bearing in mind the importance of Community policies regarding information and communications technologies, as well as home robotics and online communication solutions, and the need to move towards full accessibility by promoting compatible standards in the single market and facilitating their dissemination.”

European Parliament report on mobility and inclusion of people with disabilities and European Disability Strategy 2010-2020 (2010/2272 (INI))⁸¹

The resulting competition among providers and the opening up of markets across EU Member States is intended to increase the choice of accessible goods and services at more affordable prices, thereby stimulating business opportunities and economic growth and as a result facilitating the social integration of persons benefiting from these goods and services.⁸² The Commission opened up a public consultation in December 2011 on the European Accessibility Act, encouraging input from a broad range of stakeholders.⁸³

Policies and programmes aimed at increasing physical accessibility to buildings were launched in some EU Member States, including **France**,⁸⁴ **Germany**⁸⁵ and **Romania**.⁸⁶ Enhancing accessibility goes beyond physical environment and may also concern procedures, processes, services or virtual environments (see Chapter 7 for information on measures taken to promote the accessibility of polling stations).

The lack of accessibility has also been the focus of attention of equality bodies in some EU Member States. For instance, in its 2010 annual report, the Office of the **Bulgarian** Ombudsman (*Омбудсман на Република България*) points to a lack of accessibility, both physical and in terms of administrative processes, in hospitals, social assistance departments, the homes of persons with disabilities and public transport.⁸⁷

81 European Parliament (2011b).

82 European Commission (2011e).

83 European Commission (2011f).

84 France, Bill 3431; France, Interdepartmental Monitoring Body of Accessibility and Universal Design (2011).

85 Germany, Bundeskompetenzzentrum Barrierefreiheit (2011); Germany, Federal Ministry for Work and Social Affairs (2011), p. 196.

86 Romania, PROIECT (2011).

87 Bulgaria, Office of the Bulgarian Ombudsman (2011), p. 10.

Promising practice

Improving access to buildings

The Danish Organisation for Accessibility for All (*Foreningen Tilgængelighed for Alle*) developed an Accessibility Label Scheme (*Mærkeordningen for Tilgængelighed*). The scheme's purpose is to make clear how accessible government office buildings, as well as companies and organisations that provide public access, actually are. There are seven focus categories: wheelchair users, reduced mobility, visual impairments, hearing impairments, asthma and allergies, mental disabilities and reading difficulties. It provides signs that indicate when a building has complied with the minimum accessibility requirements in any of the seven focus categories. All court buildings that have been included in the scheme are presented online with a factsheet concerning the building and its accessibility at <http://www.godadgang.dk> and <http://www.borger.dk>. The organisation also drafts a report on the accessibility of each building and includes recommendations for possible improvements.

For more information, see: www.godadgang.dk, compare also Chapter 5.

FRA ACTIVITY

Developing easy-to-read communication material

The FRA published a series of short publications in an easy-to-read format to make its research accessible to people with intellectual disabilities. The information focuses on FRA's work in the area of disability and includes a summary of its 2010 report on political participation.

For more information, see: http://fra.europa.eu/fraWebsite/disability/disability_en.htm

The World Health Organisation and the World Bank, in their joint *World Report on Disability* published in 2011, underline that promoting equality by prohibiting discrimination and positive action measures are more likely to benefit those already in employment than those in search of employment.⁹² The report points out that people with disabilities have generally poorer health, lower educational achievement, fewer economic opportunities and higher levels of poverty than people without disabilities.

5.5.4. Combating discrimination against persons with disabilities: employment, inclusive education and independent living

A report by the European Parliament on the mobility and inclusion of people with disabilities points out that discrimination in the context of employment is often more strongly related to access to employment than to discrimination in the workplace for those already in employment.⁸⁸ Of the estimated 80 million persons with disabilities living in the EU, the report notes that only 30–40 % are employed, placing persons with disabilities at greater risk of living in poverty. At the national level, low levels of employment of persons with disabilities have been the subject of research and confirmed by occupational health specialists and equality bodies in **Denmark**,⁸⁹ **Finland**⁹⁰ and **Slovenia**.⁹¹

European Structural Funds are a useful tool for improving accessibility and promoting the inclusion of people with disabilities in the labour market, thereby increasing their participation in civil society. In October 2011, the European Commission submitted its proposal for a Regulation laying down common provisions for the funds for the period from 2014 to 2020.⁹³ The proposal sets out a number of provisions related to disability, particularly in relation to accessibility and independent living. Most importantly, Article 87(3)(ii) says that operational programmes financed by structural funds shall include “a description of the specific actions to promote equal opportunities and prevent any discrimination based on [...] disability [...] during the preparation, design and implementation of the operational programme and in particular in relation to access to funding, taking account of the needs of the various target groups at risk of such discrimination and in particular the requirements of ensuring accessibility for disabled persons”. In addition, one of the general conditions that must be in place before funds are disbursed concerns disability, and requires “the existence of a mechanism which ensures effective implementation and application of the UN Convention on the Rights of Persons with Disabilities”. Moreover, the monitoring committees evaluating operational programmes must examine “actions to promote equality [...] and non-discrimination, including accessibility for disabled persons”.

88 European Parliament (2011a).

89 Denmark, Thomsen, L.B. and Høgelund, J. (2011).

90 Finland, Finnish Institute of Occupational Health (2010).

91 Slovenia, *Univerza na Primorskem, Fakulteta za management* (2010).

92 World Health Organization and World Bank (2011).

93 European Commission (2011g).

The **Spanish** Ministry of Labour and Immigration's 2010 annual report of activities, for example, reveals that financing through the European Social Fund enabled 8,243 persons with disabilities to find a job by the end of 2010.⁹⁴ This fund has also financed awareness-raising campaigns to promote the recruitment of workers with disabilities among employers.

“People with disabilities often have unique insights about their disability and their situation. In formulating and implementing policies, laws and services, people with disabilities should be consulted and actively involved. Disabled people’s organisations may need capacity-building and support to empower people with disabilities and advocate for their needs. When suitably developed and funded, they can also play a role in service delivery – for example, in information provision, peer support and independent living.”

World Health Organization and World Bank (2011), World Report on Disability, p. 265

Inclusive education is a precondition for the integration of people with disabilities in society, in particular because education and formal qualifications open up access to employment and career advancement. In some EU Member States, however, children with disabilities are only allowed to attend ‘special schools’ and are not admitted into mainstream education.

This can severely disadvantage the children’s education, as an expert hearing the Children’s Commission of the Lower House of the **German** Parliament (*Bundestag*) concluded.⁹⁵ The expert hearing also determined that a majority of children with disabilities in Germany have learning disabilities and speech disorders, while a much smaller proportion have severe disabilities. Nonetheless, 85 % of children with disabilities attend special schools. The experts who took part at the hearing favoured integrating children with disabilities into the mainstream education system and providing for specially trained teachers instead of retaining two distinct educational systems.

The ready availability of good quality support teachers is crucial to ensure inclusive education. In this context, the Constitutional Court in **Italy** found unlawful legislation that introduced a maximum ceiling on the number of learning-support teachers in state schools and prevented schools from hiring fixed-term teachers to assist children with serious disabilities.⁹⁶ Similarly, the Court of Milan found that a Ministry of Education decision to reduce the number of special assistance hours given to children with disabilities amounted to discrimination.⁹⁷ The court concluded that the government failed to respect the duty to adopt reasonable accommodation for children requiring

special assistance in the education system. Although the actual number of support teachers increased in Italy, the teacher/pupil ratio decreased, given a 45 % rise in the number of pupils with disabilities in the last decade.

Independent living is recognised by Article 19 of the CRPD, which also includes a right to personal assistance. In 2011, the European Network of Independent Living called on the EU to take a range of measures that would protect and promote these rights.⁹⁸ The notion of independent living originated in the disability movement’s efforts to encourage alternatives to institutional living by advocating a concept based on giving people with disabilities choice and control over their own lives. Living independently empowers people with disabilities to take part in the life of their community on an equal basis with others. It acts as a vehicle for autonomy and control over living arrangements and daily life activities.

The **United Kingdom’s** Office for Disability Issues thus reports that over one-fifth of disabled people believe that they frequently do not have choice and control over their daily lives. The report highlights that when persons with disabilities received direct payments and personal budgets to organise personal assistance they exercised greater choice and control.⁹⁹

The body responsible for monitoring the implementation of the CRPD in **Austria** issued an opinion on personal assistance (*Stellungnahme zu persönlicher Assistenz*) in June 2011.¹⁰⁰ The opinion emphasised that persons with disabilities ought to be given the choice and control over their personal assistance and that this choice is an important vehicle facilitating inclusion into society. The opinion noted that there was no adequate and needs-based funding for personal assistance in Austria.

Deinstitutionalisation programmes increase the possibility for persons with disabilities to live independently. One such project was established for children living in institutions in **Bulgaria**, with every child benefiting from a personalised programme of deinstitutionalisation.¹⁰¹ The project includes plans for the development of family care homes, protected homes where small numbers of children are accommodated together, day-care centres for children with disabilities and centres for rehabilitation and social integration in cities and villages across the country. The planned services would allow for greater capacity (2,076 places) than is currently required, in case more children require such services in the future – such as children under the age of three living in institutions and children living in the community but at risk of abandonment.

94 Spain, Ministry of Labour and Immigration (2011).

95 Germany, German Parliament (2011a).

96 Italy, Constitutional Court (2010), Law No. 247/2007.

97 Italy, Court of Milan (2011).

98 European Network on Independent Living (ENIL) (2011).

99 United Kingdom, Office for Disability Issues (2011).

100 Austria, Independent Monitoring Board (2011).

101 Bulgaria, Ministry of Labour and Social Policy (2011).



In a report highlighting poor living conditions for patients with intellectual and psycho-social disabilities who live in psychiatric institutions and social care homes, the Mental Disability Advocacy Centre in **Croatia** highlights the need for urgent reforms in the field.¹⁰² The report recommends the immediate introduction of a package of reforms prioritising deinstitutionalisation and the establishment of community-based care to remedy the situation.

“[U]nder International and European human rights law, Governments should transfer from a system of institutional care to alternative community-based services that enable children, persons with disabilities (including users of mental health services) and older people to live and participate in the community.”

Office of the High Commissioner for Human Rights, Brussels office, Forgotten Europeans, forgotten rights (2011)

5.6. Discrimination on the grounds of age

This section deals with discrimination on the grounds of age. It begins by presenting international developments related to the rights of older people and then moves on to discuss the labour market situation of younger and older workers across the EU Member States. The section finishes by outlining initiatives promoting the independence of older people and their dignified living in order to combat abuse against the elderly.

5.6.1. International developments

In December 2010, the UN General Assembly established an Open-ended Working Group for the purpose of strengthening the protection of the human rights of older persons, also known as the Open-ended working group on Ageing.¹⁰³ Its mandate calls for the consideration of the existing international framework on the human rights of older persons and for the identification of possible gaps and how best to address them, including by considering the feasibility of further instruments and measures, where appropriate.¹⁰⁴

The Committee of Ministers of the Council of Europe gave mandate to its Steering Committee for Human Rights to elaborate a non-binding instrument on the promotion of the rights and dignity of the elderly between 2012 and 2013. A drafting group was set up to this effect.

The year 2012 is the European Year of Active Ageing and Solidarity between Generations, for which preparations

began in 2011.¹⁰⁵ The aim here is to raise awareness of opportunities available for older adults to stay in the workforce, should they wish to do so; to play an active role in society; and to live a healthy life. Another objective is to highlight challenges politicians and stakeholders must take up if they are to improve opportunities for active ageing and for living independently in the areas of employment, healthcare, social services, adult learning, volunteering, housing, information technology, services or transport.

Numerous activities have already been scheduled in EU Member States in the run up to the European Year of Active Ageing and Solidarity between Generations, including among others, the commissioning of studies on the reality of active ageing, such as was done by the **Belgian** Federal Public Service for Social Security,¹⁰⁶ awareness raising campaigns, such as the **Bulgarian** Red Cross' *Age Awareness and Advocacy of Older People Project*,¹⁰⁷ or the annual e-learning day organised by the **Estonian** e-Learning Development Centre in the framework of the Adult Learner Week.¹⁰⁸

5.6.2. Discrimination on the grounds of age in employment

Court judgments that found age discrimination in employment, particularly in relation to recruitment and dismissal, were delivered at the EU and national level. In a case relating to **Germany**, the CJEU ruled in September in *Prigge and Others v. Deutsche Lufthansa AG* that prohibiting airline pilots from working after the age of 60 constitutes discrimination on the grounds of age.¹⁰⁹

In July, the **Austrian** Supreme Court (*Oberster Gerichtshof*) made a finding of age discrimination in the case of a doctor who was refused a post of general practitioner with the statutory health insurance (*Vertragsarzt*) at the age of 58. The recruitment rules exclude persons over the age of 55, unless there is an agreement reached between the insurance company and the job applicant. The applicant argued that this clause constituted age discrimination. The Court of Appeal made a finding of age discrimination which the Supreme Court confirmed on appeal.

The District Court of Helsinki (*Helsingin käräjäoikeus/Helsingfors tingsrätt*), **Finland**, ruled in June that the Social Insurance Institution (*Kansaneläkelaitos/Folkpensionanstalten*) discriminated against a 58-year-old applicant with better qualifications and more work experience than a 46-year-old applicant who was offered the managerial

¹⁰² Croatia, Mental Disability Advocacy Centre and Association for Social Affirmation of People with Mental Disabilities (2011).

¹⁰³ United Nations, General Assembly (2010).

¹⁰⁴ United Nations (2011).

¹⁰⁵ European Commission (2012).

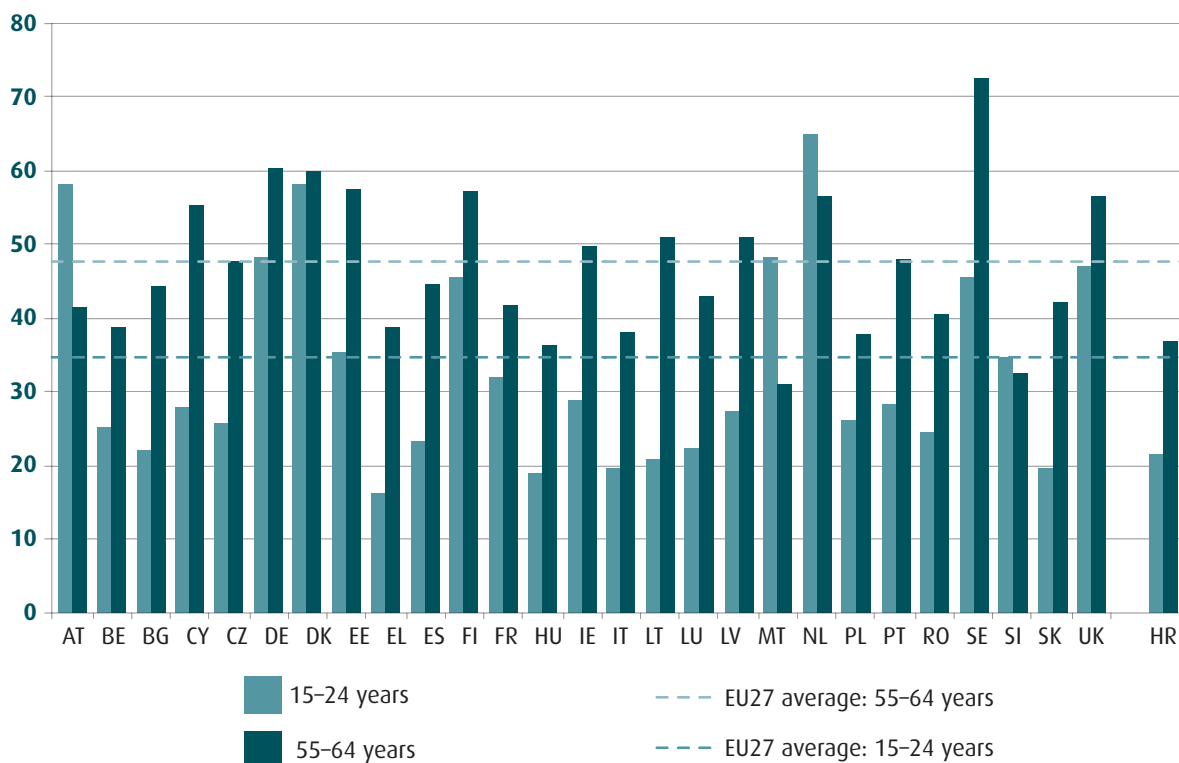
¹⁰⁶ Belgium, Federal Public Service Social Security (2011).

¹⁰⁷ Bulgaria, Red Cross (2011).

¹⁰⁸ Estonia, Estonian e-Learning Development Centre (2011).

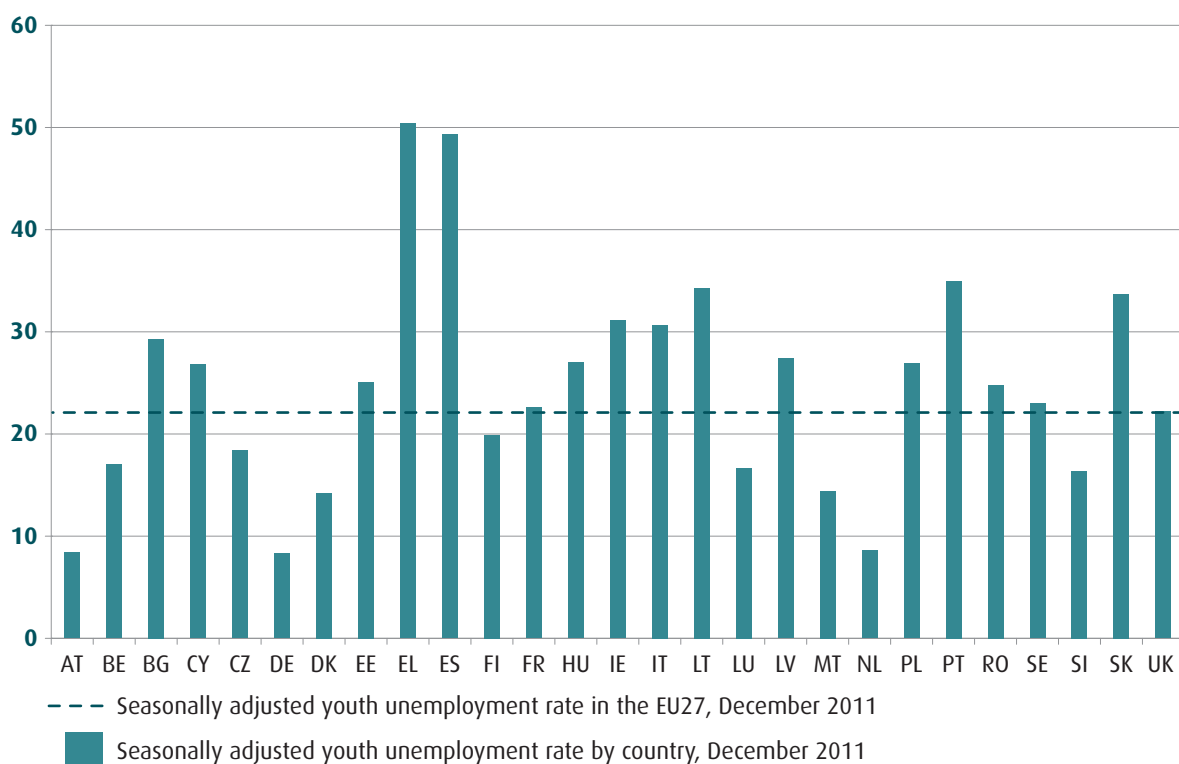
¹⁰⁹ CJEU, *Reinhard Prigge and Others v. Deutsche Lufthansa AG*, Case C-447/09, 13 September 2011.

Figure 5.2: Employment rates by age groups, by country, fourth quarter 2011 (%)



Source: Eurostat, 2012

Figure 5.3: Seasonally adjusted youth unemployment rate in 2011, by country (%)



Note: Data refer to young persons under the age of 25.

Source: Eurostat, 2012, Euro area unemployment rate at 10.8 %, p. 4, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-02042012-AP/EN/3-02042012-AP-EN.PDF

position they both applied for.¹¹⁰ The claimant was paid €8,000 in compensation.

The Supreme Court in **Spain** issued two decisions abolishing a maximum threshold of 30-years of age when applying for certain posts within the Spanish police.¹¹¹ These are the first court decisions to recognise and abolish age-based discrimination in access to jobs in the Spanish central administration. Their importance lies in the influence they could have over a large number of pending legal proceedings on the same issue, namely: alleged age-based discrimination in more than 15 recruitment cases affecting more than 30,000 public sector jobs since 2004.

The **Greek** Council of State ruled that the maximum age of 35 years for candidates to posts of judges of lower courts is not contrary to either the Greek Constitution, Directive 2000/78 establishing a general framework for equal treatment in employment and occupation or to national legislation transposing this directive. The duration of military service – which is only compulsory for men – is, however, not taken into account here, since it would otherwise conflict with the principle of gender equality.¹¹²

The European Ombudsman drafted a recommendation to the European Commission in March, asking it to establish that it did not discriminate on the grounds of age in the case of a 63-year-old candidate in a selection competition for an assistant post.¹¹³

Lower rates of employment for younger and older workers could be indicative of indirect discrimination on the grounds of age in employment. Data collected by Eurostat on a quarterly basis thus show that younger persons between the ages of 15 and 24 and older persons between the ages of 55 and 64 have lower rates of employment compared to the active population (age group 15 to 64) as a whole. In addition, younger persons have lower rates of employment than older persons across most of the EU Member States, with the exception of **Austria, Malta, the Netherlands** and **Slovenia** (Figure 5.2).

Likely explanations for differences in the employment rates of younger and older persons include the possibility that job requirements are set at too high a level for many graduate positions, as the Equal Opportunities Ombudsperson in **Lithuania** suggests. Such high expectations particularly affect the job prospects of young women who went on maternity leave after completing their degrees.¹¹⁴

The unemployment rate among young people under the age of 25 exceeds 10 % throughout the EU, except in

Austria, Germany and the **Netherlands**, as data from Eurostat show (Figure 5.3).

Younger workers are also faced with long-term unemployment. In its 2011 update on *Global Employment Trends for Youth* between the ages of 15 and 24, the International Labour Organization cites **Italy** as an example of a developed economy where the long-term youth unemployment rate far surpasses that of other adults. In 2010, young people there were three and a half times more likely to be in long-term unemployment than were other adults. In other EU Member States such as **Belgium, France, Greece, Hungary, Ireland, Slovakia, Spain**, and the **United Kingdom** young people were about twice as likely to find themselves in a similar situation.¹¹⁵

5.6.3. Ageism

Research published in 2011 points out that ageism – that is, discrimination or unfair treatment based on age – persisted in EU Member States. In its 2011 *European report on preventing elder maltreatment*, the World Health Organization (WHO) notes that “elder maltreatment is pervasive in all countries in the [WHO] European Region”,¹¹⁶ with at least four million people a year experiencing maltreatment due to their age.

At the national level, the Ombudsman in **Croatia** signals evidence of involuntary placement of older persons in retirement homes, suggesting that further monitoring of the system of legal capacity restrictions is required.¹¹⁷

The **Finnish** Ministry of the Interior published an action plan in May 2011, aiming to improve security for the elderly. The programme contains recommendations to improve safety, including preventing abuse, violence and crime against the elderly.¹¹⁸

A British charity working for the benefit of older persons, Age UK, published a study on ageism in Europe.¹¹⁹ The study was conducted by the European Research Group on Attitudes to Age (Eurage), “an international team of researchers specialised in ageism, attitudes to age and cross-cultural comparisons” led by the University of Kent in the United Kingdom (for more information on Eurage, see www.eurage.com). The study was based on the findings of the European Social Survey and found that old age is the most widely experienced source of discrimination in Europe. Around 64 % of respondents in the **United Kingdom** and 44.4 % across Europe considered old-age discrimination to be a serious problem.

110 Finland, District Court of Helsinki, Dnro L10/27675.

111 Spain, Supreme Court, STS 2187/2011, 21 March 2011; STS 2185/2011, 21 March 2011.

112 Greece, Council of State (2011).

113 European Ombudsman (2011).

114 Lithuania, Office of Equal Opportunities Ombudsperson (2010).

115 International Labour Office (2011), p. 3.

116 World Health Organization, Sethi, D. *et al.* (eds.) (2011).

117 Croatia, Ombudsperson (2011), pp. 28-32.

118 Finland, Ministry of the Interior (2011).

119 Age UK (2011).

Promising practice

Festival celebrating the elderly in Ireland

The Bealtaine Festival in Ireland is a yearly national festival celebrating older people in the arts. Bealtaine runs in partnership with over 400 organisations and groups which organise events throughout the country. Each year, the participating organisations collaborate closely with a small number of artists, groups or organisers to facilitate challenging or unusual events, providing advice, networking and some funding support. The Bealtaine festival has grown in scope and ambition in the 15 years since its inauguration, and is recognised globally as the first such festival of its kind – a national festival celebrating older people.

For more information, see: www.bealtaine.com

5.7. Discrimination on the grounds of religion or belief

This section explores legal, social and policy developments relating to discrimination on the grounds of religion or belief that took place in 2011. It begins by considering legal developments relevant to discrimination on the grounds of religion or belief. It then moves to case law exploring the boundaries of where freedom of religion or belief could justifiably be curtailed. The section concludes by examining the manifestation of religious intolerance in EU Member States.

5.7.1. Legal developments relevant to discrimination on the grounds of religion or belief

Legislative developments took place in several EU Member States that could adversely affect the religious practices and rituals of members of some faith groups, particularly Jews and Muslims in **Belgium**, **France** and the **Netherlands**.

Legislation came into force or was proposed in these Member States relating to banning the wearing of face-covering apparel in public spaces. While generally framed in terms of national security, these developments could affect Muslim women who wear full-face veils in accordance with their religious beliefs.

Legislation prohibiting the concealment of the face in public spaces (*Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace*)

came into force in **France** in April 2011.¹²⁰ Similar legislation prohibiting the wearing of all clothing partly or completely hiding the face in public spaces (*Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*) came into force in **Belgium** in July 2011.¹²¹ An individual appeal to annul this law was filed before the Constitutional Court on 17 November 2011. The ruling has not yet been delivered. The **Dutch** Council of Ministers voted in favour of a bill in September 2011 proposing that face-covering apparel should be banned, as such clothing is perceived to be in contradiction with principles of equality between men and women.¹²² The Dutch Parliament (*Tweede Kamer der Staten-Generaal*) has been considering the bill since February 2012.¹²³

“Derogation from stunning in case of religious slaughter taking place in slaughterhouses was granted by Directive 93/119/EC. Since Community provisions applicable to religious slaughter have been transposed differently depending on national contexts and considering that national rules take into account dimensions that go beyond the purpose of this Regulation, it is important that derogation from stunning animals prior to slaughter should be maintained, leaving, however, a certain level of subsidiarity to each Member State. As a consequence, this Regulation respects the freedom of religion and the right to manifest religion or belief in worship, teaching, practice and observance, as enshrined in Article 10 of the Charter of Fundamental Rights of the European Union.”

Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing

In June 2011, the **Dutch** Parliament had accepted a bill – proposed by the Party for Animals (*Partij voor de Dieren*) – that would have led to banning the ritual slaughter of animals without first stunning them. The Dutch Senate (*Eerste Kamer der Staten-Generaal*) rejected the bill in its proposed format in December 2011. Had this bill been accepted, it could have had repercussions on the provision of kosher or halal meat to practitioners of Judaism or Islam. The debate, however, is still ongoing, with the Secretary of State for Agriculture in discussion with representatives of Jewish and Muslim groups to define modifications that could be applied to the legislation.¹²⁴

A bill proposing the banning of ritual slaughter without anaesthetising animals was proposed by the New-Flemish Alliance party (*Nieuw-Vlaamse Alliantie*) in late 2010 in **Belgium**. The bill is still pending before Parliament (*Chambre des représentants*). Its substance, according to its

120 France (2011) Law 2010-1192.

121 Belgium (2011) *Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage*.

122 Netherlands, Ministry of the Interior and Kingdom Relations (2011).

123 Netherlands, Lower House of Parliament (2012).

124 Netherlands, Government of the Netherlands (2012).

authors, is that the well-being of animals should take precedence over the right to freedom of religion.¹²⁵

Discussions on practices of ritual slaughter were also held in **France**, although within the framework of the protection of consumers and the traceability of consumer products, particularly in relation to labelling meat as coming from animals that were slaughtered without being stunned. A decree relating to the modalities of slaughter was submitted to the consultative committee on the health and protection of animals (*Comité consultatif de la santé et de la protection animale*) in October.¹²⁶

5.7.2. Cases of discrimination on the grounds of religion or belief

Documented cases of unequal treatment on the grounds of religion or belief often relate to discrimination against Muslim women wearing veils at the workplace. These cases also often relate to the intersection of sex and religion as grounds of discrimination.

A number of cases pertaining to discrimination on the grounds of religion or belief are reported in the context of education. With respect to the display of religious symbols, the Grand Chamber of the European Court of Human Rights (ECtHR) ruled in March in *Lautsi and others v. Italy* that the requirement set by Italian law to display crucifixes in the classrooms of state schools does not violate the rights of parents to education and teaching in conformity with their own religious and philosophical convictions (protected under Article 2 of Protocol No. 1 of the ECHR).¹²⁷ Although the ECtHR did not find cause to examine the case under Article 14 of the ECHR prohibiting discrimination, its judgment sheds light on the question of when differential treatment on the grounds of religion might be justifiable. In this case, the ECtHR considered that the display of a crucifix is essentially a “passive symbol” that “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities”. At the same time, it acknowledged that “the display of a religious symbol on classroom walls may have an influence on pupils and so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed.”

The ECtHR concluded that the point at which religious activities or symbols can be considered to infringe upon freedom of conscience or religion is when an active process of “indoctrination” takes place.

“It is true that by prescribing the presence of crucifixes in state-school classrooms – a sign which, whether or not it is accorded in addition a secular symbolic value, undoubtedly refers to Christianity – the regulations confer on the country’s majority religion preponderant visibility in the school environment. That is not in itself sufficient, however, to denote a process of indoctrination on the respondent State’s part and establish a breach of the requirements of Article 2 of Protocol No. 1.”

European Court of Human Rights, Lautsi and others v. Italy, 18 March 2011, paragraph 71

The Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG) in **Germany** found that not permitting pupils to pray within school premises outside of school hours could amount to discrimination on the grounds of religion or belief (case BVerwG 6 C 20.10, OVG 3 B 29.09). The BVerwG concluded that putting restrictions on praying within school premises could not be justified on the grounds of the right to education nor by invoking the neutrality of the state.

Restrictions could, however, be justified to safeguard the religious freedom of other pupils or in the interest of ensuring peaceful coexistence among pupils at the school. Since there had been several incidents motivated by religious tensions among pupils at the school in question, the BVerwG was prepared to accept that allowing an individual to pray on its premises could give rise to additional tensions.

The BVerwG nevertheless found that the school should have explored less intrusive means than an outright prohibition – such as providing a separate prayer room – for the limitation to be considered as proportionate to the need of preserving peaceful coexistence. The school had, however, already tried this, but the dedicated prayer room had given rise to conflicts between pupils wearing headscarves and those who did not, and because male students refused to share the room with female pupils. The school judged that the decision to restrict prayers altogether was justified in light of the fact that a dedicated prayer room proved not to be an adequate solution to the problem.¹²⁸

Other cases relate to situations where freedom of religion exercised by religious organisations may itself result in discrimination. Article 4 (2) of the Employment Equality Directive¹²⁹ stipulates that churches and other public or private organisations with an ethos based on religion or belief may require individuals working for them to be loyal to that ethos, as long as this requirement conforms to national constitutions and laws.

¹²⁵ Belgium, *Chambre des Représentants* (2010).

¹²⁶ France, *Assemblée Nationale* (2011).

¹²⁷ European Court of Human Rights (ECtHR), 30814/06, *Lautsi and others v. Italy*, 18 March 2011.

¹²⁸ Germany, Federal Administrative Court, BVerwG 6 C 20.10, OVG 3 B 29.09, 30 November 2011.

¹²⁹ Council Directive 2000/78/EC, OJ 2000 L 303, p. 16.

In September, the **German** Federal Labour Court (*Bundesarbeitsgericht*) ruled that the dismissal of a Catholic chief physician working in a Catholic hospital because of the doctor's remarriage was unlawful.¹³⁰ By contrast, in *Siebenhaar v. Germany* – a case concerning the dismissal of an employee from a kindergarten run by a Protestant parish on the grounds of her active involvement with another religious community – the ECtHR found no violation of Article 9 of the ECHR guaranteeing freedom of religion or belief.¹³¹

According to the domestic courts that had examined the case, the dismissal had been necessary to preserve the Church's credibility, which outweighed the jobholder's interest in keeping the post. In ruling that the dismissal of the kindergarten teacher by the Protestant Church for active commitment to another religious community was justified, the ECtHR found the German labour courts' findings to be reasonable.

5.7.3. Evidence of intolerance towards religious groups

Intolerance towards religious groups persisted among sections of the general public and in political discourse in EU Member States in 2011. ENAR, the European Network Against Racism, reports incidents of intolerance directed at Jews, Muslims and minority non-Orthodox Christians in the EU. ENAR relates evidence showing that, as well as being the victims of violence, members of ethnic and religious minorities suffer discrimination in employment, housing, education, health and access to goods and services.¹³²

The UN Special Rapporteur on freedom of religion or belief criticised integration debates in **Germany** because they focused on Muslims. This focus, he argued, could push some Muslims towards radicalisation and intolerance.¹³³

The Institute of Race Relations noted that some anti-Muslim rhetoric in the **United Kingdom** is influenced in part by counter-terrorism policies, which have been shown to contribute to the treatment of Muslim minorities as 'suspect communities'.¹³⁴ This finding echoes that of comparative research funded by the Economic and Social Research Council on the impact of counter-terrorism policies on Irish and Muslim communities in Britain carried out at London Metropolitan University.¹³⁵

Intolerance against Muslims was evident in **Bulgaria**, where supporters of the Ataka political party attacked Muslims who congregated for Friday prayer in Sofia's Banya Bashi

mosque on 20 May 2011. Several people were injured in the attack and the police made a number of arrests on the day. Pre-trial proceedings were initiated immediately. Similarly, violence against Jehovah's Witnesses erupted in Burgas when the Bulgarian National Movement (*Българско национално движение*) organised a demonstration in April calling for the banning of this faith. A group of young men with hoods raided the Kingdom Hall, the place of worship of the Jehovah's Witnesses, with bystanders chanting and shouting slogans to encourage their actions. Seven demonstrators were detained, of which five were later convicted as per the penal code, the scope of which was extended in April in line with the transposition into Bulgarian law of the Framework Decision on Combating Racism and Xenophobia.

Outlook

EU institutions, national courts and equality bodies are expected to increasingly recognise and use the concept of multiple discrimination – a trend that would allow policy makers to elaborate measures tailored to addressing the obstacles facing those most vulnerable to discrimination on several grounds.

Whereas the adoption of the European Commission's proposal for a horizontal directive prohibiting discrimination beyond employment on the grounds of sexual orientation, age, disability and religion or belief risks further delays, it is crucial that its primary aim – namely to engage in a more all-encompassing fight against discrimination – is put into practice.

At the national level, legislative measures taken to fully implement the CRPD and to combat discrimination on grounds of sexual orientation or gender identity will provide guidance to policy makers as they strive to combat all forms of discrimination more effectively. Also, the growing national-level emphasis on measures to promote accessibility for persons with disabilities may enhance the chances of achieving more inclusive education and independent living. There needs to be vigilance, however, to ensure that the impact of the economic crisis does not unduly affect the provisions of services to persons with disabilities.

The 2012 European Year of Active Ageing and Solidarity between Generations will offer an opportunity for policy makers to address and redress discriminatory treatment and the exclusion older people experience in some EU Member States.

Legal developments relating to health and safety, security issues or the protection of consumers that could adversely affect persons who follow religious practices in accordance with their beliefs will need close monitoring, so as to avoid situations of indirect discrimination on the grounds of religion or belief.

¹³⁰ Germany, Federal Labour Court (2011), 2 AZR 543/10, 8 September 2011.

¹³¹ ECtHR, 18136/02, *Siebenhaar v. Germany*, 3 February 2011.

¹³² ENAR, Gauci, J. (2011); ENAR, Iganski, P. (2011).

¹³³ Germany, German Parliament (2011b).

¹³⁴ United Kingdom, Institute of Race Relations (2011).

¹³⁵ Hickman, M. *et al.* (2011).



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UN & CoE

EU

January

8 February – Council of Europe European Commission against Racism and Intolerance issues its fourth report on Spain

February

7 March – UN Committee on the Elimination of Racial Discrimination holds a thematic discussion on racial discrimination against people of African descent

March

4 April – UN Committee on the Elimination of Racial Discrimination issues its Concluding observations on Lithuania and on Ireland

8 April – UN Committee on the Elimination of Racial Discrimination issues its Concluding observations on Spain

April

31 May – Council of Europe European Commission against Racism and Intolerance issues its fourth report on Cyprus

May

24 June – Council of Europe European Commission against Racism and Intolerance adopts general policy Recommendation No. 13 on combating anti-Gypsyism and discrimination against Roma

June

July

August

13 September – Council of Europe European Commission against Racism and Intolerance issues its fourth report on Lithuania

14 September – UN Committee on the Elimination of Racial Discrimination issues its Concluding observations on the Czech Republic, on Malta and on the United Kingdom

22 September – Council of Europe Summit of Mayors on Roma adopts final declaration supporting the setting up of a European alliance of cities and regions for Roma inclusion

September

October

November

December

January

February

9 March – European Parliament adopts a Resolution on the EU strategy on Roma inclusion

March

5 April – European Commission issues a Communication on an EU Framework for national Roma integration strategies up to 2020

April

May

June

July

August

2 September – Council of the European Union issues its conclusions on an EU Framework for national Roma integration strategies up to 2020

September

October

November

December

6

Racism and ethnic discrimination



The killing of 77 people and injuring of another 242 in Norway in July 2011, sent a stark and tragic reminder of how far the excesses of racism, antisemitism, ethnic discrimination and intolerance can go if left unchecked. The attacks also threw into sharp relief other manifestations of racism and ethnic discrimination in the European Union (EU) in 2011: anti-Roma violence in at least four EU Member States, violent clashes between local residents and asylum seekers and racially motivated murders all testified to the continued challenges posed by extreme forms of intolerance. In addition, and despite the greatest efforts of EU Member States to curb it, ethnic discrimination remains a reality throughout the EU, whether in the areas of healthcare, education, employment or housing. Roma populations in particular continue to face discrimination in these areas, as evidence collected by the FRA and other bodies demonstrates.

This chapter begins by describing notable incidents of racist violence against minority groups. It then moves to consider developments in legislation, policies and practices in EU Member States that pertain to racism and ethnic discrimination, including an overview of the status of official data collection on racist crimes in the EU. Next, evidence of ethnic discrimination in the areas of healthcare, education, employment and housing across EU Member States is examined. The chapter finishes by considering the situation of Roma populations in more depth, analysing it through the prism of ethnic discrimination. This last section also highlights initiatives taken at the EU and the national level to bring about improvements to the situation of Roma populations. At EU level, these initiatives are mainly reflected through the European Commission's communication on an EU Framework for national Roma integration strategies released in April 2011.¹

Key developments in the area of racism and ethnic discrimination:

- incidents of racist crime and violence continue to occur in many EU Member States. While gaps in data collection of such instances remain, some EU Member States are taking steps to improve data collection on racist crime;
- at EU Member State level studies reveal persisting disadvantages of second-generation migrant school children from particular backgrounds, while Roma children continue to experience disadvantages at school. Discrimination testing in some Member States reveals discrimination in employment and housing;
- the Council of the European Union endorses the European Commission's Communication on an EU Framework for national Roma integration strategies up to 2020. In the context of this new framework of cooperation, EU Member States communicate their national integration strategies on Roma inclusion to the European Commission;
- whereas several Member States begin introducing measures at the national level to improve Roma inclusion, recent data show the situation of Roma remain critical with respect to healthcare, education, employment, housing, poverty and discrimination.

¹ European Commission (2011).

6.1. Notable incidents of racist abuse in EU Member States

In March 2011, extremist groups in **Hungary** (Civil Guard for a Better Future – *Szebb Jövőért Polgárőrség*; Rascal Troop – *Betyársereg*; and Defence Force – *Véderő*) coalesced and organised anti-Roma demonstrations that lasted a full month in Gyöngyöspata. Demonstrators inflicted racist abuse on members of the local Roma population, including on:

- a young Roma woman they physically attacked and threatened, saying: ‘we will decorate the house with your blood!’;
- a Roma man they threatened with an axe in front of his two-year-old daughter and told: ‘[I] will use your blood to build my new house’;
- a pregnant Roma who went into pre-term labour provoked by the shock of the threats she endured.

In late August 2011, some 1,500 persons demonstrated against local Roma populations in Rumburk, **Czech Republic**. Rioters destroyed Roma property and yelled at them to go away. After another anti-Roma demonstration in September in Varnsdorf, a young demonstrator was charged with the crime of denying genocide. She was also seen wearing a T-shirt with the following slogan: “Revive Hitler! Get rid of the dirt! Roma into the gas chambers!” These incidents led to further tensions and anti-Roma demonstrations in other localities, such as Nový Bor.

A Roma driver believed to be close to the family of a Roma businessman, Kiril Rashkov, was implicated in the traffic accident death of a young Bulgarian man in September in **Bulgaria**, leading to a spree of anti-Roma violence there. On the night of the accident, three Rashkov family houses were burnt down. At anti-Roma rallies organised through Facebook demonstrators attacked and injured several Roma persons and vandalised Roma property. They also hurled insults at Roma and Turks, shouting slogans such as “Turks under the knife!”, “Death to Gypsies!”, “Gypsies into soap!”, or “Turks – out of Bulgaria!”

In December in Turin, **Italy**, a 16-year old girl reported she had been raped by a Roma person. After a general demonstration against criminality, organised by some inhabitants of the area where the girl lived, a group of local demonstrators marched to the Continassa Roma camp, setting it on fire. Although no one died, the camp was devastated and its inhabitants lost their belongings. The girl later admitted that she had not been sexually assaulted: she had invented the story to hide from her parents an intimate relationship with her Italian boyfriend.

Just days after the Turin incident, a second major episode of racist violence erupted, this time in Florence, **Italy**. A sympathiser of an organisation with neo-fascist leanings, CasaPound, killed two Senegalese nationals and seriously injured three others. Civil society organisations and some local authorities organised a large demonstration of solidarity in Florence on 17 December and the President of the Republic called for collective action to stop racist violence and crimes. After the murder, however, several messages were published online in support of the killer. The authorities launched investigations to identify and prosecute the authors of these statements.

Although events of such violence are the exception rather than the rule, official data collected in EU Member States that record incidents of racist crime suggest that the phenomenon remains an issue of great concern across the EU. Most of the data collection systems currently in place in EU Member States remain imperfect, as the next section of this chapter demonstrates.

6.2. Developments and trends in officially recorded racist crime

The Racial Equality Directive and the Framework Decision on Racism and Xenophobia,² respectively, guarantee protection against discrimination on grounds of race and ethnic origin, and protection against racist and xenophobic offences.

Despite the commitment and best efforts of Member States to counter racially motivated crime, such crime remains a reality in the EU. Furthermore, many Member States still do not have systematic mechanisms of data collection in place to record the incidence of racist crime at the national level. It therefore remains difficult to quantify the prevalence of racist crime in the EU or to compare trends over time among Member States.

The regular and continued collection of official data on racist crime by law enforcement agencies, criminal justice systems and relevant ministries is necessary if decision makers are to be provided with a solid base of evidence upon which to formulate effective and targeted policies to combat racist crime. The ready availability of reliable and robust data in the field would make it possible to assess the effectiveness of these policies and fine tune them as needed.

Most EU Member States record some form of official data on racist crime. There are, however, important differences as to the scope and transparency of the systems they operate, as Tables 6.1 and 6.2 show. Member

² Council Framework Decision 2008/913/JHA, OJ 2008 L 328, p. 55.



States' official data collection mechanisms on racist crime fall into four broad categories:

- no data – no data on racist crime are recorded or published;
- limited – data collection is limited to a few incidents of racist crime, and the data are, in general, not published;
- good – different bias motivations for racist crime are recorded (racism/xenophobia, religion, antisemitism, Islamophobia, (right-wing) extremism) and the data are, in general, published;
- comprehensive – different bias motivations for racist crime are recorded (racism/xenophobia, religion, antisemitism, Islamophobia, (right-wing) extremism), as are characteristics of victims and perpetrators, where criminal victimisation has occurred, and what types of crimes were committed, such as murder, assault or threats. The data are always published.

Table 6.1: Status of official data collection on racist crime, by country as of January 2012

No data	Limited	Good	Comprehensive
Estonia	Bulgaria	Austria	Finland
Romania	Cyprus	Belgium	Netherlands
	Hungary	Czech Republic	Sweden
	Italy	Denmark	United Kingdom
	Latvia	France	
	Luxembourg	Germany	
	Malta	Ireland	
	Portugal	Lithuania	
	Slovenia	Poland	
	Spain	Slovakia	
	Croatia		
Greece: data collection system established on 29 September 2011			

Source: FRA, 2011

Official data on racist crime continue not to be recorded or published in **Estonia** and **Romania**.

Steps to improve data collection were taken in **Greece**, **Italy** and **Spain**. On the initiative of the National Commission for Human Rights and the United Nations High Commissioner for Refugees (UNHCR), a network for the collection of data on incidents of racist violence was established in **Greece**, allowing authorities to monitor the incidence of racist crime more closely.³

The Observatory for security against discriminatory acts (*Osservatorio per la sicurezza contro gli atti discriminatori*,

3 Greece, National Commission for Human Rights and UNHCR Greece (2011).

Oscad) set up in **Italy** in September 2010 now allows for the official monitoring of discriminatory acts against minorities motivated by ethnic or racial origin.⁴ Oscad is housed at the Department of Public Security within the Ministry of the Interior and works under the authority of the Central Direction of the Criminal Police. Part of Oscad's activities consist in determining whether discriminatory acts against minorities motivated by ethnic origin can be prosecuted as criminal offences.

The crime statistics system in **Spain** was amended in 2011, resulting in the systematic recording of racist/xenophobic acts in the autonomous regions of the Basque Country, Catalonia and Navarra.⁵

FRA research has shown that it is often difficult to distinguish between ethnic and religious discrimination. For example, the European Union Minorities and Discrimination Survey – EU-MIDIS – interviewed 23,500 people from various ethnic minority and immigrant groups across the 27 Member States. About 40 % of all the respondents self-identified as Muslim. The survey shows that many of the members of the minority groups that were surveyed said they suffered discrimination, with almost half of Muslim respondents not being able to tell whether they felt they were discriminated against on the grounds of their 'religion or beliefs' or on the grounds of their 'ethnic or immigrant background'.

Tables 6.3-6.5 indicate trends in officially recorded and published data on racist, antisemitic and (right-wing) extremist crimes in individual EU Member States; not enough data is collected at Member State level to report on trends for crimes motivated by Islamophobia. Direct comparisons between Member States cannot and should not be made here, because any observed variations are a reflection of data collection practices at the national level.

The data included in these tables differ from those presented in the annual report on hate crime in the region of the Organization for Security and Co-operation in Europe (OSCE) and published by its Office for Democratic Institutions and Human Rights (ODIHR).⁶ ODIHR's annual report presents data on hate crime incidents submitted to it by the governments of the OSCE's 56 participating States, partner organisations and NGOs active in the field.

The data presented in Tables 6.3-6.5 are collected from official reports relating to racist crime available in the public domain published by the relevant EU Member State authorities, and as such reveal what official criminal justice data are able to show with respect to racist crime.

4 Italy, Italian National Police (2011).

5 Spain, Ministry of Labour and Immigration (2011).

6 Organization for Security and Co-operation in Europe (OSCE) – Office for Democratic Institutions and Human Rights (2011).

Table 6.2: Officially recorded racist crime, by country, as of 1 January 2012

	Recorded data (as defined by the body collecting the data)	Data source(s)	Publication of data
AT	Politically motivated crimes (<i>Politisch motivierte Kriminalität</i>): committed offences (<i>Tathandlungen</i>) and cases reported to the court (<i>Anzeigen</i>)	Ministry of the Interior, Federal Agency for State Protection and Counter-terrorism (<i>Bundesministerium für Inneres, Bundesamt für Verfassungsschutz und Terrorismusbekämpfung</i>)	Data published: annual report on the protection of the Constitution (<i>Verfassungsschutzbericht</i>)
BE	Number of incidents of racism and xenophobia reported to the police	Centre for Equal Opportunities and Opposition to Racism	Data published: annual report on discrimination/diversity (<i>Rapport annuel Discrimination/Diversité – Jaarverslag Discriminatie / Diversiteit</i>)
BG	Criminal offences against the rights of citizens recorded by the police	Ministry of the Interior	Data not published
CY	Serious offences – racial incidents and/or court cases	Cyprus Police	Data published: Serious offences – racial incidents and/or cases
CZ	Crimes with extremist context (<i>Trestná činnost s extremistickým podtextem</i>)	Ministry of the Interior, Security Policy Department (<i>Ministerstvo vnitra, Odbor bezpečnostní politiky</i>)	Data published: annual report on the issue of extremism in the Czech Republic (<i>Zpráva o problematice extremismu na území České republiky</i>)
DE	Politically motivated crime: politically motivated criminal offences (<i>Politisch motivierte Kriminalität: politisch motivierte Straftaten</i>)	Ministry of the Interior (<i>Bundesministerium des Innern</i>)	Data published: annual report on the protection of the Constitution (<i>Verfassungsschutzbericht</i>)
DK	Crimes with a possible extremist background (<i>Kriminelle forhold med mulig ekstremistisk baggrund</i>)	Danish Security and Intelligence Service (<i>Politiets efterretningstjeneste</i>)	Data published: annual report on crimes with a possible extremist background (<i>Kriminelle forhold [...] med mulig ekstremistisk baggrund</i>)
EE	No official data collected on racist crime	n/a	n/a
EL	Incidents of racist violence	National Commission for Human Rights and Office of the UN High Commissioner for Refugees in Greece	n/a
ES	Racist and xenophobic acts (Basque Country, Catalonia, Navarra)	National Police Force and Civil Guard	Data not published
FI	Racist crimes reported to the police	Police College of Finland (<i>Poliisiammattikorkeakoulu</i>)	Data published: annual report on hate crimes reported to the police in Finland (<i>Poliisin tietoon tullut viharikollisuus Suomessa</i>)
FR	Actions and threats with a racist, antisemitic or xenophobic character recorded by the police and the gendarmerie (<i>actes et menaces à caractère raciste, antisémite et xénophobe constatés par les services de police et de gendarmerie</i>)	National Consultative Commission on Human Rights (<i>Commission nationale consultative des droits de l'homme</i>)	Data published: annual report on the fight against racism, antisemitism and xenophobia (<i>La lutte contre le racisme, l'antisémitisme et la xénophobie</i>)
HU	Number of criminal cases	Unified Investigation and Prosecution Statistical Database	Data not published
IE	Reported racist crime	Central Statistical Office	Data published: Office for the Promotion of Migrant Integration
IT	Discriminatory acts against minorities motivated by ethnic or racial origin, religious beliefs, sexual orientation, gender identity and disability recorded	Italian National Police (<i>Polizia di Stato</i>), Observatory for security against discriminatory acts (<i>Polizia di Stato, Osservatorio per la sicurezza contro gli atti discriminatori, Oscad</i>)	Data published as an aggregated figure of discriminatory acts



Table 6.2 : (continued)

	Recorded data (as defined by the body collecting the data)	Data source(s)	Publication of data
LT	Recorded cases, pre-trial investigations and number of court cases/people sentenced in relation to discrimination on grounds of nationality, race, sex, descent, religion or belonging to other groups, and in relation to incitement against any national, racial, ethnic, religious or other group of persons	Information Technology and Communications Department, Ministry of the Interior (<i>Informatikos ir ryšių departamentas prie Vidaus reikalų ministerijos</i>)	Data not published
LU	Offences against persons, racial discriminations (<i>Infractions contre les personnes, discriminations raciales</i>)	Luxembourg Police (<i>Police grand-ducale</i>)	Data published: annual activity report of the police (<i>Rapport d'activité de la Police grand-ducale</i>)
LV	Number of criminal cases initiated in relation to incitement to national, ethnic and racial hatred	Security Police (<i>Drošības policija</i>)	Data not published
MT	Racist crime	Malta Police Force	Data not published
NL	Incidents of criminal discrimination recorded by the police (<i>Door de politie geregistreeerde en aangeleverde incidenten met een discriminatoir karakter</i>)	Police's National Expertise Centre on Diversity (<i>Landelijk ExpertiseCentrum Diversiteit van de Politie</i>)	Data published: annual report on criminal discrimination (<i>Criminaliteitsbeeld discriminatie</i>)
PL	Initiated proceedings and ascertained crimes relating to hatred based on national, ethnic, racial or religious differences; cases with racist or xenophobic motives handled by prosecutorial offices; final convictions pursuant to relevant articles of the criminal code	Temida, Police Crime Statistics System; State Prosecution; National crime register	Data not published
PT	Racist crimes recorded by the police	Directorate-General for Justice Policy (<i>Direcção-Geral da Política de Justiça</i>)	Data not published
RO	No official data collected on racist crime	n/a	n/a
SE	Offences reported to the police with an identified hate crime motive (<i>polisänmälningar med identifierade hatbrottsmotiv</i>)	Swedish National Council for Crime Prevention (<i>Brottsförebygganderådet</i>)	Data published: annual report on statistics relating to offences reported to the police with an identified hate crime motive (<i>Statistik över polisänmälningar med identifierade hatbrottsmotiv</i>)
SI	Criminal offences including racial, ethnic or religious intolerance as a motive	Police Directorate (<i>Policijske uprava</i>)	Data not published
SK	Racially motivated crime, prosecuted and investigated persons (<i>rasovo motivovaná trestná činnosť, údaje o stíhaných a vyšetrovaných osobách</i>)	Ministry of the Interior, Police (<i>Ministerstvo vnútra, Polícia</i>)	Data published: monthly report on crime statistics (<i>Štatistika kriminality v Slovenskej republike</i>)
UK	England, Northern Ireland & Wales: recordable crimes under Home Office recording rules Scotland: racist incidents recorded by the police; racist hate crime charges	England, Northern Ireland & Wales: Association of Chief Police Officers Scotland: Procurator Fiscal	Data published: England, Northern Ireland & Wales: Total of recorded hate crime from regional forces in England, Wales and Northern Ireland during the calendar year Scotland: annual report on hate crime (fiscal year)
HR	Reported criminal offences, racial or other discrimination (<i>Rasna i druga diskriminacija</i>)	Ministry of the Interior (<i>Ministarstva unutarnjih poslova</i>)	Data published: overview of basic indicators for public safety (<i>Temeljnih sigurnosnih pokazatelja</i>)

Source: FRA, 2011

Promising practice

Teaching about the Holocaust and preventing crimes against humanity

Since 2003, the Croatian Agency for Education has been developing the school curriculum to include a teacher training programme designed to assist teachers in incorporating Holocaust education and the prevention of crimes against humanity (*Poučavanje o holokaustu i sprečavanju zločina protiv čovječnosti*). A total of 517 teachers have attended the annual three-day training seminars on the matter and proceeded to develop and deliver training content and student projects. Each year, the Ministry also sends a circular to all schools requesting that Holocaust Remembrance Day be observed, thereby ensuring the continued impact and success of the initiative.

The Council of Europe, together with the OSCE, has also set a website to provide information on the Roma genocide (www.romagenocide.org). It comprises a database on the Roma genocide, with a virtual library of useful publications, and an interactive map on which countries can indicate their special/distinctive features at national level. The website also provides information on curricula, available teaching materials, school textbooks, places of remembrance, and innovative practices introduced by ministries, civil society, international organisations, museums and schools.

For more information, see: Agency for Education (Agencije za odgoj i obrazovanje) www.azoo.hr/index.php?option=com_content&view=article&id=3204:pouavanje-o-holokaustu-mora-postati-temeljna-vrijednost-u-odgoju-i-obrazovanju&catid=273:povijest

When considering trends, care must be taken not to confuse the rate of recorded incidents of racist crime with the actual rate of racist crime. Not only is it widely acknowledged that racist crime is grossly under-recorded (as are many forms of inter-personal crime), but variations observed within EU Member States from one year to the next could be the result of:

- how racist crime is defined in criminal law;
- changes in how (the characteristics of) incidents of racist crime are recorded;
- the willingness of victims and/or witnesses to report incidents;
- the actual occurrence of racist crime.

Tables 6.3-6.5 should therefore be read as indicative of fluctuations in recorded racist crime. They should not be taken to reflect the prevalence of racist crime in any given EU Member State. The example below illustrates why comparisons should not be made between Member States.

Member States where few incidents of racist crime are recorded tend to show the highest levels of

year-on-year variation in recorded crime. Consider the 300 % increase in recorded racist crime observed in **Cyprus** between 2009 and 2010, the 11.8 % decrease observed in **England** and **Wales** and the 15.9 % decrease observed in **Germany** in the same period. While 24 incidents account for the increase in Cyprus, more than 3,000 incidents account for the decreases observed in either England and Wales or Germany. For this reason, any observed variation must be considered on its own merits; in relation to changes in data collection practices at the national level; and in relation to both the national context and the period when incidents of racist crime are recorded.

Increases in recorded racist crime are observed in **Austria**, **Cyprus**, the **Netherlands** and **Northern Ireland** as well as **Croatia** (Table 6.3). Decreases are observed in all other Member States that publish official data. In terms of officially recorded antisemitic crime, increases are observed in **Austria** and the **Netherlands**, while decreases are observed in all other Member States that publish data (Table 6.4). In terms of right-wing extremist crime, a fall in officially recorded crime can be observed in all Member States that publish data, except the **Netherlands** (Table 6.5).

FRA ACTIVITY

Addressing the under-recording of incidents of crime: surveys on experiences of criminal victimisation in the EU

The FRA has completed one survey encompassing experiences of criminal victimisation to date – the European Union Minorities and Discrimination Survey (EU-MIDIS) – with three other FRA surveys at different stages of implementation: (1) experiences and perceptions of antisemitism among Jewish populations in selected EU Member States; (2) discrimination against and victimisation of lesbian, gay, bisexual and transgender (LGBT) persons; and (3) an EU-wide survey of violence against women. Taken together, these surveys will provide a more complete picture of experiences of criminal victimisation among various populations groups across the EU. The results of these surveys will be published in 2013.

For more information on these surveys, see:

- EU-MIDIS: <http://fra.europa.eu/eu-midis>
- Experiences and perceptions of antisemitism among Jewish populations in selected EU Member States: http://fra.europa.eu/fraWebsite/research/projects/proj_survey_jews_en.htm
- Discrimination and victimisation of LGBT persons: http://fra.europa.eu/fraWebsite/research/projects/proj_surveys-lgbt-persons_en.htm
- EU-wide survey of violence against women: http://fra.europa.eu/fraWebsite/research/projects/proj_eu_survey_vaw_en.htm

Table 6.3: Trends in officially recorded racist crime, 2000-2010 number of recorded incidents and year-on-year variation in recorded crime, by country

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
AT	450	528 17.3 %	465 -11.9 %	436 -6.2 %	322 -26.1 %	406 26.1 %	419 3.2 %	752 79.5 %	835 11 %	791 -5.3 %	1,040 31.5 %
BE	757	751 -0.8 %	727 -3.2 %	848 16.6 %	1,021 20.4 %	1,226 20.1 %	1,362 11.1 %	1,318 -3.2 %	1,193 -9.5 %	1,086 -9 %	924 -14.9 %
CY	n/a	n/a	n/a	n/a	n/a	2	18 800 %	3 -83.3 %	6 100 %	8 33.3 %	32 300 %
DE	n/a	14,725	12,933 -12.2 %	11,576 -10.5 %	12,553 8.4 %	15,914 26.8 %	18,142 14 %	17,607 -2.9 %	20,422 16 %	19,468 -4.7 %	16,375 -15.9 %
DK	28	116 314.3 %	68 -41.4 %	53 -22.1 %	37 -30.2 %	87 135.1 %	227 160.9 %	35 -84.6 %	113* 323.1 %	73 -35.4 %	62 -15.1 %
FI	495	448 -9.5 %	364 -18.8 %	522 43.4 %	558 6.9 %	669 19.9 %	748 11.8 %	698 -6.7 %	1,163* 67.1 %	1,385 19.1 %	1,168 -15.7 %
FR	903	424 -53 %	1,317 210.6 %	833 -36.8 %	1,574 89 %	979 -37.8 %	923 -5.7 %	723 -21.7 %	864 19.5 %	1,841 113.1 %	1,352 -26.6 %
IE	72	42 -41.7 %	100 138.1 %	62 -38 %	84 35.5 %	94 11.9 %	173 84 %	214 23.7 %	172 -19.6 %	128 -25.6 %	122 -4.7 %
LU	n/a	n/a	n/a	n/a	n/a	n/a	14	17 21.4 %	21 23.5 %	28 33.3 %	24 -14.3 %
NL	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	1,223	1,089 -11 %	1,168 7.3 %
SE	2,703	2,785 3 %	2,391 -14.1 %	2,436 1.9 %	2,414* -0.9 %	2,383 -1.3 %	2,575 8.1 %	2,813 9.2 %	4,826* 71.4 %	4,707 -2.5 %	4,338 -7.8 %
SK	35	40 14.3 %	109 172.5 %	119 9.2 %	79 -33.6 %	121 53.2 %	188 55.4 %	155 -17.6 %	213 37.4 %	132 -38 %	114 -13.6 %
UK: EN & WAL** ***	25,116	30,133 20 %	31,034 3 %	35,022 12.9 %	37,074 5.9 %	41,459 11.8 %	42,554 2.6 %	38,351 -9.9 %	36,762 -4.1 %	35,705 -2.9 %	31,486 -11.8 %
UK: NI**	n/a	n/a	n/a	n/a	n/a	n/a	1,006	1,183 17.6 %	1,044 -11.7 %	1,036 -0.8 %	1,061 2.4 %
UK: SCO**	n/a	n/a	1,699	2,673 57.3 %	3,097 15.9 %	3,856 24.5 %	4,294 11.4 %	4,474 4.2 %	4,543 1.5 %	4,564 0.5 %	4,513 -1.1 %
UK: EN, NI, WAL****										43,426	39,311 -9.5 %
HR	n/a	1	0	1	3 200 %	0	9	5 -44.4 %	8 60 %	6 -25 %	11 83.3 %

Notes: Comparisons can only be made within, and not between, EU Member States. * Not comparable with previous years due to changes in recording procedure. ** Fiscal year: April – March. UK data include: EN – England, WAL – Wales, NI – Northern Ireland and SCO – Scotland. *** Racist and religiously motivated criminal offences. **** Calendar year: January – December, racist crime recorded by the Association of Chief Police Officers.

Source: FRA, 2011

6.3. Ethnic discrimination in healthcare

Before presenting evidence of ethnic discrimination in healthcare in EU Member States, it must be noted that various legal instruments guarantee the prohibition of racial or ethnic discrimination in healthcare, education, employment and housing. These include the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the Charter of Fundamental Rights of the

European Union; the Racial Equality Directive;⁷ and the European Social Charter (revised).

In addition, adequate housing is recognised as one element of the right to an adequate standard of living in the Universal Declaration of Human Rights. The Charter of Fundamental Rights of the European Union further provides that “in order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources,

7 Council Directive 2000/43/EC, OJ 2000 L 180, p. 22.

Table 6.4: Trends in officially recorded antisemitic crime, 2001–2010: number of recorded incidents and year-on-year variation in recorded crime, by country

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
AT	3	20 566.7 %	9 -55.0 %	17 88.9 %	8 -52.9 %	8 0.0 %	15 87.5 %	23 53.3 %	12 -47.8 %	27 125.0 %
CZ	n/a	n/a	n/a	n/a	23	14 -39.1 %	18 28.6 %	27 50.0 %	48 77.8 %	28 -41.7 %
DE	1,629	1,594 -2.1 %	1,226 -23.1 %	1,346 9.8 %	1,682 25.0 %	1,662 -1.2 %	1,561 -6.1 %	1,496 -4.2 %	1,690 13.0 %	1,268 -25.0 %
FR	219	936 327.4 %	601 -35.8 %	974 62.1 %	508 -47.8 %	571 12.4 %	402 -29.6 %	459 14.2 %	815 77.6 %	466 -42.8 %
NL	41	60 46.3 %	50 -16.7 %	58 16.0 %	65 12.1 %	108 66.2 %	50 -53.7 %	141 182.0 %	209 48.2 %	286 36.8 %
SE	115	131 13.9 %	128 -2.3 %	151 18.0 %	111 -26.5 %	134 20.7 %	118 -11.9 %	159 34.7 %	250 57.2 %	161 -35.6 %
UK*	310	350 12.9 %	375 7.1 %	532 41.9 %	459 -13.7 %	598 30.3 %	561 -6.2 %	546 -2.7 %	926 69.6 %	639 -31.0 %
UK: EN, NI, WAL**									703	488 -30.6 %

Notes: Comparisons can only be made within, and not between, EU Member States. *Antisemitic incidents in the UK as a whole (England, Northern Ireland, Wales and Scotland) recorded by the Community Security Trust, an independent Jewish organisation that has been used by successive governments as a source of data on antisemitic incidents. UK data include: EN – England, WAL – Wales, NI – Northern Ireland and SCO – Scotland. ** Antisemitic crimes recorded in the calendar year in England, Wales & Northern Ireland; data collected by the Association of Chief Police Officers.

Source: FRA, 2011

Table 6.5: Trends in officially recorded right-wing extremist crime, 2000–2010 number of recorded incidents and year-on-year variation in recorded crime, by country

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
AT	291	301 3.4 %	261 -13.3 %	264 1.1 %	189 -28.4 %	188 -0.5 %	204 8.5 %	280 37.3 %	333 18.9 %	356 6.9 %	335 -5.9 %
CZ	364	452 24.2 %	473 4.6 %	335 -29.2 %	364 8.7 %	253 -30.5 %	248 -2.0 %	196 -21.0 %	217 10.7 %	265 22.1 %	252 -4.9 %
DE	n/a	10,054	10,902 8.4 %	10,792 -1.0 %	12,051 11.7 %	15,361 27.5 %	17,597 14.6 %	17,176 -2.4 %	19,894 15.8 %	18,750 -5.8 %	15,905 -15.2 %
FR	207	198 -4.3 %	179 -9.6 %	148 -17.3 %	461 211.5 %	419 -9.1 %	301 -28.2 %	247 -17.9 %	129 -47.8 %	181 40.3 %	127 -29.8 %
NL	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	85	113 32.9 %	134 18.6 %
SE	566	392 -30.7 %	324 -17.3 %	448 38.3 %	306*	292 -4.6 %	272 -6.8 %	387 42.3 %	667*	538 -19.3 %	421 -21.7 %

Notes: Comparisons can only be made within, and not between, EU Member States. * Not comparable with previous years due to changes in the recording procedure.

Source: FRA, 2011

in accordance with the rules laid down by Union law and national laws and practices.”

This section considers cases of ethnic discrimination in healthcare against the backdrop of these legal instruments.

Through a study conducted in four public and private institutions in the Ile-de-France region and drawing on 116 interviews and field observations, the former Equal Opportunities and Anti-discrimination Commission (*Haute autorité de lutte contre les discriminations et*

pour l'égalité, Halde)⁸ uncovered evidence of three types of racial discrimination in the healthcare sector, whether actual or perceived.⁹ The first, most common, type relates to patients discriminating against healthcare professionals, which the latter perceive as the ‘ordinary racism’ they endure daily. The second type is that of healthcare professionals discriminating against

⁸ In March 2011, the Halde was incorporated into the Rights Defender (*Défenseur des Droits*), an independent constitutional authority.

⁹ Bertossi, C. and Prudhomme, D. (2011), p. 5.

patients. The third type consists of healthcare professionals discriminating against one another. According to the study, victims of ethnic discrimination never report the incidents, whether to management or to complaint bodies. In fact, hospital managers who were also interviewed said they were unaware ethnic discrimination was taking place in health facilities, which was why they had not addressed the problem.

The **Spanish** council for the promotion of equal treatment and non-discrimination on the grounds of ethnic or racial origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*), which established a network of centres of assistance for victims of discrimination (*Red de centros de asistencia a víctimas de discriminación por origen racial o étnico*) in June 2010, published a report on the functioning of this network in April 2011.¹⁰ The report shows that the network dealt with 235 cases of alleged discrimination in its first seven months, finding discrimination in 212 of the cases, nine of which pertained to the health sector. The council also carried out a survey in 2010 among 556 members of ethnic and migrant groups in Spain on their perceptions of discrimination.¹¹ The results of this survey, published in March 2011, show that 28.8 % of the respondents said they had felt discriminated against in the area of health in the past 12 months.

The differences in cases of alleged discrimination and people's perceptions of discrimination revealed through this type of survey could indicate that channels for making complaints are difficult to access for the minorities concerned.

Cases of (alleged) ethnic discrimination in healthcare are sometimes settled by awarding compensation to (alleged) victims of discrimination. The **Swedish** Equality Ombudsman (*Diskrimineringsombudsmannen*) reports a case it was involved in where a settlement was reached in 2011. The facts of the case relate to medical staff seemingly berating a Kurdish woman for her perceived failure to integrate into Swedish society. When she sought treatment, a doctor badgered her with repeated questions about why she had not learned Swedish despite 15 years in the country and made disparaging comments about her facial tattoos. As part of the settlement, Karlstad County Council awarded her SEK 30,000 (€3,000)¹² in compensation.

¹⁰ Spain, Council for the promotion of equal treatment and non-discrimination on the grounds of ethnic or racial origin, Network of centres of assistance to victims of discrimination (2011).

¹¹ Spain, Council for the promotion of equal treatment and non-discrimination on the grounds of ethnic or racial origin (2011).

¹² Sweden, Equality Ombudsman (2011a).

Few EU Member States, however, collect data on healthcare users by nationality and/or country of birth, while the **United Kingdom** alone collects data specifically on ethnicity. Therefore, in most Member States, this precludes any comprehensive or comparative analysis of inequalities in healthcare outcomes between members of ethnic groups and the majority population.

6.4. Ethnic discrimination in education

While at a formal level EU Member States may provide open access to education, in practice members of ethnic groups continue to face difficulties due to segregation; discriminatory enrolment procedures and access testing; unavailability or inaccessibility of pre-school facilities; or cuts in educational funds. Roma children are particularly disadvantaged by practical barriers to education.

This section begins by giving an overview of policies and practices that could lead to or that have led to ethnic discrimination in education. It then focuses on actual experiences of ethnic discrimination in education as reported through research in EU Member States. The section finishes by considering discrimination of Roma in education.

“Promoting and protecting the right to education and promoting equality and non-discrimination are clearly interrelated duties in accordance with human rights norms. The decisions of several human rights bodies recognise the central role of education in ensuring the enjoyment of an equal protection of other human rights.”

UN Special Rapporteur on the right to education (2011)

6.4.1. Policies and practices

UN and national monitoring bodies have highlighted barriers to education in EU Member States that affect ethnic groups. In its 2011 report on **Spain**, CERD raised concerns about the existence of ‘ghetto schools’ for migrant and Roma children.¹³ The European Commission against Racism and Intolerance (ECRI) reflected similar concerns in its 2011 report on Spain, which noted that it had received “consistent reports of ‘ghetto’ schools of immigrant and Roma children in certain parts of the country, and discriminatory practices in the admission procedures, enabling publicly-funded private schools to pick and choose pupils.”¹⁴

¹³ United Nations, Committee on the Elimination of Racial Discrimination (UN, CERD) (2011a).

¹⁴ Council of Europe, European Commission against Racism and Intolerance (ECRI) (2011a), p. 18.

In its concluding observations on the **United Kingdom**, CERD points out “the relative lack of success in addressing under-achievement in schools, particularly for those groups which have been identified as most affected, notably Gypsy and Traveller children and Afro-Caribbeans.”¹⁵

The British government announced changes in April to the related Ethnic Minority Achievement Grant (EMAG) programme, which aims to narrow the achievement gaps of pupils from minority ethnic groups who are most at risk of underachieving.¹⁶ The Equality and Human Rights Commission (EHRC) – the national human rights institute – expressed concerns that by making EMAG part of the Dedicated School Grant system it would lose its ring-fenced status. “The consequence of this is that schools will have discretion to increase or reduce the level of specialist provision to ethnic minority pupils as they see fit,”¹⁷ which brings with it a risk that support for black and minority ethnic pupils will be reduced.

In its August response to CERD, the British government countered, however, that “for England we believe that schools know best how to raise the attainment and aspirations of Black and minority ethnic pupils (including Gypsies and Travellers) and so we are giving them the resources and freedom they need to achieve this. £210 million of funding for these groups of pupils is available to schools this year as part of the mainstreamed Dedicated School Grant.”¹⁸

6.4.2. Experiences of ethnic discrimination and segregation in education

Children with ethnic minority backgrounds experience discriminatory treatment or segregation in education in several EU Member States, research has shown. The Ethnic Differences in Education and Diverging Prospects for Urban Youth in an Enlarged Europe (Edumigrom) study on Ethnic and Social Differences in Education in a Comparative Perspective¹⁹ surveyed approximately 5,000 second-generation migrant and Roma pupils between 14- and 17-years of age who were attending the final year of compulsory education. This comparative survey, funded by the European Commission seventh framework programme, was conducted in 2009 in eight Member States: the **Czech Republic, Denmark, France, Germany, Hungary, Romania, Slovakia** and the **United Kingdom**.

The findings of the study, published in late December 2010, found that “children of ‘visible minorities’ [...] are continually exposed to conditions and daily practices in their schooling that conclude in remarkable relative disadvantages in their achievement and advancement.” These conditions and practices, it added, ensured the continued and unceasing reproduction of ethnic inequalities and made it ever more difficult for an individual to break out of the cycle and enjoy equal opportunities and prospects with their peers.²⁰

With respect to ethnicity-driven bullying, this survey also revealed important differences among EU Member States. About 60 % of students in the **Czech Republic** reported such bullying compared to 90 % of students in **France, Hungary** and the **United Kingdom**.²¹

There is also evidence from **Germany** of ethnic discrimination in education. The situation of people of Turkish origin in Germany was the subject of the 11th annual report of the Centre for Studies on Turkey (*Zentrum für Türkeistudien, ZfT*) published in January.²² In the summer/autumn of 2010, the ZfT conducted a survey among 1,000 adults aged 18 and over of Turkish origin living in North Rhine-Westphalia. Overall, 81 % of the respondents reported having experienced ethnic discrimination, with the highest rates of perceived discrimination reported at school and university: 60.3 % of the respondents reported having been the victims of ethnic discrimination in education.

According to the findings of the aforementioned survey on the perceptions of discrimination on the grounds of ethnic or racial origin carried out by the **Spanish** council for the promotion of equal treatment and non-discrimination, 52.9 % of respondents felt that they had been the subject of ethnic discrimination in education in the past 12 months.²³

6.5. Ethnic discrimination in employment

This section highlights cases of ethnic discrimination in employment identified in the reporting period. It then discusses discrimination testing in access to employment.

¹⁵ UN, CERD (2011b), p. 6.

¹⁶ United Kingdom, Department of Education (2011).

¹⁷ United Kingdom, Equality and Human Rights Commission (EHRC) (2011), p. 39.

¹⁸ United Kingdom, UK Government (2011).

¹⁹ Szalai, J. et al. (2010).

²⁰ Szalai, J. et al. (2010), p. 173.

²¹ Szalai, J. et al. (2010), p. 121.

²² Sauer, M. (2011).

²³ Spain, Council for the promotion of equal treatment and non-discrimination on the grounds of ethnic or racial origin (2011).



“Discrimination based on racial or ethnic origin may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and of social protection, the raising of the standard of living and quality of life, economic and social cohesion and solidarity. It may also undermine the objective of developing the European Union as an area of freedom, security and justice.”

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

6.5.1. Cases of ethnic discrimination in employment

An employee of the **French** national railways (SNCF) brought a case to the Criminal Court of Cambrai at the end of 2010, complaining of acts of racial discrimination and harassment at the workplace. The employee reported being a victim of abuse and bullying by a manager over a period of six years 2003–2009 because of his North African origin. The local branch of the Movement against Racism and for Friendship among Peoples (*Mouvement Contre le Racisme et pour l’Amitié Entre les Peuples*, MRAP) began legal proceedings as a civil complainant. In January, the court sentenced the defendant to pay €3,000 in damages, €300 to MRAP and €600 to the victim, plus legal costs.

In the case of *Gerschen Moodley v. Counter Product Marketing Ltd* in **Ireland**, the complainant, a black man from South Africa, proved that he had been harassed and denied access to promotion on the grounds of race.²⁴ The Equality Tribunal found that the complainant was not allowed access to promotion in the same way as Irish nationals. The complainant was awarded €5,000 for the effects of harassment and €10,000 for the effects of discrimination regarding access to promotion.

A black man employed as a truck driver at a company in Gothenburg in **Sweden** lodged a complaint with the Equality Ombudsman saying that his then manager had called him a “nigger”.²⁵ The man had only worked at the company for a short time when the incident occurred. A colleague recounted that while the man was fetching a tool, the manager had said: “Where did the nigger go?” Shortly after this incident, the man was dismissed. The Equality Ombudsman held that the manager had subjected him to ethnic harassment. A settlement was reached between the Equality Ombudsman and the company, awarding the man SEK 40,000 (€4,000) in damages.

6.5.2. Discrimination testing in access to employment

Discrimination testing is “a method of identifying discriminatory behaviour by conducting similar and successive tests on behalf of people who differ only in respect of their ‘origin’ or some other prohibited criterion.”²⁶ In several EU Member States it has been used as a means of identifying barriers to employment for ethnic minorities.

One method of discrimination testing in the field of employment consists of using curriculum vitae (CVs) withholding the names of the applicants to veil their presumed ethnic or national origins. The Federal Antidiscrimination Agency in **Germany** (*Antidiskriminierungsstelle des Bundes*, ADS) initiated a nationwide pilot project in November 2010 to test this method, which was implemented by different companies, government agencies and municipalities over a period of 12 months. The project sent out 4,000 anonymous job applications for 111 jobs, apprenticeships and university posts. In June 2011, the ADS published an interim evaluation of the project, which shows that job applicants tend to prefer job applications where their names are withheld.²⁷

French legislation on equal opportunities recognises the possibility of using anonymous CVs withholding the names of applicants.²⁸ While this method is widely thought to make discrimination less likely, research carried out by the governmental Centre for research in economics and statistics (*Centre de Recherche en Économie et Statistique*) in partnership with the Employment pole (*Pôle Emploi*, the governmental agency for the unemployed), calls the potential benefit of using this method into question, showing that it can be counterproductive. Thousands of CVs, half of which withheld the names of the job applicants, were sent to 1,000 randomly selected companies. Against all expectations, the results of the research showed that the use of anonymous CVs can reinforce the effects of discrimination for candidates with an immigrant background. One of the most significant survey results was that candidates from immigrant families had a one in 10 chance of being recruited when the CV was not anonymous, with that rate dropping to one in 22 when the CV was anonymous. One explanation put forward for this is that recruiters may be less willing to hire applicants whose addresses are in poorer, ‘difficult neighbourhoods’, such as so-called ‘sensitive urban zones’ (*zones urbaines sensibles*).²⁹ The results of this investigation led the government to abandon plans to generalise this recruitment practice.

²⁶ Cediey, E. et al. (2008), p. 9.

²⁷ Germany, Federal Anti-Discrimination Agency (2011).

²⁸ France, Law No. 2006-396.

²⁹ Behaghel, L. et al. (2011), p. 2.

²⁴ Ireland, Equality Tribunal (2011).

²⁵ Sweden, Equality Ombudsman (2010).

Another means of countering ethnic discrimination in the field of employment is to acknowledge contributions made by minorities to the employment sector, and therefore also to the national and EU economies. Policies supporting ethnic entrepreneurship are likely to assume an ever more important role here. Indeed, “ethnic entrepreneurs contribute to the economic growth of their local area, often rejuvenate neglected crafts and trades, and participate increasingly in the provision of higher value-added services. They offer additional services and products to immigrants and the host population, and create [...] an important bridge to global markets. In addition, ethnic entrepreneurs are important for the integration of migrants into employment.”³⁰

6.6. Ethnic discrimination in housing

This section will consider developments in relation to equal access to social and private housing, spatial segregation and forced evictions.

“Discrimination in housing can take the form of discriminatory laws, policies or measures, zoning regulations, exclusionary policy development; exclusion from housing benefits; denial of security of tenure; lack of access to credit; limited participation in decision-making; or lack of protection against discriminatory practices carried out by private actors.”

Office of the United Nations High Commissioner for Human Rights, the Right to Adequate Housing, www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf

Unequal access to housing for ethnic minorities increases their risk of social exclusion and can contribute to spatial segregation. Reports from international human rights monitoring mechanisms and national equality bodies show that ethnic minorities face barriers – such as residence or language requirements – when accessing housing in several EU Member States.

In March 2011, **Belgium’s** national equality body, the Centre for Equal Opportunities and Opposition to Racism (CEOOR), published the results of a study about discrimination against persons of sub-Saharan origin.³¹ This report provides an overview of stereotypes and forms of discrimination they confront, including in the housing sector. The study highlights that it is more difficult for persons of sub-Saharan origin to find a house or apartment to rent than it is for other foreign population groups. In its 2010 annual report on discrimination published in June 2011, CEOOR also flags advertisements by real estate agents that set discriminatory conditions

concerning the origin of future tenants; some landlords’ requirements even stipulated that “no black people” should apply.³² In the same publication, CEOOR reported receiving 338 new files of alleged discrimination concerning access to or supply of goods and services in 2010, a majority of which concerned racial criteria. Of the 338 files, 38 % concerned housing and, of these, 41 % involved discrimination on the basis of racial and ethnic criteria.³³

The Halde published a recommendation in April 2011 on equal access and housing maintenance in **France**.³⁴ The recommendation notes that of the 2,200 housing complaints the Halde received since its establishment in December 2004, 48 % involved discrimination on the grounds of ethnic origin. It also cautions that greater demand for social housing, arising from the shortage of housing stock and the economic crisis, could lead to the allocation of housing of lower quality and longer waiting times, which may lead to unequal treatment. The recommendation underlines that migrants and non-nationals appear to be at particular risk of direct and indirect discrimination from private landlords, by, for instance, simply refusing to rent property or requiring particularly high deposits. As a result, the Halde recommended: the adoption of frameworks that ensure an adequate supply of social housing; that better information be provided by the real estate federations concerning the prohibition of discrimination; and greater transparency in procedures for allocating social housing.

Promising practice

Certifying equal treatment of all tenants regardless of country of origin

The Dortmund integration council in Germany, in association with Planerladen (an association working for the promotion of democratic urban planning and neighbourhood-related community work), with support of the Dortmund renters’ association, issues landlords who commit to equal treatment principles in housing with a certificate attesting their equal treatment of all tenants regardless of country of origin (*Siegel für herkunftsunabhängige Gleichbehandlung bei Vermietung*). The aim of the project is to prevent unequal treatment in the housing sector.

For more information, see: www.integrationsprojekt.net/siegel_gleichbehandlung.html

³⁰ Eurofound, Rath, J. (2011), p. 5.

³¹ Belgium, Centre for Equal Opportunities and Opposition to Racism (CEOOR) (2011a).

³² Belgium, CEOOR (2011b), p. 67.

³³ Belgium, CEOOR (2011b), pp. 90-91.

³⁴ France, Equal Opportunities and Anti-discrimination Commission (Halde) (2011).

In its annual report covering the year 2010, the **Swedish** Equality Ombudsman highlights that most of the complaints it receives concern access to housing, whether in the rental market – including rental criteria (*förmedlingssystem*) – or in the owner-occupied housing market (*bostadsrättsmarknaden*). The report notes that ethnicity is among the most common grounds for discrimination in housing.³⁵

Austria amended its equal treatment legislation in March,³⁶ extending the scope of protection against discrimination to cases of discrimination by association, in which discriminatory grounds apply to one person but another is treated detrimentally as a result. It also prohibits and punishes discriminatory advertisements in the housing market and provides for an administrative fine of up to €360.

The European Commission's Progress programme funded a study on access to public and publicly funded housing, as it relates to equality in housing, in Austria. The study reports that the national ombudsman for equal treatment, local anti-discrimination bodies and non-governmental organisations (NGOs) repeatedly reported cases where the allocation of public housing in several municipalities was tied to sufficient German-language knowledge. This requirement put ethnic minorities at the highest risk of discrimination. The findings of the study were published in *'Right to Housing? Access of Migrants and Ethnic Minorities to Public Housing in Austria'* (*Recht auf Wohnen? Der Zugang von MigrantInnen und ethnischen Minderheiten zu öffentlichem Wohnraum in Österreich*).³⁷

The **French** city of Villeurbanne commissioned a discrimination testing survey as part of its local plan to fight discrimination in housing.³⁸ The survey was conducted between November 2010 and April 2011. Four testers responded to 100 housing advertisements – 50 from housing agencies and another 50 from private owners. The testing revealed that in 57 % of the cases candidates of North African origin were disadvantaged compared with candidates of French origin. In some neighbourhoods, people of North African origin saw their offers to rent housing rejected nine times out of 10.

The results of the survey conducted by the ZfT, mentioned earlier, indicate that the housing market is an area where respondents of Turkish origin in the North Rhine-Westphalia region in **Germany** experience

a high degree of discrimination.³⁹ Of the total, 47.1 % of respondents said that they had felt discriminated against when looking for a flat, while 33.1 % of the respondents reported experiences of discrimination in the neighbourhood.

According to the study mentioned earlier on perceptions of discrimination carried out by the **Spanish** council for the promotion of equal treatment and non-discrimination on the grounds of ethnic or racial origin, 59.9 % of respondents felt they had been discriminated against in the area of housing in the past 12 months.⁴⁰

6.7. The situation of Roma populations in the EU

The situation of Roma populations in the EU continues to be a cause for concern. In an effort to address the precarious living conditions in which many Roma find themselves, the European Commission, on 5 April 2011, issued a Communication on an EU Framework for National Roma Integration Strategies up to 2020.⁴¹ The Communication is a landmark policy document linking the need to tackle poverty and exclusion with protecting and promoting fundamental rights. On 19 May 2011 – at the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) – all 27 Member States agreed to a set of conclusions that endorsed the EU Framework for coordinating national Roma strategies.⁴² On 24 June 2011, this framework was endorsed by the Council of the European Union. This framework sets EU-wide goals for the integration of Roma across the EU, focusing particularly on improving their situation in healthcare, education, employment and housing at the local, regional and national level in accordance with a human rights perspective, as noted in the Council conclusions.⁴³

The precarious situation of the Roma is also acknowledged in a general policy recommendation on combating anti-Gypsyism and discrimination against Roma adopted by ECRI in June 2011.⁴⁴ This recommendation focuses on measures to be taken in the sectors of housing, education, healthcare and access to public services as well as in the fight against racist crime. These measures are intended to provide Council of Europe member states with guidelines

35 Sweden, Equality Ombudsman (2011b).

36 Austria, Equal Treatment Act; Austria, Act relating to the Equal Treatment Commission and the Ombud for Equal Treatment.

37 Frey, V. (2011).

38 France, ISM-Corum (2011).

39 Sauer, M. (2011).

40 Spain, Council for the promotion of equal treatment and non-discrimination on the grounds of ethnic or racial origin (2011); *Panel sobre discriminación por origen racial o étnico* (2011).

41 European Commission (2011).

42 Council of the European Union (2011).

43 Council of the European Union (2011).

44 Council of Europe, ECRI (2011b).

to help them develop effective and practical policies that would improve the living conditions of members of Roma communities.

This section examines evidence of discrimination against members of Roma populations in the sectors of healthcare, education, employment and housing.

FRA ACTIVITY

Conducting household surveys of Roma populations in the EU

In 2011, the FRA and the United Nations Development Programme (UNDP) in association with the World Bank (with funding from the European Commission) conducted two household surveys on the situation of Roma populations. The surveys were administered in a coordinated manner following a similar approach with regard to sampling design, interviewer training and applying a common set of core questions. This is the first time such a comprehensive data collection exercise has been attempted through international inter-agency cooperation. It allowed for selected data that were collected by both surveys to be pooled, thereby increasing the reach and representativeness of the surveys.

The FRA pilot survey comprised 11 EU Member States: **Bulgaria**, the **Czech Republic**, **France**, **Greece**, **Hungary**, **Italy**, **Poland**, **Portugal**, **Romania**, **Slovakia** and **Spain**. The UNDP/World/European Commission regional survey comprised five of these (**Bulgaria**, the **Czech Republic**, **Hungary**, **Romania** and **Slovakia**) plus another seven European countries (Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro, Moldova and Serbia). In total, 22,203 persons who self-identify as Roma (14,925) and non-Roma (7,278) persons living in close proximity to Roma populations were interviewed in the 11 EU Member States, thereby covering 84,287 household members.

The results are representative for Roma living in areas in a higher than national average density. Although the results for non-Roma persons who were surveyed are not representative of the majority population as a whole, they do serve as a benchmark against which to evaluate the situation of the Roma in the Member States under analysis. This is because non-Roma persons who were interviewed share the same environment, labour market and social infrastructures with Roma populations; the surveyed populations are thus functionally equivalent.

The surveys covered the following thematic areas: socio-demographic characteristics of all household members; situation in employment, education, health and housing; neighbourhood and its infrastructure; integration, discrimination, rights awareness and active citizenship; and mobility and migration.

On a global level, the results of the survey show that the socio-economic situation of the Roma in the four key areas of health, education, employment and housing is worse on average than the situation of non-Roma living in close proximity.

For more information on the FRA survey, see: FRA and UNDP (2012), The situation of Roma in 11 EU Member States – Survey results at a glance

The main findings of the survey are as follows:

- **in healthcare:**
 - one out of three Roma respondents aged 35 to 54 years reported health problems limiting their daily activities;
 - on average, about 20 % of Roma respondents were not covered by medical insurance or did not know if they were covered;
- **in education:**
 - on average, only one out of two Roma children surveyed attended pre-school or kindergarten;
 - during compulsory school age, with the exception of **Bulgaria**, **Greece** and **Romania**, nine out of 10 Roma children aged seven to 15 years were reported to be in school;
 - participation in education drops considerably after compulsory school: only 15 % of young Roma adults surveyed had completed upper-secondary general or vocational education;
- **in employment:**
 - on average, less than one out of three Roma were reported to be in paid employment;
 - one out of three Roma respondents said that they were unemployed;
 - others said that they are homemakers, retired, not able to work or self-employed;
- **in housing:**
 - on average, more than two persons lived in one room in the Roma households that were surveyed;
 - about 45 % of the Roma lived in households that lacked at least one of the following basic housing amenities, namely indoor kitchen appliances, such as a refrigerator, an indoor toilet, shower or bath and electricity;
- **poverty:**
 - on average, about 90 % of the Roma surveyed live in households with an equivalised income below the national poverty lines;
 - on average, 40 % of the Roma live in households where somebody had to go to bed hungry at least once in the last month, because they could not afford to buy food;
- **discrimination and rights awareness:**
 - about half of the Roma surveyed said that they had experienced discrimination in the past 12 months because of their ethnic background;
 - about 40 % of the Roma were aware of laws forbidding discrimination against members of ethnic minorities when applying for a job.

6.7.1. Evidence of discrimination of Roma populations in healthcare

Despite existing limitations to ethnic data collection, there is concrete evidence to show that members of Roma populations are sometimes the victims of discrimination in healthcare, according to a report published by the **Hungarian** National Health Council (*Nemzeti Egészségügyi Tanács*)⁴⁵ in March 2011. The government plans to involve 150,000 people of Roma origin in healthcare prevention programmes within the framework of the National Social Inclusion Strategy. The strategy includes family planning and reproductive health protection initiatives with a view to improving access to health services in disadvantaged regions.⁴⁶

In its concluding observations on **Ireland**, the United Nations Committee on the Elimination of Racial Discrimination (CERD) noted that while efforts had been made “to understand the issues affecting Travellers [...] the Committee regrets that efforts made to improve the welfare of Travellers have not substantially improved their situation. The Committee notes with regret the poor outcomes” in several areas, including health.⁴⁷

CERD reached similar conclusions on the situation of Gypsies and Travellers in the **United Kingdom**, where they continue to register poor outcomes in the health sector.⁴⁸ The same holds true for CERD’s conclusions on **Lithuania**, where it notes that the “Roma continue to be marginalised and live in precarious conditions in terms of adequate housing, access to adequate health facilities [and] employment.”⁴⁹

The forced sterilisation of Roma women emerges as a particularly grave manifestation of ethnic discrimination in the health sector. In October 2011, the European Court of Human Rights (ECtHR) issued a landmark decision in *V.C. v. Slovakia*, ruling in favour of a Roma woman who was forcibly sterilised in 2000.⁵⁰ The applicant complained that she had been sterilised without her full and informed consent and that the ensuing official investigation into her sterilisation had not been thorough, fair or effective. The forced sterilisation of Roma women, which originated under the former Communist regime and was once a widespread practice, occurred against a backdrop of persistently hostile attitudes towards people of Roma origin in Slovakia.

On 12 December 2011, the Slovak Minister of Justice expressed her regrets in relation to this case, while pointing out that amended legislation introduced in 2004 (Act No. 576/2004 on healthcare, services related to healthcare and amending certain laws – *Zákon č. 576/2004 Z. o zdravotnej starostlivosti, službách súvisiacich s poskytovaním zdravotnej starostlivosti a o zmene a doplnení niektorých zákonov*) aligned patients’ rights with international standards to prevent such situations from occurring in the future. This legislation came into force on 1 January 2005.

The ECtHR ruled that forced sterilisation violated Article 3, prohibiting inhuman and degrading treatment, and Article 8, protecting respect for private and family life, of the European Convention on Human Rights. It found further that Article 14 on non-discrimination raised no separate issues and, therefore, it did not examine the state’s compliance with its duty to investigate whether the applicant’s sterilisation was racially motivated. The ECtHR ordered Slovakia to pay the applicant €31,000.

The Medical Professional Order (*Colegiul Medicilor din România*, CMR) in **Romania** investigated an alleged case of discrimination on the grounds of ethnic origin. The case, filed in 2009 by *Sastipen* – a Roma health advocacy Network – concerned alleged discrimination by a gynaecologist from Târgu Neamţ Hospital who was accused of denying three Roma women access to healthcare and of infringing upon their right to personal dignity. Although the national equality body (*Consiliul National pentru Combaterea Discriminarii*, CNCD) made a finding of discrimination in July 2010,⁵¹ the CMR dismissed the case. *Sastipen* appealed the decision in November 2010 and the appeal is pending before the CMR.⁵²

6.7.2. Evidence of discrimination against Roma populations in education

“Segregation of Roma students at schools does not help them to develop their potential. On the contrary, it rather results in their discrimination, which hinders the development of their personalities and their fully-fledged socialisation and integration into society,” a study on **Slovakia** published by the Open Society Foundation argues.⁵³

45 Hungary, Ministry of Health – National Health Council (2011).

46 Hungary, Ministry of Public Administration and Justice – Office of the Minister of State for Social Inclusion (2011).

47 UN, CERD (2011c).

48 UN, CERD (2011b).

49 UN, CERD (2011d).

50 European Court of Human Rights (ECtHR) *V.C. v. Slovakia*, No. 18968/07, 8 November 2011.

51 Romania, *Consiliul National pentru Combaterea Discriminarii* (CNCD), Decision No. 149 of 7 July 2010.

52 Romania, Medical Profession Order (2011).

53 Slovakia, Open Society Foundation (2011), p. 5.

Research conducted in **Germany** by the Centre for Culture, Education, and Antiziganism Research (*RomnoKher*) between 2007 and 2011 shows that 81.2 % of the 275 German Sinti and Roma spanning three generations who were interviewed about their educational situation reported personal experiences of discrimination. These “experiences in school are to a great extent affected by overt and covert discrimination in the form of everyday antiziganistic name-calling and prejudices on the part of individual pupils.”⁵⁴

“The European Parliament emphasises that quality education and training influence an individual’s future personal and professional life, and that it is therefore essential to ensure equal access to effective education and training systems, without discrimination or segregation of any kind.”

European Parliament Resolution of 9 March 2011 on the EU strategy on Roma inclusion

A study on participation, school attendance and experiences of discrimination of Roma in **Romania** shows that 39.9 % of the 985 Roma parents who were surveyed between December 2009 and January 2010 perceive that their children are treated worse in school than non-Roma children.⁵⁵ According to the study, which was funded in part by the Romanian office of the United Nations Children’s Fund (UNICEF), 12.5 % of the respondents attributed early school leaving to inequitable treatment received by Roma children in the education system. Some 60 % of Roma children who participate in pre-school education attend segregated establishments, in which over 50 % of the children attending them are Roma, the study also found.

Roma children who had previously been placed in de facto segregated or special schools in the **Czech Republic** and **Slovakia** were successfully completing primary and secondary education at integrated, mainstream schools in the **United Kingdom**. This was one of the main findings of a survey conducted between June and August 2011 in eight locations in the United Kingdom, which examined the impact of mainstream education on Roma pupils who had previously studied in the Czech Republic and Slovakia. During the field research, 114 people were interviewed: 61 Roma primary and secondary school students, 28 Roma parents and 25 school staff and other education employees working with Roma pupils. Roma students in seven out of the eight locations reported that they were not experiencing any form of racism or discrimination in their schools in the United Kingdom and that teachers were providing help and support.⁵⁶ The majority of Roma students reported that they had previously experienced racist bullying or verbal abuse by their non-Roma peers at Czech and Slovak schools.

54 Strauß, D. (2011), p. 7.

55 Surdu, L. (2011).

56 United Kingdom, Equality (2011).

They also reported suffering discriminatory or unequal treatment at the hands of their teachers in the Czech Republic and Slovakia, who were alleged to have punished them physically in a number of cases.

Monitoring bodies also highlighted the issues of discrimination and segregation of Roma children in education. The Council of Europe Committee of Ministers, for example, in a resolution on the implementation of the Framework Convention for the Protection of National Minorities by **Croatia**, urged it “to put an end to the continued segregation of Roma children in schools and redouble efforts to remedy other shortcomings faced by Roma children in the field of education.”⁵⁷

“In sum, in the circumstances of the present case and while recognising the efforts made by the Croatian authorities to ensure that Roma children receive schooling, the Court considers that there were at the relevant time no adequate safeguards in place capable of ensuring that a reasonable relationship of proportionality between the means used and the legitimate aim said to be pursued was achieved and maintained. It follows that the placement of the applicants in Roma-only classes at times during their primary education had no objective and reasonable justification.”

ECtHR, Oršuš and Others v. Croatia, No. 15766/03

The Commissioner for Human Rights of the Council of Europe published a report on the **Czech Republic** in March 2011.⁵⁸ Although it welcomed the adoption of the government’s national action plan of inclusive education, which sets out measures aimed at facilitating the inclusion of Roma children in mainstream education, the report expressed concerns that official statistics indicate that Roma children across the country are 12 times more likely than their non-Roma peers to attend ‘practical schools’.

In its concluding observations on the Czech Republic,⁵⁹ CERD also expressed concerns with “the persistent segregation of Romani children in education as confirmed by the decision of the European Court of Human Rights of 13 November 2007 (*DH and Others v. the Czech Republic*) and the 2010 report of the Czech School Inspection Authority. In June 2011, the Committee of Ministers of the Council of Europe noted with concern that considerable progress remained to be achieved in the execution of the DH judgment and stressed the importance of the Czech authorities” intensifying and, if possible, speeding up the implementation of their action plan.⁶⁰ Similarly, in its concluding observations for **Lithuania**, CERD expressed regrets on the placement of Roma children in special needs schools.⁶¹

57 Council of Europe, Committee of Ministers (2011a).

58 Council of Europe, Commissioner for Human Rights (2011a), p. 15.

59 UN, CERD (2011e), p. 4.

60 Council of Europe, Committee of Ministers, 1115th meeting, 8 June 2011.

61 UN, CERD (2011d).



Court proceedings in EU Member States further illustrate the types of discrimination Roma pupils experience in education. In February, the Deputy Prosecutor of the Hellenic Supreme Court of Civil and Penal Law (*Άρειος Πάγος*) communicated complaints concerning the exclusion of Roma children from public education in **Greece** to the Prosecutors of Appeals Courts.⁶² The complaints, submitted by the Organisations and Communities in Cooperation for Roma Human Rights (*Συνεργαζόμενες Οργανώσεις και Κοινότητες για τα Ανθρώπινα Δικαιώματα των Ρομά στην Ελλάδα*, ΣΟΚΑΔΡΕ), relate to six primary schools attended exclusively by Roma pupils; five areas of Greece which denied school access to Roma pupils; and to restricted access to school for 10 Roma communities because of the absence of transport, although municipalities are legally bound to provide such access. The complaints also relate to signatures collected by parents' associations of schools in the city of Lamia requesting either the exclusion of Roma children from local schools or their transfer to other schools.⁶³

Nevertheless, the Greek Ministry of Education and the Special Secretariat of Intercultural Education, through their joint project titled *Education of Roma Children*, are working towards gradually abolishing schools attended exclusively by Roma pupils, with the assistance of local authorities. The aim is to integrate Roma pupils in mainstream schools in cooperation with municipalities, also through meeting the needs for transport to and from school of all pupils living in distant camps.⁶⁴

Similarly, the Prešov District Court in **Slovakia** ruled in December 2011 that an elementary school in the village of Šarisské Michalany had discriminated against Roma children by teaching them in separate classrooms without reasonable justification.⁶⁵ For several years the elementary school had organised separate mainstream education classes, while classes for Roma children were held on a different floor. This situation worsened in the 2008/2009 school year when the school transferred all the remaining Roma children out of the integrated classes and into the separate classes. The school appealed the Prešov District Court's decision in January 2012.

Article 5 of the Racial Equality Directive allows EU Member States to maintain or adopt specific measures to prevent or compensate for disadvantages linked to ethnic origin, with a view to ensuring full equality in practice. Such promotional measures allow Member States

to address the situation of groups that face persisting forms of discrimination in education, such as the Roma. Reductions of funding for such promotional measures reported in a number of Member States in 2011 could negatively affect their effectiveness.

The Commissioner for Human Rights of the Council of Europe, in a report following a visit to **Ireland**, expressed concerns about the impact that budgetary cuts made in 2011 could have on Travellers' education. He raised particular concerns about reduced teaching hours, posts and special needs assistance to children and to the phasing out of all Senior Traveller Training Centres.⁶⁶

6.7.3. Evidence of discrimination against Roma populations in employment

Discrimination against Roma populations continues to create obstacles to their full and equal participation in the employment market. At the same time, several EU Member States have launched policy initiatives to improve their integration. In 2011, the Council of Europe Ad hoc Committee of experts on Roma issues (Cahrom) adopted an Implementation Report on CM Recommendation Rec(2011)17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe, which contains examples of good practices in the employment area which will be progressively integrated into the Council of Europe's database on policies and good practices.

The Pest County Labour Court (*Pest Megyei Munkaügyi Bíróság*, Decision No. 1.M.471/2004/3) in **Hungary** ruled in September 2011 against an employer who was found to refuse hiring Roma applicants. In 2005, Csaba T., responded to a job advertisement published in a newspaper. Upon calling, he was told that persons of Roma origin would not be hired. Mr Csaba T. contacted an NGO, which used discrimination testing as described earlier to collect evidence for the court case: testers repeatedly called the offending company, each time introducing themselves with a typically Roma name. Every time they called, they were told that the post was not available, although it had not yet been filled. The court ordered the employer to pay HUF 500,000 (€2,200) plus interest in compensation to the plaintiff.

Still concerning **Hungary**, the Equal Treatment Authority (*Egyenlő Bánásmód Hatóság*) conducted a survey on employee selection practices, with a sample of 10,000 respondents, concluding that Roma job seekers face high levels of discrimination when looking for work.⁶⁷

62 Greece, Greek Helsinki Monitor (2011a).

63 Greece, Greek Helsinki Monitor (2011 b).

64 Greece, National and Kapodistrian University of Athens (2010).

65 Slovakia, *Rozhodnutie Okresného súdu v Prešove, č. konania 25C 133/2010*, 5 December 2011.

66 Council of Europe, Commissioner for Human Rights (2011b).

67 Hungary, Equal Treatment Authority (2011).

The local antidiscrimination agency in Uppsala, **Sweden**, received a complaint from a Roma woman who had been prohibited from wearing a traditional Roma skirt to work. The woman, who had previously worn the skirt while completing her internship at the grocery store, had not received any complaints prior to this. When her internship ended she was offered more hours in the shop. Her new manager asked her to wear trousers to work since skirts did not comply with the company's dress policy. Although the woman explained that she could not wear trousers because of her ethnic origin, the manager persisted with the requirement. The case was forwarded to the Equality Ombudsman, who eventually reached a settlement with the store, and the woman in question was awarded SEK 75,000 (€7,000) in damages.⁶⁸

An official report on the situation of Roma in the **Czech Republic** in 2010, published in October 2011, highlighted persisting and high unemployment rates among Roma populations. The unemployment rate in socially excluded localities ranged from 70 % to 100 %.⁶⁹

Some EU Member States took steps to improve Roma integration in the labour market. The state employment agency in **Bulgaria** (*Агенцията по заетостта*), for instance, reported that 10,369 Roma were provided employment under different programmes and projects. A national programme entitled 'From Social Benefits to Employment' (*От социални помощи към заетост*) hired more than half of them. Another scheme, with a budget of BGN 11 million (€5.5 million), named 'Take Your Life in Your Hands' (*Вземи живота си в ръце*) aims to unite the efforts of all stakeholders at the local level to provide support for Roma job seekers to access the employment market.⁷⁰

In **Lithuania**, UNDP with partners such as SOPA (a non-profit organisation working on the integration of socially excluded groups into the labour market), the Roma community centre (*Romų visuomenės centras*) and the social support centre at the Vilnius municipality (*Vilniaus miesto savivaldybės biudžetinė įstaiga Socialinės paramos centras*) implemented a project entitled 'Face Roma: Innovative Ways of Roma Integration into the Labour Market' (*Atsigręžk j romus: inovatyvius romų dalyvavimo darbo rinkoje priemonės*). The project ran from 2009 to 2012 and was designed to combat Roma social exclusion and boost their participation in the labour market and interaction with the local community. By the end of the reporting period, 105 Roma persons had participated in the project. A mere seven participants in the project found work in 2010, while 17 others found employment between January and September 2011; these numbers illustrate

the on-going problems faced by Roma in the employment sector. Successful participants found jobs in construction, at a circus, in fast food restaurants and in the agricultural sector.

The **Slovak** government adopted several policies addressing the integration of national minorities and migrants into the labour market, including the revised action plan of the decade of Roma inclusion.⁷¹ In its section on employment, the action plan identifies several ways to increase the employability of disadvantaged population groups, such as providing social and counselling services. This action plan proposes several measures aimed at furthering the integration of disadvantaged population groups into the labour market, with special reference to marginalised Roma populations. It envisages the continuation of measures such as the 'office assistant' project, which has proved to be an effective means of integrating Roma job seekers into the labour market. Under this project, Roma people were employed by the local Offices of Labour, Social Affairs and Family to provide services mainly to unemployed, socially disadvantaged people.

Promising practice

Integrating Roma into the employment market

The Polish Roma Union (*Związek Romów Polskich*) implemented a project on the integration of Roma into the labour market in the Szczecinek area (*Szczecinieccy Romowie na rynku pracy*), between January and December 2011. The project offered free vocational training to 30 Roma or their spouses in hairdressing, warehouse keeping, cooking, party catering, forklift operation and driving. Upon completion of the project, the top 10 graduates were to be offered paid internships, giving them the possibility to remain in work. Although the project is conducted in a setting where few Roma families live, 90 % of these families rely on the social protection system. The Polish Roma Union ran a similar project in the Świdwin area between November 2010 and December 2011.

6.7.4. Evidence of discrimination against Roma populations in housing

The housing situation of Roma populations remains precarious. They continue to face spatial segregation, discrimination in access to social housing and forced

⁶⁸ Sweden, Equality Ombudsman (2011c).

⁶⁹ Czech Republic, Government decision No. 750.

⁷⁰ Bulgaria, Ministry of Labour and Social Policy (2011).

⁷¹ Slovakia, Deputy Prime Minister for National Minorities and Human Rights (2011).



evictions. This is the case despite measures, such as housing integration policies, taken to improve their situation.

The People's Ombudsman (*Pučki pravobranitelj*) in **Croatia** issued a recommendation to the government to promote Roma social inclusion by intensifying efforts to systematically resolve issues surrounding the legalisation of Roma settlements and to develop an improved system of social housing.⁷²

The **Bulgarian** Ombudsman (*Омбудсман на Република България*) reported on the housing problems of poor Roma families and mediated for the provision of municipality housing for them in Sofia. The Ombudsman's annual report covering 2010 identified problems in the availability of housing and the transparency of municipal housing policies. The report stresses that municipalities, especially those with high-density Roma populations, cannot cope on their own with the housing 'hardship' faced by Roma families, making a targeted national policy essential.⁷³

The **Swedish** Equality Ombudsman reported receiving 230 complaints from Roma in the period 2004-2010⁷⁴ Forty-five of these complaints concerned discrimination in the housing market. Examples of discrimination included discriminatory selection processes for rented accommodation, refusal to permit the purchase of tenant-owned housing on the grounds of ethnicity or harassment by landlords and neighbours.

CERD and the Council of Europe Commissioner for Human Rights noted persistent discrimination against Roma populations in the **Czech Republic**, regarding access to adequate housing⁷⁵ and evictions of Roma families from rented municipal housing on grounds of non-payment of rent or utilities.⁷⁶

In June 2011, the European Committee of Social Rights (ECSR), in its decision in the case of *European Roma Rights Centre (ERRC) v. Portugal*, found that national authorities had failed to show that they had taken sufficient measures to ensure that Roma live in housing that meet minimum standards of adequacy. It also found that the implementation of re-housing programmes by municipalities have often led to the segregation of Roma populations. The ECSR unanimously found that this amounted to violations of: Article 16, which protects family rights; Article 30, which protects against poverty and social exclusion; and Article 31 (1) on adequate housing, read alone or in conjunction with Article E, non-discrimination, of the European Social Charter (Revised).⁷⁷

Upon a visit to **Slovenia**, the Council of Europe Commissioner for Human Rights raised concerns over Roma's poor housing conditions. The most problematic issues were the lack of access to public infrastructures, unresolved property issues and illegal construction.⁷⁸

In December 2010, the European Roma Rights Centre published *Standards do not apply: inadequate housing in Romani communities*, which included **Romania**. The report found that Roma communities there face difficulties in accessing social housing. Local authorities may refuse their applications without explanation or public servants may subject them to ill-treatment when they apply for social housing.⁷⁹

Similarly, an Amnesty International report on the housing conditions of Roma communities in Romania notes that "despite the challenges facing Roma communities in accessing adequate housing, the criteria used by local authorities for allocation of social housing fail to target Roma."⁸⁰ The same report, published in June 2011, argues that the lack of an adequate legal framework incorporating international human rights standards, combined with pervasive discrimination against Roma, have led to widespread violations of the right to housing, including forced evictions.

Slovakia's national equality body, the National Human Rights Centre (*Slovenské národné stredisko pre ľudské práva, SNSLP*), issued a *Report on Human Rights Implementation in Slovakia* focusing on implementation of the right to housing. In this report, the SNSLP points out that residential segregation of the Roma increased due to construction of various walls and fences designed to keep Roma populations away from the majority population. Local and municipal governments took, or tacitly endorsed, these initiatives. The SNSLP qualified these actions as involuntary residential segregation giving rise to the risk of creating concentrated pockets of ethnic minorities.⁸¹

Another example of residential segregation is the three-metre high wall built by local authorities in Baia Mare, **Romania** that surrounds a block inhabited mostly by Roma residents. The decision to construct the wall, adopted by the municipal council, drew criticism from human rights organisations such as Amnesty International and Romani Criss⁸² and prompted an investigation by the National Council for Combating Discrimination, Romania's national equality body.

72 Croatia, Ombudsperson (2011), p. 66.

73 Bulgaria, Ombudsman (2011), pp. 57-58.

74 Sweden, Equality Ombudsman (2011c).

75 UN, CERD (2011e).

76 Council of Europe, Commissioner for Human Rights (2011a).

77 European Committee of Social Rights (ECSR) (2011a).

78 Council of Europe, Commissioner for Human Rights (2011c).

79 European Roma Rights Centre (2010), p. 45.

80 Romania, Amnesty International (2011), p. 3.

81 Slovakia, Slovak National Centre for Human Rights (2011), p. 47.

82 Romania, Romani Criss, Amnesty International, Equal Chances Association (2011).

"In order to reduce segregation and guarantee the right to housing for minority members (particularly the Roma), it is inevitable to pursue policies aimed at preventing segregation of Roma communities, increasing participation of the Roma in solving their own housing situation and preventing evictions of the Roma inspired solely by the majority population's intolerance."

Slovakia, Slovak National Centre for Human Rights (2011), p. 47

In June 2011, the ECSR found that the forced evictions from **France** of Roma of Romanian and Bulgarian origin that took place in the summer 2010 were incompatible with human dignity and constitute a violation of Article E on non-discrimination taken in conjunction with Article 31 (2) on the right to housing of the European Social Charter (Revised). The ECSR also concluded that the expulsion of Roma to Romania and Bulgaria in the summer of 2010 constitutes a violation of Article E on non-discrimination in conjunction with Article 19 (8) on guarantees concerning deportation of the European Social Charter (Revised).⁸³ In November 2011, the Council of Europe Committee of Ministers therefore invited "the French authorities to report at a forthcoming meeting on the measures taken or foreseen in order to deal with the situation described in the complaint and on cooperation with other countries concerned."⁸⁴

The European Roma Rights Centre reported in 2011 that evictions of EU citizens who are Roma had taken place in Marseille, **France**, and in Rome, **Italy**.⁸⁵ The Commissioner for Human Rights of the Council of Europe expressed concerns in September about "the evictions of Roma and Sinti from settlements in **Italy** and at the impact that these practices have on the right to housing and other human rights of the persons concerned."⁸⁶

"The application of the circular of 5 August 2010 – which stipulated that 'within 3 months, 300 unlawful sites must be cleared, with priority given to those occupied by Roma [...] It is therefore the responsibility of the prefect of each département to organise the systematic dismantling of the unlawful sites, particularly those occupied by Roma' – led to the forced eviction of Roma of Romanian and Bulgarian origin which amounted to directly discriminatory treatment based on the ethnic origin of the persons concerned. These evictions took place against a background of constraint, in the form of the threat of immediate expulsion from France."

European Committee of Social Rights, Decision on the Merits, Centre on Housing Rights and Evictions (COHRE) v. France, Complaint No. 63/2010

Still in **Italy**, the Council of State ruled in November that the state of emergency targeting Roma populations that has been in effect in parts of the country since

May 2008 was illegal and unfounded.⁸⁷ This state of emergency was initially instituted in the regions of Lombardy, Campania and Lazio and subsequently extended to Piedmont and Veneto. It was extended several times and remained in force until December 2011. According to this decree, the authorities were afforded extraordinary powers, including: monitoring camps; conducting a census of persons resident in camps, including minors; taking photos and requesting documents to identify and record residents; expelling persons with irregular status from camps; displacing persons to formally monitored camps; and carrying out forced evictions from informal settlements.⁸⁸

The EHRC reports that a lack of decent, appropriate and secure accommodation led to inequalities experienced by Gypsies and Travellers in the **United Kingdom**. It also reports on pioneering initiatives undertaken by some local authorities to facilitate access to health and education services and maintain good relations with other communities, while meeting the needs of nomadic groups to preserve their traditional lifestyle. In reviewing progress by local authorities to meet the accommodation needs of Gypsies and Travellers the EHRC finds that provision is "patchy and remains insufficient". It also found a "slowing down in progress over the period 2008-2010 and that the previous 2011 target, to increase the number of authorised sites, has not been met."⁸⁹

In October 2011, 86 families of Irish Travellers, all of them British citizens, were evicted from the largest Irish Traveller site in the **United Kingdom**, Dale Farm in Essex. Although they owned the land, they did not receive permission from planning authorities to reside there. The residents had resisted the eviction through legal action but lost a long-running legal battle. The UN Special Rapporteur on adequate housing and the UN Independent Expert on minority issues had already called on the United Kingdom in July 2011 to find a peaceful and appropriate solution and adequate alternative housing for the families.⁹⁰ CERD had also addressed the issue in its concluding observations on the United Kingdom issued in September 2011, expressing its "regrets on the state's party insistence on proceeding immediately with the eviction of the Gypsy and Traveller community at Dale Farm in Essex before identifying and providing alternative culturally appropriate housing for members of these communities."⁹¹

87 Italy, Council of State (2011) Ruling No. 6050 of 16 November 2011.

88 European Roma Rights Centre (2011b).

89 United Kingdom, Equality and Human Rights Commission (EHRC) (2011), p. 60.

90 UN, Office of the High Commissioner for Human Rights (OHCHR) (2011).

91 UN, CERD (2011b).

83 ECSR (2011b).

84 Council of Europe, Committee of Ministers (2011b).

85 European Roma Rights Centre (2011a).

86 Council of Europe, Commissioner for Human Rights (2011d), p. 10.

Outlook

Existing structural inequalities between ethnic minorities and majority populations are likely to persist. To address this challenge, sustained efforts on the part of policy makers and civil society are required. Moreover, there is a need for more systematic and comprehensive data collection practices to ensure better understanding of the scale and nature of ethnic discrimination and racist violence and crime in the EU.

The enforcement of existing legislation, greater rights awareness and ease of access to courts and other complaints bodies will continue to be essential tools in the battle against ethnic discrimination in healthcare, education, employment and housing.

Measuring the success of policy measures to combat ethnic discrimination and to promote the integration and social inclusion of disadvantaged groups will require periodic collection and analysis of data using fundamental rights indicators.

The EU Framework for National Roma Integration Strategies up to 2020 provides the EU and its Member States with an opportunity to improve the social inclusion of Roma populations. If they are successful, these strategies could act as models for the better inclusion and integration into society of other disadvantaged groups.

Overcoming entrenched challenges – such as segregation in education or housing – will, however, require a long-term and sustained commitment. In addition to national authorities, the role of local and regional authorities will be crucial. There is a strong need to strengthen their capacity for Roma inclusion policies, as was recognised by the Council of Europe Summit of Mayors on Roma in September 2011, which agreed to set up an European Alliance of Cities and Regions to this end.

The ability to track the impact of policies over time and tailor them as necessary will be key to the success of strategies implemented at EU and national level to tackle racism and ethnic discrimination.

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Participation of EU citizens in the
Union's democratic functioning

Citizens' rights

ქართველ, უცხოელ

UN & CoE

January

February

March

April

May

17-18 June – Council of Europe Venice Commission adopts a report on out-of-country voting

June

July

August

19-23 September – UN Committee on the Rights of Persons with Disabilities adopts its Concluding observations on Spain

September

18-20 October – Council of Europe Congress of Local and Regional Authorities adopts a resolution and a recommendation on citizen participation at local and regional level in Europe

October

16 November – Council of Europe Committee of Ministers adopts a recommendation on the participation of persons with disabilities in political and public life

November

16-17 December – Council of Europe Venice Commission adopts a revised interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections

December

EU

January

16 February – European Parliament and the Council adopt a Regulation on the European citizens' initiative

February

22 March – European Economic and Social Committee adopts a Roadmap for participatory democracy in Europe

March

April

May

June

July

August

September

October

17 November – European Commission adopts the implementing Regulation laying down technical specifications for online collection systems

November

22 December – European Commission makes open-source software as regards online collection systems for the European citizens' initiative available to the general public

December



7

Participation of EU citizens in the Union's democratic functioning



Active political participation is the core of democracy. The year 2011 saw some European Union (EU) Member States undertake reforms to make elections more accessible to all persons, thereby fostering democratic participation. For instance, by the end of 2011, 19 EU Member States had ratified the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), placing themselves under a legal obligation to enhance the right to vote of persons with disabilities. Ever greater levels of abstention in elections to the European Parliament prompted discussions on electoral reform. Beyond elections, 2011 also witnessed developments in the wider context of participation in public life. Further preparatory discussions took place on the European citizens' initiative, a potentially powerful participatory tool at EU level.

This chapter covers developments in EU and EU Member State policies and practices in the area of participation of citizens in the EU's democratic functioning. The chapter begins with an overview of current developments in the right to vote in elections. Particular emphasis is placed on the participation of non-national EU citizens. The subsequent sections also look at general reforms in electoral legislation because these have a direct impact on the way citizens express their vote. While arrangements for voting processes are freely chosen by each Member State, electoral reforms often affect all types of elections, including European Parliament, national, regional and local elections. They are therefore directly relevant for European Parliament and municipal elections, in both of which EU citizens have the right to vote and to stand as candidates, regardless of where they reside in the EU. Drawing on last year's report, the chapter examines limitations on voting rights faced by persons with disabilities and concludes with an update on developments related to participatory democracy.

7.1. Voting rights in the EU

7.1.1. EU citizens' right to vote

The participation of EU citizens in European and municipal elections is an important issue. Article 20 (2) (b), 22 of the Treaty on the Functioning of the European Union (TFEU) as well as Article 39 (1), 40 of the Charter of

Key developments in the area of participation of EU citizens in the Union's democratic functioning:

- the adoption of the European citizens' initiative provides the basis for participatory democracy at EU level and the European Commission takes various steps to make the new instrument operational;
- whereas public debates on the citizens' initiative remain limited, the creation of the online 'Citizen House' is an example of efforts to make the existing avenues for participation better known and more accessible;
- the European Commission proposes designating 2013 the European Year of Citizens and the European Parliament discusses electoral rule reforms;
- against the background of the CRPD, the participation of persons with disabilities in elections becomes an issue to be addressed – various EU Member States take steps to facilitate the participation of persons with disabilities in elections, whereas in the case of mental health problems and persons with intellectual disabilities a majority of the EU Member States still link disenfranchisement to the loss of legal capacity.

Fundamental Rights confer on EU citizens, wherever they reside in the Union, the rights to vote and to stand as candidates in European Parliament elections and at municipal elections. This will also be the case

for **Croatia**. When Croatia joins the EU in July 2013 the necessary reforms enabling EU citizens to participate in local self-government councils as well as European Parliament elections will enter into force.

In 2011 the European Commission proposed designating 2013 the European Year of Citizens. Under this initiative, the EU has a total of €1 million in funds for projects of relevance to citizenship. The Commission underlines that raising awareness on citizens' electoral rights in their Member State of residence will be crucial in view of the European Parliament elections in 2014.¹

"The European Year of Citizens will be a good opportunity to remind people what rights they have thanks to the European Union and what the European Union can do for every one of us."

Viviane Reding, Vice-President of the European Commission, Brussels, 11 August 2011

The year 2011 witnessed some efforts to reform the European Parliament electoral system to make it more responsive to EU citizens in preparation for the next elections in 2014. In July, the plenary of the European Parliament failed to adopt a proposal, outlined in the 'Duff report', modifying the act of 20 September 1976 concerning the election of Members of the European Parliament (MEPs) by direct universal suffrage.² The matter was referred back to the Committee on Constitutional Affairs which subsequently approved the draft.³ The report proposes introducing a pan-European constituency electing 25 extra MEPs on Europe-wide party lists.⁴ Also in 2011, negotiations between Member States in the Council reopened regarding a legislative proposal⁵ aiming to simplify the mechanism to prevent double voting in European Parliament elections by EU citizens resident in a Member State other than their own.

As reported last year, EU citizens still face obstacles when accessing their voting rights.⁶ In the **Cypriot** village of Pegia, for instance, where citizens of the **United Kingdom** represent over 20 % of the population, Greek Cypriots are reported to fear the impact and influence of this 20 % vote on the outcome of local elections. In general, however, data showing how many EU citizens are voting outside their country of origin are lacking or of insufficient reliability. In **Italy**, for instance, the Ministry of Interior Circular no. 39/2011⁷ called upon municipalities to collect precise data on the registration and actual participation of non-national EU citizens. The necessary software was, however, unavailable and the data were

1 European Commission (2011a).
 2 European Parliament (2009).
 3 European Parliament (2011a).
 4 Duff, A. (2011).
 5 European Parliament (2011b).
 6 European Commission (2010).
 7 Italy, Ministry of the Interior (2011).

apparently not completely processed during the reporting period. The overwhelming majority of non-national EU citizens who registered to vote for the May 2011 municipal elections are Romanian citizens (65.88 %), followed by Polish (7.19 %) and German (5.69 %) citizens. In **Spain**, similar statistics are reportedly available, but again only registered non-national EU citizens are recorded; no data are available on their actual participation in the May 2011 municipal elections. In 2012, the European Commission adopted a new report on local elections, providing fresh information on this topic across the EU Member States.⁸

Promising practice

Informing EU citizens about their right to participate in elections

The 'I can vote' campaign in Luxembourg aimed to encourage high registration of non-national EU citizens in municipal elections in October 2011. By the registration's closing date, 30,937 foreigners living in Luxembourg had registered. The campaign, organised by non-governmental organisations and municipal authorities and launched in early 2011, provided information on rights and responsibilities in five languages (available at: www.jepeuxvoter.lu). Various expatriate platforms and social networking sites were engaged to spread the word and to translate information, especially to involve the English-speaking community. The campaign also sent workers door-to-door in the various communities.

In September, the Cypriot authorities sent out 1,500 personal letters to EU citizens who did not participate in the last municipal elections informing them of their rights to participate. The authorities informed the relevant embassies. They also ran advertisements in the two English-speaking newspapers informing all non-Greek speaking voters of their right to vote.

7.1.2. The right to vote: national-level trends

The concrete electoral procedures governing the various elections at local, regional, national or even EU level are drawn up by the EU Member States; they are not determined by EU law. Such procedural rules, however, have an impact on the conditions under which EU citizens participate in local and European elections. The following therefore provides an overview of key developments at national level, including plans to make elections more accessible by, for instance, allowing for postal voting, e-voting, advance voting or even voting from abroad.

Some EU Member States made progress in enlarging voting rights for citizens living abroad. Both **Belgium**,

8 European Commission (2012).

with reference to European Parliament elections,⁹ and **Romania**, with reference to national elections,¹⁰ discussed proposals to expand the voting rights of citizens living abroad. In the 2011 Parliamentary elections **Cyprus** organised, for the second time, voting abroad in some of its diplomatic representations. Under this system, at least 30 voters must be registered on the electoral roll for a polling station to be opened abroad.¹¹ The **Hungarian** constitutional reform removed residence requirements for voting. But although there is no residence requirement in the general rule of Article XXIII paragraph (1) of Fundamental Law, paragraph (4) states that a cardinal Act may condition the right to vote to residence in Hungary. Finally, a development in the opposite direction took place in **Spain**, where the Organic Act 2/2011 removed the right to vote in municipal elections for Spanish citizens permanently living abroad.¹² Finally, the topic was also argued before the European Court of Human Rights (ECtHR) in May. The voting rights of nationals living abroad is central to the *Sitaropoulos and Others* case heard by a Grand Chamber. The applicants complained that they were unable to vote at their place of residence during the 2007 parliamentary elections because no rules existed governing the voting rights of **Greek** voters living abroad.¹³ A judgment was expected for March 2012.

In June 2011, the Venice Commission adopted a report on out-of-country voting (CDL-AD(2011)022).¹⁴ This report, based on a comparative study of the situation in the member States of the Venice Commission, is mainly devoted to the right to vote (and not eligibility). It noted that the right to vote is no longer reserved to residents in most States concerned (mainly EU Member States) and concluded that States should adopt a positive approach to the right to vote of citizens living abroad.

Germany addressed the issue of thresholds. The Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG) handed down a judgment ruling that the 5 % minimum threshold parties must reach to gain seats in European Parliament elections is unconstitutional. The threshold, which is prescribed by the German European Elections Act, makes it more difficult for small parties to be represented in the European Parliament. Admittedly, the 5 % clause also applies in German national elections, but the Constitutional Court concluded that the situation was different in European Parliament

elections, where a splintering of party representation would not lead to a failure to form a government.¹⁵ An amendment to the German European Elections Act will apply at the next European Parliament elections in 2014, making it easier for small parties to play a role in European Parliament elections.

An open issue, however, remains how to increase voter participation in the upcoming European Parliament elections in most EU Member States where voting is no longer compulsory. **Belgium** witnessed discussions in 2011 on a legislative proposal supporting the abolition of compulsory voting. The proposal reflects the belief that the evolution of democratic patterns no longer requires mandatory voting.¹⁶ In those very few EU Member States which continue to have compulsory voting, including **Cyprus**, **Luxembourg** and **Greece**, penalties for non-voters in the form of fines have grown ever rarer.¹⁷

In order to facilitate actual voting, **Italy**¹⁸ offers financial allowances to voters travelling from their workplace, even if it is abroad, to their place of residence, where they are registered to vote. The availability of, and reforms in, postal voting were also reported. **Austria**, for instance, amended its Law on National Assembly Elections (*Nationalratswahlordnung*) and, in **Romania**, a bill to introduce postal voting was discussed. A new **Portuguese**¹⁹ law standardises and broadens an advance voting system. It defines which electors may exercise the right to cast their ballot in advance and how this right may be exercised. Voters who are unable to go to polling stations due to ill-health, as well as prisoners who are not deprived of their political rights, are among those who benefit from this reform.

The introduction of e-voting might also make elections more accessible. **Estonia** has allowed e-voting, including at European elections, for several years. E-voting security was unsuccessfully challenged after the country's March parliamentary elections.²⁰ In **Lithuania**, some municipalities introduced an electronic registration system for voters, which enabled them to vote electronically in the 2011 municipal elections. **Austria** piloted e-voting in student representation elections in 2009, but it was never generally applied, because the Constitutional Court ruled that the implementation had been unlawful.²¹

9 Belgium, House of Representatives (2010a).

10 Romania, Ministry of Foreign Affairs (2011); For more information, see also: www.ziare.com/articole/abuzuri-la-vot. All hyperlinks were accessed on 17 April 2012.

11 Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights (OSCE/ODIHR) (2011a).

12 Spain, Organic Act 2/2011.

13 ECtHR, *Sitaropoulos and Others v. Greece*, No. 42202/07.

14 European Commission for Democracy through Law (Venice Commission) (2011a).

15 Germany, Federal Constitutional Court, Decision of 9 November 2011.

16 Belgium, House of Representatives (2010b).

17 Malkopoulou, A. (2009), pp. 8 and 9.

18 Italy, Law of 1 June 2011, No. 78/2011.

19 Portugal, Organic Law 3/2010.

20 Estonia, Postimees (2010a); Estonia, Postimees (2010b).

21 Austria, Constitutional Court, Decision of 13 December 2011.

Another topic of interest in 2011 was the disenfranchisement of convicts. It triggered discussions in **Estonia**, contentious debate in the **United Kingdom** and reforms in **Austria**, which in response to the ECtHR's judgment in the *Frodl* case as of 1 October abandoned the automatic loss of voting rights upon conviction for a severe crime.²² In a case against **Italy** in January, an ECtHR Chamber held that the automatic nature and the indiscriminate application of a voting ban imposed upon a convicted person violated their right to vote.²³ This judgment was referred to a Grand Chamber of the ECtHR which held a hearing on 2 November.

7.2. The limitation of voting rights in the case of disability

The right to political participation of persons with disabilities took more concrete shape in 2011. On 16 November, the Committee of Ministers of the Council of Europe adopted a Recommendation on the participation of persons with disabilities in political and public life.²⁴ The recommendation's scope extends beyond participation in elections, but the following section focuses on this aspect only. The recommendation calls on Council of Europe Member States to guarantee persons with disabilities the right to vote and the right to stand for election in a manner equal to that of any other citizen. It seeks to enhance the accessibility of voting procedures, by: improving access to polling stations; providing political information in a variety of accessible formats, such as sign language, braille, audio and easy-to-read formats; and ensuring fully accessible voting procedures. In guaranteeing such enhanced accessibility, the recommendation also aims to empower persons with disabilities, which requires a meaningful involvement in the whole policy cycle and, if necessary, assistance during elections.

In adopting this recommendation, the 47 Council of Europe Member States agreed to increase the political and public participation of persons with disabilities, including in elections. The Recommendation contains a set of standards, which applies to all types of elections, therefore including municipal and European Parliament elections. As a result, it also helps support the broader implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD)²⁵ for those EU Member States that have ratified it (see Chapter 10).

In December 2011, the Venice Commission revised its interpretative declaration adopted in 2010²⁶ to better take into account CRPD requirements by reaffirming the principle of universal suffrage that should be applied in a non-discriminatory way.²⁷

The UN Committee on the Rights of Persons with Disabilities helped flesh out the meaning of 'participation'. In its Concluding Observations of its first State report on an EU Member State (Spain), it adopted a broad interpretation in September of what Article 29 of the convention calls "participation in political and public life".

"[...] all relevant legislation be reviewed to ensure that all persons with disabilities, regardless of their impairment, legal status or place of residence, have the right to vote and participate in public life on an equal basis with others."

Committee on the Rights of Persons with Disabilities (2011), p. 7

7.2.1. The right to vote of persons with disabilities

Data on the right to vote of persons with disabilities are often lacking. The **German** National Action Plan on the implementation of the CRPD expressly recognises this gap and refers to a study that the Federal Ministry for Employment and Social Affairs is launching to better understand the situation on the ground.²⁸ That problems exist is, however, beyond doubt. The Organization for Security and Co-operation reported in 2011 that the right to vote of persons with disabilities was an issue of concern, resulting in dedicated recommendations in several instances (**Bulgaria**,²⁹ **Cyprus**,³⁰ **Estonia**,³¹ **Finland**,³² and **Latvia**³³).

With their ratifications of the CRPD, 19 EU Member States stand under a legal obligation to enhance the right to vote of persons with disabilities. When existing legislation was insufficient, countries drafted new legislation. Two examples can be reported. In March, **Spain** adopted Royal Decree 422/2011,³⁴ which includes measures ranging from the accessibility of polling stations and of public and official spaces where electoral campaign activities are held, to the provision of free-of-charge sign-language interpretation. In **Poland**, a new Electoral Code entered into force on 1 August. It defines a person with disabilities as one with limited physical, psychological,

22 Austria, Modification law on the electoral law, BGBl. I Nr. 43/2011. See also: Council of Europe, Committee of the Ministers, Resolution CM/ResDH(2011)91 concerning the execution of the case ECtHR, *Frodl v. Austria*, No. 20201/04, 8 April 2010, final on 4 October 2010.

23 ECtHR, *Scoppola v. Italy* (No.3), No. 126/05, 18 January 2011.

24 Council of Europe, Committee of Ministers (2011).

25 For a detailed analysis of Article 29 of the CRPD requirements see: www.ohchr.org/EN/Issues/Disability/Pages/ThematicStudies.aspx.

26 FRA (2011), p. 136.

27 European Commission for Democracy through Law ('Venice Commission') (2011b).

28 Germany, Federal Ministry for Work and Social Affairs (2011), p. 86.

29 OSCE/ODIHR (2011b), p. 9.

30 OSCE/ODIHR (2011a), p. 6.

31 OSCE/ODIHR (2011c), p. 23.

32 OSCE/ODIHR (2001d), p. 5.

33 OSCE/ODIHR (2011e), pp. 4 and 18.

34 Spain, Royal Decree 422/2011.



mental or sensorial ability to take part in elections.³⁵ It introduces solutions to accommodate the needs of voters with such disabilities and gives them the right to: information about elections; proxy and postal voting; and to vote in dedicated, accessible polling stations. Persons with a visual impairment have the right to use Braille voting templates and/or have personal assistance during voting. A lack of awareness about the new rules meant, however, that on election day, 9 October, only 211 voters requested Braille templates and just 841 used a postal vote. An additional complication was that the Braille templates did not make it possible for voters to read the candidates' names; those using the templates therefore required further assistance. Just under 12,000 voters used proxies in the election, far fewer than the 19,800 that availed themselves of the possibility in the earlier 2010 elections.

Promising practice

Seeking voter information to drive accessibility improvements

Cypriot authorities requested a list of persons with disabilities from the Association of Persons with Disability (*Οργάνωση Παραπληγικών Κύπρου*) to determine where they vote, so as to make the necessary arrangements for them, such as setting up access ramps at polling stations. The Association of People with Disabilities confirmed that, as a result, in recent years their members had not lodged any complaints.

A variety of measures must be implemented to ensure the accessibility of polling stations. The most common relates to the building itself. A polling station should be accessible for persons with physical impairments; in particular, it should be wheelchair accessible. Furthermore, polling stations should be adapted to persons with visual impairments. Many EU Member States promote fully accessible polling stations. In **Austria**, for instance, there must be at least one barrier-free polling station per municipality.³⁶ **Belgium** requires that each polling station be equipped with one adapted voting booth and that one-in-five booths are adapted overall. In **France** at least one voting booth per polling station must be fully accessible, whatever the disability, and ballot boxes must be accessible to wheelchair users.³⁷ In **Germany**, the polling station should be as accessible as possible for persons with disabilities.³⁸ In the **Netherlands** at least a quarter of polling stations in a single municipality should be accessible to voters with physical disabilities.³⁹ In **Slovenia**, according to Article 79a of National Assembly Elections Act, at least one polling station per

county should be accessible. A visually impaired wheelchair user who considered that the accessible polling station was too far from his residence challenged this ratio, but both the administrative court and the supreme court rejected the complaint.⁴⁰

Many EU Member States and **Croatia** are taking steps to improve polling station accessibility, but they often face major hurdles. The **Latvian** Central Election Commission acknowledged that it was a matter of great concern that only 46 % of polling stations could be considered accessible. In March, the **Dutch** organisation Disabled National (*Handicap nationaal*) randomly sampled 320 polling stations to test their accessibility. It concluded that most of the stations surveyed were not fully accessible to wheelchair users, although electoral authorities had classified 83 % of the polling stations as accessible.⁴¹ The **Polish** National Electoral Committee said that 7,785 out of 25,993 voting districts (*obwody do głosowania*) were accessible, or some 33 %. In **Portugal**, voters with visual impairments encountered problems when voting. The Association of the Blind and the Partially-Sighted of Portugal (*Associação dos Cegos e Ambliopes de Portugal*, ACAPO) and the I Want to Vote Movement (*Movimento Quero Votar*)⁴² – a coalition of NGOs, individual persons, sponsors and private companies – called for solutions to enable persons with visual impairments to vote. Following the presidential elections on 31 January, ACAPO called for the development of Braille templates by the 2013 parliamentary elections.⁴³ Similarly, in **Spain** in January, the Catalan Association for the Integration of Blind People called for the use of Braille templates and envelopes to be extended to municipal elections. The templates and envelopes have been in use since 2007⁴⁴ in regional, national and European Parliament elections,⁴⁵ but the extension to municipal elections is considered a challenge.

In the absence of rules on accessibility, some governments, such as that of **Greece**,⁴⁶ issued ministerial circulars calling for practical alternatives for election day. Such measures may require an election official to go to the person's home to register a proxy voting request or to fetch a ballot box from an inaccessible polling station and bring it somewhere more accessible including the home. In the case of sensory impairment, it may mean accompanying the voter into the voting booth or enabling the voter to be accompanied by someone else. To a greater or lesser extent, **Austria, Belgium, Bulgaria,**

35 Poland, Electoral Code, Art. 5 para. 11.

36 Austria, Modification law on the electoral law, para. 52 (5).

37 France, Ministry of Labour, Social Relations, Family, Solidarity and of the City (2009), Art. D56-1 to D56-3 of the Electoral Code.

38 Germany, European Election Rule, para. 39.

39 The Netherlands, Elections Act, Art. J4 (2).

40 Slovenia, Supreme Court, Decision of 5 May 2011.

41 For more information, see: www.handicapnationaal.nl/verenigingsnieuws/010/010.html.

42 For more information, see: www.querovotar.com/movimento.asp.

43 Portugal, Association of Blind and Partially-Sighted Persons of Portugal (2011).

44 Spain, Royal Decree 1612/2007.

45 For more information, see: www.votoaccessible.com/default.asp.

46 Greece, Ministry of the Interior (2011a).

Croatia, the Czech Republic, Cyprus, Denmark, Greece, Ireland, Italy, Luxembourg,⁴⁷ Malta, the Netherlands,⁴⁸ and Slovakia all apply similar measures.

In some countries specific disability action plans address the challenge of elections. **Finland** plans two measures aimed at improving voters' accessibility as part of its Disability Policy Programme Vampo (2010-2015). One measure involves drawing up and monitoring guidelines ensuring the accessibility of all polling stations. The other is a commitment to take into account the needs of visually impaired people in the development of electronic voting, which improves the independence of voting. The Finnish Ministry of Justice is responsible for implementing these measures.⁴⁹

In other cases, national electoral commissions have launched wide consultations with organisations of persons with disabilities to tackle accessibility problems. **Romania** conducted such a consultation, focusing on physical barriers to polling stations.

In **Sweden**, electoral authorities conducted wide-ranging information campaigns directed at persons with disabilities in order to encourage their participation. The **Polish** Commissioner for Citizens' Rights, together with Polish Radio, also launched such a campaign.⁵⁰

Promising practice

Providing fully accessible electoral information

The **Swedish** Election Authority (*Valmyndigheten*) is responsible for public information on when, where and how voting takes place. To improve accessibility for persons with disabilities, the authority produced electoral information in various formats, including sign language, Braille, an easy-to-read booklet and a compact disc (CD). It circulated both the CD and the booklet to members of the Visually Impaired National Federation and the Centre for Easy-to-Read and sent the CD to audio libraries as well. It also created special documents that allowed visually impaired people to read in Braille and vote without assistance.⁵¹

The **United Kingdom** Electoral Commission issued a new factsheet in April entitled Disabled People's Voting Rights.⁵² It calls on local authorities to "take proactive steps to ensure that polling stations don't disadvantage disabled people". The document also spells out four key entitlements for persons with disabilities, the rights to: request assistance to

mark a ballot; use a tactile voting device; receive assistance when accessing polling stations and use large-print versions of ballot papers. Similarly, since a Government decision of 8 December 2010 on the implementation of the CRPD in **Lithuania**,⁵³ the Central Election Commission together with the Lithuanian Association of Municipalities are tasked with securing the electoral participation of persons with disabilities, by facilitating access to polling stations and providing relevant information. In February 2011, the **Irish** Department of the Environment, Community and Local Government together with the National Disability Authority developed guidance for election officials on how to ensure that the voting process and the choice of polling station are as disability-friendly as possible.⁵⁴

Promising practice

Enabling voters to learn about candidates by telephone

During the elections for the **Dutch** Provincial Councils held on 2 March, voters were able to acquire spoken information about candidates through a dedicated free-phone number. Visually impaired voters could dial the electoral list phone number (*Kieslijsttelefoon*), which provided an audio version of the electoral list.

7.2.2. The right to vote of persons with intellectual disabilities and persons with mental health problems

EU Member States differ greatly in how they handle the right to political participation of persons with mental health problems and persons with intellectual disabilities. Despite this heterogeneity, three main approaches characterise the participation spectrum: total exclusion, case-by-case consideration and full participation.⁵⁵ Member States which totally exclude individuals link the right to vote to the legal capacity of the individual. In other Member States, national legislation prescribes an individual assessment of the ability to vote before taking the right away. Countries which have lifted all restrictions enable persons with intellectual disabilities and persons with mental health problems to vote on an equal footing with other citizens. There has been little change since 2010.⁵⁶

Hungary witnessed an important development with the adoption of a new Basic Law which entered into force on 1 January 2012. The new law (Article XXIII (2) of the Basic Law) says that guardianship will no longer serve as

47 Luxembourg, Election Law, Art. 79 as amended in 2004.

48 The Netherlands, Elections Act, Art. J28.

49 Finland, Ministry for Social and Health Affairs (2011).

50 For more information, see: www.rpo.gov.pl/pliki/13152985810.pdf.

51 Sweden, Election Authority (2011).

52 United Kingdom, Electoral Commission (2011).

53 Lithuania, Decision on the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol.

54 For more information, see: www.nda.ie/website/nda/cntmgmtnew.nsf/0/3965829F6783133B802578320058BB21?OpenDocument.

55 FRA (2010), pp. 15ff.

56 FRA (2010).



the basis for disenfranchisement. A judge must, instead, determine whether an individual should be excluded from voting based on an assessment of his/her "limited mental ability", a term whose exact meaning is as yet unclear but which a new electoral law is likely to address. Hungary thereby joined the group of EU Member States where an individual judicial assessment is made before a disenfranchisement decision is taken.

A majority of EU Member States still link disenfranchisement to the loss of legal capacity. **Croatia** also has such a system: Article 2 of the Act on Voter Registers (*Zakon o popisima birača*)⁵⁷ stipulates that Croatian citizens 18 years of age or older are listed in the register, except those who have lost legal capacity through

a final court decision. Thus, like many EU Member States, Croatia has an automatic exclusion provision.⁵⁸ According to the Annual Statistical Report on the Application of Social Welfare Rights for 2010,⁵⁹ 15,761 persons were without legal capacity on 31 December 2010. This issue stirred public debate in Croatia and in a report published in 2011 the Ombudsperson for Persons with Disabilities warned that the voting rights of persons with intellectual disabilities and persons with mental health problems is an issue of compliance with CRPD requirements.⁶⁰

Table 7.1 provides an updated summary of a table published in 2010.⁶¹

Table 7.1: The right to political participation of persons with mental health problems and persons with intellectual disabilities

Country	Exclusion	Limited Participation	Participation
AT			X
BE	X		
BG	X		
CY		X	X
CZ	X	X	
DE	X		
DK	X	X	
EE	X	X	
EL	X		
ES		X	X
FI		X	X
FR*		X	X
HU**		X	
IE	X		X
IT			X
LT	X		
LU	X		
LV	X		
MT	X	X	
NL			X
PL	X		
PT	X		
RO	X		
SE			X
SI		X	
SK	X		
UK			X
HR***	X		

Notes: A Member State can be represented in more than one column, as persons with health problems and persons with intellectual disabilities may be treated differently according to the national law of the respective Member State.

* Due to a legislative amendment, which does not affect the right to vote, the relevant article is now: Article L3211-3 7° Public Health Code. ** Hungary, Article XXIII (2) Basic Law. *** Croatia, Act on Voter Registers, 30 April 1996.

Source: FRA, 2011; based on information published in the FRA report on The right to political participation of persons with mental health problems and persons with intellectual disabilities in November 2010, p. 23.

58 FRA (2010), pp. 15 and 23.

59 Croatia, Ministry of Health and Social Welfare (2011).

60 Croatia, Ombudsperson for Persons with Disability (2011).

61 FRA (2010), p. 23.

57 Croatia, Act on Voter Registers, 30 April 1996.

In the **Netherlands**, although legislation ensuring full participation is in place, there is a lack of specific assistance to help persons with intellectual disabilities. The Dutch Electoral Council considers that persons with intellectual disabilities who cannot vote without assistance cannot express their electoral opinion independently and therefore should not vote.⁶² This situation raises a wider question of the adaptation necessary to facilitate the vote of persons with intellectual disabilities. In May, a wide range of good practices and a set of recommendations were published in the context of the 'Accommodating Diversity for Active Participation in European Elections' (ADAP) project.⁶³

Promising practice

Supporting political participation for persons with intellectual disabilities

Sunbeam Media developed an awareness-raising video clip *Your Power, Your Vote*⁶⁵ for the 2011 **Irish** General Election and posted it on YouTube in February. The video explains the support required to enable political participation for persons with intellectual disabilities and provides an overview of why people with disabilities should vote and how they can exercise this right.

7.3. Developments in participatory democracy

The right to take part in municipal and European elections is only one element that EU law provides in the wider context of political participation. The Treaty on European Union (TEU) establishes in Article 10 (3) that all decisions at EU level should be taken "as openly and as closely as possible to the citizens". Article 11 of the TEU provides for various elements of participatory democracy; with the European citizens' initiative (ECI) the most important tool. Besides the citizens' initiative this Article provides for: "public exchanges" among "citizens and representative associations"; "open, transparent and regular dialogue" of the institutions "with representative associations and civil society"; and "consultations" to be carried out by the Commission "with parties concerned". The number of consultations rose last year,⁶⁵ with 131 closing in 2011, four of which were in the area of Justice and Fundamental Rights.⁶⁶

62 For more information, see: www.kiesraad.nl/nl/Onderwerpen/Thema-Stemmen/Hulp_bij_stemmen.html.

63 See: www.inclusion-europe.org/images/stories/documents/Project_ADAP/Good_Practices_EN.pdf.

64 For more information, see: www.youtube.com/watch?feature=player_embedded&v=aDk6gYnbFL8.

65 FRA (2011), p. 136.

66 For more information, see: http://ec.europa.eu/yourvoice/consultations/2011/index_en.htm.

In March, the European Economic and Social Committee (EESC) published a Roadmap for participatory democracy, which promoted practical implementation of civil dialogue.⁶⁷ The tumultuous events occurring in the Mediterranean region make clear the vital role that civil society should play in the processes of democratisation and clarifies the challenge for Europe in adopting concrete tools and making adequate investments to strengthen the infrastructure of democracies, the roadmap says. It calls for a comprehensive inventory of existing civil dialogue mechanisms in all EU institutions and bodies and an evaluation of these. Practices at national level should be mapped, it says, in order to draw lessons from them and further develop them at EU level.

"Providing clear, comprehensive and accessible information on local and regional policies strengthens active citizenship and fosters a feeling of belonging to a community as well as the civic duty to contribute to this community in a democratic society."

CLRA Recommendation 307 (2011) on citizen participation at local and regional level in Europe

The Council of Europe Congress of Local and Regional Authorities (CLRA) forcefully reaffirmed the importance of direct citizen participation as a tool for strengthening local and regional democracy. In a recommendation adopted in October, the CLRA advised the Council of Europe member states to increase public participation in decision making processes so that citizens can directly express their choices, preferences and opinions on given policies.⁶⁸

Promising practice



Enhancing access to Europe with a one-stop website

Citizen House is a new website providing a one-stop shop for EU citizens submitting complaints to the European Commission, requesting access to EU documents, submitting a petition to the European Parliament, delivering a request to the European Ombudsman or launching a European citizens' initiative. Citizenhouse.eu is a "360 degree resource by citizens for citizens to learn, share and engage". The European Citizen Action Service created the website as the first stage of an ambitious project to set up the 'European Civil Society House', aimed at enabling NGOs and individuals to make their voices heard within the EU by providing advice on how to lobby, fundraise and defend European citizenship rights. The website also plans to offer access to citizens on a national level.

For more information, see: www.citizenhouse.eu

67 EESC (2011).

68 CLRA (2011).

On 1 April 2011, the EU Regulation on the citizens' initiative⁶⁹ entered into force; it applies as of 1 April 2012. On 17 November 2011, the Commission adopted the implementing Regulation (EU) No 1179/2011.⁷⁰ On 22 December 2011, it made "open source software" available.⁷¹ The European Commission is required to maintain "open-source software incorporating the relevant technical and security features necessary for compliance with the provisions of this Regulation regarding the online collection systems. The software shall be made available free of charge"⁷² and "technical specifications" must be "adopted" for this purpose.⁷³

The time between the adoption of the regulation and its application enabled EU Member States to implement various obligations under the regulation including: the certification of the online collection system;⁷⁴ the verification of the "statements of support", including the issuance of a certificate regarding the "number of valid statements";⁷⁵ data protection issues;⁷⁶ and to address questions of liability for damages caused by organisers of a citizens' initiative and penalties for false declarations made by organisers of a citizens' initiative and the fraudulent use of data provided in the context of a citizens' initiative.⁷⁷

With respect to the process of drafting implementing legislation, **Austria, Belgium, Bulgaria, the Czech Republic, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Poland** and the **United Kingdom** have taken concrete preparatory steps, and in seven of these countries (Austria, Bulgaria, Finland, Germany, Hungary, Latvia, Luxembourg) the process has already reached parliament. In some countries, like **Denmark, France, Greece, the Netherlands, Slovakia, Spain** or the **United Kingdom**, direct applicability of the regulation does not require specific legislation.

Public debates on the citizens' initiative were rather limited during the reporting period and it remains to be seen whether public awareness will increase when the first initiatives are launched on 1 April 2012. At least one feature of the legal framework of the citizens' initiative should already be highlighted, however: the option to collect signatures online sets a modern standard which could, in principle, enhance civic participation.

Outlook

Increasing citizen participation in EU elections and reforming the European Parliament's electoral system remain challenges to be addressed in the run-up to the next elections in 2014. Reforms of electoral systems at the national level are also likely to remain on the agenda, including as regards the right to vote from abroad.

Ensuring that persons with disabilities are able to vote in a manner equal to that of any other citizen will continue to pose concerns and challenges in many EU Member States. Progress in this area is even more pressing after the ratification of the CRPD and the adoption of a recommendation setting high standards in this area by the Committee of Ministers of the Council of Europe.

Active participation of EU citizens in the democratic life of the EU outside the context of elections remains a major challenge. Following the launch of the European citizens' initiative on 1 April 2012, the EU's democratic functioning should be enhanced. It remains to be seen how EU citizens will seize the opportunity provided by this tool.

69 Regulation (EU) No 211/2011, OJ 2011 L 65/1.

70 European Commission (2011b).

71 For more information, see <http://joinup.ec.europa.eu/software/ocs/release/100>.

72 Regulation (EU) No 211/2011, Art. 6 (2) (4).

73 Regulation (EU) No 211/2011, Art. 6 (5).

74 Regulation (EU) No 211/2011, Art. 6 (3).

75 Regulation (EU) No 211/2011, Art. 8 (2).

76 Regulation (EU) No 211/2011, Art. 12 (4), (5).

77 Regulation (EU) No 211/2011, Art. 13 and 14.

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Access to efficient and independent justice

Rights of crime victims



Justice Justice

UN & CoE

EU

January

January

February

14 February – European Union Agency for Fundamental Rights issues an Opinion on the draft Directive regarding the European Investigation Order

13 March – Council of Europe European Commission for the Efficiency of Justice publishes a comparative report on courts in EU Member States

February

March

March

April

April

May

31 May – Council of Europe issues guidelines on child-friendly justice

8 June – European Commission presents a proposal for a directive on the right to access to a lawyer in criminal proceedings and on the right to communicate upon arrest

14 June – European Commission launches a consultation on Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention

May

June

June

July

July

August

August

20 September – European Court of Human Rights, in the *Ullens de Schooten and Rezabek v. Belgium* case, rules that national courts need to provide a reasoned opinion when refusing to refer a case to the Court of Justice of the European Union

20 September – European Commission adopts a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Towards an EU criminal policy: Ensuring the effective implementation of EU policies through criminal law'

September

October

September

29 November – European Commission proposes Alternative Dispute Resolution mechanisms, including a platform for online disputes

October

November

18 November – UN Commission on Crime Prevention and Criminal Justice adopts draft UN principles and guidelines on access to legal aid in criminal justice systems

13 December – European Parliament adopts a legislative Resolution on the proposal for a directive of the European Parliament and of the Council on the right to information in criminal proceedings

December

November

December



8

Access to efficient and independent justice



The financial crisis kept access to justice in the spotlight in 2011. Budget reductions posed challenges for key institutions such as courts and bodies with a human rights remit. Still, efforts were made to improve the situation by reducing the length of court proceedings, broadening legal standing before courts and developing e-justice. Pressure for reform is driven by the need to improve access to justice and to further modernisation, with European Union (EU) legislation and criticism from Council of Europe and UN bodies helping spur the reform push.

The vast number of cases pending before the European Court of Human Rights (ECtHR), many of which stem from EU Member States, exemplify the challenges to access to justice in the EU. In the cases it concluded in 2011, the ECtHR found more than 500 EU Member State violations. Of these, approximately 100 concerned fair trial and 200 length of proceedings – both essential elements of access to justice. Some specifics of these ECtHR cases are dealt with in this chapter and additional details are provided in Chapter 10.

This chapter covers developments in the EU and its Member States related to core issues of access to justice in general as well as defence rights, but excludes victims' rights, as they are dealt with in Chapter 9. Additionally, Chapter 10, on obligations of states under international human rights law, discusses the complaints mechanisms under various treaties, which enhance access to justice at the international level. Chapters 5 and 6, dealing with equality and non-discrimination, offer supplementary overviews of equality bodies, which are relevant to understanding access to justice. The thematic Focus of this Annual report on the fundamental rights architecture of the EU is, likewise, closely connected to this chapter. The Focus illustrates the interrelatedness of the variety of bodies operating at national, EU, Council of Europe and UN levels and how this plays out in various areas, not the least in the area of access to justice.

Key developments in access to efficient and independent justice:

- in light of financial austerity, many EU Member States attempt to streamline various judicial and non-judicial mechanisms, potentially affecting fundamental rights guarantees;
- EU Member States continue work to reduce the length of court proceedings and bring about other court reforms;
- various EU Member States establish and reform independent institutions with a human rights remit that can support and/or provide access to justice; national equality bodies and National Human Rights Institutions (NHRIs) in particular gain further prominence;
- online technological developments that facilitate and modernise justice, known as e-justice, move further up the agenda in several EU Member States, linked both to the need to modernise judicial systems and to improve cost effectiveness;
- with the on-going development of the EU *Roadmap on criminal procedures*, procedures for the rights of the individual in criminal proceedings, particularly as regards access to justice in cross-border situations, are strengthened.

8.1. Developments of the concept of access to justice

The area of access to justice has developed through legislation, as well as judicial interpretation, in the EU over the years. The CJEU case law makes clear that justice systems have to be characterised by the principle of ‘effective judicial protection’, which is also reflected in Article 47 of the EU Charter of Fundamental Rights (right to an effective remedy and a fair trial; also referring to the concept of ‘access to justice’). An effective judicial protection includes a variety of elements ranging from appropriate legal aid to the imposition of effective sanctions. Consequently, this chapter does not only cover ‘access’ to the courts, but also offers a wider perspective on ‘access to justice’, which also includes non-judicial mechanisms.

Important ECtHR judgments in 2011, delivered by the Grand Chamber, dealt, for instance, with a conviction based on anonymous witnesses and an inadequately argued court decision which could not be appealed¹ and an Embassy official unable to bring an employment dispute before the French courts.² A third example concerns a French court that effectively prevented an applicant – a person with severe disabilities claiming sexual assault – from appealing by requiring an explicit reference to the grounds of appeal, which was not formally required under the law.³ In all three cases, violations of Article 6 on the right to fair trial of the European Convention on Human Rights (ECHR) were found.

More specifically related to the EU is the case of *Ullens de Schooten and Rezabek v. Belgium*.⁴ The ECtHR concluded that a national court must deliver a reasoned decision if it denies the request for a case referral to the Court of Justice of the European Union (CJEU), a ruling that clarifies the procedures around the preliminary ruling (Article 267 TFEU) within Article 6 of the ECHR. In this specific case, the ECtHR concluded that the national court’s reasoning was sufficiently argued and, therefore, no violation had taken place.

The CJEU also had the opportunity to elaborate on access to justice. In the *DEB* case, the CJEU ruled, for example, that Article 47 of the Charter of Fundamental Rights precluded a rule whereby advanced court fees were of such a cost as to effectively bar access to

justice.⁵ In the *Solvay* case, the CJEU dealt with the length of competition law procedures between the company Solvay and the European Commission.⁶ The CJEU has also continued its elaboration on Kadi-related cases (see FRA 2010 Annual Report, section 8.2.3), which deal with freezing funds on the basis of a UN Security Council resolution aimed at countering terrorism and the right to be heard, an essential aspect of effective judicial protection and of the concept of access to justice.⁷

8.1.1. International instruments and reports

In 2011, the United Nations (UN) further refined standards and provided guidance in the area of access to justice. For instance, the UN Commission on Crime Prevention and Criminal Justice (CCPCJ) convened an expert group that adopted a draft *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, which are to be revised and adopted by the CCPCJ.⁸ This draft defines legal aid as including “legal advice, assistance and representation for suspects, arrested, prosecuted and detained persons and for victims and witnesses in the criminal justice process” and that this should be “provided at no cost for those without means or when the interest of justice so requires”.⁹

The European Commission for the Efficiency of Justice (CEPEJ), a body of the Council of Europe, continued data collection and work on indicators for measuring the quality of justice in national court systems throughout Europe.¹⁰ CEPEJ also progressed on its Saturn Time Management Project to improve the efficiency of courts, as well as its scheme for evaluating judicial systems through a peer review mechanism, with the Netherlands and Austria scrutinised in 2011.¹¹ Another Council of Europe body, the Consultative Council of European Judges (CCJE), issued an Opinion on justice and information technologies, which will be explored in some detail

1 ECtHR, *Taxquet v. Belgium*, No. 926/05, 16 November 2010.

2 ECtHR, *Sabeh el Leil v. France*, No. 34869/05, 29 June 2011.

3 ECtHR, *Poirot v. France*, No. 29938/07, 15 December 2011, which is not final.

4 ECtHR, *Ullens de Schooten and Rezabek v. Belgium*, No. 3989/07 and 38353/07, 20 September 2011.

5 CJEU, C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH*, para. 59, 22 December 2010.

6 CJEU, joined cases C-109/10 and 110/10, *Solvay SA v. European Commission*, 25 October 2011.

7 CJEU, C-548/09, *Bank Melli Iran v. Council of the European Union*, 16 November 2011, para. 94, 103 and 104; CJEU, C-27/09, *French Republic v. People’s Mojahedin Organization of Iran*, 21 December 2011, para. 66. See also, CJEU, C-380/09, *Melli Bank v. Council*, 28 June 2011, para. 33.

8 UN, CCPCJ (2011) *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, E/CN.15/2012/24, 16–18 November 2011.

9 *Ibid.*, Preamble para. 8 (as revised during the meeting).

10 Council of Europe, CEPEJ (2010), CEPEJ (2011a). See also, CEPEJ (2011b).

11 For more information, see: on CEPEJ SATURN Centre for judicial time management, www.coe.int/t/dghl/cooperation/cepej/Delais/default_en.asp; on the CEPEJ Meeting reports of the Working party on the evaluation of judicial systems, www.coe.int/t/dghl/cooperation/cepej/WCD/GTEVALReports_en.asp#



later in the chapter.¹² The CCJE also adopted the *Magna Carta of Judges*, which is a compilation of key principles related to judiciaries – judicial independence, ethical aspects, access to justice¹³ – and issued an Opinion on the role of judges in the enforcement of judicial decisions, including those of the ECtHR.¹⁴

FRA ACTIVITY

Report identifies various obstacles to access to justice

The FRA published its first report on access to justice in March: *Access to justice in Europe: an overview of challenges and opportunities*. In a comparative analysis of access to justice across EU Member States, the report finds that there are many obstacles that make it difficult for individuals to enforce their rights. These obstacles appear in areas ranging from time limits, legal standing and length of proceedings, to legal costs, procedural formalities and requirements and complexity of legislation. The report focuses on civil and administrative procedures available to victims of discrimination, but its findings are more broadly relevant. The report also offers an analysis of access to justice at UN, Council of Europe and EU levels, pointing out both opportunities and challenges. The report was presented at a conference in Budapest on 'Protecting victims in the EU: the road ahead', hosted by the Hungarian Presidency of the Council of the European Union, with the support of the FRA.

The FRA also completed research on access to justice through national equality bodies in 2011. This report focuses on the experiences of complainants, national equality bodies and intermediaries – lawyers and NGOs, for instance, that support complainants in accessing justice. This qualitative study looks at access to justice in cases of discrimination through equality bodies in eight selected EU Member States (**Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Italy** and the **United Kingdom**). On 26 September, the FRA held a stakeholder consultation to discuss the preliminary findings of this research, which was attended by representatives from equality bodies, judges and lawyers' associations, as well as legal aid services. The report, which will be presented in 2012, points out the challenges in EU Member States, such as the often complex systems through which a person must navigate to seek redress in cases of discrimination. The report also suggests possible improvements.

For more information, see: FRA (2011a)

¹² Council of Europe, CCJE (2011).

¹³ CCJE (2010a).

¹⁴ CCJE (2010b).

8.2. Legislative developments at EU level

EU-level developments in both criminal and civil law strongly affected access to justice in 2011. These developments range from enhanced protection of rights in criminal proceedings to further attempts to facilitate 'free movement' of judicial decisions, which aim at ensuring that justice can be accessed irrespective of borders.

8.2.1. Criminal law

The Action Plan of the Stockholm Programme required several measures to be taken in 2011, including some with a clear link to access to justice.¹⁵ Among those, substantial progress and improvements were made in the area of the rights of the individual in criminal proceedings, particularly in access to justice in cross-border situations.

Following up on the 2009 *Criminal Procedure Roadmap*¹⁶ (for the parallel roadmap on victims' rights, see Chapter 9) and the Directive touching on the roadmap's first measure – A – regarding interpretation and translation,¹⁷ the European Commission has proceeded to further consider the remaining five measures – B-F – of the Roadmap. In 2010, the Commission proposed a Directive on the right to information in criminal proceedings, reflective of measure B, the 'letter of rights'.¹⁸ The Council of the European Union agreed upon this in mid-November 2011 and the European Parliament voted in favour of the measure on 13 December 2011.¹⁹ The letter of rights Directive will facilitate the understanding of essential rights for suspects and accused at the earliest stage of a criminal investigation.

Further, in 2011, the European Commission proposed a Directive on the right to access a lawyer in criminal proceedings and on the right to communicate upon arrest, which jointly encompasses roadmap measures C and D, with D proposed earlier than originally planned.²⁰ These measures would guarantee the right to communicate with relatives or an employer at the time of arrest (Article 5) and the right to a lawyer as soon as possible, at the latest upon the deprivation of liberty (Article 3). Under a European Arrest Warrant (EAW), an arrest warrant valid in all EU Member States, an arrested person has the right to a lawyer both where the warrant is carried out and in the state requesting the warrant (Article 11). The Council of Europe was

¹⁵ European Commission (2010a).

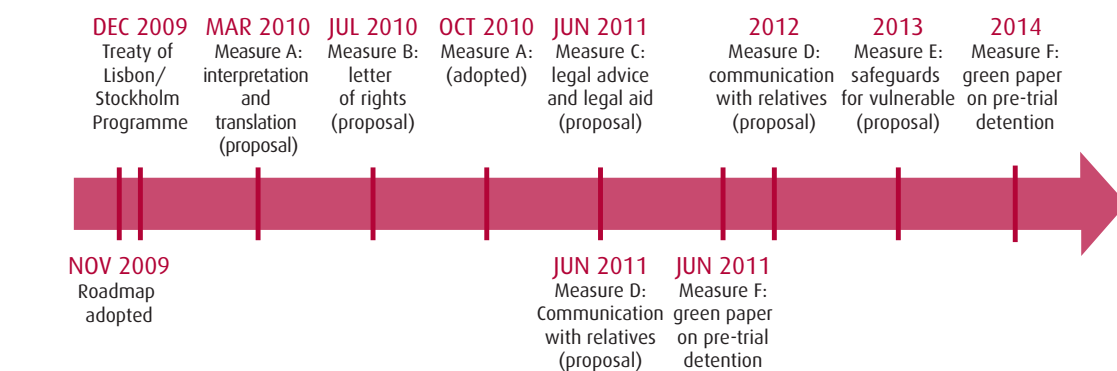
¹⁶ Council of the European Union (2009), pp. 1-3.

¹⁷ Directive 2010/64/EU.

¹⁸ European Commission (2010b).

¹⁹ European Commission (2011a).

²⁰ European Commission (2011b).

Figure 8.1: Timeline of the Criminal Procedure Roadmap, with revisions from original plan

Source: FRA, 2011

regularly consulted on the Roadmap and on the draft measures at the Secretariat level, at different stages of their elaboration, and on the basis of ECtHR case law, provided its opinion on the compatibility of the drafts with the ECHR standards, pointing out where the language might be too vague or fall short of the minimum standards.²¹

Unlike measures A-D, measure E, on safeguards for vulnerable persons, is yet to be presented in detail. Measure F, which was tentatively scheduled for presentation in 2014, was already made public in 2011.²² This green paper aimed at soliciting comments through a round of public consultations on subsequent legislation related to, in particular, detention conditions in cross-border settings, such as under an EAW. The consultations were concluded in late November 2011.²³

The European Commission also issued a Communication entitled *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*.²⁴ The Lisbon Treaty, the Communication underscores, provides the explicit legal basis not only for adopting legislation on criminal procedural law but also for the substance of criminal law itself. Such measures would aim at strengthening trust in criminal law in cross-border situations. A more uniform approach to various types of crimes would ensure easier cooperation among Member States and a smoother application of several cross-border instruments which are either in place or in development. More importantly, the Communication recognises the important role of fundamental rights in this area (Paragraph 2.1. – ‘General principles to respect’).

Last year’s Annual Report reported on the European Parliament’s request to the FRA for an Opinion on the draft Directive on the European Investigation Order (EIO), designed to facilitate the gathering and transfer of evidence between Member States.²⁵ Some of the issues raised by the FRA, such as the grounds for refusing the execution of an EIO, were under debate at the Council of the European Union at the time of writing. During 2011, agreement was largely reached.²⁶ Instruments like the planned EIO seek to simplify exchanges among EU Member States in order to create a justice system that ‘stumbles’ less at border crossings. However, differences in ways legal systems operate, not necessarily differences in levels of fundamental rights protection, create challenges. In *Stojkovic v. France and Belgium*, for instance, the ECtHR found a violation of the right to legal assistance (Article 6 (3) (e) of the ECHR), in a cross-border case where Belgian police questioned a suspect by request of a French investigative judge without permitting him legal counsel. This exemplifies the problems faced in cross-border cases, with legal safeguards in one Member State not fully matching the implementation of measures in another.²⁷

The Council of Europe Commissioner for Human Rights also expressed concerns related to cross-border issues over the application of the European Arrest Warrant (EAW). He criticised, among other things, the absence of effective remedy against an EAW, the impossibility of having an EAW cancelled when proven innocent, the long duration between an alleged crime and issuance of an EAW and the misuse of an EAW for minor crimes.²⁸

21 Council of Europe (2011a).

22 European Commission (2011c).

23 For more information on the green paper, see: http://ec.europa.eu/justice/newsroom/criminal/opinion/110614_en.htm.

24 European Commission (2011g). Also see: comments on the Communication by the European Data Protection Supervisor, 24 October 2011: www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2011/11-10-24_EU_criminal_policy_EN.pdf.

25 European Union Agency for Fundamental Rights (FRA) (2011a). Also see: Eurojust opinion on Council document 6812/11, 4 March 2011: <http://register.consilium.europa.eu/pdf/en/11/sto6/sto6814.en11.pdf>.

26 Council of the European Union (2011a). Also see: Council of the European Union (2011b).

27 ECtHR, *Stojkovic v. France and Belgium*, No. 25303/08, 27 October 2011 (not final).

28 Council of Europe, Commissioner’s Human Rights Comments (2011a). Also see: European Commission (2011e).

FRA ACTIVITY

Cooperation among EU agencies: Together against trafficking in human beings

The FRA cooperates to various degrees with the EU's Justice and Home Affairs Agencies (JHA) – such as Europol, Frontex, Cefpol and Eurojust – to enhance the fundamental rights dimension of their policing, border and judicial activities. The FRA, drawing on its research and analysis, provides a rights-based perspective to the operational work of the JHA agencies through advice as well as input for training curricula. In October 2011, directors of seven EU agencies, including the FRA, committed to creating a Europe-wide approach to the eradication of human trafficking. The joint statement of the Heads of the EU Justice and Home Affairs Agencies says that the fundamental rights of victims of human trafficking are central to EU policy in this field. Efforts to address trafficking would be made in partnership with EU Member States, EU institutions and other partners, including civil society organisations. The October event featured a debate between the directors of the EU agencies, moderated by the EU Anti-Trafficking Coordinator.

For more information, see: http://fra.europa.eu/fraWebsite/news_and_events/2011-events/evt11_1810_en.htm

8.2.2. Civil law

Already in 2010, the European Commission proposed recasting the *Brussels I* regulation, which seeks to remove obstacles to the free movement of judicial decisions.²⁹ This measure will improve access to justice by enabling cross-border applicability of decisions. The recasting is still under discussion, in particular the proposed abolition of the intermediate procedure for recognition and enforcement of judgment, which would make a judgment directly applicable across borders. This is especially difficult with regard to issues that differ among Member States, such as defamation.³⁰ Rulings on defamation are particularly sensitive, and, according to the European Commission, it is premature to presume the required level of trust exists among legal systems in order to move beyond the status quo on this matter. Therefore an exception is envisaged for defamation.³¹ Critics argue that there would be other areas where exceptions would be reasonable, such as disputes involving property.³²

29 Council of the European Union (2001), p. 1. See also FRA (2011b).

30 European Commission (2010c), p. 6.

31 *Ibid.*, p. 7.

32 United Kingdom, Ministry of Justice (2010), p. 9.

The European Commission has also proposed legislation related to alternative dispute resolution (ADR). ADR mechanisms, such as mediation, may help to ensure access to justice by providing claimants with faster and cheaper alternatives even though some of the benefits of more formal procedures are lost. The majority of EU Member States have recently reformed legislation with respect to mediation, in part to align domestic law with the 'Mediation Directive', which aims to ease access to justice by addressing key aspects of civil procedure in cross-border disputes.³³ The European Commission initiated action against six Member States in late 2011, by sending them reasoned opinions³⁴ on their failure to notify national bodies of the need to implement this directive.³⁵ The European Parliament has called on the Commission to explore providing a harmonised legal framework for some aspects of ADR across sectors, while developing existing schemes and encouraging Member States to increase funding to ADR-related matters.³⁶ In November, the European Commission, moreover, proposed reinforced ADR mechanisms related to consumer disputes, including a platform for online disputes. Austria followed up on this proposal, with an act on mediation procedures in cross-border civil and commercial law disputes.³⁷

8.3. Institutional developments at European and Member State levels

Across Europe efforts are underway to adopt measures specifically aimed at reducing the length of proceedings at both European level, with the courts in Strasbourg and Luxembourg, as well as at national level, with courts in EU Member States. Additionally, 2011 witnessed court reforms aimed at increasing judicial independence and overall justice efficiency through restructuring and modernisation. Some of these reforms, however, might compromise access to justice by curtailing legal aid. Progress was made during the year in promoting e-justice. An additional trend that is visible in Member States is the continued development of National Human Rights Institutions (NHRIs).

8.3.1. Length of proceedings

The length of proceedings continued to represent one of the main obstacles to effective access to justice in the whole EU. Table 8.1 shows the number of judgments finding at least one violation of any

33 Directive 2008/52/EC, OJ 2008 L 136.

34 See Focus Section.

35 European Commission (2011f).

36 European Parliament Committee on Legal Affairs (2011).

37 Austria, Act on Cross-border Mediation in Civil Law in the European Union.

Table 8.1: Number of ECtHR judgments in 2011 finding at least one violation, violations of the right to a fair trial and violations of length of proceedings, by country

Country	Judgments finding at least one violation	Right to a fair trial	Length of proceedings
AT	7 (-9)	0 (-6)	5 (-4)
BE	7 (+3)	2 (-1)	0 (no change)
BG	52 (-17)	2 (-4)	21 (-10)
CY	1 (-2)	0 (no change)	1 (+1)
CZ	19 (+10)	13 (+10)	2 (+1)
DE	31 (+2)	0 (-2)	19 (-10)
DK	1 (+1)	0 (no change)	0 (no change)
EE	3 (+2)	1 (+1)	0 (no change)
EL	69 (+16)	6 (-2)	50 (+17)
ES	9 (+3)	4 (no change)	1 (+1)
FI	5 (-11)	0 (-2)	2 (-7)
FR	23 (-5)	11 (+1)	2 (+1)
HU	33 (+12)	4 (+3)	19 (+5)
IE	2 (no change)	0 (no change)	2 (+1)
IT	34 (-27)	7 (-2)	16 (-28)
LT	9 (+2)	3 (no change)	5 (+2)
LU	1 (-4)	1 (-1)	0 (-3)
LV	10 (+7)	0 (-1)	1 (+1)
MT	9 (+6)	3 (+3)	3 (+3)
NL	4 (+2)	1 (+1)	0 (no change)
PL	54 (-33)	14 (-6)	15 (-22)
PT	27 (+12)	1 (-1)	13 (+7)
RO	58 (-77)	9 (-21)	10 (-6)
SE	0 (-4)	0 (-1)	0 (-1)
SI	11 (+8)	1 (+1)	6 (+4)
SK	19 (-21)	2 (no change)	5 (-24)
UK	8 (-6)	3 (+3)	1 (no change)
HR	23 (+2)	8 (+2)	3 (-5)
Total	529 (-128)	96 (-25)	202 (-76)

Note: The difference in the number of cases to 2010 is in parentheses.

Source: Council of Europe/ECtHR, Annual Report 2011, published in 2012, pp. 155-157

right of the ECHR, as well as the number of judgments generally related to the right to fair trial and, more specifically, to the length of proceedings. The data underscore the problems related to length of proceedings across Europe.

In 2011, several EU Member States undertook specific legislative measures to address the persisting problem of over-lengthy proceedings. In **Austria**, for example, the civil procedural law was amended to abolish summer and winter recess periods.³⁸ **France** reformed its criminal courts, dropping the number of jurors in the first instance to six from nine and on appeal

to nine from 12³⁹ to enable criminal courts to try more cases per session. In response to a 2010 pilot judgment delivered by the ECtHR (*Rumpf*) **Germany** adopted a new law in December 2011. It addresses excessive length of proceedings in two stages: those affected by lengthy proceedings must first file a complaint against the lengthy proceedings, giving by that an opportunity to the judges to accelerate them. If the proceedings continue to be delayed, compensation may be granted.

Several legal provisions aimed at speeding up judicial proceedings have been adopted around Europe. **Greece**, for example, gave lower first-instance courts in civil cases

38 Austria, Draft Budget Consolidation Act – Justice 2011–2013.

39 France, Decree No. 2011-939 of 10 August 2011.



a broader mandate by upping the sums of money which may be handled at this level. They also curtailed the flexibility courts have in postponing criminal proceedings.⁴⁰ In **Romania**, judges may now set shorter terms for hearings and take active measures to compel parties to present evidence and fulfil their obligations without unnecessary delays, and documents may be communicated by fax or e-mail, including subpoenas.⁴¹ The **Slovenian** National Assembly adopted two acts introducing specific measures to accelerate proceedings before courts. These include a mechanism to lower the remuneration of court experts if they cause delays, and the option for judges to schedule and hear trials after regular business hours.⁴²

8.3.2. Court reform

Similarly, steps were taken across Europe to make access to justice more effective. Developments include increasing judicial independence and overall justice efficiency, as well as restructuring and modernising court systems. Some changes, however, suggest that access to justice has been compromised.

The ECtHR, the CJEU and many EU Member States all dealt with court reform during the year. The Council of Europe convened the Izmir Conference on the future of the ECtHR, a follow-up to the 2010 Interlaken Conference,⁴³ with the twin goals of dealing more effectively with urgent and relevant cases and of resolving more issues at national level. The ECtHR itself also sought improved practices, such as making its interim measures more effective in preventing a situation from deteriorating pending possible trial.⁴⁴ Other measures include issuing a practical guide on admissibility criteria and establishing an ECtHR section to filter out inadmissible cases, efforts designed in particular to reduce cases from the highest case-count States.⁴⁵ The ECtHR also institutionalised a pilot-judgment procedure – in which one judgment addresses several cases – in an effort to identify systemic problems and reduce the number of pending and repeat cases.⁴⁶ At the national level, the **Latvian** Parliament in June adopted amendments to the administrative procedure law, introducing an ‘experimental judgment procedure’.⁴⁷ Under this procedure, the chairperson of the court may assign ‘experimental status’ to one or several cases of similar factual and legal circumstance

if there is no well-established case-law to deal with the question at hand. All court instances review experimental cases on a priority basis. Only once the final decision of the experimental case comes into force are the other, similar, cases reviewed.

The CJEU has kept up with the constantly increasing number of cases it receives each year, although its case-load growth is far smaller than that experienced by the ECtHR.⁴⁸ The CJEU received 1,406 cases in 2010, against 60,000 new applications at the ECtHR.⁴⁹ The CJEU is also to undergo reform: both the Statute of the Court and its Rules of Procedures are up for revision.⁵⁰ One major issue relates to the composition of judges’ panels. Some suggest increasing the number of judges in the Grand Chamber composition to 15 from 13 and dropping the requirement that all four Chamber Presidents must sit in the Grand Chamber simultaneously. Another important change relates to improving case processing. Decisions on legal aid would be simplified, and chambers would be able to use expedited approaches to speed up procedures in particular cases and to grant anonymity to parties to protect privacy. The CJEU would also be able to pursue judgment in some cases, even if a requested referral for a CJEU ruling is later withdrawn, to ensure that determinations are made on important points of law.

Several areas of reform have, however, caused concern, including plans to: discontinue publishing the written arguments submitted to the CJEU prior to an oral hearing, called ‘report for the hearing’ documents; discontinue translations, except for translations of parties’ written observations and oral arguments; and the CJEU’s new power to reject a hearing, even if a request was made by one of the parties.⁵¹ These efficiency-boosting measures will affect the overall access to justice, both positively and negatively.

At the national level, a majority of EU Member States and **Croatia** took steps to reform and re-organise national judicial systems to enhance their effectiveness. The **Netherlands**, for instance, will reduce the number of courts of appeal (*Gerechtshoven, Hof*) to four from five, and the number of courts (*rechtbanken*) to 10 from 19.⁵² **Romania** has reorganised its courts by closing or merging some smaller courts with low activity courts and by re-allocating some staff to busier courts.⁵³ The **Irish** parliament is seeking to reduce judicial pay, but questions have arisen about the implications of reduced pay on judicial independence.⁵⁴ Early in 2012, the European

40 Greece, Law 3994/2011 Streamlining and improving the administration of civil justice and Greece, Law 3904/2010 Consolidation and improvement to the grant of criminal justice.

41 Romania, Law 202/2010 regarding some measures for accelerating judicial proceedings. Similar changes are also introduced in Romania, Law 134/2010 of the Civil Procedure Code, and Romania, Law 135/2010 on the Criminal Procedure Code.

42 Slovenia, Act amending the Courts Act, Slovenia, Act Amending the Judicial Service Act.

43 Council of Europe (2011b).

44 ECtHR (2011a).

45 ECtHR (2011b).

46 ECtHR (2011c).

47 Latvia, Draft law on amendments to the Administrative Procedure Law.

48 CJEU (2011a).

49 ECtHR (2011d).

50 CJEU (2011b).

51 United Kingdom, Law Society of England and Wales (2011a).

52 The Netherlands, House of Representatives (2011).

53 Romania, Law 148/2011.

54 Ireland, 29th Amendment to the Constitution (Judges’ Remuneration) Bill 2011.

Commission launched legal procedures against **Hungary** on issues related to the independence of its judiciary, specifically on the mandatory retirement age of judges.⁵⁵

Promising practice

Measuring public trust in justice: justice indicators

EURO-JUSTIS, a justice indicator project co-financed by the EU's seventh framework programme (FP7) research programme, is designed to provide EU institutions and Member States with new indicators for assessing public confidence in justice, such as trust in court effectiveness, court distributive fairness and court procedural fairness. These indicators are designed to help policymakers at both EU- and Member State-levels to understand how to adjust policies to address areas where there may be problems in perceptions of or experience with courts. In June, the final project report was published, entitled *Trust in justice*.

For more information, see: www.eurojustis.eu

Bulgaria and **Romania** undertook judicial reform commitments upon EU accession.⁵⁶ Budget cuts also stimulated additional court reforms in Europe. **Greece**, for example, introduced court reforms that included ensuring the enforcement of judicial decisions, improving judges' management skills and eliminating backlogs in addition to the reforms mentioned.⁵⁷

8.3.3. Court fees and legal aid

High costs associated with legal proceedings, such as court and lawyers' fees, may deter individuals from pursuing remedies through the courts. Adequately resourced legal aid systems are therefore crucial for access to justice to be effective. According to ECtHR case law under Article 6 (1) of the ECHR, states are to provide free legal assistance in civil matters when such assistance proves indispensable for effective access to the courts, either because legal representation is mandatory under domestic law or because of the complexity of the procedure or case.⁵⁸

Court fees – paid to the court by a claimant on commencement of the proceedings – were reviewed in several EU Member States during 2011. The **Czech Republic** raised court fees, in some cases by up to 50%.⁵⁹ **Lithuania** introduced new court fees in relation to, for

instance, a request for interim measures and for appeal against a decision by a first instance court adopted in absentia, while abolishing fees for other types of cases, such as those related to consumer rights.⁶⁰ The **Netherlands** is also considering a fee increase.⁶¹ **Austrian** legal professionals criticised the high cost of photocopying documents from case files, as such charges considerably raised the overall costs of court proceedings.⁶²

The demand for legal aid has been increasing in some Member States. **Bulgaria** provided legal aid in a substantially higher number of cases, due largely to amendments to the Criminal Procedure Code allowing for a 'reserve counsellor' – a back-up lawyer, growing awareness of legal aid among the population and many people's financial situations.⁶³ In **Ireland**, those seeking legal services for non-asylum civil matters rose to 17,000 in 2010 from 10,000 in 2007. The figure continued to climb in 2011, nearly reaching the 2007 total in the first six months of the year. Inevitably, this has created huge pressure on the Irish Legal Aid Board's law centres and its capacity to deliver legal services within a reasonable period of time.⁶⁴

In a broader context, several EU Member States introduced legislative reforms of existing legal aid systems (see also Measure C of the roadmap on criminal procedures in Figure 8.1, which, to some extent, deals with legal aid). **France** adopted a law in July on the right to see a lawyer when in police custody, customs and 'excise' detention.⁶⁵ The reform includes state contributions towards payment of court-appointed lawyers, and provides a grant to the bar associations to cover all or part of the cost of providing such lawyers. **Austria** amended a Law Relating to Aliens in September, which requires obligatory legal counselling for asylum seekers in the admission, first instance and appeals procedures before the asylum court (*Asylgerichtshof*).⁶⁶ (For further information on asylum-related issues, see Chapter 1). **Slovakia** reformed its legal aid to expand eligibility to a wider segment of society.⁶⁷

Other EU Member States, have, however, introduced more restrictive measures. The Minister for Immigration and Asylum Policy of the **Netherlands** announced new policies to shorten asylum procedures.⁶⁸ Legal aid will be reduced or cut when asylum seekers submit further applications without presenting new facts.⁶⁹ An expert group

55 European Commission (2012).

56 Council of the European Union (2011c).

57 European Commission Directorate-General for Economic and Financial Affairs (2011).

58 See e.g. ECtHR, *Mirosław Orzechowski v. Poland*, No. 13526/07, 13 January 2009, para. 20.

59 Czech Republic, Act No. 549/1991, 1 September 2011.

60 Lithuania, Seimas Law of the Republic of Lithuania amending and supplementing the Code on Civil Procedure, No. XI-1480, 21 June 2011.

61 The Netherlands, Council of State (2011).

62 Austria, Recht.extrajournal.net (2011).

63 Bulgaria, Ministry of Justice (2011) p. 5.

64 Ireland, House of the Oireachtas (2011).

65 France, Decree n° 2011-810 of 6 July 2011.

66 Austria, Amending Act to the Law Relating to Aliens.

67 Slovakia, Law 332/2011 amends the Act no. 327/2005 Coll.

68 The Netherlands, Minister for Immigration and Asylum Policy (2011).

69 *Ibid.*



has already pointed out that this policy will conflict with Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status as well as Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the ECHR, both of which guarantee the right to a fair trial.⁷⁰ In the **United Kingdom**, the Legal Aid, Sentencing and Punishment of Offenders Bill appears to be controversial,⁷¹ given substantial reductions in the availability of legal aid and changes to funding methods for civil litigation.

At national level, new legislative developments took place in 2011 also in relation to legal assistance in the area of criminal law. In light of the precedent created by the ECtHR in the 2008 judgment of *Salduz v. Turkey*⁷² in Belgium, for example, the federal Parliament adopted in August 2011 a 'Salduz law' conferring the right to access to a lawyer from the first police interrogation (i.e. Law amending the Criminal Procedure Code and the Law of 20 July 1990 on the preventive detention as to confer certain rights, amongst which the right to consult and be assisted by a lawyer, to each person interrogated and deprived from his freedom).

8.3.4. Legal standing

Legal standing – the legal possibility to bring a case before a court – is obviously central to accessing justice. Legal standing can be improved in several ways, such as broadening the scope of those eligible to bring a case, or reducing procedural obstacles. On a parallel issue of cases before institutions other than courts, FRA research has shown that cases of discrimination are rarely reported to the competent authorities.⁷³ Ongoing research supports the view that complainants avoid accessing justice since the individual stigma of bringing a case is too great.⁷⁴ Changing legal standing to allow for collective complaints might be a way forward at both courts and other institutions such as National Equality Bodies. Collective complaints, also referred to as 'class action' or 'collective redress', allow for the aggregation of several individual claims into one shared case.

The EU undertook a public consultation in 2011 on the introduction of a collective redress mechanism,⁷⁵ designed in part to identify related common legal principles. The consultation should also help to examine

how such common principles could fit into the legal systems of the EU and the 27 EU Member States. The consultation also explores in which fields, such as compensation versus halting a situation, collective redress would have added value for improving the enforcement of EU legislation or for better protecting the rights of victims. The intention with collective complaints is to improve the ability to hinder unlawful practices and to seek compensation for breaches of EU law harming large groups of persons or businesses.⁷⁶

Collective complaints are also closely associated, but should not be confused with what could be called 'public interest actions'. International environmental law has for many years required states to allow complaints from a directly affected person as well as from the general public with a sufficient interest in the matter. "What constitutes a sufficient interest and impairment of a right shall be determined [...] with the objective of giving the public concerned wide access to justice [...]. To this end, the interest of any non-governmental organization [promoting environmental protection] shall be deemed sufficient [...]."⁷⁷ The EU has implemented this part of international law via the Environmental Impact Assessment (EIA) Directive, which deals with public participation in environmental planning.⁷⁸ The CJEU clarified that national procedural law is trumped by the requirement to allow such NGOs to bring cases.⁷⁹

Promising practice

Filing a complaint via webcam

Police are also employing innovative approaches to the submission of complaints. The Rotterdam-Rijnmond Police Department in the Netherlands introduced in April a pilot scheme whereby citizens can report a crime via webcam. A person who wants to file a complaint: enters a virtual room on the police department's website and, using the private webcam there, shows the camera his or her identification papers and answers the questions of a police officer who then completes the required forms. The virtual reporting room is open from 8.00 to 22.00. Some complaints, such as violent and sexual crimes and crimes committed by family members of the person filing, cannot be filed in this manner.

For more information, see: www.politie-rotterdam-rijmond.nl/online-service/aangifte/aangifte-via-webcam.aspx

70 The Standing Committee of Experts on International Immigration, Refugee and Criminal law, also known as the Meijers Committee, available at: www.commissie-meijers.nl/commissiemeijers/pagina.asp?paginaam=english.

71 Hale, B. (2011); United Kingdom, Law Society of England and Wales (2011b); United Kingdom, Bar Council of England and Wales (2011); United Kingdom, Law Centres Federation (2011); United Kingdom, Liberty (2011).

72 ECtHR, *Salduz v. Turkey*, No. 36391/02, 27 November 2011.

73 FRA (2009), p. 50.

74 See FRA activity box, p. 199.

75 European Commission (2011g).

76 *Ibid.*, para. 3.

77 UN, Economic Commission for Europe (UNECE), Art. 9.; see also: FRA (2011c), pp. 39-40.

78 Council Directive 85/337/EEC of 27 June 1985, amended by Directive 2003/35/EC.

79 CJEU, C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, 12 May 2011, para. 50 *et seq.* See also CJEU, C-128/09, *Antoine Boxus et al v. Région wallonne*, 18 October 2011.

Several EU Member States took steps in 2011 to broaden the group of those eligible to bring complaints by allowing collective actions in areas where such mechanisms did not exist before. In **Belgium**, the Flemish Bar Association (*Orde van Vlaamse Balies*) is working on a bill to allow a 'class action' procedure under Belgian law. The law would create the possibility for several complainants, or 'supportive plaintiffs' who are not individually identified, to join forces behind one representative plaintiff.⁸⁰ In **Estonia**, the new Code of Administrative Procedure (*Halduskohtumenetluse seadustik*), effective from 1 January 2012, includes legal standing for environmental NGOs and groups of activists who represent the opinions of a significant number of local residents.⁸¹ The government in **Lithuania** adopted a resolution approving of collective complaints.⁸² Similar developments are also underway in **Croatia**.⁸³

8.3.5. E-justice

E-justice, the use of information technology to simplify access to justice, is developing rapidly in the EU, bringing with it both good and bad implications for fundamental rights. E-justice allows a broader and speedier access to justice for all but poses risks to rights to privacy of personal data as well as reduced physical access to various legal services. The European e-Justice Portal, launched in 2010, is a 'one-stop-shop' for EU-justice-related issues.⁸⁴ As the FRA report *Access to justice in Europe* (2011) explains, the portal provides details on, for instance, judicial systems and legal aid in all Member States. In late 2011, the CJEU launched a new online feature, e-curia, allowing parties to deposit, receive and consult procedural documents in electronic format.⁸⁵

Electronic tools may provide various e-services and effectively bridge geographical distance to a court, although there are limits to the reach of such tools, because not all segments of society have access to the internet nor are they sufficiently proficient or willing to make use of it. The CCJE Opinion on justice and information technologies, mentioned earlier, underscores the importance as well as the pitfalls in using information technology for justice.⁸⁶ The Opinion calls, for instance, for improved access to justice through e-filing and by making case law available. The CCJE says "that the judiciary should make case law, or at

least landmark decisions, available on the internet i) free of charge, ii) in an easily accessible form, and iii) taking account of personal data protection."⁸⁷

Promising practice

Enhancing the e-justice portal

The European e-justice portal is continuously expanding its features. The Council of Bars and Law Societies of Europe (CCBE) provided data for a 'find-a-lawyer' function that enables searches by country, practice area and languages spoken. This was piloted in 2011 and will be made available in 2013. A similar function for notaries was developed by the CNUE (Council of the Notariats of the European Union), which will also be integrated in the portal in 2013. Direct electronic exchanges between individuals and courts in the Member States in European small claims procedures and European payment orders will be piloted in 2012, as part of the e-Codex project. Factsheets on the rights of suspects and defendants in criminal proceedings in the respective EU Member States, prepared by the Commission, together with the CCBE, will be uploaded in 2012. It is anticipated that these developments will inspire similar moves at national level.

For more information, see: <https://e-justice.europa.eu>

Similar developments relating to e-justice took place at EU Member State level in 2011, in particular in relation to electronic exchange of documents and e-filing at courts. The EU's Internal Market Directive has helped push Member States to improve e-justice.⁸⁸ In **Austria**, as of 2011, documents can be submitted electronically to courts in all legal proceedings. The Federal Ministry of Justice (*Bundesministerium für Justiz*) has prioritised further e-justice enhancements to promote access to justice and reduce the length of proceedings.⁸⁹ The latest available data, from 2010, shows that some 95 % of summary proceedings and more than 65 % of applications to enforce a court decision were transmitted electronically.⁹⁰ In June, **Finland's** judicial administration opened an electronic service that allows individuals and businesses to perform some judicial matters online, including filing for legal aid and taking action on an undisputed debt, provided there is only one debtor.⁹¹

France introduced an e-bar (*e-barreau*) platform that enables electronic communication between parties and the courts of appeal. As of 1 September, appeals

80 Belgium, Flemish Bar Association (2011).

81 Estonia, Code of Administrative Court Procedure. Also see: Estonia, Code of Civil Procedure.

82 Lithuania, Resolution approving the collective complaint concept.

83 Croatia, Civil Procedure Act.

84 For more information, see: <https://e-justice.europa.eu>; FRA (2011a), p. 21; Council of the European Union (2011d), p. 1.

85 CJEU (2011c); See also, http://curia.europa.eu/jcms/jcms/P_78957/?hlText=e-curia.

86 CCJE (2011).

87 CCJE (2010a) Art. 24. The Opinion also notes the need to comply with the ECLI-standards, see above.

88 Council Directive 2006/123/EC, OJ 2006 L 376, p. 36 and Art. 8.

89 Austria, Ministry of Justice (2011), p. 4.

90 *Ibid.*

91 Finland, Act on the amendment of the Parliamentary Ombudsman Act 20.5.2011/535.



are only admissible if submitted via the e-bar platform: electronic appeals have thereby replaced paper appeals.⁹² **Germany** saw three major e-justice developments. The act on de-mail, an e-government communications service that makes it possible to exchange legal documents electronically among citizens, agencies and businesses, entered into force in May.⁹³ Germany also instituted e-filing in courts at the federal and regional level.⁹⁴ And, by the end of 2011, Germany was expected to have set up a system allowing all federal courts and federal prosecutors to handle all written communication electronically.⁹⁵ Court orders in **Lithuania** can be applied for via the TJEUS online system, which also provides continuously updated information on an application's status.⁹⁶ Lithuania has also made standard forms for refusal and acceptance of a claim available, reducing the need for legal assistance.⁹⁷

The **Netherlands** launched a Digital Procedures for Administrative Law project (*Digitaal Procederen Bestuursrecht*), which includes a component enabling citizens to launch legal proceedings electronically.⁹⁸ In the area of criminal law, the Rotterdam Court piloted a fully digital process in 2011.⁹⁹ The Ministry of Justice in **Slovakia** introduced an e-portal with an e-actions (*ežaloby*) section through which citizens may file an action or a motion to on-going civil court proceedings. The section includes the relevant forms along with instructions on how to fill them in.¹⁰⁰ **Slovenia** established e-filing for land registry in May, prompting the filing of a large number of cases in the following months. Under its e-justice strategy, an additional set of e-projects are being prepared.¹⁰¹

Promising practice

Visualising sentencing: you be the judge

The **United Kingdom's** Ministry of Justice was recognised at the International Visual Communications Awards for an interactive guide to help people understand sentencing – 'you be the judge'. This type of tool facilitates access to justice by allowing people to become accustomed to the procedures of courts outside the actual courtroom.

For more information, see: <http://ybtj.justice.gov.uk>

The **United Kingdom** announced a work programme in September to modernise and improve the efficiency

of the criminal justice system in England and Wales.¹⁰² Two components are: streamlined digital working and increased use of video technology, which includes the use of a 'virtual court', where first hearings in magistrates' courts are held via video link with the defendant remaining in the police station following charge. A United Kingdom research project also discusses the use of a video link between a police station and court for early hearings in criminal cases.¹⁰³ Electronic disclosure – parties making information available and manageable electronically – became obligatory in civil cases in England and Wales late in 2010.¹⁰⁴

8.3.6. National Human Rights Institutions

National Human Rights Institutions (NHRIs), bodies established to protect and promote human rights at the national level, play an important role in providing access to justice. How they do so varies greatly by institutional mandate. Some NHRIs, for instance, are focused on monitoring compliance with human rights, conducting research or actually hearing complaints. Others seek to raise awareness of human rights and thereby prevent the need to access justice from arising.

In June 2011, the UN Human Rights Council in Geneva passed a resolution that affirmed the important role of NHRIs in promoting and protecting human rights at the national and UN levels.¹⁰⁵ The resolution encouraged UN Member States to establish NHRIs that are compliant with international standards and likewise encouraged states to strengthen their established NHRIs. This was the Human Rights Council's first resolution to focus specifically on the work of NHRIs.¹⁰⁶ The Council of Europe Human Rights Commissioner issued in 2011 an opinion on national structures for promoting equality. This opinion aims to assist member states in enacting equal treatment legislation, establishing independent and effective equality bodies and enabling these structures to discharge their functions in an independent and effective way. It underlines the importance of strong equal treatment legislation as well as independence and effectiveness as two core factors for assessing national structures for promoting equality.¹⁰⁷

The International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights' (ICC) accreditation process, conducted by its Sub-Committee on Accreditation in line with the Paris Principles, is central to the status of these institutions, because it guarantees greater effectiveness and

92 France (2011).

93 Germany, De-Mail Act, 3 May 2011.

94 *Ibid.*

95 *Ibid.*

96 *Ibid.*

97 Lithuania, Ministry of Justice (2011).

98 Netherlands (2011a).

99 Netherlands (2011b).

100 Slovakia, Ministry of Justice (2011).

101 Slovenia, Ministry of Justice (2011).

102 United Kingdom, Ministry of Justice (2011).

103 Terry, M., *et al.* (2010).

104 United Kingdom (2010).

105 UN, Human Rights Council Resolution.

106 Asia Pacific Forum (2011a).

107 Council of Europe, Commissioner for Human Rights (2011a).

independence. 2011 reforms relating to NHRIs and their accreditation status took place.¹⁰⁸ NHRIs in two Member States, **Denmark**¹⁰⁹ and **Portugal**,¹¹⁰ were assessed and found to be in full compliance with the Paris Principles, thus maintaining their A-status. Both Member States have put forward legislative amendments to restructure the existing NHRIs to streamline the existing system of human rights protection and to strengthen the role of NHRIs. **Croatia** is also restructuring its NHRI.¹¹¹

NHRIs in **Bulgaria**, **Hungary** and **Sweden** applied for ICC accreditation status in the same period. The ICC reviewed their compliance with the Paris Principles, awarding all the institutions B-status for incomplete compliance. The two **Bulgarian** institutions received B-status: the Ombudsman and the Commission for the Protection against Discrimination. **Hungary** replaced the four existing rights-related commissioners with a Commissioner of Fundamental Rights (*Alapvető jogok biztosa*), who, under the new law on the Commissioner for Fundamental Rights (CXI/2011), monitors and analyses the situation of fundamental rights and prepares a related statistical study. The Commissioner also receives and collects statistical data from the Equal Rights Commission, the National Data Protection Authority, the Police Complaints Body and the Educational Rights Commissioner.

Since 2010, the number of accredited NHRIs in EU Member States has reached 22: twelve NHRIs with A-status

located in 10 different Member States (the **United Kingdom** having three), nine with B-status in eight different Member States (**Bulgaria** having two) and one NHRI with C-status (see Table 8.2).

In at least three of the Member States with accredited NHRIs, namely **Austria**, **Belgium** and the **Netherlands**, reforms are underway that might lead to an upgrade to A- from B- status. For example, **Austria's** amended National Ombudsman Board Act (*Volksanwaltschaftsgesetz*, 1982) will come into force on 1 July 2012. In Belgium, negotiations launched in December 2006 to transform the Centre for equal opportunities and opposition to racism (*Centre pour l'égalité des chances et la lutte contre le racisme*) into an inter-federal centre and aim for A- status continued.¹¹² The **Netherlands** formally established a new NHRI in November, which is expected to become operational in mid-2012.¹¹³ In **Italy**, new draft legislation has been proposed to establish an NHRI, with a view to seeking ICC-accreditation.¹¹⁴ **Cyprus**,¹¹⁵ **Finland**¹¹⁶ and **Lithuania**¹¹⁷ have all taken steps to strengthen existing non-accredited institutions, also with an aim to apply for ICC accreditation. The **Cypriot** change consists of amendments making the Ombudsman Commissioner for the Protection of Human Rights, including a mandate to fulfil monitoring commitments under the Optional Protocol to the UN Torture Convention (OP-CAT). In **Sweden**, as reported in last year's Annual Report (p. 148), a government-appointed inquiry

Table 8.2: NHRIs, by institution and ICC-accreditation status

Status	Countries
A	<u>Denmark</u> , France, Germany, Greece, Ireland, Luxembourg, Poland, Portugal, Spain, United Kingdom (Scotland, <u>England and Wales</u> , and Northern Ireland) and Croatia
B	<i>Austria</i> , <i>Belgium</i> , Bulgaria (two institutions), Hungary , <i>Netherlands</i> , <i>Slovakia</i> , Slovenia, Sweden
C	Romania
No accredited NHRI	<i>Cyprus</i> , Czech Republic, Estonia, <i>Finland</i> , <i>Italy</i> , Latvia, <i>Lithuania</i> , Malta

Notes: NHRIs in Member States in bold were accredited by the ICC in 2011. Italicised Member States indicate changes underway that could affect the NHRI's accreditation status. Underscored Member States have NHRIs that also serve as a National Equality Body under EU law. Source: FRA, 2011

108 Asia Pacific Forum (2011b).

109 Denmark, *Regeringsgrundlag* (2011).

110 Portugal, Amendment of the Organic Law on the Portuguese Ombudsman Services.

111 Croatia, Ombudsman Act. See also: Carver, R. et al.

112 Belgium, Centre for equal opportunities and opposition to racism (CEOOR) (2012).

113 Netherlands, Dutch Senate draft bill on the establishment of a National Human Rights Institute.

114 Italy, Draft Bill for the creation of a National Commission for the promotion and protection of human rights.

115 Cyprus, Law 158(I)/2011 strengthening the functioning of the Ombudsman in respect to Human Rights protection amending the Commissioner of Administration (Ombudsman) Law (Law 36(I) 2004) so as to provide a mandate also for the protection of human rights.

116 Finland, Act on the amendment of the Parliamentary Ombudsman Act 20.5.2011/535. See also Finland, Government Bill to amend the Parliamentary Ombudsman Act; and Finland (2010).

117 Lithuania, Human Rights Committee of the Seimas (2011).



committee proposed the establishment of an NHRI in compliance with the Paris Principles.¹¹⁸ In 2011, another government-appointed inquiry delivered its findings, concluding that, among other things, a new NHRI should be established. Its mandate should be broader than the present one which addresses equality; the aim should be to seek A-status.¹¹⁹

FRA ACTIVITY

Handbook on establishing and accrediting National Human Rights Institutions in EU Member States

The FRA has prepared a practical handbook on guidance for establishing NHRIs in the EU, particularly with regard to the accreditation process. The FRA consulted NHRIs in 2011 on the structure and content of the handbook resulting in major improvements as well as concrete examples from NHRIs around the EU. Along with outlining the accreditation process, the handbook provides practical accreditation examples from EU Member States, as well as information on how to maintain or improve ICC-status once accredited. It primarily targets national governments, parliaments and existing bodies with a human rights remit that are considering an NHRI or are seeking to encourage existing institutions to get accreditation. The handbook may also serve as a practical tool for civil society actors who advocate and support developments in this area. It will be published in 2012.

In 2011, **Ireland** announced that its existing NHRI would merge with its National Equality Body – an entity required under EU law to promote equality.¹²⁰ This would increase the number of accredited NHRIs in EU Member States that also serve as National Equality Bodies to seven: three with A-status and four with B-status. Among those, the **Netherlands**, is integrating its existing Equal Treatment Commission, which holds B-status, with the recently established NHRI mentioned earlier.

Under the requirements of the OP-CAT, **Austria**¹²¹ appointed its ICC-accredited NHRI as the required National Preventive Mechanism (NPM). **Croatia** did the same.¹²² Of the 14 EU Member States, plus Croatia, that had appointed an NPM by the end of 2011, four were also NHRIs (**Croatia**,

Hungary, Poland and Slovenia).¹²³ Similarly, in 2011, the A-status NHRI in **Denmark**¹²⁴ and the B-status NHRI in **Belgium**¹²⁵ were entrusted with a mandate to monitor the UN Convention on the Rights of Persons with Disabilities (CRPD). Of the 19 EU Member States which are Parties, six have appointed an accredited NHRI as part of the monitoring framework under the CRPD.¹²⁶ See further Chapter 5.

Outlook

Reforms initiated in 2011 merit commendation for striving to tackle lengthy judicial proceedings as well as to streamline court systems, both of which will make access to justice at European and national levels more practical and effective. However, some measures taken risk reducing access to justice by introducing or increasing obstacles to access courts or other redress mechanisms.

The search for increased efficiency has driven pioneering work in the use of e-justice tools. EU Member States are expected to expand and develop their work in the area, though caution is needed to avoid marginalising those without access to the internet. The area of legal standing also saw progress in 2011, with the scope of those eligible to make a claim widening. The development of institutions with a human rights remit is also helping to make justice more accessible. And, as EU law continues to evolve, the judicial systems of EU Member States will need to adapt and harmonise in order to effectively handle cross-border issues and ensure that fundamental rights are sufficiently guaranteed.

Looking ahead, 2012 will be the year that the EU adopts the Criminal Procedure Roadmap's Measure B – the letter of rights – and substantial progress is also expected on other measures. The financial situation will likely continue to play a major role in priorities and efforts to make the justice system more effective. A trend towards strengthening NHRIs and their roles as non-judicial 'access to justice' mechanisms will most likely continue in the coming period, as will the role of the monitoring mechanisms under international human rights conventions.

¹¹⁸ Sweden, National action plan for human rights (2010), pp. 343, 346-347.

¹¹⁹ Sweden, Delegation for Human Rights (2011), pp. 252-269.

¹²⁰ Ireland, Department of Justice and Equality (2011a); Ireland, Department of Justice and Equality (2011b).

¹²¹ Austria, Federal Act on the Implementation of the Optional Protocol of 18 December 2002 to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 17.

¹²² Croatia, Act on a preventive mechanism for the suppression of torture and other cruel, inhuman or degrading treatment or punishment.

¹²³ Association for the prevention of torture (APT) (2012).

¹²⁴ For more information on Denmark's NHRI mandate, see: www.humanrights.dk/who+we+are/dihr's+mandate.

¹²⁵ Belgium, CEOOR (2011).

¹²⁶ UN, Office of the High Commissioner for Human Rights (2011).

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UN & CoE

January

February

March

7 April – Council of Europe Committee of Ministers adopts the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

April

11 May – Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) opens for signature and is signed by 11 member states on the same day

May

June

July

August

12 September – Council of Europe Group of Experts on Action against Trafficking in Human Beings publishes its first report

September

October

November

December

EU

January

February

March

5 April – European Parliament adopts a Resolution on priorities and outline of a new EU policy framework to fight violence against women

15 April – European Parliament and the Council of the European Union adopt a Directive on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

April

18 May – European Commission issues a proposal for a directive of the European Parliament and of the Council on establishing minimum standards on the rights, support and protection of victims of crime

May

10 June – Council of the European Union adopts a Resolution on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings

June

July

August

September

October

November

13 December – European Parliament and Council of the European Union adopt a Directive on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA

13 December – European Parliament endorses the European Protection Order for crime victims

December



9

Rights of crime victims



The year 2011 marked the 10th anniversary of the EU Framework Decision on the standing of victims in criminal proceedings. The year witnessed progress in the area of victims' rights in the European Union (EU), driven by European Commission and Council of the European Union initiatives. The adoption of the Council of Europe Convention on preventing and combating violence against women and domestic violence in April 2011 complemented these reforms. Victims' rights were also addressed in the context of the protection of children and the fight against trafficking.

This chapter explores key changes in EU and Member State legislation, policies and practices in the area of the rights of victims of crime in 2011. The chapter will first look at developments concerning all crime victims and then turn to groups of victims of particular forms of crime, namely: domestic violence, trafficking and severe forms of labour exploitation and hate crime. For key developments in the area of rights of child victims, see Chapter 4 on 'The rights of the child and protection of children', specifically for key developments in the area of the rights of child victims.

9.1. Developments at EU and Member State level

Since 1989 when the Court of Justice of the European Union (CJEU) ruled in the *Cowan* case¹ that the provision of compensation to victims of crime should not discriminate on grounds of nationality, the EU has striven to set common minimum standards for crime victims across all EU Member States. To date, the most important legislative instruments are the Council Framework Decision on the standing of victims in criminal proceedings² and the Council Directive relating to the compensation of crime victims.³ These legal instruments, however, have

Key developments in the area of the rights of crime victims:

- at the EU level various measures are proposed that aim to grant victims a uniform level of rights across the EU both in the area of civil law as well as in the area of criminal law and a *Roadmap for strengthening the rights and protection of victims* is adopted;
- a new European Pact for gender equality for the period 2011-2020 reaffirms the EU's commitment to combating all forms of violence against women and some EU Member States carry out reforms relevant for protection against domestic violence;
- while several EU Member States make significant progress in their efforts to combat violence against women, complaints surface about the lack of sufficient resources for victim support services for women victims of domestic violence;
- the EU steps up efforts to combat trafficking in human beings and protect its victims; policy development at national level shows a tendency to look beyond trafficking for sexual exploitation and to pay more attention to other areas of exploitation.

had little impact, which is due in part to the cautious approach taken by the legislation itself and in part to a lack of determination by EU Member States as to its implementation.⁴ More specifically, under the pre-Lisbon regime, the European Commission was not legally entitled to undertake legal proceedings to compel

1 CJEU, Case C-186/87, *Ian William Cowan v. Trésor public*, 2 February 1989.

2 Council Framework Decision 2001/220/JHA, OJ 2001 L 82.

3 Council Directive 2004/80/EC, OJ 2004 L 261.

4 Pemberton, A., Rasquete, C. (2009), p. 10.

Member States to meet the obligations flowing from Framework Decisions. A European Commission assessment in 2009 revealed that national legislation at that time largely reflected the situation prior to the adoption of the Framework Decision.⁵ The Lisbon Treaty has, in Article 82 paragraph 2 of the Treaty on the Functioning of the European Union (TFEU), since provided a new legal basis that allows for the adoption of directives – for instance on the rights of victims of crime – in accordance with the ordinary legislative procedure which enhances the role of the European Parliament. The year 2011 thus marks the launch of the post-Lisbon era in the field of victims’ rights.

“Protecting victims, wherever they find themselves across the Union, is and must remain a crucial element of our action. Exercising one’s freedom of movement and residence should not result in a loss of that protection.”

European Commission Vice-President and Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding, Press release, Brussels, 13 December 2011

The most fundamental right of victims is the right to access justice, as provided for in Article 47 of the Charter of Fundamental Rights of the European Union. This right has several aspects:

- to effectively protect victims, there must be definitions in criminal law that brand severe fundamental rights violations as criminal offences and include dissuasive and proportionate penalties;
- when a claim of victimisation appears legitimate, victims must have the right to a thorough and effective investigation;
- victims must have the right to participate in criminal proceedings; and
- the right to redress, covering rights to compensation and to proportionate criminal sanctions.

9.1.1. EU-level: victims’ package and victims’ roadmap

The European Commission, on 18 May, submitted a victims’ package, which seeks to grant victims a uniform level of rights across the EU, and covers access to justice, protection, support and recompense. It emphasises the needs of specific groups of victims, including child victims and victims of terrorism. The victims’ package consists of a Communication on strengthening victims’ rights,⁶ a proposal for a Directive establishing minimum standards for victims’ rights⁷ and a proposal for a Regu-

lation on the mutual recognition of protection measures in civil matters.⁸ In the area of criminal law, the European Protection Order (EPO), which will complement this last measure on mutual recognition, was initiated by several EU Member States under the auspices of the Council of the European Union and was adopted by the European Parliament on 13 December.⁹

FRA ACTIVITY

Protecting victims in the EU: the road ahead

An international conference on the future of victim protection in the EU took place in March, preceding the Council of the European Union’s adoption of the *Roadmap for strengthening the rights of victims*. The twin objectives of the conference, organised by the Hungarian Ministry of Public Administration and Justice with the support of the FRA, were to identify the problems of victim support and to suggest a long-term strategy to enhance the protection of victims’ rights in line with the EU’s overarching policy guidelines in the field, the Stockholm Programme. In his opening statement, FRA Director Morten Kjærsum stressed the importance of empowering victims to enforce their rights and of helping them to come forward and report incidents. The conference took place in Budapest on 23 and 24 March.

For more information, see: http://fra.europa.eu/fraWebsite/news_and_events/news-archive/news-archive-2011/infocus11_23-2403_en.htm

The Council of the European Union, building on the European Commission’s victims’ package, adopted in June the *Roadmap for strengthening the rights and protection of victims*.¹⁰ The *roadmap* has five components:

- **Measure A** – the European Commission has drafted a proposal for a directive replacing the Council Framework Decision on the standing of victims in criminal proceedings;
- **Measure B** – a recommendation or recommendations on practical measures and best practices that would provide guidance to EU Member States when implementing the new directive as outlined in Measure A;
- **Measure C** – the European Commission has proposed a regulation on mutual recognition of protection measures for victims in civil matters; which would complement the Directive on the European Protection Order;

5 European Commission (2009), p. 9; Aa, S. van der et al. (2009), p. 11.

6 European Commission (2011a).

7 European Commission (2011b).

8 European Commission (2011c).

9 Council of the European Union (2011a).

10 Council of the European Union (2011b).

- **Measure D** – a review of the Council Directive 2004/80/EC on compensation to crime victims, with a view to simplifying procedures for compensation requests;
- **Measure E** – recommendations, similar to Measure B, relating to the specific needs of certain groups of victims, such as victims of trafficking in human beings, child victims of sexual exploitation, victims of terrorism and victims of organised crime.

FRA ACTIVITY

Exploring models of victim support structures

At the request of the European Commission, the FRA initiated in 2011 a project on the rights of victims, which aims to explore various models of victim support structures and to assess the important role of support services in making victims' rights a reality. The goal of the project, which will run from 2012 to 2013, is to identify and highlight promising practices, enabling EU Member States to improve the implementation of the rights of crime victims at national level. The project was launched in November with a stakeholder meeting, which brought together some 60 representatives of victim support services, European institutions, governments and academia.

In its September Communication *Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law*, the European Commission presented its vision of a framework for a coherent EU criminal policy by 2020, placing victims' rights in the wider context of criminal justice.¹¹ According to the communication, effective criminal law provisions protect the rights of defendants just as they protect the rights of victims.

9.1.2. National examples

Several EU Member States strengthened victims' rights. In **Croatia**, the new Criminal Procedure Act, which was endorsed by the Croatian parliament in 2008, entered into force in September.¹² The new code strengthens victims' procedural rights in line with the Council Framework Decision on the standing of victims in criminal proceedings.

In **Denmark**, the parliament adopted a bill in April that extended the right to pre-notification of an offender's release to a larger group of victims.¹³ Similarly, the

Netherlands announced plans to strengthen the right of victims to notification of prison releases. Under the plan, victims will also be consulted about pardons for long-term offenders and furloughs for mentally disabled offenders.¹⁴

According to its Programme for Government 2011–2016, **Ireland** plans to enact legislation strengthening the rights of victims of crime and their families. Commitments include an initiative to introduce legislation to ensure that aggravating factors, which relate to the violation of rights of victims, are considered in sentencing. The legislation should include a mechanism whereby the criminal prosecution service can draw the court's attention to aggravating factors that relate to the crime. The programme also pledges to introduce a series of post-imprisonment restraint orders for violent and sexual offenders, including electronic tagging and other restrictions, which may be imposed at the time of sentencing. Violent and sexual offenders may earn early release only through good behaviour, participation in education and training, completion of addiction treatment programmes and, where appropriate, sex offender programmes.¹⁵

9.1.3. Victim support

Article 13 of the Council Framework Decision on the standing of victims in criminal proceedings underlines the necessity of having strong victim support structures in place, provided either by specialised public services or by non-governmental organisations. Progress in this area has, however, been modest. A comparative study on 'Victims in Europe', carried out jointly by the Dutch International Victimology Institute at Tilburg University (Intervict) and the Portuguese Association for Victim Support (*Apoio à Vítima*) and published in 2009, listed eight EU Member States that lacked a national victim support organisation. Another seven EU Member States had victim support organisations, but these did not cover the entire country.¹⁶

Given the impact of the financial crisis on budgetary policies, the need to fund robust and reliable victim support structures became a matter of public debate in 2011 in, for example, **Latvia** and **Lithuania**. In Latvia, state-funded social rehabilitation services are provided only to child victims of violence and to victims of human trafficking. Although the Latvian parliament adopted amendments in 2009 to the Law on Social Services and Social Assistance, which entitle all victims of violence to social rehabilitation services, in practice the situation has not yet improved. The amendments were originally due to enter into force

¹¹ European Commission (2011d).

¹² Croatia, Criminal Procedure Act (2008).

¹³ Denmark (2011).

¹⁴ Van Dijk, J. (2011).

¹⁵ Ireland, Department of the Taoiseach (2011), p. 17.

¹⁶ Aa, S. van der et al. (2009), p. 123.

by 1 January 2011; however, their implementation was delayed in October 2010 due to the financial crisis. They are now expected to enter into force by 1 January 2013. In **Lithuania**, resources available to non-governmental victim support organisations are limited and have fallen further recently. Some non-governmental organisations (NGOs), including those specialised in supporting child victims, have been forced to reduce or discontinue their services.¹⁷

Along with the new Act on Criminal Procedure, **Croatia's** National Programme for the Protection and Promotion of Human Rights prioritises the situation of victims and triggered a corresponding improvement in the situation of victims between 2008 and 2011. The Ministry of Justice, assisted by the United Nations Development Programme (UNDP), set up an institutional structure to provide victim support in Croatia. This structure includes ministerial departments that supply information to victims, a National Committee for the Support of Victims/Witnesses and the establishment of seven county court offices for victims and witnesses of crime. These court offices operate as part of the court administration and report to the president of the court. They are staffed by two public servants per office, volunteers from the Association for Support to Victims and Witnesses as well as students from the Law Clinic of the University of Zagreb's Law Faculty. Although much has been achieved, the Croatian Human Rights Office still sees room for improvement in the training of the police and the judiciary.¹⁸

In **France**, the Commission on Constitutional Law, Legislation and General Administration of the Republic (*Commission des lois constitutionnelles, de la législation et de l'administration générale de la république*) is tasked with reviewing access to justice. In a report issued in April 2011, it called for improvements to the organisation and funding of victim support services.¹⁹ **Hungary** launched new victim support initiatives in nine counties under the Tett Programme for Victims and Offenders (*Program az áldozatokért és a tettesekért*).²⁰

¹⁷ Vaiky linija (2011).

¹⁸ Croatia, Human Rights Office (2010).

¹⁹ France, Commission on Constitutional Law, Legislation and General Administration of the Republic (2011).

²⁰ For more information about the Tett Programme, see: www.tettprogram.hu/Aldozatsegites.

Promising practice

'May I help you?' – meeting the needs of victimised tourists

In August 2011, the Portuguese Victim Support Association (*Apoio à Víctima*, APAV) launched a campaign entitled 'May I help you?'. This campaign aims to improve information and support provided to tourists who fall victim to crime in Portugal. Tourists as victims of crime may feel particularly vulnerable as language and cultural barriers make it especially difficult to seek information and support.

As a second component, APAV is carrying out training for foreign embassies to allow them to better meet the specific needs of tourists who have become victims of crime. Foreign embassies and consulates have an important role to play as they are often the preferred contact point for tourists when they fall victim to a crime.

For more information, see www.apav.pt/portal_eng/index.php?limitstart=8

9.1.4. Compensation of victims

Several EU Member States changed, or considered changes, to the terms and conditions of compensation claims in 2011.

In **Denmark**, the bill mentioned earlier that extends the right of pre-notification of an offender's release to a larger group of victims, relaxed reporting requirements. Prior to the bill's adoption, a victim needed to report a criminal offence to the police within 24 hours to be entitled to claim compensation. The bill extended the time limit to 72 hours.

In the **Netherlands**, the Law on strengthening the position of victims in criminal proceedings entered into force in January.²¹ One of the law's main innovations provides for the government to advance payment to the victim when the perpetrator fails to pay the full compensation ordered within eight months of sentencing. At that point, the Central Fine Collection Agency will grant an advance and then collect the payment from the offender. In September, the first victims received compensation from the collection agency. In June, the Senate approved an amendment to the Law on the criminal offences compensation fund which entered into force in January 2012.²² The amendment allows family members of deceased victims to claim compensation, even if they were not financially dependent on the victim.

²¹ Netherlands, Decision of 13 July 2010.

²² Netherlands, Act of 6 June 2011 amending the Law on the criminal offences compensation fund (2011).



The **German** Federal Social Court ruled on 7 April that stalking does not per se constitute violence and therefore does not in all cases entitle victims to claims of compensation. Rather, it has to be examined on a case-by-case basis to see whether in a given context of stalking any particular act can be singled out that in itself constitutes an intentional violent assault.²³

9.2. Rights of victims of domestic violence and stalking

9.2.1. European level

In March, the Council of the European Union adopted a new European Pact for gender equality for the period 2011–2020. The pact reaffirms the EU's commitment to combating all forms of violence against women. It urges the EU and its Member States to take measures to “strengthen the prevention of violence against women and the protection of victims, and focus on the role of men and boys in order to eradicate violence.”²⁴

The following month, the European Parliament adopted a non-legislative resolution on a new EU policy framework to fight violence against women,²⁵ which is in line with the 2010 Council Conclusions on improving prevention in order to tackle violence against women.²⁶ The Parliament emphasised the need to deal with gender-specific crimes, such as domestic violence and crimes directed against migrant women. It rejected any references to cultural relativism when it comes to violence against women, including so-called ‘crimes of honour’ and female genital mutilation. The Parliament also called on the EU to become a party to the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which would require the amending of the Convention to allow this.²⁷ Recalling that the FRA has begun a project to survey a representative sample of 40,000 women from all EU Member States regarding their experiences of violence, the European Parliament asked that “the focus be placed on examining the responses women receive from the various authorities and support services when reporting”. In addition, the European Parliament called “on the EU Fundamental Rights Agency and the Gender Institute to carry out research which looks at the pervasiveness of violence in teenage relationships and the impact this has on their welfare.”²⁸

²³ Germany, Federal Social Court (2011).

²⁴ Council of the European Union (2011c).

²⁵ European Parliament (2011a).

²⁶ Council of the European Union (2010).

²⁷ UN CEDAW (1979).

²⁸ European Parliament (2011a), pts. 13 and 16.

FRA ACTIVITY

EU-wide survey on gender-based violence

In 2011–2012, the FRA is conducting an EU-wide survey on gender-based violence against women. This is the first survey of its kind to randomly sample and interview more than 40,000 women across all EU Member States and Croatia. The survey looks in particular at experiences of violence in different settings, such as the home or the workplace. It includes questions regarding the frequency and severity of violence, the physical, emotional and psychological consequences of violence, use of healthcare and other services, satisfaction with the services received, as well as questions on women's experiences in contacting the police. The survey also asks women about experiences in childhood and collects data on women's background to explore the interplay of gender-based violence with age, educational level, employment status and other factors. The results of the survey will assist states in shaping policies combating violence against women and, in particular, adopting measures needed to conform to the Council of Europe Convention on preventing and combating violence against women and domestic violence (the ‘Istanbul Convention’).

For more information, see Chapter 5 of this Annual Report and the factsheet on the survey: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2011/pub-vaw-survey-factsheet_en.htm

The Council of Europe Convention on preventing and combating violence against women and domestic violence,²⁹ the ‘Istanbul Convention’, which was adopted in Istanbul on 11 May, is a landmark international treaty. It lays down an all-encompassing definition of violence against women that includes all acts based on gender if they result, or are likely to result, in sexual, physical, psychological or economic harm or suffering to women. The term ‘gender-based violence’, which is used throughout the Convention, refers to violence that targets women because of their gender or violence that affects women disproportionately.

The Istanbul Convention also sets up a monitoring mechanism to ensure effective implementation. A group of experts on action against violence against women and domestic violence (GreVio), to be set up once the convention enters into force, will monitor implementation of the convention, following a procedure outlined in its Article 68. As a first step, parties submit a report on legislative and other

²⁹ Council of Europe, Convention on preventing and combating violence against women and domestic violence (‘Istanbul Convention’) (2011).

implementation measures, based on a questionnaire prepared by Grevio. Grevio may also receive information from NGOs, national human rights institutions (NHRIs), national parliaments and other international bodies. If the information collected appears insufficient or should a particular issue require immediate attention, Grevio may organise a country visit. Based on the information at its disposal, Grevio may adopt reports and conclusions with the aim of helping the state party to better fulfil its obligations under the convention.

By April 2012, 18 states had signed the Istanbul Convention, including 11 EU Member States: **Austria, Finland, France, Germany, Greece, Luxembourg, Portugal, Slovakia, Slovenia, Spain and Sweden** (for more information, see Chapter 10 on EU Member States and international obligations). Several EU Member States, including **Austria, Finland, France and Germany**, report that they are working toward a swift ratification of the convention. The convention is open to ratification not only by EU Member States but also by the EU. It will enter into force following its 10th ratification (Article 75 of the convention). To raise awareness and encourage Council of Europe member states to sign and ratify the convention, the Council of Europe organised two international conferences in 2011 on effective ways to prevent and combat violence against women and domestic violence. One of these was held outside the EU Member States, the other took place in Bratislava, Slovakia, in cooperation with the Ministry of Justice of **Slovakia** and Norway Grants.³⁰ It was attended by government and NGO representatives from 16 EU Member States and Norway as well as by a FRA representative.³¹

9.2.2. Violence against women: a high priority at Member State level

The issues of violence against women and domestic violence sparked debates and political action in many EU Member States in 2011.

For instance, in **France**, the government adopted an inter-ministerial action plan to combat violence against women (*Plan de lutte contre les violences envers les femmes*) in April.³² It addresses domestic violence, forced marriage, polygamy, genital mutilation, violence at work, rape and prostitution. This action plan responds to 2010 events, particularly the October murder of a 17-year old girl, stabbed by her boyfriend. Following this crime, the French government issued a decree establishing a protection order for victims of domestic

violence. This decree was part of the implementation of Law No. 2010-769 on violence against women, violence within couples and their impact on children, voted on in the French parliament in July 2010. This law created the legal basis for protection orders, introduced a definition of bullying and facilitated the filing of complaints.³³

In **Portugal**, the Council of Ministers passed in December 2010 the fourth Action Plan against Domestic Violence, covering the years 2011 to 2013.³⁴ The plan introduces measures in five areas: information, awareness raising and education; protection of victims; preventing repeat victimisation by intervening against the offender; training of professionals; and research and monitoring.

In November 2010, the government of the **United Kingdom** published its 'Call to end violence against women and girls strategy (England and Wales)', outlining its view and guiding principles in this area until 2015. The call was followed on 8 March 2011 by a cross-government Action Plan setting out 88 actions to tackle all aspects of violence against women and girls. The Action Plan allocates over GBP 28 million of funding through 2015 for specialist services in this area, including GBP 900,000 for national domestic violence helplines and GBP 3.5 million a year to establish new rape support centres. An update of the plan in November 2011 showed that a quarter of the 88 actions had already been taken; a further updated version of the Action Plan, which will also comprise new measures, will be published close to the International Women's Day on 8 March 2012.

In response to a report on domestic violence statistics from 2010,³⁵ which was published by a national organisation representing domestic violence services in **Ireland**, Safe Ireland, the Minister of Foreign Affairs said:

"The Government is committed to implementing the national strategy on domestic, sexual and gender-based violence for the five-year period from 2010 to 2014. One of the main aims of that strategy is to respond to the needs of victims of domestic violence. The HSE (Ireland's Health Service Executive) is currently undertaking a national and regional review of domestic violence service provision. The aim of this review is to ensure that funding is allocated according to need and that the areas of high demand are appropriately resourced."³⁶

In **Germany**, public attention focused on the topic of so-called 'honour killings'.³⁷ Research commissioned by the Federal Criminal Police Office (*Bundeskriminalamt*) and carried out by the Max Planck Institute for Foreign and International Criminal Law (*Max-Planck-Institut*

30 For more information on the Norway Grants refer to www.eeagrants.org.

31 More information on this conference is available at: www.coe.int/t/dghl/standardsetting/convention-violence/Seminars/bratislava2011/default_en.asp.

32 France, Ministry for Solidarity and Social Cohesion (2011).

33 France, Law No. 2010-769 (2010).

34 Portugal, Council of Ministers (2010).

35 Safe Ireland (2011a).

36 Kildarestreet.com (2011).

37 Der Spiegel (2011).



für ausländisches und internationales Strafrecht) lent a factual underpinning to the discussion. On the basis of the research findings, the authors refuted a number of assumptions surrounding the phenomenon of honour killings. Honour killings, they said, do not occur in population groups of all social and educational levels but only among the most disadvantaged and poorly educated groups. No evidence was found suggesting an increase in the number of honour killings in recent years.³⁸

The issue of (in)sufficient legislation and policies aimed at combating violence against women and domestic violence is a recurrent feature within the UN Universal Periodic Review (UPR) (for more information, see Chapter 10 'EU Member States and international obligations'). In May, **Belgium, Denmark and Hungary** were reviewed. In the case of **Belgium**, eight recommendations urged the stepping up of efforts to combat violence against women and domestic violence; all of which Belgium accepted.³⁹ **Denmark** received 10 related recommendations.⁴⁰ The UPR recommended, in particular, that Denmark launch an action plan to combat domestic violence in Greenland and the Faroe Islands. In response to UPR recommendations to guard against impunity in cases of marital rape, Denmark asked an expert committee to carry out a thorough review of the criminal code. The committee is expected to finish its work in 2012.⁴¹ For **Hungary**, nine related recommendations were made, which Hungary largely accepted.⁴²

Severe complaints surfaced about the lack of sufficient resources in the area of specific victim support for women as victims of domestic violence, particularly in **Finland, Germany, Ireland and Latvia**. In Germany, a parliamentary debate in November raised the issue of insufficient funding of women's shelters.⁴³ Safe Ireland published its annual statistics on domestic violence in September. The statistics show that in 2010 domestic violence services provided support to 7,235 women of whom 1,545 women and 2,355 children lived in refuges for various periods of time. Still, on more than 3,000 occasions in 2010, up 38 % from 2,300 in 2009, women and children looking for safety could not be accommodated, because shelters were either full or unavailable in a given area. An upwards trend is now developing into what support services perceive as an accommodation crisis. With budget cutbacks, new refuges are not opening and existing ones are finding it more difficult to maintain their services.⁴⁴

38 Oberwittler, D., Kasselt, J. (2011).

39 UN Human Rights Council (2011a).

40 UN Human Rights Council (2011b).

41 UN Human Rights Council (2011c).

42 UN Human Rights Council (2011d).

43 Germany, German Bundestag (2011a), p. 16601.

44 Safe Ireland (2011b).

Promising practice

Youth4Youth – Preventing gender-based violence through peer education

In March, the Mediterranean Institute of Gender Studies in Cyprus kicked off a project that provides adolescents with a safe space to reveal their attitudes towards violence and to reassess their tolerance towards it. The project encourages them to become involved in developing an environment free from violence for themselves as well as for their peers. One of the project's aims is to help young people explore their attitudes towards and the links between gender stereotypes and gender-based violence. Another aim is to empower young people to develop attitudes of self-respect and self-worth.

For more information, see: www.medinstgenderstudies.org/current-projects/youth4youth-empowering-young-people-in-preventing-gender-based-violence-through-peer-education

9.2.3. Effective protection against repeat violence

While the Council Framework Decision on the standing of victims (as well as the proposed Directive on victims' rights) covers the rights of all victims, it also recognises the specific rights of especially vulnerable victims. This includes, in particular, the rights of victims of domestic violence under Article 8 to effective protection against repeat violence. The Istanbul Convention spells out what this obligation implies to date: a professional risk assessment and risk management (Article 51), emergency barring orders (Article 52), restraining or protection orders (Article 53) and other measures ensuring the victims' and their families' protection against repeat victimisation (Article 56).

As one important step in this direction, the European Parliament adopted the Directive on the European Protection Order (EPO) in December. This measure aims at extending the protection granted by a 'protection measure' – which restricts the movements of a person who is endangering a victim – in one Member State to victims who move to another Member State. The directive applies to protection measures taken in criminal matters and aims to protect the victim against a criminal act which may endanger, for example, her dignity. The authority issuing a protection measure need not be criminal, however, but can also be administrative or civil; the state carrying out the order may apply criminal, administrative or civil measures according to its national law.

Under the EPO directive, a judicial (or equivalent) authority in an EU Member State in which a protection

measure has been implemented may issue an EPO on the request of the protected person. This means that if the protected person chooses to reside or stay in another Member State, the EPO enables an authority in that Member State to assume the responsibility of safeguarding the protected person. The directive thus forestalls a situation in which a victim would have to restart the entire legal process of obtaining protection measures when moving to another Member State.

As the directive does not oblige EU Member States to adopt legislation on protection measures, it can only be as powerful as the measures available under Member State laws. That said, in several Member States, the lack of effective means of disrupting the cycle of domestic violence remains an issue of particular concern.

In **Malta**, the Commission for Domestic Violence (CDV) commissioned research that found that one in four women reported having experienced violence at least once in their lifetime. Half of these reported that the violence was still taking place during the year the survey was carried out. Despite this, court protection orders are rarely implemented, nor do police have the power to remove suspected offenders from their homes.⁴⁵

Since the 2005 adoption of the Law on Protection against Domestic Violence, **Bulgaria** has been implementing annual national programmes on the prevention of and protection against domestic violence. In 2011, it allocated state funds of BGN 500,000 (€254,800) for such projects. Information for victims is published on the Ministry of the Interior's internet site. Standard request forms on lodging complaints with the police and the courts are available. As a result, legal proceedings and protection orders issued by the courts have increased markedly, running at about 1,300-1,400 annually in recent years.⁴⁶ Still, a number of organisations, including the United Nations CEDAW monitoring body, the Committee on the Elimination of Discrimination against Women, and the Bulgarian Gender Research Foundation,⁴⁷ have criticised what they consider a situation of pervasive impunity of domestic violence. According to these bodies, victims are not sufficiently encouraged to report incidents, the effectiveness of investigations is limited and courts apply an overly narrow approach to domestic violence. In August 2011 the CEDAW Committee presented its views in the context of the *V.K. v. Bulgaria* case, asking Bulgaria to amend the Law on Protection against Domestic Violence, to ensure that a sufficient number of state-funded shelters are available to victims of domestic violence and to provide

mandatory training on the issue to judges, lawyers and law enforcement personnel.⁴⁸

Looking at the **United Kingdom**, in England and Wales more than one in four women have experienced domestic abuse since reaching the age of 16; in Scotland, the figure is one in seven.⁴⁹ At the end of June, three police force areas in England and Wales piloted Domestic Violence Protection Orders. These orders give the police and courts the power to protect victims of domestic violence by preventing the perpetrator from returning to a residence and from having contact with the victim for up to 28 days. By the end of 2011, courts had issued 232 such orders.

Domestic violence continues to stir debate in **Finland**. A man who killed his former wife, their 13-year-old son and himself in southern Finland in April put Finnish gun laws on the political agenda. In this case, police had earlier confiscated the man's weapons, but later returned them to him when the former wife withdrew her complaint. The Finnish Ministry of Social Affairs and Health elaborated an Action Plan to reduce violence against women, identifying a number of issues to be addressed. The Action Plan foresees that in situations with an obvious and immediate threat of violence, the police should have the power not only to remove the offender from the scene but also to impose a temporary restraining order.⁵⁰ Proposed measures include conducting a comprehensive review of the effectiveness of restraining orders and issuing guidelines for the authorities (police, prosecutors, social welfare authorities) on the use of restraining orders.⁵¹

In **Estonia**, the decision to discontinue criminal proceedings against a successful businessman who was charged with repeated physical attacks against his wife and son prompted a major public controversy. The public prosecutor requested the case be dropped due to a lack of compelling public interest, given that the case concerned violence within a family and the proceedings had lasted an unreasonably long time.⁵² On another topic, NGOs report that protection measures often lack effectiveness. A restraining order is available under the Code on Criminal Procedure, for example, but there are no means of enforcing the order if it is breached.⁵³

45 Fsadni et al. (2011); Laiviera (2011).

46 Information provided by the Bulgarian government in February 2012.

47 Bulgarian Gender Research Foundation (2011).

48 UN, Committee on the Elimination of Discrimination against Women (2011).

49 For more information, see Equality and Human Rights Commission, *How fair is Britain? The first Triennial Review*, available at: www.equalityhumanrights.com/key-projects/how-fair-is-britain/full-report-and-evidence-downloads.

50 Finland, Ministry of Social Affairs and Health (2011), p. 41.

51 Finland, Ministry of Social Affairs and Health (2011), p. 42.

52 Ratt (2011); Sulbi (2011). See also, Estonia, Parliament of Estonia (*Riigikogu*) (2011).

53 Information based on e-mail communication with Järva Women's Shelter.



The **Lithuanian** Parliament took a crucial step on 26 May, adopting the Law on Protection against Violence in Close Relations.⁵⁴ The law envisages the temporary eviction of offenders from their residence coupled with an order to refrain from contacting the victim. The court of pre-trial investigations must decide upon these protective measures no later than 48 hours after a complaint is filed. Before the law's adoption, violence in the private sphere was often conceived of as a private matter and cases were thus pursued solely as private prosecutions. The new law clearly establishes that prosecution in cases of domestic violence is a matter of public concern, a change which is expected to lead to a considerable rise in the number of cases taken to court.⁵⁵

Poland adopted legislation in August amending several laws. The changes now make it possible to evict an alleged offender from his home even when the municipality is not in a position to provide a temporary residence.⁵⁶

In **Germany**, the national parliament (*Bundestag*), unanimously adopted a law on 1 December establishing an emergency telephone number for women victims of violence (*Hilfetelefongesetz*). The helpline will provide support and advice to 700 women per day and will require a staff of some 80-to-90 persons. It will be available 24 hours per day cost-free. As of January 2012, the bill was pending in the second chamber of the German Parliament (*Bundesrat*).⁵⁷ The new law is expected to be implemented by the end of 2012.

The **Irish** Civil Law (Miscellaneous Provisions) Act 2011, which came into force in August, provides a number of important reforms to the 1996 law on domestic violence. The 2011 Act broadens the definition of 'applicant', allowing individuals to apply for protection when, for example, they have a child in common with the alleged abuser. The applicants no longer need to be living with a violent partner in order to be eligible to apply for protection. The Minister for Justice has promised further reform of domestic violence law through more comprehensive legislation.⁵⁸

Promising practice

Mobile-phone based emergency signalling to speed up police response to domestic violence cases

In July 2011, the Hungarian Women's Rights Association (*Nők a Nőkért Együtt az Erőszak Ellen*, NANE) and the Budapest police have teamed up with Vodafone to launch a pilot programme to speed up police response in cases of domestic violence. The programme introduces a mobile-phone based emergency signalling technology. A matchbox-sized device sends out an emergency signal through the push of a button, pinpointing the victim's exact location for the police operation's centre. NANE, which has been involved in supporting women victims of violence since 1994, developed the programme and trained the police.

For more information, see: www.nane.hu/english/index.html and at EU level www.wave-network.org/start.asp?ID=23527

9.2.4. Mediation in domestic violence cases: conforming to victims' rights?

Several EU Member States, including **Estonia, Finland, Hungary, Lithuania and Malta**, experienced debates in 2011 that called into question the appropriateness and admissibility of victim-offender-mediation in cases of domestic violence. Critics underline, for example, that court hearings – in contrast to mediation – allow for public recognition of the crime and the victim.

The **Estonian** Ministry of Justice, for example, reported that of the 319 mediations in criminal cases in 2010, 60 % related to domestic violence. Women's organisations raised concerns that this practice fails to take into account the particularities of domestic violence, such as the vulnerability of its victims.⁵⁹

In **Lithuania**, the inclusion of mediation in new legislation on domestic violence stirred controversy. The Parliament's Committee on Human Rights argued that mediation should not apply in domestic violence cases; therefore, the proposal to allow for mediation in such situations was rejected.⁶⁰ In **Malta**, the chief executive of the Foundation of Social Welfare Services called for a revision of the Mediation Act, which forces couples to go through mediation, even if there is abuse involved.⁶¹

54 Lithuania, Seimas (2011).

55 *Ibid.*

56 Poland, Act on the protection of tenants' rights, municipal housing stock, the Civil Code and Civil Procedure Code (2011).

57 Germany, German Bundestag (2011b).

58 Ireland, Joint Oireachtas Committee on Justice (2011).

59 Information based on e-mail communication with Järva Women's Shelter.

60 Lithuania, Human Rights Committee (2011).

61 Calleja (2010).

The Istanbul Convention addresses the controversy around mediation in domestic violence cases and prohibits any form of mandatory mediation or alternative dispute resolution in domestic violence cases and cases concerning other forms of violence covered by the convention, such as stalking, sexual harassment, sexual violence, forced marriage and female genital mutilation (Article 48).

When asked for a preliminary ruling by a Spanish court, the CJEU made it clear that the Framework Decision on the standing of victims in criminal proceedings does not prevent a Member State from excluding mediation from domestic violence cases. This ruling allows for an exception to Article 10, which, in general terms, requires Member States to seek to promote mediation in appropriate criminal cases.

“Article 10(1) of Framework Decision 2001/220 must be interpreted as permitting Member States, having regard to the particular category of offences committed within the family, to exclude recourse to mediation in all criminal proceedings relating to such offences.”

CJEU, Case C-1/10, Gueye, judgment of 15 September 2011

9.3. Rights of victims of trafficking and other severe forms of labour exploitation

Throughout the EU, trafficking in human beings remains at the top of the political agenda on criminal justice. Still, the numbers of court cases remain low – ample proof of persistent difficulties in identifying victims and prosecuting offences. This situation is reflected in the findings of the Council of Europe’s Group of Experts on Action against Trafficking in Human Beings (Greta), which evaluated the first 10 countries that became parties to the Convention on Action against Trafficking in Human Beings (entry into force 2008). The evaluation covered a number of EU Member States: **Austria, Bulgaria, Cyprus, Denmark, Romania, Slovak Republic**, as well as **Croatia**. In its September report on **Cyprus**,⁶² for example, Greta welcomed authorities’ assurances that trafficking is considered a human rights violation in Cyprus, but noted that, four years after the entry into force of the relevant legislation, there had not yet been a single conviction for this offence. The first civil action initiated by a victim was also still pending, it said. **Croatian**⁶³ courts convicted three in 2010, six in 2009 and eight in 2008, the report on Croatia said, while **Danish**

courts convicted 11 in both 2010 and 2009 against seven in 2008, the report on Denmark said.⁶⁴

The Greta reports show that the main reason for the lack of effectiveness of investigations and prosecutions is an inadequate consideration of the fundamental rights of victims, who may instead be criminalised as migrants in an irregular situation. The report on **Slovakia**,⁶⁵ for example, suggests that developing a human rights-based concept of victimisation would significantly contribute to a more effective implementation of the Anti-Trafficking Convention. This would entail: improving the identification of victims of trafficking; introducing a recovery and reflection period with the corresponding assistance and protection measures to allow victims to consider whether to assist police in their investigations; and providing victims with adequate protection in criminal proceedings.

At the level of EU legislation, the most important achievement was the adoption of the Directive on preventing and combating trafficking in human beings and protecting its victims, which EU Member States are to transpose by 6 April 2013 (for more information on children’s rights, see Chapter 4).⁶⁶ The Directive is based on a victim-centred approach and a gender perspective.

FRA ACTIVITY

Cooperating to combat trafficking in human beings

In October 2011, directors of seven EU agencies, including the FRA, committed to creating a EU-wide approach to the eradication of human trafficking. The joint statement of the Heads of the EU Justice and Home Affairs Agencies says that the fundamental rights of victims of human trafficking are central to EU policy in this field. Efforts to address trafficking would be made in partnership with EU Member States, EU institutions and other partners, including civil society organisations. The October event featured a debate between the directors of the EU agencies, moderated by the EU Anti-Trafficking Coordinator.

For more information, see: http://fra.europa.eu/fraWebsite/news_and_events/infocus11_1810_en.htm

On 14 December 2010, the European Commission appointed an EU anti-trafficking coordinator who is responsible for ensuring the coordination and coherence of EU anti-trafficking policies and activities, and for providing an overall strategic orientation in this

62 Council of Europe, Committee of the Parties to the Convention on Action against Trafficking in Human Beings (2011a).

63 Council of Europe, Group of Experts on Action against Trafficking in Human Beings (Greta) (2011a).

64 Council of Europe, Greta (2011b).

65 Council of Europe, Committee of the Parties to the Convention on Action against Trafficking in Human Beings (2011b).

66 Directive 2011/36/EU.

area. On 21 December 2010, the European Commission launched its website on trafficking in human beings, including information about EU policies and legislation, developments at EU Member State level, recommendations from EU expert groups and publications from a large number of sources.⁶⁷

FRA ACTIVITY

Rights of migrants in domestic work at risk

In its report on *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, published in 2011, the FRA highlighted one important sector of extreme labour exploitation: domestic work, which is dominated by women. The report shows that the rights of migrant domestic workers in an irregular situation, as well as their access to these rights, vary across the 10 countries examined. Access to fundamental rights by such migrants is currently largely at the discretion of their employers. Consequently, employment issues that may appear clear for regular workers – such as sick leave and sick pay, prior notice for dismissal and severance payments – are, for migrants in an irregular situation, luxuries to which they often have no access.

For more information, see: http://fra.europa.eu/fraWebsite/attachments/FRA-report-domestic-workers-2011_EN.pdf

While policies relating to trafficking to date have tended to focus on trafficking for sexual exploitation, there is a clear tendency recently to pay more attention to other areas of exploitation. **Austria**, for example, has not only included the objective to enhance the identification of potential victims of labour exploitation in its second Action Plan but also includes other actors in its implementation such as labour inspectorates and fiscal authorities.⁶⁸ The Austrian Federal Ministry of Labour, Social Affairs and Consumer Protection has set up regional initiatives jointly with the Austrian Institute for International Affairs (oiip) and the International Organization for Migration (IOM). In September, a regional round table on trafficking in human beings for the purpose of labour exploitation, including domestic servitude, was organised in Vienna.⁶⁹

67 For more information on the European Commission anti-trafficking website, see: <http://ec.europa.eu/anti-trafficking/index.action>.

68 The second National Action Plan Against Human Trafficking prepared by the Task Force on Combating Human Trafficking and covering the period from 2009–2011 can be accessed at: www.bmeia.gv.at/fileadmin/user_upload/bmeia/media/2-Aussenpolitik_Zentrale/Menschenrechte/TFM_Aktionsplan_engl_V20091007_LAYOUT_FINAL.pdf.

69 Information provided by the Austrian government by note from 17 February 2012.

The **Danish** government held a parliamentary hearing on human trafficking in February which focused on trafficking for labour exploitation.⁷⁰ The **Finnish** parliament, in response to the report of the Finnish National Rapporteur on *Trafficking in human beings*, requested the government to take action to counteract trafficking for labour exploitation.⁷¹

Recently, research projects have focused on the topic of labour exploitation even beyond trafficking. The qualitative report entitled *Trafficking for Forced Labour and Labour Exploitation in Finland, Poland and Estonia*, stressed that the low visibility of forced labour is in part due to “the belief that forced labour is equal to enslaving people to work at gunpoint and/or in chains, or imprisoned in sweatshops”. By carefully studying the environment in which forced labour takes place the report convincingly demonstrates how hidden information can be ‘mined’ from existing sources and combined to furnish an overview of the phenomenon.⁷² Similar in outcome, in December 2010 the Migrant Rights Centre in **Ireland** published a report on *Trafficking for Forced Labour in Ireland and the United Kingdom: Issues and Emerging Good Practice*. The report concluded that “considerable weaknesses in addressing forced labour remain. [...] Legislators, policymakers, crime prevention officers and practitioners now face the challenge of expanding the trafficking framework to incorporate victims of forced labour and afford them the same rights and protections.”⁷³

In **Germany**, it has become clear that it is more difficult to protect and support non-trafficked victims of labour exploitation than trafficked victims, because the former are not covered by trafficking definitions. They therefore do not enjoy the same amount of support or protection and may not be entitled to compensation even though the consequences of the exploitation may be similar to that faced by those who have been trafficked. The fact that public attention and policies focus on certain types of crime carries the risk that the rights of certain victims receive more recognition than the rights of others. While it is an undisputed achievement that the rights of victims of trafficking or the rights of children who are victims of sexual exploitation receive all the attention they deserve, the fact remains that victims of equally severe crimes do not receive similar attention. This applies, for example, to non-trafficked victims of severe forms of labour exploitation.

70 United States, Department of State (2011).

71 Finland (2010), Parliamentary communication 43/2010.

72 Jokinen *et al.* (2011), pp. 9–10.

73 Coghlan (2010), p. 3; Jokinen *et al.* (2011).

In response to these deficiencies in protection, legislation such as the Directive providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals⁷⁴ – the so-called ‘Employers’ Sanctions Directive’ – play an important role. Article 9 of this directive states that EU Member States are obliged to ensure that illegal employment combined with particularly exploitative working conditions constitute a criminal offence. Article 13 of the directive, entitled ‘facilitation of complaints’, provides that Member States should define the conditions under which they grant permits of limited duration to third-country nationals. The article explicitly refers to the Council Directive on the issuance of residence permits to third-country nationals who are victims of trafficking in human beings.⁷⁵ Member States were required to comply with the Employers’ Sanctions Directive by 20 July 2011. By July 2014, the Commission will report to the European Parliament and the Council of the European Union concerning the directive’s implementation.

Slovenia, for example, took legislative steps to ensure implementation. It amended Article 50 of the Aliens Act in light of the Employers’ Sanctions Directive, extending the level of protection offered victims of trafficking to include victims of illegal employment. Temporary residence permits are now issued for the duration of criminal proceedings but for no less than six months or more than one year. The permit may be extended until criminal proceedings are concluded. Similarly, the **Czech Republic**, in implementing the Employers’ Sanctions Directive, included residence permits of victims of illegal labour exploitation in the Act on the Residence of Aliens in the Territory of the Czech Republic.

9.4. Rights of victims of bias-motivated crime

Bias-motivated crime is often referred to as ‘hate crime’. Evidence suggests, however, that any definition insisting on ‘hate’ constituting ‘hate crime’ would exclude a high percentage of offences motivated by bias or prejudice.⁷⁶ European Court of Human Rights (ECtHR) case-law makes clear that EU Member States’ criminal justice systems are obliged to demonstrate when a crime is motivated by bias against the victim. As the section on ‘racist crime’ in Chapter 6 shows, however, convictions for racist crimes are infrequent, even non-existent, in some Member States.

9.4.1. Racist crime

High on the agenda of EU Member States is the need to improve the protection against racially motivated violence of vulnerable groups.

This concern was one of the main focuses of the Universal Periodic Review (UPR) when it issued an evaluation of the situation in **Hungary** in May. The recommendations from 14 states include: training and capacity-building of law enforcement and judicial authorities; establishing guidelines to identify and promptly and effectively investigate racist crime, encouraging victims to report incidents of racist crime and ensuring their protection from reprisal when they do so; as well as ensuring that victims of racist crime have access to assistance and protection, including counselling and legal assistance. Hungary supported all these recommendations.⁷⁷

In the course of the same session, **Belgium** was reviewed. Again, several states voiced concerns with regard to racist crime, in particular relating to organisations and political parties inciting racial hatred. It was recommended that Belgium consider discontinuing public funding of such organisations.⁷⁸

The main EU legislative instrument to protect the rights of victims of offences motivated by discriminatory attitudes is the Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.⁷⁹ This framework decision obliges EU Member States to enact criminal law definitions covering certain forms of conduct inciting violence or hatred (Article 1), and to ensure that racist and xenophobic motivation is considered an aggravating factor (Article 4). EU Member States were obliged to comply with this Framework Decision and notify the European Commission as to what implementing measures they had taken as of 28 November 2010. By February 2012, 23 Member States had notified the Commission of their implementing measures; **Belgium, Estonia, Greece** and **Spain** had yet to do so. Once all Member States have reported, the Commission will analyse the transposition of the Framework Decision, reporting back in 2013. On the basis of this report, the Council of the European Union will have until November 2013 to review the Framework Decision and its implementation by Member States.

From a victims’ rights perspective, the Framework Decision focuses on criminalising discriminatory conduct. Otherwise it hardly touches on victims’ rights, disregarding, for example, the right to competent support services or to respectful and compassionate treatment by trained personnel who carefully avoid any secondary

74 Directive 2009/52/EC, p. 24.

75 Council Directive 2004/81/EC, p. 19.

76 Garland, J., Chakraborti, N. (2012), p. 40.

77 UN Human Rights Council (2011d).

78 UN Human Rights Council (2011a).

79 Council Framework Decision 2008/913/JHA, OJ 2008 L 328/55.



victimisation. Article 8 of the Framework Decision alone can be interpreted as considering victims, for it prohibits investigations or prosecutions of relevant offences from depending on a victim's report, an important exception as victims often refrain from reporting incidents unless they are encouraged and advised by skilled and reliable victim support services or police.

Victim support requires sufficient training and an appropriate level of specialisation as well as regulations safeguarding victims against secondary victimisation. Significantly lower rates of reporting occur when bias-motivated offences against vulnerable groups or individuals coincide with victims' low confidence in the willingness or ability of the criminal justice system to effectively investigate, prosecute and sanction these crimes. The response of the police, public prosecutors and judges, therefore, serves not only to reassert society's condemnation of racism and other forms of discrimination but also to build and maintain the trust of disadvantaged persons or communities in the ability and determination of authorities to fully recognise their victimisation and to reassure them of the effective protection of their rights.

Promising practice

Cooperation between county police and the Lesbian, Gay, Bisexual and Transgender (LGBT) community

The Stockholm Police set up a specialised hate crime unit that carries out police training and serves as a point of contact in cooperating with LGBT groups. One focus of the unit's work is to make sure that police do not overlook a bias motivation when investigating offences directed at LGBT persons. This model of cooperation is seen to have increased public confidence in the police.

This and other projects have received notice and evolved further in the context of the International Lesbian and Gay Association's European project entitled 'Working with the police and challenging hate crimes in Europe'. The project held its closing conference in the Hague in December.

For more information, see: www.ilga-europe.org/home/news/for_media/media_releases/closing_conference_hate_crime_2011 and <http://www.polisen.se/en/Languages/Victims-of-Crime/Hate-crime-victims>

9.4.2. LGBT persons as victims of bias-motivated crime

When **Latvia**, like **Hungary** and **Belgium**, underwent a UPR in May, the United States recommended considering legislative and administrative measures to recognise violence on the basis of gender identity or sexual orientation as a hate crime. Norway recommended amending

Latvian criminal law to recognise hate speech against LGBT persons, as did Brazil.⁸⁰

Although the Framework Decision on hate crime covers racist and xenophobic discrimination only, many EU Member States have extended criminal law definitions to cover other protected characteristics.

As concerns definitions of incitement to violence or hatred, some EU Member States, including **Denmark, Ireland, Sweden** and the **United Kingdom**, have over time introduced definitions covering sexual orientation, as has Croatia. A number of other EU Member States – **Austria, Belgium, Estonia, Finland, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia and Spain** – have enacted definitions that cover an even wider range of protected grounds, evidence that the majority of Member States recognise some form of 'hate speech' beyond racism and xenophobia.

This trend to including a larger number of characteristics in criminal law provisions protecting individuals from severe forms of discrimination, and in particular against bias-motivated violence, corresponds to emerging political consensus and legal parameters. This is most evident with regard to the protection of LGBT groups and individuals. In recent resolutions, the European Parliament has asked EU Member States to ensure that LGBT persons are protected from homophobic hate speech and violence. In these resolutions, the Parliament has also called on the European Commission to combat homophobia through legislation similar to the Council Framework Decision on racism.⁸¹ In December, the Parliament adopted a resolution with regard to **Croatia's** application to become a member of the EU. This resolution expresses deep concerns about the violence against participants in the LGBT pride march in Split in June and the inability of the Croatian authorities to protect participants. The resolution calls on Croatia to firmly address cases of hate crime directed against LGBT minorities.⁸²

The Council of Europe Commissioner for Human Rights published a report in 2011 entitled *Discrimination on grounds of sexual orientation and gender identity in Europe*, which takes an in-depth look at violence against LGBT persons and at legislation aimed at combating that violence. It concludes that violence against LGBT persons is rarely addressed specifically in national legislation. This contributes to a climate in which bias-motivated incidents occur without strong public condemnation. Therefore, EU Member States should step up efforts to combat hatred against LGBT persons (for more

⁸⁰ UN Human Rights Council (2011e).

⁸¹ European Parliament (2006a), (2006b), (2007), and (2009).

⁸² European Parliament (2011b), pts. 14 and 15.

information on discrimination against LGBT persons, see Chapter 5 on Equality and non-discrimination).⁸³

FRA ACTIVITY

Large-scale surveys on the victimisation of LGBT persons and of Jews

FRA reports have continuously pointed to limitations of victims' access to justice stemming from low numbers of victims who are aware of their rights, have confidence in the police and are sufficiently supported and encouraged to report.⁸⁴ For a more complete picture, the FRA will conduct two large-scale surveys on the discrimination and victimisation of LGBT Persons and of Jews. The 'European Union Survey of discrimination and victimisation of Lesbian, Gay, Bisexual and Transgender Persons' responds to a 2007 European Parliament request. Reports published by FRA in this area have highlighted the serious absence of robust and comparable data on discrimination against and victimisation of LGBT persons. The survey will build on former research conducted by the FRA with regard to violence against LGBT persons and their right to protection.⁸⁵ The 'Survey: Discrimination and hate crime against Jews' will collect comparable data in nine Member States on the experiences, perceptions and views of persons who self-identify as Jewish. This survey will also assist policy makers in tackling bias-motivated crime.

to improve the situation of victims in difficult working conditions.

The political relevance of bias-motivated crimes and relevant case law will challenge legislators at both the EU and Member State levels. Differences among Member States as to the scope of criminal law provisions are likely to remain considerable, despite common obligations under the European Convention on Human Rights to highlight the bias-motivation aspect of crimes in criminal proceedings.

Legal and practical measures will need to be taken to encourage victims to report their victimisation to the authorities and to build trust in these authorities. Individuals and groups at risk of victimisation must feel confident that authorities are able and willing to react in a respectful and professional manner to reports of crimes. Otherwise, difficulties will persist in closing the gap between what is penalised in law and what is investigated and prosecuted in practice.

The future directive establishing minimum standards on the rights, support and protection of victims of crime, which will replace the existing Council Framework Decision on the standing of victims in criminal proceedings, should make important progress at EU level, thereby fostering legal developments on the participation of victims in criminal proceedings at EU Member State level.

Outlook

The swift ratification of the Council of Europe Convention on preventing and combating violence against women and domestic violence, or the Istanbul Convention, by EU Member States would constitute an important step in addressing persisting challenges in tackling violence against women, particularly domestic violence.

Ratification of this convention will require that EU Member States enact legislation to ensure effective and immediate protection of women against repeat victimisation. Many EU Member States, for instance, currently lack an adequate definition of stalking, which is necessary to tackle it effectively, as per Article 34 of the convention.

The Anti-Trafficking Directive, which must be transposed into national law by 6 April 2013, is likely to bring improvements to the situation of victims of forced labour and severe forms of labour exploitation, while the Employer's Sanctions Directive is expected

⁸³ Council of Europe (2011), p. 124.

⁸⁴ FRA (2010), pp. 71-74; and FRA (2009), pp. 43-45.

⁸⁵ FRA (2011); for a summary, refer to Chapter 2.

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EU Member States and
international obligations

Human rights instruments instruments instruments

10

EU Member States and international obligations

The European Union (EU) and its Member States are embedded in an international context that has increasingly established human rights standards and obligations. The year 2011 witnessed important steps with regard to such obligations, both at the EU and Member State level. EU Member States ratified over various international agreements or protocols that are of direct relevance for the protection of fundamental rights. European or international monitoring bodies submitted over 50 reports on the fundamental rights performance of EU Member States, recognising both achievements and challenges. International case law developed further, especially at the European Court of Human Rights (ECtHR), which identified Member State violations of the European Convention of Human Rights (ECHR) in 506 judgments.

The EU's fundamental rights landscape is drawn from national norms, institutions and procedures, and their complex interplay with EU, Council of Europe and international institutions, which are designed to protect and promote fundamental rights. The national systems of fundamental rights protection and promotion – including the courts, national laws, equality bodies and fundamental rights policies – also interact with the European (Council of Europe and European Union) and international (United Nations, UN) levels.

Against this background, this chapter traces changes in the level of formal commitment to international human rights obligations of EU Member States and the candidate country Croatia that took place between 1 January 2011 and 31 December 2011. It thereby updates the information provided in FRA's last annual report on fundamental rights challenges and achievements in 2010. Developments that occurred in 2011 are highlighted in grey in the following tables, while the figures provide an overview of the level of commitment. The chapter begins by looking at the Council of Europe's treaty covering human rights for everyday life, the European Social Charter (ESC), which celebrated its 50th anniversary in 2011. It then examines the acceptance of Council of Europe conventions and their optional protocols, also looking at data from the European Court of Human Rights in relation to cases brought against the 27 EU Member States and Croatia. Finally, it provides an overview of United Nations' conventions and

their respective optional protocols accepted by EU Member States and Croatia, thereby highlighting the need for coordination among European and UN levels to render the fundamental rights framework operational and successful throughout the EU (see Focus).

10.1. Commitment to social rights: the European Social Charter

The ESC was adopted in 1961 and revised in 1996; the more detailed and enriched 1996 revised ESC is gradually replacing the initial 1961 treaty, with both Charters currently remaining in force. One of the objectives of the ESC revision was to take into account the developments in the social field and, in particular, the many directives adopted on the basis of the 1989 Community Charter of Fundamental Social Rights for Workers, which established the major principles on which the European labour law model is based. The ESC guarantees social and economic rights alongside the mainly civil and political rights protected under the ECHR. To commemorate the ESC anniversary, the Council of Europe Committee of Ministers issued a declaration in October 2011 reaffirming the importance of social rights throughout Europe and welcoming "the great number of ratifications since

Table 10.1: Conformity and non-conformity of national law and practice with provisions of the 1961 and 1996 ESC (and additional protocol) in 2011, as concluded by the ECSR, by country

Country	Number of Charter provisions examined	Number of conclusions in conformity	Number of conclusions of non-conformity	Non-conformity of State Party with number of Charter provisions examined (%) Red = greater than 25 %, Yellow = 15 %-25 % Green = lower than 15 %
AT	20	17	1	5
BE	29	18	4	14
BG	19	4	8	42
CY	23	11	8	35
CZ	16	10	4	25
DE	23	14	5	22
DK	3	0	2	67
EE	31	21	5	16
EL	26	13	8	31
ES	26	15	6	23
FI	30	24	2	7
FR	36	22	12	33
HU*				
IE	32	14	13	41
IT	36	17	16	44
LT	30	19	6	20
LU	25	16	4	16
LV	6	4	1	17
MT	19	11	5	26
NL**	35	19	9	26
PL	23	14	5	22
PT	36	21	4	11
RO	21	7	7	33
SE	31	25	4	13
SI	36	13	12	33
SK	27	11	8	30
UK	19	7	8	42
HR	16	7	6	38

Notes: * Hungary failed to submit a report and consequently the ECSR was unable to adopt conclusions.

** This only relates to the Netherlands and not to the Kingdom of the Netherlands overseas territories.

The discrepancy between the total number of cases examined and the number of cases with respect to which EU Member States are in conformity or non-conformity with ESC provisions is due to the ECSR being unable to reach a conclusion for some situations, pending receipt of additional information from the EU Member State government concerned.

Source: FRA, 2011; data extracted from Council of Europe website, 'European Social Charter – The Conclusions of the European Committee of Social Rights for 2011', available at: www.coe.int/T/DGHL/Monitoring/SocialCharter/NewsCOEPortal/Conclusions2011Publication_en.asp

the Second Summit of Heads of States and Governments" in 1997.¹ To date, all EU Member States and the candidate country Croatia are among the 43 states Party to the 1961 ESC; with **Austria's** ratification in 2011, 18 EU Member States have ratified the 1996 ESC (see Table 10.2). The Committee of Ministers further "expressed its resolve to secure the effectiveness of the Social Charter through an appropriate and efficient reporting system and, where applicable, the collective complaints procedure", urging all states who had

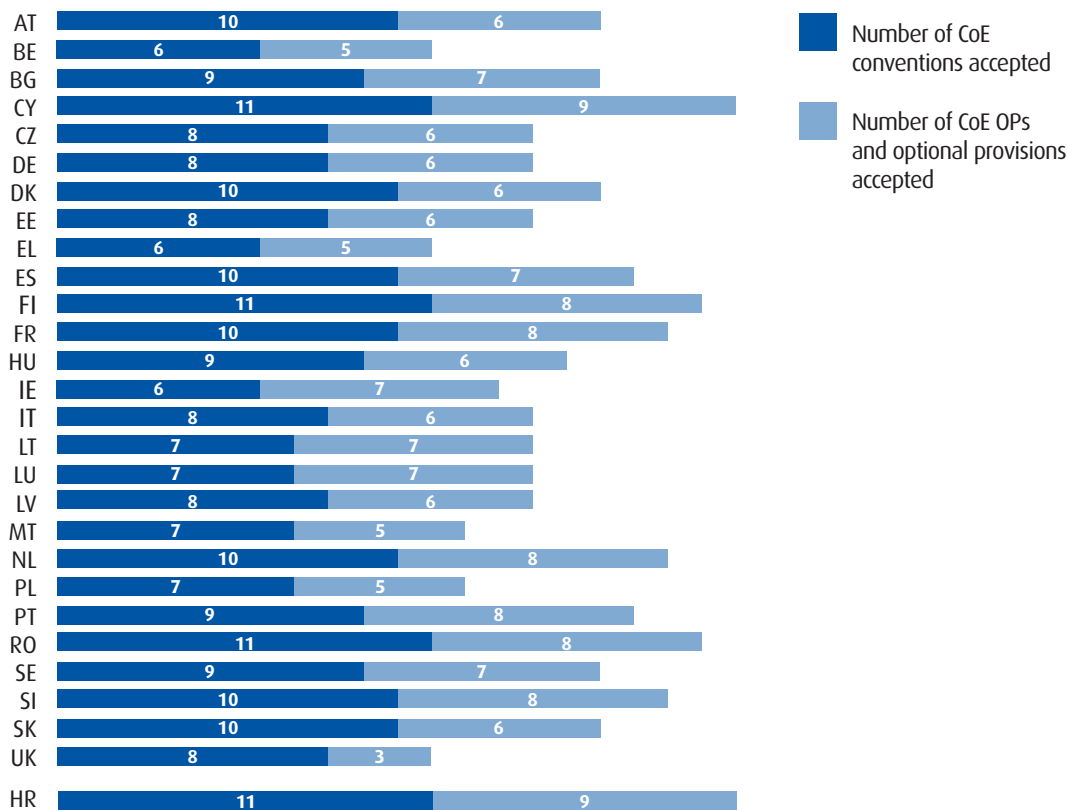
not yet done so to consider accepting the Collective Complaint Procedure Protocol (CCPP) (see Table 10.3).² All EU Member States and **Croatia** have signed the CCPP; 12 of these, including Croatia, have also ratified this instrument. Only one EU Member State, **Finland**, has in addition accepted the submission of collective complaints (Article 2 of the CCPP) from national and international non-governmental organisations (NGOs) and national trade unions.³

1 Council of Europe, Committee of Ministers (2011), *Declaration of the Committee of Ministers on the 50th anniversary of the European Social Charter*, 12 October 2011.

2 *Ibid.*

3 For more information on the European Social Charter, see: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp.



Figure 10.1: Acceptance of selected Council of Europe conventions, by country

Notes: Acceptance includes both being a State Party as well as accepting additional monitoring provisions.

CoE = Council of Europe; OP = optional protocol

Source: FRA, 2011; data extracted from: Council of Europe website 'Treaty office', available at: <http://conventions.coe.int>

To ensure compliance with the provisions of both the 1961 and 1996 ESC, as well as with those of the 1988 Additional Protocol, the European Committee of Social Rights (ECSR) monitors on a four-year cycle the implementation of the treaty by the State Parties. To cover all provisions during this four-year cycle, the ECSR has determined four thematic groups of provisions. States present a report on one of the four thematic groups of provisions on an annual basis. As a result, each provision of the Charter is reported on once every four years. As regards the 27 EU Member States and Croatia, the theme of 2011 focused on children, families and migrants, relating to Articles 7, 8, 16, 19, 27 and 31 of the Charter. Consequently, the ECSR examined in 2011 the application of these articles as provided for in the 1961 ESC by **Croatia** and 11 EU Member States – **Austria, the Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Slovakia, Spain** and the **United Kingdom**, while examining the application of these articles as provided for in the 1996 ESC by 15 EU Member States – **Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Ireland, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia and Sweden**. **Hungary** did not submit a report in

time. Of the provisions examined in relation to each State Party, ranging from three to 36 depending on the number of provisions accepted by a state, an average of 27 % of ESCR conclusions stated a non-conformity with Charter provisions across all EU Member States and Croatia. Table 10.1 outlines the number of provisions examined as well as the number and rate of conformity of national law and practice with ESC provisions by EU Member State and Croatia. Table 10.2 provides an overview of EU Member States' and Croatia's acceptance of ESC provisions.

10.2. Acceptance of Council of Europe conventions and protocols

Several important developments occurred in relation to Council of Europe conventions and protocols in 2011. Most notably, in April, the Council of Europe adopted a new Convention on Preventing and Combating Violence against Women and domestic Violence ('Istanbul Convention'), a comprehensive legal framework for

Table 10.2: Acceptance of different ESC provisions, by country

Article	Country <i>Total accepted</i>	ESC (1996)									
		AT	BE	BG	CY	EE	FI	FR	HU	IE	IT
		16	24	17	15	20	26	31	18	28	30
1 – right to work		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
2 – just conditions of work		○	✓	○	○	○	✓	✓	✓	✓	✓
3 – safe and healthy working conditions		✓	✓	✓	○	○	○	✓	✓	✓	✓
4 – fair remuneration		○	✓	○	○	○	○	✓	✗	✓	✓
5 – right to organise		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
6 – right to bargain collectively		○	✓	✓	✓	✓	✓	✓	✓	✓	✓
7 – protection of children and young persons		○	✓	✓	○	○	○	✓	✓	✓	✓
8 – right of employed women to protection of maternity		✓	✓	✓	○	✓	○	✓	✓	○	✓
9 – vocational guidance		✓	✓	✗	✓	✓	✓	✓	✓	✓	✓
10 – vocational training		✓	✓	✗	✓	○	✓	✓	✓	✓	✓
11 – protection of health		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
12 – social security		✓	✓	○	✓	✓	✓	✓	○	✓	✓
13 – social and medical assistance		✓	✓	○	○	○	✓	✓	✓	✓	✓
14 – right to benefit from social welfare services		✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
15 – rights of persons with disabilities		✓	✓	✗	✓	✓	✓	✓	✓	✓	✓
16 – protection of the family		✓	✓	✓	✗	✓	✓	✓	✓	✓	✓
17 – social, legal and economic protection of children and young persons		✓	✓	○	✗	✓	✓	✓	✓	✓	✓
18 – work in the territory of other Parties		✓	✓	○	○	✗	✓	✓	✗	✓	✓
19 – protection of and assistance to migrant workers		○	○	✗	✓	✓	○	✓	✗	✓	✓
20 – non-discrimination on the grounds of sex		✗	✓	✓	✓	✓	✓	✓	✓	✓	✓
21 – information and consultation		✗	✓	✓	✗	✓	✓	✓	✓	✗	✓
22 – participation in improvement of working conditions		✗	✓	✓	○	✓	✓	✓	✓	✓	✓
23 – social protection of elderly persons		✗	✗	✗	✗	✗	✓	✓	✗	✓	✓
24 – protection in cases of termination of employment		✗	✗	✓	✓	✓	✓	✓	✗	✓	✓
25 – protection in case of employer’s insolvency		✓	✓	✓	✓	✓	✓	✓	✗	✓	✗
26 – dignity at work		○	○	✓	✗	✗	✓	✓	✗	✓	✓
27 – workers with family responsibilities		○	✗	○	○	✓	✓	✓	✗	✓	✓
28 – protection of workers’ representatives		✓	✗	✓	✓	✓	✓	✓	✗	✓	✓
29 – consultation in collective redundancy procedures		✗	✓	✓	✓	✓	✓	✓	✗	✓	✓
30 – protection against poverty and social exclusion		✗	✓	✗	✗	✗	✓	✓	✗	✓	✓
31 – housing		✗	✗	✗	✗	✗	✓	✓	✗	✗	✓

Notes: Acceptance includes both being a State Party as well as accepting additional monitoring provisions. Yellow-shaded boxes indicate developments in 2011.

Source: FRA, 2011; data extracted from Council of Europe website ‘European Social Charter – Table of accepted provisions’, available at: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionsIndex_en.asp and www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevOct2011.pdf

Table 10.2: (continued)

								ESC (1961)										
LT	MT	NL	PT	RO	SK	SI	SE	CZ	DK	DE	EL	LV	LU	PL	ES	UK	HR	
24	21	30	31	17	25	29	23	16	18	15	21	10	16	11	23	14	15	
✓	✓	✓	✓	✓	✓	✓	✓	o	✓	✓	✓	✓	✓	✓	✓	✓	✓	
✓	o	✓	✓	o	✓	✓	o	✓	o	✓	✓	x	✓	o	✓	o	✓	
✓	✓	✓	✓	o	✓	✓	o	✓	✓	✓	✓	x	✓	✓	✓	✓	x	
✓	✓	✓	✓	✓	✓	✓	o	o	o	o	✓	x	o	o	✓	o	x	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	o	o	✓	✓	✓	
✓	✓	✓	✓	✓	✓	✓	o	✓	x	o	✓	x	✓	o	✓	o	✓	
✓	o	✓	✓	✓	✓	✓	o	✓	o	o	✓	✓	o	✓	✓	o	✓	
✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	
✓	✓	✓	✓	x	✓	✓	✓	x	✓	o	✓	x	✓	o	✓	✓	x	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
o	o	✓	✓	✓	✓	✓	o	✓	✓	✓	✓	x	✓	✓	✓	o	x	
o	✓	✓	✓	o	o	o	✓	✓	✓	✓	✓	✓	✓	o	✓	✓	✓	
✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	o	✓	✓	✓	
✓	✓	✓	✓	o	o	✓	✓	o	✓	✓	✓	x	✓	✓	✓	✓	x	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
o	o	✓	✓	o	o	o	✓	o	✓	✓	✓	x	✓	o	✓	✓	x	
o	x	o	✓	o	o	✓	✓	o	x	✓	✓	x	✓	✓	✓	✓	x	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	x	x	x	✓	x	✓	
✓	x	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	x	x	x	✓	x	✓	
✓	x	✓	✓	x	✓	✓	✓	✓	✓	x	✓	x	x	x	✓	x	✓	
x	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	x	x	x	✓	x	x	
✓	✓	✓	✓	✓	✓	✓	x											
✓	✓	✓	✓	✓	✓	✓	✓											
✓	✓	✓	✓	x	✓	✓	✓											
✓	o	✓	✓	o	o	✓	✓											
✓	✓	✓	✓	✓	✓	✓	x											
✓	✓	✓	✓	✓	✓	✓	✓											
x	x	✓	✓	x	✓	✓	✓											
o	x	✓	✓	x	x	✓	✓											

✓ = accepted
o = partly accepted
x = not accepted

Table 10.3: Acceptance of selected Council of Europe conventions, by country

	Country												
	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	
<i>Total accepted</i>	16	11	16	20	14	14	16	14	11	17	18	18	
ECHR (as amended by Protocol 14)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
ECHR Protocol 1 (property, education, etc.)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
ECHR Protocol 4 (no prison for debt, etc.)	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	
ECHR Protocol 6 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
ECHR Protocol 7 (criminal appeal)	✓	S	✓	✓	✓	S	✓	✓	✓	✓	✓	✓	
ECHR Protocol 12 (discrimination)	S	S	✗	✓	S	S	✗	S	S	✓	✓	✗	
ECHR Protocol 13 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
ESC (1996)*	✓	✓	✓	✓	S	S	S	✓	S	S	✓	✓	
ESC CCPP**	S	✓	✓	✓	S	✗	S	✗	✓	✗	✓	✓	
CPIPPD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
CPIPPD Additional Protocol	✓	S	✓	✓	✓	✓	S	✓	S	✓	S	✓	
ECCVVC	✓	✓	✗	✓	✓	✓	✓	✓	S	✓	✓	✓	
ECPT	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	
ECRML	✓	✗	✗	✓	✓	✓	✓	✗	✗	✓	✓	S	
FCNM	✓	S	✓	✓	✓	✓	✓	✓	S	✓	✓	✗	
ECECR	✓	✗	✗	✓	✓	✓	✗	✗	✓	S	✓	✓	
'Oviedo Convention'	✗	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	
Convention on Cybercrime	S	S	✓	✓	S	✓	✓	✓	S	✓	✓	✓	
Additional Protocol to the Convention on Cybercrime	S	S	✗	✓	✗	✓	✓	S	S	✗	✓	✓	
CATHB	✓	✓	✓	✓	✗	S	✓	S	S	✓	S	✓	
CSEC	✓	S	✓	S	✗	S	✓	S	✓	✓	✓	✓	
CAOD	✗	S	✗	✗	✗	✗	✗	S	✗	✗	S	✗	
'Istanbul Convention'***	S	✗	✗	✗	✗	S	✗	✗	S	S	S	S	

Notes: Acceptance includes both being a State Party as well as accepting additional monitoring provisions. Yellow-shaded boxes indicate developments in 2011.

ECHR (as amended by Protocol 14) European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)

ESC (1996)* European Social Charter (1996 revised)

ESC CCPP** ESC Collective Complaints Procedure Protocol

CPIPPD Convention for the Protection of Individuals with regard to automatic Processing of Personal Data. The European Union will be able to accede to the CPIPPD, pending additional declarations by Council of Europe member states.

CPIPPD Additional Protocol Additional Protocol to the CPIPPD, on supervisory authorities and transborder data flows

ECCVVC European Convention on the Compensation of Victims of Violent Crimes

ECPT European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECRML European Charter for Regional or Minority Languages

FCNM Framework Convention for the Protection of National Minorities

ECECR European Convention on the Exercise of Children's Rights

'Oviedo Convention' Convention on Human Rights and Biomedicine



Table 10.3: (continued)

HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR	Total accepted out of 27 Member States and Croatia
15	13	15	14	14	14	12	18	12	17	19	16	18	16	11	20	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	s	✓	26
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	24
s	s	s	x	✓	s	x	✓	x	s	✓	x	✓	s	x	✓	8
✓	✓	✓	✓	✓	s	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	26
✓	✓	✓	✓	s	s	✓	✓	s	✓	✓	✓	✓	✓	s	s	18
s	✓	✓	x	x	x	x	✓	x	✓	x	✓	✓	s	x	✓	13
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	s	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	s	✓	20
s	x	x	s	✓	x	x	✓	x	✓	✓	✓	x	✓	✓	✓	18
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	x	s	x	✓	x	s	✓	✓	x	✓	✓	✓	✓	✓	✓	17
✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	24
s	s	✓	x	s	✓	s	x	✓	s	x	s	✓	s	x	✓	12
✓	x	s	✓	s	✓	x	s	s	✓	✓	s	✓	✓	x	✓	17
✓	s	✓	✓	s	✓	s	✓	s	✓	✓	s	✓	✓	✓	✓	19
x	x	s	✓	s	✓	s	✓	s	✓	✓	s	✓	x	x	✓	12
s	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	21
s	s	s	s	✓	x	✓	✓	s	s	✓	s	s	s	s	✓	12
✓	x	x	s	x	x	x	x	x	x	x	✓	s	x	x	x	2
x	x	x	x	s	x	x	x	x	s	x	s	s	s	x	x	0

Additional Protocol to the Convention on Cybercrime
CATHB
CSEC

CAOD
'Istanbul Convention'

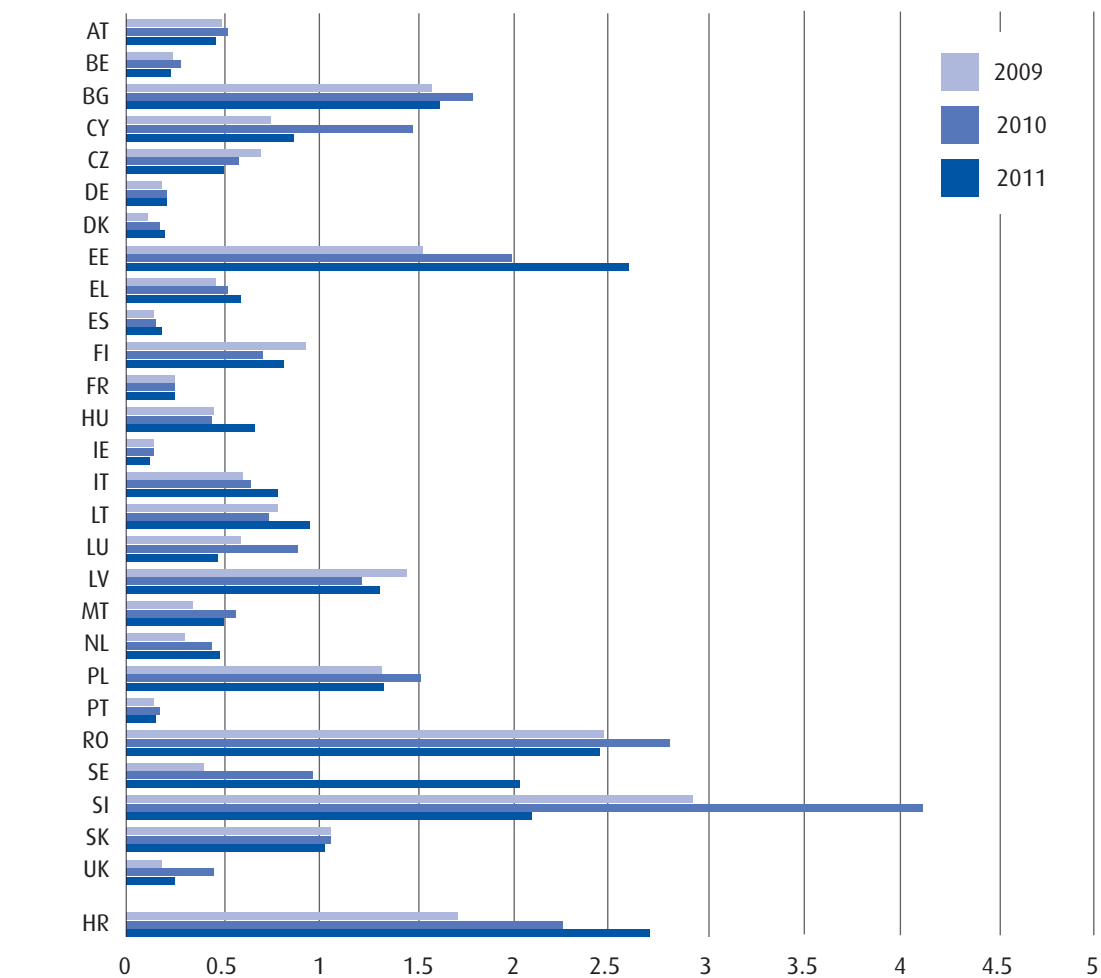
*
**

Additional Protocol on criminalisation of acts of a racist and xenophobic nature committed through computer systems
Convention on Action against Trafficking in Human Beings
Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
Convention on Access to Official Documents
Convention on Preventing and Combating Violence against Women and Domestic Violence
All European Member States are State Parties to the 1961 ESC.
Article D of the 1996 ESC stipulates that the collective complaints procedure is applicable for the provisions of the 1996 revised ESC for states which have ratified the ESC CCPP. According to the article, it is also possible for State Parties to accept the collective complaints procedure at any point in time, without formally being party to the ESC CCPP; Bulgaria and Slovenia have made use of this possibility.
Istanbul Convention was adopted in April 2011.

✓ = State Party/
applicable
s = signed
x = not signed

Source: FRA, 2011; data extracted from: Council of Europe website 'Treaty office', available at: <http://conventions.coe.int>

Figure 10.2: Applications allocated to a judicial formation per 10,000 inhabitants, by country



Notes: The Council of Europe member states had a combined population of about 819 million inhabitants on 1 January 2011. The average number of applications allocated per 10,000 inhabitants amounted to 0.79 in 2011. Only the 27 EU Member States and Croatia covered by this Annual report are shown in the graph, while the original figure included statistics on all 47 Council of Europe member states.

Source: ECtHR, Annual report 2011

the protection of women that broadens the Council of Europe’s repertoire of human rights conventions (for more information, see Chapter 9 on ‘Rights of crime victims’). By the end of 2011, 11 EU Member States had signed the Istanbul Convention, but no EU Member State had yet ratified the convention.

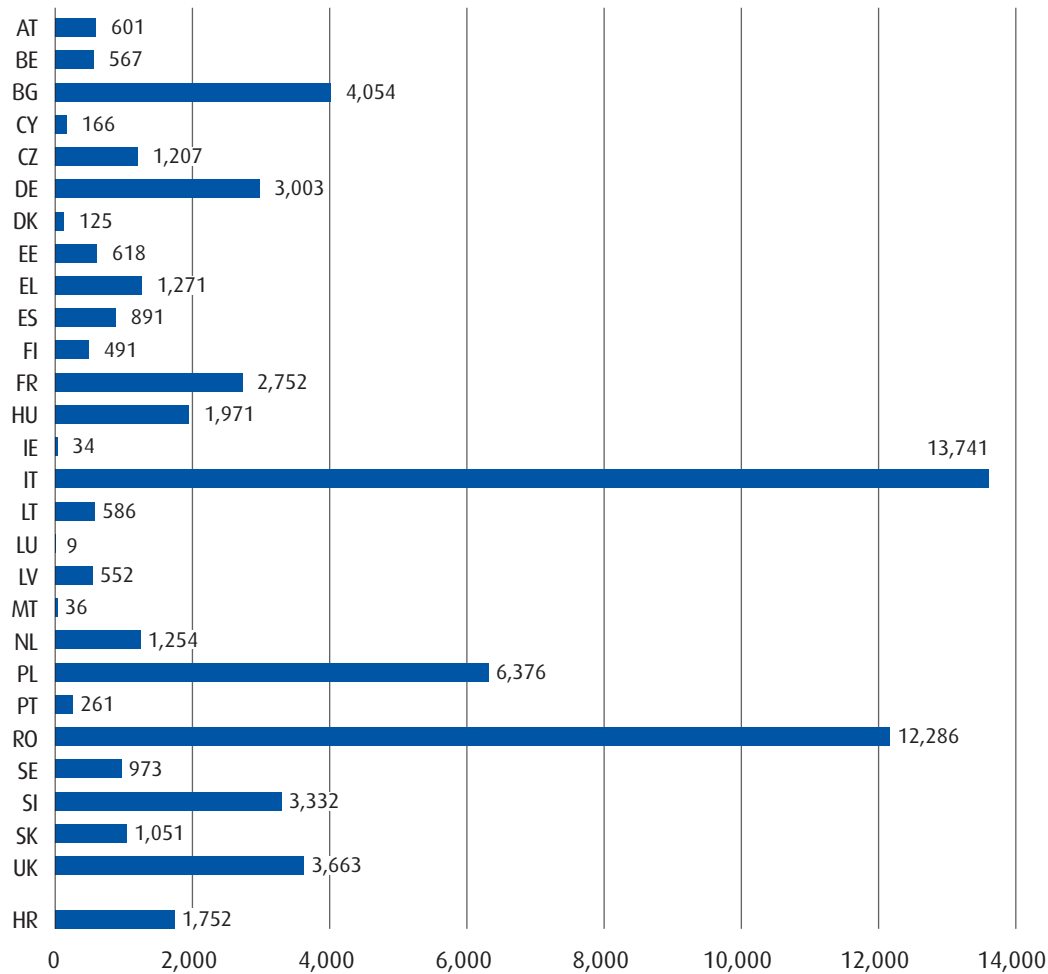
As Table 10.3 shows, in 2011 **Austria, Bulgaria, Finland, Luxembourg, Romania** as well as **Croatia** ratified the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CSEC), bringing the total number of EU Member State ratifications to 11 plus Croatia. The **United Kingdom** ratified the Convention on Cybercrime; **Finland and Germany** ratified, and **Italy** signed, its Additional Protocol. Thus, at the end of 2011, all EU Member States had signed the convention and 18, plus Croatia, had ratified it. The Additional Protocol has been signed by nine EU Member States and ratified by 11, with **Croatia** being Party to both the convention and the protocol.

The EU continued to negotiate its accession to the ECHR during 2011, taking final steps to determine the relevant legal dimensions of the EU’s accession agreement. As part of this process, all EU Member States must ratify the accession agreement, of which terms must be accepted by all Council of Europe member states through formal consent of their respective national parliaments.⁴ Although no final deadline has yet been set for the EU’s accession to the ECHR, it is expected that the process will be completed as soon as possible.⁵ Once the EU is Party to the ECHR, the legal system of the EU itself will be brought, as regards ECHR compliance,

4 Council of Europe, Informal Group on the Accession of the European Union to the Convention (2011), *Accession by the European Union to the European Convention on Human Rights: Answers to frequently asked questions*, 30 June 2011.

5 Council of Europe, Steering Committee for Human Rights (2011), *Report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights*, 14 October 2011.

Figure 10.3: Number of applications pending before judicial formations as of December 2011, by respondent country



Note: Only the 27 EU Member States and Croatia covered by this Annual report are shown in the graph, while the original figure included statistics on all 47 Council of Europe member states.

Source: ECtHR, Annual report 2011

under the supervision of the European Court of Human Rights (ECtHR).⁶

10.3. European Court of Human Rights proceedings

The most recent statistics from the ECtHR indicate that the court handed down 633 judgments in relation to cases brought against the 27 EU Member States and **Croatia**. As shown in Table 10.4, the most frequent subjects of proceedings before the ECtHR related to the length of proceedings (199 judgments), the right to an effective remedy (105), the right to liberty and security (94) and the right to a fair trial (88). Compared with 2010, when a total of 795 judgments were delivered

against EU Member States, the ECtHR handed down considerably fewer judgments on the length of proceedings, the right of property and non-enforcement in 2011.

Table 10.4 provides an overview of the number of judgments handed down by the ECtHR in 2011, broken down by ECHR articles and country and also shows the number of pending 'leading' cases for execution. The Council of Europe determines those cases as 'leading cases' that are not repetitive in nature but relate to a structural or general problem in the state concerned. Such problems can only be addressed by legislative measures at a general level.

It is also interesting to look at other statistics prepared by the ECtHR, for example at the number of complaints it allocates to its internal judicial formations by population, known as 'applications allocated to a judicial formation'. This is graphically illustrated in Figure 10.2 based on the ECtHR's statistics. Whereas

⁶ Council of Europe, Informal Group on the Accession of the European Union to the Convention (2011), *Accession by the European Union to the European Convention on Human Rights: Answers to frequently asked questions*, 30 June 2011.

Table 10.4: Number of ECtHR judgments in 2011, by ECHR article, and number of 'leading' cases pending execution at the end of 2011, by country

	Number of judgments least one violation	Judgments finding a violation	Friendly settlements/ Striking out judgments	Other judgments**	Right to life – deprivation of life	Lack of effective investigation	Prohibition of torture	Inhuman or degrading treatment	Lack of effective investigation	Prohibition of slavery// forced labour	Right to liberty and security	Right to a fair trial	Length of proceedings
ECHR Article	2	2	3	3	3	4	5	6	6				
AT	12	7	4	1									5
BE	9	7	1		1	2			6			6	2
BG	62	52	8		2	1	4	1	3	3		10	2
CY	2	1	1										1
CZ	22	19	1		2							1	13
DE	41	31	9		1				1			8	19
DK	6	1	5										
EE	3	3										1	1
EL	73	69	2		2				10			8	6
ES	12	9	2		1					1			4
FI	7	5			2								2
FR	33	23	9		1		1	1	5			1	11
HU	34	33			1				3			5	4
IE	2	2											2
IT	45	34	3		8	1	1		2			2	7
LT	10	9		1					1	1			3
LU	3	1	2										1
LV	12	10	2									17	1
MT	13	9	3		1								3
NL	6	4	2									4	1
PL	71	54	16		1	1			5			16	14
PT	31	27	3		1								1
RO	68	58	3		7	3	8		20	6		2	9
SE	4		4										
SI	12	11	1						2				1
SK	21	19	2						1			12	2
UK	19	8	9	2			5	2				1	3
Sub-total		506	92	4	31	8	19	4	59	11		94	88
Total		633*											
HR	25	23	2				2		3	4		5	8

Notes: Judgments may concern more than one provision.

* Some judgments concern two EU Member States, one case for each of the following couples: Italy and France, Greece and Belgium, Poland and Germany, France and Belgium.

** Other judgments: just satisfaction, revision judgments, preliminary objections and lack of jurisdiction.

*** 'Leading' cases relate to the supervision of leading case execution and are those that the Council of Europe identified as not being repetitive cases but showing a structural or general problem in the state concerned, for which measures must be taken to address the problem.

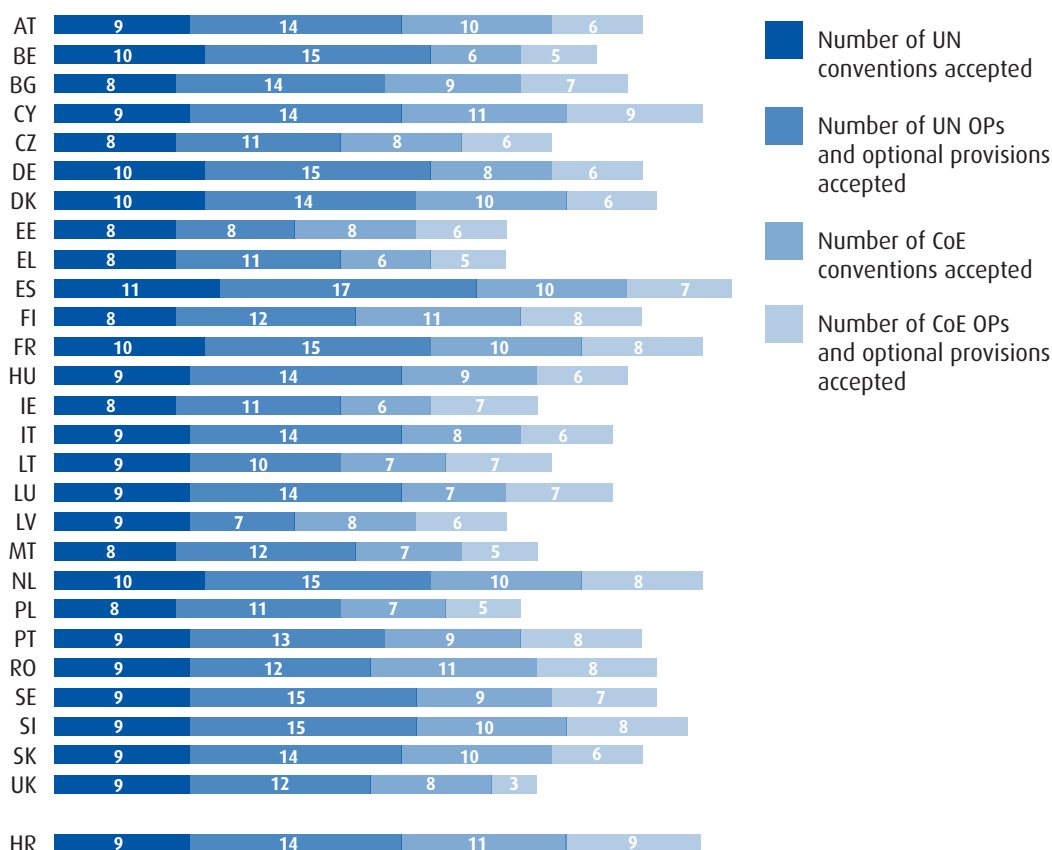
Source: FRA, 2011, data extracted from ECtHR Annual report 2011. 'Violations by Article and by State, available at: www.echr.coe.int/NR/rdonlyres/596C7B5C-3FFB-4874-85D8-F12E8F67C136/0/TABLEAU_VIOLATIONS_EN_2011.pdf



Table 10.4: (continued)

Non-enforcement	No punishment without law	Right to respect for private and family life	Freedom of thought, conscience and religion	Freedom of expression	Freedom of assembly and association	Right to marry	Right to an effective remedy	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried or punished twice	Other articles of the convention	pending execution ¹ ***	'Leading' cases
6	7	8	9	10	11	12	13	14	P1-1	P1-2	P1-3	P7-4			
							1	1	1						21
				1			2								22
		5	1	2	3		26	1	7				6		116
															8
		2					1								20
1	5	2		1	1		10		1						14
		1													3
							1								3
3		1	1				32	1	4						63
		2		1											15
		2		1											16
		2	1	2			6		1						46
		2		2			1		2				1		25
							1								3
1		2							13		1		1		59
											1				10
															5
		2											2		18
				2				1	5						12
															8
1		8		2					1						72
		2		3			10		8						12
6		8		1	1		4		10				1		88
															6
		2					7								9
1		2		1			3	1							20
		1		1											25
13	5	46	3	20	5		105	5	53		2		11		
															719
		4					1		2			1			42

Figure 10.4: Acceptance of international human rights instruments, by country



Notes: OPs = optional protocols. Acceptance includes both being a State Party as well as accepting additional monitoring provisions.

The figure includes the instruments listed in Tables 10.3 (Council of Europe conventions) and 10.5 (United Nations' conventions).

Source: FRA, 2011; data extracted from: United Nations website 'Treaty Collection' available at: <http://treaties.un.org> and Council of Europe website 'Treaty office' available at: <http://conventions.coe.int>

in general terms the workload of the court remained consistent over the past three years, a look at countries such as **Croatia**, **Estonia** and **Sweden** shows a constant and sharp increase of pending cases between 2009 and 2011.

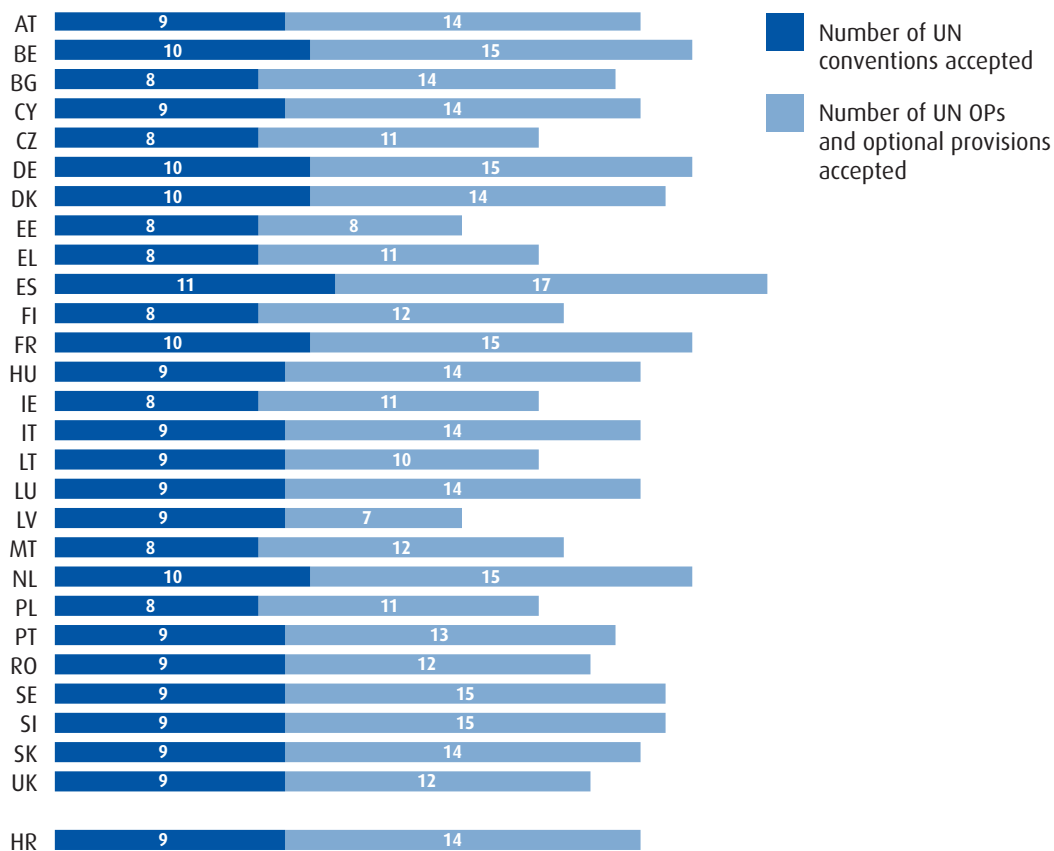
10.4. Acceptance of UN instruments, conventions and protocols

In the UN context, the Convention on the Rights of Persons with Disabilities (CRPD) embodies the closest formal interconnection between the EU and the UN human rights system. The CRPD is the first of the core international human rights treaties that explicitly allows for accession by regional organisations, an option the EU made use of by becoming party to the CRPD in December 2010.

In 2011, three additional EU Member States, namely **Cyprus**, **Luxembourg** and **Romania**, ratified the CRPD, bringing the total number to 19, plus **Croatia**. All EU Member States have, at a minimum, signed the CRPD. In 2011 **Cyprus** and **Luxembourg** also ratified the Optional Protocol to the CRPD which allows for individual complaints. The total number of EU Member States that are party to the CRPD Optional Protocol is 16, plus Croatia, with six others being signatories to the protocol. The CRPD illustrates the increasing interconnection between the national, EU and international human rights levels, reinforcing the institutional framework and ensuring consistency (see Table 10.5, the Focus and Section 5.5 in Chapter 5).

Other UN conventions that have already been in force for some time saw less EU activity in 2011. **Greece** ratified the Convention on Transnational Organized Crime (UNTOC), the purpose of which is to protect and assist victims of human trafficking, and its Optional Protocols (Protocol 1 on smuggling migrants and Protocol 2 on

Figure 10.5: Acceptance of selected United Nations' conventions, by country



Notes: OPs = optional protocols. Acceptance includes both being a State Party as well as accepting additional monitoring provisions. Please note that the figure includes all United Nations conventions as well as optional protocols and optional provisions listed in Table 10.5.

Source: FRA, 2011; data extracted from United Nations website 'Treaty Collection' available at: <http://treaties.un.org>

trafficking). As shown in Table 10.5, this brings the total number of EU Member States Party to the UNTOC to 26 plus Croatia. Membership of Protocols 1 and 2 increased to 24 and 26, respectively. **Croatia** is a State Party to the convention as well as its protocols, and the same is true for the EU, which ratified the convention in 2004, and Protocols 1 and 2 in 2006.

Although all EU Member States and **Croatia** are Party to the Convention on the Rights of the Child (CRC), the two protocols to this treaty are yet to be fully ratified by all EU Member States. Twenty-four EU Member States are Party to Protocol 2 on child prostitution, with **Luxembourg** having become Party in 2011. **Belgium** and the **Netherlands** ratified the International Convention for the Protection of All Persons from Enforced Disappearance (ICPED), raising the total number of ratifications from three to five. Similarly, in the context of the Convention against Torture, already ratified by all EU Member States, **Bulgaria** ratified and **Greece** signed the Optional Protocol (OP-CAT), requiring National Preventive Mechanisms to be appointed or established. With these additions in 2011, 17 EU Member States, as well as

Croatia, are Parties and another seven are signatories. The International Convention on the Rights of Migrant Workers (ICRMW) remains the only 'core' UN human rights treaty which no EU Member State has signed or ratified. However, a Convention on Domestic Workers (ILO C189), although not yet in force, was adopted in the context of the International Labour Organization (ILO) in June 2011.

Most of the UN treaties referred to above provide for the establishment of monitoring bodies which supervise implementation of their obligations by State Parties, through, among other means, a periodic reporting procedure. The UN Human Rights Council provides a further monitoring role through the Universal Periodic Review (UPR) process created in 2006. In 2011, the UPR completed its first four-year monitoring cycle, having monitored all UN member states.⁷

⁷ For more information on basic facts about the UPR system, see: www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx.

Table 10.5: Acceptance of selected United Nations' conventions, by country

	Country											
	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR
Total accepted	23	25	22	23	19	25	23	16	19	27	20	25
ICERD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICERD - Individual complaints (Art. 14 (1))	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓
ICCPR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICCPR - State complaints (Art. 41)	✓	✓	✓	✗	✓	✓	✓	✗	✗	✓	✓	✗
ICCPR - OP1 (individual complaints)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICCPR - OP2 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICESCR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICESCR - OP (Individual complaints) [not yet in force]	✗	s	✗	✗	✗	✗	✗	✗	✗	✓	s	✗
CEDAW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CEDAW - OP (Individual complaints)	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
CEDAW - OP (Inquiry procedure, Art. 10, 'opt-out')	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
CAT	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CAT - OP	s	s	✓	✓	✓	✓	✓	✓	s	✓	s	✓
CAT - State complaints (Art. 21 (1))	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
CAT - Individual complaints (Art. 22 (1))	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
CAT - Inquiry procedure (Art. 20 (2), 'opt-out' in Art. 28 (1))	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CRC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CRC - OP1 (armed conflict)	✓	✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✓
CRC - OP2 (prostitution)	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	s	✓
ICRMW	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
CRSR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
UNTOC	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓
UNTOC - OP1 (smuggling of migrants)	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓
UNTOC - OP2 (trafficking)	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓
ICPED	s	✓	s	s	✗	✓	s	✗	s	✓	s	✓
ICPED - Individual complaints (Art. 31)	✗	✓	✗	✗	✗	✗	✗	✗	✗	✓	✗	✓
CRPD	✓	✓	s	✓	✓	✓	✓	s	s	✓	s	✓
CRPD - OP (individual complaints)	✓	✓	s	✓	s	✓	✗	✗	s	✓	s	✓
ILO C169	✗	✗	✗	✗	✗	✗	✓	✗	✗	✓	✗	✗
ILO C189*	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗

Notes: Acceptance includes both being a State Party as well as accepting additional monitoring provisions. Yellow-shaded boxes indicate developments in 2011.

- ICERD International Convention on the Elimination of All Forms of Racial Discrimination
- ICCPR International Covenant on Civil and Political Rights
- ICCPR - OP1 Optional Protocol to the ICCPR
- ICCPR - OP2 Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty
- ICESCR International Covenant on Economic, Social and Cultural Rights
- ICESCR - OP Optional Protocol to the ICESCR
- CEDAW Convention on the Elimination of All Forms of Discrimination against Women
- CEDAW - OP Optional Protocol to the CEDAW
- CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- CAT - OP Optional Protocol to the CAT
- CRC Convention on the Rights of the Child
- CRC - OP2 Optional Protocol to the CRC on the involvement of children in armed conflict



Table 10.5: (continued)

HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR	Total accepted out of 28 countries
23	19	23	19	23	16	20	24	19	22	21	24	24	23	21	23	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	23
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✗	✓	✗	✓	✓	✓	✗	✗	✓	✓	✓	✓	✓	20
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	27
✓	✓	✓	✓	✓	✗	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	26
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✗	✗	s	✗	s	✗	✗	s	✗	s	✗	✗	s	s	✗	✗	1
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	25
✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	25
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✗	s	s	✗	✓	✗	✓	✓	✓	s	✓	✓	✓	✗	✓	✓	17
✓	✓	✓	✗	✓	✗	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	24
✓	✓	✓	✗	✓	✗	✓	✓	✓	✓	✗	✓	✓	✓	✗	✓	23
✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	27
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	25
✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	0
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
✓	s	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	25
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
✗	s	s	s	s	✗	s	✓	✗	s	s	s	s	s	✗	s	5
✗	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	4
✓	s	✓	✓	✓	✓	s	s	s	✓	✓	✓	✓	✓	✓	✓	20
✓	✗	✓	✓	✓	✓	s	✗	✗	✓	s	✓	✓	✓	✓	✓	17
✗	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	3
✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	0

ICRMW International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
 ICPED International Convention for the Protection of All Persons from Enforced Disappearance
 CRPD Convention on the Rights of Persons with Disabilities
 CRPD - OP Optional Protocol to the CRPD
 ILO C169 Indigenous Tribal People Convention
 ILO C189 Domestic Workers Convention
 UNTOC Convention on Transnational Organized Crime
 UNTOC - Op 1 Optional Protocol 1 to the CTOC on smuggling migrants
 UNTOC - Op 2 Optional Protocol 2 to the CTOC on trafficking
 CRSR Convention relating to the Status of Refugees
 * ILO C189 was adopted in 2011, but is not yet in force.

✓ = State Party/
 applicable
 s = signed
 ✗ = not signed

Source: FRA, 2011; data extracted from United Nations website 'Treaty Collection', available at: <http://treaties.un.org>



Table 10.6: Universal Periodic Review recommendations in 2011, by country

	Total	Accepted*	Postponed	Rejected
AT	170	135	0	35
BE	155	112	13	30
DK	133	82	2	49
EE	125	91	22	11
EL	139	116	2	21
HU	148	113	29	6
IE	Pending results report			
LT	Pending results report			
LV	122	71	44	7

Notes: * Numbers are subject to change as postponed or rejected recommendations may later be accepted. Please note that these figures may differ depending on the source used for compiling the data.

Source: FRA, 2011; the table draws on information available at: www.upr-info.org/+Detailed-statistics-available+.html and www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

As Table 10.6 shows, in 2011 nine EU Member States underwent the UPR procedure: **Austria, Belgium, Denmark, Estonia, Greece, Hungary, Ireland, Latvia and Lithuania.**⁸

The UPR Working Group issues recommendations based on the reviews, suggesting how human rights obligations can be met more effectively at the national level. States have the option to accept, reject or postpone implementation of these recommendations. **Belgium**, for example, received 121 recommendations, accepting 85, rejecting six and postponing 13. **Latvia** accepted 71, rejected seven and postponed four of the 122 recommendations it received. The reasons for rejection or postponement of recommendations vary from country to country, and include postponements in order to consider how to approach best a recommendation or rejection because similar steps are already underway. Belgium, for instance, rejected a recommendation on establishing a national plan for human rights because it had already begun implementing a sectoral approach to human rights.⁹

In contrast to the UPR system, which considers the entire human rights record of a state, UN treaty-monitoring bodies monitor the implementation of rights guaranteed under their respective treaties. A treaty body generally conducts a review on the basis of regular reports submitted by the state in question. Review cycles of treaty bodies typically range between four and five years, with the exception of the Convention on the

Elimination of All Forms of Racial Discrimination (CERD), which has a two-year cycle. In 2011, several EU Member States were reviewed by UN treaty-monitoring bodies. As Table 10.7 shows, of all the treaty bodies, the monitoring body for CERD, the Committee on the Elimination of Racial Discrimination, reviewed the greatest number of EU Member States in 2011: the **Czech Republic, Ireland, Lithuania, Malta, Spain** and the **United Kingdom**. The table shows that EU Member States are subject to a diverse range of monitoring activities both at the UN and Council of Europe level.

10.5. Securing fundamental rights protection and promotion

The interplay appears to be increasing between national, European and UN mechanisms for protecting and promoting human rights. In light of the substantial EU competencies, the Regional Office for Europe of the UN Office of the High Commissioner for Human Rights published a report in 2011 on *The European Union and international human rights law*.¹⁰ The report concludes with a series of recommendations directed both at EU and UN bodies, including an overarching suggestion that the EU, its Member States and UN human rights bodies should cooperate closely to minimise the risk of gaps in the protection of human rights in the European region. Such a degree of coordination and cross-fertilisation among national, European and UN levels could help secure a European landscape in

8 For more information about UPR sessions, see: www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx.

9 United Nations, Human Rights Council (2011), 'Human Rights Council adopts outcomes of Universal Periodic Review on Belgium, Denmark and Palau', Press release, 21 September 2011.

10 United Nations, Human Rights Office of the High Commissioner, Europe Regional Office (2011), *The European Union and International Human Rights Law*.



which fundamental rights are vigorously protected and promoted. The challenge of coordination as well as of furthering a joined-up approach to the protection

of fundamental rights is also addressed in the focus section of this Annual report on 'Bringing rights to life: the fundamental rights landscape in the EU'.

Table 10.7: Overview of monitoring reports released under United Nations and Council of Europe monitoring procedures in 2011, by country

Country	UN reports								Council of Europe reports					Total
	CERD	HRC	CESCR	CEDAW	CAT	CRC	CRC-OP-SC	CRPD	UPR	ECPT	ECRML	FCNM	ECRI	
AT									✓			✓		2
BE									✓					1
BG		✓			✓									2
CY											✓		✓	2
CZ	✓					✓						✓		3
DE			✓		✓									2
DK						✓			✓			✓		3
EE			✓						✓	✓		✓		4
EL									✓					1
ES	✓							✓		✓	✓		✓	5
FI					✓	✓					✓			3
FR														0
HU									✓					1
IE	✓				✓				✓	✓				4
IT				✓		✓								2
LT	✓								✓	✓			✓	4
LU														0
LV									✓	✓				2
MT	✓									✓				2
NL														0
PL										✓	✓			2
PT														0
RO										✓	✓			2
SE											✓			1
SI					✓							✓		2
SK														0
UK	✓											✓		2
HR														0
Total	6	1	2	1	5	4	0	1	9	8	6	6	3	52

Notes: ✓ = Participation in monitoring cycles in 2011

CERD Committee on the Elimination of All Forms of Racial Discrimination

HRC Human Rights Committee (Monitoring body of the International Covenant on Civil and Political Rights, ICCPR)

CESCR Committee on Economic, Social and Cultural Rights

CEDAW Committee on the Elimination of Discrimination against Women

CAT Committee against Torture

CRC Committee on the Rights of the Child

CRC-OP-SC Committee on the Rights of the Child (Monitoring the Optional Protocol on the Sale of Children)

CRPD Convention on the Rights of Persons with Disabilities

UPR Universal Periodic Review

ECPT European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECRML Committee of Experts on Regional and Minority Languages

FCNM Advisory Committee on National Minorities

ECRI European Commission against Racism and Intolerance

Source: FRA, 2011; data extracted from: UN bodies – <http://tb.ohchr.org/default.aspx>; Council of Europe bodies – www.cpt.coe.int/en/states.htm, www.coe.int/t/dg4/education/minlang/Report/default_en.asp, www.coe.int/t/dg4/monitoring/minorities/3_FCNMdocs/Table_en.asp, www.coe.int/t/dg4/monitoring/ecri/activities/countrybycountry_en.asp

European Union Agency for Fundamental Rights

Fundamental rights: challenges and achievements in 2011

2012 – 253 p. – 21 x 29.7 cm

ISBN 978-92-9192-919-1
doi:10.2811/62303

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Country codes

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HU	Hungary
HR	Croatia
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom



HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

To secure and safeguard the fundamental rights of everyone in the European Union (EU), the EU and its 27 Member States pressed forward with a number of initiatives in 2011. The EU adopted key legislative and policy measures in, for example, the areas of victim protection, human trafficking and the integration of Roma, and, for the first time, was itself directly bound to an international human rights treaty – the United Nations Convention on the Rights of Persons with Disabilities. Various EU Member States, among other steps, reformed their child protection systems and made efforts to combat violence against women and shorten the length of court proceedings.

Challenges, however, remain. The areas of racism, equality and non-discrimination will continue to be core concerns. The year 2012 will also be crucial to the finalisation of the Common European Asylum System and the debate on the new EU data protection framework.

This year's FRA annual report chronicles the positive developments made in 2011 as well as the challenges facing the EU and its Member States in the field of fundamental rights, drawing on objective, reliable and comparable socio-legal data. It examines progress on EU and Member State rights obligations under the EU Charter of Fundamental Rights, covering the following topics: asylum, immigration and integration; border control and visa policy; information society and data protection; the rights of the child and protection of children; equality and non-discrimination; racism and ethnic discrimination; participation of EU citizens in the Union's democratic functioning; access to efficient and independent justice; and rights of crime victims.



This year's annual report Focus maps the fundamental rights landscape in the EU today. It looks at how the various institutions, norms and laws at national, Council of Europe, EU and international level interrelate. It also describes the rights, bodies and procedures at these different levels. In combination, they should not only protect and promote fundamental rights, but also aim to bring these rights to life for everyone in the EU.



The full report and the annual report summary – Highlights 2011 – are available in English, French and German. These documents are available for download at: fra.europa.eu.



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ISSN 1831-0362

ISBN 978-92-9192-919-1



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