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# Between promise and delivery: 10 years of fundamental rights in the EU



**FRA**

EUROPEAN UNION AGENCY  
FOR FUNDAMENTAL RIGHTS



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# Contents

<b>INTRODUCTION</b> .....	<b>5</b>
A time of progress and crisis? .....	5
<b>AN EU FUNDAMENTAL RIGHTS CULTURE EMERGES</b> .....	<b>7</b>
Laying the legal foundations .....	7
Embedding fundamental rights obligations in legislative and policy processes .....	8
Further means of protecting and promoting fundamental rights .....	9
Increasing the visibility of fundamental rights in an EU context .....	10
<b>FUNDAMENTAL RIGHTS UNDER PRESSURE: EXPERIENCES IN FOUR KEY AREAS</b> .....	<b>13</b>
Discrimination and fundamental rights: violence against women .....	13
Security and fundamental rights: implications for the use of personal data .....	15
Poverty and fundamental rights: the case of Roma .....	17
Migration and fundamental rights: the situation of children .....	19
<b>WHAT REMAINS TO BE DONE</b> .....	<b>23</b>
Gaps and deficiencies persist .....	23
New challenges ahead: commitment and communication .....	24
Role of the Fundamental Rights Agency .....	25
<b>CONCLUSIONS</b> .....	<b>29</b>
<b>ENDNOTES</b> .....	<b>31</b>



# Introduction

The 10<sup>th</sup> anniversary of the European Union Agency for Fundamental Rights (FRA) offers an opportunity to reflect on some of the dynamics underpinning the major fundamental rights developments in the EU since 2007. Taken together, they seem to tell a story of twin impulses. On the institutional side, the EU has built tools to better promote and protect fundamental rights. Yet profound gaps in the implementation of fundamental rights persist on the ground and – in some areas – are deepening. Addressing this tension requires translating the law on the books into effective measures to fulfil rights in the daily lives of all people living in the EU. In addition to acknowledging that fundamental rights are a precondition for successful law- and policy-making, making the ‘business case’ for human rights, ‘giving rights a face’ and using social and economic rights more consistently will be beneficial. Without a firmly embedded fundamental rights culture that delivers concrete benefits, many people living in the EU will feel little sense of ownership of the Union’s values.

Recent political, social and economic developments have shown that what was often regarded over the last decade as a natural development towards greater respect for fundamental rights can easily backslide. This regression can be partly blamed on the fact that where EU and national legislators have celebrated progress at a formal level, this has often not translated into improvements in people’s lives. For too many, fundamental rights remain an abstract concept enshrined in law, rather than a series of effective and practical tools that can and do make a difference to their everyday lives. This is a disturbing truth, and one of which the EU Agency for Fundamental Rights is reminded forcefully in its interactions with the people whose rights are often violated as a matter of course, and whose perceptions and experiences figure in the agency’s large-scale surveys and fieldwork projects.

## A time of progress and crisis?

The year 2017 marks a double anniversary: 60 years since the creation of the European Community and 10 since the establishment of FRA. These anniversaries tell a story of the EU’s evolution from an organisation focused mainly on economic cooperation to one in which respect for fundamental rights is a basic pillar of law and policy. They also reflect the fact that the

EU is not just a union of states, but a union of people, granting rights to citizens and individuals.

At the same time, the past decade witnessed fundamental rights challenges that have not just persisted but in many areas – such as migration, asylum and data protection – have grown more pressing. In fact, despite the many pledges the EU and its Member States made over the last 10 years and more, the fundamental rights system itself is increasingly under attack.

The Treaty of Rome, signed in March 1957, primarily focused on economic integration. However, it did leave room for the later commitment to fundamental rights, with reference to an “accelerated raising of the standard of living”, and the introduction of the principle of equal pay for women and men.<sup>1</sup> Thirty-five years later, the 1992 Treaty on European Union (Maastricht Treaty) included the first treaty provision to underline the importance of respect for fundamental rights, stating that the “Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms”.<sup>2</sup>

The Charter of Fundamental Rights of the European Union (the Charter) was adopted later that decade, paving the way for the EU to take a more outspoken stance on fundamental rights.<sup>3</sup> This found expression in FRA’s creation in March 2007.<sup>4</sup> FRA is the EU’s specialised independent body in this area, with a mandate that covers the full scope of rights laid out in the Charter. Its establishment demonstrated the EU’s serious intent to make fundamental rights a guiding principle, which “would determine rather than simply limit the European legal system, and would move to the forefront of its institutions”.<sup>5</sup> But the negotiation and framing of FRA’s mandate reflected Member States’ reticence to create a fully-fledged human rights institution at EU level equivalent to the national human rights institutions predicated on the Paris Principles.<sup>6</sup>

The double anniversary also underlines the necessity of reflecting – and taking action – on the striking gaps in the realisation of fundamental rights for everyone living in the EU. Delivering on the Member States’ promise to use European integration as an instrument to promote and improve “economic and social progress”;<sup>7</sup> “well-being”<sup>8</sup> and “living and working conditions”<sup>9</sup> for their people very much remains a work in progress.



This focus reflects on the progress the EU has made over the last 10 years in establishing fundamental rights as the cornerstone of its identity. It explores the tangible impact of the fundamental rights framework by drawing on evidence and legal expertise provided by

FRA over the first decade of its existence. The section concentrates on four areas: violence against women; poverty and discrimination; migration; and security.



Perhaps most importantly, it sheds light on the gaps between legislation and policy on the one hand and the reality lived by people in the 28 Member States on the other, and suggests possible remedies. The focus concludes by analysing what shortcomings

need to be addressed to fill these gaps, and by looking ahead to the challenges and opportunities that may shape fundamental rights in the decade to come.



# An EU fundamental rights culture emerges



## Laying the legal foundations

Reflecting back over the past decade, a powerful story of a growing institutional commitment to fundamental rights emerges. Ten years ago, it was difficult to identify EU bodies or roles specifically tasked with protecting and promoting fundamental rights in general. The then still new offices of the European Data Protection Supervisor and the European Ombudsman were responsible for very specific segments of fundamental rights: data protection and maladministration, respectively. In contrast to the situation in many Member States, no institution at the EU level was responsible for fundamental rights as such. Moreover, in 2007, no member of the European Commission had a specific portfolio linked to fundamental rights.

Ten years later, the EU has created a fully functioning independent agency assisting not only EU institutions but also Member States in fulfilling fundamental rights obligations when implementing EU law. FRA acts as the EU's independent centre of excellence on fundamental rights. Representing a milestone in the EU's approach to human rights, it extended the scope of the previous EU Monitoring Centre on Racism and Xenophobia. This gave the EU its first expert body with authority to address the full breadth of the EU Charter of Fundamental Rights, including questions of racism and discrimination.<sup>10</sup> Around the same time, this horizontal approach was complemented by the creation of a targeted European Institute for Gender Equality (EIGE).<sup>11</sup> Both FRA and EIGE are advisory agencies; however: they cannot deal with individual rights violations and do not have to be consulted by the EU institutions.

Nevertheless, fundamental rights are far more visibly and prominently anchored within the core EU institutions. The First Vice President of the European Commission

is tasked with watching over the implementation of the Charter, the EU's own bill of rights. In the Council, a working party responsible for Fundamental Rights, Citizens' Rights and Free Movement of Persons within the EU became permanent in late 2009. It supplements the Council Working Party on Human Rights, which deals with human rights in the EU's external policies. Since 2012, the Special Representative for Human Rights has represented the EU's commitment to human rights externally, in relations with third countries.

At the national level, fundamental rights policies are increasingly 'institutionalised'. National human rights institutions (NHRIs) have grown in number and status,<sup>12</sup> as have other relevant bodies, such as equality bodies, data protection authorities and ombudsperson institutions. The European Network of National Human Rights Institutions (ENNHRI) has a membership of 40 NHRIs from across the whole continent of Europe, including ombuds institutions, human rights commissions and institutes. Despite having a diversity of mandates and national contexts, they are committed to working together to promote and protect human rights. Ten years ago, 16 Member States had accredited NHRIs, of which 11 were institutions with A status, five with B status and one with C status. In 2017, 21 Member States have accredited NHRIs, of which 17 have A status and six have B status.

Bringing fundamental rights more concretely into the EU treaties reinforced these institutional developments. When FRA was created in 2007, the EU still lacked a legally binding bill of rights to frame its actions and those of the Member States within the scope<sup>13</sup> of EU law. This changed in 2009, when the Lisbon Treaty entered into force and made the Charter legally binding. Underlining the political ramifications of this new status, the new European Commissioners when

taking office in 2010 solemnly declared that they would uphold the Charter as well as the EU treaties. The EU also ratified the UN Convention on the Rights of Persons with Disabilities in 2010 – the first time the EU acceded to an international human rights convention. These developments provided further evidence of the EU’s transformation into an organisation visibly based on and committed to fundamental rights.

Concrete evidence of the Charter’s growing significance comes in the form of case law of the Court of Justice of the European Union (CJEU). Between 2010, the first year in which the Charter was legally binding, and 2014, the number of references to the Charter in CJEU decisions quadrupled, reflecting its increasing prominence as a legal point of reference at EU level. FRA tracks the use of the Charter at national level. Its annual Fundamental Rights Report and online tool ‘Charterpedia’ report that the Charter is also contributing to fundamental rights protection through Member States’ legal systems. Its added value is not, however, yet fully exploited (see Chapter 1 of the [Fundamental rights report 2017](#)).

With threats to the rule of law emerging in various EU Member States in recent years, the EU is also engaging more in matters concerning the rule of law.<sup>14</sup> That involvement reflects the increasing emphasis on fundamental rights in a wider sense. In 2013, the European Commission launched its annual EU Justice Scoreboard, which provides comparable data on the functioning of the justice systems in the EU Member States.<sup>15</sup> The scoreboard aims to assist Member States in achieving more effective justice systems for citizens and businesses. In 2014, the Commission added [a new framework for addressing systemic threats to the rule of law](#) in Member States.<sup>16</sup> Both the Council of the EU<sup>17</sup> and the European Parliament have followed suit with their own initiatives for combating threats to the values listed in Article 2 of the Treaty on European Union (including respect for human rights, rule of law and democracy).

While FRA is not involved directly in the debate on the rule of law in the EU institutional system, there are obvious interdependencies between the rule of law and fundamental rights. This led FRA to call for a “more encompassing and substantial reading of the rule of law”.<sup>18</sup> An opinion, requested by the European Parliament, elaborated on this position and proposed a comprehensive approach because the rights “as recognised in the Charter cover most of the values of Article 2 of the Treaty on European Union (TEU)”.<sup>19</sup> In 2016, the European Parliament adopted a resolution advocating for an interinstitutional agreement on arrangements concerning monitoring and follow-up procedures on the situation of democracy, the rule of law and fundamental rights in the Member States and EU institutions.<sup>20</sup> There is, however, no political consensus in favour of such a coordinated approach to the shared values laid down in Article 2 of the TEU.<sup>21</sup>

## Embedding fundamental rights obligations in legislative and policy processes

The Charter provides primary law guidance to the EU and Member States, without creating “any new power or task for the Union”: they are explicitly obliged to “respect the rights, observe the principles and promote the application” of the Charter.<sup>22</sup> This emphasis on promoting as well as respecting EU values is also visible in the criteria for acceding to the EU stated in the Treaty of Lisbon. According to Article 49 of the TEU, any European state that respects the values referred to in Article 2 and is “committed to promoting them” may apply for EU membership.<sup>23</sup> This prompted questions of whether and how the EU should expand its treaty commitment to fundamental rights to its legislative and administrative branches by developing a fully fledged human rights policy.<sup>24</sup>

Elements of such a policy are visible in a series of major EU legislative developments.<sup>25</sup> Fundamental rights are at the core of the 2008 Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law;<sup>26</sup> the 2012 Victims’ Rights Directive;<sup>27</sup> the 2016 data protection reform package;<sup>28</sup> and various directives adopted under the Criminal Procedure Roadmap between 2010 and 2016.<sup>29</sup> Another signal is greater awareness of the need to develop legislation based on in-depth knowledge of the fundamental rights situation on the ground.

An increasing focus on mainstreaming fundamental rights led the European Commission to promote a “culture of fundamental rights” from 2005 onwards.<sup>30</sup> As only fundamental rights-compliant legislation will survive a test before the CJEU, to be sustainable it must be developed with fundamental rights firmly in mind. One example of how the EU legislative process has become increasingly fundamental rights-oriented is impact assessments. In 2010, the European Commission reinforced the process of assessing the impact of new legislative proposals on fundamental rights;<sup>31</sup> a year later, the Council of the EU adopted its own ‘Guidelines on methodological steps to be taken to check fundamental rights compatibility in the Council’s preparatory bodies’.<sup>32</sup> In 2012, the European Parliament followed suit and created a new Directorate for Impact Assessment and European Added Value, responsible for guaranteeing independent impact assessment. Finally, in 2016, the three institutions agreed to “carry out impact assessments in relation to their substantial amendments to the Commission’s proposal”.<sup>33</sup>

As a result, the EU legislator addressed fundamental rights in instruments involving a variety of policy areas, ranging from civil aviation to the revised regulation on the European Border and Coast Guard Agency (Frontex),



which includes over 100 references to fundamental rights.<sup>34</sup> Although such references to fundamental rights on paper are not a guarantee of their protection on the ground, they can help to drive rights-compliant implementation. The European Ombudsman has, for example, looked into Frontex's compliance with fundamental rights obligations.<sup>35</sup>

The CJEU's increasingly active stance on fundamental rights supports these developments. The CJEU is the EU's ultimate arbiter of EU legislation's compliance with fundamental rights. Although the CJEU had ruled in numerous judgments over several decades that fundamental rights are part of EU law, it had seldom annulled EU legislation for infringing on fundamental rights. In recent years, however, the court has explicitly noted that compliance with fundamental rights must underpin EU legislation. It reminded the legislator of the need to strike a "proper balance between the various interests involved" and to show to both legal practitioners and beneficiaries of EU law how, "when adopting [legislation], the Council and the Commission took into consideration methods [...] causing less interference" in fundamental rights.<sup>36</sup> Most prominently, in 2014, the court invalidated the Data Retention Directive because it did not sufficiently guarantee "to effectively protect [...] personal data against the risk of abuse and against any unlawful access and use of that data".<sup>37</sup>

The focus on ensuring that EU legislation complies with fundamental rights is also reflected in calls for a greater role for FRA in informing the legislative process. In 2009, the European Council stressed that the EU institutions should "make full use of" FRA's expertise in devising the EU's actions in the area of freedom, security and justice. It invited them "to consult, where appropriate, with the Agency, in line with its mandate, on the development of policies and legislation with implications for fundamental rights, and to use it for the communication to citizens of human rights issues affecting them in their everyday life".<sup>38</sup> In its 2014 guidelines in the area of freedom, security and justice, the Council highlighted the relevance of mobilising the expertise of relevant EU agencies, including FRA.<sup>39</sup> This underlines the importance of sound evidence to inform legislators and policymakers.

One way FRA responded to this call is through legal opinions expressing its views on draft EU legislation "as far as [its] compatibility with fundamental rights [is] concerned".<sup>40</sup> Following requests from the EU institutions – most frequently the European Parliament but also the European Commission<sup>41</sup> and



the Council<sup>42</sup> – FRA delivered 18 legal opinions relating to EU legislation between 2008 and 2016. Four of these opinions do not refer to a legislative proposal as such but comment on the implementation of existing EU legislation (such as the FRA opinion on the Equality Directives). Six of them were published in 2016 alone, commenting on the revisions to the Eurodac<sup>43</sup> and Dublin<sup>44</sup> regulations and the proposal to establish an EU list of safe countries of origin,<sup>45</sup> among others. Such legal opinions from an independent expert body can supplement internal impact assessments and legal scrutiny by the legal services of the EU institutions. Although FRA's legal expertise is not yet requested systematically or through a set structure during the preparation of EU legislation, the agency is increasingly invited to participate in hearings at the European Parliament and meetings of Council working groups. This shows that EU institutions acknowledge the added value of FRA's input when discussing measures that affect fundamental rights.

## Further means of protecting and promoting fundamental rights

In addition to making the Charter legally binding, the Lisbon Treaty laid down explicit obligations for the EU to increase social inclusion and equality "in defining and implementing [all of its] policies and activities".<sup>46</sup> In so doing, it provided a solid foundation for including references to fundamental rights obligations across all areas and types of EU action, fostering a culture of fundamental rights. This is reflected in a more holistic approach incorporating coordinated strategies, EU funds and economic coordination, in addition to legislation, as ways to improve human rights outcomes.

The development of EU policies on Roma inclusion is a good example. In 2011, the European Commission issued a Communication on an EU framework for national Roma integration strategies (NRISs). The communication stresses that "Member States need to ensure that Roma are not discriminated against but treated like any other EU citizens with equal access to all fundamental rights as enshrined in the [...] Charter".<sup>47</sup> Member States established national contact points, developed national integration strategies and worked together with FRA to establish indicators and monitoring tools to measure progress in Roma inclusion. In December 2013, the Council of the EU gave guidance on how to enhance the effectiveness of national Roma integration strategies and policies.<sup>48</sup> The Council recommendation retains a primary focus on rights, in particular equality.

At the same time, the Council Regulation governing the European Structural and Investment Funds (ESIF) set out ex ante conditions that must be met before

funds can be disbursed. ESIF are the EU's major financial policy instrument for implementing the Europe 2020 strategy. Several of the conditions specifically relate to fundamental rights. In addition to a general requirement for the use of EU funds to comply with the Charter, they also require the existence of a national Roma integration strategy and administrative capacity to implement and apply the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD).<sup>49</sup> Further reflecting the new attention on fundamental rights compliance, in 2014 the European Ombudsman launched an own-initiative inquiry into respect for fundamental rights in the implementation of EU cohesion policy.<sup>50</sup> It resulted in eight recommendations to the European Commission on avoiding fundamental rights violations.<sup>51</sup> In parallel, the European Court of Auditors audited the Commission and four Member States to assess whether or not EU policy initiatives and financial support through the European Regional Development Fund and European Social Fund between 2007 and 2015 had contributed effectively to Roma integration. The findings resulted in eight recommendations.<sup>52</sup>

Moreover, new EU funding schemes provide funding that is specifically focused on projects relating to fundamental rights – something that was already a feature of the EU's relations with third countries.<sup>53</sup> Such funding schemes are another facet of the overall effort to align the EU's internal fundamental rights actions with those already in place in its external relations.

Social rights, an area of fundamental rights that has received relatively little attention in the past, is rapidly becoming a policy priority in the EU to address shortcomings and delays in the implementation of the EU 2020 strategy. This could have an impact on the EU's economic coordination and structural reform procedures, particularly the European Semester, and make the Economic and Monetary Union more 'rights oriented'. In 2016, the European Commission engaged in a public consultation on a Pillar of Social Rights intended to place more focus on equal opportunities in and access to the labour market, fair working conditions, and adequate and sustainable social protection.<sup>54</sup> The consultation yielded a record number of responses, with a [European Commission press release of 23 January 2017](#) indicating there were more than 16,000 responses and that the ensuing conference attracted more than 600 participants, including all major social partner organisations.<sup>55</sup> As a result of this consultation on 26 April 2017, the European Commission presented the European Pillar of Social Rights.<sup>56</sup> This clearly points to a new dynamic in the strengthening of the EU's fundamental rights profile.

## Increasing the visibility of fundamental rights in an EU context

Complementing these internal changes, the EU also took steps to make fundamental rights more visible in the EU as a whole. Back in 2007, an informed citizen might have been aware that the EU promotes gender equality and consumer rights, and is committed to fighting discrimination against citizens of other EU countries. However, there was little to give the EU a wider reputation as an important actor in fundamental rights protection.

The European Commission took steps to raise fundamental rights awareness among citizens as part of its 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European

Union'.<sup>57</sup> For example, the Commission improved its e-Justice portal, which informs citizens where they can turn for assistance if fundamental rights are violated in their country.<sup>58</sup> It also launched an annual report on the application of the Charter, incorporating issues identified in the thousands of letters the European Commission receives annually from citizens.

For its part, FRA carries out large-scale surveys on people's experiences of the protection of their fundamental rights. They cover a range of issues, from violence against women to discrimination and criminal victimisation of people with minority ethnic backgrounds. These help draw attention to major fundamental rights issues in the EU. Moreover, work with relevant actors helps to raise awareness of and increase coordination on fundamental rights. Networks of government focal points (liaison officers in governments and parliaments), NHRIs, Member States and civil society organisations promote awareness of fundamental rights and offer increased opportunities to share experiences.

In addition, thousands of court practitioners, including judges, prosecutors and attorneys, and law enforcement officers benefit from practical handbooks developed by FRA in close cooperation with the European Court



of Human Rights (ECtHR) and the Council of Europe.<sup>59</sup> These handbooks provide hands-on guidance on legal principles in the areas of non-discrimination, data protection, asylum and immigration, children's rights, and access to justice. Published in all EU languages, almost 100,000 copies had been disseminated by the end of 2016, while around 340,000 had been downloaded by mid-2016. Producing practical tools for practitioners is one way in which FRA provides relevant advice on fundamental rights.

At the beginning of this millennium, academics questioned if the EU could be described as a human rights organisation.<sup>60</sup> The institutional and procedural developments described mean that today we can argue that fundamental rights are firmly embedded not just in law but in the legislative process and the development and implementation of EU policies. No longer confined to the EU's judiciary, fundamental rights are becoming part of the EU's administrative, policy and economic culture. However, there is no room for complacency.



# Fundamental rights under pressure: experiences in four key areas



While the fundamental rights framework has been added to and improved over the past decade, serious shortfalls persist in many areas. This section briefly examines how rights-based law- and policy-making have affected the lives of people in the EU. It looks at four areas in which fundamental rights are particularly at stake: violence against women, the tension between protecting privacy and ensuring security, Roma's experiences with poverty and discrimination, and the situation of migrant children. In each area, FRA's work brings added value by providing evidence on serious and ongoing fundamental rights violations.

This section draws on different types of FRA evidence and on agency opinions examining actions at the EU level. It should be read alongside the respective chapters of the *Fundamental Rights Report 2017* and previous reports, which track key developments at national level. In addition, the materials stemming from the first Fundamental Rights Forum, which FRA organised in June 2016, also provide a wealth of further information, addressing different aspects of these thematic areas.<sup>61</sup>

## Discrimination and fundamental rights: violence against women

*"European governments, parliaments and judiciaries must become more sensitive towards women's rights and put an end to this unbearable injustice. Ensuring women's safety must be among Europe's top priorities."*

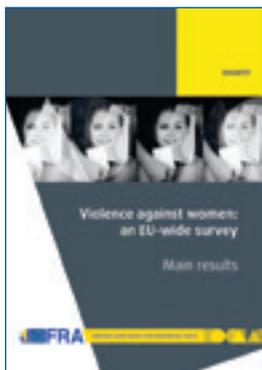
*Council of Europe Commissioner for Human Rights, 'Fighting violence against women must become Europe's top priority', New Europe, 4 January 2016*

Violence against women is typically thought of as a human rights issue in the context of war and armed conflict. It is only relatively recently that gender-based violence – ranging from domestic violence to sexual

harassment – has been viewed from a rights-based perspective and acknowledged as a particularly severe fundamental rights concern.<sup>62</sup>

Despite greater acknowledgement that violence against women involves serious and widespread fundamental rights violations, until recently, few comprehensive data on the extent of the problem were available. This prompted the European Parliament to call on FRA to collect "reliable, comparable statistics on all grounds of discrimination [...], including comparative data on violence against women within the EU" in 2009.<sup>63</sup> The Council of the EU reiterated this request in March 2010.<sup>64</sup> The agency responded by launching the first EU-wide survey to record women's experiences with violence, encompassing different types of physical, sexual and psychological violence experienced since the age of 15, as well as women's childhood experiences with violence (by an adult) before the age of 15. The survey included face-to-face interviews with 42,000 women in the 28 EU Member States. Based on a representative sample of women in the general population, it presents a comprehensive picture of women's experiences with violence.

The results of FRA's survey, published in 2014, are sobering.<sup>65</sup> The findings show that an estimated 13 million women in the EU had experienced physical violence in the 12-month period preceding the survey, and that an estimated 3.7 million women experienced sexual violence in the same period. Overall, one in three women (33 %) indicated that they had been a victim of physical and/or sexual violence at least once since the age of 15, and one in 20 women indicated that they had been raped. The survey also captured experiences of sexual harassment. Depending on the six or 11 examples of sexual harassment asked about in the survey, between 45 % and 55 % of women indicated that they had experienced at least one form of sexual harassment since the age of 15. Many women had experienced multiple incidents.



The survey also covers areas of abuse that have only recently been recognised, such as stalking and the psychological abuse that often accompanies violence. It reveals the extent to which social media and the internet are being used as new tools for abuse. For example, 11 % of women had received unwanted, offensive and sexually explicit emails or text messages, as well as offensive and inappropriate advances on social networking sites.

The results also indicate the extent of underreporting of incidents of violence against women. Only 14 % of women reported the most serious incident of physical and/or sexual violence to the police in cases where the perpetrator was an intimate partner, according to the survey. This suggests that police statistics – to the extent that they record a victim’s gender and relationship with the perpetrator – show only the ‘tip of the iceberg’ when it comes to women’s experiences of violence.

The past decade shows that three elements are relevant to addressing violence against women:

- strengthening protection through mutually reinforcing legal standards;
- coordinated policy action;
- improving data collection.

In addition to an increasing focus on violence against women by the UN, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) entered into force in 2014. As the first binding and comprehensive European legal instrument on the issue, it is a significant milestone for sustained efforts to prevent violence against women, protect victims and bring offenders to justice. As of February 2017, all EU Member States have signed the convention and 11 have ratified it. On 11 May 2017, the Council adopted two decisions on the signing of the Council of Europe Convention (Istanbul Convention) on preventing and combating violence against women and domestic violence.<sup>66</sup>

Conversely, there is currently no equivalent legislation at the EU level that comprehensively addresses violence against women. Instead, protection against forms of violence that specifically target women (such as sexual abuse and sexual harassment at the workplace) or affect them disproportionately (such as domestic violence) is framed in terms of non-discrimination. The Gender

Equality Directive (recast), for example, addresses specific forms of violence such as sexual harassment.<sup>67</sup>

Nevertheless, the increasing alignment of law at the European level to address violence against women is evident when looking across different legal instruments. For example, the Istanbul Convention emphasises women’s right to be protected immediately against further victimisation if they are victims of violence by their domestic partners. This is in line with the right of victims under Article 18 of the Victims’ Rights Directive to be protected against repeat victimisation. Recent EU law takes it up specifically in the form of the Directive on the European protection order<sup>68</sup> and the Regulation on mutual recognition of protection measures in civil matters.<sup>69</sup> In addition, the Victims’ Rights Directive recognises that victims of gender-based violence, victims of sexual violence and victims of violence in a close relationship are vulnerable as a result of the nature or type of crime to which they have fallen victim.

Despite the lack of a general EU legal instrument on gender-based violence, the European Commission has increasingly recognised violence against women and gender-based violence among

*“If I look back now, what I really needed at the time was professionals with the understanding and knowledge of all the dynamics of domestic violence.”*

*Catherine, victim of domestic violence in FRA video ‘A decade of human rights protection: The EU Agency for Fundamental Rights turns 10’*

its policy priorities. The Commission’s Roadmap for equality between women and men 2006–2010<sup>70</sup> and the Strategy for equality between women and men 2010–2015<sup>71</sup> both outlined key actions in the area of gender-based violence. Most recently, in December 2015 the Commission released its Strategic engagement for gender equality 2016–2019<sup>72</sup> as a follow up to the 2010 strategy. It presents a number of key actions, including EU ratification of the Istanbul Convention, continued enforcement of the Victims’ Rights Directive, and awareness-raising activities and measures to eradicate female genital mutilation and human trafficking. In addition, the European Commission used the results of FRA’s survey as a basis for developing further measures to combat violence against women, such as setting up funding opportunities for the Member States and civil society organisations.

One area of particular focus is asylum. For example, in its 2010 strategy, the Commission set out to ensure that EU legislation in the area of asylum takes gender equality into account, and that the gender perspective is promoted in the work of the European Asylum Support Office and the European Refugee Fund. For its part, FRA looked at the specific experiences of and responses to violence against women in the context of its monthly reporting on the impact of the asylum situation in select Member States.<sup>73</sup> In addition to a thematic focus on violence against women, another monthly report examined the theme of trafficking, including with respect to gender.<sup>74</sup>

However, during the same period, other planned initiatives were withdrawn. Most notable is the EU-wide Strategy on combating violence against women, which was announced in the 2010 Strategy on equality between women and men.

In parallel to working on improving legal standards and policies, policymakers have noted the absence of comprehensive data on violence against women. Such data can inform corresponding initiatives, such as improving support services for victims or training relevant professionals. In the absence of reliable administrative and criminal justice data, FRA's survey – the largest cross-country dataset of its kind – serves as a model for several additional data collection efforts. Eurostat, the EU's statistical office, is piloting a survey on violence against women *and* men in select Member States. It will build on the experience, questionnaire and findings of FRA's survey. FRA is part of the expert group that will provide input to the development and roll-out of this survey. If successful, it will provide much-needed data in an area where official statistics are limited. Furthermore, the EU is financially supporting the Organization for Security and Co-operation in Europe's efforts to replicate FRA's survey – using the same questionnaire – in 10 non-EU European countries.

More broadly, in 2016 the agency's Management Board agreed that FRA should repeat its surveys on Jewish people in select Member States and on lesbian, gay, bisexual, transgender and intersex (LGBTI) persons across the EU. Both encompass experiences of hate-motivated violence that can be broken down by respondents' gender and other variables. Moreover, results from the second round of the agency's EU Minorities and Discrimination Survey (EU-MIDIS II) will be released in 2017. Its data on crime victimisation can be disaggregated with respect to gender and characteristics such as respondents' self-declared ethnicity or immigrant background.<sup>75</sup>

*“To complement police records, comprehensive and in-depth surveys are necessary. The [FRA] survey paved the way in this field. It is now considered the gold standard, and we should be proud of this achievement. However, we cannot stop here [...]. We need to repeat the [FRA] survey again, and we will make sure that such surveys are conducted at regular intervals to detect new trends and gaps.”*

*Commissioner Věra Jourová, speech to the European Parliament on 25 November 2014 – International Day for the Elimination of Violence against Women*

Looking ahead, regular assessments of the implementation of legal standards will constitute an important step in closing the gap between existing legal protections and women's actual experiences in the EU. From 2016, an independent expert body will contribute to monitoring the implementation of the Istanbul Convention through a country-by-country evaluation procedure.<sup>76</sup> This work should provide

impetus for States parties to ensure full implementation of the convention by giving a better overview of gaps in the protection of victims and provision of services. The coming period will show whether or not the political climate in the EU is favourable to the EU's ratification of the Istanbul Convention. In parallel, the effectiveness of EU legislation to tackle issues such as cross-border protection of victims of violence (which should benefit women), as well as the Victims' Rights Directive, should be closely assessed to see the extent to which the law is applied in practice to assist women who are victims of violence. FRA provided the EU with comprehensive data on the extent of violence against women; Member States now have to address it appropriately.

## Security and fundamental rights: implications for the use of personal data

*“Respecting fundamental rights in planning and implementing internal security policies and action has to be seen as a means of ensuring proportionality, and as a tool for gaining citizens' trust and participation.”*

*Council for the European Union (2014), Council conclusions on development of a renewed European Union Internal Security Strategy, Brussels, 4 December 2014, p. 7*

From the Madrid and London bombings of 2004 and 2005 to the numerous terrorist attacks of 2015 and 2016, the last 10 years have seen a rise in major terrorist acts around the EU. With new, often internet-based, technology playing an increasingly important role in both organising and preventing such acts of mass violence, possible tensions between security and firmly embedded EU rights to data protection and privacy moved to the fore. This tension was cast into sharp relief in 2013, when whistleblower Edward Snowden exposed mass surveillance practices by the United States and United Kingdom governments. Lifting the lid on large-scale, indiscriminate gathering and analysis of data under the auspices of national security and counter-terrorism, these revelations seemed to indicate a trade-off between ensuring security and protecting privacy rights.

Selected examples show how the perceived need to 'balance' the fundamental rights to data protection and privacy with security has been at the core of debates about the three major EU-level legislative issues in the area:<sup>77</sup>

- preparation and adoption of the 2016 data protection package;
- preparation and adoption of the 2016 Passenger Name Record (PNR) Directive;
- responses to the annulment of the 2006 Data Retention Directive.



Source: FRA video (2017), 'A decade of human rights protection: The EU Agency for Fundamental Rights turns 10'

The Snowden revelations marked a turning point in discussions on reform of the EU data protection law<sup>78</sup> by forcefully underlining the need for a strong legal framework reflecting new technological possibilities for mass surveillance. After four years of negotiation, in 2016 the EU adopted a package consisting of the General Data Protection Regulation<sup>79</sup> (GDPR) and Directive (EU) 2016/680 on data protection in the police and criminal justice sectors,<sup>80</sup> which covers data protection related to criminal offences and criminal penalties (see Chapter 6 of the [Fundamental rights report 2017](#)).

Marking a clear step forward in the protection of fundamental rights, both the GDPR and Directive (EU) 2016/680 incorporate several of the privacy safeguards that FRA proposed in its 2012 legal opinion on the data protection reform package.<sup>81</sup> They include strengthening the right to an effective remedy and enabling organisations acting in the interests of individuals to lodge complaints. For example, both instruments provide for strong supervision by independent national data protection authorities (DPAs), who can receive complaints and award compensation to data subjects, as FRA's opinion suggested.

Similar privacy-based concerns accompanied the negotiation of the EU PNR Directive, which is viewed as a central plank of the EU's security agenda.<sup>82</sup> The directive entered into force in 2016 after almost a decade of discussion.<sup>83</sup> The adopted text includes a number of safeguards missing from the 2011 proposal,<sup>84</sup> which the European Parliament rejected in 2013 amid concerns about its proportionality and necessity, as well as its lack of data protection safeguards and transparency.<sup>85</sup>

Several of these safeguards build on suggestions that FRA made in its 2008 and 2011 legal opinions on the EU PNR data collection system. For example, the directive includes a clearer list of criminal offences that justify the use of PNR data by law enforcement authorities,

and requires Member States to appoint dedicated data protection officers within the units responsible for processing PNR data at the national level.<sup>86</sup>

In addition to the collection and processing of personal data, recent terrorist attacks focused attention on data retention by telecommunication providers as a tool for protecting national security and addressing crime. There is currently no EU-wide legislation in this area. The CJEU annulled the 2006 Data Retention Directive in 2014,<sup>87</sup> one of a series of judgments underlining the court's proactive stance on ensuring data protection.<sup>88</sup> While acknowledging that the directive pursued a legitimate aim in the fight against serious crime and in protecting national security, the court found that it provided insufficient safeguards to protect privacy and data protection rights.<sup>89</sup> This reflected major concerns that national courts had expressed. FRA's mapping showed that all constitutional courts that addressed the issue deemed national data retention regimes either partly or entirely unconstitutional.<sup>90</sup>

If the EU heeds Member States' call for "an EU-wide approach [...] to put an end to the fragmentation of the legal framework on data retention across the EU"<sup>91</sup> recent CJEU rulings give clear criteria for assessing how compatible any future data retention proposal will be with fundamental rights.<sup>92</sup> As FRA has emphasised, any new EU action would need to incorporate the safeguards that the CJEU identified and include strict proportionality checks and appropriate procedural safeguards to guarantee the essence of the rights to privacy and the protection of personal data.<sup>93</sup>

*"Fundamental rights must be at the heart of the [European security] framework. [...] [G]reater security can only become real when rooted in the full respect of fundamental rights. [...] I am fully committed to the Charter [of Fundamental Rights of the EU]. Our actions must always be based on the rule of law, with appropriate safeguards and exceptions only when necessary, proportionate and legally justified."*

*Sir Julian King, European Commissioner for the Security Union (2016), 'Introductory remarks by Commissioner-designate Sir Julian King to the LIBE Committee', Strasbourg, 12 September 2016*

Realising these protections in practice will require the full and prompt implementation of the new legal framework. FRA's research has consistently highlighted gaps, so this will include steps to make individuals aware of their data protection rights and available remedies.<sup>94</sup> In addition, it demands particular focus on effective remedies and independent oversight, in line with recent CJEU case law.<sup>95</sup> This includes ensuring that supervisory authorities are fully independent, and can take action on their own initiative to protect the interests of data subjects proactively and effectively.<sup>96</sup> The wider role for DPAs also underlines the importance of ensuring they have adequate human and financial resources to carry out their supervisory and enforcement tasks.<sup>97</sup>

This vigilance will be essential in protecting against some of the fundamental rights risks that remain, particularly concerning PNR. The possibility to extend the system to intra-EU flights would significantly increase its scope, calling into question its compliance with the proportionality criteria set out by the CJEU.<sup>98</sup> Furthermore, PNR data, if inappropriately used to assess the risk posed by certain passengers, can amount to discriminatory profiling.

Two practical FRA tools give guidance on how Member States can embed fundamental rights as they incorporate the PNR Directive into national law. First, FRA's guidance on setting up domestic PNR systems addresses issues such as transparency towards passengers and transfer of PNR data.<sup>99</sup> Second, its Guide on discriminatory ethnic profiling – to be updated in 2018 to reflect technological developments – explains when profiling would be considered discriminatory and therefore unlawful.<sup>100</sup>

Examples of recent EU legislation show that privacy rights can be incorporated into security and counter-terrorism measures. Looking ahead, the next step is to reconceive the relationship between privacy and security so that they are viewed as mutually reinforcing. Rather than speaking of striking a balance between security concerns and the right to privacy and data protection, politicians can use data protection concerns to make security interventions more legitimate. They have already made strong commitments to promote a fundamental rights culture within the security union.<sup>101</sup> FRA's evidence can help to ensure that future actions in this area encapsulate this approach.<sup>102</sup>

## Poverty and fundamental rights: the case of Roma

*"The EU has made available to the Member States a range of legal, policy and financial instruments to address the situation of the Roma through different perspectives: non-discrimination, free movement of people or enlargement strategy. However, it is clear that the legal instruments in place are not sufficient to address the Roma issue alone. The economic and social marginalisation of Roma persists, which is neither acceptable nor sustainable in the EU of the 21st Century. [...] The economic integration of Roma will contribute to social cohesion and will improve respect for fundamental rights."*

*Viviane Reding, Vice-President of the European Commission, responsible for Justice, Fundamental Rights and Citizenship (2011), 'The EU Framework for national Roma Integration Strategies: Moving from good intentions to concrete action', 8 April 2011*

In 2010, at the height of the economic and financial crisis, the EU adopted Europe 2020, its 10-year strategy for growth and jobs.<sup>103</sup> It set a target of reducing, by 2020, the number of people threatened by poverty

or social exclusion by 20 million. Being unemployed and living in conditions of poverty and social exclusion are detrimental to the full enjoyment of rights, as FRA underlined in its 2013 focus on safeguarding fundamental rights in times of crisis.<sup>104</sup> This calls into question compliance with numerous Charter rights, including human dignity (Article 1); the freedom to choose an occupation and the right to engage in work (Article 15); non-discrimination (Article 21); social security and social assistance (Article 34); healthcare (Article 35); and freedom of movement and of residence (Article 45).

Roma are overrepresented among those affected by poverty or social exclusion. FRA's 2011 Roma survey found that at least 80 % of the Roma

surveyed were at risk of poverty or social exclusion, compared with 24 % of all adults.<sup>105</sup> At the same time, about half of the Roma surveyed reported that they had experienced discrimination in the year preceding the survey because of their ethnic origin, while only around 40 % were aware of laws forbidding discrimination against members of ethnic minorities when applying for a job. Few of the EU's main large-scale surveys sufficiently cover ethnic minorities including Roma, so these data shed new light on the fundamental rights challenges faced by the EU's largest ethnic minority.<sup>106</sup>

Reflecting the urgency of the situation revealed by these and other data, different EU institutions put in place comprehensive legal and policy commitments specifically aimed at improving Roma socio-economic conditions. The EU adopted a Framework for NRISs in April 2011, marking an unprecedented commitment by EU Member States to promoting the inclusion of their Roma communities.

Progress on the ground, however, has been notably slower. FRA published data in 2016 – as part of EU-MIDIS II – suggesting that little progress has been achieved.<sup>107</sup> Overall, 80 % of Roma live below their country's at-risk-of-poverty threshold, one in three live in housing without tap water and one in 10 live in housing without electricity (see also Chapter 4 of the [Fundamental rights report 2017](#)). Furthermore, a quarter of all Roma and a third of Roma children live in a household that faced hunger at least once in the month preceding the survey. Roma also continue to face intolerable levels of discrimination when looking for work, at work, in education, in healthcare, when in contact with administrative bodies or even when entering a shop: 41 % felt discriminated against at least once in one of these areas of daily life in the past five years.

***"Roma have been – for some reason – chosen to be the scapegoat."***

*Kumar, Roma rights defender in FRA video  
'A decade of human rights protection: The EU Agency for Fundamental Rights turns 10'*

*“First of all, Member States need to ensure that Roma are not discriminated against but treated like any other EU citizens with equal access to all fundamental rights as enshrined in the EU Charter of Fundamental Rights. In addition, action is needed to break the vicious cycle of poverty moving from one generation to the next.”*

*Commission Communication ‘An EU Framework for National Roma Integration Strategies up to 2020’, 5 April 2011, COM(2011) 173 final*

These results support the Commission’s assessment in 2016 that, whereas the legal, policy and funding instruments put in place had resulted in better coordination and mainstreaming, they were unable to “prevent further deterioration of the living conditions of Roma and widespread hostility of majority societies”.<sup>108</sup> Among the actions proposed by the Commission to improve implementation of Roma inclusion measures, three emerge from FRA’s research as particularly important:

- strengthening the monitoring and evaluation of Roma inclusion measures;
- empowering Roma and involving them in developing, implementing and monitoring integration measures at local level;
- reflecting age- and gender-specific vulnerabilities in efforts to tackle poverty and social exclusion.

The European Commission also highlighted these issues as particular challenges in 2010 and 2016.<sup>109</sup>

The importance of effective monitoring and evaluation of initiatives to improve the realisation of fundamental rights is a consistent theme of FRA’s research, and is firmly embedded in Roma-related initiatives. Both the EU Framework on NRISs and the 2013 Council recommendation afford prominence to regularly monitoring progress. To support these efforts, FRA worked with the European Commission and Member States – through the Ad-Hoc Working Party on Roma integration indicators<sup>110</sup> – to develop and apply a two-pronged monitoring system on Roma integration. The first pillar consists of a framework of indicators for measuring progress against a range of fundamental rights, based on the UN’s structure–process–outcome model.<sup>111</sup> Process indicators are particularly important for informing policymakers about possible gaps or deficits at the implementation level, so the second pillar is an information collection tool for generating data to apply these indicators. In 2016, this fed into Member States’ first report on progress made in implementing the 2013 Council recommendation.

Nevertheless, weaknesses in monitoring processes persist. One challenge concerns linking measures to outcomes, which would enable policymakers to track the results of their efforts.<sup>112</sup> FRA’s surveys go some

way to plugging the gap in data on outcomes. It would give further insight into the impact of measures on the ground if other major European survey instruments, such as the Survey on Income and Living Conditions and the Labour Force Survey systematically included the possibility to disaggregate relevant data.

Moreover, fundamental rights-based monitoring tools may not be consistently applied across the full breadth of Roma integration measures. For example, although the introduction of ex ante conditions in the current ESIF regulation marks a significant step forward, there remains room for improvement in assessing their role in realising fundamental rights. In this regard, FRA’s assistance to European Commission desk officers working with ESIF on human rights-based monitoring tools can help to enhance ESIF’s role in tackling discrimination and reducing poverty and social exclusion.<sup>113</sup>

Effective monitoring is closely tied to the involvement of those concerned. One way to support full and meaningful participation is through empowerment. Both the European Commission and the Council of Europe have taken action to improve the civil and political participation of Roma citizens, as well as the capacity of Roma civil society. The European Commission supported pilot projects for shadow monitoring of NRISs, including information on the involvement of civil society,<sup>114</sup> while the Council of Europe helped to develop community action groups through which Roma citizens can contribute to decision-making processes at the local level.<sup>115</sup> Further evidence on the complex processes empowering local Roma communities will come through FRA’s Local Engagement for Roma Inclusion project.<sup>116</sup> Bringing together local residents, including Roma, with other local stakeholders, the project investigates how they can best be involved in Roma integration actions.

FRA research also underlines the particularities of poverty and social exclusion experienced by women and children. FRA data show that, of the Roma who are at risk of poverty, 42 % are children under 18 years of age, while for non-Roma households the figure is around half of that (22 %).<sup>117</sup> Roma children also lag behind their non-Roma peers on all education indicators: for example, nearly a fifth (18 %) of Roma aged between six and 24 attend an educational level lower than that corresponding to their age. Similarly, data show poorer outcomes for women than for men. Roma women report lower employment rates than Roma men, for example: 16 % compared with 34 %. As many as 72 % of young Roma women surveyed are not employed, in education or training, compared with 55 % of young Roma men. These findings can help policymakers develop better-targeted responses to promote the social inclusion of Roma women and children more effectively.



As EU legal and policy provisions are increasingly framed by fundamental rights, measures tackling discrimination and combating anti-Gypsyism should become embedded not only in Roma integration strategies, but more broadly in the range of measures against poverty and social exclusion. In addition to existing national reform programmes and ESIF projects, further initiatives are expected to be developed under the new European Pillar of Social Rights. As Commissioner Thyssen underlined in her opening speech at the conference on the proposed pillar: “Europe has always placed importance on social justice – as the core of its social market economy, so we need to tackle inequalities and poverty head on.”<sup>118</sup>

## Migration and fundamental rights: the situation of children

*“We can build walls, we can build fences. But imagine for a second it were you, your child in your arms, the world you knew torn apart around you. There is no price you would not pay, there is no wall you would not climb, no sea you would not sail, no border you would not cross if it is war or the barbarism of the so-called Islamic State that you are fleeing. So it is high time to act to manage the refugee crisis. There is no alternative to this.”*

*Jean-Claude Juncker, President of the European Commission (2015), State of the Union address 2015: time for honesty, unity and solidarity, Strasbourg, 9 September 2015*

Over one million refugees and migrants entered the EU through Greece and Italy in 2015. A further 360,000 people crossed the Mediterranean into the EU in 2016.<sup>119</sup> Of these, 26 % were children, many of them unaccompanied.<sup>120</sup> The total number of child asylum applicants increased from 61,195 in 2010 to 368,800 in 2015, a six-fold increase. Of these applications, 96,465 were submitted by unaccompanied children, which represents almost a ten-fold increase from 2010 (10,610 applications). 87.5 % of all children who arrived in Italy by sea in 2016 were unaccompanied.<sup>121</sup>

The situation illustrated in stark terms the potential for fundamental rights violations at all stages of the migration and asylum process. FRA highlighted some of the most pressing concerns in its *Fundamental Rights Report 2016*,<sup>122</sup> including limited legal possibilities for refugees to enter the EU; smuggling of migrants; the impact of asylum and border management policies on EU free movement rules; and preventing *refoulement*<sup>123</sup> – returning a refugee to a risk of persecution. Other issues, such as resettlement of migrants to other EU Member States, reuniting family members in different Member States, the implications of the so called EU-Turkey Statement adopted on 18 March 2016, and information systems in the area of asylum and migration,<sup>124</sup> are discussed in Chapter 5 of the *Fundamental rights report 2017*.

Reflecting the urgency of the crisis at the EU’s borders, FRA supplemented its existing research in the area<sup>125</sup> with new activities, in particular the deployment of FRA experts to the Greek ‘hotspots’ between April and September 2016 to provide on-the-ground fundamental rights expertise to EU actors,<sup>126</sup> and the publication of regular overviews of migration-related fundamental rights concerns in Member States particularly affected by large migration movements.<sup>127</sup> Furthermore, four legal opinions, which the European Parliament requested, highlighted the fundamental rights impact of certain EU responses, namely a proposed EU common list of safe countries of origin,<sup>128</sup> the situation in the hotspots established in Greece and Italy,<sup>129</sup> and the effects on children of proposals to revise the Dublin<sup>130</sup> and Eurodac<sup>131</sup> regulations.

The situation calls into question compliance with numerous Charter rights, including the rights to asylum (Article 18), respect for private and family life (Article 7), an effective remedy (Article 47), integrity of the person (Article 3) and liberty (Article 6) as well as the prohibition of *refoulement* and collective expulsion (Article 19). Evidence collected through the agency’s operational engagement and research underlines particular risks associated with children arriving in large numbers. They make it harder to fulfil Article 24 on the rights of the child in conjunction with the above rights.<sup>132</sup>



Source: FRA video (2017), ‘A decade of human rights protection: The EU Agency for Fundamental Rights turns 10’

Around a third of asylum applications in the EU in both 2015 and 2016 were from children. A significant minority of these were unaccompanied – not accompanied by an adult responsible for them – or separated – accompanied by a relative other than their parents or guardian.<sup>133</sup> Efforts to implement the enhanced protection that international, EU and national law afford to unaccompanied and separated children have put asylum and child protection systems in many Member States under unprecedented strain.<sup>134</sup>

A closer look at three issues highlights a range of specific challenges concerning unaccompanied migrant and refugee children (see also Chapters 5 and 7 of the [Fundamental rights report 2017](#)).<sup>135</sup> Each of these issues is relevant to proposed reforms to the Common European Asylum System and to the EU's large-scale information systems:<sup>136</sup>

- preventing detention of unaccompanied children;
- ensuring guardianship for unaccompanied children; and
- preventing unaccompanied children from going missing from reception facilities.

FRA first highlighted challenges concerning missing children in the context of trafficking in 2009.<sup>137</sup> Two reports from 2010 captured separated children's experiences of legal guardianship and detention, and presented a comparative overview of legal provisions concerning detention of separated children in return procedures.<sup>138</sup>

A first key fundamental rights risk is child detention. Although EU law strongly discourages the detention of all children for migration purposes,<sup>139</sup> FRA has collected evidence indicating that unaccompanied and separated children continue to be detained in some EU Member States.<sup>140</sup> This raises a number of fundamental rights issues, including insufficient individual assessment of the necessity of detention, limited assessment of the child's best interests prior to detention, and the type of facility and child-specific safeguards available.<sup>141</sup> Children held in the hotspots, in particular, lack meaningful age-appropriate activities and are at heightened risk of being placed together with adults not related to them due to a lack of dedicated facilities.<sup>142</sup> Children's experiences, collected by FRA before the current crisis, bear out these concerns. Separated children talked of bullying and aggression in detention, as well as confusion about why they were detained, given that they had not committed any crime.<sup>143</sup>

*"[E]ven for a short period of time and in adequate material conditions, immigration detention is never in a child's best interests. [...] [D]etention is a disproportionate measure as the harm inflicted on children in the context of detention cannot be justified by immigration control requirements."*

Council of Europe Commissioner for Human Rights (2016), 'Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to the Secretary of State for Migration and Asylum of Belgium, Theo Francken, concerning the detention of migrant children', *CommDH(2016)43*, 19 December 2016

For those exceptional situations in which children are detained, Article 17 of the Return Directive and Articles 11 and 12 of the Reception Conditions Directive set out safeguards. These include ensuring that detention is for the shortest appropriate period of time and takes place

in accommodation with appropriate personnel and with facilities that enable children to engage in recreational activities appropriate to their age.<sup>144</sup>

Evidence that the agency has collected over a decade powerfully underlines a second issue: the importance of effective and efficient guardianship systems for ensuring the rights of all children, in particular migrant and refugee children separated from their families. Throughout the arrival, asylum and immigration process, guardians play a critical role in ensuring the child's access to services, information and support, as well as safeguarding their best interests in legal and administrative procedures.<sup>145</sup> In practice, however, FRA's work illustrates persisting problems: significant delays in the appointment of guardians; difficulties identifying sufficient numbers of suitable guardians; the appointment of guardians who may have conflicts of interest; and guardians being responsible for large numbers of children.<sup>146</sup> Separated asylum-seeking children also often do not know if they have a guardian or who that person is, interviews in 2010 indicate.<sup>147</sup>

Proposed revisions to the Reception Conditions Directive were published in 2016 in response to the migrant and refugee crisis. They address several of these issues. Among other aspects, the proposal calls for the appointment of a guardian within five days of the application for international protection, vetting of guardians, and ensuring that guardians are not responsible for a disproportionate number of children.<sup>148</sup> The joint FRA-European Commission *Handbook on guardianship for children deprived of parental care* provides practical guidance on how Member States can apply these safeguards within their national guardianship systems.<sup>149</sup> For example, to avoid potential conflicts of interest, it cautions against appointing guardians who are also working for reception facilities. It also provides advice on the training of guardians and sets out core components of review and oversight mechanisms. This is in response to evidence that FRA collected showing that most Member States do not have in place provisions for filing complaints against guardians.<sup>150</sup> As part of its presence in the hotspots in 2016, FRA facilitated a workshop on reforming the Greek guardianship system that drew on promising practices in EU Member States.

Lack of registration, inadequate accommodation, fear or experience of detention, and ineffective guardianship can be factors in migrant children going missing. Although a lack of comprehensive data means there is little clarity on the numbers of missing unaccompanied children, evidence that FRA has

*"It is not good to close the way for refugees – because if they close the way, they will find a dangerous way and many people will die on the way."*

15-year-old female migrant in FRA video  
'A decade of human rights protection: The EU Agency for Fundamental Rights turns 10'

collected gives some insight into why unaccompanied children go missing from reception facilities.<sup>151</sup> Many leave to meet parents or other family or friends living in another Member State. Others decide to travel alone because asylum procedures are lengthy and often have cumbersome administrative requirements, and because they do not trust authorities and they lack information. Inadequate reception conditions and detention practices are further push factors: evidence from FRA's monthly reporting in 2015 and 2016 suggests that children mainly go missing from transit and temporary first reception facilities that fail to meet child protection standards.<sup>152</sup>

These factors support introducing various possible measures to reduce the number of missing unaccompanied children,<sup>153</sup> estimated at over 10,000 in 2015.<sup>154</sup> First, they might be less inclined to leave in search of relatives if there were more opportunities for prompt family reunification – for example, a special scheme for the transfer of unaccompanied children to Member States where there is the best chance of family reunification.<sup>155</sup> Second, ensuring children are given accurate information in an age-appropriate manner helps to build trust; promptly appointing a trained and qualified guardian can help to convey information

and identify children at risk of disappearing. Lastly, reception and accommodation should be provided in more 'family-like' form, such as foster care, with the involvement of child protection authorities. In the hotspots established in Greece and Italy in 2015, providing adequate conditions includes having a qualified person responsible for child protection issues, as FRA's 2016 legal opinion proposed.<sup>156</sup>

These responses proposed by the agency are practical ways to ensure that the fundamental rights of children can be protected throughout the arrival and asylum process. More broadly, they underline the importance of ensuring that EU law and policy fully incorporate the needs of this especially vulnerable group of refugees and migrants. Upcoming EU-level initiatives provide an opportunity to reinforce and strengthen existing safeguards. For example, the proposal for a revised Dublin Regulation marks progress in certain areas, such as children's extended right to information.<sup>157</sup> Additional guarantees would further enhance protection – such as appointing a guardian and excluding unaccompanied children from accelerated procedures to ensure a genuine assessment of their best interests, as FRA argues in its opinion on the revised Dublin Regulation.<sup>158</sup>



# What remains to be done



This focus began by describing how the EU has developed and improved tools to respect, protect and promote fundamental rights, among them the FRA. But – as the four examples discussed above underscore – major obstacles to fulfilling the human rights of everyone living in the EU remain.

The discrepancy between fundamental rights structures and outcomes on the ground points to persisting gaps. Filling these gaps requires a renewed commitment to fundamental rights. This is even more needed as recent years have witnessed new challenges in the political landscape. Against this backdrop, FRA’s role appears even more relevant than 10 years ago.

## Gaps and deficiencies persist

The EU has taken significant steps towards becoming a fully fledged human rights actor. But this remarkable progress must be put in perspective. The past decade’s strengthening of the formal fundamental rights architecture will only have achieved its aim when people in the EU actually feel that their fundamental rights are protected and fulfilled. Precisely here, though, we see two major shortcomings. One is the inconsistent application of fundamental rights legislation and policy around the EU. The other is the failure to communicate that human rights are for everyone and provide the best basis for societies to develop and flourish. It is this failure that at least partly explains the rise in support for populist groups in many places throughout Europe.

Four examples highlight these problems:

- Member States have not fully embedded a ‘Charter culture’ in their administrative, legislative and judicial procedures. The implementation of the ‘law on the books’ into lived realities continues to suffer shortcomings.

- The EU does not yet fully use the potential of all Charter rights (including socio-economic rights) and their guiding function across the EU’s activities.
- The EU does not systematically request independent socio-legal advice (e.g. by FRA) when legislating. Moreover, the EU has not yet acceded to the European Convention on Human Rights (ECHR) and is therefore as such not subject to the jurisdiction of the European Court of Human Rights (ECtHR).
- A gap persists between the EU’s internal fundamental rights policies and its external commitment to human rights.

The Charter is now part of EU primary law. As such, it guides and shapes both EU and national legislation, the latter when it falls within the scope of EU law. Since large parts of national legislation and policy are within so-called EU competence, the Charter provides fundamental rights standards for many aspects of Member States’ activities. Nonetheless, the Charter plays only a peripheral role in national law- and policy-making, and in domestic jurisprudence.

The Charter can reach its full potential only if it is actively used by lawyers in national administrations and courts. However, references to the Charter at national level remain limited in quantity and superficial in quality (see Chapter 1 of the [Fundamental rights report 2017](#)). Whether scrutinising upcoming national legislation and policies or applying national norms to implement EU law, a detailed ‘Charter compatibility check’ should be standard practice – but currently is not.

In addition to the obligation to “respect the rights [and] observe the principles” of the Charter, Member States must also “promote the application thereof” (Article 51 of the Charter). Yet national policies to promote the use of the Charter in national public administrations

and legal systems are lacking. Efforts to tackle this gap between statutory obligation and political reality would enhance the use of the Charter itself, and could also cement the wider role of fundamental rights as a central component of law- and policy-making processes.

At the EU level, explicit references to the Charter are far more frequent and assessments of Charter-related impacts have become standard. Nevertheless, potential to enhance the Charter's use remains. One clear example is the area of social and economic rights. Many of the instruments shaping the EU's economic governance do not assign a specific role to the Charter. This limits its role in some of the policy areas that are most relevant to people living in the EU.<sup>159</sup> For example, the Charter could be put to better use in the context of the European Semester and other instruments of economic and budgetary surveillance. In addition, the EU could take steps to address criticisms that it has not given sufficient weight to other relevant international standards, such as the Council of Europe's European Social Charter.<sup>160</sup> Actively engaging with the Turin process of reinforcing the norms set out in the European Social Charter would be one way to achieve this.

Moreover, EU institutions seem to have focused on avoiding violations of Charter rights, rather than on maximising its potential to enhance and guide the development of policies. Assessing the fundamental rights impact of potential EU legislation and policies has become standard in the European Commission. Proposals are checked against the Charter, a further sign of how it has instilled a new fundamental rights culture in EU institutions and processes. Nevertheless, fundamental rights impact assessments could be further improved across all EU institutions.<sup>161</sup> Involving FRA in the EU legislative process in a more structured manner would be an important contribution in this regard. For example, the European Commission took a more informal but nevertheless effective approach when creating the High Level Expert Group on Interoperability between large-scale information systems by the EU in the field of asylum, border control and immigration (see Chapter 5 of the [Fundamental rights report 2017](#)):<sup>162</sup> FRA was involved from the very beginning, providing expertise and advice throughout the process.

The EU's accession to the CRPD, and thus its acceptance of the CRPD Committee's external monitoring and review of its progress in implementing the convention, clearly signalled that the Union is willing to submit itself to external scrutiny of its human rights performance. This openness to guidance from non-EU sources creates greater scope for international human rights law to enhance the EU's human rights performance. [Ratification](#) of the Istanbul Convention, as proposed in March 2016, would extend this possibility to a new area.

The situation regarding the EU's accession to the European Convention on Human Rights (ECHR) is less encouraging. The CJEU's Opinion 2/13 could substantially delay the process.<sup>163</sup> This risks creating the impression that the EU is hesitant to agree to external judicial review by the ECtHR. Such external judicial control would be important given that the CJEU's jurisdiction is limited – it excludes the EU's common foreign and security policy – and individuals have only restricted access to the CJEU.<sup>164</sup> Furthermore, it would avoid the danger of creating the perception (at national and/or international level) that the protection of fundamental rights is subservient to the importance of retaining an autonomous legal order.

Lastly, imbalances persist between human rights policy coordination inside and outside the EU. While the EU has had a Strategic Framework and Action Plan on Human Rights and Democracy for its external relations since 2012,<sup>165</sup> a similar degree of coordination does not exist in the EU's internal sphere. The Council of the EU's rationale when adopting the current action plan in 2015 was that "complex crises and widespread violations and abuses of human rights and fundamental freedoms require ever more determined efforts by the EU".<sup>166</sup> That would seem to apply equally within the EU.

Just as in external relations, an internal action plan could enable to EU "to meet these challenges through more focused action, systematic and coordinated use of the instruments at its disposal, and enhanced impact of its policies and tools on the ground".<sup>167</sup> In 2014, FRA looked at what form such an internal strategic framework for fundamental rights could take. It identified a series of EU-level, national and general tools.<sup>168</sup> One recurrent theme mirrors another aspect highlighted by the Council for external relations: "put[ting] special emphasis on ownership by, and co-operation with, local institutions and mechanisms, including national human rights institutions, as well as civil society."<sup>169</sup> Again, these arguments used in the context of the EU's external relations very much also lend themselves for the call for developing an EU internal strategic framework for the protection and promotion of fundamental rights.

## New challenges ahead: commitment and communication

Additional difficulties are emerging that will require innovative responses. Evidence collected by FRA suggests that the 'space' for civil society in public discourse and policymaking is being squeezed, both politically and financially. This was confirmed by a 2016 survey amongst 300 diverse associations and NGOs.<sup>170</sup> Yet it is during periods when fundamental rights are on the defensive that civil society organisations have special relevance. Civil society organisations can



play an important role in generating ownership and fighting mis- and disinformation. To fulfil this task, however, they must be empowered and enabled to communicate fundamental rights in a narrative that people find convincing.

Another challenge relates to communicating rights. Those who are committed to human rights and to strengthening their protection in the EU must admit that we have failed to communicate the importance of human rights for all members of society and the importance of respectful and tolerant public and political debate. In 2013, FRA pointed out that the political environment in which human rights look to protect individuals was becoming increasingly difficult.<sup>171</sup> That still holds true. Elements of extremist ideology – particularly concerning attitudes to migration and Islam – have gained a foothold within some large political parties and seem to be gaining acceptance among the electorate. Anti-human rights rhetoric makes it easier to depict rights as ‘political correctness’ rather than legal obligations. Left unchecked, intolerant rhetoric in political discourse, disseminated through the media, could incite discrimination, hatred or violence, as a recent FRA paper shows.<sup>172</sup> This has wide societal implications far beyond the immediate interaction between offender and victim.<sup>173</sup>

Even where a fully fledged fundamental rights protection system exists, upholding fundamental rights is difficult in the face of repeated efforts to discredit them in parts of the political and public discourse. Looking ahead, the EU and its Member States will need to find effective ways to:

- address mistrust of public institutions and perceived threats deriving from phenomena such as immigration or globalisation;
- highlight the benefits of fundamental rights for everyone in the EU.

Successfully responding to challenges requires first understanding them. This necessitates analysing the motivation of those expressing disregard for human rights. Such rhetoric does not necessarily reflect rejection of the values enshrined in fundamental rights standards. A 2016 survey in the EU’s nine largest Member States concludes that it is not values but fear of globalisation that is driving moves away from the political mainstream.<sup>174</sup> Attitudes to human rights are likely linked to levels of trust in the state, underlining the link between fundamental rights, on the one hand, and the rule of law and democracy, on the other. It is here that a ‘mechanism on democracy, the rule of law and fundamental rights’ could add value, especially if it is firmly anchored in national realities, institutions and processes.<sup>175</sup> Embedding fundamental rights in social realities should also help to better communicate the

societal function and benefits of rights, and so make the ‘business case’ for human rights’.

Fundamental rights are sometimes perceived as focusing on minorities, rather than shared by all. This means that defenders of fundamental rights need to increase collective ownership of fundamental rights. With signs of decreasing support for fundamental rights within their constituencies, politicians might become less willing to support and enforce international human rights standards. The notion of fundamental rights as being ‘rights for minorities’ that are ‘imposed’ by the ‘international community’ contributes to a decreasing affinity for human rights within societies.

One point of departure is acknowledging that civil and political rights have so far had more prominence than social and economic rights. Social and economic rights have the potential to signal to individuals that the state provides them with legal entitlements just as it entitles a migrant to apply for asylum. The Charter is unique in combining, with equal status, civil and political and social and economic rights in a single document. The potential of the social and economic rights set out in the Charter has not, however, been fully exploited thus far. To increase understanding of how the EU protects human rights and renew faith in their overwhelming significance for both individual development and social cohesion, these less well-known rights enshrined in EU legislation should be given more weight.

Traditional human rights activities and tools may no longer suffice to address these challenges effectively. However, countering the perception of fundamental rights as a complicating factor or even a hurdle in responding to the urgent challenges facing everyone in the EU is essential if they are to live up to their promise as one of the values underpinning the EU and its 28 Member States.

## Role of the Fundamental Rights Agency

By establishing FRA, the EU supplemented existing tools with an independent centre of fundamental rights expertise that can provide objective, comparable, relevant and reliable data and information as well as advice and guidance.<sup>176</sup> It also created an agency that contributes to raising awareness of fundamental rights, cooperates with public bodies responsible for human rights at the national level, engages with civil society and coordinates with international human rights organisations.

FRA’s activities demonstrate that the best way to assess the effectiveness and efficiency of measures to promote and protect fundamental rights is through a combined focus on the outcomes of laws and policies.

These outcomes can be measured through surveys and other forms of objective and comparable research that systematically collect data on the experiences of rights holders (individuals), and the specific actions and investments that duty bearers (states) undertake to implement their commitments. Having hands-on contact with and providing advice to practitioners provides opportunities to engage with practical realities rather than only with the relevant normative frameworks. The four policy areas examined above highlight the different forms of FRA's engagement with fundamental rights, particularly:

- large-scale surveys providing robust, detailed and comparable data that complement the results of major European statistical surveys;
- practical, on-the-spot guidance to support practitioners in the field; and
- legal opinions scrutinising legislative proposals and providing guidance on the development and implementation of rights-related legislation.

FRA's large-scale surveys assess the experiences and perceptions of individuals, and give unique insight into the outcome of EU policies on the ground. Looking ahead, the upcoming Fundamental Rights Survey will collect information on people's experiences with, and opinions on, fundamental rights issues in the EU. Taking a fundamental rights perspective on everyday issues such as access to justice, consumer rights and good administration, the survey will identify gaps in the realisation of rights and service provision across a broad range of areas.<sup>177</sup> Moreover, by applying the UN's structure-process-outcome indicator model, it is possible to measure progress, stagnation and regression, and improve policies in a more targeted way.<sup>178</sup>

FRA's decade of experience shows that rights-related developments are influenced by an overall political and practical context subject to sudden change. For example, the recent migration situation put Member States under unexpected levels of pressure. FRA provided hands-on assistance and expertise to relevant actors on the ground by engaging in the hotspots in Greece. By focusing on practical issues such as how to apply child protection safeguards in guardianship systems for unaccompanied children<sup>179</sup> and steps to reduce the risk of *refoulement* in external border management,<sup>180</sup> FRA provided practical guidance to national actors on how to address fundamental rights issues in migration management.

While independent expert institutions in many Member States systematically issue legal opinions and statements on legislative drafts on their own initiative, this is not the case for the EU. The Paris Principles on the status of national human rights

institutions (NHRIs) require that such legal expertise can be delivered on NHRIs' own initiative.<sup>181</sup> This is the case for the sector-specific European Data Protection Supervisor but not for FRA, which has a horizontal role across all fundamental rights.<sup>182</sup> FRA, as the EU's human rights agency, cannot issue legal opinions on legislative drafts on its own initiative. FRA's mandate instead requires that the European Parliament, Council or Commission explicitly request a legal opinion when "it concerns" their proposals or positions in the course of the legislative process.<sup>183</sup> The EU institutions do not, however, consistently request such independent external fundamental rights scrutiny.

Building on robust and comparable socio-legal evidence collected systematically by FRA is central to the delivery of sustainable and human rights-compatible legislation and policies. Moreover, drawing on such independent evidence signals that the EU is open to independent advice and guidance. FRA's more systematic involvement in the development of EU legislation should therefore be considered should the agency's founding regulation be revised.<sup>184</sup>

The challenges highlighted in the Fundamental rights report 2017 – migration, security, increasing digitalisation, social inequality and poverty – look set to remain. They are likely to unfold against a background of fragmentation in societies, fragmented information and an international environment whose legitimacy is questioned by some politicians and parts of the population.

As integral part of the international human rights system, FRA can play a vital role in efforts to reinvigorate the legitimacy of human rights. On the research side, the agency will need to enhance further the delivery of targeted outputs of immediate use to policymakers and lawmakers. At the same time, FRA will need to continue developing and implementing multi-annual programmes of research in areas where evidence gaps hamper progress in the full implementation and fulfilment of fundamental rights.

In terms of cooperation, FRA will further strengthen its ties with all parts of the international and regional human rights system,<sup>185</sup> and in particular with the Council of Europe,<sup>186</sup> UN system, OSCE, as well as EU institutions. This includes FRA's partners in European Parliament committees, European Commission General Directorates, and Council working groups that share inter-institutional responsibility for fundamental rights. At the same time, FRA will emphasise the importance of identifying further synergies within the European and global human rights community to enhance complementarity and multiply impact.

Equally important will be to further build on national human rights institutions<sup>187</sup> and, more generally, communities of support at national levels, including



through the unique composition of FRA's Management Board. Unlike other agencies' boards, the FRA Management Board is not composed of Member States' representatives but of "independent person[s] appointed by each Member State, having high level responsibilities in an independent national human rights institution or other public or private sector organisation".<sup>188</sup> Finally, FRA is in the process of revamping its engagement with civil society<sup>189</sup> and will use the tools available through its Fundamental Rights

Platform to act as closely to the citizen and align with Article 15 (1) of the TFEU and the spirit of Article 11 of the TEU on openness and transparency.

In both its research and cooperation activities, the agency will consider the entire range of rights contained in the EU Charter of Fundamental Rights, while making full use of its mandate and focusing on the policy areas identified in its multi-annual framework.



## Conclusions

In terms of fundamental rights performance, the last decade can seem one of divergent narratives. On the one hand, the EU has translated its long-standing commitment towards human rights beyond its borders into a set of internal policies to protect and promote fundamental rights within the 28 EU Member States. Two key milestones reflect this change:

- the entry into force of the EU Charter of Fundamental Rights; and
- the creation of the Fundamental Rights Agency.

Another key milestone would be the EU's accession to the ECHR, as required by the Lisbon Treaty.

On the other hand, implementation of fundamental rights on the ground remains a reason for great concern.

This is exacerbated by a political environment in which parts of the electorate and their representatives increasingly appear to question not only certain rights but the very concept of a rights-based polity.

Bringing these two narratives together is an urgent call for action to close the gap between the fundamental rights framework in principle and fundamental rights outcomes in practice. It demands that all actors reinvigorate their commitment to ensure, together, that fundamental rights result in real changes in people's lives. Only renewed action in this spirit will allow us to look back in 2027 at a successful decade during which the EU and its Member States delivered on their shared values of "human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".



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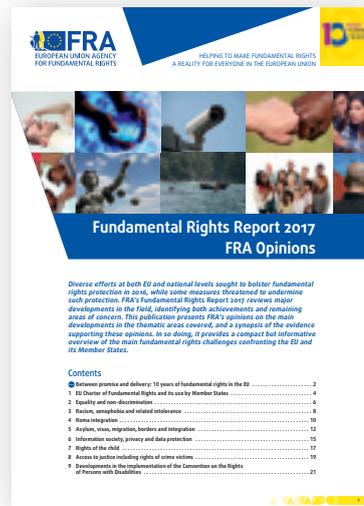
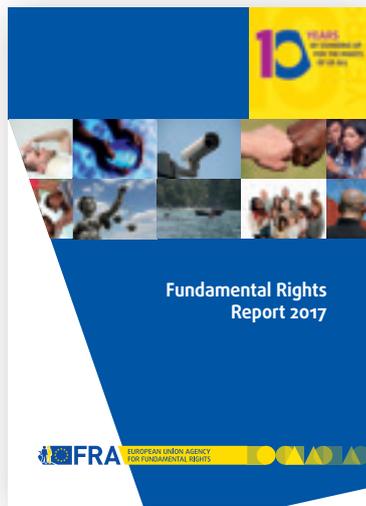
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This year marks the 10<sup>th</sup> anniversary of the EU Agency for Fundamental Rights. Such a milestone offers an opportunity for reflection – both on the progress that provides cause for celebration and on the lingering shortcomings that must be addressed.

The EU's commitment to fundamental rights has grown tremendously during the past decade, but daunting challenges remain. Moreover, recent developments underscore how quickly laboriously accomplished progress can be undone. Across the EU, the fundamental rights system is increasingly under attack – dismissed as political correctness gone awry, as benefiting only select individuals, or as hampering swift responses to urgent challenges.

This year's focus, *'Between promise and delivery: 10 years of fundamental rights in the EU'*, further explores these challenges, providing a thorough review of the past decade's highlights and persisting shortfalls.

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