10 YEARS
OF STANDING UP
FOR THE RIGHTS
OF US ALL

Fundamental Rights Report 2017

FRA
EUROPEAN UNION AGENCY
FOR FUNDAMENTAL RIGHTS

A great deal of information on the European Union Agency for Fundamental Rights is available on the Internet. It can be accessed through the FRA website at fra.europa.eu.

The *Fundamental Rights Report 2017* is published in English. A fully annotated version, including the references in endnotes, is available for download at: fra.europa.eu/en/publication/2017/fundamental-rights-report-2017.

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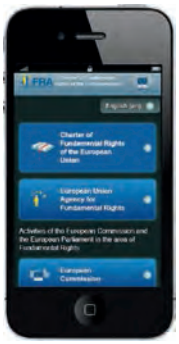

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Fundamental Rights Report 2017

Foreword

The *Fundamental Rights Report 2017* coincides with the 10th anniversary of the European Union Agency for Fundamental Rights (FRA). Like all birthdays, this milestone offers an opportunity for reflection – both on the progress that provides cause for celebration and on the lingering shortcomings that need to be addressed.

The European Union's commitment to fundamental rights has grown tremendously during the past decade. In late 2009, the Charter of Fundamental Rights of the European Union (EU) became legally binding, guaranteeing a wide array of rights to EU citizens and residents. Its adoption has spurred considerable progress, particularly at the EU level.

But daunting challenges remain, and 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 benefitting only select individuals, or as hampering swift responses to urgent challenges. While civil society organisations and individuals have shown remarkable dedication in helping to protect fundamental rights and have played a very positive role, they make for easy scapegoats in such a hostile political environment.

This year's focus section, '*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.

The remaining chapters take a look at the main developments of 2016 in nine specific thematic areas: the EU Charter of Fundamental Rights and its use by Member States; equality and non-discrimination; racism, xenophobia and related intolerance; Roma integration; asylum, borders and migration; information society, privacy and data protection; rights of the child; access to justice including rights of crime victims; and implementation of the Convention on the Rights of Persons with Disabilities.

The report also presents FRA's opinions, which outline evidence-based advice for consideration by the main relevant actors within the EU. These provide timely and practical policy proposals that aim to ensure that Europe's considerable fundamental rights architecture more consistently brings real benefits to all individuals living in the Union.

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

Frauke Lisa Seidensticker
Chairperson of the FRA Management Board

Michael O'Flaherty
Director

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

EQUALITY

- Equality and non-discrimination
- Racism, xenophobia and related intolerance
- Roma integration
- Rights of the child

FREEDOMS

- Asylum, visas, migration, borders and integration
- Information society, privacy and data protection

JUSTICE

- Access to justice including rights of crime victims

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10 YEARS OF STANDING UP FOR THE RIGHTS OF US ALL

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

The 10th 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.[1] 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".[2]

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.[3] This found expression in FRA's creation in March 2007.[4] 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".[5] 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.[6]

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",[7] "well-being"[8] and "living and working conditions"[9] for their people very much remains a work in progress.

This focus section 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 section 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.[10] Around the same time, this horizontal approach was complemented by the creation of a targeted European Institute for Gender Equality (EIGE).[11] 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,[12] 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[13] 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).

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.[14] 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.[15] 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.[16] Both the Council of the EU[17] 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".[18] 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)".[19] 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.[20] 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.[21]

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.[22] 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.[23] 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.[24]

Elements of such a policy are visible in a series of major EU legislative developments.[25] 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;[26] the 2012 Victims' Rights Directive;[27] the 2016 data protection reform package;[28] and various directives adopted under the Criminal Procedure Roadmap between 2010 and 2016.[29] 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.[30] 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;[31] 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'.[32] 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".[33]

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.[34] 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.[35]

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.[36] 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".[37]

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".[38] 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.[39] 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".[40] Following requests from the EU institutions – most frequently the European Parliament but also the European Commission[41] and the Council[42] – 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[43] and Dublin[44] regulations and the proposal to establish an EU list of safe countries of origin,[45] 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".[46] 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".[47] 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.[48] 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).[49] 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.[50] It resulted in eight recommendations to the European Commission on avoiding fundamental rights violations.[51] 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.[52]

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.[53] 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.[54] 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.[55] As a result of this consultation on 26 April 2017, the European Commission presented the European Pillar of Social Rights.[56] 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'.[57] 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.[58] 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.[59] 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.[60] 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 this and previous Fundamental Rights 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.[61]

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.[62]

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.[63] The Council of the EU reiterated this request in March 2010.[64] 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.[65] 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.[66]

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 disproportionally (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.[67]

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[68] and the Regulation on mutual recognition of protection measures in civil matters.[69] 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 theyhave 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 its policy priorities. The Commission's Roadmap for equality between women and men 2006–2010[70] and the Strategy for equality between women and men 2010–2015[71] 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[72] 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.

> ***"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'*

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.[73] In addition to a thematic focus on violence against women, another monthly report examined the theme of trafficking, including with respect to gender.[74]

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.[75]

> *"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 Jourova, 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.[76] 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:[77]

- 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.

The Snowden revelations marked a turning point in discussions on reform of the EU data protection law[78] 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

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

Data Protection Regulation[79] (GDPR) and Directive (EU) 2016/680 on data protection in the police and criminal justice sectors,[80] which covers data protection related to criminal offences and criminal penalties (see Chapter 6).

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.[81] 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.[82] The directive entered into force in 2016 after almost a decade of discussion.[83] The adopted text includes a number of safeguards missing from the 2011 proposal,[84] 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.[85]

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.[86]

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,[87] one of a series of judgments underlining the court's proactive stance on ensuring data protection.[88] 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.[89] 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.[90]

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",[91] recent CJEU rulings give clear criteria for assessing how compatible any future data retention proposal will be with fundamental rights.[92] 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.[93]

> *"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.[94] In addition, it demands particular focus on effective remedies and independent oversight, in line with recent CJEU case law.[95] 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.[96] 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.[97]

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.[98] 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.[99] 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.[100]

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.[101] FRA's evidence can help to ensure that future actions in this area encapsulate this approach.[102]

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.[103] 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.[104] 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 ad of residence (Article 45).

"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'

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.[105] 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.[106]

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.[107] 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). 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.

"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".[108] 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.[109]

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[110] – 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.[111] 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.[112] 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.[113]

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,[114] 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.[115] Further evidence on the complex processes empowering local Roma communities will come through FRA's Local Engagement for Roma Inclusion project.[116] 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 %).[117] 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."[118]

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 Junker, 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.[117] Of these, 26 % were children, many of them unaccompanied.[120] 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.[121]

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*,[122] 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*[123] – 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,[124] are discussed in Chapter 5.

Reflecting the urgency of the crisis at the EU's borders, FRA supplemented its existing research in the area[125] 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;[126] and the publication of regular overviews of migration-related fundamental rights concerns in Member States particularly affected by large migration movements.[125] 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,[128] the situation in the hotspots established in Greece and Italy,[129] and the effects on children of proposals to revise the Dublin[130] and Eurodac[131] 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.[132]

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.[133] 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.[134]

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

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

- 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.[137] 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.[138]

A first key fundamental rights risk is child detention. Although EU law strongly discourages the detention of all children for migration purposes,[139] FRA has collected evidence indicating that unaccompanied and separated children continue to be detained in some EU Member States.[140] 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.[141] 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.[142] 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.[143]

"[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.[144]

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.[145] 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.[146] Separated asylum-seeking children also often do not know if they have a guardian or who that person is, interviews in 2010 indicate.[147]

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.[148] 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.[149] 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.[150] As part of its presence in the hotspots in 2016, FRA facilitated a workshop on reforming the Greek guardianship system thatdrew on promising practices in EU Member States.

"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'

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 collected gives some insight into why unaccompanied children go missing from reception facilities.[151] 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.[152]

These factors support introducing various possible measures to reduce the number of missing unaccompanied children,[153] estimated at over 10,000 in 2015.[154] 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.[155] 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.[156]

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.[157] 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.[158]

What remains to be done

This focus section 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). 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.[159] 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.[160] 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.[161] 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):[162] 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.[163] 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.[164] 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,[165] 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".[166] 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".[167] 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.[168] 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."[169] 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.[170] 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.[171] 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.[172] This has wide societal implications far beyond the immediate interaction between offender and victim.[173]

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.[174] 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.[175] 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.[176] 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.[177] 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.[178]

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[179] and steps to reduce the risk of *refoulement* in external border management,[180] 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.[181] 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.[182] 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.[183] 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.[184]

The challenges highlighted in this report – 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,[185] and in particular with the Council of Europe,[186] 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[187] and, more generallly, 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".[188] Finally, FRA is in the process of revamping its engagement with civil society[189] 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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1 EU Charter of Fundamental Rights and its use by Member States

The Charter of Fundamental Rights of the European Union complements national human rights documents and the European Convention on Human Rights (ECHR). Its potential is not yet fully exploited, with references thereto in national courts, parliaments and governments limited in number and often superficial. However, there are examples of the Charter adding value and profiting from its standing as part of Union law, especially in court decisions. Meanwhile, EU Member States continue to lack policies aimed at promoting the Charter – though awareness of the need to train legal professionals on Charter-related issues appears to be growing.

The European Commission's annual report on the application of the EU Charter of Fundamental Rights provides information on how the Charter is used.[1] Information on the EU institutions' use of the Charter is just a mouse-click away from citizens: everybody can easily track this through the EU's legal database, eur-lex. A eur-lex search for the 'Charter of Fundamental Rights' reveals that, in 2016, it was referred to in well over 600 EU documents, all of which can be accessed in full text. Over 100 of these documents pertained to the judiciary; almost 30 were legislative documents; and close to 400 were preparatory acts.

It is far more difficult to track and analyse the use of the Charter in parliamentary debates, impact assessments, bills, legislation and case law in the 28 different national systems (although EUR-Lex does link, via N-Lex, to national law databases in individual EU Member States). Meanwhile, academic literature on the Charter remains rich. Articles published in 2016 deal with the Charter in general terms,[2] its overall scope and effect at national level,[3] its criminal law aspects,[4] its social[5] and economic aspects,[6] issues of access to justice,[7] and other select issues.[8] However, expert writing deals only fragmentarily with the Charter's use in the various national legal systems.[9]

More needs to be known about the Charter's 'life' at national level – the level at which the document, like EU law in general, is mainly implemented and applied. National parliaments incorporate EU legislation into national law. National governments, regional and local authorities, as well as national judiciaries apply EU law provisions and the Charter when delivering on their tasks and dealings with citizens. Whenever they act within the scope of an EU law provision, national authorities and judges are bound by the Charter. Against this backdrop, it is recognised that national authorities are key actors in – to borrow the words of the European Parliament – giving "concrete effect to the rights and freedoms enshrined in the Charter".[10] In 2016, the parliament reiterated its call not to forget "the importance of raising awareness about the Charter".[11] Moreover, on 19 February 2016, the Dutch Presidency of the EU convened a conference to exchange ideas about the challenges of applying the Charter at national level. Finally, in June 2016, the Council of the EU agreed on Conclusions on the application of the Charter, placing the national application of the Charter at the centre of attention.

FRA therefore regularly looks into the use of the Charter in different national contexts. This is the fourth Fundamental Rights Report that contains a chapter focused on the Charter. As for previous reports, the agency's research network, Franet, provided the information on which the analysis is based. Franet is the agency's multidisciplinary research network, which has been in operation since 2011. It is composed of contractors in each EU Member State who, upon request, provide relevant data to FRA on fundamental rights issues to facilitate the agency's comparative analyses.

> *"[T]o ensure follow-up, the Council calls […] to continue exchanging information about tools, best practices and awareness raising methods on the application of the Charter at both EU and national level on a yearly basis. […] Recognising that the Charter only applies to Member States when they are acting within the scope of EU law, the Council underlines the need to establish the applicability of the Charter in individual circumstances and underlines the need for particular attention by national authorities to those Charter provisions the meaning and scope of which are not determined by corresponding provisions of the ECHR with a view to the effective application of the Charter. […] The Council also recognises the relevance of the development of trainings and tools, such as a checklist for national guidance on the application of the Charter or targeted training for determining the applicability of the Charter in national legislative and policy procedures within a broader framework of human rights protection."*
>
> *Council of the European Union (2016), Council conclusions on the application of the Charter of Fundamental Rights in 2015, adopted at its 3473rd meeting on 9 June 2016, paras. 2, 3, 6 and 7*

FRA asked Franet to provide up to three specific and relevant examples under each of the categories addressed here: case law, impact assessments, parliamentary debates, etc. The possibility of searching and finding judgments, impact assessments or parliamentary debates that refer to the Charter varies from Member State to Member State. Moreover, the procedural law against which the rights enshrined in the Charter are used differs in the legal systems of the 28 Member States. This further reduces the comparability of the data.

Despite these limitations, this chapter provides a unique set of information that sheds light on the Charter's use by national courts (Section 1.1), its use in legislative processes and national parliaments (Section 1.2), and other initiatives concerning the Charter (Section 1.3).

1.1. National high courts' use of the Charter: a mixed picture

The analysis below is based on 70 court decisions from 27 EU Member States; for **Malta**, no relevant court decision was reported. In 2014, the analysis was based on 65 court decisions from 25 Member States; in 2015, it was based on 68 court decisions from 26 Member States. Decisions in which the parties referred to the Charter but the courts' reasoning did not do so are not covered. In many Member States, the absolute numbers of court decisions using the Charter are not easily identifiable – for example, because electronic databases covering all case law are lacking.

Moreover, the frequency of such references vary from court to court. By way of illustration: in **Lithuania**, the Constitutional Court used the Charter once, the Supreme Court used it 10 times, and the Supreme Administrative Court used it 178 times.

1.1.1. Invoking the Charter: national courts continue to 'bring in' the Charter

National judges continued to show awareness of the Charter by 'bringing in' Charter-related arguments on their own accord. In about half (51 %) of the 70 cases analysed in 2016, judges raised the Charter-based arguments. In the other half (49 %), the parties did so and the respective courts then picked these up. Judges have also been the ones to take the initiative with respect to citing the Charter in a substantial part of the analysed case law in past years. Against this background, it is welcomed that bar associations in various Member States offer Charter-specific training to legal practitioners (see Section 1.3.2).

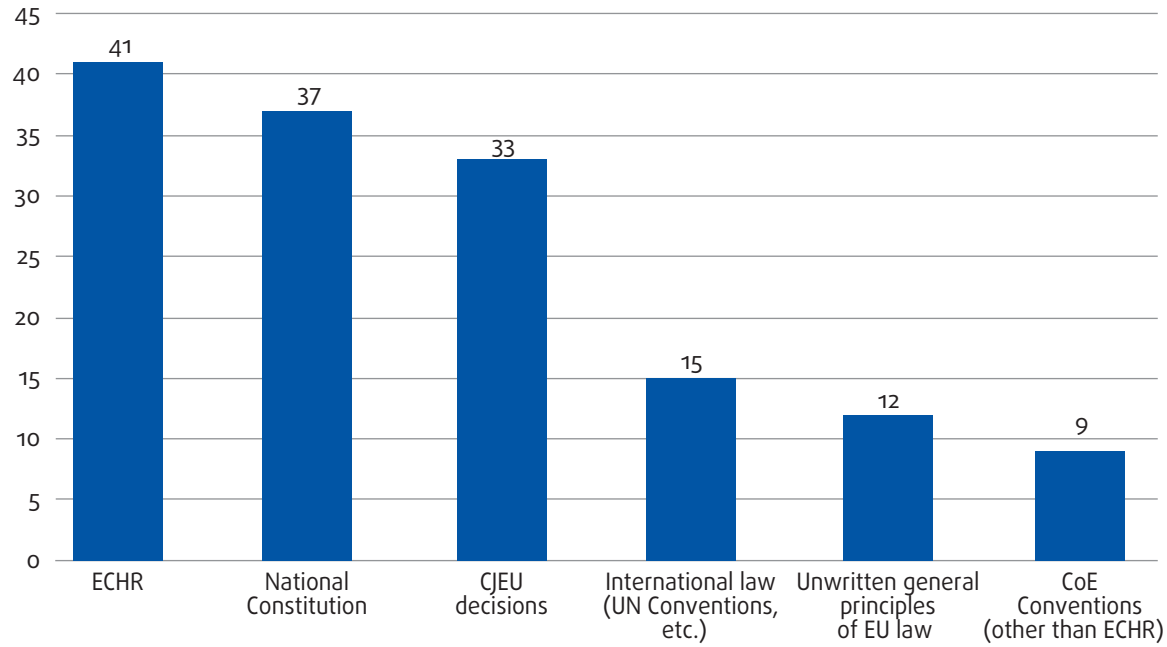
As in past years, an analysis of the court decisions issued in 2016 shows that the Charter is used in combination with other legal sources (see Figure 1.1). Likewise, just as in past years, the ECHR and national constitutional norms were the most prominent legal standards used besides the Charter. In addition, courts continued to frequently refer to (Charter-relevant) judgments by the CJEU alongside the Charter.

1.1.2. Procedural rights and policy area of freedom, security and justice remain prominent

There was also continuity in 2016 with regard to the policy areas that provided fertile ground for raising Charter arguments in national courtrooms: asylum and immigration, and criminal law matters (Figure 1.2). However, in contrast to 2014 and 2015, data protection was not a highly prominent policy area in 2016.

Just as in past years, the right to an effective remedy (Article 47) remained the provision that was most often referred to. The Charter's field of application (Article 51) and the scope of guaranteed rights (Article 52) were the other two most frequently referred to provisions in 2016 (Figure 1.3). This means that no substantive provision of the Charter was amongst the most referred to provisions. In 2014 and 2015, the right to private and family life (Article 7) and the protection of personal data (Article 8) were among the top three articles referred to in the analysed court decisions.

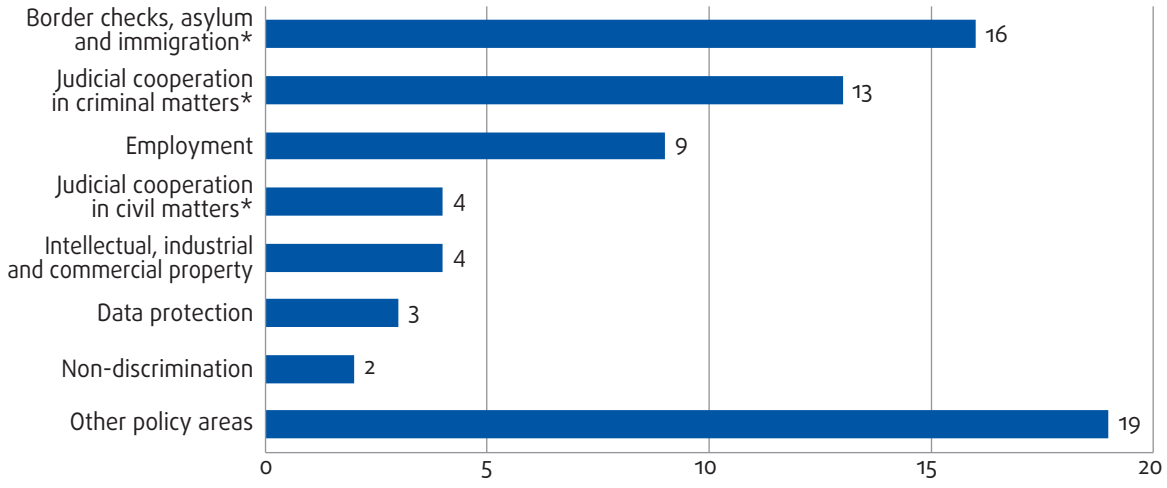
Figure 1.1: Number of references to other legal sources alongside the Charter in court decisions analysed, by legal source referred to



Notes: *Based on 70 court decisions analysed by FRA. These were issued in 27 EU Member States in 2016. Up to four decisions were reported per Member State; no decision was reported for Malta. More than one legal source can be referred to in one court decision.*

Source: *FRA, 2016*

Figure 1.2: Policy areas addressed in analysed court decisions

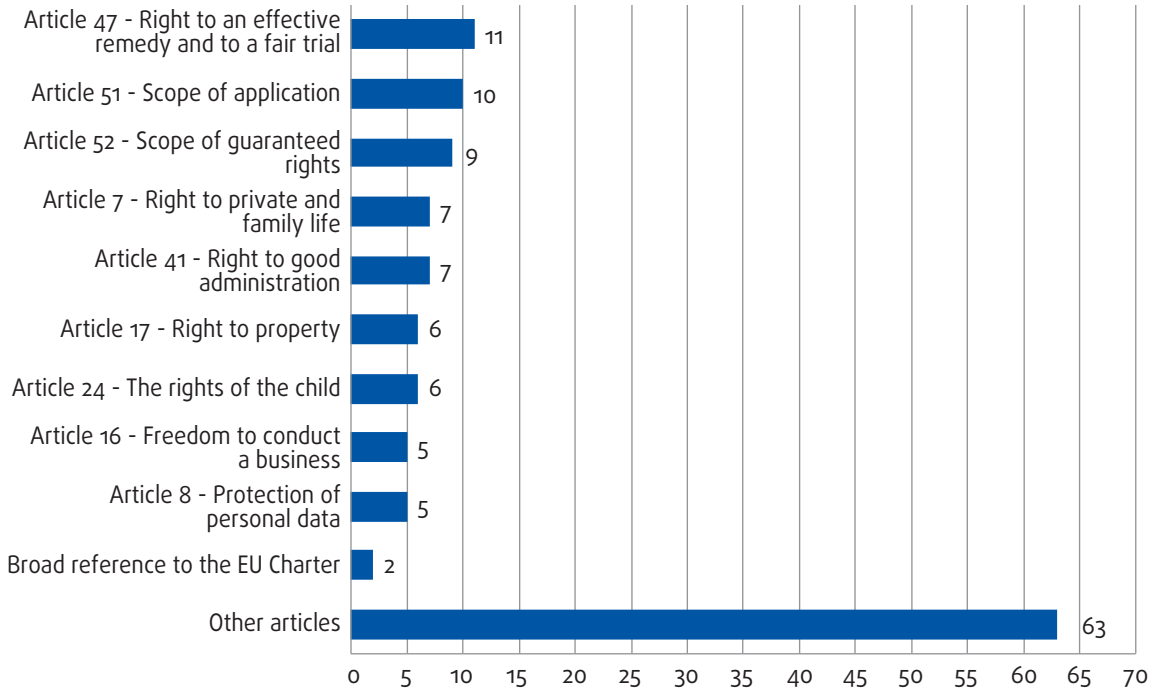


Notes: *Based on 70 court decisions analysed by FRA. These were issued in 27 EU Member States in 2016. Up to four decisions were reported per Member State; no decision was reported for Malta. The category 'Other policy areas' includes policy areas that were referred to in fewer than three analysed decisions. The categories used in the graph are based on the subject matters used by EUR-Lex.*

**Taken together, these three categories form the subject matter 'Justice, freedom and security'.*

Source: *FRA, 2016*

Figure 1.3: Number of references to Charter articles in court decisions analysed, by article



Notes: *Based on 70 court decisions analysed by FRA. These were issued in 27 EU Member States in 2016. Up to four decisions were reported per Member State; no decision was reported for Malta. The category 'Other articles' includes articles that were referred to in fewer than five analysed decisions. More than one Charter article can be referred to in one court decision.*

Source: *FRA, 2016*

1.1.3. Referring cases to Luxembourg: divergence persists

As stated at the outset, not much is known about how national courts use EU law in general, and the Charter in particular, in their day-to-day business. This goes for both the qualitative and the quantitative dimensions of national courts' work as 'EU courts' (that is, when applying EU law). This phenomenon prompted a General Advocate to speak – in his academic capacity – of a 'black box' in this regard.[12] However, national court requests for CJEU preliminary rulings shed some light on this issue.

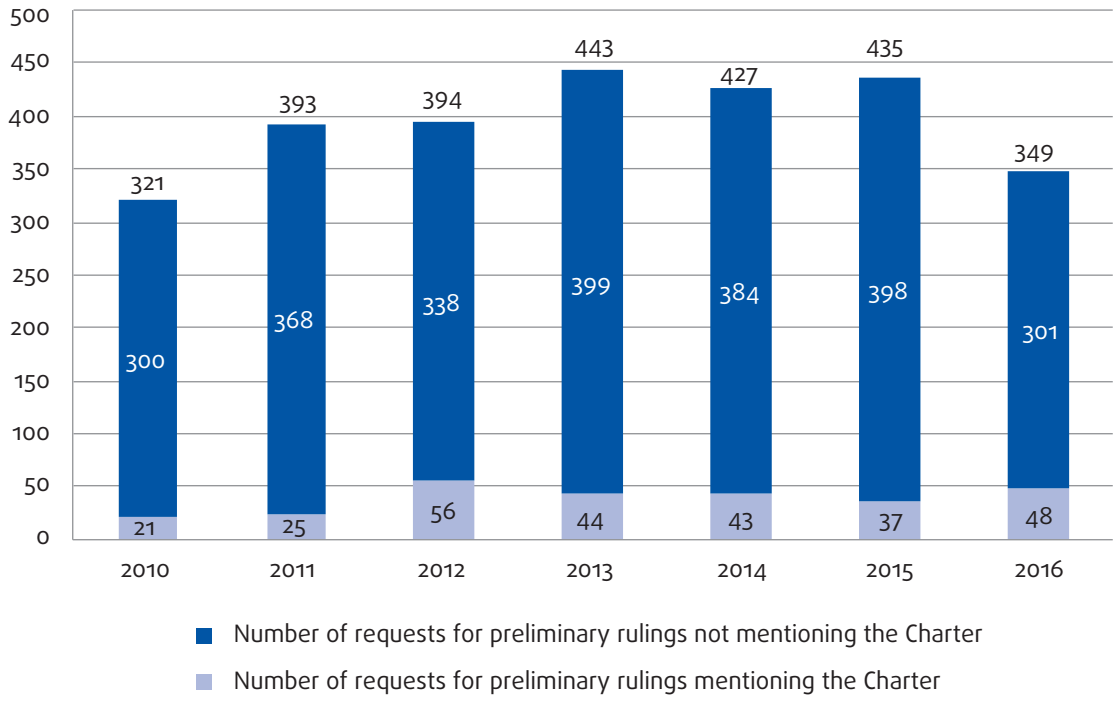
Just as in past years, in 2016, courts from almost all Member States sent requests to the CJEU for guidance in interpreting and applying EU law provisions. No such request was sent from courts in **Cyprus**. In recent years, on average, around one tenth of these requests have referred to the Charter (see Figure 1.4). In 2016, national courts sent 349 requests for preliminary rulings, and 48 of these referred to the Charter. That is close to 14 %, which is higher than the proportions observed in the past 3 years (these were 7 % in 2010, 6 % in 2011, 14 % in 2012, 10 % in 2013 and 2014, and 9 % in 2015).

In 10 Member States, no court asked the CJEU for an interpretation in the context of the Charter. Meanwhile, other Member State courts sent quite many Charter-related requests. In **Spain**, eight initiated preliminary ruling procedures concerned the Charter (21 % of all requests sent by Spanish courts to the CJEU). In **Belgium**, this figure was seven (35 %), in **Italy** it was five (13 %), in **Hungary** it was four (29 %), and in **Poland** it was also four (27 %). Other Member States sent fewer than four such requests. Notably, there was one request each from both the **Czech Republic** and **Lithuania** – countries in which no court asked the CJEU for a Charter-related interpretation during the preceding five years.

1.1.4. Scope of the Charter: an often ignored question

Article 51 of the Charter underlines that it is addressed to Member States "only when they are implementing Union law". According to the case law of the CJEU, this means that the fundamental rights guaranteed in the legal order of the EU are applicable at the national level "in all situations governed by European Union law, but not outside such situations".[13] However, just as in previous years, the majority of the analysed 2016 court decisions

Figure 1.4: Number of preliminary ruling requests submitted by national courts to the CJEU in 28 EU Member States, by year



Notes: *The data for 2016 reflect the data saved in the CJEU database on the Curia website at the end of January 2017. The data for 2010–2015 are as published in the respective Fundamental Rights Reports. Any updates of data available on the Curia website are not taken into account.*

Source: *FRA, 2016 (based on Curia, website of the CJEU)*

did not explicitly address the questions of if and why the Charter applied to the cases at issue. The following observation about courts in **Poland** appears applicable to most Member States: national courts "refer to and apply the Charter in various ways – at times substantial, sometimes more ornamental, but very rarely ponder whether in a given case it is permissible to apply the charter as an act".[14] The borderline of the scope of EU law is not easy to draw and might raise complex questions of interpretation. A request for a preliminary ruling by the CJEU can bring clarity in this regard. However, national judges do not necessarily take this route, as shown by a competition law example from **Ireland**, where the court did not refer to the CJEU for a preliminary ruling.[15] More training and awareness, as well as exchange of practices – as recommended in the *Fundamental Rights Report 2016* – might encourage more judges to explicitly address in their decisions whether or not, and why, the Charter applies in a particular case.

Likewise, just as in previous years, the 2016 sample included decisions referring to the Charter in cases that lacked a clear link to EU law. For instance, in **Bulgaria**, a court used Article 10 of the Charter (right to freedom of thought, conscience and religion) to conclude that a Muslim prisoner should have been provided with food that was appropriate to his religious belief. The court referred to the Charter alongside the ECHR and ECtHR case law, without examining if and why EU law applied to the case.[16]

Judges may be more likely to explicitly address whether or not the Charter applies in a given case when they review requests for a preliminary ruling from the CJEU (see Section 1.1.3). For instance, in a case centring on a person's affiliation with national security services and access to documents, a court in **Bulgaria** was asked to send a preliminary ruling request to the CJEU. In this context, it did address the application of EU law and the Charter, dismissing the request after concluding that EU law did not apply to the case.[17] Similar conclusions were reached in **Cyprus** in a case concerning the amendment of an electoral law adopted in 2015[18] and in **Portugal** in a case involving a disciplinary measure against a judge.[19]

> *"Member States have their own systems protecting fundamental rights and the Charter does not replace them. The country's own courts must ensure respect for fundamental rights without the need to make a preliminary ruling on the questions of the law raised."*
>
> *Portugal, Supreme Court of Justice, Case 134/15.7yflsb, 23 June 2016*

The analysed cases suggest that national judges are more likely to explicitly address the question of the Charter's scope where they conclude that the Charter is not applicable in the case in question; see examples from **Bulgaria**,[20] **Germany**,[21] **Ireland**,[22] **Poland**[23] and **Romania**.[24]

"The determination and proclamation of affiliations of a person to state security bodies and the intelligence services of the Bulgarian National Army does not fall under any of the powers of the Union, determined by the TFEU. In this case the Bulgarian state and courts should not apply the provisions of the Charter, because EU law does not apply to those societal relations."

Bulgaria, Supreme Administrative Court, Case No 8412/2015, 1 June 2016

Sometimes national courts do deal with the applicability of EU law in detail, as a case from **Denmark** shows.[25] The case concerned an applicant who argued that the obligation under national law to label his letterbox with his full name was against the rights enshrined in Article 7 (respect for private and family life) and Article 8 (protection of personal data) of the Charter. The High Court concluded that this was not a context where the Member State was implementing EU law in the sense of Article 51 of the Charter. Explicitly referring to the cases of *Fransson* (C-617/10) and *Siragusa* (C-206/13), the national court underlined that the concept of 'implementing EU law' requires a certain degree of connection above and beyond the matter covered by the relevant national law being closely related to EU law. The court also pointed out that the requirement that letterboxes must be equipped with a nametag was already in place before the national act implementing the Postal Services Directive was adopted. It also stressed the different purposes of the national and EU legislation. Whereas the postal services directives "have a nature of liberalisation directives and have the main purpose to regulate universal postal service", the national act wants to "ensure the greatest possible assurance that letters are delivered to the correct addressee". Therefore, the requirement of nametags on letterboxes was not imposed as part of implementing EU law, and the Charter of Fundamental Rights was thus inapplicable. The case was appealed to the Supreme Court, which rejected the case because the complainant passed away and his estate could not step in his place, as the case did not concern a claim to which the estate was entitled.

Just as in previous years, Article 41 (right to good administration) was referred to vis-à-vis national administrative authorities, whereas the Charter limits the reach of this provision to EU institutions. For instance, in a case from **Slovakia**, the Ministry of the Interior decided not to include a person in the programme of support and protection for victims of human trafficking.[26] This decision was communicated only to the International Organization for Migration, not to the applicant herself. This was the first case in Slovakia on access to justice in the context of the programme for victims of human trafficking. The applicant appealed to the Supreme Court to clarify the consequences of accepting that the decision on non-inclusion in the programme was indeed an individual administrative act. The Supreme Court referred to Article 41 of the Charter and, while not holding it applicable as such – the court held that the right applies as a general principle of law rather than as a Charter right – it stressed the judiciary's overall responsibility for enforcing the right to good governance.

1.1.5. The Charter as legal standard for interpreting national law

Judges use the Charter for different purposes. Often national law – mostly, but not exclusively, when falling within the scope of EU law – is interpreted in light of the Charter. Sometimes domestic constitutional reviews even include checking whether a national law is consistent with the Charter. In rare cases, the Charter forms the basis for directly granting individuals a specific right. Just as in past years, it appears that the most frequent use of the Charter before national courts takes place when interpreting national or even EU secondary law. As the Constitutional Court in **Germany** underlined, where national law "is determined by the EU directive, national authorities and courts have to interpret their respective national law in a manner consistent with the directives and have to take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the EU legal order".[27]

When a court interprets national law, the Charter tends to be one among several legal sources guiding the court in interpreting national provisions. An exception is a case from **Sweden**, where the Charter was the key source referred to.[28] The case concerned a man who had helped a family to cross the border illegally. Normally, a person who is paid for assisting a foreigner's entry into Sweden is sentenced to three to four months in prison. However, in this case and in light of Article 24 (the rights of the child), the court decided to change the prison time to a suspended sentence and community service because the person concerned was motivated by the desire to help children.

"[He] refused to help his brother's acquaintances to Sweden but agreed to help a family with children. The principle of the best interest of the child has special protection under Article 24 of the EU Charter of Fundamental Rights, which should be considered applicable in cases concerning the rights of asylum seekers, which are covered by EU regulations [...] It is also noted that there is an mitigating circumstance under [...] the Penal Code for a crime that is prompted by strong human compassion."

Sweden, Skåne and Blekinge Court of Appeal, Case B 7426-15, 5 December 2016

In a case from the **Czech Republic**, the parameter for interpretation was not the Charter itself but Council Directive 2011/36/EU on preventing and combating trafficking in

human beings and protecting its victims. This directive also refers to the Charter. The case concerned Vietnamese citizens who had signed a contract of employment and were then forced to perform hard forestry work for a year, without receiving any wages and while being prevented from leaving. They later reported this to the police, but no action was taken. In its judgment, the Constitutional Court referred extensively to the wording of the directive and thereby also the Charter, before concluding that the authorities had acted negligently.

"In this case we cannot ignore important commitments of the Czech Republic arising from EU law [...] The mentioned directive sets out [...] 'Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union. Preventing and combating trafficking in human beings is a priority for the Union and the Member States'."

Czech Republic, Constitutional Court, Case II. ÚS 3436/14, 19 January 2016

1.1.6. The Charter as legal standard for constitutional review

Previous Fundamental Rights Reports have shown that, in some legal systems, the Charter is used as a standard for constitutional review. This is most prominently the case in Austria where, since 2012, the Constitutional Court has developed case law establishing the EU Charter of Fundamental Rights as a standard under national constitutional law, thereby allowing the Constitutional Court to review national legislation against the Charter. Courts in **Austria** carried out such reviews in 2016. In a case concerning a Somali citizen who applied for international protection, the Federal Office for Immigration and Asylum denied the appellant asylum. Thereupon, the appellant submitted a complaint to the Federal Administrative Court, which rejected it without conducting a public hearing. According to the Constitutional Court, the Federal Administrative Court violated Article 47 (right to an effective remedy and a fair trial) by not conducting a public hearing.[29] In another case concerning a decision to return a migrant to his country of origin, the Constitutional Court for the first time recognised the direct applicability of the third paragraph of Article 47, which stipulates that legal aid "shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".[30]

"Fundamentally, a contradiction between a general Austrian provision and Union law (only) leads to the non-applicability of the Austrian provision, which is to be acknowledged incidentally by all state organs [...], but not to its repeal (VfSlg 15.189/1998). In principle, the Constitutional Court has no competence to examine general Austrian legal provisions in light of European Union law, unless there is a violation of a right which is guaranteed by the Charter and which is similar in formulation and assertiveness to constitutionally guaranteed rights of the Austrian constitution."

Austria, Constitutional Court, Case G447/2015, 9 March 2016, para. 3.2.5

Romania's constitution explicitly provides for the supremacy of EU law over national law (in Article 148, para. 2). A Romanian court set aside a national provision because its application was seen as not in line with Article 49, para. 3, of the Charter ("the severity of the penalties must not be disproportionate to the criminal offence"). The case concerned a person who was charged with 138 crimes for running an online scam consisting of promising fake jobs and asking jobseekers for money. According to Romania's Criminal Code, courts have to establish a sentence for each crime and then apply the harshest sentence, to which they need to add one third of the sum of all the other sentences, which for this case would have meant applying a total prison sentence of 26 years. The court invoked Article 49 (principles of legality and proportionality of criminal offences and penalties), noted that the Charter overrules contradictory national law, and reduced the sentence to 10 years in prison.

"The Charter of Fundamental Rights of the European Union, which provides in Article 49, para. 3, that 'penalties must not be disproportionate to the offence', has the same legal value as the Treaties according to Article 6 of the Treaty on European Union and is binding on both the judiciary and the legislature, according to Article 148 of the Constitution [...] In respect of this and keeping in mind that first of all we should offer priority to Community law, then to constitutional law and after that to criminal legislation, the Court establishes that even when applying a penalty the provisions of Article 49, para. 3, of the Charter of Fundamental Rights of the European Union and Article 53 of the Constitution establishing the principle of proportionality are imperative."

Romania, Tribunalul Arad, decision of 25 January 2016

When national courts review national law against the Charter, they may also interpret the Charter itself. A detailed assessment was offered in a case from the **United Kingdom**. In the case, tobacco product manufacturers appealed against the refusal of their application for judicial review of national legislation that restricts their ability to advertise their brands on tobacco packaging or products. They argued that the legislation breached Article 17 of the Charter (right to property). The court dismissed all of the appellants' arguments and analysed Article 17 in detail. It admitted that a registered trademark was a type of property, but added that, before one can say that a person's proprietary rights have been affected, it is necessary to identify what those rights are. Some of the claimants argued that registration of a trademark grants a positive right to use the mark on goods in the class for which it has been registered. The Secretary of State on the other hand maintained that a trademark confers purely negative rights, i.e., the right to stop someone else from doing things. The court concluded: "We accept that article 17 of the Charter protects proprietary rights in intellectual property. However we do not accept that article 17 changes the nature of

those rights. If (for example) the rights conferred by a trademark are only negative rights, we cannot see that article 17 creates positive rights."[31]

An interpretation of the Charter does not necessarily go hand in hand with its application in the concrete case at hand, as a decision by the Cassation Court in **Belgium** shows: it interpreted Article 48 of the Charter while denying its applicability as such.[32]

1.1.7. The Charter as directly conferring individual rights and providing wider protection than national law

The Charter's added value as part of EU law becomes most obvious where the substantial scope of its provisions goes beyond that of comparable national norms and, in addition, these provide individuals directly with individual rights. National courts rather seldom explicitly interpret Charter provisions as granting individual rights.

In a case from the **United Kingdom**, the court interpreted the Charter itself. The case concerned a Nigerian national who had been continuously resident in the UK for 25 years. His two daughters were both British citizens, aged 13 and 11. He received a deportation order on grounds of public policy. The court of appeal found that the court of first instance had failed to acknowledge the existence of a right conferred on both of the appellants' children by the Charter.[33] The third paragraph of Article 23 states: "Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests." This Charter provision formed a successful ground of appeal and provided a free standing right in the context of immigration law.

> *"Article 24 (3) creates a free standing right. It may, of course, be viewed as the unequivocal articulation of a concrete 'best interests' right and, on this analysis, is a development, or elaboration, of Article 24 (2). Furthermore, given the exception formulated in the final clause of Article 24 (3), the nexus with Article 24 (2) is unmistakable."*
>
> *United Kingdom, Upper Tribunal (Immigration and Asylum Chamber), Case UKUT 106 (IAC), 13 January 2016*

In **Slovenia**, a court ruled that Article 6 of the Charter (right to liberty and security) in combination with Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (the Reception Conditions Directive) provides an individual right. The directive was supposed to be incorporated into Slovenian law by 20 July 2015. However, that was delayed. Despite this delay and in line with the case law of the CJEU, the directive could be directly applied in Slovenian law. The case concerned a citizen of Tunisia, who first entered Slovenia on 4 February 2016. He was intercepted by the police and was not carrying any identity documents. During the procedure, he applied for international protection. The authorities decided to limit the applicant's freedom of movement to the premises of the Aliens Centre for a maximum period of three months, with a possible extension for an additional month. The decision was based on provisions of the International Protection Act (*Zakon o mednarodni zaščiti*), which the court of appeal found to be partly not in line with the Reception Conditions Directive. The court revoked the decision and issued an interim decision to release the applicant from detention immediately after receipt of the judgment.

> *"The Administrative Court took as a starting point [...] the possibility of a direct effect of a provision of a Founding Treaty, which establishes a subjective right for an individual. This principle was reaffirmed in subsequent judgments a while before the establishment of subjective justiciable rights from the Charter. The right enshrined in Article 26 (2) and Article 9 (3), second subparagraph of the Reception Conditions Directive in connection with Article 6 of the Charter is without a doubt this kind of a subjective right and in the given part [...] it can be exercised without any implementation measures."*
>
> *Slovenia, Administrative Court, Case I U 246/2016, 18 February 2016, para. 40*

That the Charter can be directly invoked is in practical terms most relevant where the Charter's provisions go further than national law, including constitutional law. In the **Czech Republic**, the Charter was instrumental in a case concerning a German national arrested and prosecuted for being a member of a criminal group that trafficked drugs from the Czech Republic to Germany.[34] However, she had already been prosecuted and sentenced for some of these acts in Germany. The Constitutional Court deemed her constitutional complaint justified and found a breach of the legal principle *ne bis in idem*. The court stressed the extended transnational protection of the *ne bis in idem* principle as laid down in the Charter, compared with the more limited scope of the corresponding constitutional provision. Consequently, the decisions of the authorities involved in the criminal proceedings were annulled.

> *"The legal principle 'ne bis in idem' applies only to criminal proceedings in the state's jurisdiction, so anyone could be prosecuted for the same act in another state. However, in the European Union (hereinafter the 'EU'), thanks to Article 50 of the Charter, the legal principle 'ne bis in idem' applies to all EU Member States when EU law is applied, as a follow-up to Article 54 of the Convention Implementing the Schengen Agreement from 1985."*
>
> *Czech Republic, Constitutional Court, Case II. ÚS 143/16, 14 April 2016*

The potential of EU fundamental rights was also underlined by the Constitutional Court in **Portugal**, which stressed that "the specific rights conferred on citizens of the European Union and coming into force following the Treaty of Lisbon, take on the true nature of fundamental rights [...] Today, the Charter has been granted the same legal status as the Treaties, therefore the infringement of it, whether by Member States or by the European Union, may be contested in court."[35]

The Charter's effect in areas where it provides more protection than the corresponding constitutional norm was shown in **Slovakia**. The case concerned the area of consumer protection. A telephone company took one of its clients to court for not paying his bills. The company argued that, by affording specific protection to consumers, the Consumer Protection Act interfered with the principles of a fair trial and equality of arms set out in the Slovak Constitution and was hence unconstitutional. The court acknowledged that the Slovak Constitution does not provide a specific right to consumer protection and that the Charter thus provides a higher level of consumer protection than the constitution. However, it found that, as the Charter is part of the national legal order, Slovakia is bound by its provisions. The court also referred to the Consumer Protection Act's legislative history, which showed that the motivation for including the provision at issue in the act was to address problems found in practice and to ensure effective protection of consumers' rights, embodied in Article 169 of the TFEU and Article 38 of the Charter.

"The Charter of Fundamental Rights of the European Union (the 'EU Charter') recognises the same values as the Constitution; however, the area in which it provides protection of rights beyond the Constitution is precisely the area of consumer legal relationships. In this respect, Article 38 of the Charter should be noted, according to which the states' policies shall ensure a high level of consumer protection. Given the wording of Article 7 of the Constitution, in light of the Lisbon Treaty, the Charter is part of the legal order of the Slovak Republic. The Charter obliges the Slovak Republic, as an EU Member State, to ensure a high level of consumer protection and the Court of Appeal considers that the provisions of Article 5b of the Consumer Protection Act are among the rules that lead to the fulfilment of Article 38 of the Charter."

Slovakia, Regional Court Prešov, Case 17Co/286/2015, 28 June 2016

As also reported last year, in some – admittedly very rare – cases, national courts raise the central question of whether the Charter applies only to the relationship between individuals and the state (that is, vertically) or also to relations between two individuals (so-called horizontal applicability).[36] A case from **Denmark** is of interest in this context. It concerned severance payments by employers in the event of dismissals. The national law on legal relationships between employers and employees provided that in the event of a salaried employee's dismissal, the employer shall, on termination of the employment relationship, pay a sum to the employee. This sum should correspond to one, two or three months' salary depending on the length of the employment. The law explicitly stated in paragraph 2(a)(3) that this rule does not apply if, at termination, the employee will receive an old-age pension from the employer. The first instance court declared this provision to be in violation of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Employment Equality Directive).

The Supreme Court referred the case to the CJEU for a preliminary ruling. The court's request did not concern the Charter but the application of the Employment Equality Directive and the general principle of EU law prohibiting age discrimination.[37] The CJEU concluded that this general principle of law, as given concrete expression by the Employment Equality Directive, must be interpreted as precluding – including in disputes between private persons – a national provision such as the one at stake.[38] The Supreme Court acknowledged that it is for the CJEU to decide on the interpretation of EU law. However, disagreement arose as to how to interpret national law. The judgment states that paragraph 2(a)(3) could not be interpreted "*contra legem*" in accordance with the directive. Regarding the general principle of EU law, the majority of 8 of 9 judges held that the Accession Act on Denmark's accession to the EU did not contain any provisions allowing an unwritten principle to prevail over national law when this applied between two private parties. In this context, the Supreme court stressed that the Charter does not extend the competencies of the EU and that the ratification of the Lisbon Treaty did not imply legal obligations for individuals. (Judge Jytte Scharling observed in a dissenting opinion that the general principle of law, prominently developed by the CJEU in the 2005 *Mangold* judgment, was well known before Denmark ratified the Lisbon Treaty.[39]) Therefore, Article 21 of the Charter (non-discrimination) was not – so the court – directly applicable in Denmark. This approach was described by some as an expression of 'sovereigntism' and an attempt to 'domesticate EU law'.[40]

"The Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties [...] and it appears from the Foreign Minister's answer [...] that the Charter does not imply legal obligations for individuals. It follows from the foregoing that the principles developed or established on the basis of TEU Article 6 (3) are not made directly applicable in Denmark pursuant to the Accession Act. Similarly, the provisions of the Charter, including the Charter's Article 21 on non-discrimination, are not made directly applicable in this country pursuant to the Accession Act".

Denmark, Supreme Court, Case 15/2014, 6 December 2016

1.2. National legislative processes and parliamentary debates: Charter of limited relevance

1.2.1. Assessment of fundamental rights impact

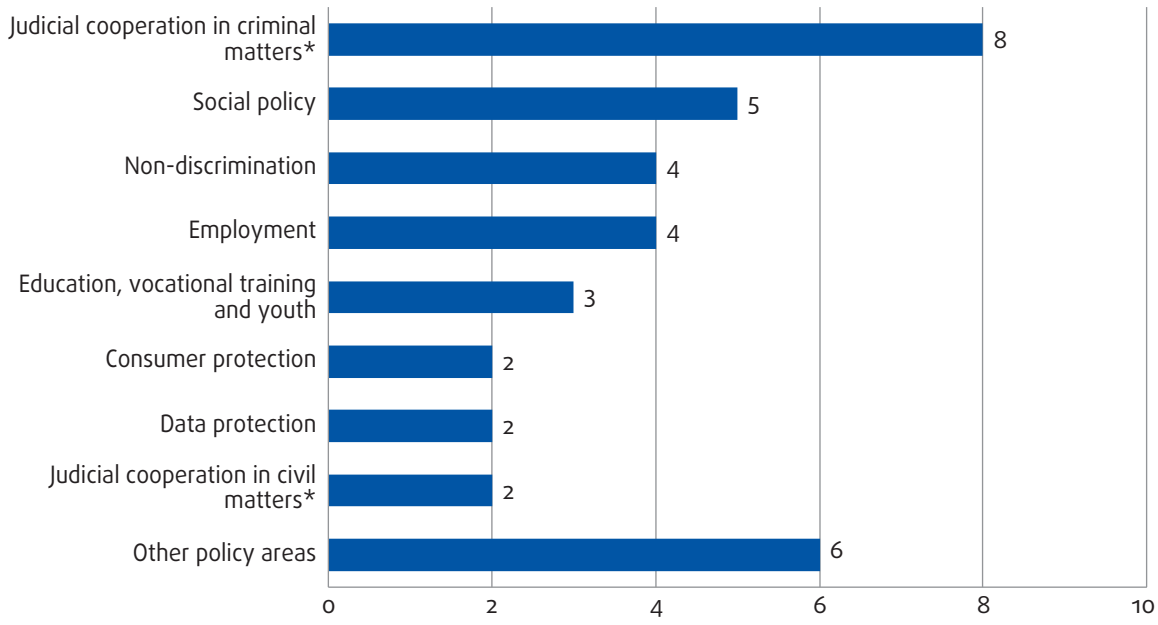
As noted in past Fundamental Rights Reports, Member States have procedures in place for assessing economic, environmental, social or other impacts of bills.[41] Many of these procedures explicitly take effects on fundamental rights into consideration. However, such procedures tend not to refer to EU law or the Charter, although a significant part of national legislation can be expected to fall within the scope of EU law. Despite the absence of such explicit references to the Charter in norms for national impact assessment procedures, the Charter is sometimes referred to in practice. Indeed, in only three Member States could no examples of Charter-related impact assessments be identified over the last three years (2014-2016): **Cyprus**, **Ireland** and **Malta**.

Looking at the 36 examples of impact assessments reported in 2016, it appears that the area of criminal law is most prone to raising Charter concerns during impact assessments (Figure 1.5). This is in line with last year's finding, with the difference that in 2015 data protection also played a major role.

In addition, in impact assessments, the Charter appears to be referred to alongside other international legal instruments, making it difficult to track the relative relevance and impact of such Charter references. For instance, in the **Netherlands**, the Council of State alerted the government to the fact that the law regarding the privatisation of casinos raises data protection issues; the Gambling Authority will process personal data of the licensees and they, in turn, will process data of their staff and customers based on closed-circuit television footage. The Council of State called on the government to take into account Article 10 of the Constitution, Article 8 of the Charter and Article 8 of the ECHR.[42]

Many of the references were also brief and general in nature, most of them integrated in the explanatory memoranda of the bills in question. It should be noted that, of the 36 impact assessments analysed, only 14 involved bills implementing EU law.

Figure 1.5: Number of impact assessments referring to the Charter, by policy area



Notes: *Based on 36 impact assessments analysed by FRA. These were carried out in 17 EU Member States in 2016. Up to four assessments were reported per Member State; no assessments were reported for Cyprus, the Czech Republic, Denmark, Germany, Ireland, Luxembourg, Malta, Poland, Sweden, Slovakia and the United Kingdom. The category 'Other policy areas' includes policy areas that were referred to in only one analysed impact assessment. The categories used in the graph are based on the subject matters used by EUR-Lex.*

**Taken together, these two categories form the subject matter 'Justice, freedom and security'.*

Source: *FRA, 2016*

One example is **Hungary**'s Draft Act of Parliament on the amendment of acts regulating European Union and international cooperation in criminal matters and on certain aspects of criminal law.[43] The corresponding memorandum refers to Article 12 of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, which stipulates that "[t]he person may be released provisionally at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding."[44] The impact assessment argues that, since the Act on Cooperation in Criminal Matters does not contain this possibility of release, a corresponding amendment should be introduced. The explanatory memorandum further argues that, in light of the ECHR and the EU Charter of Fundamental Rights, the national authorities are obliged to examine the possibility of using less restrictive coercive measures, such as house arrest or bans on leaving the place of residence, and considering detention as a last resort.

1.2.2. Assessment of fundamental rights compliance

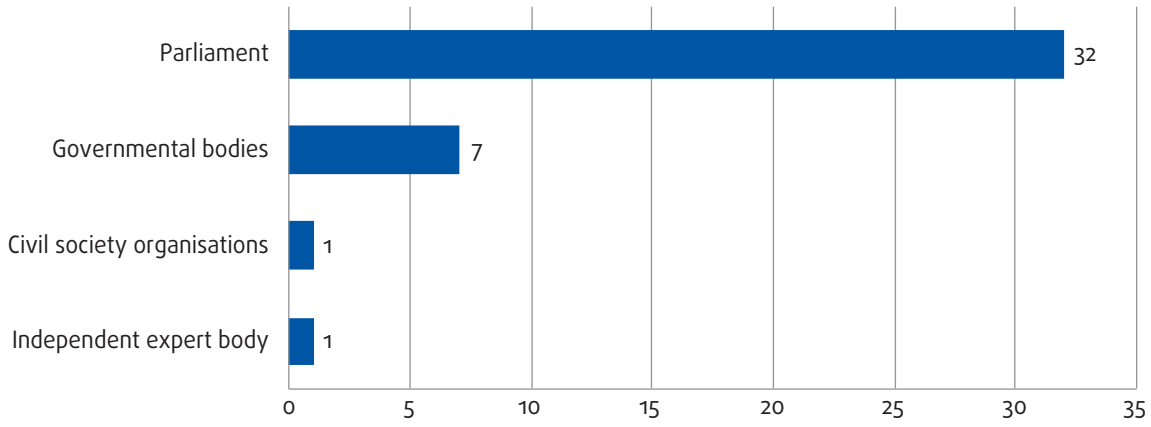
Whereas impact assessments are not necessarily a legal exercise, the legal scrutiny of a bill is a legal assessment. There is another difference: an impact assessment is typically carried out when a bill has not yet been fully defined, so that various legislative options can be compared. In contrast, an assessment of legal compliance is based on the specific wording of a final bill. However, there are systems that do not neatly differentiate between impact assessments and legal scrutiny.

All Member States have some sort of procedure in place to check bills against fundamental rights standards, primarily those enshrined in their constitutional frameworks. However, international sources, mainly the ECHR, are also often referred to in such procedures. Whereas in some Member States EU law is explicitly mentioned as a relevant standard to be looked at, this is not true of the Charter specifically. Nevertheless, exercises of legal scrutiny do sometimes refer to and use the Charter. Indeed, only in a few Member States were no such examples reported both for 2016 and 2015 (**Cyprus**, **Estonia**, **Italy**, **Malta** and **Slovakia**). Of the 41 examples of legal scrutiny reviewed for 2016, which involve 17 Member States, most were carried out by parliaments (Figure 1.6).

The nature of Charter references in legal assessments varies substantially. Some of the analysed examples contain a rather superficial statement that no conflicts with the Charter were identified. Others underline that the very intention of the bill is to protect certain rights. In other constellations, the Charter is mentioned as the guideline that should inform the national legislature how best to incorporate EU legislation into national law. This was the case in **Germany**, for instance, where the Bundestag held that, in the context of incorporating Directive 2014/15[45] into national law, punishing people by prohibiting their employment in certain occupations is a serious interference with Article 15 of the Charter (freedom to choose an occupation and right to work) and that such bans would be legitimate only in extreme cases.[46]

However, there were also examples where the Charter was used to express strong reservations about proposed legislation on the basis of fundamental rights.

Figure 1.6: Number of legal assessments referring to the Charter, by author



Notes: *Based on 41 legal assessments analysed by FRA. These were issued in 17 EU Member States in 2016. Up to three legal assessments were reported per Member State; none were reported for Croatia, Cyprus, Estonia, France, Ireland, Italy, Latvia, Malta, Slovakia, Spain and Sweden.*

Source: *FRA, 2016*

In **Lithuania**, changes to the law on the status of aliens raised Charter-related concerns. The proposal intended to remove provisions guaranteeing that refugee or other status be withdrawn only after the available remedies are explained and the person concerned is invited to comment orally or in writing. The European Law Department, a government body that carried out the scrutiny, was of the opinion that the proposal would contradict EU law, including Article 47 of the Charter.[47] In **Austria**, the Judges Association identified tensions between a bill in the area of asylum law and Articles 18 (right to asylum), 19 (protection in the event of removal, expulsion or extradition) and 47 (right to an effective remedy and to a fair trial) of the Charter.[48] In **Slovenia**, the revised Schengen Borders Code and an EU regulation for the establishment of an entry/exit system raised serious Charter-related concerns on the part of the Information Commissioner, who called for the proportionality of measures to be ensured, for restrictions on the purpose of the use of information gathered and for appropriate time limits for the retention of personal information.[49]

Compatibility with the Charter is raised not only where a Member State is implementing EU law. In fact, this was the case in only 21 out of 41 examples reported for 2016. For instance, in **Romania**, the Legislative Committee was concerned about a proposed law to ban organisations, symbols and acts of a communist nature and to ban promoting the cult of persons guilty of crimes of genocide against humanity and war crimes. These concerns were based on, among other considerations, Article 12 (freedom of assembly and association) and Article 21 (non-discrimination) of the Charter.[50]

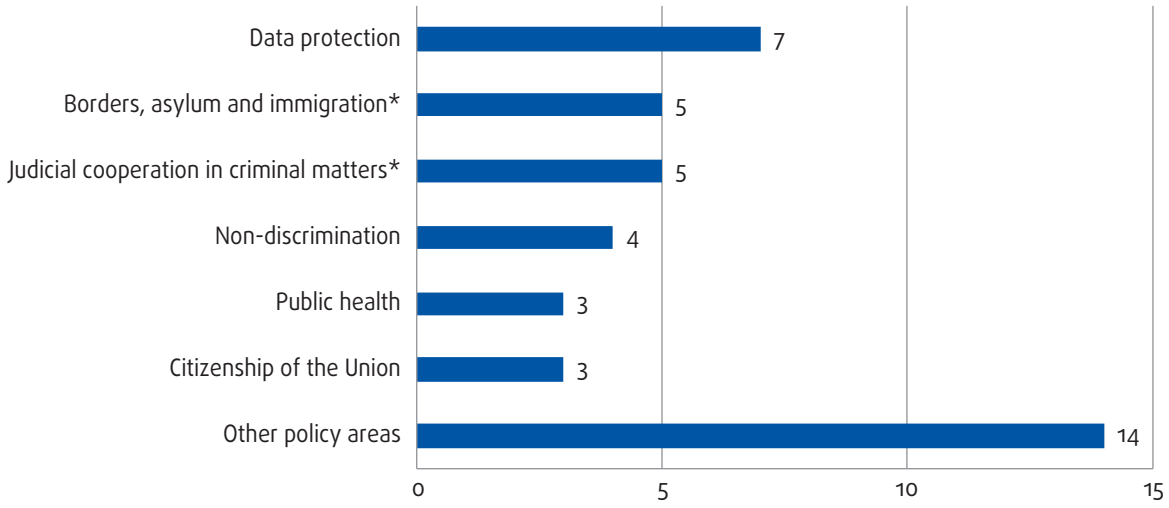
As in past years, amongst the examples reported for 2016, the area of data protection again appears to be the most prone to raising Charter concerns (Figure 1.7).

1.2.3. National legislation

As outlined above, the Charter is sometimes referred to in draft legislation and accompanying documents. However, it is only rarely mentioned in the text of adopted legislation. The evidence collected in 2016 contains 19 examples of explicit references to the Charter in the legislation of 12 Member States.

France amended its Code of Criminal procedure to include Article 694-31, which deals with the recognition of European Investigation Orders. The article provides for a general possibility to refuse to execute such an order, if there are serious reasons to believe that its execution would be incompatible with France's respect of the rights and freedoms guaranteed by the ECHR and the Charter.[51] A similar provision was enshrined in **Germany**'s Bill to amend the Act on International Mutual Legal Assistance in Criminal Justice Matters.[52] Charter references are sometimes simply repetitions of such references found in the EU legislation incorporated into national law – as, for instance, in **Greek** legislation on extradition.[53]

Figure 1.7: Number of legal assessments referring to the Charter, by policy area



Notes: *Based on 41 legal assessments analysed by FRA. These were issued in 17 EU Member States in 2016. Up to three legal assessments were reported per Member State; none were reported for Croatia, Cyprus, Estonia, France, Ireland, Italy, Latvia, Malta, Slovakia, Spain and Sweden. The category 'Other policy areas' includes policy areas that were referred to in fewer than three analysed assessments. The categories used in the graph are based on the subject matters used by EUR-Lex.*

** Taken together, these two categories form the subject matter 'Justice, freedom and security'.*

Source: *FRA, 2016*

However, as in previous years, there are also examples of Charter references that go beyond the technical implementation of EU legislation. In 2016, these examples covered areas such as gender equality and identity[54] and lesbian, gay, bisexual, transgender and intersex (LGBTI) issues[55] (in **Spain**); disability[56] (in **Italy**); consumer protection[57] (in **Germany**); legal aid (in **Austria**[58] and **Slovakia**[59]); the regulation of the accountancy profession[60] (in **Malta**); education[61] (in **Belgium**); and the death penalty[62] (in **Cyprus**).

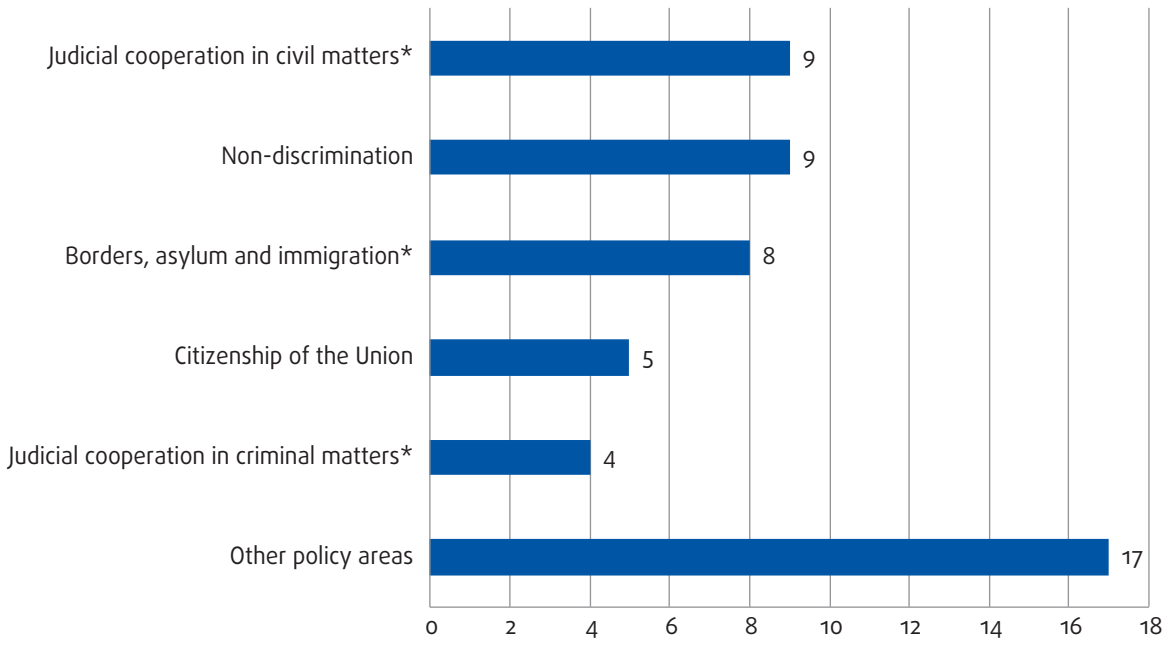
> *"The publication of sanctions and measures and of any public statement by the Board shall respect fundamental rights as laid down in the Charter of Fundamental Rights of the European Union, the Constitution of Malta and the Convention for the Protection of Human Rights and Fundamental Freedoms; in particular the right to respect for private and family life and the right to the protection of personal data."*
>
> *Malta, Article 16 of the Act to introduce amendments to the Accountancy Profession Act and to other Laws and to implement Directive 2014/56/EU and certain provisions of Regulation (EU) No. 537/2014 (Act XXXVI) of 2016*

1.2.4. Parliamentary debates

Parliamentary debates in 2016 also occasionally referred to the Charter. The context of such references included asylum, terrorism, data protection, the death penalty and criminal matters, discrimination, the right to marry, freedom of speech, legal aid, non-discrimination, the rights of persons with disabilities, and media freedom, among others. FRA collected information about 52 examples of such Charter references registered in parliamentary debates of 20 Member States (Figure 1.8). The Charter was often invoked to argue for amendments to bills, as in **Germany**, where a member of parliament stated that a total ban of contact on arrested persons suspected of terrorism violates Articles 47 and 48 of the Charter.[63] Furthermore, in two written declarations, a political group explained its opposition to the decision of the Petitions Committee of the German Bundestag declining petitions against the reintroduction of telecommunication data retention. They claimed that the indiscriminate retention of telecommunication data is a disproportionate interference with fundamental rights and a violation of the Charter.[64] Similarly, in **Poland**, a member of parliament asked if the draft of an anti-terrorism law was in line with the provisions of the Charter.[65]

The Charter has also been mentioned as an argument in favour of adopting laws. For instance, in **Italy**, a member of parliament stressed that the approval of Draft Law

Figure 1.8: Number of identified parliamentary debates referring to the Charter, by policy area



Notes: *Based on 52 parliamentary debates analysed by FRA. These took place in 20 EU Member States in 2016. Up to five debates were reported per Member State; no parliamentary debate was reported for Belgium, the Czech Republic, Estonia, Latvia, Luxembourg, Malta, Portugal and Romania. The category 'Other policy areas' includes policy areas that were referred to in fewer than four analysed parliamentary debates. The categories used in the graph are based on the subject matters used by EUR-Lex.*

** Taken together, these three categories form the subject matter 'Justice, freedom and security'.*

Source: *FRA, 2016*

no. S 2232 on support to persons with disabilities deprived of family support would contribute to the implementation of not only the Convention on the Rights of People with Disabilities, but also Articles 22 and 26 of the Charter.[66] In **Hungary**, two members of parliament submitted a proposal for a parliamentary resolution on the reduction of wage inequality between men and women. They argued that the government should come forward with a legislative proposal to comply with the Charter.

"If [the Government does not propose legislation] we will exercise our rights as Members of Parliament and will submit draft laws in the near future, all the more so because we would like to comply with Article 23 of the EU Charter [equality between women and men], which makes the Government's obligation unequivocal in this field."

Lajos Korozs, Member of Parliament, Hungary, 07.11.2016 session of the Hungarian Parliament; see also Proposal for Parliamentary Resolution no. H/11718 on narrowing the gap in wages between genders (H/11718 határozati javaslat a nemek közötti bérszakadék mérsékléséről)

The Charter may also be referred to in order to identify (unintended) effects of a newly adopted law, as happened in the **Netherlands**.[67] A member of parliament asked if a new Act on the deregulation of employment relationships might in practice lead to violations of Article 6 (the freedom to conduct a business). The new law was introduced to prevent employers from making use of sole traders (business entities owned and run by one natural person) in a manner that actually resembles employment relationships. According to the member of parliament, many sole traders have now lost their jobs because employers avoid approaching them so that they are not accused of hiring them as employees.

The Charter was also referred to outside the context of concrete legislative proposals. For instance, in **Denmark**, a parliamentary resolution on strengthening data protection recommended linking the Danish Data Protection Agency more closely to the parliament and quoted in this context the Danish Council of Digital Security,[68] which had stated that it "does not believe that the Data Protection Agency with its current location under the Ministry of Justice meets the requirement of independence as set out in, for example, the EU Charter of Fundamental Rights".[69] In **Ireland**, a member of parliament asked the Deputy Prime Minister about her views on whether Ireland may be in breach of its fundamental obligations under Article 47 of the Charter if it forces companies to be represented by lawyers and does not offer any regime for legal aid for companies.[70]

"I am aware of Case C-258/13 regarding Article 47 of the European Union Charter of Fundamental Rights which was heard by the European Court of Justice. While there are no plans at present to introduce legal aid for the type of commercial enterprise referred to, the situation is kept under review in my Department."

Ireland, Deputy Frances Fitzgerald, Written Answers Nos. 160–173, 12 July 2016

In **Poland**, the Commissioner for Human Rights, when presenting his annual report to parliament, referred to the widely discussed case of a same-sex couple who wanted to marry in another EU Member State. One of the partners was Polish, but he could not obtain a certificate from the Polish Civil Status Office stating that he was not married to anyone else, since the authorities stated that same-sex marriages were not recognised under Polish law. The commissioner stated that such a refusal was not justified under EU law and the Charter of Fundamental Rights.

"Ladies and gentlemen, in my opinion, and I would like to underline it once more, Article 18 of the Constitution does not make provision for same-sex marriages. […] However, in the case of Polish citizens – and there are some of them – who want to enter a same-sex marriage abroad, e.g. in Spain, Belgium, the Netherlands, with their partner who comes from one of these countries, in my opinion and in accordance with the provisions of the Treaty on European Union, the Charter of Fundamental Rights and the freedom of movement as well as EU citizenship, the Polish state should not cause any problems or difficulties for these people to do so."

Poland, Commissioner for Human Rights, Sejm Rzeczypospolitej Polskiej Kadencja VIII, Sprawozdanie Stenograficzne z 24. posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu 5 września 2016 (Sejm's term of office VIII, manuscript of 24th meeting on 5 September 2016)

1.3. National policy measures and training: initiatives lacking

1.3.1. Policies referring to the Charter

Article 51 of the Charter obliges Member States to respect the rights it covers, observe its principles, and "promote the application thereof in accordance with their respective powers". However, as in past years, the research revealed hardly any relevant public policies specifically aimed at promoting the Charter. Twenty-six Charter-related policy measures from 13 Member States were reported to FRA in 2016. However, many of these are only peripherally related to the Charter. Sometimes the Charter is vaguely referred to in policy documents that promote human rights or have a fundamental rights dimension. By way of illustration: the French Community in **Belgium** refers, in a document related to its reception programme for immigrants, to the requirement that the fund for asylum, migration and integration must respect the rights and principles enshrined in the Charter.[71] Moreover, there are hardly any examples of Member States analysing how the Charter is used in legal practice. **Poland** looked into the Charter's use before national courts and **Sweden** announced, in a document concerning the government's strategy for work on human rights, that it would review the Charter's application in Sweden.[72]

Promising practice

Studying the use of the Charter at national level

A bilingual volume entitled *Stosowanie Karty Praw Podstawowych UE przez sądy polskie / Application of the EU Charter of Fundamental Rights by Polish Courts* was published at the end of 2016. Its nine contributions analyse in detail how the Polish judiciary uses the Charter.

The book, edited by the Ministry of Foreign Affairs of **Poland**, is a follow-up to a conference that took place on 25 September 2015. More than 100 participants – representatives of all legal professions, civil servants and academics – discussed complexities in the interpretation and application of the Charter as they emerge in the relevant case law. To maximise the practical impact of the legal analysis, the publication will be made available online and distributed in print to appellate and district courts, administrative courts, national and regional organisations for legal professionals, and academic centres/universities.

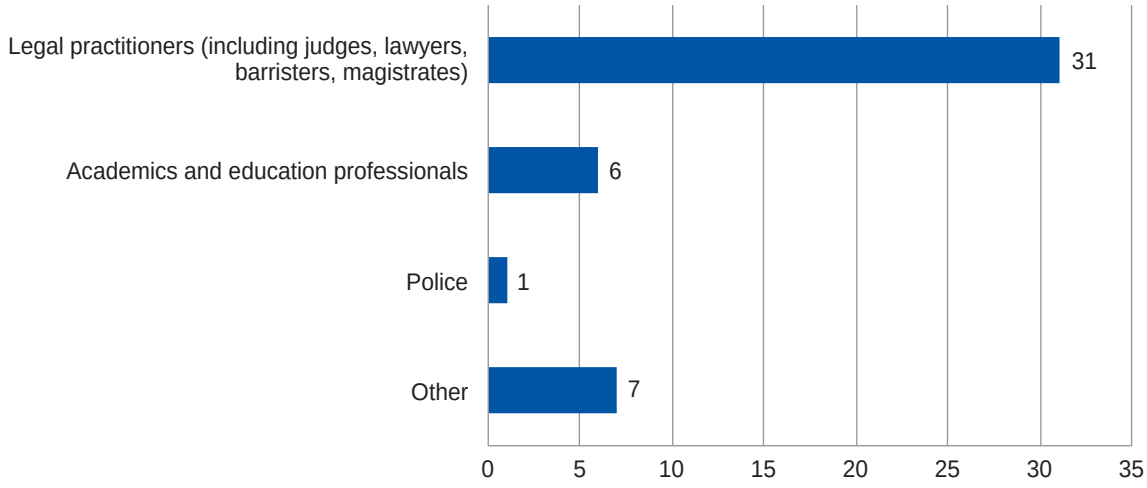
For more information, see Poland, Ministry of Foreign Affairs, Conference on application of EU Charter of Fundamental Rights by Polish courts, press statement, 26 September 2015

1.3.2. Training related to the Charter

When it comes to training, 2016 offers a more active picture. There appears to be an understanding that, the better legal practitioners are trained, the better the services they deliver. The European Commission's official aim is to ensure that half (around 700,000) of all legal practitioners in the EU are trained on EU law or on the national law of another Member State by 2020. According to the report *European Judicial Training 2016*, "more than 124 000 legal practitioners (judges, prosecutors, court staff, lawyers, bailiffs and notaries) as well as trainees of these professional groups took part in training activities on EU law or on the national law of another Member State" in 2015.[73] However, only about 6 % of these training activities focused on fundamental rights. This relatively low figure corresponds to the fact that the agency's Franet partners have often found it difficult to identify training activities focused on the Charter.

Forty-five Charter-relevant training programmes in 22 EU Member States were reported for 2016. The titles of fourteen of these referred to the Charter. Hence, the majority of the identified courses were not exclusively focused on the Charter, but rather addressed it alongside EU law or the ECHR. This is in line with past FRA advice – namely, to provide training that puts the Charter in context and explains the interactions between the different human rights sources and systems, be it the ECHR and Council of Europe sources or UN standards and sources and the fundamental rights enshrined in national constitutional law.

Figure 1.9: Number of identified training events, by main target audience



Notes: *Based on 45 training events analysed by FRA. These took place in 22 EU Member States in 2016. No training was reported for Belgium, the Czech Republic, Cyprus, Estonia, Latvia, and Slovakia. The category 'Other' refers to training events targeting public sector employees, non-governmental organisations, children and the general public.*

Source: *FRA, 2016*

Promising practice

Improving legal practitioners' Charter knowledge

The EU-funded project Active Charter Training through Interaction of National Experiences (ACTIONES) is coordinated by the EUI Centre for Judicial Cooperation in **Italy**. It involves 17 partners: seven academic institutions, a Europe-wide association of judges, and nine national institutions responsible for training judges and lawyers. It aims to improve the understanding and knowledge of the Charter among European legal practitioners and to ensure its better and swifter application in national legal practices. It also seeks to familiarise legal practitioners with how European and national courts can interact. In 2016, ACTIONES facilitated a series of transnational training workshops. The Judicial Academy (**Croatia**), the Superior School for Magistracy (**Italy**), the National Institute for Magistracy (**Romania**), the Judicial Training Centre (**Slovenia**) and the Judicial School (**Spain**) hosted such workshops, each with a specific focus (consumer protection, migration and asylum, non-discrimination, effective judicial protection). The workshops endorsed a bottom-up approach, whereby academics and practitioners exchange views directly, in light of their real needs and difficulties as highlighted by practice.

Another transnational and EU-funded initiative – called 'Judging the Charter' – was launched in September 2016. It aims to increase judges' and other legal professionals' knowledge in relation to the Charter. In particular, it aims to share how the judiciary and academia interpret crucial questions relating to the Charter's applicability and the rights and principles it enshrines. One focus of the project will be the role of Charter rights in asylum cases. Expert institutions from **Austria**, **Croatia**, **Greece**, **Italy** and **Poland** are carrying out this project, which will last until August 2018.

For more information, see Active Charter Training through Interaction of National Experiences (ACTIONES); Judging the Charter

Most of the training programmes identified are seminars, symposiums or conferences. For instance, a Seminar on the Implementation of the Charter[74] in **Finland** aimed, among other objectives, to provide a comprehensive picture of the Charter's use at national level. It referred to FRA's Fundamental Rights Reports as a working tool. The President of the Supreme Court in **Austria** prepared a symposium – 'Charter of Fundamental Rights, consumer rights and reference for a preliminary ruling'[75] – to promote recommendations for the correct drafting of references for preliminary rulings. In **Lithuania**, a conference on the 'Application of EU Charter as a Standard of Individual Rights' Defense at Supra- and National Levels' took place at the Presidential Palace of the Republic. The conference was attended by scholars as well as by judges, representatives from the Bar Association, and other related institutions.[76]

About two thirds of the identified training events targeted legal practitioners. For example, 'The Charter of Fundamental Rights of the European Union in Practice'[77] was a two-day training seminar for legal professionals organised in **Germany**, and a conference entitled 'Lawyers in dialogue with the Court of Justice of the European Union'[78] took place in **Luxembourg**. Some training is offered regularly – such as the monthly courses on EU and fundamental rights law provided by the Paris Bar in **France**.[79]

Teachers, academics, researchers and students also have a role in raising awareness of, and familiarity with, the Charter's provisions. Of the training programmes identified in 2016, 13 % addressed this audience. For example, **Portugal** organised a 'Research seminar on fundamental rights'[80] intended to foster PhD students' interest in engaging in an autonomous and informed reflection on the issue of fundamental rights protection in Europe.

Promising practice

Innovative forms of Charter training for practitioners

A possible avenue for strengthening knowledge of the Charter among legal practitioners is the official training programmes already in place for legal practitioners. According to the judicial training principles adopted in 2016 by the European Judicial Training Network (EJTN), training should be part of a legal practitioner's normal working life.

For instance, in the **Netherlands**, judges are required to take part in 30 hours of in-service training per year, or 90 hours in three years. Ten per cent of the training activities must be dedicated to European law. As a rule, the Dutch Training and Study Centre for the Judiciary (SSR) integrates European law into its regular course activities on substantive and procedural law. On certain topics, such as the ECHR, specific courses are provided.

In autumn 2016, the SSR contracted an external expert to develop a one-day face-to-face basic course on EU fundamental rights and an online practicum on the Charter's scope of application. This digital laboratory started in 2017 and combines the formal learning setting of a (digital) classroom with learning on the job. It includes an introductory video lecture and tailor-made guidelines that can be used for real cases. Easy access to the lab will be provided through SSR's digital learning platform and through a link on the digital knowledge platforms of the courts (Wiki Juridica) and the prosecution service. This will enable judges, prosecutors and their support staff to learn about the scope of the Charter when they need it to solve a case ('just in time'), while sitting at their desk at work or at home ('any place, anywhere') and targeted to their needs ('just enough').

For more information, see European Judicial Training Network (2016), 'Nine principles of judicial training'; Studiecentrum Rechtspleging, Dutch Training and Study Centre for the Judiciary

FRA opinions

According to the case law of the Court of Justice of the European Union (CJEU), the EU Charter of Fundamental Rights is binding on EU Member States when acting within the scope of EU law. The EU legislature affects, directly or indirectly, the lives of people living in the EU. EU law is relevant in the majority of policy areas. In light of this, the EU Charter of Fundamental Rights should form a relevant standard when judges or civil servants in the Member States deliver on their day-to-day tasks. FRA's evidence suggests, however, that judiciaries and administrations make only rather limited use of the Charter at national level. More awareness could contribute to increased and more consistent application of the Charter at national level.

FRA opinion 1.1

The EU and its Member States should encourage greater information exchange on experiences and approaches between judges and administrations within the Member States but also across national borders. In encouraging this information exchange, Member States should make best use of existing funding opportunities, such as those under the Justice programme.

According to Article 51 (field of application) of the EU Charter of Fundamental Rights, all national legislation implementing EU law has to conform to the Charter. As in past years, the Charter's role in legislative processes at national level remained limited in 2016: the Charter is not a standard that is explicitly and regularly applied during procedures scrutinising the legality or assessing the impact of upcoming legislation – whereas national human rights instruments are systematically included in such procedures. Moreover, just as in past years, many decisions by national courts that used the Charter did so without articulating a reasoned argument about why the Charter applied in the specific circumstances of the case.

FRA opinion 1.2

National courts, as well as governments and/or parliaments, could consider a more consistent 'Article 51 (field of application) screening' to assess at an early stage whether a judicial case or legislative file raises questions under the EU Charter of Fundamental Rights. The development of standardised handbooks on practical steps to check the Charter's applicability – so far the case only in very few Member States – could provide legal practitioners with a tool to assess the Charter's relevance in a particular case or legislative proposal.

Under Article 51 of the EU Charter of Fundamental Rights, EU Member States are obliged to respect and observe the principles and rights laid down in the Charter, while they are also required to actively "promote" the application of these principles and rights. In light of this, more policies promoting the Charter and its rights at national level should be expected. Whereas such policies are rare, there appear to be increased efforts to provide human rights training to relevant professional groups.

FRA opinion 1.3

EU Member States should ensure that relevant legislative files and policies are checked for Charter compliance and increase efforts to ensure that Charter obligations are mainstreamed whenever states act within the scope of EU law. This could include dedicated policymaking to promote awareness of the Charter rights and targeted training modules in the relevant curricula for national judges and other legal practitioners. As FRA has stressed in previous years, it is advisable for the Member States to embed training on the Charter in the wider human rights framework, including the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR).

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UN & CoE

January

February

10 March – UN Committee on the Elimination of Discrimination against Women (UN CEDAW) publishes concluding observations on Sweden

14 March – UN CEDAW publishes concluding observations on the Czech Republic

22 March – In *Guberina v. Croatia* (23682/13), the European Court of Human Rights (ECtHR) holds that authorities' disregard of a disabled child's needs when applying rules on tax relief violates the prohibition of discrimination in conjunction with the protection of property (Article 14 of the ECHR and Article 1 of Protocol No. 1 to the ECHR)

23 March – UN Human Rights Council (UN HRC) adopts a resolution on the rights of persons belonging to national or ethnic, religious and linguistic minorities

23 March – UN HRC adopts a resolution on freedom of religion or belief

24 March – UN HRC adopts a resolution on combating intolerance, negative stereotyping and stigmatisation of, and discrimination, incitement to violence and violence against, persons based on religion or belief

March

21 April – Parliamentary Assembly of the Council of Europe (PACE) adopts a resolution on assessing the impact of measures to improve women's political representation

21 April – UN Human Rights Committee (CCPR) publishes concluding observations on Slovenia

26 April – In *Izzettin Doğan and others v. Turkey* (62649/10), the ECtHR holds that refusing to provide a public religious service to followers of the Alevi faith violates the right to freedom of religion and the prohibition of discrimination in conjunction with the right to freedom of religion (Articles 9 and 14 of the ECHR)

28 April – UN CCPR publishes concluding observations on Sweden

April

1 May – European Social Charter (revised) enters into force in Greece

24 May – In *Biao v. Denmark* (38590/10), the ECtHR holds that refusing to grant family reunion to a Danish citizen of Togolese origin and his Ghanaian wife in Denmark violates the prohibition of discrimination in conjunction with the right to respect for private and family life (Articles 14 and 8 of the ECHR)

May

21 June – PACE adopts a resolution on women in the armed forces, promoting equality, putting an end to gender-based violence

30 June – UN HRC adopts a resolution on the elimination of discrimination against women

30 June – UN HRC adopts a resolution on protection against violence and discrimination based on sexual orientation and gender identity

30 June – UN HRC creates the mandate of independent expert on protection against violence and discrimination based on sexual orientation and gender identity

June

1 July – UN HRC adopts a resolution on the role of the family in supporting the protection and promotion of human rights of persons with disabilities

1 July – UN HRC adopts a resolution on mental health and human rights

25 July – UN CEDAW publishes concluding observations on France

July

15 August – UN CCPR publishes concluding observations on Denmark

August

29 September – UN HRC adopts a resolution on the human rights of older persons

29 September – UN HRC adopts a resolution on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

30 September – UN HRC adopts a resolution on equal participation in political and public affairs

September

12 October – PACE adopts a resolution on sport for all, a bridge to equality, integration and social inclusion

13 October – PACE adopts a resolution on female genital mutilation in Europe

October

18 November – UN CEDAW publishes concluding observations on Estonia and on the Netherlands

22 November – UN CCPR publishes concluding observations on Slovakia

23 November – UN CCPR publishes concluding observations on Poland

30 November – Council of Europe (CoE) adopts the Strategy on the rights of persons with disabilities 2017–2023

November

December

EU

January

3 February – European Parliament (EP) adopts a resolution on the new strategy for gender equality and women's rights post-2015

February

8 March – EP adopts a resolution on the situation of women refugees and asylum seekers in the EU

8 March – EP adopts a resolution on gender mainstreaming in its work

March

19 April – In *Dansk Industri v. Estate of Karsten Eigil Rasmussen* (C-441/14), the Court of Justice of the European Union (CJEU) rules that the general principle prohibiting discrimination on grounds of age under Directive 2000/78/EC precludes national legislation, including in disputes between private persons, which deprives an employee of entitlement to a severance allowance where the employee is entitled to claim an old-age pension from the employer under a pension scheme the employee joined before reaching the age of 50, regardless of whether the employee chooses to remain on the employment market or take his retirement

28 April – EP adopts a resolution on gender equality and empowering women in the digital age

28 April – EP adopts a resolution on women domestic workers and carers in the EU

April

26 May – EP adopts a resolution on poverty, a gender perspective

May

3 June – Council of the EU issues a progress report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

16 June – In *Lesar v. Telekom Austria AG* (C-159/15), the CJEU deems compatible with Articles 2(1), 2(2)(a) and 6(2) of Council Directive 2000/78/EC national legislation that does not take into account apprenticeship and employment periods completed by a civil servant before the age of 18 for the purpose of calculating pension entitlements, in so far as that legislation seeks to guarantee, within a civil service retirement scheme, a uniform age for admission to the scheme and a uniform age for entitlement to retirement benefits thereunder

17 June – Council of the EU issues conclusions in response to the European Commission's list of actions to advance LGBTI equality

June

28 July – In *Kratzer v. R+V Allgemeine Versicherung AG* (C-423/15), the CJEU rules that a situation in which a person who, in applying for a job, does not seek to obtain that post but only the formal status of applicant to seek compensation does not fall within the definition of 'access to employment, to self-employment or to occupation', within the meaning of Article 3(1)(a) of Council Directive 2000/78/EC and Article 14(1)(a) of Directive 2006/54/EC and may, if the requisite conditions under EU law are met, be considered an abuse of rights

July

5 August – European Commission launches campaign to raise awareness and increase the social acceptance of lesbian, gay, bisexual, transgender and intersex people

August

15 September – EP adopts a resolution on the application of the Employment Equality Directive

September

October

10 November – In *De Lange v. Staatssecretaris van Financiën* (C-548/15), the CJEU rules that a taxation scheme providing for different levels of deductions for vocational training costs depending on a person's age falls within the material scope of Directive 2000/78/EC, to the extent to which the scheme is designed to improve access to training for young people

15 November – In *Sorondo v. Academia Vasca de Policía y Emergencias* (C-258/15), the CJEU rules that legislation requiring candidates for police officer posts who are to perform all operational duties incumbent on police officers to be under 35 years of age is compatible with Article 2(2) of Council Directive 2000/78/EC, read together with Article 4(1) of that directive

22 November – Council of the EU issues a progress report on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation

22 November – EP adopts a resolution on sign languages and professional sign language interpreters

24 November – In *Parris v. Trinity College Dublin and others* (C-443/15), the CJEU rules that a national rule which, in connection with an occupational benefit scheme, makes the right of members' surviving civil partners to receive a survivor's benefit subject to the condition that the civil partnership was entered into before the member reached the age of 60, where national law did not allow the member to enter into a civil partnership before reaching that age, neither constitutes discrimination on grounds of sexual orientation or age nor indirect discrimination from the combined effect of discrimination based on sexual orientation and age

November

1 December – In *Daouidi v. Bootes Plus SL and others* (C-395/15), the CJEU rules that, where someone is in a situation of temporary incapacity for work for an indeterminate amount of time due to an accident at work, the limitation of that person's capacity cannot be classified as being 'long-term', within the meaning of the definition of 'disability' laid down by Council Directive 2000/78/EC, read in light of the UN Convention on the Rights of Persons with Disabilities

8 December – Council of the EU issues conclusions on women and poverty

December

2 Equality and non-discrimination

EU Member States did not reach an agreement on the proposed Equal Treatment Directive by the end of 2016. Several Member States, however, continued to extend protection against discrimination to different grounds and areas of life. Various domestic court decisions upheld the rights of persons with disabilities, and diverse efforts at international, European and national level sought to advance LGBTI equality. Meanwhile, measures and proposals to ban certain garments sparked debates on freedom of religion and belief, amid fears caused by the threat of terrorism. The year ended with a growing acknowledgement that addressing discrimination based on a single ground fails to capture the different ways in which people in the EU experience discrimination in their daily lives.

2.1. Proposed Equal Treatment Directive still not adopted

People across the EU continue to experience discrimination on a number of grounds and in various areas of life, as the 2016 conclusions of the European Committee on Social Rights show, for example. In conclusions concerning 21 EU Member States, the committee found insufficient protection against discrimination in employment on the grounds of gender or sexual orientation; insufficient integration of persons with disabilities in mainstream education, the labour market and society in general; and insufficient guarantee of equal rights between men and women, in particular as regards equal pay. The EU Member States covered by the 2016 conclusions of the European Committee on Social Rights include **Austria**, **Belgium**, **Bulgaria**, **Denmark**, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Italy**, **Latvia**, **Lithuania**, **Malta**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Spain** and the **United Kingdom**.

In its 2016 work programme, the European Commission prioritised the adoption of the proposed Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation (Equal Treatment Directive). However, the eight-year-long negotiations on the adoption of this directive had not reached a conclusion at the end of 2016. The proposal is based on Article 352 of the Treaty on the Functioning of the European Union, so requires unanimity for its adoption by the Council of the EU.

The persistence of diverging views became apparent in June, when several Member States again questioned the need for the directive, seeing it as "infringing on national competence for certain issues and as conflicting with the principles of subsidiarity and proportionality".[1] A number of other Member States continued to view the proposal as too far-reaching because it covers social protection and education. Another two Member States held general reservations towards the proposal by the end of the year, meaning that they would not vote in favour of adopting the directive as things stand.

> *"[The European Parliament] stresses how important it is to reach an agreement as soon as possible, and calls on the Council to break the deadlock, in order to move towards a pragmatic solution and speed up without further delay the adoption of the EU horizontal anti-discrimination directive proposed by the Commission in 2008 and voted for by Parliament; [the European Parliament] considers [the proposed directive] a pre-condition to secure a consolidated and coherent EU legal framework, protecting against discrimination on the grounds of religion and belief, disability, age and sexual orientation outside of employment."*
>
> European Parliament (2016), *European Parliament resolution of 15 September 2016 on application of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation*

Germany maintained its general reservation towards the proposal, which it introduced in 2010. In July 2016, a number of parliamentarians asked the federal government to stop blocking the directive.[2] They contended that, since existing national legislation goes beyond the provisions of the proposed directive, there is no reason for the federal government to refuse to adopt it. The federal government had not dealt with this request by the end of 2016.

In September, **Poland** withdrew its support for the proposal, arguing that national legislation provides protection against discrimination. In addition, the government asserted that the proposed directive does not comply with the principle of subsidiarity, contradicts provisions of the Polish Constitution and could limit the freedom of economic activity because of the impact that positive action could have on the freedom of businesses and entrepreneurs to enter into contractual agreements.[3]

In the words of the Slovak Presidency of the Council of the EU, "it is clear that there is still a need for further work and political discussions before the required unanimity can be reached in the Council."[4]

2.2. Member States broaden scope of non-discrimination laws

Despite lack of progress at the EU level, Member States continued to introduce changes in national law relevant to equality and non-discrimination. Such efforts are in line with FRA's opinion, expressed in its *Fundamental Rights Report 2016*,[5] that Member States should consider extending protection against discrimination to different areas of social life to ensure more equal protection against discrimination.

Some Member States added grounds of protection against discrimination to their legislation in 2016, including as regards a person's socio-economic status. This was the case in **France**,[6] where being in a socially precarious situation and vulnerability due to a person's economic situation became protected characteristics. Similarly, in **Ireland**,[7] individuals who receive housing assistance benefit from protection against discrimination in the provision of accommodation since 1 January 2016. The Protection against Discrimination Act adopted in **Slovenia** in May includes sexual orientation, gender identity and gender expression as protected characteristics.[8] Protection against discrimination in **Greece** was extended in December – to include the grounds of chronic disease, family or social status, sexual orientation, gender identity and sex characteristics in the fields of labour and employment; and the grounds of colour, descent and national origin in the field of labour and employment, social protection, education and provision of goods and services. Furthermore, the denial of reasonable accommodation is considered discrimination under the new law.[9]

Legislation enacted in **Luxembourg** in June makes discrimination on the ground of 'sex reassignment' equivalent to discrimination on the ground of sex.[10] In April 2015, the national equality body questioned the use of the term 'sex reassignment' rather than 'gender reassignment', maintaining that this terminology makes it unclear whether the law would apply only where there has been a medical or legal change in a person's sex, or also when a person self-identifies with a gender other than that assigned at birth.[11]

Legislation passed in **Lithuania** in June 2016 introduced protection in the area of consumer protection to ensure equal conditions for buying goods and services, without discrimination on the ground of sex. The law also prohibits less favourable treatment of pregnant women, those who recently gave birth and those who are breastfeeding.[12]

> *"Highlighting persisting barriers to employment, education, housing and health services, this report also reveals that four out of 10 Roma surveyed felt discriminated against at least once in the past five years – yet only a fraction pursued the incident. With most Roma unaware of laws prohibiting discrimination, or of organisations that could offer support, such realities are hardly surprising. But they do raise serious questions about the fulfilment of the right to non-discrimination guaranteed by the Charter of Fundamental Rights of the European Union (EU) and the Racial Equality Directive."*
>
> *Michael O'Flaherty, FRA Director, Foreword, Second European Union Minorities and Discrimination Survey, Roma – Selected Findings (2016)*

Other relevant legislative changes relating to discrimination in employment on the grounds of age and religion took effect on 1 January 2016. Concerning age, employers in **Denmark** cannot include redundancy clauses in individual contracts or in collective agreements any more, meaning that people can no longer be made redundant because they have reached a certain age.[13] Employers in **Ireland** can offer fixed-term contracts to persons over the compulsory retirement age only if this is objectively and reasonably justified by a legitimate aim, and if the means of achieving that aim are appropriate and necessary. In addition, employers can set a compulsory retirement age only if they can objectively justify the fixed age limit.[14]

Following entry into force of the Equality (Miscellaneous Provisions) Act on 1 January 2016 in **Ireland**,[15] an institution in receipt of public money is no longer permitted to discriminate favourably on the ground of religion, if such treatment also constitutes discrimination on any other ground and the religion or belief of the employee does not constitute a genuine occupational requirement having regard to the institution's ethos.

Promising practice

Raising awareness of discrimination in the labour market

Unia, the equality body in **Belgium**, launched a campaign to address age stereotyping in the area of work, with posters and banners distributed in places visited by job seekers. The awareness-raising campaign aims to inform people of support available to them from Unia if they face discrimination based on age in the employment field.

For more information, see Belgium, Unia (2016), Trop jeune? trop vieux? Unia lance une campagne contre les préjugés liés à l'âge dans l'emploi or Te jong? te oud? Unia start een campagne tegen vooroordelen leeftijd

2.3. Bans on select clothing trigger debate on freedom of religion and belief

Measures and proposals to ban certain garments sparked debates on freedom of religion and belief in the EU, against the backdrop of heightened tension prompted by the threat of terrorism. Two opinions of Advocates General of the Court of Justice of the European Union (CJEU), as well as cases dealt with by national courts in 2016, illustrate the complexities inherent in balancing freedom of religion or belief with the notion of 'living together' or the interests of national security. Any limitation of these freedoms must respect the principles of legality, necessity and proportionality.

In her opinion of May 2016, Advocate General Kokott stated that banning Muslim women from wearing headscarves at work may be permissible if general company rules prohibit ostentatious symbols of religion or belief: "such a ban may be justified if it enables the employer to pursue the legitimate policy of ensuring religious and ideological neutrality."[16] In an opinion issued in the context of another case in July 2016, Advocate General Sharpston contended that "requiring an employee to remove her Islamic headscarf when in contact with clients constitutes unlawful direct discrimination."[17] According to this opinion, such a ban would nevertheless be justified if it is in the interests of the employer's business and proportionate. The CJEU had not ruled on either case by the end of the year.

In May 2016, the **Austrian** Supreme Court ruled that a Muslim woman was discriminated against when her employer reduced her contact with customers because she wore a hijab and abaya (Muslim veil and robe). The court also ruled, however, that wearing a niqab (face veil) negatively affected how she communicated and interacted with clients of the notary office at which she worked. The court ruled that prohibiting the face veil was proportionate to the needs of the employer, and that not covering one's face was a genuine and determining occupational requirement.[18]

Other court decisions issued in 2016 in **Bulgaria**, **France** and **Germany** further illustrate the difficulties inherent in ensuring a balance between all the interests at stake when considering courses of action that could lead to restricting freedom of religion or belief.

The Supreme Administrative Court in **Bulgaria** ruled that a pupil who was suspended from a secular public school because she wore religious clothing was not discriminated against. This was because her clothing went against internal school rules prohibiting pupils from expressing their faith through their clothing. The court ruled that "the school's internal rules are an adequate and proportionate measure intended to defend the values of pluralism, acceptance and tolerance, respect for the rights of others and equality."[19]

Bulgaria is the only EU Member State that enacted legislation in 2016 to ban wearing in public spaces clothing that entirely or partly conceals the face. **Belgium**, **France** and **Spain** have similar bans in place. The bans in Bulgaria and France do not apply to houses of prayer of registered religions; when full-face covering is needed for health or professional reasons; or in the context of sport, cultural, educational and other occasions. The first violation of the ban introduced in Bulgaria incurs a fine of BGN 200 (€ 100), with public officials subject to a higher fine of BGN 500 (€ 250). Subsequent violations incur a fine of BGN 1,500 (€ 750), rising to BGN 2,000 (€ 1,000) for public officials.[20]

In October, the **German** Federal Constitutional Court issued a decision on blanket bans on certain religious expression by educators. Overturning the decision of three lower courts, the Constitutional Court found that a Muslim childcare worker's right to freedom of religion was violated when the city administration of Sindelfingen sent her a disciplinary warning letter because she wore a headscarf at work. The court concluded that the children's right to freedom of religion and belief could not be considered to be at risk simply because the childcare worker wore a headscarf, as prescribed by her religious beliefs. The German Basic Law protects the right to exercise religion as long it does not "threaten the peace". Since the childcare worker did not actively try to influence the children's religious beliefs, she could not be considered to have threatened the peace of the nursery.[21]

On 14 July, a terrorist attack in Nice claimed by the so-called Islamic State killed more than 80 people and injured scores of others. Although not as a direct

consequence of this attack, more than 30 municipalities in **France** sought to enact by-laws prohibiting the so-called 'burkini', a swimsuit designed for women that covers their entire body, save for their face, hands and feet. Justifications for such bans tend to argue that the burkini runs counter to moral standards, French secularism (*laïcité*), rules of hygiene and to swimming safely.

Two civil society organisations (*Ligue des droits de l'homme* and *Collectif contre l'islamophobie en France*) appealed against the first such by-law to be proposed, in Villeneuve-Loubet. The Nice administrative court rejected the appeal on the grounds that "beaches are not a suitable place to express one's religious convictions in an ostentatious way" and that "following the succession of Islamic extremist attacks in France" the wearing of the burkini poses "a risk to public law and order".[22]

This prompted the *Ligue* and *Collectif* to lodge an appeal with the Council of State. In its decision, issued in late August, the Council of State held that banning a woman from wearing such a swimsuit, which identifies her as belonging to a religion, could only be justified on the grounds of safeguarding the public order. The prohibition cannot be based on any other considerations and any restriction on individual freedoms must be justified by proven risks to the public order. The Council of State ruled that, "in the absence of such a risk, the emotion and concerns resulting from terrorist attacks, and in particular from the attack carried out in Nice on 14 July, are not sufficient to legally justify the contested banning measure".[23]

On 6 September, however, the administrative court of Bastia issued an ordinance upholding a by-law adopted by the municipality of Sisco on 16 August.[24] The reason was that there had been a violent confrontation on the beach in Sisco, allegedly sparked by reactions to the unconfirmed presence on the beach of a woman wearing a full-body bathing suit. The by-law was temporary and expired on 30 September.

2.4. Domestic courts uphold rights of persons with disabilities

By 2016, the EU and 27 of its Member States had ratified the UN Convention on the Rights of Persons with Disabilities (CRPD), whose full and correct implementation can help ensure that people with disabilities participate fully and effectively in society on an equal basis with others. (For more information on CRPD implementation, see Chapter 9). Throughout the year, domestic courts in **Finland** and **Poland** issued decisions relating to several articles of this important convention.

The Constitutional Tribunal of **Poland** deemed unconstitutional certain provisions of the Act on mental health protection[25] regulating persons with disabilities' placement in nursing homes by their guardians – particularly with regard to the rights to personal freedom, dignity and access to a court.[26] The disputed provisions stipulated that such placements are to be considered voluntary when authorised by guardianship courts, even if any review of the reasonableness or legality of such placements takes place after they occurred. The court found that such practices do not offer procedural guarantees to persons with disabilities, since they are seldom heard when such decisions are made, are not given sufficient opportunities to appeal against placement orders, and courts rarely review placement orders. Although not explicitly mentioned in the judgment, it can be noted that Article 12 of the CRPD provides that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."

Finland's Non-discrimination and Equality Tribunal found that the national railways discriminated against persons with disabilities because they had to confirm that they have a disability when buying online tickets for any persons accompanying them.[27] In another case, the tribunal held that a restaurant that did not provide an accessible toilet in accordance with building regulations discriminated against persons with disabilities.[28] This tribunal specifically referred to Article 5 of the CRPD, which provides that "States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds" and that they have to ensure that reasonable accommodation is provided to persons with disabilities.

Promising practice

Facilitating persons with disabilities' participation in society

In April of 2016, the government of **Portugal** introduced so-called 'inclusion desks' (*balcões da inclusão*) within social security centres in six pilot localities across the country (Lisbon, Faro, Setúbal, Porto, Viseu and Vila Real). These desks provide persons with disabilities and their families with specialised assistance and information on residential homes, centres for occupational activity, rehabilitation centres, employment issues, social benefits and technical aids. Assistance and information are also available in sign language and braille.

For more information, see Government of Portugal (2016), 'First inclusion desk of a national network opened in Lisbon' (Primeiro balcão da inclusão da rede nacional inaugurado em Lisboa)

2.5. Taking steps to advance LGBTI equality

Throughout 2016, the United Nations (UN), the EU and its Member States took various steps to safeguard the rights of lesbian, gay, bisexual, transgender and intersex (LGBTI) persons.

In June, the UN Human Rights Council established the mandate of an independent expert on protection against violence and discrimination based on sexual orientation and gender identity.[29] The first independent expert took up the mandate on 1 November, nearly 10 years after adoption of the Yogyakarta principles on the application of international human rights law in relation to sexual orientation and gender identity.[30] The independent expert's role will be to assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity; to raise awareness of violence and discrimination against these persons; and to identify and address the root causes of such violence and discrimination.

The EU's commitment to promoting the fundamental rights of LGBTI persons is evidenced in Council conclusions issued in June 2016 in response to the list of actions to advance LGBTI equality published by the European Commission in December 2015.[31] The Council called on the Commission "to step up efforts in the field[s] of comparative data collection on the discrimination of LGBTI persons in the EU", awareness raising and under-reporting of incidents of discrimination. It also called on FRA to compile statistics on the situation of LGBTI persons, such as those collected through the agency's EU-wide lesbian, gay, bisexual and transgender survey, which it will repeat in the coming years.[32] In December, the European Parliament also called on the Commission and EU agencies to collect data and information on violations of the fundamental rights of LGBTI persons, and encouraged Member States to inform them of their rights.[33]

In that respect, Member States could take inspiration from the proceedings of the Council of Europe's December 2015 seminar on 'National Action Plans as effective tools for the promotion and protection of human rights of LGBT people', published in June 2016. Six EU Member States had such action plans in place at the time of the seminar, namely **Denmark**, **France**, **Italy**, **Malta**, the **Netherlands** and the **United Kingdom**.[34] The proceedings of the seminar provide guidance to states on how to develop such action plans. This guidance can be complemented with the Council of Europe's *Compendium of Good Practices on Local and Regional Level Policies to Combat Discrimination on the Grounds of Sexual Orientation and Gender Identity*, also published in June.[35]

Throughout the year, a number of EU Member States did take steps to advance LGBTI equality. These involved the status of same-sex partnerships (**Czech Republic**, **Greece**, **Italy**, **Portugal**, **Slovenia**); the de-pathologisation of sexual orientation, gender identity and gender expression (**Denmark**, **Malta**); and putting a stop to unnecessary surgical interventions on intersex children (**Finland**).

Concerning partnerships, legislation allowing for same-sex marriages came into force in **Italy** in June.[36] In **Greece**, a circular of 2016 clarifies that persons in civil partnerships and married persons have equal rights to social insurance, labour legislation and the health and welfare system. The **Slovenian** Partner Relationship Act will make same-sex registered partnerships largely equivalent to marriage as of February 2017.[37] Significant differences remain, however; same-sex partners will still not be allowed to adopt children or be entitled to assisted reproduction.

This is not the case in **Portugal**. In that country, married or cohabitating heterosexual or lesbian couples, as well as all women – irrespective of their civil status or sexual orientation – are entitled to assisted reproduction since June 2016.[38] In February, it also became possible for same-sex couples in Portugal to jointly adopt children.[39] As of the end of 2016, this was also the case in **Austria**, **Belgium**, **Denmark**, **France** (for married couples), **Ireland** (for married couples), **Luxembourg**, **Malta**, the **Netherlands**, **Spain**, **Sweden** and the **United Kingdom**.[40] In a similar development, in June, the Constitutional Court of the **Czech Republic** abolished the statutory ban on adoption for same-sex partners in registered partnerships. The court deemed the ban unconstitutional and incompatible with the right to human dignity.[41]

In December, the **Maltese** president assented to Act No. LV of 2016 – Affirmation of sexual orientation, gender identity and gender expression,[42] as well as to the Gender Identity, Gender Expression and Sex Characteristics (Amendment) Act.[43] These acts de-pathologise a person's sexual orientation, gender identity and gender expression. The acts also outlaw and criminalise any conversion practices seeking to change a person's sexual orientation, gender identity or gender expression. As of 1 January 2017, 'transsexualism' has been removed from the section on psychical diseases and behavioural disorders of the **Danish** health administration system, following a communication to that effect by the Minister for Health in December 2016.[44]

The right to self-determination of intersex persons was at the centre of position papers published by the national equality body of **Cyprus**[45] and by the National Advisory Board on Social Welfare and Health Care Ethics, within the Ministry of Social Affairs and Health, in **Finland**.[46] Both bodies stress that operations that change a child's sex characteristics require consent, and that unnecessary operations should be avoided. In addition, the Finnish Ombudsman for Children called for the establishment of guidelines on the treatment of intersex children.[47]

2.6. Fostering equal treatment by tackling multiple discrimination

People with widely differing backgrounds face multiple discrimination in the EU, evidence collected by FRA shows consistently.[48] It is slowly coming to be recognised that addressing discrimination from the perspective of a single ground fails to capture or tackle adequately the various manifestations of unequal treatment that people may face in their daily lives.[49]

Discrimination can be based on more than one ground and manifest itself in different forms: intersectional discrimination; compound, aggravated or additive discrimination; and sequential or consecutive discrimination. Intersectional discrimination arises out of the combination of two or more inseparable grounds. Compound or additive discrimination refers to cases where one ground adds to another ground. Consecutive discrimination occurs when someone is affected by discriminatory practices on separate grounds at different times.[50]

> *"Intersectionality highlights the flaws in discrimination laws which focus on one ground at a time. Firstly, focussing on single grounds at a time ignores the fact that everyone has an age, a gender, a sexual orientation, a belief system and an ethnicity; many may have or acquire a religion or a disability as well. Secondly, it assumes that everyone within an identity group is the same, obscuring real differences within groups. Thirdly, it ignores the role of power in structuring relationships between people. Discrimination is not symmetrical; it operates to create or entrench domination by some over others."*
>
> *European Network of Legal Experts in Gender Equality and Non-discrimination (2016), Intersectional Discrimination in EU Gender Equality and Non-discrimination Law, p. 8*

Discrimination on the ground of gender combined with ethnicity has to date received the most attention among policy actors, although only superficially so. For example, a report on the implementation of Directive 2010/41 on the application of the principle of equal treatment between self-employed men and women, commissioned by the European Commission and published in 2015, mentions 'intersectional discrimination' only once, when referring to the experiences of self-employed migrant women.[51] The directive itself does not mention multiple discrimination, nor does any other gender equality directive or related implementation report.[52] This gap is noted in a publication on intersectional discrimination in EU gender equality and non-discrimination law prepared for the European Commission and released in May 2016.[53]

The Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC) each mention multiple discrimination only once, without defining the concept, merely stating in their recitals that "women are often the victims of multiple discrimination". The same is true of the draft proposal for an Equal Treatment Directive published in December 2016.[54]

It is therefore not surprising that multiple discrimination rarely figures in important EU policy instruments used to counter discrimination and foster equal treatment. An exception is the European Commission's 2016 annual Communication on effective measures of Roma integration, which stresses that Roma women "face multiple forms of discrimination (violence, trafficking in human beings and underage and forced marriages, and begging involving children)".[55] For more information on Roma integration and their experiences with discrimination, see Chapter 4.

The European Parliament adopted five resolutions that mention multiple discrimination in 2016.[56] The EU's *Strategic Engagement for Gender Equality 2016–2019*,[57] however, makes no direct reference to this issue, nor does the European Commission's list of actions to advance LGBTI equality[58] or the European Disability Strategy 2010–2020.[59] This contrasts with the Council of Europe's strategy on the rights of persons with disabilities 2017–2023. Adopted in November 2016, this strategy stipulates that multiple discrimination must be acknowledged "in all the work and activities within the Council of Europe and at the national and local levels, including in the work of independent monitoring mechanisms."[60]

The UN Committee on the Rights of Persons with Disabilities, for its part, recommended that the EU "ensure that discrimination in all aspects on the grounds of disability is prohibited, including multiple and intersectional discrimination".[61] The committee further addressed multiple and intersectional discrimination in two general comments it released in 2016 – on women and girls with disabilities[62] and on inclusive education.[63]

In its concluding observations on **Lithuania**[64] and **Portugal**,[65] the UN Committee on the Rights of Persons with Disabilities also called for these countries to adopt specific measures to address multiple and intersectional discrimination faced by women and girls with disabilities. In its recommendations to **Italy**,

the committee raised its concern "about the absence of legislation and mechanisms with a mandate that addresses multiple discrimination, including effective sanctions and remedies".[66] This recommendation appears to contradict findings of the European Network of Legal Experts in Gender Equality and Non-Discrimination, according to which Italy explicitly mentions multiple discrimination in its legislation.[67]

The UN Human Rights Council passed a resolution in July to address the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls. The Human Rights Council also asked the High Commissioner for Human Rights to prepare a report on the issue, which will be released in 2017.[68]

In March, the UN Committee on the Elimination of Discrimination against Women addressed multiple discrimination in its general comment on the rights of rural women.[69] The UN Working Group on discrimination against women issued a report on discrimination against women in the area of health and safety in April. The working group recommends that States "[p]rovide special protection and support services to women facing multiple forms of discrimination," with a particular focus on women with disabilities, migrant women, lesbians, bisexuals and transgender persons.[70]

Similarly, the UN Committee on Economic, Social and Cultural Rights acknowledged, in its general comment on the right to sexual and reproductive health, that LGBTI persons and persons with disabilities face multiple discrimination. The committee called for "[m]easures to guarantee non-discrimination and substantive equality [...] to overcome the often exacerbated impact that intersectional discrimination has on the realisation of the right to sexual and reproductive health."[71]

By the end of 2016, attention to multiple discrimination had gained momentum among equality bodies. Equinet, the European network of equality bodies, published a specific report on the activities of equality bodies in this area in November.[72] Twenty-two equality bodies from 19 Member States responded to Equinet's survey. Of these, five reported that current national legislation contains provisions on multiple discrimination: **Austria**, **Bulgaria**, **Croatia**, **Germany** and **Sweden**. Despite limited coverage in national legislation, 17 equality bodies in 16 Member States reported that they work on issues of intersectionality: **Austria**, **Belgium**, **Bulgaria**, **Croatia**, the **Czech Republic**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Malta**, **Poland**, **Portugal**, **Slovakia**, **Sweden** and the **United Kingdom**. The activities covered by equality bodies in this area include advocating the adoption of national legislation addressing intersectionality and raising awareness on the issue. "The dominant area of work by equality bodies on intersectionality is research, with an emphasis on building a knowledge base for work on intersectionality and bringing this into public and political debate."[73]

Information is also available on Member States not covered by Equinet's survey. Evidence published by FRA in 2012 and 2013 shows that **Greece**, **Italy** and **Romania** cover multiple discrimination in national legislation.[74] In May 2016, **Slovenia** adopted its Act on Protection against Discrimination,[75] subsuming multiple discrimination under a new concept of 'severe forms of discrimination'. By the end of 2016, nine EU Member States explicitly covered multiple discrimination in national legislation: **Austria**, **Bulgaria**, **Croatia**, **Germany**, **Greece**, **Italy**, **Romania**, **Slovenia** and **Sweden**.

Notably, **Germany** and **Malta** in 2016 introduced national legislation on disability that mentions multiple discrimination. The Maltese Equal Opportunities (Persons with Disabilities) Act prohibits discrimination in a "multiple manner" of people with disabilities.[76] The German Act on the Further Development of the Right to Equality of People with Disabilities recognises that they can experience multiple discrimination on all protected grounds.[77]

FRA opinions

Negotiations on the proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation – the Equal Treatment Directive – entered their eighth year in 2016. Adopting this directive would guarantee that the EU and its Member States offer a comprehensive legal framework against discrimination on these grounds on an equal basis. By the year's end, the negotiations had not reached the unanimity required in the Council of the EU for the directive to be adopted, with two Member States holding general reservations towards the proposal. As a result, EU law is still effectively marked by a hierarchy of grounds of protection from discrimination.

Article 21 (principle of non-discrimination) of the EU Charter of Fundamental Rights prohibits discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Article 19 of the Treaty on the Functioning of the European Union holds that the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

FRA opinion 2.1

The EU legislator should consider all avenues to ensure that the proposed Equal Treatment Directive is adopted swiftly to guarantee equal protection against discrimination on the grounds of religion or belief, disability, age or sexual orientation across key areas of life.

As in previous years, EU Member States extended protection against discrimination to additional grounds and different areas of life in 2016. For instance, some Member States introduced a person's socio-economic status or gender reassignment as protected grounds in their national legislation. Other Member States extended non-discrimination law to areas such as consumer protection, age redundancy clauses and retirement age. Such steps further contribute to tackling discrimination and fostering equal treatment across a broad range of key areas of life.

FRA opinion 2.2

EU Member States should consider adding grounds of protection against discrimination to broaden the scope of national anti-discrimination legislation.

Against a backdrop of heightened tension caused by the threat of terrorism in the EU in 2016, national courts dealt with the question of when it is acceptable to ban particular types of clothing, with related cases pending before the Court of Justice of the EU (CJEU). These cases revealed that the introduction of such bans risks disproportionally affecting and leading to discrimination against Muslim women who choose to wear certain garments as an expression of their religious identity or beliefs. Article 10 of the EU Charter of Fundamental Rights guarantees everyone's right to freedom of thought, conscience and religion. This right includes the freedom to change religion or belief and the freedom to manifest religion or belief in worship, teaching, practice and observance, either alone or in community with others. Article 21 of the EU Charter of Fundamental Rights prohibits any discrimination on the ground of religion or belief. Article 22 of the EU Charter of Fundamental Rights further provides that the Union shall respect cultural, religious and linguistic diversity.

FRA opinion 2.3

EU Member States should pay utmost attention to the need to safeguard fundamental rights and freedoms when considering any bans on symbols or garments associated with religion. Any legislative or administrative proposal to this end should not disproportionally limit the freedom to exercise one's religion. When considering such bans, fundamental rights considerations and the need for proportionality should be embedded from the outset.

The year 2016 saw a growing acknowledgement that addressing discrimination from the perspective of a single ground fails to capture the different ways in which people experience discrimination in their daily lives. This is evidenced in the continued trend at national level to enlarge the scope of anti-discrimination legislation by adding protected grounds and/or areas of life in relevant national legislation. Yet, the EU and its Member States still tend not to deal explicitly with multiple discrimination when developing legal and policy instruments. By the end of 2016, only nine EU Member States explicitly covered multiple discrimination in national legislation. Such an approach can lead to better recognition of how people experience discrimination in their daily lives and enable devising courses of action that would truly foster inclusion.

FRA opinion 2.4

The EU and its Member States should acknowledge multiple and intersectional discrimination when developing and implementing legal and policy instruments to combat discrimination, foster equal treatment and promote inclusion.

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77 Germany, Federal Ministry for Labour and Social Affairs (2016), 'Act on the further development of the right to equality of people with disabilities comes into force' (*Gesetz zur Weiterentwicklung des Behindertengleichstellungsrechts in Kraft*).

UN & CoE

12 January – In *Boacă and others v. Romania* (No. 40355/11), the European Court of Human Rights (ECtHR) reiterates state authorities' duty to take all reasonable steps to unmask racist motives and concludes that the lack of any apparent investigation into a complaint of discrimination violates the prohibition of degrading treatment (substantive aspect) and effective investigation (procedural aspect) and also violates the prohibition of discrimination in conjunction with the right of effective investigation (Articles 3 and 14 of the ECHR)

January

February

1 March – European Commission against Racism and Intolerance (ECRI) publishes its fifth monitoring report on France and conclusions on the implementation of its priority recommendations in respect of Ireland

16 March – ECRI adopts a general policy recommendation on safeguarding irregularly present migrants from discrimination

21 March – ECRI publishes a general policy recommendation on combating hate speech

March

12 April – In *M.C & A.C. v. Romania* (No. 12060/12), the ECtHR holds that the Romanian authorities failed to effectively investigate a homophobic attack, violating the right of effective investigation in conjunction with the prohibition of discrimination (Articles 3 and 14 of the ECHR)

12 April – In *R.B. v. Hungary* (No. 64602/12), the ECtHR holds that the inadequate investigations into the applicant's allegations of racially motived abuse violated his right to respect for private life (Article 8 of the ECHR)

20 April – Council of Europe Parliamentary Assembly (PACE) adopts a resolution on a renewed commitment in the fight against antisemitism in Europe

April

May

7 June – ECRI publishes its fifth monitoring reports on Cyprus, Italy and Lithuania and the conclusions on the implementation of its priority recommendations in respect of Finland, The Netherlands and Portugal

15 June – Commissioner for Human Rights of the Council of Europe (CoE Commissioner for Human Rights) publishes a report following his visit to Poland

21 June – Committee on the Elimination of All Forms of Racial Discrimination (CERD) publishes concluding observations on the twenty-first to twenty-third periodic reports of Spain

24 June – PACE adopts a resolution on violence against migrants

June

1 July – UN Human Rights Council (UN HRC) adopts a resolution on 'Addressing the impact of multiple and intersecting forms of discrimination and violence in the context of racism, racial discrimination, xenophobia and related intolerance on the full enjoyment of all human rights by women and girls'

July

5 August – UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance publishes a report on these issues and on follow up to the Durban Declaration and Programme of Action

August

September

3 October – CERD publishes concluding observations on the twentieth to twenty-second periodic reports of Greece and of the United Kingdom and Northern Ireland

4 October – ECRI publishes its fifth monitoring report on the United Kingdom and the conclusions on the implementation of its priority recommendations in respect of Malta

5 October – CoE Commissioner for Human Rights publishes a report following his visit to Croatia

October

18 November – UN Human Rights Committee publishes concluding observations on the fourth report of Slovakia

23 November – UN Human Rights Committee publishes concluding observations on the seventh periodic report of Poland

November

9 December – CERD publishes concluding observations on the nineteenth and twentieth periodic reports of Italy and concluding observations on the fifteenth to seventeenth periodic reports of Portugal

December

EU

19 January – European Parliament (EP) passes a resolution on the role of intercultural dialogue, cultural diversity and education in promoting EU fundamental values

January

February

March

April

31 May – European Commission and major IT companies (Facebook, Microsoft, Twitter and YouTube) agree on a Code of conduct on countering illegal hate speech online

May

14 June – Launch of the European Union High Level Group on combating racism, xenophobia and other forms of intolerance

June

July

August

September

25 October – EP passes a resolution on human rights and migration in third countries

26 October – EP removes parliamentary immunity of two MEPs for inciting racial hatred

October

November

13 December – EP passes a resolution on situation of fundamental rights in the EU in 2015

13 December – EP adopts new Rules of Procedure strengthening hate speech sanctions

December

3 Racism, xenophobia and related intolerance

Racist and xenophobic reactions towards refugees, asylum seekers and migrants persisted across the EU in 2016. Muslims experienced growing hostility and intolerance, while discrimination and anti-Gypsyism continued to affect many Roma. The European Commission set up a High Level Group on combating racism, xenophobia and other forms of intolerance to support national efforts in this area, as well as to counter hate crime and hate speech. EU Member States targeted hate crime in diverse ways, reviewing classifications of bias motivations, conducting awareness-raising campaigns and providing specialised training to law enforcement officers and prosecutors. Meanwhile, the European Commission continued to monitor implementation of the Racial Equality Directive. Recurring challenges include various impediments to equality bodies' effectiveness and independence, discriminatory ethnic profiling and a lack of national action plans to fight racism.

3.1. Refugees, asylum seekers and migrants remain targets of racism and xenophobia

Racist and xenophobic reactions to the arrival of refugees, asylum seekers and migrants in the EU, which had marked 2015, continued unabated in 2016. These included hate speech, threats and hate crimes. Where perpetrators could be identified, they were most often – but not exclusively – found to be extreme right-wing sympathisers (for more information on asylum, migration and integration, see Chapter 5).

For example, vigilante groups with ties to right-wing extremist groups violently attacked and harassed asylum seekers and migrants in **Bulgaria**, **Finland**, **Germany**, **Greece**, **Hungary** and **Sweden**.[1] In **Bulgaria** and **Poland**, some authority figures welcomed such groups patrolling areas with large numbers of refugees and asylum seekers, as FRA noted in its November 2016 monthly report on the migration situation in the EU. The available evidence indicates that right-wing extremists, members of the general population and those with minority ethnic or religious backgrounds can all be perpetrators of racist and xenophobic violence.[2]

Germany remains the EU Member State that collects the most comprehensive data on hate crime targeting asylum seekers, their accommodation centres or organisations that work for their benefit. The authorities recorded 2,545 hate crimes targeting asylum seekers and refugees between 1 January and 31 December 2016, with another 988 targeting asylum seekers' accommodation and 217 targeting help organisations or volunteers. Nearly all of the identified perpetrators were right-wing extremists.[3]

Data from the **Netherlands** show that 53 crimes with a discriminatory motive targeting refugees were brought to the attention of the police in 2015. Most of these crimes were recorded in the context of protests against planned asylum seeker centres.[4] In **Finland**, 15 attacks against reception centres were registered by the police in 2015, including arson.[5] No data were available for 2016 at the time of writing for either Finland or the Netherlands.

Promising practice

Holding workshops on hate speech and migration

A project, run by the Peace Institute–Institute for Contemporary Social and Political Studies in **Slovenia**, educates young people about hate speech against migrants through workshops at schools. Students first analyse particular cases of hate speech and discuss its effects and potential responses to it. The second part entails a discussion with a person with a migrant background. The main objective is for students to be able to recognise hate speech and set it in the context of migration, human rights and intercultural dialogue. The project is financed by the state budget.

For more information, see The Peace Institute, Institute for Contemporary Social and Political Studies,'Workshops on hate speech and migration' (Delavnice o sovražnem govoru in migracijah)

Human rights activists, politicians and journalists perceived as 'pro-refugee' were also targeted by extreme right-wing sympathisers in 2016. The most brutal example is perhaps the murder of Jo Cox, a Member of Parliament in the **United Kingdom**, who was shot and stabbed to death in June. The presiding judge noted during sentencing that "[t]here is no doubt that this murder was done for the purpose of advancing a political, racial and ideological cause namely that of violent white supremacism and exclusive nationalism most associated with Nazism and its modern forms", adding that this "is one of the indices of an offence of exceptionally high seriousness for which the appropriate starting point is a whole life term".[6]

Muslims also experienced more hostility and intolerance across the EU in 2016, increasingly perceived as terrorists or sympathisers of terrorism. For example, a survey by the Pew Research Center shows that many Europeans perceive migration as being linked to the threat of terrorism.[7] On average, in the 10 EU Member States surveyed, 59 % of respondents believe that the presence of refugees in their country increases the likelihood of terrorist attacks. The Member States surveyed were **France**, **Germany**, **Greece**, **Hungary**, **Italy**, the **Netherlands**, **Poland**, **Spain**, **Sweden** and the **United Kingdom.**

> *"In some parts of Europe, and in the United States, anti-foreigner rhetoric full of unbridled vitriol and hatred, is proliferating to a frightening degree, and is increasingly unchallenged. The rhetoric of fascism is no longer confined to a secret underworld of fascists, meeting in ill-lit clubs or on the 'Deep Net.' It is becoming part of normal daily discourse."*
>
> *Zeid Ra'ad Al Hussein, UN High Commissioner for Human Rights (2016), 'Human rights "under unprecedented pressure" world-wide: Zeid calls on people to stand up for rights of others'*

There is no concrete evidence that terrorists systematically use the movements of refugees to enter the EU undetected – though isolated cases were identified, as Europol notes.[8] Nevertheless, some political actors continued to exploit such perceptions to further their agendas in 2016, just as in 2015. For example, the Prime Minister of **Hungary** claimed before a referendum on EU quotas for the relocation of asylum seekers that "migration poses a threat, increases terrorism and increases crime. Mass migration fundamentally changes Europe's cultural make-up. Mass migration destroys national culture."[9] In **Slovakia**, the Prime Minister stated in May 2016 that "Islam has no place in Slovakia",[10] and the President of the **Czech Republic** said in January that "it is basically impossible to integrate Muslim communities".[11]

The potential negative impact of such rhetoric is perhaps best illustrated by reactions that followed the **United Kingdom**'s referendum on its continued membership in the EU. The National Police Chiefs' Council stressed that "[p]olice forces are working closely with their communities to maintain unity and tolerance and prevent any hate crime or abuse following the EU referendum. [...] We are seeing an increase in reports of hate crime incidents to True Vision, the police online hate crime reporting site."[12] In the four days following the referendum, 57 % more hate crimes were reported to the police than in the same four-day period during the previous month.[13] Data published by the Home Office in October 2016 further show that there was a clear increase in the number of racially or religiously aggravated offences recorded by the police following the referendum.[14]

3.2. EU steps up efforts to counter hate speech and hate crime

The Framework Decision on Racism and Xenophobia penalises racist and xenophobic hate speech and hate crime.[15] In December 2015, the European Commission initiated formal inquiries with Member States in which major transposition gaps remained, with a view to launching infringement proceedings where necessary. This prompted notable legislative developments in **Cyprus**,[16] **France**,[17] **Hungary**,[18] **Ireland**,[19] **Italy**[20] and **Slovakia**.[21]

Italy introduced legislative provisions on hate speech and propaganda based on racial and ethnic grounds, an explicit reference to Holocaust denial, crimes of genocide, crimes against humanity and war crimes, providing for a penalty of two to six years of detention. In **France**, a bill making racism, antisemitism and homophobia general aggravating circumstances was under scrutiny in the Senate in 2016. It proposes raising

the maximum punishment for racist or discriminatory insults (currently six months and € 22,500) to the same level as that for provocation and racist or discriminatory slander (one year and € 45,000).

Hungary amended its criminal code provisions relating to the offence of 'incitement against a community' to comply with the Framework Decision on Racism and Xenophobia. Similarly, **Slovakia** amended its Criminal Code of Criminal Procedure. Pursuant to the changes, all trials for racist and extremist crimes will be handled by a Special Criminal Court. The amendments also introduce a new type of crime: apartheid and discrimination of a group of people.

In addition to its enforcement actions in 2016, the EU stepped up its efforts to counter hate crime and hate speech in various ways – thereby following up directly on the conclusions of the first Annual Colloquium on Fundamental Rights, which focused on combating antisemitism and anti-Muslim hatred.[22] In April, the European Commission set aside € 7,325,000 for grants[23] that meet the objective of combating racism, xenophobia, homophobia and other forms of intolerance under the Rights, Equality and Citizenship Programme.[24]

Priority funding areas include grassroots projects on preventing and combating antisemitism and anti-Muslim hatred and intolerance; projects promoting the development of tools and practices to prevent, monitor and combat online hate speech; and projects fostering understanding between (religious) communities, and preventing and combating racism and xenophobia through interreligious and intercultural activities. A further € 1,500,000 were earmarked to promote the exchange of best practices on preventing and combating hate crimes among public authorities.

Such exchanges are at the core of the EU High Level Group on combating racism, xenophobia and other forms of intolerance, which the European Commission set up in June.[25] The group aims to facilitate the exchange and dissemination of best practices between national authorities to better prevent and combat hate crime and hate speech; foster thematic discussions on gaps, challenges and responses; strengthen cooperation and synergies between key stakeholders, with the ultimate aim of providing guidance to Member States on how to better prevent and combat hate crime and hate speech; and examine national strategies that exist to combat racism, xenophobia and other forms of intolerance.

The high level group brings together all 28 Member States, civil society organisations, community representatives, FRA and other relevant EU agencies, as well as international organisations including the UN, the Organization for Security and Co-operation in Europe and the Council of Europe. It is composed of two subgroups, with one focusing on countering online hate speech and the other on methodologies for recording and collecting data on hate crime. These subgroups will operate for an initial period of two years.

3.2.1. EU tackles hate speech on social media

With many people using social media platforms as their main sources of information, addressing online hate speech is crucial. As FRA noted in its contribution to the second Annual Colloquium on Fundamental Rights, (unverified) statements posted online can go viral almost instantly and may incite hatred.[26] Challenging and removing them is difficult. This can have a corrosive effect, especially when such content is amplified and alternative views are seldom, if ever, expressed.

The European Commission coordinates the subgroup on online hate speech under the High Level Group on combating racism, xenophobia and other forms of intolerance.[27] This subgroup aims, among others, to assess the implementation of a voluntary code of conduct on countering illegal hate speech online, agreed in May 2016 between the Commission and four information technology (IT) companies: Facebook, Twitter, Microsoft and YouTube. Though strongly criticised by organisations defending freedom of expression and information,[28] the code of conduct was well received by Member States and civil society organisations active in the field of tackling online hate speech. Some civil society organisations working on digital rights and freedom were also critical, citing concerns about private legal entities – such as social media platforms – acting as arbiters between competing fundamental rights. The code of conduct sets out that these companies shall review, remove or disable illicit content within 24 hours of receiving a valid removal notification from users.[29]

> *"[T]o prevent the spread of illegal hate speech, it is essential to ensure that relevant national laws transposing the Council Framework Decision 2008/913/JHA are fully enforced by Member States in the online as well as the in the offline environment. While the effective application of provisions criminalising hate speech is dependent on a robust system of enforcement of criminal law sanctions against the individual perpetrators of hate speech, this work must be complemented with actions geared at ensuring that illegal hate speech online is expeditiously acted upon by online intermediaries and social media platforms, upon receipt of a valid notification, in an appropriate time-frame."*
>
> *European Commission (2016), Code of Conduct on Countering Illegal Hate Speech Online, pp. 1–2*

Although monitoring online content under the code of conduct is a continuous process, results are available for the first monitoring exercise, which covered the six weeks from 10 October to 18 November 2016.[30] Ten civil society organisations and two equality

bodies based in nine Member States participated in this exercise (**Austria**, **Belgium**, **Denmark**, **France**, **Germany**, **Italy**, the **Netherlands**, **Spain** and the **United Kingdom**). Eight of these organisations are members of the International Network Against Cyberhate; the equality bodies are the Belgian Interfederal Centre for Equal Opportunities and the Italian National Office against Racial Discrimination.

For the first monitoring exercise, the organisations sent IT companies a total of 600 notifications of alleged illegal online hate speech, as defined in national criminal codes transposing the Framework Decision on Racism and Xenophobia. The largest proportion of notifications concerned antisemitic content (23.7 %), followed by content relating to national origin (21 %), anti-Muslim hatred (20.2 %), race (11.7 %) and ethnic origin (9.5 %). The remaining 13.9 % of notifications fell into the category of 'other content', which encompasses colour, descent, religion, sexual orientation and gender-related hatred. The IT companies removed 28.2 % of the content of which they were notified, and 40 % of the notifications were reviewed within 24 hours.[31]

Initiatives taken in Member States in 2016 to counter online hate speech can also be noted here. Largely mirroring the high level group, the **Slovak** government established a working group on hate crimes in June to counter online hate speech, bringing together public authorities, non-governmental organisations and IT companies.[32] Since September, the **Danish** Institute for Human Rights has coordinated a Nordic network mapping online sexist speech and hate speech.[33] The Ministry of Culture in **Latvia** issued recommendations in September on how to prevent the dissemination of hate speech in the media, including online. To that end, the ministry recommends, among other things, stricter enforcement of existing legislation; revising outdated definitions of the 'media'; training law enforcement agents; and conducting public awareness campaigns.[34]

3.2.2. EU and Member States target hate crime

As reported in previous Fundamental Rights Reports, and as Table 3.1 and Table 3.2 on official data on hate crime show, large discrepancies remain in terms of how Member States record incidents of hate crime, preventing meaningful comparisons between countries. Variations and gaps between EU Member States can result from many factors, including how these crimes are defined in criminal law; how incidents or their characteristics are recorded; the willingness and ability of victims and/or witnesses to report incidents; victims' awareness of organisations to which incidents can be reported; the degree of victims' trust that authorities will deal with such incidents appropriately; and the actual occurrence of racist, xenophobic and related crime.

Partly to address these discrepancies, the European Commission asked FRA to coordinate a subgroup on methodologies for recording and collecting data on hate crime under the High Level Group on combating racism, xenophobia and other forms of intolerance.[35] This subgroup, set up in October, aims to identify core elements of a methodology with which to record incidents and data on hate crime to enable comparisons between Member States. The initial priorities of the subgroup will be to agree on a monitoring definition of hate crime; develop a set of bias indicators to be recorded; and design a reporting tool that covers relevant bias indicators, victims' perceptions and bias motivations underlying a hate crime. The first outputs of the subgroup are expected in 2017.

Examples from several Member States illustrate the types of steps taken to prevent and counter hate crime, including reviewing classifications of bias motivations; awareness-raising campaigns on hate crime; training law enforcement officers and prosecutors; and enhancing understanding of hate crime through research.

Concerning classifications, the Police and Border Guard Board in **Estonia** began recording three new categories of bias motivations: race, religion, origin; sexual orientation/identity; and other.[36] The **Danish** National Police issued national guidelines on how to record hate crime.[37] The Danish Director of Public Prosecutions revised instructions to the police and prosecution services on how to process cases of hate crime and ethnic discrimination, which can lead to improving the quality of recorded data.[38]

Several Member States conducted campaigns to raise awareness of hate crime and hate speech in 2016. In the **Czech Republic**, the focus lay on supporting relevant professionals in tackling hate crime.[39] In **Germany**[40] and **Portugal**,[41] attention was directed at empowering young people to recognise and act against online hate speech. In Austria, the campaign #GegenHassimNetz (#againsthateontheweb), supported by the Austrian Federal Chancellery, aims to expose cases of hatred and racism on the web and offers ways of dealing with such postings. **Ireland**[42] and the **United Kingdom**[43] ran campaigns on public transport services to encourage people to report racism when they witness it and raise awareness of how and where hate crime can be reported.

Member States also organised specialised training on hate crime for police officers throughout the year – including **Bulgaria**,[44] **Cyprus**[45] and **Greece**.[46] In **Hungary**, the Working Group against Hate Crime arranged several training events for police officers, using videos on experiences of different victim groups, after which participants assessed factors hindering victims from cooperating with police and reporting incidents to them. A forum was established for exchanging good practices related to the investigation of hate crime cases.[47]

Table 3.1: Summary overview of officially recorded data pertaining to hate crime by EU Member State, as of 31 December 2016

Member State	Recorded data (according to recording authorities' definition)	Recording authority	Publication of data
AT	Politically motivated crimes: offences committed and cases reported to the court	Ministry of the Interior, Federal Agency for State Protection and Counter-terrorism	Annual report on the protection of the Constitution
BE	Incidents/crimes recorded by the police	Belgian Federal Police	Criminal statistics of the Belgian Federal Police
CY	Motive in incidents and/or cases of racial nature and/or with racial motive	Office for Combating Discrimination, Crime Combating Department, Police Headquarters	Criminality statistic data - racist incidents - incidents and/or cases of racial nature and/or with racial motive, published by the Cyprus Police
CZ	Crimes with an extremist context	Ministry of the Interior, Security Police Department	Annual report on the issue of extremism in the Czech Republic
DE	Politically motivated crime: criminal offences; acts of violence	Ministry of the Interior	Annual report on the protection of the Constitution
DK	Hate crimes separated into three main categories: racially motivated, religiously motivated and sexually oriented, which are further divided into a number of subcategories	National Police of Denmark	Annual report on hate crimes
ES	Hate crimes distinguished by racial, xenophobic, antisemitic, religious and disability bias	Ministry of the Interior, Forces and Security Bodies	Ministry of the Interior: report on incidents related to crimes of hate in Spain
FI	Suspected hate crimes reported to the police motivated by prejudice or hostility towards the victim's real or perceived ethnic or national origin, religion or belief, sexual orientation, transgender identity or appearance, or disability	Police University College of Finland	Annual report on hate crimes reported to the police in Finland
FR	Cases with racial, antisemitic and anti-Muslim aspects recorded by the police and the gendarmerie	Ministry of the Interior	Annual report on the fight against racism, antisemitism and xenophobia
HR	Hate crime incidents recorded by police by bias motivation: race, colour, religion, national or ethnic origin, disability, sex, sexual orientation, or gender identity.	Police, State's Attorney Office and the Ministry of Justice	Data published in the police annual statistics
IE	National total of reported racially motivated crime (including antisemitism)	Central Statistical Office	Data on reported racist crime published on the website of the Office for the Promotion of Migrant Integration
IT	Hate crimes recorded by police by bias motivation: racism, xenophobia, bias against LGBT people and bias against people with disabilities	Police	Data published on the website of ODIHR
LT	Data collected according to the Criminal Code	Police Department under the Ministry of the Interior and the Prosecutor General's Office	Data published on the website of Information Technology and Communications Department under the Ministry of the Interior of the Republic of Lithuania
NL	Incidents of criminal discrimination	Discrimination incidents recorded by the police	Annual report on criminal discrimination
PL	Crimes of incitement to hatred recorded by the police	Ministry of the Interior and Administration	Data published on the website of ODIHR
SE	Offences reported to the police with an identified hate crime motive	Swedish National Council for Crime Prevention	Annual report on statistics relating to offences reported to the police with an identified hate crime motive

Table 3.1: (continued)

Member State	Recorded data (according to recording authorities' definition)	Recording authority	Publication of data
UK	*England, Northern Ireland and Wales:* recordable crimes under Home Office recording rules; monitored categories are race, faith and religion, sexual orientation, transgender, disability and antisemitism *England and Wales:* hate crime offences for the five centrally monitored strands: race, sexual orientation, religion, disability and gender identity *Northern Ireland:* crimes with a hate motivation recorded by the police of Northern Ireland *Scotland:* hate crime reported to the Procurator Fiscal: race crime and crimes aggravated by religious, disability, sexual orientation or transgender identity prejudice	*England, Northern Ireland and Wales:* regional police forces in England, Northern Ireland and Wales *England and Wales:* Home Office *Northern Ireland:* Police Service of Northern Ireland *Scotland:* Crown Office and Procurator Fiscal Service	*England, Northern Ireland and Wales:* data published on the police-funded website True Vision, designed to provide information about hate crime *England and Wales:* Home Office annual statistical bulletin on hate crime recorded by police in England and Wales *Northern Ireland:* Home Office annual bulletin on trends in hate motivated incidents and crimes recorded by the police *Scotland:* Hate Crime in Scotland, 2015–16 annual report

Source: *FRA, 2016*

Table 3.2: Official data pertaining to hate crime published in 2016, by bias motivation and by EU Member State

Member State	Racism	Anti-Roma	Antisemitism	Anti-Muslim hatred	Religion	Extremism	Sexual orientation	Gender identity	Disability
AT	323		41	31		523			
BE	1,028		8				169		
CY	5		0		0		0	0	
CZ	54	33	47	5		175			
DE	1,214		1,366		1,112		222		19
DK	104		13	41	6		26	5	
ES	505		9		70		169	24	226
FI	991		8	71	54		55	6	65
FR	797		808	429					
HR	1	1[a]	2[a]	1[a]	1		6		
IE	105								
IT	369[a]						45[a]		141[a]
LT	8				1		32		
NL	2,215		428	439	21		1,574	109	61
PL	133[a]	26[a]	50[a]	42[a]	12[a]				
SE	4,765	239	277	558	719		602	62	
UK – EN, WAL & NI	40,744[b]		629[b]		3,177[b]		5,553[b]	607[b]	2,350[b]
UK – EN & WAL	49,419[c]				4,400[c]		7,194[c]	858[c]	3,629[c]
UK – NI	853[c]				19[c]		210[c]	12[c]	74[c]
UK – SCO	3,712[c]				581[c]		1,020[c]	30[c]	201[c]

Notes: *Comparisons between Member States are not possible, as they each record different types of data relating to hate crime.*
Blank entries = no data are collected or published.
ODIHR = Office for Democratic Institutions and Human Rights.
[a] *ODIHR hate crime reporting.*
[b] *Fiscal year (1 April 2014 to 31 March 2015).*
[c] *Fiscal year (1 April 2015 to 31 March 2016).*

Source: *FRA, 2016 (based on data published by responsible EU Member State authorities)*

EU-MIDIS II: gauging progress

FRA launched its second European Union Minorities and Discrimination Survey (EU-MIDIS II) in 2015. It assesses the actual impact of EU and national anti-discrimination and equality measures on people's lives.

EU-MIDIS II covers all 28 EU Member States and involves about 26,000 randomly selected respondents from different ethnic minority or immigrant backgrounds. The survey focuses on experiences of discrimination, criminal victimisation, and rights awareness. It also collected data on socio-economic conditions and issues relating to social inclusion and participation, addressing employment, education, health and housing.

The survey aims to support policymakers in developing more targeted responses to racism and hate crime, and can also bolster the advocacy work of civil society organisations. Selected EU-MIDIS II findings on the situation of Roma were published in 2016; further outputs, as well as data visualisation on the FRA website, will follow in 2017.

For more information, see FRA (2015), EU-MIDIS II: European Union Minorities and Discrimination Survey

Training on hate crime for judges and prosecutors was also organised – for example, in **Belgium**,[48] **Bulgaria**[49] and **Poland**.[50] In **Latvia**, the Judicial Training Centre led a seminar for prosecutors and judges on 'Hate Crimes and Freedom of Expression', addressing what qualifies crimes as hate crimes and outlining relevant ECtHR case law.[51] In **Hungary**, several courses were organised[52] and an online learning programme[53] for legal practitioners was launched in May 2016.

Children at schools can also become victims of racism. In **Cyprus,** the Code of Conduct against Racism and the Guide for Handling and Recording Racist Incidents was applied to at least 73 schools of all levels in 2015-2016.[54] Primary schools recorded 40 incidents and a secondary school recorded one incident. According to the Ministry of Education, the low number of recorded incidents is affected by underreporting by both schools and by victims, who may be afraid to report incidents or not convinced that doing so would be useful.

3.2.3. Courts confront racist and related hate speech and hate crime

Several ECtHR rulings issued in 2016 concluded that Member States failed to efficiently investigate incidents potentially involving discriminatory motives. At national level, various court decisions further clarified what kind of acts and statements constitute incitement to hatred and insult.

In *R.B. v. Hungary*,[55] the ECtHR found a violation of Article 8 (right to respect for private and family life) of the ECHR on account of an inadequate investigation into the applicant's allegations of racially motivated abuse. The applicant, a woman of Roma origin, claimed that she was subjected to racist insults and threats by participants in an anti-Roma march and that the authorities failed to investigate the racist verbal abuse. The court concluded that the authorities failed to take all reasonable steps to determine the role of racist motives, and ordered **Hungary** to pay € 4,000 for non-pecuniary damage and € 3,717 for costs and expenses. It should be noted that the incident at issue occurred before Hungary introduced the legislative amendments referred to at the beginning of Section 3.2, pursuant to which Section 216 of the Criminal Code now prohibits 'violence against a member of a community'.

In *Boacă and others v. Romania*[56] the ECtHR found that the lack of any apparent investigation by the authorities into a complaint of discrimination amounted to a violation of Article 14 (principle of non-discrimination) in conjunction with Article 3 (prohibition of inhuman or degrading treatment) of the ECHR. Seven applicants of Roma origin claimed that they suffered ill-treatment by the police and that the authorities decided not to bring criminal charges against the police officers, who had beaten them predominantly because of their Roma ethnicity. The court ordered **Romania** to jointly pay the applicants € 11,700. This case belongs to a group of older cases, for which the Council of Europe Council of Ministers' examination was closed by Resolution CM/ResDH(2016)150 in *Barbu Anghelescu v. Romania and other 35 cases*. In this resolution, the Council of Ministers welcomed the measures adopted by the Romanian authorities to enhance the effectiveness of criminal investigations into allegations of ill-treatment by law-enforcement officials, noting the reinforced monitoring of their implementation by the General Prosecutor's Office.[57]

In *M.C & A.C. v. Romania*,[58] the ECtHR examined a case concerning the police investigation of an attack on two Bucharest Pride March participants. The applicants were subjected to homophobic abuse and were punched and kicked by a group of six people on the metro.

The court found that the Romanian authorities' failure to efficiently investigate the incident and its potential discriminatory motive was in breach of Article 3 of the ECHR, in conjunction with Article 14. The court ordered **Romania** to pay € 7,000 to each applicant for non-pecuniary damage and € 3,863.02 to them jointly for costs and expenses.

Meanwhile, in the **Czech Republic**, the Supreme Court ruled that placing a sticker with the symbol of a Nazi movement on the window of a car and then using the car in regular traffic amounted to a public expression of sympathy with a movement aiming to suppress human rights and freedoms, prohibited by the Criminal Code.[59]

In **Luxembourg**, the Court of Appeal fined a politician € 7,000 for inciting racial hatred by producing and disseminating pamphlets accusing immigrants of being responsible for the "destruction of the country".[60] In **Malta**, two men were fined € 3,000 each for anti-immigrant hate speech on Facebook.[61]

In the **Netherlands**, the Supreme Court ruled that certain statements made by a politician – such as "Ali B. and Mustapha, move to Ankara" and "today we demonstrate against the multicultural terror and for a total immigration stop" – constituted incitement to racial discrimination and insult motivated by racial bias as defined in the Dutch criminal code. In another case, the leader of the Dutch Party for Freedom was tried over statements he made about Moroccans. The District Court of the Hague convicted him of inciting discrimination and "insulting a group", but deemed the evidence insufficient to find him guilty of incitement to hatred.[62]

3.3. Tackling discrimination effectively in line with the Racial Equality Directive

The European Commission indicated in 2014 that increasing awareness of existing protection and ensuring "better practical implementation and application" of the Racial Equality Directive (2000/43/EC) was a major challenge.[63] It continued to closely monitor implementation of the directive in 2016, initiating and pursuing infringement proceedings against Member States found to be in breach of its provisions.

Following up on the CJEU's 2015 judgment in *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*,[64] the European Commission sent a formal notice to the Bulgarian government, asking it to present the measures it planned to undertake to bring the national anti-discrimination legislation in line with the Racial Equality Directive. In response, the Bulgarian parliament adopted amendments to the Protection against Discrimination Act and revised the legal definitions of the terms 'indirect discrimination' and 'unfavourable treatment'.[65]

In May 2016, the European Commission sent a formal notice to **Hungary** based on non-conformity with the Racial Equality Directive. The formal notice, which is the first step of an infringement procedure, concerns discrimination against Roma children in the education sector. Specifically, the Commission expressed concerns that legislation and administrative practices in place lead to discrimination against Roma children both by segregating them in mainstream education and by resulting in their over-representation in special schools for mentally disabled children.[66] The Commission has sent letters of formal notice to two other Member States, the **Czech Republic**[67] and **Slovakia**,[68] in relation to similar issues in the recent past, also alleging discrimination against Roma children in educational legislation and practice.

The Council of the European Union also raised concerns over inequalities in education regarding Roma children in the **Czech Republic**,[69] **Hungary**[70] and **Slovakia**.[71] In the case of **Hungary**, the Council noted that the lack of equal access to quality mainstream education is particularly acute for Roma children. With regard to **Slovakia**, it stressed that the "recently adopted anti-segregation legislation has yet to be implemented to bring about positive change and increase Roma participation in mainstream education, including pre-school education."[72]

Meanwhile, to tackle segregation of Roma children in primary and secondary education, **Romania** adopted two framework orders prohibiting segregation on ethnic grounds.[73]

In addition to the ongoing infringement proceedings noted above, a number of other Member States have been under investigation for discrimination against Roma and Travellers, in particular in the fields of education and housing. For more information on Roma integration, see Chapter 4.

3.3.1. Diverse challenges hamper effective functioning of equality bodies

The European Commission also closely monitors the setting up of equality bodies in EU Member States. Pursuant to Article 13 (2) of the Racial Equality Directive, these bodies should be able to provide independent assistance to victims of discrimination. In that respect, the Commission in 2014 initiated

infringements proceedings against **Slovenia** for failing to set up an independent equality body able to provide efficient assistance to such victims.[74] In response, the Slovenian parliament adopted the Protection against Discrimination Act, establishing an independent body – the Office of the Government of the Republic of Slovenia for Principle of Equality – without, however, providing the new body with appropriate financial means to perform its function.[75] Following adoption of the new law, the Commission discontinued its infringement proceedings against Slovenia in July 2016. The Commission carried out similar investigations into the independence and functioning of equality bodies in a number of Member States during 2016.

Strengthening the powers of equality bodies contributes to more effective implementation of the Racial Equality Directive. The European Network of Equality Bodies (Equinet) stressed the need for standards to secure the effectiveness of such bodies. According to Equinet, these standards should address and secure, among other things, adequate financial staff and physical resources, general powers – such as commissioning and conducting research, making recommendations, conducting general investigations and challenging domestic legislation – and specific powers to underpin tribunal-type functions.[76]

A number of Member States adopted legislation aimed at increasing the powers, and extending the mandates, of their equality bodies in 2016. For example, **Greece** adopted legislation making the Ombudsperson the central supervisory authority of the two Equality Directives.[77] The new law also gives the Ombudsperson the mandate to investigate, as an independent mechanism, incidents of arbitrary acts involving security forces and in detention facilities. In addition, it creates 20 additional staff posts to permit the entity to effectively accomplish its tasks under its new competences as equality body as well as national mechanism for the investigation of incidents of ill-treatment. Moreover, if the ECtHR finds that **Greece** is guilty of violating the ECHR, the Ombudsperson shall review the case at issue and decide whether or not to initiate an investigation. Although the Greek National Commission for Human Rights considered this development to be positive, it noted that the powers allocated to the Ombudsperson do not suffice to guarantee its effective functioning as an independent investigative mechanism.[78]

In **Portugal**, legislation adopted in 2016 refers to the setting up of a National Council for Equality and Non-Discrimination.[79] This body will coordinate the public bodies and agencies dealing with equality and non-discrimination.[80] The Commission for Equality and against Racial Discrimination (CICDR) is also empowered to monitor the implementation of laws prohibiting racism and ethnic discrimination.

> *"The situation of specialised bodies has also been affected in many countries by the general austerity measures and budget cuts. Although the tasks and the scale of the problem continued to increase, the financial and human resources have rarely been adjusted accordingly. Limited resources and expertise can also affect specialised bodies' ability to fulfil their advisory role to legislative and executive authorities, as well as other stakeholders, which is emphasised in ECRI's GPR No. 2 on specialised bodies to combat racism, xenophobia, antisemitism and intolerance at national level."*
>
> *European Commission against Racism and Intolerance (ECRI) (2016), Annual Report on ECRI's Activities, p. 12*

In parallel, international human rights monitoring bodies raised concerns that budgetary and staff cuts, as well as legislative amendments relating to the mandates of equality bodies, could affect their effective functioning.

The Committee on the Elimination of All Forms of Racial Discrimination (CERD), in its concluding observations on **Italy**[81] and **Portugal**,[82] recommended that authorities allocate sufficient human and financial resources to their equality bodies. The UN Human Rights Committee voiced concern about the dissolution of the Polish Council for the Prevention of Racial Discrimination, Xenophobia and Related Intolerance, calling on the authorities to reinstate it or establish an alternative institution.[83] Instead, the **Polish** parliament decided to cut the budget of the Commissioner for Human Rights to PLN 35 million – approximately € 9 million – the budget granted to this body in 2011, before extension of its mandate.[84] This prompted the UN Human Rights Committee to call on the Polish authorities to provide the commissioner the necessary resources to allow the body to implement its mandate effectively, independently and fully.[85]

In the **United Kingdom**, trade unions expressed concerns about the effective function of the Equality and Human Rights Commission (EHRC) after its restructuring. Under the restructuring, the EHRC's budget would be pared to GBP 17.4 million by 2020 – down from GBP 62 million in 2010 – and its workforce would be reduced by 10 % (20 posts).[86] CERD in its concluding observations on the **United Kingdom** recommended "that any spending cuts and legislative amendments relating to the mandates of the national human rights institutions should not restrict their independent and effective operation".[87]

> *"Our reforms will ensure that we remain a strong and independent voice protecting equality and human rights and challenging government where rights are threatened. We strongly resisted budget cuts at the highest levels but we believe the difficult changes we are making will ensure we can still deliver our ambitious programme. For example, we have produced our biggest report on race, will soon be publishing the most comprehensive assessment ever of disability in Britain, and we will remain a robust and independent voice to protect people's rights as we leave the European Union."*
>
> *Rebecca Hilsenrath, Equality and Human Rights Commission Chief Executive, personal communication, 6 November 2016*

In several Member States, equality bodies sought to raise awareness of anti-discrimination legislation by undertaking awareness-raising activities and developing information tools, reports and guidance documents – including in **Belgium**,[88] **Bulgaria**,[89] **Croatia**,[90] **Cyprus**,[91] the **Czech Republic**,[92] **Denmark**,[93] **Estonia**,[94] **Hungary**,[95] **Malta**[96] and the **United Kingdom**.[97]

The **Bulgarian** Commission for Protection against Discrimination published a training curriculum and a handbook on anti-discrimination, both designed for prison staff. The **Croatian** Ombudsman paid several visits to areas populated by Roma, informing Roma inhabitants about his functions and how he could assist them in cases of ethnic discrimination. In **Cyprus**, the Ombudsman offered lectures and seminars on racism and discrimination at schools, youth organisations and trade unions. The Danish Institute for Human Rights (DIHR) set up a new advisory forum called Ethnic Forum, which will operate as a platform via which key actors in the field of non-discrimination can exchange knowledge with civil society organisations. In **Estonia**, the Office of the Gender Equality and Equal Treatment Commissioner published a booklet in English and Russian that clarifies differences between discrimination on the grounds of ethnicity, language and nationality. The Estonian Human Rights Centre organised a seminar on the topic of intolerance and xenophobia in the working environment.[98] In **Hungary**, the Equal Treatment Authority delivered training to the management of the National University of Public Service on non-discrimination law and on the powers of the Equal Treatment Authority. The **Maltese** National Commission for the Promotion of Equality delivered 16 training sessions addressing discrimination on the ground of race/ethnic origin, amongst other grounds. It also carried out awareness-raising initiatives to promote equality on the basis of race and ethnic origin, through its Facebook page[99] and YouTube channel.[100]

3.3.2. Discriminatory police treatment and ethnic profiling persist

Discriminatory racial and ethnic profiling – an issue already addressed in previous FRA Fundamental Rights Reports – remained a serious issue across the EU in 2016. Such profiling can undermine trust in law enforcement among persons with ethnic minority backgrounds, who may frequently find themselves stopped and searched for no reason other than their appearance.

In **France**, the Court of Cassation in a landmark case reviewed claims by 13 men of African or Arab origin alleging that they were victims of humiliating police checks. None of the men had a police record. The court ruled that the police illegally checked the identities of three of them based on discriminatory ethnic profiling, stating that identity checks based on physical features associated with a real or supposed origin, without any prior objective justification, are discriminatory. [101] However, it found that eight other contested identity checks were legal, as they were based on objective elements and therefore not discriminatory. The court did not decide on two other cases, returning them to lower courts for retrial.

The Court of Cassation's decision set more specific rules for identity checks. According to the ruling, alleged victims of discriminatory profiling only have to provide courts with 'elements' that support an assumption of discrimination – the testimony of a single witness, for instance – while police authorities have to prove that 'objective elements' justified the identity checks.

France's *Commission Nationale Consultative des Droits de l'Homme* (CNCDH) also issued an opinion on abusive and discriminatory identity checks, recommending that the authorities ensure the traceability of identity check operations.[102] In addition, the CNCDH launched a survey aiming to collect testimonies and experiences of victims of discriminatory ethnic profiling and police abuse.[103]

The **Finnish** Non-Discrimination Ombudsman called on the Helsinki police to respond to claims that police action in four immigration control operations in Helsinki amounted to racial profiling. In its report, the police called the operations justified to combat illegal immigration and denied all allegations of ethnic profiling.[104]

In the **United Kingdom**, the Home Secretary in September re-admitted to the best use of stop and search scheme 13 police forces who were previously suspended from the scheme.[105] These forces had been found to be failing to meet three or more of the scheme's requirements during inspections conducted in 2015 by Her Majesty's Inspectorate of Constabulary. In September, the inspectorate published the findings of its re-inspection, confirming that all 13 forces had been fully compliant with all features of the scheme.[106] Meanwhile, research conducted by the Independent Police Complaints Commission (IPCC) in the **United Kingdom** showed that black and minority ethnic groups (76 %), in particular black respondents (61 %), expressed lower levels of trust in the police to use reasonable force in the course of their duties than the general population (83 %).[107]

In parallel, international human rights monitoring bodies stressed the need to tackle discriminatory ethnic profiling and misconduct by law enforcement officials. In its concluding observations on **Greece**, CERD raised concerns that Roma are disproportionately subjected to frequent identity checks.[108] CERD also raised concerns about practices of police discriminatory ethnic profiling in **Italy**[109] and **Spain**.[110] Meanwhile, ECRI pointed out to **Cypriot** authorities "that racial profiling by the police is defined and prohibited by law".[111] ECRI also recommended that the **French** authorities "intensify the training of law enforcement representatives with

regard to the contents of the Code of Ethics".[112] Similarly, in its reports on **Italy**[113] and **Lithuania,**[114] ECRI called on the authorities to set up independent police complaints services with the task of investigating allegations of racist violence committed by law enforcement officials.

Promising practice

Providing police training on anti-discrimination and diversity

To tackle stereotypes and stigmatisation in the police sector, in particular towards Muslim people, the **Belgian** Federal Police developed a policy note entitled 'Diversity and anti-discrimination'. This initiative aims to make diversity the norm, for it to be integrated into all the work of every police directorate, and for it to be considered in any evaluation. The Belgian Equality Body, Unia, supports the federal police in applying its diversity policy. The police and the equality body are also planning to jointly coordinate an action plan for 2016–2018, strengthening this objective. For instance, training on anti-discrimination legislation will be organised and Unia will define diversity indicators to measure the action plan's impact.

For more information, see Unia (2016), Annual Report 2015: Living together put to the test (Rapport Annuel 2015 – Le vivre ensemble mis à l'épreuve), Brussels, Unia

A number of Member States introduced and pursued educational measures and initiatives to raise human rights awareness among law enforcement officials. Topics covered included legislation in force to counter racism and ethnic discrimination, and policing diverse societies.

As reported in the *Fundamental Rights Report 2016*, the **Dutch** National Police adopted a strategic document to achieve more diversity in the police force, entitled *The Power of Difference*.[115] In January 2016, the strategic document was translated into several regional-level policy documents that promote better registration of discriminatory incidents; better cooperation between societal actors, the police and the Public Prosecution Service in tackling discrimination; and the prevention of ethnic profiling by the police. In **Spain**, the Platform for the Police Management of Diversity adopted a Curricular Design on the police management of diversity and non-discrimination.[116] This tool aims to train police services on how to deal with cases of discrimination and on how to manage hate crime cases.

In 2017, FRA will update and expand the scope of its guide on avoiding discriminatory ethnic profiling. It will draw on findings from EU-MIDIS II, and take into account new technological developments and their increased use by both law enforcement authorities and for border management.

3.4. Member State action plans to fight racism still lacking

Examining national strategies for combating racism, xenophobia and other forms of intolerance is, as noted above, one of the aims of the EU's high level group dedicated to these issues. However, few EU Member States had dedicated national action plans in place in 2016. Those that do not have such plans in place could draw on the guidance of the Office of the UN High Commissioner for Human Rights, which published a practical guide on developing national action plans against racial discrimination in 2014.[117]

The UN Durban Declaration and Programme of Action, signed in September 2001, emphasises states' responsibility to combat racism, racial discrimination, xenophobia and related intolerance.[118] It further urges states "to establish and implement without delay" national policies and action plans to combat these phenomena. Nearly 15 years later, in August 2016, the UN Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance encouraged states "that have not done so to seriously consider developing a comprehensive national plan of action [to counter these phenomena], especially in the global context of a growing rise of xenophobic sentiments in a prolonged migration crisis."[119]

Source: Screenshot from FRA video 'A decade of human rights protection: FRA turns 10'

Five EU Member States had dedicated action plans in place in 2016: **France**, **Germany**, **Slovakia**, **Sweden** and the **United Kingdom**. Some subsume their efforts under more general categories, such as countering discrimination (the **Netherlands**) or promoting social inclusion (**Belgium**, **Finland**). In others, dedicated action plans that had expired were not renewed by the end of 2016, with no indication of when they would be reactivated (**Italy**, **Luxembourg**, **Spain**). It should be noted that, even where plans have not been renewed, relevant activities provided for therein can nevertheless continue. Meanwhile, in **Greece**, the National Council against Racism and Intolerance – established in April 2016 – was tasked with developing a dedicated action plan. It had not achieved this by the end of the year.

The **French** government adopted a dedicated action plan to fight racism and antisemitism in April 2015,

covering the period 2015–2017.[120] Under this plan, operational committees against racism and antisemitism, responsible for ensuring its implementation, must be set up in each *département*. The first step in that direction was taken in June 2016, when a decree establishing these committees was adopted and came into force.[121] Eighty-five such committees were set up between April 2015 and November 2016.[122]

In January 2016, the government of **Slovakia** adopted an action plan to prevent and eliminate racism, xenophobia, antisemitism and other forms of intolerance, covering the period 2016–2018. The plan's main aims are to prevent racist stereotyping, prejudice and hate crime, as well as to actively combat racism, xenophobia and related intolerance.[123]

Sweden adopted a national plan against racism, other forms of intolerance and hate crime in November 2016, covering the period 2017–2020.[124] The plan falls under the responsibility of the Ministry of Culture and targets five bias motivations: Afrophobia, anti-Roma prejudice, antisemitism, anti-Muslim hatred and prejudice against the Sami people. It provides for awareness-raising activities; better coordination among responsible authorities; enhanced dialogue with civil society; online prevention; and reinforcing the criminal justice system's response to hate crime.

In the **United Kingdom**, the Equality and Human Rights Commission (EHRC) in August 2016 called upon the government to create a comprehensive race equality strategy for the UK as a whole. The commission recommended that the strategy should be informed by the experience of all ethnic groups in Britain; that the range and scope of available disaggregated ethnicity data should be improved; and that transparent and effective monitoring arrangements should be put in place.[125]

One of the key principles of the Scottish Government's race equality framework is to complement mainstreaming approaches with lawful positive action to address the impact of disadvantages faced by people with minority ethnic backgrounds.[126] The equality objectives of the Welsh Government cover racial equality, and aim to reduce all forms of harassment and abuse, including hate crime.[127] The racial equality strategy of the Northern Ireland Executive establishes a framework for action to tackle racial inequalities and to open up opportunity for all; to eradicate racism and hate crime; and to promote good race relations and social cohesion.[128]

As noted above, the fight against racism, xenophobia and related intolerance can be subsumed under other categories. This is the case in the **Netherlands**, where the government adopted its national action plan against discrimination in January 2016.[129] The plan aims to prevent and combat discrimination on all legally recognised grounds, including ethnic discrimination. Specific manifestations of racism, xenophobia and related intolerance addressed in the plan include discrimination on the grounds of origin, skin colour or religion; anti-Black racism; discrimination against Muslims; and antisemitism.

In May 2016, the Ministry of Education and Culture in **Finland** adopted an action plan to prevent hate speech and racism and to foster social inclusion. Under this plan, the ministry grants subsidies to support measures and projects that help prevent racism, with a focus on living together. This includes promoting multiculturalism, a sense of community and inclusion.[130]

Meanwhile, the Minister for Equal Opportunities of the French Community in **Belgium** in August made funding available for educational activities to support the fight against racism, with a particular focus on intercultural dialogue.[131] In July 2016, the **German** federal government adopted a strategy to prevent extremism and promote democracy, covering the period 2016–2019. One of the strategy's aims is to counter racist and discriminatory agendas promoted by right-wing extremist groups. This will be done by supporting civil society organisations active in the field, as well as by educating children, adolescents and adults to advocate social tolerance.[132]

Promising practice

Promoting anti-racist education

In March 2016, the **French** government mobilised public institutions, civil society organisations, cultural establishments, memorials, public education providers and media organisations to take part in a week of education against racism and antisemitism. More than 70 events took place at the National Museum for the History of Immigration. Another 500 activities took place throughout the country, including film screenings, debates, performing arts, exhibitions and workshops.

For more information, see France, Ministry of Education (2016), 'Week of education and action against racism and antisemitism, 21–28 March 2016' (Semaine d'éducation et d'actions contre le racisme et l'antisémitisme du 21 au 28 mars 2016)

The national equality body in **Italy** has organised annual weeks of action against racism since 2004. Through this, the equality body aims to promote social dialogue to sensitise public opinion to the benefits of a multi-ethnic, open and inclusive society. As in France, a number of activities were organised throughout the country, including seminars, sports competitions and readings.

For more information, see Ufficio Nazionale Antidiscriminazioni Razziali (2016), Open your mind, turn off prejudices (Accendi la mente, spegni i pregiudizi)

FRA opinions

Racist and xenophobic reactions to the arrival of refugees, asylum seekers and migrants in the EU that marked 2015 continued unabated in 2016. They included hate speech, threats, hate crime, and even murder. Yet very few Member States collect specific data on incidents that target refugees, asylum seekers and migrants. This is particularly relevant for the implementation of Article 1 of the EU Framework Decision on Racism and Xenophobia, which outlines measures Member States shall take to punish certain intentional racist and xenophobic conduct. Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) obliges State parties to make incitement to racial discrimination, as well as acts of violence against any race or group of persons, offences punishable by law. All EU Member States are parties to ICERD.

FRA opinion 3.1

EU Member States should ensure that any case of alleged hate crime or hate speech – including those specifically targeting asylum seekers, refugees and migrants – is effectively investigated, prosecuted and tried. This needs to be done in accordance with applicable national provisions and, where relevant, in compliance with the provisions of the EU Framework Decision on Racism and Xenophobia, European and international human rights obligations, as well as ECtHR case law on hate crime and hate speech. Member States could also collect more detailed data on incidents that specifically target refugees, asylum seekers and migrants.

Few EU Member States had dedicated national action plans to fight racial discrimination, racism or xenophobia in place in 2016. This is the case even though the United Nations Durban Declaration and Programme of Action resulting from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance assigns states primary responsibility for combating racism, racial discrimination, xenophobia and related intolerance. Implementing such plans would provide EU Member States with an effective means for ensuring that they meet their obligations under the Racial Equality Directive and the Framework Decision on Racism and Xenophobia. The EU High Level Group on combating racism, xenophobia and other forms of intolerance – formed in June 2016 – provides EU Member States with a forum for exchanging practices to secure the successful implementation of such action plans.

FRA opinion 3.2

EU Member States should adopt specific national action plans to fight racism, racial discrimination, xenophobia and related intolerance. In this regard, Member States could follow the exhaustive and practical guidance offered by the Office of the United Nations High Commissioner for Human Rights on how to develop such specific plans. In line with this guidance, the action plans should set goals and actions, assign responsible state bodies, set target dates, include performance indicators, and provide for monitoring and evaluation mechanisms.

Systematically collecting disaggregated data on incidents of ethnic discrimination, hate crime and hate speech can contribute to better application of the Racial Equality Directive and the Framework Decision on Racism and Xenophobia. Such data also facilitate evaluations of policies and action plans to prevent and combat racism, xenophobia and related intolerance. However, evidence collected by FRA shows that persistent gaps remain in how EU Member States record incidents of ethnic discrimination and racist crime. Unreported incidents remain invisible and preclude victims from seeking redress. This is particularly relevant considering EU Member States' obligation to actively ensure the effective protection of victims and guarantee their access to effective protection and remedies under Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination. Through the EU High Level Group on Combating Racism, Xenophobia and other forms of intolerance, FRA continues to work with Member States, EU institutions and international organisations to improve the recording of and data collection on hate crime.

FRA opinion 3.3

EU Member States should make efforts to systematically record, collect and publish annually comparable data on ethnic discrimination and hate crime to enable them to develop effective, evidence-based legal and policy responses to these phenomena. These data should include different bias motivations as well as other characteristics, such as incidents' locations and anonymised information on victims and perpetrators. Any data should be collected in accordance with national legal frameworks and EU data protection legislation.

Evidence from 2016 shows that a number of equality bodies faced budgetary and staff cuts or legislative amendments relating to their mandates, which could affect their effective functioning. Article 13 (1) of the Racial Equality Directive requires all EU Members States to designate an equality body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. However, the directive only provides minimum standards for the competences of equality bodies. In the context of data protection, EU law refers explicitly to independence and defines what such independence requires. The General Data Protection Regulation, adopted in 2016, calls for sufficient "human, technical and financial resources, premises and infrastructure" for data protection authorities.

FRA opinion 3.4

EU Member States should allocate to equality bodies the human, technical and financial resources, premises and infrastructure necessary to allow them to fulfil their functions and deploy their powers within their legal mandate effectively and independently.

Members of ethnic minority groups continued to face discriminatory ethnic profiling by the police in 2016, against a backdrop of heightened tension caused by terrorist attacks in EU Member States. This practice contradicts the principles of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 14 (prohibition of discrimination) of the European Convention on Human Rights, relevant jurisprudence of the European Court of Human Rights, as well as primary and secondary EU law. Training and internal monitoring could help to detect disproportionate targeting of ethnic minorities and lead to corrective action by the relevant authorities.

FRA opinion 3.5

3.5 EU Member States should end discriminatory forms of ethnic profiling. This could be achieved through providing systematic training on anti-discrimination law to law enforcement officers, as well as by enabling them to better understand unconscious bias and challenge stereotypes and prejudice. Such trainings could also raise awareness on the consequences of discrimination and on how to increase trust in the police among the public. In addition, EU Member States could consider recording the use of stop-and-search powers, and in particular recording the ethnicity of those subjected to stops, in accordance with national legal frameworks and EU data protection legislation.

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UN & CoE

28 January – Council of Europe (CoE) Commissioner for Human Rights issues his report following a visit to Belgium in September 2015

January

16 February – CoE Commissioner for Human Rights publishes his letters to the governments of Bulgaria, France, Hungary, Italy and Sweden concerning evictions of Roma

February

1 March – United Nations (UN) Committee on the Rights of the Child publishes its concluding observations on Ireland

1 March – European Commission against Racism and Intolerance (ECRI) publishes its fifth monitoring reports on France, Monaco and Georgia and the conclusions on the implementation of its priority recommendations in respect of Ireland and Liechtenstein

14 March – UN Committee on the Elimination of Discrimination against Women (UN CEDAW) publishes its concluding observations on the Czech Republic

17-18 March – ECRI issues its fifth monitoring reports on Cyprus, Italy, Lithuania and conclusions on Finland, the Netherlands and Portugal

March

21 April – UN Human Rights Committee adopts its concluding observations on Slovenia

28 April – UN Human Rights Committee adopts its concluding observations on Sweden

April

17 May – UN Committee on the Rights of Persons with Disabilities publishes its concluding observations on Slovakia

19 May – Ad hoc Committee of Experts on Roma and Traveller Issues (CAHROM) releases a thematic report on child/early and forced marriages within Roma communities

May

3 June – UN Committee on the Rights of the Child publishes its concluding observations on Bulgaria

7 June – ECRI publishes its fifth monitoring report on Cyprus, Italy, the Former Yugoslav Republic of Macedonia, and Lithuania, and the conclusions on the implementation of its priority recommendations in respect of Finland, the Republic of Moldova, The Netherlands, Portugal, the Russian Federation and San Marino

11 June – UN Committee against Torture publishes its findings on France

15 June – CoE Commissioner for Human Rights issues his report following a visit to Poland in February 2016

22 June – CAHROM releases thematic reports on Roma health mediators and on vocational education and training for Roma

29 June – release of a joint statement on evictions of Roma and Travellers, by the Operational Platform for Roma Equality (OPRE), and signed by the Office of the UN High Commissioner for Human Rights (OHCHR), the OSCE's Office for Democratic Institutions and Human Rights (OSCE/ODIHR), FRA, the European Network of European National Human Rights Institutions (ENNHRI), the European Network of Equality Bodies (Equinet), and the CoE

29-30 June – ECRI issues its Fifth monitoring report on Malta, Turkey and the United Kingdom

June

12 July – UN Committee on the Rights of the Child publishes its concluding observations on the United Kingdom

14 July – UN Committee on Economic, Social and Cultural Rights publishes its concluding observations on Sweden and United Kingdom

20 July – UN Committee on the Rights of the Child publishes its concluding observations on Slovakia

25 July – UN CEDAW publishes its concluding observations on France

July

23 August – CoE Commissioner for Human Rights publishes his letter to the Prime Minister of Romania concerning the human rights of Romania's Roma population

August

September

3 October – Committee on the Elimination of All Forms of Racial Discrimination (CERD) publishes its concluding observations on Greece and the United Kingdom

5 October – CoE Commissioner for Human Rights issues his report following a visit to Croatia in April 2016

26 October – UN Committee on Economic, Social and Cultural Rights publishes its concluding observations on Poland

31 October – UN HCR adopts its concluding observations on Slovakia

October

4 November – CoE Commissioner for Human Rights publishes his letter to the Prime Minister of the Czech Republic concerning the human rights of Roma and persons with disabilities

22 November – UN Human Rights Committee publishes Concluding Observations on the fourth report of Slovakia

November

December

EU

January

February

March

April

May

28 June – European Court of Auditors (ECA) issues a special audit report on EU-funded projects to promote Roma integration in the Member States

June

27 July – European Commission issues a Communication assessing implementation of the EU Framework for National Roma Integration Strategies and the Council Recommendations on Effective Roma Integration Measures in the Member States

July

August

September

13 October – Council of the EU issues Conclusions on the European Court of Auditors Special Report No. 14/2016 – 'EU policy initiatives and financial support for Roma integration: significant progress made over the last decade, but additional efforts needed on the ground'

October

November

8 December – Council of the EU adopts Conclusions on Roma

20 December – European Parliament issues Report on a European Pillar of Social Rights (2016/2095(INI))

December

4 Roma integration

Despite the ambitious goals set by national Roma integration strategies and the significant contribution of EU funds, little progress was visible in 2016. Over the past year, evidence on the situation of Roma in employment, education, housing and health shows that progress has been slow in respect to implementation of the EU Framework for National Roma Integration Strategies. Discrimination and anti-Gypsyism persist, and de facto segregation in housing and education continue to affect many Roma. The proposed European Pillar of Social Rights could give new impetus to Roma integration efforts, if it includes explicit reference to the right to non-discrimination guaranteed by Article 21 of the EU Charter of Fundamental Rights.

4.1. Another challenging year for Roma integration

FRA has conducted its Second European Union Minorities and Discrimination Survey (EU-MIDIS II), which, among others, collected information on almost 34,000 persons living in Roma households in nine Member States. The results largely confirm the assessment of the European Commission's Communication of June 2016 on the implementation of the EU Framework for National Roma Integration Strategies. Acknowledging some positive trends and developments, it also identified "serious bottlenecks [...] in fighting anti-Roma discrimination, especially residential and educational segregation and prevention of forced evictions".[1]

In parallel, country-specific recommendations were issued under the European Semester. Those for **Bulgaria**, the **Czech Republic**, **Hungary**, **Romania** and **Slovakia** call for action to increase the provision of quality education for Roma and their inclusion in schools and pre-schools, and to prevent early school leaving.[2] Also along these lines, the Council conclusions on 'Accelerating the Process of Roma Integration' express regret that only limited progress has been made in advancing Roma integration, in particular at the local level, because of insufficient cooperation between stakeholders, lack of commitment by local authorities, the ineffective use of available funds and continued discrimination against Roma. In this context, the Council conclusions in December 2016 reaffirmed the EU Framework for National Roma Integration Strategies up to 2020 and emphasised the need for integrated measures to improve the situation of marginalised and disadvantaged groups in Europe, including Roma.[3]

On terminology

The Council of Europe uses 'Roma and Travellers' as umbrella terms. They refer to Roma, Sinti, Kale, Romanichals, Boyash/Rudari, Balkan Egyptians, Eastern groups (Dom, Lom and Abdal) and groups such as Travellers, Yenish, and the populations designated under the administrative term "Gens du voyage", as well as persons who identify themselves as Gypsies.

See the Council of Europe's webpage dedicated to Roma and Travellers

The selected EU-MIDIS II findings published in November 2016 confirm the need for integrated measures. As many as 41 % of Roma respondents in the nine EU Member States surveyed felt discriminated against because of their Roma background at least once in the preceding five years in at least one area of daily life asked about in the survey (looking for work, at work, housing, health and education). A total of 26 % of Roma indicated that the last incident of

discrimination based on their Roma background took place in the 12 months preceding the survey.[4] These findings largely corroborate those of the Eurobarometer 2015 on discrimination, which highlights that a large proportion of the general population in the countries covered by EU-MIDIS II consider discrimination based on ethnic origin to be fairly or very widespread in their country (46–70 %).[5]

FRA ACTIVITY

EU-MIDIS II: generating data on the fundamental rights situation of Roma

In 2016, FRA completed the Second European Union Minorities and Discrimination Survey (EU-MIDIS II). Among others, it collected information on almost 34,000 persons living in Roma households in nine Member States. The survey was the third time the agency collected data on the fundamental rights situation of Roma. The data allow comparisons with Eurostat data, while retaining, as far as possible, comparability with the previous surveys on Roma.

In the framework of EU-MIDIS II, FRA surveyed Roma in nine EU Member States where probabilistic sampling using some form of random selection of respondents was possible: **Bulgaria**, the **Czech Republic**, **Greece**, **Hungary**, **Poland**, **Portugal**, **Romania**, **Slovakia** and **Spain**. The data are representative for Roma in geographic or administrative units with density of Roma population higher than 10 %.

For more information, see FRA's webpage on the survey and FRA (2016), Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Roma – Selected findings, Publications Office, Luxembourg, 2016

This chapter presents evidence on challenges faced by Roma in the areas of education, employment, housing and health, and also with respect to hate crime, rights awareness, and reporting of discrimination and hate crime.

4.1.1. Children and education

The EU has a responsibility to promote the protection of children's rights under Article 3 (3) of the Treaty on European Union (TEU). The EU Charter of Fundamental Rights guarantees the protection of the rights of the child, in particular under Article 24 (on the rights of the child) and Article 31 (on the prohibition of child labour). The 2013 Council Recommendation on effective Roma integration measures[6] notes that the situation of Roma children in the Union is particularly worrying, and recommends specific measures, in particular as regards education. Across the EU, primary and lower secondary education is compulsory and free of charge. This means that governments have an obligation to ensure that all children, including Roma, enrol in and attend school.

Several years after the 2011 Commission Communication on an EU Framework on National Roma Integration Strategies, however, Roma children continue to live under conditions that violate their fundamental rights, ▶ the results of EU-MIDIS II show. As discussed in Chapter 7 of this report, child poverty is an issue of high concern, and Roma children are particularly vulnerable. Every third Roma child in the countries covered by EU-MIDIS II was living in a household in which at least one person had faced hunger at least once in the preceding month.[7]

Education is key to improving life chances and escaping the vicious cycle of poverty and exclusion. As noted above, a June 2016 report by the European Commission assessed the implementation of the EU Framework for National Roma Integration Strategies and the relevant Council Recommendation. It confirms that "education continues to receive the most attention by Member States in their integration measures". In their national policies, Member States focus on countering early school leaving (although in many cases these strategies do not explicitly target Roma); promoting access to and quality of early education (increased funds allocated to building kindergartens, legislative changes to introduce or extend compulsory pre-school education, etc.); and promoting inclusive education and individualised support to children in mainstream education (preventing placement in special schools on the basis of social background).[8] However, segregation and early school leaving remain problems for Roma children, requiring more concerted and targeted efforts.

According to EU-MIDIS II, 7 % of respondents (students or parents) experienced discrimination in education because of their Roma background in the 12 months preceding the survey, and twice as many (14 %) did so in the five years preceding the survey.[9] Additionally, on average, only every second Roma child in the relevant age group attends early childhood education (compared with the EU 2020 strategy target of 95 %) – a small increase from the previous survey results. As a result, Roma children also lag behind the general population in enrolment in subsequent levels of education (see Table 4.1).

Segregation in education remains a problem. EU-MIDIS II results show that almost half (46 %) of Roma children aged 6–15 attend schools where all or most of their schoolmates are Roma. The highest percentages were in Slovakia (62 %), Hungary (61 %) and Bulgaria (60 %).[10] In response, the European Commission sent a letter of formal notice to **Hungary** in May 2016, the first step ▶ of an infringement procedure (see Chapter 3 for more

Table 4.1: Enrolment rates of Roma in each level of education, by age group, compared with the general population in nine EU Member States (%)

Education level (ISCED 2011)[a]	Roma			General population	
	Net Enrolment rate[b]	Total Enrolment rate[c]	Not attending any educational level	Net enrolment rate	Total Enrolment rate
ISCED1+2	86	93	7	90	93
ISCED3	30	52	48	79	92
ISCED4+	(2)[d]	5	95	34	47

Notes: [a] *The United Nations Educational, Scientific and Cultural Organization (UNESCO) developed the International Standard Classification of Education (ISCED) to facilitate comparisons of education statistics and indicators across countries on the basis of uniform and internationally agreed definitions.*

[b] *Net enrolment rate: percentage of children of the relevant age attending education level that corresponds to their age out of the total number of children of that age.*

[c] *Total enrolment rate: percentage of children of the relevant age attending any education level out of the total number of children of that age.*

[d] *Value based on low number of observations.*

Sources: *FRA, 2016 (Second European Union Minorities and Discrimination Survey: Roma – Selected Findings, p. 25); UNESCO, International Standard Classification of Education (ISCED)*

details). The Commission similarly sent letters of formal notice regarding educational segregation to the **Czech Republic**[11] in 2014, and to **Slovakia**[12] in 2015. In **Slovakia**, de facto educational segregation due to residential concentration was reported to and confirmed by the State School Inspectorate in two elementary schools (*Základná škola*), affecting 157 and 200 Romani children in January and February 2016, respectively.[13] In its concluding observations on the combined third to fifth periodic reports of Slovakia, the UN Committee on the Rights of the Child also points out that "Roma children continue to be the victims of de facto segregation in the State party's school system, with over 50 % being taught in Roma-only classes or attending classes in separate school pavilions, often providing inferior education".[14]

Early school leaving continues to affect Roma children disproportionately and is one of the key reasons behind low attainment rates. On average, 68 % of Roma aged 18–24 have attained at most lower secondary education and are not involved in any further training.[15] In **Bulgaria**, the National Council on Cooperation on Ethnic and Integration Issues claimed that a large number of young Roma drop out of school early because their parents are not motivated to send their children to school, and that this remains a great challenge for national and local authorities.[16] In the **Netherlands**, a study revealed that many Roma children attend only primary school and many go to special schools for pupils with learning problems. The study argues that the high truancy rate among Roma children results from discrimination against Roma in the Dutch education system and in society combined with low parental expectations regarding education.[17] The 2016 Observations of the Committee on the Elimination of Racial Discrimination for **Spain** note that early school drop-outs and "ghetto schools, which account for a large number of migrants and Roma children" are a problem in many regions. The committee encourages the state to adopt "effective education policies that ensure the equitable distribution of students, in order to put an end to this phenomenon."[18] FRA's Local Engagement for Roma Inclusion (LERI)[19] research project in Agia Varvara, **Greece**, and in Sokolov, the **Czech Republic**, showed that early school leaving can be addressed by engaging parents and through participatory community-level actions to encourage students to remain in school. LERI in Medway, the **United Kingdom**, also tested family learning models to address the educational needs of both parents and students. LERI is part of FRA's qualitative action research on the ground, identifying drivers of and barriers to inclusion efforts at the local level.

FRA ACTIVITY

FRA research on the ground: Local Engagement for Roma Inclusion

FRA's Local Engagement for Roma Inclusion (LERI) project is a qualitative action research project developed in response to the European Commission's Communication on an EU Framework for National Roma Integration Strategies up to 2020. In 2016, the research project brought together local authorities and residents, Roma in particular, to investigate how they could best be involved in Roma integration actions, and identify which aspects of these actions work, which do not, and why. The project aims to facilitate the engagement of all local stakeholders, including Roma, in joint efforts to enable Roma inclusion. The experience gained and the lessons learned during the process will help improve the design, implementation and monitoring of Roma integration policies and actions at the local level.

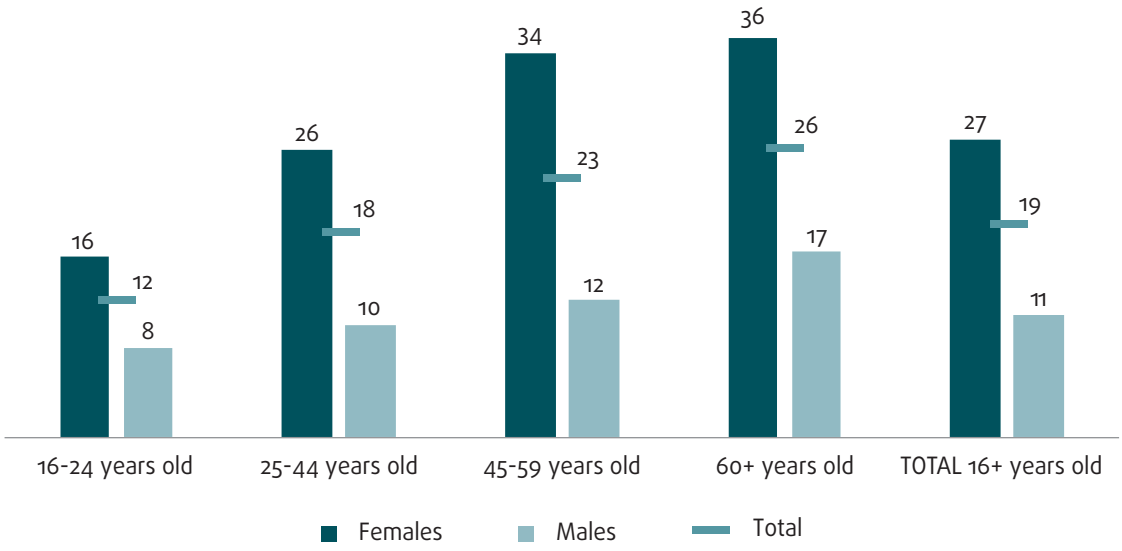
For more information, see FRA's webpage on the project

Early marriage among Roma

Health care, child welfare, education and other relevant authorities have a responsibility to protect and prevent Roma children from marrying early. The mean age at first marriage for Roma across the nine Member States where Roma were surveyed was 26.3 years (25.5 for Roma females and 27.3 for Roma males) – while for the general population in these countries in 2014, it was 30.2 years (28.8 for females and 31.6 for males).

The data from EU-MIDIS II show that certain progress has been achieved in this area. While, on average, 19 % of Roma respondents older than 16 years were married before the age of 18, the incidence of early marriage declines steadily over time: the share of those who married before the age of 18 among respondents older than 60 is 26 %, falling to 12 % for those aged 16-24 (see Figure 4.1).

Figure 4.1: Roma who married for the first time when less than 18 years old, by age and gender (%)



Sources: *FRA, 2016 (EU-MIDIS II); OECD (2016),* OECD Family Database, SF3.1: Marriage and divorce rates

In the **Netherlands**, although the criminal law relating to forced marriages has been tightened and child marriages are illegal, the National Rapporteur for Human Trafficking found that children in the Roma community are still at risk of such practices. The rapporteur also concluded that, at the moment, no active approach is in place under criminal law to tackle forced early marriages.

Promising practices combating early marriage are in place in some Member States. An EU-funded project called 'Marry when you are ready' – covering **Austria**, **Bulgaria**, **Croatia** and **Italy** – aims to tackle the issue of early and forced marriages among Roma. Similar projects addressing early marriage were implemented in **Belgium**, **Bulgaria**, **Greece**, **Slovenia** and **Spain** through a multi-country 'Early Marriage Prevention Network' project.

Sources: International Centre for Reproductive Health (ICRH) (2016), Huwelijksdwang in België – Een analyse van de huidige situatie, Ghent; Netherlands, National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (Nationaal Rapporteur Mensenhandel en Seksueel Geweld tegen Kinderen) (2016), Zicht op kwetsbaarheid. Een verkennend onderzoek naar de kwetsbaarheid van kinderen voor mensenhandel; Associazione Promozione e Solidarietà – Centro di Servizio per il Volontariato del Lazio, 'Marry when you are ready'; European Roma Information Office, Early Marriage Prevention Network

Promising practice

Providing education to hard-to-reach populations

France is among the countries applying various approaches to provide Roma children with access to education. One example is *Camion école – Antennes Scolaires Mobiles* – a mobile classrooms project aiming to make school accessible to Roma children living in slums. Three mobile schools of the association ASET 93 have been operational in the Department of Seine-Saint-Denis, providing education to Roma children. The approach is particularly relevant today, with the issue of children living in unsettled conditions – not just Roma, but also migrants and refugees – increasingly a challenge.

Another example is the work of the *Groupe de suivi académique pour la scolarisation des enfants vivant en situation de grande précarité* in the region of Paris. Formed in September 2016, the group is a network of different actors (teachers, social workers and NGOs) who support children at risk of poverty in their education.

The success of both approaches depends on the support and engagement of all local stakeholders. Both send an important message: the technical infrastructure (in the first case a mobile school unit) is the last element of the chain leading to success. Unless other elements – such as preparatory work with local communities and the engagement of people who can be role models for the children – are in place, success is not feasible.

For more information, see France, Ministry of Education (Ministère de l'Education), 'Organisation of the schooling of newly arrived non-French-speaking pupils' (Organisation de la scolarité des éléves allophones nouvellement arrivés), Instruction No. 2012-141, 2 October 2012; and the website of ASET 93.

The importance of education was emphasised in the Council Conclusions on Accelerating the Process of Roma Integration, which urged Member States to ensure equal access of Roma to education, increase efforts to eliminate all forms of segregation in education (at all levels and particularly the segregation of Roma children into special schools), and provide good-quality education.[20] The 2016 statement by the Chair of FRA's Fundamental Rights Forum draws attention to the responsibility of EU institutions and EU Member States to "encourage the learning of social competence and human rights principles, enhance critical thinking and media literacy, and increase intercultural understanding through education."[21] Member States demonstrate various approaches to this.

In **Bulgaria**, the new Pre-school and School Education Act (*Закон за предучилищното и училищното образование*), in force since 1 August 2016, defines among its main principles the provision of equal access to quality education and the inclusion of every child in the education process. The law introduces a national educational standard for children with mother tongues other than Bulgarian and prohibits the formation of classes or groups of children based on their ethnic origin. Under the law, every school and kindergarten is obliged to prepare its own programmes for prevention of early drop-out and for inclusion of children from vulnerable groups.[22]

Promising practice

Offering after-school activities via 'Tanoda' schools

'Tanoda' stands for 'study hall'. The project offers structured afternoon activities to vulnerable children in **Hungary**. It dates back to the early 1990s, when a number of civil society actors realised that just bringing children from vulnerable or marginalised backgrounds to school is only the beginning of the long road to their integration. After-school activities (not limited to assistance with homework) is no less important for overcoming deficits in knowledge, social or concentration skills.

When the programme started, it was operated by non-governmental organisations only and funded primarily by private donors. In the 2000s, the proportion of public funding started to increase and, in 2012, the government launched a publicly funded 'Tanoda Programme' using European Social and Investment Funds (ESIF). In the first budgetary period, between 2012 and 2014, public spending (from the European Social Fund) reached HUF 5,300 million (c. € 17 million) and the number of study halls tripled within these two years; in October 2014, 5,000 students were studying in 169 schools or organisations in the framework of the programme.

For more information, see State Secretariat responsible for Social Affairs and Social Integration (Szociális Ügyekért és Társadalmi Felzárkózásért Felelős Államtitkárság) (2014), 'Within two years the number of after-schools tripled' (Két év alatt megháromszorozódott a tanodák száma), Press release, 16 October 2014

The Government of the **Czech Republic** has put in effect several mainstream mechanisms that are expected to have a positive impact in the field of inclusive and early childhood education, explicitly affecting Roma. Amendments to the Education Act (561/2004 Coll.), as defined in Decree no. 178/2016 Coll., ensure that compulsory early childhood education starts at the age of five and envisage preferential admission for Roma children to kindergartens that are municipally owned.[23] Decree No. 27/2016 Coll. to the act stipulates that children with special needs are to be provided, free of charge, with supportive measures that enable them to pursue their education in mainstream schools.[24]

To tackle early school drop-out among Roma children, particularly among young girls, the government in **Portugal** is planning to hire Roma mediators to bridge the gap between Roma families and schools in areas where Roma communities reside and thus try to reverse the trend of early school drop-out among these children.[25] The Portuguese government also launched a Grants Programme for University Scholarships for Roma students in 2016. It envisages 25 scholarships during the 2016/2017 school year.[26]

In **Romania**, the Ministry of National Education (*Ministerul Educației Naționale*, MEN)[27] set aside 622 places in universities for Roma students in 2016, besides 265 places for masters' degrees; and 3,150 places were allocated for Roma students in high schools. A Romani-language curriculum was developed and included in the national curriculum. **Romania** also established a network of inspectors for Roma education issues, which means that each County School Inspectorate included in its staff plan a position for an inspector for minorities, and there are also three such positions within the central office of the MEN. In October 2016, the National School for Political and Administrative Studies launched a two-year Master Course for Roma Studies to help stakeholders dealing with Roma issues.

Implementing integration measures in education can create friction between communities, if Roma are exclusively rather than explicitly targeted. This happened in **Bulgaria**, where in 2016 the Centre for Educational Integration of Children and Schoolchildren from Ethnic Minorities (CEICSEM) (*Център за образователна интеграция на децата и учениците от етническите малцинства*, ЦОИДУЕМ) offered a stipend of € 30 per month only to Roma pupils with average grades of at least 3.5 on a scale from 2 to 6, to support them in completing secondary education.[28] However, the project (and the long-term benefits of affirmative action in general) was not properly communicated and non-Roma parents perceived this as discriminatory.[29]

4.1.2. Employment

Employment is a core element of the Europe 2020 growth strategy, which aims to ensure that 75 % of the population aged 20–64 is employed by 2020. In regard to Roma, the 2013 Council Recommendation on effective Roma integration[30] recommends that Member States take effective measures, including combating discrimination and supporting first work experience, vocational training, on-the-job training, lifelong learning and skills development, self-employment and entrepreneurship. FRA's Chair's Statement following the 2016 Fundamental Rights Forum calls for "more precise and targeted benchmarks in the areas of growth and quality employment, adequate income support, and universal access to quality services."[31] The emerging European Pillar of Social Rights identifies employment as a key priority. The European Parliament report on a European Pillar of Social Rights also addresses various aspects of employment and employability as key determinants of social inclusion and highlights the importance of personalised, face-to-face support, in particular for excluded and vulnerable households.[32]

Despite efforts undertaken by Member States, and as reported by FRA in 2016, Roma participation in the formal labour market remains weak. As the European Commission Communication concludes, low levels of education and skills and widespread discrimination are factors explaining poor employment outcomes for Roma.[33]

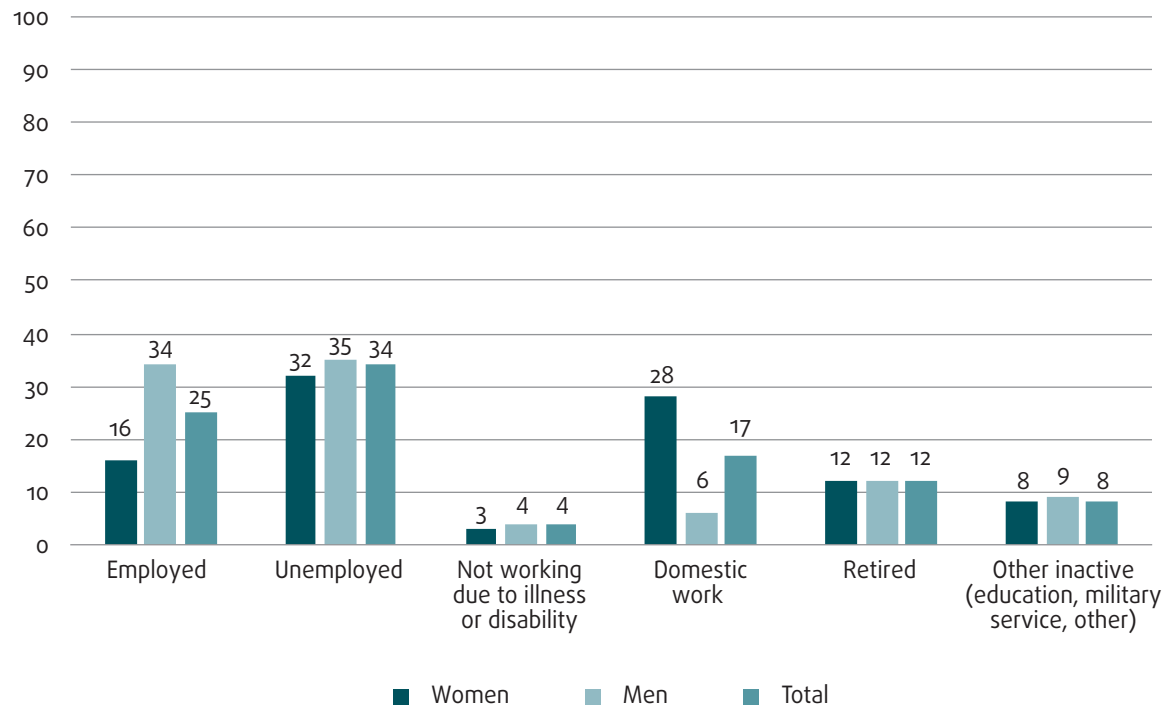
The results of EU-MIDIS II support the Commission's conclusion (see Figure 4.2). Only a quarter of the respondents consider themselves 'employed'. Not surprisingly, the 'at-risk-of-poverty rate' among Roma in the nine Member States covered by the survey was on average 80 %.[34]

Low employment rates result from a variety of factors, such as low qualifications, early school leaving, lack of vocational skills and training, general unemployment rates, etc. However, in the case of Roma, prejudice and discrimination augment all these issues, further decreasing the chances of employment. When looking for work, on average, one in six Roma respondents felt discriminated against on the grounds of their ethnic origin in the 12 months preceding the survey; this prevalence increases to 40 % if the period is extended to the five years before the survey. Roma also reported experiencing discrimination when at work: 5 % in the previous 12 months and 17 % in the previous five years.[35]

Roma are not the only group suffering from unemployment, but the magnitude of this phenomenon among Roma is unparalleled. The combination of inadequate skills, prejudice and discrimination comes on top of the 'usual' risks related to sluggish economies, jobless growth and decline in labour-intensive occupations. This is why achieving tangible improvements in the area of employment of Roma is particularly challenging.

The Council conclusions from December 2016 on accelerating the process of Roma integration include reference to specific actions that can address prejudice and discrimination against Roma and improve their skills to improve access to work opportunities. Such actions would seek synergies between education and employment policies to improve the flexibility, mobility and employability of Roma. To address jobless growth and the decline of labour-intensive occupations, the Council also calls for the creation of sustainable job opportunities in the least developed regions; support for the employability of young Roma; promotion of

Figure 4.2: Current self-declared main activity in nine EU Member States, all persons in Roma households aged 16 years or over (%)



Source: *FRA, 2016 (Second European Union Minorities and Discrimination Survey: Roma – Selected findings, p. 18)*

policies such as vocational and on-the-job training, individual counselling services, social entrepreneurship and first work experience programmes; and increased job opportunities in the public sector, especially the education system, to prevent the intergenerational transmission of poverty in Roma communities.[36]

Policy measures on employment vary among Member States and range from training and requalification to community work. In general, Member States in their reports to the Commission gave priority to mainstreaming measures for all unemployed people, such as training, subsidised jobs and public works, without explicit reference to Roma. However, many of them apply a mix of targeted and mainstreamed measures. Most Member States also report measures supporting first work experience, vocational or on-the-job training, lifelong learning and skills development.

For example, in **Belgium**,[37] as part of the European Social Fund (ESF) Operational Programme 2014–2020, the agency ESF Flanders (*FSE Vlaanderen*) finances projects that organise an integrated pathway towards training and jobs for people from the Roma community in Flanders and Brussels. In **Hungary**, employment interventions targeting Roma are implemented as part of the Hungarian National Social Inclusion Strategy to combat long-term poverty, which mentions Roma explicitly. The interventions include education and training, as well as public employment programmes targeting mainly undereducated, long-term unemployed people on a compulsory basis (currently 183,000 participants annually). However, public work schemes may not be enough to improve substantially the reintegration of participants in the open labour market, and also bear the risk of "locking participants into the scheme, particularly low-skilled workers and people in disadvantaged regions."[38] Employment components are also included in complex interventions to improve services in disadvantaged regions with a budget of € 58 million and in complex anti-segregation programmes with a budget of € 154.8 million.[39]

In **Romania**, an Integrated Package to Combat Poverty/Anti-Poverty Package (*Pachetul integrat pentru combaterea sărăciei*)[40] was launched at the end of February 2016. It was designed bearing in mind all public policies that aim to combat poverty and derive their budgets from state funds and the European Structural and Investment Funds (ESIF). The Operational Program for Human Capital also targets Roma communities directly (call 4.1) and indirectly (call 4.2) for implementing integrated services providing support in issuing the ID documents.

Slovakia adopts a mix of targeted and mainstreamed approaches and relies predominantly on ESIFs to implement Roma integration policies. The Implementation Agency of the Ministry of Labour, Social Affairs and Family

(*Implementačná agentúra Ministerstva práce, sociálnych vecí a rodiny*), using the ESF, supported national social field work and community work projects in some areas with particularly concentrated Romani populations. The projects had a specific focus on young people and children.[41]

In **Spain**, the long-established Acceder Programme (*Programa Acceder*), currently funded through the ESF under the Operational Programme for Social Inclusion and Social Economy, develops personalised 'roadmaps' to assist young Roma to access the labour market. The Learning by Doing Programme (*Programa Aprender Trabajando*) aims to increase employability and professional skills, as well as equal access to the labour market, for young Roma. In 2011, the Acceder Programme obtained authorisation from the Spanish Ministry of Employment, through the Spanish Public Employment Service (*Servicio Público de Empleo Estatal*), to function as an employment agency throughout Spain. This allows the *Fundación Secretariado Gitano* (FSG) to bring employment support services closer to Roma in their efforts to access employment. To date, more than 87,000 people have benefited directly from the Acceder Programme, with Roma constituting 67 %, and women 53 %, of the beneficiaries, far surpassing its initial objectives. Over a period of 15 years, the FSG helped into work more than 62,000 people, of whom 70 % were Roma and 52 % were women. Furthermore, it was the first job for 27 % of them. On average, half of the participants found a job after completing the project.[42]

The **Swedish** Employment Office (*Arbetsförmedlingen*) and the municipalities report that they have increased their contact with Roma, which has resulted in more people receiving support for studying and work. Roma relations officers (*brobyggare*) hired to serve in schools, social services and employment offices have played a significant and positive role in the initiative.[43]

Targeted training and participatory support activities can support Roma entrepreneurs in establishing small-scale micro-enterprises as well as expanding and improving their businesses, preliminary findings from FRA's LERI[44] research in Agia Varvara, **Greece** and in Besence, **Hungary** show. Experiences from LERI in **France** also show that participatory activities to help learn French can support entry into the labour market, particularly for Roma coming from other EU Member States.

4.1.3. Housing

Access to adequate housing with basic infrastructure is an essential precondition for social inclusion. Article 34 (3) of the EU Charter of Fundamental Rights recognises the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources. The Council Recommendation on effective Roma integration calls for more effective measures to eliminate spatial segregation, promote non-discriminatory access to social housing, and ensure access to public utilities and infrastructure for housing in compliance with national legal requirements.[45] However, the 2016 Commission report notes that "the most important housing challenges – namely fighting segregation and preventing forced evictions – were insufficiently addressed", although several Member States reported measures promoting non-discriminatory access to social housing, while others reported measures to tackle segregation.[46]

Data from EU-MIDIS II highlight the urgent need for concrete measures to ensure that Roma enjoy the right to adequate housing. When trying to rent or buy an apartment or house, 41 % of Roma respondents had felt discriminated against, based on their Roma background, in the preceding five years. Housing and employment are the two areas where Roma appear to experience discrimination the most.[47] On average, 30 % of Roma in the nine Member States live in households without tap water and 46 % have no toilet, shower or bathroom inside their dwelling.[48]

In **Romania**, the government continued to implement the Social Housing Pilot Programme for Roma Communities,[49] which aims to build 300 units of social housing for Roma. In **Spain**, Roma are explicitly mentioned in the Development Plan for Promoting the Rental Housing, Building Rehabilitation and Urban Regeneration and Renewal, 2013–2016.[50] Meanwhile, in the **United Kingdom**, a 2016 report by the Equality and Human Rights Commission notes that certain local authorities are reluctant to provide new sites or refurbish existing ones, although funding was available. Gypsies and Travellers face difficulties in obtaining planning permission to develop private sites, the commission reports.[51] In **Ireland**, a decision delivered on 16 May 2016 by the Council of Europe's European Committee on Social Rights (ECSR) concerning housing found Ireland in breach of Article 16 of the European Social Charter in relation to the provision and maintenance of accommodation for Travellers. The judgment arose from a 2013 collective complaint made jointly by the European Roma Rights Centre with support from the Irish Traveller Movement.[52]

The Council Conclusions of December 2016 again urge Member States to "prevent further unjustified forced evictions of Roma by ensuring that forced evictions always take place in full compliance with Union and national law and in accordance with international human rights instruments, in particular the European Convention on Human Rights".[53] Still, there were several allegations in 2016 of evictions and/or forced demolitions of Roma houses in a number of Member States. In **Bulgaria**, non-governmental organisations (NGOs) reported that Roma houses had been demolished in the Stolipinovo neighbourhood of Plovdiv[54] and in Stara Zagora, Varna and Pleven.[55] In **Cyprus**, in 2016 Roma families residing in abandoned Turkish Cypriot houses in Limassol were

served with eviction orders. The evictions were to a large extent averted through the combined efforts of the school attended by the Roma children, the Ombudsman and the Commissioner for Children's Rights.[56]

In **France**, NGOs reported that the number of evictions from camps was particularly high during the first quarter of the year (3,683 people forcibly evicted from 25 locations), slowed somewhat during the second quarter of 2016 (932 people forcibly evicted from 12 locations), but again increased thereafter.[57] The number of evictions however continued to decline, a trend since 2013 (some 20,000 people evicted in 2013, some 11,500 in 2015, and some 10,000 in 2016).

In **Slovakia**, NGOs reported that Romani families had been evicted from the Romani suburb Lunik IX in Košice and then set up a temporary settlement in nearby woods,[58] and that the city of Žilina had resumed evicting Romani families living there and demolishing their houses.[59] In its concluding observations on the nineteenth and twentieth periodic reports of **Italy**, the UN Committee on the Elimination of Racial Discrimination reiterated its deep concern about the persistent and entrenched discrimination that Roma, Sinti and Camminanti communities continue to experience. In particular, forced evictions continue; they continue to live in segregated camps or housing areas with substandard accommodation, many unsuitable for human habitation, and in remote areas far from basic services, including healthcare and schools; municipal authorities build new segregated Roma-only camps; and local authorities have introduced discriminatory criteria to assess social housing and housing benefits.[60]

FRA's LERI[61] research tested participatory community-level approaches to addressing housing exclusion and risk of evictions, in particular in Stara Zagora, **Bulgaria**, where mapping evicted families helped the local authorities to find appropriate solutions while at the same time raising awareness among Roma households of legal options to rebuild their homes. In Aiud and in Cluj-Napoca, **Romania**, the project developed local action groups on housing inclusion to address the housing insecurity of families in informal settlements, looking for ways to give houses official legal status, submit social housing applications, and propose changes to criteria for social housing allocation that are less likely to exclude socially marginalised populations.

4.1.4. Health

In their reports on implementation of the Council recommendation, most Member States reported measures to facilitate access to healthcare and preventative care, in particular vaccination of children and family planning, and to raise health awareness. However, for some Roma, lack of registration and health insurance coverage can limit access to healthcare.[62] The data from EU-MIDIS II show that, on average, 74 % of Roma respondents report that they are covered by national basic health insurance and/or additional insurance. At the same time, only 8 % of Roma respondents felt discriminated against because of their Roma background when using healthcare services in the 12 months preceding the survey.[63]

FRA's LERI[64] research in Pavlikeni, **Bulgaria**, identified one of the main challenges of the local community as low coverage of national health insurance and exclusion from the scheme. The project tested a small-scale pilot to cover health insurance fees for some Roma families so that they could overcome financial barriers to accessing healthcare and be reintegrated into the healthcare system.

Promising practice

Setting up health mediator networks

Health mediators are increasingly common in Member States. **Bulgaria** is one of the first to test and implement them not just as a system for providing access to health services to marginalised Roma communities but also as an opportunity for professional development for young Roma working as mediators.

The Ethnic Minorities Health Problems Foundation launched the approach in Bulgaria in 2001. The aim was to address discrimination that Roma face in access to health services. The foundation ran a pre-admission scheme that has enabled 106 Roma people to study as healthcare professionals: 22 as doctors and the rest as pharmacists, dentists, nurses and midwives. In 2016, a total of 195 health mediators were working in 113 municipalities in Bulgaria, an increase from 109 mediators in 2012. Their positions are funded from municipal budgets. Being part of the community themselves, the health mediators know the specific challenges first-hand and are better equipped to facilitate dialogue and cooperation between the vulnerable populations and the institutions. The implications of such cooperation go well beyond access to health.

A similar approach was adopted in **Slovakia**, where the programme also benefited from the existence of the network of field social workers. In Slovakia the programme relies predominantly on European Structural Funds. In 2016, the NGO Healthy Communities continued to implement the programme in 200 Roma settlements. It engaged some 200 health mediators, focusing on preventative care and health awareness, with a specific focus on children through vaccinations and regular check-ups.

Sources: Thornton, J. (2017), 'Bulgaria attempts to combat discrimination against Roma', Lancet, Vol. 389, 21 January 2017, pp. 240–241; National Network of Health Mediators (2016), 10th National Meeting of the "Initiative for Health and Vaccination Prophylactics" ' (Десета Национална среща "Инициатива за здраве и ваксинопрофилактика"), 8 December 2016; website of Healthy Communities (Zdravé Komunity)

The recognition of the forced sterilisation of Roma women in past years remains an issue. Regarding the **Czech Republic**, the Budapest-based NGO European Roma Rights Centre (ERRC) issued a parallel report[65] to the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) in January 2016. It pointed to persisting legal, policy and other obstacles concerning the compensation of Roma women who were subjected to forced sterilisation in the past. Another report, on the personal experiences of sterilised Romani women, followed in November.[66] The UN Human Rights Committee also raised the issue of recognising past forced sterilisation cases in its concluding observations on the fourth report of **Slovakia**.[67]

The services of Roma health mediators are increasingly used. The December 2016 Council conclusions urge Member States to secure funding for healthcare mediator programmes targeting Roma.[68] This approach continued to expand in **Bulgaria**[69] and **Slovakia**[70] in 2016, while **Greece** also included health mediators in legislation aimed at improving access to healthcare for vulnerable groups, including Roma.[71]

4.1.5. Anti-Gypsyism

Deeply rooted prejudice and discrimination that many Roma face contribute to their social exclusion. There is little evidence of systematic efforts to expose and tackle negative stereotypes fuelling anti-Gypsyism. The most extreme manifestation of anti-Gypsyism is in hate crime and hate speech, which Member States need to address as these fall under the scope of the EU's Framework Decision on Combating certain forms and expressions of racism and xenophobia by means of criminal law.[72] The findings of EU-MIDIS II show that one out of five Roma respondents say that someone made offensive or threatening comments to them in person in the 12 months preceding the survey because of their Roma background. Four per cent of Roma respondents report having been physically attacked in the preceding 12 months because of their Roma background. Of Roma who experienced a physical attack, 70 % did not report it anywhere.

The Council of Europe issued a report on the situation of Roma and Travellers in the context of rising extremism, xenophobia and the refugee crisis in Europe in 2016. It notes that incidents of hate speech and hate crime remain frequent across European countries. The social climate is unfavourable for Roma and Travellers, and has worsened amidst the refugee crisis and jihadist attacks in several cities in Europe.[73]

National Roma integration strategies focus on sector-specific issues. References to anti-Gypsyism are rare and generic in nature (see Table 4.2). More specifically, 20 Member States do not mention anti-Gypsyism in their national Roma integration strategies or integrated sets of policy measures. Moreover, in most of these, the strategies do not even refer to racism. Three Member States do mention the term anti-Gypsyism (or its national adaptation), in the introductory sections describing the status of Roma (**Belgium**, **Sweden**) or by listing ECRI General Policy Recommendation No. 13 on combating anti-gypsyism and discrimination against Roma as one of several recommendations taken into account (**Latvia**). **Finland** mentions anti-Gypsyism as the aim in one key area in the strategy. Three countries' strategies also include specific measures to combat anti-Gypsyism – those of the **Czech Republic**, **Italy** and **Spain**. The national Roma integration strategy of the Czech Republic devotes particular attention to this issue.

The UN Committee on the Elimination of Racial Discrimination published its concluding observations on the nineteenth and twentieth periodic reports on **Italy**, noting the prevalence of racist discourse, stigmatisation and negative stereotypes in political debates, which are also directed against Roma.[74] UNAR (*Ufficio Nazionale Antidiscriminazioni Razziali*), the Italian equality body, detected 1,366 cases of

Table 4.2: How do national Roma integration strategies or integrated sets of policy documents reflect Anti-Gypsyism?

Not mentioned	Mentioned only	Have specific goals	Have specific measures
AT, BG, HR, CY,DK, EE, EL, DE, FR, HU, IE, LT, LU, NL, PL, PT, RO, SI, SK, UK	BE: mentioned once (Status section – anti-Roma racism) LV: mentioned once (section on recommendations from various organisations, including the Council of Europe and the EU) SE: mentioned once (living conditions – anti-Roma motive)	FI: mentioned in description of problem and one of the aims of 'Key area 4.5'	CZ: mentioned in the status section, analysis section, with separate sub-section dealing with anti-Gypsyism; in specific goal 10.1 (protection of Roma against extremism and racially motivated crime) ES: under 'Non-discrimination and promotion of equal treatment' mentions a measure to promote implementation of the Council of Europe recommendation on anti-Roma attitudes IT: one of the aims of the strategy; specifically mentions eliminating anti-Gypsyism

Source: *FRA, 2016 (based on information available via the Commission's webpage on Roma integration by EU country)*

online hate speech targeting the Roma population from 1 August to 31 October 2016.[75]

Evidence of the prevalence of hate speech against Roma is also reported in several other countries. For example, in **Bulgaria**, a study on hate speech by the NGO Open Society Institute – Sofia (OSI – Sofia) estimates that the majority of hate speech cases are against Roma,[76] while the NGO Bulgarian Helsinki Committee (BHC) reports that progress in countering hate speech is insignificant.[77]

In **Slovakia**, the Ministry of the Interior recorded 25 complaints of hate speech crimes on the grounds of Roma ethnic origin in 2016. The police are investigating four of them. Furthermore, there were 17 complaints of incitement to racial hatred on the grounds of Roma ethnic origin. Out of these, the police rejected 11 petitions and are continuing to investigate the remaining six cases.[78]

A number of countries reported incidents of hate crime against Roma. In **Bulgaria**, a case of violence against Roma gained significant public attention. On 16 April 2016, a man made a video of himself forcing a young Roma man to say that they were not equal because of their different ethnic origin. The offender received a suspended sentence of 11 months in prison for bodily injury caused with racist motives. He was also placed on probation for three years.[79]

In **Croatia**, a physical attack on a Roma family was reported,[80] and so was a bomb attack on a kindergarten attended by Roma children.[81] The investigation is still in progress, so a complete case description cannot be delivered. In **Italy**, the Italian National Observatory on Hate Speech against Roma and Sinti (*Osservatorio nazionale sui discorsi d'odio nei confronti di rom e sinti*) reported nine violent attacks against Roma in various Italian cities from 1 January to 31 October 2016.[82]

In **Romania**, the NGO European Roma Rights Centre submitted a report to the European Commission highlighting excessive use of force against Roma.[83]

In **Slovakia**, the Public Defender of Rights (*Verejný ochranca práv*) reported that a Roma man had been beaten during his detention at the police station in Lučenec in May 2016. The case is currently under review,[84] as is another complaint reported to the Ministry of the Interior.[85]

In **Sweden**, the Commission against Anti-Gypsyism (*Kommissionen mot antiziganism*) reported[86] in 2016 that, although the legal framework for combating hate crime[87] is adequate, its implementation is not satisfactory, as very few complaints lead to prosecution and even fewer to convictions, despite an increase in the number of hate crimes reported. The report also notes that Roma women and children are particularly at risk of hate crime.[88]

For more information on hate speech and hate crime, see ▶ Chapter 3 on Racism, xenophobia and related intolerance.

4.1.6. Rights awareness and reporting

Awareness of rights, as well as knowing where and how to complain when these are violated, is essential to ensuring access to justice. The 2013 Council recommendation calls specifically on Member States to also empower Roma through the organisation of "information activities to further raise awareness among Roma of their rights (notably in relation to discrimination and the possibilities of seeking redress) and of their civic duties".

Of the 26 % of the Roma respondents who felt discriminated against because of their Roma background at least once in the preceding 12 months, only 12 % reported the last incident to an authority or filed a complaint, EU-MIDIS II results show. Such a low reporting rate should be read together with the low awareness of the organisations or bodies that could provide support or advice in cases of discrimination: 82 % of Roma respondents are not aware of such an organisation in their country. More respondents (29 % on average) recognised an equality body, when the name was shown, although results vary by country. On average, only 36 % of respondents knew that a law prohibiting discrimination based on skin colour, ethnic origin or religion exists; about one third (35 %) thought that such a law does not exist; and 27 % simply did not know whether or not such legislation exists.[89]

Promising practice

Improving access to justice for Roma and other vulnerable groups

A project implemented in **Romania** with support from the Norwegian Financial Mechanism 2009-2014 brought together the Superior Council of Magistracy, the Council of Europe and Norwegian Courts Administration, as well as national partners such as the National Institute of Magistracy and the National Agency for Roma. It aims to increase vulnerable populations' – especially Roma's – awareness, knowledge and assertion of their rights and obligations, as mandatory steps for better access to justice according to European standards. The project adopts a broad social vulnerability perspective – the Roma population is an explicit but not exclusive target group.

One of the project's targets is to strengthen legal professionals' knowledge on the issue of countering discrimination. In this respect, training sessions on antidiscrimination were organised for judges, prosecutors and lawyers during 2015 and 2016.

For more information, see Access to justice for vulnerable groups in Romania, 2014

The importance of being able to access justice becomes evident when looking at cases where discrimination was reported and courts or relevant bodies provided redress.

In **France**, for example, a Roma woman was not allowed to enrol her son in the local primary school. The woman appealed and the court found that the mayor's decision did not sufficiently take into account the child's right to education.[90] In **Italy**, a court found that a politician, a member of the European Parliament, was in breach of legislation for using derogatory language intended to humiliate Roma and contribute to a hostile and intimidating social environment that would hinder Roma integration.[91]

In **Ireland**, the Workplace Relations Commission is the designated body to which complaints are made in the first instance in relation to the Employment Equality Acts 1998–2015 and the Equal Status Acts 2000–2015. Subsequent appeals are heard in the Labour Court or Circuit Court. It adopted twelve decisions about discrimination on the grounds of membership of the Traveller community in 2016 (eleven Equal Status decisions and one Employment Equality decision). Six of these found that the complainant had been discriminated against.

4.2. Improving efforts for Roma inclusion

In 2016, for the first time, Member States reported on the measures taken in response to the 2013 Council Recommendation on effective Roma integration measures in the Member States.[92] The European Commission has reported that 12 Member States (**Austria**, **Belgium**, **Bulgaria**, the **Czech Republic**, **France**, **Greece**, **Hungary**, **Italy**, **Poland**, **Romania**, **Slovakia** and **Spain**) chose to fund measures under the investment priority of the ESF on socio-economic integration of marginalised communities, such as Roma, and they allocated € 1,5 billion to them.[93]

A number of Member States set up national platforms for Roma inclusion to mobilise stakeholders to coordinate action. These national platforms are supported by the Commission and were established in **Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, the **Czech Republic**, **Finland**, **Greece**, **Hungary**, **Latvia**, **Lithuania**, **Romania**, **Slovakia**, **Slovenia** and **Spain**, while **Estonia** established a Roma integration council (*Romade lõimumise nõukoda*).[94]

The national policy frameworks and measures in place do not seem, as yet, to yield significant results on the ground, as the Commission also stressed in 2016.[95] The active involvement of multiple stakeholders, including Roma, local authorities and civil society, is essential for the success of local-level integration measures. This is reflected both in the Commission's 2016 report and in the special report of June 2016 by the European Court of Auditors, which notes that "the need for active participation by civil society organisations, in particular representatives of the Roma community itself, was not always taken into account in the selected [Member States] when national Roma integration strategies were being drafted."[96] The report also notes that relevant stakeholder groups are not always appropriately involved in the preparation and implementation of projects; that omission puts the success and sustainability of the projects at risk.

FRA research also shows that, to have tangible results on the ground that can be monitored, national-level participation needs to be translated into local-level engagement of Roma and local authorities. When local communities come together to jointly discuss integration challenges and have an opportunity to participate in designing, implementing and monitoring local-level inclusion policies and actions, meaningful and tangible results can be achieved. This is reflected in a variety of local-level case studies through FRA's LERI[97] project, a qualitative action research project under FRA's multiannual Roma Programme.

While the active and meaningful engagement of Roma themselves is essential, it is equally important to have in place robust monitoring procedures to inform policy development. In 2016, Member States and the European Commission continued efforts to improve the monitoring of Roma integration measures, as required by the 2013 Council recommendation. Robust and comparable data are essential. The 2016 European Court of Auditors' report issued a relevant recommendation, no. 8 (b), calling on the European Commission to encourage Member States to collect comprehensive and appropriately disaggregated statistical data within the next two years, in accordance with national legal frameworks and EU legislation and including existing possible derogations.[98] The European Commission commented on this recommendation that the issue should be left to the discretion of Member States, in line with the principle of subsidiarity, and also highlighted challenges in the collection of statistical data on Roma, including technical and legal difficulties as well as high costs.

The European Court of Auditors' report also calls for the inclusion of "indicators and target values which deal with anti-discrimination or, more specifically, anti-Gypsyism".[99] In 2016, FRA contributed to these efforts by coordinating and providing technical expertise to a working party on Roma integration indicators – comprised of **Austria**, **Belgium**, **Bulgaria**, the **Czech Republic**, **Croatia**, **Finland**, **France**, **Greece**, **Hungary**, **Ireland**, **Italy**, the **Netherlands**, **Portugal**, **Romania**, **Slovakia**, **Spain** and the **United Kingdom** – which developed a detailed reporting template to support reporting by Member States following the structure

of the Council recommendation. Twenty-one Member States used the template to report on measures taken. By the end of 2016, the Commission took efforts to improve the tool, with the aim of developing a more user-friendly online information collection application to simplify collection of data for indicators that identify measures taken on Roma integration. Further efforts to improve translation and full functionality of the tool are still being addressed.

Meanwhile, the Council Conclusions of December 2016 urge Member States "to set measurable goals and milestones, with a view to accelerating the process of Roma integration", "further develop appropriate data collection, monitoring and reporting methodologies as necessary so as to support effective evidence-based policies" and "maintain a robust system for monitoring and evaluating the effectiveness of the national strategies".

FRA opinions

During 2016, Roma people across the EU continued to face discrimination, segregation and social exclusion. The limited progress in implementing national Roma integration strategies shows the need for a thorough review of the proposed and planned interventions. There is also a need to promote the active and meaningful participation of Roma, particularly at local level. For local-level Roma integration to succeed, the active involvement of multiple stakeholders is of utmost importance, including local authorities, civil society and representatives of all sectors of the local population. National-level participation needs to be translated into local-level engagement of Roma and local authorities to produce tangible results on the ground that can be monitored.

FRA opinion 4.1

EU Member States should review their national Roma integration strategies (or set of integrated policy measures) to ensure that Roma themselves are empowered to actively engage in the process of Roma inclusion. Member States should explicitly identify and implement specific measures to promote the active and meaningful participation and engagement of Roma, especially at local level.

Findings of FRA's second wave of the European Union Minorities and Discrimination Survey (EU-MIDIS II) show that Roma continued to be discriminated against because of their ethnicity in 2016. They face social exclusion and marginalisation, exacerbated by poverty, and are victims of hate crime. Most Roma living in the EU still do not enjoy their right to non-discrimination as recognised under Article 21 of the EU Charter of Fundamental Rights, the Racial Equality Directive and other European and international human rights instruments. While the Racial Equality Directive outlaws ethnic discrimination and the Framework Decision on Racism and Xenophobia requires criminal sanctions, such legal measures alone do not suffice to address the discrimination of Roma. They need to be combined with active inclusion policies to address the racial inequality and poverty that Roma frequently experience.

FRA opinion 4.2

EU Member States should ensure effective enforcement of the Racial Equality Directive and the Framework Decision on Racism and Xenophobia to tackle persisting discrimination against Roma and anti-Gypsyism. They should adopt explicit policy measures to address anti-Gypsyism in their national Roma integration strategies or set of integrated policy measures.

Findings of FRA's second EU Minorities and Discrimination Survey (EU-MIDIS II) show that employment is an area where discrimination against Roma triggers a chain of other vulnerabilities – namely, as regards income, education and housing conditions. Entire households, and not just the unemployed, bear the negative implications of unemployment. Roma children and Roma women constitute especially vulnerable groups, with their rights at risk of violation.

FRA opinion 4.3

The EU should consider including Roma integration in the context of the proposed European Pillar of Social Rights. The pillar should envisage specific provisions addressing the risk of structural discrimination, by, for example, reinforcing the provisions for equal treatment in the workplace and ensuring marginalised populations can effectively exercise their rights.

Tracking progress on Roma integration requires solid data – both on the measures taken, the processes and their outcomes for the people. More needs to be done to ensure the availability of robust data collection and solid monitoring of Roma integration. The European Court of Auditors' Special Report on the EU policy initiatives and financial support for Roma integration confirmed this need. It found that the lack of comprehensive and robust data remains problematic not only in relation to projects, but also for policymaking at EU and national level. However, tools allowing for solid monitoring do exist and the relevant actors can make use of these tools.

FRA opinion 4.4

EU Member States should – in accordance with national legal frameworks, EU data protection legislation and with the active and meaningful engagement of Roma communities – collect anonymised data disaggregated by ethnic identity, allowing the assessment of the National Roma Integration Strategies and policies on Roma inclusion. Eurostat could include relevant questions in large-scale surveys, such as the Labour Force Survey and the EU Statistics on Income and Living Conditions, thereby following the recommendation of the European Court of Auditors. In addition, Member States should develop or use existing monitoring tools of national Roma integration strategies to assess the impact of Roma integration measures.

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UN & CoE

January

February

16 March – European Commission against Racism and Intolerance (ECRI) adopts its General Policy Recommendation No. 16 on safeguarding irregularly present migrants from discrimination

March

April

11 May – Council of Europe (CoE) Secretary General's Special Representative on migration and refugees reports on the situation of refugees and migrants in Greece and the former Yugoslav Republic of Macedonia

31 May – CoE Commissioner for Human Rights releases a report on migrant integration, providing guidance to governments and parliaments on designing and implementing successful integration policies

May

17 June – Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Committee) launches an urgent monitoring exercise focusing on the protection of children affected by the refugee crisis

June

12 July – In a series of judgments – *A.B. and Others v. France* (No. 11593/12), *R.M. and M.M. v. France* (No. 33201/11), *A.M. and Others v. France* (No. 24587/12), *R.K. and Others v. France* (No. 68264/14) and *R.C. v. France* (No. 76491/14) – the European Court of Human Rights (ECtHR) holds that France violated the prohibition of inhumane and degrading treatment when detaining children (Article 3 of the ECHR); in *A.B. and Others* and *R.K. and Others*, the court also holds that the right to liberty and security as well as to respect for family life were violated (Articles 5 and 8 of ECHR)

July

August

19 September – Heads of state and government of UN Member States adopt a global UN strategy in New York to address the challenges resulting from large movements of refugees and migrants

29 September – CoE Ad hoc Committee for the Rights of the Child (CAHENF) initiates work to elaborate European standards on guardianship and age assessment

September

13 October – In *B.A.C. v. Greece* (No. 11981/15), the ECtHR holds that leaving an asylum-seeker under precarious conditions for some 14 years violates the competent authorities' positive obligation to provide an effective and accessible means of protecting the right to private life, also in conjunction with the right to an effective remedy (Articles 8 and 13 of the ECHR)

14 October – CoE Secretary General's Special Representative on migration and refugees expresses concern over French "Calais Jungle" refugee camp

October

3 November – CoE's anti-torture committee publishes a report on its monitoring visit to Hungary, criticising the treatment and conditions of migrants and refugees and noting that material conditions in immigration and asylum detention centres vary considerably

November

13 December – In *Paposhvili v. Belgium* (No. 41738/10), the ECtHR holds that deporting a seriously ill person to Georgia violates the prohibition of torture (expulsion) and the right to respect for family life (Articles 3 and 8 of ECHR)

15 December – In *Khlaifia and Others v. Italy* (No. 16483/12), the ECtHR concludes that the detention of certain irregular migrants in a reception centre on Lampedusa and on board of ships violated Articles 5(1), 5(2) and 5(4) of the ECHR; the ECtHR also found a violation of Article 13 taken together with Article 3 because the applicants had no opportunity to challenge the conditions in which they were held

15 December – CoE's anti-torture committee publishes two reports highlighting inadequate safeguards for foreign nationals returned by air from Italy and Spain but also noting positive observations

December

EU

19 January – European Commission proposes database for third-country nationals' criminal records (ECRIS-TCN)

January

15 February – In *J.N. v. Staatssecretaris van Veiligheid en Justitie* (C-601/15 PPU), the Court of Justice of the European Union (CJEU) for the first time interprets the detention provisions in the asylum acquis in light of the right to liberty and security (Article 6 of the EU Charter of Fundamental Rights) and states that limitations to Article 6 are only allowed when strictly necessary

22 February – Europol launches the new European Migrant Smuggling Centre

February

1 March – In *Ibrahim Alo and Amira Osso* (C-443/14 and C-444/14), the CJEU rules that residence restrictions that are not applicable to other third-country nationals may be imposed on beneficiaries of subsidiary protection only if it is justified to promote their integration

17 March – In *Mirza v. Bevándorlási és Állampolgársági Hivatal* (C-695/15), the CJEU rules that Article 3(3) of Regulation (EU) No. 604/2013 must be interpreted in a way that permits a Member State that has admitted responsibility under the Dublin Regulation to send an asylum applicant to a safe third country

18 March – EU adopts the EU-Turkey statement, enabling the return to Turkey of asylum applicants who reach the Greek islands after 20 March

March

6 April – European Commission announces the reform of the Common European Asylum System and tables a revised legislative proposal for Smart Borders, which includes the establishment of an EU Entry/Exit System

April

4 May – European Commission tables proposals to change the Dublin and Eurodac Regulations and to create a European Union Agency for Asylum

24 May – Passenger Name Record (PNR) Directive enters into force

May

7 June – European Commission publishes an Action Plan on the integration of third-country nationals; it provides a common policy framework and concrete supporting measures to help Member States further develop and strengthen their national integration policies for third-country nationals

7 June – European Commission revises the former Blue Card scheme and proposes a single EU-wide scheme to be used across the EU, aimed at facilitating intra-EU mobility; lowering the salary threshold to enter the scheme; creating more appropriate conditions for recent third-country national graduates and workers in areas with labour shortages; making the Blue Card available for highly skilled beneficiaries of international protection; and strengthening the rights of card holders and their family members

7 June – In *Sélina Affum v. Préfet du Pas-de-Calais, Procureur général de la cour d'appel de Douai* (C-47/15), the CJEU holds that imprisoning a third-country national whose return procedure has not yet been completed, merely on account of illegal entry across an internal border – resulting in an illegal stay – is prohibited

June

13 July – European Commission presents the second package of proposals to reform the Common European Asylum System, including reforms to the Asylum Procedures Qualification and Reception Conditions Directives

13 July – Commission proposes a permanent EU Resettlement Framework

July

August

13 September – In *Alfredo Rendón Marín v. Administración del Estado* (C-165/14) and *Secretary of State for the Home Department v. CS* (C-304/14), the CJEU rules that EU law does not permit automatically refusing a residence permit to, or expelling from the territory of the EU, a non-EU national who has the sole care of a minor who is a EU citizen on the sole ground that he has a criminal record

29 September – Council Dec. (EU) 2016/175 establishes that the number of persons admitted from Turkey by a Member State (under the EU-Turkey deal) should be deducted from the number of persons to be relocated to that Member State under Council Decision (EU) 2015/1601

September

6 October – European Border and Coast Guard Regulation enters into force, upgrading the tasks and responsibilities of Frontex

October

16 November – European Commission proposes a regulation to establish an automated European Travel Information and Authorisation System (ETIAS) to identify any risks associated with a visa-exempt visitor travelling to the Schengen Area

November

8 December – European Commission adopts its Fourth Recommendation on the resumption of Dublin transfers to Greece as a step towards a normal functioning of the rules of the Dublin system

9 December – Council of the EU adopts Conclusions on the integration of third-country nationals legally residing in the EU

21 December – European Commission presents modifications to improve the functionalities of the Schengen Information System, which include measures to record entry bans and return decisions, the use of facial images for biometric identification and the creation of new alerts for wanted unknown persons

December

5 Asylum, visas, migration, borders and integration

More than 5,000 people died when crossing the sea to reach Europe in 2016, even though irregular arrivals by sea dropped by over 60 % from 2015, totalling some 350,000 in 2016. Wide-ranging changes to the European asylum system were proposed while efforts to improve the efficiency of return policies intensified. Legal avenues to reach safety in Europe remained illusory for most migrants, since new restrictions to family reunification in some EU Member States offset the small progress achieved in humanitarian admissions. Information technology systems were reinforced to better combat irregular migration and respond to threats of serious crimes. Meanwhile, integrating the significant number of people granted international protection proved challenging, including in the educational context.

This chapter first examines displacement trends and their impact on EU asylum policies. It then analyses the EU's efforts to maximise the use of information systems for migration management and internal security purposes and its impact on fundamental rights. A separate section describes EU Member States' use of alternatives to immigration detention, as a drive to more effectively implement returns creates new risks of arbitrary deprivations of liberty. The chapter then reviews whether or not there has been any progress with respect to legal channels for reaching the EU. The final section examines migrant integration efforts, focusing on children's access to education.

5.1. Displacement trends trigger major changes in asylum policies

According to the UN High Commissioner for Refugees (UNHCR), over 65 million people were displaced worldwide at the end of 2015, including over 20 million as refugees. Turkey hosted the largest number of refugees in the world: 2.5 million people. Aside from Palestinians in the Middle East, more than half (54 %) of all refugees worldwide came from just three countries: Syria (4.9 million), Afghanistan (2.7 million) and Somalia (1.1 million).[1] The number of displaced persons continued to grow in 2016.

According to Frontex, some 500,000 people irregularly entered EU territory in 2016, with Syrians and Afghans forming the largest shares. Most crossed the Mediterranean Sea to reach Italy (181,000 people) or crossed the land or sea borders into Greece (178,000 people).[2] Although individuals who reached the EU in 2016 constitute only a small portion of people displaced globally, several EU Member States faced serious difficulties in tending to their basic needs and providing adequate protection to those seeking asylum. For example, as temperatures continued to drop at the end of 2016, people were staying in unheated tents or reception facilities in Hungary (Körmend) and Greece (Samos, Lesvos).[3]

Arrivals to Greece dropped significantly after the EU–Turkey statement on 18 March, which reflected a deal between the EU and Turkey on how to handle migrants and refugees who cross into the EU from Turkey.[4] The statement facilitates the return to Turkey of persons who crossed to the Greek islands in the eastern Aegean Sea without authorisation after 20 March 2016. For every Syrian returned to Turkey, another Syrian is to be resettled from Turkey to the EU.

At the operational level, the 'hotspot' approach became a central building block of the EU's response to asylum seekers and migrants arriving in its territory by sea. The purpose of the hotspots in Greece changed with implementation of the EU-Turkey statement. According to the European Commission, as a result of the agreement,

the hotspots on the islands in Greece needed "to be adapted – with the current focus on registration and screening before swift transfer to the mainland replaced by the objective of implementing returns to Turkey".[5] The Greek Parliament subsequently adopted new legislation transposing the Asylum Procedures Directive (2013/32/EU), which introduced the concepts of first country of asylum and safe third country, as well as procedures for fast-track examinations of applications for international protection at the border.[6]

In practical terms, this change of focus under the EU-Turkey statement initially meant transforming the hotspots into closed facilities. NGOs and UNHCR – which until then had played a central role in hotspots, particularly in providing services to new arrivals – opposed what they perceived as a move towards 'mandatory detention', and so terminated or significantly restricted their activities.[7] In practice, the focus on detention was gradually replaced by restrictions of movement to the particular island, and most humanitarian organisations reinstated their efforts. However, the Greek hotspots remain a core pillar of the implementation of the essentially return-oriented EU-Turkey statement, which clearly distinguishes them from the Italian hotspots.

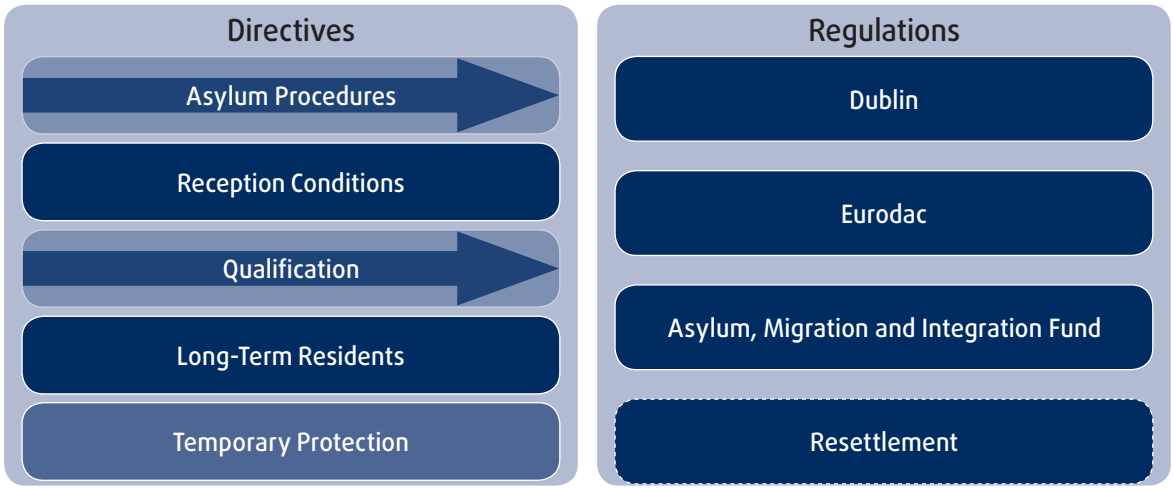
FRA presented a comprehensive overview of the fundamental rights challenges at hotspots as observed during its regular missions to Greece and Italy in its opinion submitted to the European Parliament in November 2016.[8] Although the hotspot approach offers new opportunities to enhance protection and identify vulnerabilities upon arrival, its practical implementation raised a number of issues under the EU Charter of Fundamental Rights, linked to child protection or sexual and gender-based violence, for example.

One of the most significant changes affecting fundamental rights concerned the increased European involvement in national asylum procedures in Greece. The European Asylum Support Office (EASO) trained and deployed teams of experts who assisted the Greek Asylum Service with the formal registration of applications for international protection. They also carried out the personal asylum interviews and drafted recommendations for decisions to be taken by the Greek authorities. Initially limited to assessing the admissibility of Syrian applicants, this approach was subsequently extended to eligibility interviews examining the substance of asylum claims.

The European Commission proposed changes to almost all core instruments of the EU asylum *acquis* in 2016, reacting to the need to simplify and shorten the asylum procedure, to discourage unauthorised onward movements of asylum seekers to other EU Member States, and increase the integration prospects of those entitled to international protection.[9] Two instruments, on asylum procedures (Asylum Procedures Directive) and on the definition of who is in need of international protection and on their rights and obligations (Qualification Directive), are currently cast in the form of directives and will become regulations. The proposal for the Qualification Regulation (in Article 44) also includes an amendment to the Long-Term Residents Directive (2003/109/EC).

Figure 5.1 presents the instruments to which changes were proposed in 2016.

Figure 5.1: Changes proposed to EU asylum acquis in 2016



Notes: *EU law instruments in dark blue are those to which changes were proposed in 2016. Arrows refer to changes of form from directive to regulation. No changes were proposed to the Temporary Protection Directive. The Resettlement Regulation is a new instrument proposed in 2016.*

Source: *FRA, 2017 (based on legislative proposals listed in endnote no. 9 of this chapter)*

The European Parliament asked FRA to submit four legal opinions relating to asylum during 2016. Three concerned pending EU legislation: the proposal on safe countries of origin and the suggested amendments to the Dublin and Eurodac Regulations. FRA's opinions on Dublin and Eurodac highlighted the proposed changes' impact on children. The fourth legal opinion concerned the hotspot approach applied to new arrivals in Greece and Italy, and summarised FRA's experiences during its six-month presence on the Greek islands and its regular visits to hotspots in Italy.[10]

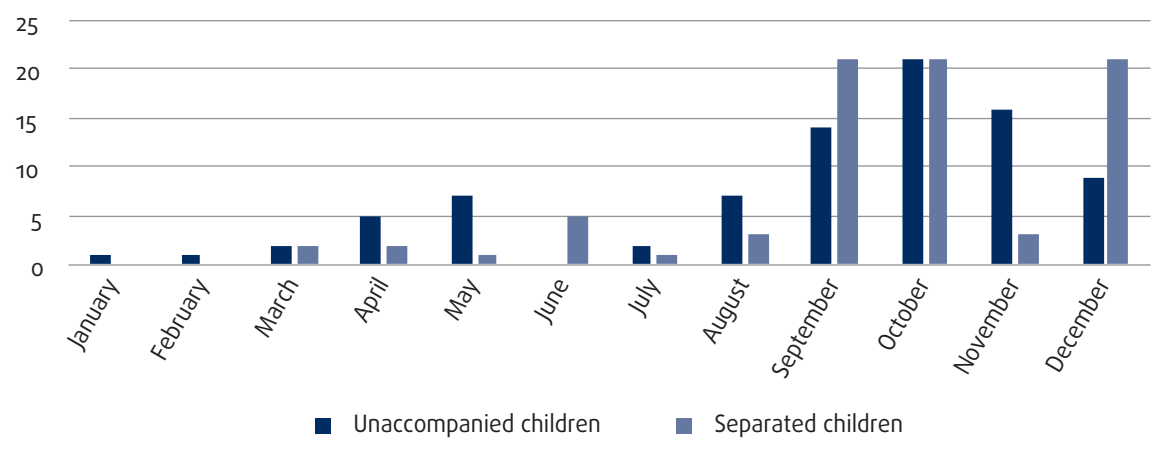
In response to the limited progress in reforming the EU asylum system, the UNHCR in December proposed a series of measures to enable Europe to better manage the emerging challenges in full respect of international law. Suggestions include better contingency planning; a common asylum registration system; and a new approach to unaccompanied children entailing early identification, appointment of a guardian and a best interests assessment.[11]

Meanwhile, several Member States toughened their asylum and migration legislation, leading to new fundamental rights challenges. Notably, **Hungary** allowed the police to send migrants apprehended within 8 km of the southern border with Serbia – including those who expressed their intention to apply for asylum – back to the outer side of the border fence. The region of Upper **Austria** reduced benefits for refugees to below the poverty threshold and less than the minimum benefits for Austrian nationals. **Germany** introduced cuts in social benefits where asylum seekers refuse, without good cause, to take part in integration measures assigned to them, such as attending German language classes or work opportunities. In **Sweden**, a new law introduced time-limited residence permits for refugees and persons granted subsidiary protection as long as they are not employed.[12]

Limited progress occurred on the initial target of relocating 160,000 asylum seekers from Greece and Italy, set in 2015.[13] It was reduced to a minimum of 106,000 people following adoption of the EU–Turkey statement. (Member States have been given the option of resettling the remaining 54,000 directly from Turkey).[14] By 8 December 2016, a total of 8,162 asylum applicants had been relocated (6,212 from Greece and 1,950 from Italy), the majority of them Syrians. This was some 12 % of the minimum target to be met by September 2017. Three Member States – Austria (benefiting from a temporary suspension),[15] Hungary and Poland – have not accepted anyone.[16] Hungary's and Slovakia's requests to the Court of Justice of the European Union (CJEU) to annul the relocation scheme remained pending.[17] The example of Hungary illustrates the opposition in some EU Member States to compulsory relocation. Hungary held a referendum on 2 October asking the population the following question: *"Do you want the European Union to order the mandatory settlement of non-Hungarian citizens in Hungary without the approval of the National Assembly?"*[18] Although the referendum result turned out to be invalid because of low voter turnout, anti-refugee propaganda and xenophobic attitudes in Hungary continued to raise fundamental rights concerns. For more information, see Chapter 3.

Relocating unaccompanied and separated children remained a significant challenge. By the end of 2016, only one separated child was relocated from Italy, and 164 children (85 unaccompanied and 79 separated) were relocated from Greece; see Figure 5.2. Italy is hosting a significant number of Eritreans who could benefit from relocation. Practical obstacles that remained unaddressed at year's end relate to delays in appointing a guardian (a precondition to ensure that relocation is in the child's best interests) and the determination of the child's best interests. Regarding Greece, Member States' alleged difficulties with relocating married minors, with or without children of their own, as a specific category

Figure 5.2: Unaccompanied and separated children relocated from Italy and Greece in 2016



Source: *European Commission, personal communication, 2017*

of separated children are hampering the process. In addition, many unaccompanied children in Greece are nationals of countries not eligible for relocation.

Finally, towards the end of 2016, calls re-emerged for international protection applications to be assessed outside the EU. Germany's Federal Minister of the Interior proposed that asylum seekers and migrants rescued at sea be disembarked in North African countries. Their asylum applications would be examined in facilities supported by the EU and run in collaboration with the host country and the UNHCR.[19] No further details were made available on how such an approach could be made compatible with the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR).

5.2. Information systems bring new risks and opportunities

The significant number of people who crossed the EU's external border and moved onwards without authorisation, together with threats to internal security, prompted Member States to reintroduce internal border controls within the Schengen area. At the end of 2015, border controls within the Schengen area were in place at some sections of the borders of four EU Member States (**Austria**, **France**, **Germany** and **Sweden**) and **Norway**. None of them lifted internal controls in 2016. In January 2016, **Denmark** also temporarily reintroduced border controls.[20] Such controls adversely affect one of the main freedoms within the EU: the right of citizens to move freely within the common area.

At the same time, the absence of internal border controls makes it difficult for Member State law- enforcement authorities to obtain necessary information on who is entering and leaving their territories. As the European Commission points out, data on persons entering or leaving the Schengen area are fragmented in different national or European information systems. National border guards and police authorities operate in a complex landscape of differently governed information systems, creating significant practical difficulties.[21]

5.2.1. Improving existing EU information systems

EU institutions and Member States made significant efforts to make EU information systems more robust throughout the year. As shown in Table 5.1, the European Commission presented seven legislative proposals to change existing systems or create new ones. Most changes concern the processing of data on third-country nationals.

The EU has so far set up three large-scale information technology (IT) systems with very different purposes, containing personal data on individuals along with data on objects, in particular the second-generation Schengen Information System (SIS II). These IT systems are:

- Eurodac, to help determine the Member State responsible for examining an application for international protection;[22]
- the Visa Information System (VIS),[23] to manage visa applications; and
- SIS II, which contains alerts on wanted persons and objects (e.g. missing persons, persons subject to an entry ban, or stolen cars or documents).[24]

The personal data of around 40 million individuals are stored in one or more of these three large-scale IT systems, for one reason or another. The majority involve third-country nationals, as the largest amount of personal data is stored in VIS and Eurodac.

The European Commission presented proposals to expand Eurodac and SIS II in 2016. In addition, three more databases are planned: the European Criminal Records Information System for third-country nationals (ECRIS-TCN), the Entry/Exit System (EES), and the European Travel Information and Authorisation System (ETIAS). ECRIS-TCN will be an EU-wide database of criminal records of third-country nationals. The EES will record border crossings by third-country nationals who are entitled to visit the Schengen area.[25] ETIAS will gather data on visa-exempt third-country nationals before they arrive at the border, to determine whether or not the person may enter the EU.

A few trends can be seen. Data on all third-country nationals coming to the EU for short stays will be included in the new systems. Currently, the only personal data stored in EU databases are those of asylum and visa applicants, of persons apprehended when crossing the border in an irregular manner, and of people banned from entry.

As shown in Table 5.1, old and new EU systems will increasingly rely on biometric data to identify persons with a certain degree of certainty. In some systems, fingerprints are complemented by an additional biometric identifier, namely the facial image. The age at which biometrics can be taken is dropping, as scientific research indicates that high-quality fingerprints can be collected from children aged six.[26] Linked to this, the proposed SIS II reform suggests adding an alert for children at risk of abduction, and to better categorise types of missing persons, which could enhance the tracing of missing children.[27]

The information systems serve different purposes. Most, however, include the objectives of enforcing immigration law and preventing, detecting and investigating serious

Table 5.1: Legislative changes relating to EU information systems proposed in 2016

System	Data stored	New?	Biometrics?	Persons	Source
ECRIS-TCN	Criminal records of third-country nationals	✓	Fingerprints	TCN	COM(2016) 7 final, 19 January 2016
EES	Entry and exit data and refusal of entry data of TCNs crossing the external borders	✓	Fingerprints (4 fingers), facial image	TCN	COM(2016) 194 final, 6 April 2016
Eurodac	Extending scope of Eurodac to cater to wider migration management purposes with more data stored on individuals	–	Fingerprints (10 fingers), facial image	TCN	COM(2016)272 final, 4 May 2016
ETIAS	Advance travel information and authorisation system for visa-free TCNs	✓	No	TCN	COM(2016) 731 final, 16 November 2016
SIS II (return)	Storing personal data, including confirmation of departure, of persons against whom a return decision has been issued	–	Fingerprints	TCN	COM(2016) 881 final, 21 December 2016
SIS II (border checks)	Improving SIS II for visa, border management and immigration law enforcement purposes, storing searchable biometrics and entry bans in SIS II	–	Fingerprints (10 fingers), palm prints, facial image	TCN	COM(2016) 882 final, 21 December 2016
SIS II (police and judicial cooperation)	Improving SIS II for judicial and police cooperation purposes, including storing searchable biometrics in SIS II	–	Fingerprints (10 fingers), palm prints, facial image, DNA profile	TCN, EU citizens	COM(2016) 883 final, 21 December 2016

Note: *TCN = third-country national.*
Source: *FRA, 2017 (based on proposed legislation)*

criminal offences. This leads to longer data retention periods. For example, the first proposal for an entry/exit system, published in 2013,[28] envisaged a retention period of 181 days; the revised proposal, issued in 2016, extended this to five years.[29]

FRA has been looking into the fundamental rights implications of using biometric data in information systems in the areas of borders, visa and asylum since 2014.[30] The risks and benefits to fundamental rights are not fully known. As a starting point, data protection safeguards need to be observed, such as the principles of purpose limitation and data minimisation. Lawful access to, and use of, the data stored in the systems need to be ensured. Biometrics are sensitive personal data that call for special protection. Biometric identifiers are thought to establish a person's identity reliably. Therefore, safeguards to ensure quality become important.

Fundamental rights risks intrinsically linked to the processing of biometric identifiers include the use of coercive measures when collecting the identifiers. They also include risks to the safety of vulnerable persons, such as persons in need of international protection or victims or witnesses of crime, if personal data of such persons are shared with third countries or third parties – for example, if people are fleeing state persecution. Third-country nationals are also likely to face more obstacles (language barriers, the need to start a procedure from a third country, etc.) if they wish to have incorrect data corrected or deleted.

The proper use of biometric data can prevent mistakes in establishing a person's identity and can reduce the risk of people being wrongfully apprehended or arrested. Biometrics could also potentially be used to optimise the tracking of people who are reported missing, including missing children. In addition, introducing a degree of automation in border control may reduce the risk of discriminatory ethnic profiling at borders.

From a fundamental rights point of view, improving EU-level information systems brings new opportunities but also challenges, as noted in this chapter's FRA opinions.

5.2.2. Interoperability

If the various proposals relating to IT-systems are accepted, technical aspects of the systems will be better aligned with each other, making it easier to consult them simultaneously. National authorities believe that this could improve efficiency and security. They note that, to facilitate border management and satisfy security needs, existing information systems

should not work in silos; they should "speak" to each other, making it easy to share information between them. As a result, significant efforts were made in 2016 to identify ways to improve the interoperability between existing and future information systems.

There are different ways to make information systems interoperable. For example, a single-search interface can query several information systems at the same time, then display combined results on a screen. This single-search interface can be queried with alphanumerical or biometrical data. Information systems could also be technically interconnected so that new information stored in one system would automatically be accessed by the other system. This option is envisaged by the proposed Entry-Exit System, through which the biometrics of visa holders would simultaneously be consulted in VIS.[31] Finally, basic personal data needed to identify a person – and not just biometric data – could be stored in a common repository. This solution represents a more future-oriented model.[32] To increase the reliability of the identification of a person across many IT-systems, a "shared biometric matching service" could be set up, using fingerprints and/or facial images.

Interoperability involves both risks as well as benefits to fundamental rights. It ensures that more data are more easily accessed. This may affect the right to asylum, to respect for privacy and family life, the rights of the child, and the right to liberty and security of the person. Decisions taken based on false matches can have negative consequences for individuals, underlining that quality standards are very important when searching and matching alphanumeric or biometric data – be it through a single-search interface, a shared biometric matching aid or a common repository of data. The increased accessibility of data, possibly including through mobile devices, may also heighten the risk of data being unlawfully processed and shared, including with third parties or third countries, exposing people to risks. Where non-EU databases are included among the interoperable IT-systems, there is also a risk that data may have been intentionally stored in information systems to harm an individual; that is, oppressive regimes may deliberately include political dissidents in the Interpol Database on Stolen and Lost Travel Documents to limit their ability to travel. Users of the information systems must remain vigilant and evaluate matches on a case-by-case basis.

Interoperability also brings benefits. For example, the status of persons who need protection may become immediately visible to users, thus avoiding uninformed decisions that put at risk applicants for international protection, missing children, or victims or witnesses of crime. To minimise negative fundamental rights consequences and promote benefits, interoperability should be based on 'privacy by design' solutions.

5.3. Alternatives to detention remain underutilised

A drive to increase the effectiveness of returns followed the EU Action Plan on Return of September 2015[33] and continued in 2016, with efforts focusing on making better use of asylum-related tools for return purposes. This is illustrated by the proposed changes to Eurodac, which is being redesigned to facilitate and accelerate the identification and documentation of migrants in an irregular situation. FRA has consistently pointed out that the effective return of migrants who are in an irregular situation and for whom there are no legal bars to removal is essential to uphold the credibility of the asylum system.[34] However, the current emphasis on implementing returns increases the risk of arbitrary detention, as alternatives to detention remain underutilised in this context. As noted in the discussion on migration in this report's Focus Section, using alternatives to detention is particularly important to avoid detaining children.

In 2016, some Member States announced that they were increasing the use of immigration detention. For example, at the end of the year, **Italy** announced the creation of an immigration detention facility in each of its 20 regions.

Under EU law, Member States may resort to detention to prevent migrants from absconding or otherwise interfering with the return process. However, to comply with the right to liberty and security protected by Article 6 of the EU Charter of Fundamental Rights, deprivation of liberty must be used only as a last resort and migrants must be kept in facilities that respect standards of human dignity. Moreover, before authorities resort to deprivation of liberty, EU law requires them to examine in each individual case whether or not the purpose can also be achieved by applying more lenient measures, so-called alternatives to detention. The Return Directive (2008/115/EC) stipulates in Article 15 (1) that deprivation of liberty may be ordered "unless other sufficient but less coercive measures can be applied effectively in a specific case". Similar provisions can be found in Recital 20 and Article 8 (2) of the recast Reception Conditions Directive (2013/33/EU). Article 8 (4) of the Reception Conditions Directive obliges Member States to lay down alternatives to detention in national law.

Alternatives to detention include a wide set of non-custodial measures. Typical measures consist of residence restrictions, the duty to report regularly to the police, and release on bail (see also Article 7 (3) of the Return Directive). The use of alternatives to detention is especially desirable for vulnerable categories of foreigners, such as children. Pursuant to Articles 16

and 17 of the Return Directive and Article 11 (2) of the Reception Conditions Directive, particular attention must be paid to children and other vulnerable people. Detaining children has a severe impact on their physical and mental health. Research indicates that even short periods of detention negatively affect children's cognitive and emotional development and can cause lifelong trauma and developmental challenges.[35]

FRA last reviewed the use of alternatives to detention in 2012.[36] Increasing efforts to enforce returns of migrants in an irregular situation and to speed up asylum procedures have created an environment in which Member States resort to restrictive measures, including deprivation of liberty. It is against this background that FRA decided to review how the situation has evolved over the past five years.

Overall, there has been progress in law, but alternatives remain little used in practice. All EU Member States have provisions on alternatives to detention in their national laws. The two Member States that did not have such provisions in 2012 – **Cyprus** and **Malta** – have meanwhile enacted legislation, although specific types of alternatives are listed only for asylum seekers and not for migrants in an irregular situation, which affects their actual use for this second category of persons.[37] Table 5.2 provides an overview of the state of play at

Table 5.2: Types of alternatives to detention envisaged in national legislation, EU-28, by country, at end of 2016

Member State	Duty to surrender documents	Bail/ sureties	Regular reporting	Designated residence	Designated residence and counselling	Electronic monitoring
AT		X	X	X		
BE	X	X	X	X	X	
BG			X			
CY		X	X	X		
CZ		X	X	X		
DE			X	X	X	
DK	X	X	X	X		
EE	X		X	X		
EL	X	X	X	X		
ES	X		X	X		
FI	X	X	X	X		
FR	X		X	X		
HR	X	X	X	X		
HU	X	X	X	X		
IE	X		X	X		
IT	X		X	X		
LT		X	X	X		
LU	X	X	X	X		X
LV	X		X			
MT	X	X	X	X		
NL	X	X[a]	X	X		
PL	X	X	X	X		
PT			X	X		X
RO			X	X		
SE	X		X	X		
SI	X	X[b]	X	X[b]		
SK		X	X			
UK	X	X	X	X	X	X

Notes: *Entries in red denote changes in legislation since 2012.*

The duty to surrender documents in the United Kingdom (imposed on all individuals who do not have permission to stay) is per se not categorised as alternatives.

[a] Concerns children whose guardianship is entrusted to an agency or an individual (Dutch Aliens Circular para. A6/5.3.3.3.).

[b] Bail is not formally considered an alternative to detention, but is allowed under "permission to stay" decisions under a separate administrative procedure under Art. 73 (6) of the Slovenian Aliens Act. Designated residence is optional under Article 81 (3) of this act.

Source: *FRA, 2017 (based on national legislation listed in endnote no. 38 of this chapter)*

the end of 2016.[38] It illustrates the types of alternatives to immigration detention envisaged under national law for asylum seekers or persons in return procedures.

In the past four years, alongside **Cyprus** and **Malta**, five Member States stipulated new forms of alternatives to detention in their legal systems: **Belgium**, **Finland**, **Hungary**, **Luxembourg** and **Poland**. Electronic tagging is no longer used in **Denmark**, with legislative changes to remove it from the law underway at the end of the year. In **France**, Article L 552-4-1 of the *Code de l'entrée et du séjour des étrangers et du droit d'asile* (CESEDA) – which provided for electronic tagging – was removed.[39] **Lithuania** repealed one alternative to detention: entrusting an unaccompanied child to the care of a social institution.[40] In **Belgium**, since 2014, in addition to hosting foreigners in dedicated return houses, families with children may be given the option to remain in their own home while their return is being planned.[41]

Most Member States do not collect regular statistics on the use of alternatives, making it difficult to determine how frequently they are applied. FRA asked Member States to report how many persons were in immigration detention and how many were subject to an alternative to detention on a specific day of the year: 1 September 2016. Thirteen Member States provided both figures, although some did not specify whether the persons under a restrictive measure (detention or alternative) included only persons in return procedures or also asylum seekers. The data provided have been compiled by counting the individual files.

As Table 5.3 shows, the number of persons subject to an alternative to detention was higher than 10 % of those detained in only six Member States: **Croatia**, **Greece**, **Latvia, Lithuania**, **Luxembourg** and **Malta**. Alternatives to detention in **Greece** essentially consist of geographical restrictions of movement systematically imposed on certain categories of asylum seekers in the Eastern Aegean islands.[42] **France** provided figures on detention and alternatives for the first 11 months of 2016, noting that, as of 30 November 2016, a total of 21,037 people had been placed in administrative detention as part of a removal measure (obligation to leave France, expulsion on grounds of public order, judicial exclusion order, decision to return pursuant to the Dublin III regulation, etc.) and 3,636 foreigners had been placed under house arrest. In three Member States – the **Czech Republic**, **Estonia** and **Slovakia** – nobody was subject to an alternative to detention on that day. Aside from **Greece**, in the other 12 Member States that reported back, on 1 September 2016, the number of persons subject to an alternative to detention corresponded to some 7 % of those under a detention regime.

Table 5.3: Persons in immigration detention or subject to an alternative to detention on 1 September 2016, in 13 EU Member States

Member State	Detention	Alternative to detention
AT	185	6
BE	535	22
CZ	107	0
EE	24	0
EL	2,958	4,169
HR	32	12
LT	31	16
LU	31	5
LV	49	34
MT	9	2
SE	290	2
SK	95	0
SL	16	1

Notes: *Statistics provided by national authorities for the total number of persons detained pending removal and persons against whom alternatives to detention were executed on 1 September 2016. Statistics for Lithuania cover a different date: 31 December 2016. For Greece, the figure on alternatives to detention includes territorial restrictions on the Eastern Aegean islands imposed systematically on asylum applicants who could be returned to Turkey.*

Source: *FRA, 2016 (based on information provided by national authorities)*

Alternatives are not applied systematically. In 2016, FRA identified several obstacles to their application; the following examples illustrate some of these. In **Bulgaria**, alternatives are not applicable to the majority of new arrivals because they cannot meet the mandatory requirement of having a place of residence in the country.[43] In **Hungary**, the authorities assess the applicability of only asylum bail: if its conditions are not met, the two other measures (designated place of residence and regular reporting obligation) are not assessed and the authority orders detention. The UNHCR also noted that the authority generally sets the amount of asylum bail at a very high level, and that no transparent guidance has been adopted on the factors to be taken into account in setting its amount. Few applicants have the requisite financial resources.[44] The lack of financial means was also reported as a problem in **Latvia**.[45] Similarly, in **Lithuania**, the possibility of using alternatives essentially depends on income and accommodation. Given that third-country nationals whose return or removal is being considered usually have no funds for subsistence and no residence in Lithuania, applying alternatives to them becomes difficult.[46]

Promising practice

Providing community-based support to ex-offenders awaiting deportation

In the **United Kingdom**, alternatives to detention include community-based support. If people are to be deported after they committed a criminal offence, one-to-one, person-centred support can help them to stabilise their lives in the community, avoiding reoffending or absconding while their cases are resolved. Such alternatives to detention can assist them to understand and participate better in immigration procedures, enabling their cases to be resolved in a fair, timely and humane manner in the community, with the minimum use of enforcement. This shift in approach, from enforcement to involvement, can build greater fairness, accountability and trust into the system and produce better outcomes for individuals, communities and the government.

Sources: United Kingdom, Shaw, S. (2016), Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office by Stephen Shaw; for information on Detention Action's Community Support Project, see Detention Action (2016), Without Detention: Opportunities for Alternatives, London, Detention Action, September 2016

5.4. Legal avenues to safety in the EU remain illusory

Many people in need of international protection continue to risk their lives and safety to reach the EU. Besides the dangerous sea crossing, many are also exposed to exploitation and violent crimes by criminal networks. Vulnerable migrants and refugees are particularly at risk. In 2015, FRA highlighted – in its focus paper on *Legal entry channels to the EU for persons in need of international protection: A toolbox* – that strengthening legal channels for refugees to reach protection and safety would not only reduce the number of migrants' lives lost at sea and the abuses perpetrated by smuggling networks, but would also enhance security, promote integration, fill skills gaps and reduce the need for psychosocial care due to traumatic experiences.[47] It suggested a combination of refugee-related schemes, such as resettlement and humanitarian admissions, and regular mobility schemes that are more refugee-friendly – for example, family reunification. FRA noted that private sponsorship can help tap additional resources that would otherwise not be available to support legal entry programmes.

Resettlement policy did make progress in 2016. However, this was offset by significant restrictions in national family reunification laws.

5.4.1. Resettlement and humanitarian admissions

One of the legal and safe options for people in need of international protection to enter the EU is resettlement. Resettlement involves the selection of refugees upon a referral by the UNHCR based on established criteria related to specific needs and vulnerabilities[48] and their subsequent transfer from a state in which they have sought protection (for example, in a refugee camp) to a third state that has agreed to admit them as refugees with permanent residence status.

In July 2015, EU Member States, as well as Iceland, Liechtenstein, Norway and Switzerland, agreed to resettle 22,504 people by 2017.[49] Despite a slow start, by 6 February 2017, the number of resettled persons was almost 14,000.[50] Part of this number comes from the resettlement mechanism under the EU–Turkey statement. Some 3,100 persons were resettled from Turkey between April 2016 and February 2017.[51] Compared with the number of refugees resettled worldwide, however, EU efforts remain limited, which could partly be explained by the significant number of asylum applicants reaching the EU spontaneously. From January to 30 September 2016, the largest proportion of refugees was resettled to the United States (58,037), followed by Canada (17,785).[52] During the same period, 8,547 persons were resettled to all EU Member States combined.[53] The UNHCR estimates that in 2017 it will submit to states some 170,000 refugees for resettlement, out of nearly 1.2 million people in need of resettlement.[54]

As a result of EU-level initiatives, more EU Member States were engaged in resettlement than in previous years – 17 accepted resettled refugees in 2016.[55] To align resettlement policies in Member States, on 13 July 2016, the Commission proposed a permanent EU Resettlement Framework. It plans to establish common procedures for the selection of resettlement candidates and a common protection status for persons resettled to the EU.[56] The proposed regulation envisages an annual EU resettlement plan that establishes priorities regarding from which broad geographical regions resettlement should take place. The plan will contain the maximum number of persons to be resettled in the following year.[57] At the same time, the proposed regulation blurs the distinction between resettlement and family reunification. Individuals who may already be entitled to join their family members on the basis of Directive 2003/86/EC could be included by Member States in their resettlement quota.[58] This would allow Member States to use resettlement for individuals who already have a legal avenue to reach the EU. The UNHCR has pointed out that resettlement should not be used for persons who have a legal right to join their families in resettlement states in a timely manner pursuant to national or regional legislation.[59]

Meanwhile, other humanitarian admission programmes – such as humanitarian corridors to Italy initiated for vulnerable migrants by the country's Federation of Protestant Churches – continued to be implemented alongside EU and national resettlement schemes.

Promising practice

Humanitarian corridors to Italy established for vulnerable migrants

The Federation of Protestant Churches in Italy (FCEI) – a member of the Churches' Commission for Migrants in Europe (CCME) – in partnership with the Sant'Egidio Community and the Waldensian and Methodist churches, launched a Humanitarian Corridors Programme at the beginning of 2016. The initiative is largely funded by the Waldensian Church. The organisations signed a memorandum of understanding with the Italian interior and foreign affairs ministries, allowing them to issue 1,000 humanitarian visas to vulnerable persons in Lebanon, Morocco and Ethiopia during 2016 and 2017. In January 2017, the Italian government and the Italian Catholic Bishops' Conference signed another protocol, providing for a further 500 visas.

By the end of January 2017, 600 asylum seekers had arrived in Italy through these corridors. They are accommodated in facilities funded and managed by the different ecumenical organisations.

For more information, see Mediterranean Hope, 'Corridoi umanitari'

Refugees welcomed at Rome's Fiumicino airport – safe travel made possible by Italian churches' project for humanitarian corridors. Photo: © Federation of Protestant Churches in Italy

5.4.2. Family reunification

EU law regulates family reunification for refugees – but not for beneficiaries of subsidiary protection – in the Family Reunification Directive (2003/86/EC).[60] Family ties constitute one of the major factors determining the choice of destination country for asylum seekers.[61] The desire to live with one's own family is a strong drive for migration. Family reunification is also an important factor facilitating integration. Many beneficiaries of international protection who reached the EU as part of the 2015 migration flows have family members abroad. Bringing them to the EU lawfully is becoming increasingly difficult.

In 2016, at least seven Member States restricted their family reunification legislation, with the effect of reducing or delaying family reunification possibilities, particularly for beneficiaries of subsidiary protection. Four of these were among the five countries with the highest arrivals of Syrians in 2015 as well as 2016, according to Eurostat: Germany (158,655 in 2015 and 266,250 in 2016), Hungary (64,080 in 2015 and 4,875 in 2016), Sweden (50,890 in 2015 and 4,710 in 2016) and Austria (24,720 in 2015 and 8,730 in 2016).[62]

For an overview of these changes, see Table 5.4.[63] Changes introduced at national level include new or shorter timeframes to apply for family reunification to benefit from more favourable conditions (**Austria**, **Finland**, **Hungary**, **Ireland, Sweden**); increased material requirements – for example, proving sufficient income, adequate accommodation or health insurance – in case of non-compliance with the new timeframe (**Austria**, **Finland, Hungary, Sweden**); restricting the notion of family member (no family reunification for children above 18 in **Austria** and limiting family reunification to core family members in **Ireland**); excluding beneficiaries of subsidiary protection from applying for family reunification for a certain time period after being granted protection (**Austria**, **Denmark**, **Germany**, **Sweden**); and abolishing the possibility of reimbursing the costs of certain family members travelling from their country of origin (**Denmark**).

When assessing interference with the right to respect for private and family life enshrined in Article 8 of the ECHR, the European Court of Human Rights takes into account whether or not there are insurmountable obstacles to the family living in the country of origin or in another state.[64] This would, for example, be the case for people in need of international protection who fear serious harm if they were to live with their families in their home country.[65] In this context, it seems difficult to justify Member States treating refugees (fleeing persecution) differently from persons granted subsidiary protection (typically fleeing armed conflict). In *Alo and Osso*, the CJEU stated that different treatment of refugees and beneficiaries of subsidiary protection status concerning residence requirements is not justified, if their situations are objectively comparable.[66] The CJEU pointed out that beneficiaries of subsidiary protection cannot, in principle, be subject to more restrictive rules, as regards the choice of their place of residence, than those applicable to refugees or non-EU citizens legally resident in the Member State concerned. According to

Table 5.4: Legislative changes to family reunification legislation in 2016, seven EU Member States

Member State	Shorter deadlines to apply under more favourable rules	Additional conditions in case of elapsed deadline	Restricting notion of family member	Waiting period for beneficiaries of subsidiary protection
AT	X	X	X	X
DE				X
DK				X
FI	X	X		
HU	X	X		
IE	X		X	
SE	X	X		X

Note: *In Denmark, the exclusion of subsidiary protection beneficiaries from family reunification is subject to exceptions, where Denmark's international obligations so require.*

the European Council on Refugees and Exiles (ECRE),[67] the logic applied by the CJEU to residence restrictions would also apply to family reunification.

FRA reports every month on the fundamental rights situation in the Member States most affected by the arrivals of refugees and migrants. FRA's September 2016 report includes a thematic focus on family tracing and family reunification. It highlights, among other things, restrictive legislative changes at national level and lists practical obstacles faced by people who wish to bring their family members to the EU through legal family reunification procedures. The focus report covers Austria, Bulgaria, Germany, Greece, Hungary, Italy and Sweden. Subsequent monthly reports also refer to legislative changes concerning family reunification in 14 Member States.[68]

Practical obstacles to family reunification also created additional hardships. The jump in the number of applications for family reunification created significant delays. For example, at **German** consulates in Jordan, Lebanon and Turkey, the waiting times for an appointment to file an application ranged from several months up to a year.[69] To benefit from fewer admission requirements, **Finland** asked applicants to visit a Finnish embassy or consulate to prove their identity within three months from the decision granting asylum to the sponsor; however, obtaining the necessary travel documents to reach the embassy – for example, for Syrians to go to Turkey – is often not possible within this timeframe.[70] Other practical obstacles include complicated procedures to determine family links (**Greece**), provision of limited information on the possibility of and procedure for family reunification, and limited access to legal assistance (**Germany**).[71]

5.5. Integration measures for recently arrived refugees and migrants in education

5.5.1. Ensuring access to education for refugee and migrant children

Article 14 of the EU Charter of Fundamental Rights and Article 28 of the UN Convention on the Rights of the Child assert the right of every child to education. EU Member States have an important responsibility to uphold this right for recently arrived refugee and migrant children. Most Member States and their societies significantly stepped up their efforts to provide access to education to such children in 2016, acknowledging the challenge as an opportunity and investment. However, not all Member States provided systematic support.

Protecting and fulfilling children's rights, especially the right to education, produces win–win outcomes that benefit both rights holders and the general population. The future positive contribution of migrants and refugees partly depends on timely measures to respect and promote their fundamental rights. Member State efforts to produce policies that meet the immediate needs of these children as early as possible will lay the foundations for their long-term integration into society and the labour market. The European Commission's 2016 Action Plan for the integration of third-country nationals[72] stresses that education is a key policy priority to achieve successful integration and unlock children's full potential, to the benefit of all. As it stated during the action plan's launch, "[e]nsuring that third-country nationals can contribute

economically and socially to their host communities is key to the future well-being, prosperity and cohesion of European societies."[73]

The Commission's action plan provides a common policy framework and supporting measures that should help Member States further develop and strengthen their national integration policies for third-country nationals. In particular, it clearly lays down the concrete policy, operational and financial support to be delivered at EU level.

On 9 December 2016, the Justice and Home Affairs Council conclusions[74] endorsed the action plan, prioritising a focus on education and promoting access to mainstream education systems. The Council noted that promoting integration, although a competence of Member States under EU law, is not an individual and independent effort: "the effective integration of third-country nationals legally residing [in the EU] contributes to the building of inclusive, cohesive and prosperous societies, which is of a common interest to all Member States."

Attending school again is an important starting point for children fleeing war, whose schooling has often been interrupted for a long time. Restoring their right to education in a new cultural, social and schooling environment requires special measures and targeted support.

Providing access to education for refugee and migrant children requires considerable efforts from Member States, and decisions as to how to approach the issue entail risks and challenges that affect the longer-term integration of such children in school systems and host societies more broadly. In some countries, such as Greece, there are still refugee and migrant children aged between 6 and 15 who do not yet attend school, and children above 15 who are not in education or training, as relevant structures to implement the government's plans have yet to be set up.[75] The International Organization for Migration contributes by providing transport to school for such children; according to its press release, 1,200 children already attended school in autumn 2016 and more are expected to start school in 2017. Meanwhile, negative – and in some cases even violent – reactions by locals and parents of native children in Italy and Greece have cast a shadow on the effort to send migrant and refugee children to school like all other children.

Separate schooling reflects but can also lead to or reinforce divisions in society, as the agency's research from 2015 and 2016 underscores. Introductory courses and support are necessary to bridge the gap with the rest of the pupils, especially to learn the national language. However, attending school separately from the rest of the children for long periods, in terms of both location and type of schooling, inevitably delays their school integration. Depending on the settings and modalities of such courses, it may also limit their interactions and socialisation, compromising the chances for mutual understanding and integration.

This reality affecting newcomers also echoes and feeds into a long-standing problem of *de facto* segregation and separate schooling of children from migrant families. This often happens despite Member States' efforts to avoid it – a side effect of their residential concentration in distinct urban neighbourhoods and of their reduced contacts and interaction with the general population. As FRA's report *Together in the EU: Promoting the Participation of Migrants and Their Descendants* – published in March 2017 – demonstrated, this is clearly a concern for half of the Member States, particularly the traditional immigration countries. Relevant data are needed for the rest of the EU countries.[76]

On the other hand, integration in normal classes without or before any preparatory period may lead to marginalisation in the classroom or to poorer-quality education being offered to some or even all pupils. It therefore requires considerable educational and learning support efforts in parallel.

Developing responses to these challenges is not easy. Member States need to share solutions and promising practices, as the Commission's action plan stresses. This can ideally be done in the context of the European Integration Network of the national contact points on integration of third-country nationals – a network of high-ranking public servants from Member State governments responsible for integration policies. Created by the European Commission in 2002, the action plan upgraded it to a European Integration Network, with a stronger coordination role and mutual learning mandate.

The comparative overview that follows examines Member States' diverse approaches to addressing the educational needs of newly arrived refugee and migrant children and to upholding their fundamental right to education in the context of their integration into, and contribution to, the host society.

For more information on intolerance and xenophobic incidents, see Chapter 3. More information about challenges relating to the rights of children can be found in Chapter 7.

5.5.2. Member States offer introductory courses and language support to refugee and migrant children

Almost all Member States adopted special measures providing language support and/or introductory courses

in 2016. Some already do so in the refugee reception centres. Others prioritise immediately integrating children into the mainstream schooling system, alongside regular classes that provide parallel educational support.

Introductory classes, mainly offering language support to pupils from refugee and migrant families before they join standard classes, are provided by all EU Member States.

Austria,[77] **Denmark**,[78] **Greece**,[79] **France**,[80] **Ireland**,[81] **Lithuania**,[82] **Luxembourg**,[83] **Malta**[84] and the **Netherlands**[85] are among the Member States that already provide educational support, mainly language and basic introductory support, at reception and in the reception centres.

Outside the reception centres and in countries that do not have any, the maximum duration of this introductory period before the children join normal classes in area schools ranges from 12 to 36 months. In **Austria**,[86] **Denmark**,[87] **Poland,**[88] **Slovenia**[89] and **Sweden**,[90] the maximum period is 24 months. In **Belgium**,[91] it is 12 months but can be extended to 18 months, or to 36 months for the Flemish community. In **Croatia**,[92] **Finland**,[93] **France**,[94] **Luxembourg**,[95] **Malta**[96] and **Romania**[97] the maximum duration of introductory classes is 12 months. In the **Netherlands**[98] it can range from 12 to 24 months on a case-by-case basis. In **Greece**[99] it can be as long as 36 months – three full years outside of the mainstream school system. Authorities in Greece have chosen to provide introductory courses either inside the reception centres and hotspots or as afternoon classes in the schools, after the regular classes have ended and pupils have left. In **Estonia**, the maximum period is 10 months. In **Latvia** and **Lithuania**, linguistic support while attending regular classes lasts for 120 and 240 hours, respectively. In other Member States, either no specific maximum duration is nationally determined or there is a case-by-case assessment of the migrant and refugee children's individual progress in linguistic capacity before they join regular classes – as in **Germany**[100] or the **United Kingdom**,[101] where such policies are decentralised and determined at local level.

The introductory courses for newcomer children in many cases provide more than language support. In **Belgium**,[102] **Bulgaria**[103] and **Cyprus**,[104] they also get psychological support and counselling for post-traumatic stress. In **Austria**[105] and the **Czech Republic**,[106] introductory support includes courses on values, social competence and legal principles. In **Greece**,[107] alongside language support, pupils take courses in mathematics, computer skills and English and also engage in athletic and artistic activities.

Such courses, both in reception centres and in introductory school classes, are implemented by governments in cooperation with civil society or by local authorities. In others, non-governmental organisations assigned by authorities undertake this task, often within EU-funded projects, or voluntarily provide support to migrant and refugee children.

However, a significant number of EU Member States have opted to integrate third-country national pupils directly in normal mainstream classes, regardless of whether they offer a first phase of introductory support. **Bulgaria**,[108] **Croatia,**[109] **Cyprus**,[110] **Estonia**,[111] **Finland**,[112] **Latvia**,[113] **Italy**,[114] **Poland**,[115] **Portugal**,[116] **Romania**,[117] **Slovenia**,[118] **Sweden**[119] and the **United Kingdom**[120] provide mainly language support to newcomer pupils who are already in mainstream education and standard classes. **Lithuania**[121] and **Malta**[122] also do so, in addition to the educational support provided as early as in the reception centres. In most cases, introduction and language support in normal classes is part of national education policies. However, in a number of Member States, this is an optional initiative to be decided by schools, as in **Finland**,[123] or at regional level, as in **Romania**.[124]

In **Hungary**, the government has confirmed that children have access to kindergarten and school education under the same conditions as Hungarian children.[125] At the age of 6, children are enrolled in local schools in the towns in which the reception centres are located, which host a special preparatory language learning class for children to later join regular classes. However, the Hungarian authorities were not in the position to provide any further information about the implementation of such measures, such as the duration of the learning support classes, the numbers of children covered, and whether schools are enrolling them and hosting such classes. In addition, there are civil society initiatives in the country – such as the 'Inclusive kindergartens and schools' by Menedék, the Hungarian Association for Migrants, supported by the Asylum, Migration and Integration Fund (AMIF).[126]

Slovakia's Ministry of Education confirmed that no special integration measures were in place for primary and secondary education.[127] It is the only Member State that has not adopted, and is not implementing, any introductory support measures at national level to facilitate the integration of third-country national pupils in education. Member States could follow the best practices and approaches of other Member States that are dealing with this critical challenge.

Table 5.5 summarises the range of different approaches to providing introductory and language support to children of refugee and migrant families.

Table 5.5: Initiatives to secure access to education for refugee and newcomer pupils in EU Member States in 2016

Member State	Educational support in reception centres	Introductory classes before joining regular classes	Language support in regular classes	Maximum duration of introductory and language support (months)
AT	✓	✓	✓	24
BE	–	✓	✓	French community: 12–18 Flemish community: 12–36
BG	–	–	✓	N/A
CY	–	–	✓	N/A
CZ	–	–	✓	6
DE	–	✓	✓	N/A; individual assessment
DK	✓	✓	✓	24
EE	–	–	✓	10
EL	✓	✓	✓	36
ES	✓	–	–	N/A
FI	–	✓	✓[a]	12
FR	✓	✓	✓	12
HR	–	✓	✓	12
HU	–	–	✓	N/A
IE	✓	✓[b]	✓	N/A
IT	–	–	✓	N/A
LT	✓	–	✓	240 hours
LU	✓	✓	–	6–12
LV	✓	–	✓	120 hours
MT	✓	✓	✓	12
NL	✓	✓	–	12–24
PL	–	✓[e]	✓	N/A
PT	–	✓	✓	10
RO	–	✓[c]	✓	12
SE	–	✓	✓	24
SI	–	✓	✓	24
SK	–	–	✓	N/A
UK	–	✓[d]	✓	N/A

Notes: *N/A= not applicable*

[a] *Introducing language support is optional for schools.*

[b] *This is the case for some schools only.*

[c] *Depends on region – ad hoc programmes.*

[d] *Depending on individual assessment by schools that are independent or under local authority control.*

[e] *Introducing introductory classes and language support are optional for schools.*

Source: *FRA, 2016*

5.5.3. Schooling of refugee children triggers tensions

Schooling of children of refugees and migrants has not been introduced without tensions, and triggered occasionally harsh and negative reactions among segments of society in some Member States.

In 2016, there were violent reactions to the schooling of refugee and migrant children at least in **Italy** and **Greece**, as FRA reported in its monthly overviews.[128] In Sicily, **Italy**, refugee children were attacked by locals and needed to be hospitalised.[129]

In **Greece,** refugee children's first days of joining schools' preparatory and introductory classes were marked by negative reactions from local parents, including attempts to obstruct and prevent the children's access to schoolrooms. According to the Greek government, negative reactions in the country were considered isolated incidents that took place in approximately 25 % of the schools, while, in many cases, migrant, refugee and asylum-seeking children were well received, with welcoming activities organised.

Some parents sent letters and gained media attention for refusing to accept migrant and refugee children or to enrol their own children in the same schools. In a couple of cases, they went so far as to padlock school entrances to prevent the children from accessing the schools, discouraging migrant and refugee families from bringing their children to school. This often occurred even though the children were not yet admitted to normal classes and in many cases were to follow different timetables that would not permit them to have contact with the rest of the children. In one case, the police had to escort refugee children as they entered the school premises.[130] This prompted the competent authorities in the country to conduct informational meetings with local community stakeholders to raise awareness among local communities and facilitate and encourage the schooling of migrant and refugee children.

5.5.4. Involving parents in school life and training teachers

As the European Commission's action plan stresses, "education plays a strong role in the socialisation of children and can foster social cohesion and mutual understanding between third country nationals and the receiving societies."[131] Involving children, parents and the families of newcomers in school life may prove the key to promoting participation in shared spaces on the basis of common values and to strengthening relations with local communities in everyday life.

More than one third (10) of the Member States provided assistance measures to help parents and families of migrant refugee children integrate into school life in 2016. Some Member States set a clear path of support for migrant and refugee families to join school life and strengthen their role in the education of their children. Member States such as **Austria**,[132] **Luxembourg**,[133] **Malta**,[134] the **Netherlands**[135] and **Portugal**[136] provide translated education material, extra language and multi-level support to parents of third-country national school children. They integrate such modules in the general induction and introductory courses and support programmes for newly arrived children of asylum seekers, refugees and other third-country nationals. **Belgium**[137] provides mediation and general introductory services to parents, although not at school level. In **Poland**[138] and in the **Czech Republic**,[139] support is available in the form of bilingual teacher assistants for foreign national pupils, and not specifically for third-country nationals. **Estonia**[140] provides counselling to schools and staff to make sure they can provide advice to immigrant parents in supporting their children's learning. Similarly, general information material is provided to parents of third-country national children in **France**.[141]

Education and support for and training of teachers are important and areas on which Member States need to focus their efforts, as the Justice and Home Affairs Council stressed in its conclusions of 9 December 2016.[142] Member State investments in integrating migrant and refugee children in education can bear fruit if teachers are equipped with the skills and tools necessary to support such children in learning the national language and catching up with the rest of the classroom. They also need to be adequately trained and prepared to create and support cohesive and inclusive school communities that build on diversity as an advantage for reaching both curricular and extracurricular objectives of the personal and collective development and growth of all pupils and students.

By the end of 2016, half of the EU Member States did provide some kind of training to teachers who deal with migrant and refugee children who are learning the national language as a second language, FRA's data collection showns. In some Member States, such as **Austria**,[143] **Denmark**,[144] **Finland**[145] and **Ireland**,[146] the teacher-training curriculum includes teaching children who are learning the national language as a second language. In others, such as in **Slovakia** – where the Centre for Continuing Education at Comenius University in Bratislava offers systematic training for teachers in the programme 'Slovak as a Foreign Language'[147] – the influx of migrants and refugees has encouraged the production and provision to teachers of ad hoc training courses, information portals and material about improving their skills in dealing with a diverse classroom and teaching children of migrants and refugees.

Table 5.6: Initiatives for involving parents, and training support for teachers, in EU Member States in 2016

Member State	Involving parents in school life	Training support for teachers
AT	✓	✓
BE		–
BG	–	–
CY	–	–
CZ	✓	✓
DE	–	–
DK	✓	✓
EE	✓	✓
EL	–	–
ES	–	✓
FI	✓	✓
FR	✓	–
HR	–	✓
HU	–	–
IE	✓	✓
IT	–	–
LT	–	–
LU	✓	✓
LV	–	✓
MT	✓	✓
NL	–	–
PL	–	–
PT	✓	✓
RO	–	–
SE	–	✓
SI	–	✓
SK	–	✓
UK	–	–

Source: FRA, 2016

FRA opinions

In 2016, EU institutions and Member States made significant efforts to further develop information systems for migration management and internal security purposes. Existing systems were modified and new systems were proposed. For the future, the plan is to make such systems 'interoperable', allowing the competent authorities to access multiple systems simultaneously. A forthcoming FRA publication on interoperability will address the related fundamental rights concerns. In many cases, the fundamental rights impact of information systems is not immediately visible. The consequences of storing incorrect personal data may affect an individual only years later – for example, when applying for a visa or a residence permit. Article 8 (protection of personal data) of the EU Charter of Fundamental Rights and in particular its principle of purpose limitation (i.e. that data are only used for the purpose for which they were collected) is a central standard when developing technical solutions to improve interoperability between information systems. Therefore, all steps to enhance existing information systems and create new ones should be subject to a comprehensive fundamental rights impact assessment.

FRA opinion 5.1

The EU and its Member States should ensure that information systems for migration management are designed so that officers who handle the data contained therein can only access data in accordance with their work profiles. Officers should only have access to data relevant for the specific tasks they are carrying out at a given moment in time, and be fully aware of which databases they are consulting. Since interoperability means that more data – including biometric data – are more easily accessible, Member States should develop quality standards and administrative procedures to secure the accuracy of the data and limit the risks of unauthorised sharing of data with third parties or countries. Moreover, they should introduce specific safeguards to guarantee that interoperability does not lead to adverse effects on the rights of vulnerable persons, such as applicants for international protection or children, or to discriminatory profiling.

Article 6 of the EU Charter of Fundamental Rights, as well as secondary EU law in the field of asylum and return, requires Member States to examine in each individual case the viability of more lenient measures before resorting to deprivation of liberty. By the end of 2016, all EU Member States provided for alternatives to detention in their national laws, albeit in some cases for certain categories only. However, the inclusion of alternatives to detention into national legislation is in itself not a guarantee that these are applied. In practice, alternatives remain little used.

FRA opinion 5.2

EU Member States should require the responsible authorities to examine in each individual case whether a legitimate objective can be achieved through less coercive measures before issuing a detention order. If this is not the case, the authorities should provide reasons in fact and in law.

Legal avenues to reach safety continued to be illusory for most refugees. There was some progress on resettlement in 2016, but this was offset by a step backwards concerning family reunification, with several EU Member States introducing restrictions in their national laws. Any action undertaken by a Member State, when acting within the scope of EU law, must respect the rights and principles of the EU Charter of Fundamental Rights, which enshrines in Article 7 the right to respect for private and family life. In the case of refugees and persons granted subsidiary protection, it can generally be assumed that insurmountable obstacles prevent their families from living in their home country and that establishing family life in a transit country is usually not an option.

FRA opinion 5.3

EU Member States should consider using a combination of refugee-related schemes and more refugee-friendly, regular mobility schemes to promote legal pathways to the EU. In this context, they should refrain from adopting legislation that would result in hindering, preventing or significantly delaying family reunification of persons granted international protection.

The EU could consider regulating family reunification of subsidiary protection status holders to address the different approaches taken by Member States.

Upholding every child's right to education in the continuing movement of migrant and refugee families in the EU is a major responsibility for the EU Member States. Article 14 of the EU Charter of Fundamental Rights and Article 28 of the United Nations Convention on the Rights of the Child guarantee the right to education to every child, including migrant and refugee children. Making sure that all children enjoy their right to education will benefit not only them, but also the societies they will live in.

This underlines that it is important and beneficial for both the economy and society at large to invest in human rights. 2016 shows that most Member States provided language support and aim to integrate refugee and migrant children in regular classes, allowing for their socialisation with other children and investing in long-term and sustainable social cohesion. However, the level of separated and segregated schooling remains too high.

FRA opinion 5.4

EU Member States should ensure that migrant and refugee children are effectively supported through linguistic, social and psychological support based on individual assessments of their needs. This would prepare them to attend school and integrate successfully in education and local communities. Policies and measures should be in place to avoid separated schooling and segregation and to promote access of migrant and refugee children to regular classes and the mainstream education system.

FRA evidence shows that in 2016 most EU Member States stepped up their efforts to introduce migrant and refugee children in education and support their integration. However, in very few cases, there are still migrant and refugee children who do not attend school, and some local communities and parents of native children react negatively to or even with violence against their schooling together with other children. Expressions of intolerance and hatred towards migrant and refugee children and their families that lead to the deprivation of the children's right to education violate EU and national legislation against discrimination and hatred. Addressing parents' concerns can support integration and promote the participation of migrants and refugees in local communities.

FRA opinion 5.5

EU Member States should address adequately discriminatory or violent reactions against the schooling of migrant and refugee children, both through law enforcement and by promoting mutual understanding and social cohesion. They should apply positive measures for fighting prejudices and help eradicate unfounded concerns. Furthermore, the Member States' authorities should enforce laws and rules against discrimination and hate-motivated crimes on any ground – including ethnic origin, race and religion – that are in force in all EU Member States.

Involving children's parents and families in school life and supporting their efforts to get involved is a crucial part of the education and integration process. A third of the EU Member States do provide measures to support and encourage parents and families of migrant and refugee children by involving them in the education process through information, mediation and language support. Such measures may improve the children's school performance, their and their families' integration in education and in local communities, and foster better community relations. The European Integration Network, whose status was upgraded through the European Commission Action Plan on Integration launched in June 2016, is an adequate framework and space for sharing best practices and solutions that can help Member States to both fulfil their human rights obligations and invest successfully in more cohesive and inclusive societies.

FRA opinion 5.6

EU Member States should share good practices and experiences in integration through education, promoting the participation of children's parents and families in school life, and making the right to education a reality for all children.

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UN & CoE

12 January – In *Szabó and Vissy v. Hungary* (No. 37138/14), the European Court of Human Rights (ECtHR) holds that Hungarian legislation on secret surveillance violates the right to respect for correspondence, home and private life, as it failed to provide adequate safeguards against abuse (Article 8 of the ECHR)

12 January – In *Bărbulescu v. Romania* (No. 61496/08), the ECtHR holds that an employer may under certain circumstances monitor the employees' use of the internet at their workplace and may use the collected data to justify their dismissal, concluding that there was no violation of the right to respect for private and family life (Article 8 of the ECHR); the case was later referred to the Grand Chamber

13 January – Council of Europe (CoE) Committee of Ministers adopts Recommendation CM/Rec(2016)1 on protecting and promoting the right to freedom of expression and the right to private life with regard to network neutrality

26 January – CoE Parliamentary Assembly (PACE) adopts Resolution 2090 (2016) on combating international terrorism while protecting CoE standards and values

January

2 February – In *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (No. 22947/13), the ECtHR holds that imposing strict liability on internet portals for offensive comments posted by their readers, which did not amount to hate speech or direct threats to physical integrity, violates their right to freedom of expression and to impart information (Article 10 of the ECHR)

February

8 March – United Nations (UN) Special Rapporteur on the Right to Privacy issues his first report to the Human Rights Council

30 March – CoE issues its 2016-2019 Internet Governance Strategy

March

13 April – CoE Committee of Ministers adopts Recommendations CM/Rec(2016)4 and CM/Rec(2016)5, relating to internet freedom and the protection of journalism and safety of journalists and other media actors, respectively

April

19 May – In *D.L. v. Bulgaria* (No. 7472/14), the ECtHR holds that the automatic and blanket monitoring of the correspondence and telephone calls of minors placed in an educational centre violates the right to respect for correspondence (Article 8 of the ECHR)

May

7 June – In *Cevat Özel v. Turkey* (No. 19602/06), the ECtHR holds that the unjustified lack of ex post facto notification of the applicant of a temporary phone-tapping measure violates the right to respect for private and family life and for correspondence (Article 8 of the ECHR)

7 June – In *Karabeyoğlu v. Turkey* (No. 30083/10), the ECtHR holds that the use of data in disciplinary proceedings – which originated from a lawful telephone tapping in criminal proceedings – violates the right to respect for private and family life (Article 8 of the ECHR)

17 June – International conference on the globalisation of the Council of Europe convention for the protection of individuals with regard to automatic processing of personal data gathers 80 countries

June

July

30 August – UN Special Rapporteur on the Right to Privacy issues his second report, criticising British and German surveillance measure reforms

August

1 September – Draft modernised Convention for the Protection of Individuals with Regard to the Processing of Personal Data is published

15 September – CoE Consultative Committee of the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data adopts an opinion on the 'Data protection implications of the processing of Passenger Name Records'

16 September – CoE adopts the Bratislava Declaration and Roadmap

September

October

8 November – In *Magyar Helsinki Bizottság v. Hungary* (No. 18030/11), in a Grand Chamber judgment, the ECtHR finds a violation of Article 10 of the ECHR for police stations' refusal to provide an NGO with certain information about public defenders; the government's obligation to impart information held by a public authority may arise where disclosure has been imposed by a judicial order and access to information is instrumental for exercising the right to freedom of expression, and where its denial constitutes an interference with that right

24 November – European Judicial Cybercrime network is launched

November

13 December – In *Eylem Kaya v. Turkey* (No. 26623/07), the ECtHR holds that the prison authorities' systemic physical monitoring of the applicant's correspondence with her lawyer was not proportionate to the aim pursued and thus violated the right to respect for correspondence (Article 8 of the ECHR)

20 December – In *Radzhab Magomedov v. Russia* (No. 20933/08), the ECtHR holds that the national courts' rejection – without sufficient reasoning – of the applicant's request for disclosure of the warrant authorising the interception of his telephone communications in criminal proceedings violated his right to respect for private life (Article 8 of the ECHR)

December

EU

25 January – Europol creates the European Counter Terrorism Centre (ECTC), which focuses on foreign fighters, sharing intelligence on terrorism financing, online terrorist propaganda, illegal arms trafficking and international cooperation among counter-terrorism authorities

January

2 February – European Commission and US Government reach a political agreement on a new framework regarding exchanges of personal data for commercial purposes ("EU-US Privacy Shield")

29 February – European Commission presents the draft Adequacy Decision for free data flow from the EU to the US Privacy Shield companies in the US

February

March

6 April – European Commission issues Communication on Stronger and Smarter Information Systems for Border and Security

12 April – European Commission launches Public Consultation on the Evaluation and Review of the ePrivacy Directive until 5 July 2016

13 April – Article 29 Working Party delivers its Opinion on EU-US Privacy Shield

20 April – European Commission issues Communication on Delivering on the European Agenda on Security to fight against terrorism and pave the way towards an effective and genuine Security Union

21 April – Council of the EU adopts Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime

27 April – Council of the EU and European Parliament (EP) adopt Regulation (EU) 2016/679, on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data

April

5 May – Police Directive enters into force (transposition period until 6 May 2018)

24 May – GDPR enters into force (to be applied from 25 May 2018)

26 May – EP issues resolution on EU-US Privacy Shield

30 May – European Data Protection Supervisor (EDPS) delivers Opinion 4/2016 on EU-US Privacy Shield – More robust and sustainable solution needed

May

16 June – EDPS issues a background paper on necessity – a toolkit for assessing the necessity of measures that interfere with fundamental rights

June

12 July – European Commission adopts the decision on the adequacy provided by the EU-US Privacy Shield (EU) 2016/1250

18 July – EDPS issues guidelines for Data Protection and Whistleblowing in the EU institutions

22 July – EDPS delivers Opinion 5/2016 on e-Privacy: rules should be smarter, clearer, stronger

July

1 August – European Commission publishes a guide to the EU-US Privacy Shield for citizens, explaining available remedies for individuals who believe their personal data were used without taking into account data protection rules

4 August – European Commission publishes summary report on the Public Consultation on the Evaluation of the e-Privacy Directive

August

8 September – Advocate General Mengozzi delivers Opinion 1/15, requested by the EP, on the PNR Agreement between EU and Canada: agreement partly incompatible with Articles 7, 8 and 52 (1) of the EU Charter of Fundamental Rights

14 September – European Commission issues Communication COM(2016) 602 on 'Enhancing security in a world of mobility: improved information exchange in the fight against terrorism and stronger external borders'

16 September – European Council adopts the Bratislava Declaration and Roadmap

16 September – In *Digital Rights Ireland v. Commission* (Case T-670/16), Digital Rights Ireland challenges the Commission's adoption of the EU-US Privacy Shield decision before the General Court, alleging that it lacks adequate privacy protections

23 September – EDPS delivers Opinion 8/2016 on coherent enforcement of fundamental rights in the age of Big Data

September

12 October – First report by the European Commission on progress towards an effective and sustainable Security Union

19 October – In *Breyer v. Bundesrepublik Deutschland* (Case C-582/14), the Court of Justice of the EU (CJEU) rules that a dynamic IP address of a website visitor constitutes personal data with respect to the operator of the visited website, if the operator has the legal means to identify the visitor with additional information about the visitor held by an internet access provider; the decision notes that website operators may have a legitimate interest in storing personal data relating to visitors to their websites to protect themselves against cyberattacks

20 October – EDPS delivers Opinion 9/2016 on Personal Information Management Systems

26 October – Proposal for a Directive of the EP and the Council of the EU on combating terrorism

October

16 November – European Commission issues second report on progress towards an effective and sustainable Security Union

28 November – European Commission releases a Staff Working Document on the Implementation Plan for the Passenger Name Records (PNR) Directive

November

21 December – In *Tele2 Sverige* (C-203/15) and *Watson v. Home Secretary* (C-698/15), the CJEU rules in joined cases that Article 15 (1) of Directive 2002/58/EC, read in light of Articles 7, 8 and 11 and Article 52 (1) of the EU Charter of Fundamental Rights, precludes national legislation which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication

December

6 Information society, privacy and data protection

The year's terrorist attacks in Brussels, Nice and Berlin further intensified debates about ways to effectively fight terrorism in compliance with the rule of law. A number of steps were taken in this respect at both EU and national levels. They include national reforms on surveillance measures, consultations on encryption, and the adoption of the Passenger Name Record (PNR) Directive. Meanwhile, the adoption of the General Data Protection Regulation (GDPR) and the Data Protection Directive for the police and criminal justice sector (Police Directive) constituted a crucial step towards a modernised and more effective data protection regime. The EU in 2016 did not propose revised legislation in response to the Court of Justice of the European Union's (CJEU) earlier invalidation of the Data Retention Directive, but new CJEU case law further clarified how data retention can comply with fundamental rights requirements.

6.1. Responding to terrorism: surveillance, encryption and passenger name records – international standards and national law

The EU faced a continued wave of terrorist attacks throughout 2016. France, Belgium and Germany were particularly affected, with the most devastating attacks killing 86 in Nice, 32 in Brussels and 12 in Berlin. Such attacks threaten various fundamental values, including the right to life, which states are obliged to protect. Coupled with the continuing threat posed by returning foreign terrorist fighters,[1] the attacks underscored the security challenges faced by Member States and, consequently, by the EU. As a result, counter-terrorism remained high on both national and EU agendas and sparked diverse discussions and policy responses, including regarding intelligence and law enforcement agencies; encryption of data; and the collection of passenger name records (PNR) data.

Policy responses included efforts to provide intelligence and law enforcement agencies with increased powers and to improve their cooperation at both national and European levels. Although these services play a vital role in safeguarding national security and individuals' right to life and security, Member States should ensure that their activities – such as surveillance – are conducted in a democratic, lawful manner.

The European Parliament asked FRA to research fundamental rights protection in the context of large-scale surveillance, prompting the following observations about developments in this field in 2016.

6.1.1. International organisations call for restraint on surveillance

Member States' efforts to strengthen intelligence and law enforcement agencies triggered calls for restraint by various international organisations, who also reminded all parties to respect relevant international and European legal standards.

> *"Whatever we do to counter terrorism must be consistent with the values which unite us: human rights, democracy and the rule of law."*
>
> *Terrorism: #NoHateNoFear, a Council of Europe Parliamentary Assembly (PACE) initiative*

The UN Special Rapporteur on the right to privacy, Joseph Cannataci, who took on his role in July 2015, has since issued two reports. In his March 2016 report,

he proposed a shift in approach to the tensions of the field – from speaking of "privacy versus security" to instead speaking of "privacy and security", with both rights seen as "enabling rights rather than ends in themselves".[2] He also noted that many countries had rushed privacy-intrusive legislation through parliament.[3] Meanwhile, the UN Special Rapporteur on human rights and counter-terrorism, Ben Emmerson, in a report issued in April 2016, stated that the "demonstrable inadequacy of a strict security approach to countering terrorism" had led states to shift their focus to measures that address the root causes of terrorism and radicalisation.[4]

The Council of Europe Parliamentary Assembly (PACE) echoed this approach in a resolution calling on Member States to "refrain from indiscriminate mass surveillance, which has proven to be inefficient"[5] and instead improve national and international cooperation.[6] In the same spirit, PACE also launched the #NoHateNoFear initiative to counter terrorism. It aims to draw attention to the complexity of the problem to avoid fuelling populist movements, which "play on security as a simplistic option to combat terrorism".[7] (For more on this issue, see Chapter 3 on Racism, xenophobia and related intolerance.)

To help further clarify the legal framework applicable to Member States, the Secretary General of the Council of Europe pledged to work with states in launching a process before the end of 2016, aiming to codify international standards, good practices and guidance relating to mass surveillance.[8] In March, the Venice Commission also adopted a so-called Rule of Law Checklist, providing, among others, specific rule of law benchmarks on the collection of data and surveillance.[9]

The UN Human Rights Council (HRC) called upon states to review their practices and legislation relating to surveillance and ensure that they are in line with their obligations under international human rights law. It underlined that any interference with the right to privacy must be regulated by "publicly accessible, clear, precise, comprehensive and non-discriminatory" laws.[10] Data protection in the context of surveillance has also featured throughout the Universal Periodic Review of EU Member States (**Belgium**,[11] **Estonia**,[12] **Latvia**[13]) and was stressed in the UN Human Rights Committee's concluding observations on **Denmark**,[14] **Poland**[15] and **Sweden**.[16] Regarding **Sweden**, for example, the committee stated that it was concerned by the limited transparency about the scope of surveillance powers and the safeguards in place both regarding their application and the sharing of raw data with other intelligence services.[17]

Meanwhile, in January 2016, the European Court of Human Rights (ECtHR) delivered an important judgment on secret surveillance. In *Szabó and Vissy v. Hungary*, the court found that the 2011 **Hungarian** legislation on secret anti-terrorist surveillance violated Article 8 of the ECHR because it failed to provide adequate safeguards against abuse. Referring to the Court of Justice of the European Union's (CJEU) judgment in *Digital Rights Ireland v. Minister of Communications & Others*, the ECtHR stated that, where national rules enable large-scale or strategic interception and where this interference "may result in particularly invasive interferences with private life", the "guarantees required by the extant Convention case-law on interceptions need to be enhanced so as to address the issue of such surveillance practices".[18]

Contrary to claims that the ECtHR outlawed mass surveillance with *Szabó and Vissy*, it in fact did "not seem to have taken a final position on the legality of the massive and indiscriminate collection of personal data (i.e. non-targeted bulk collection)".[19] Several cases pending before the court are likely to further clarify its stance on surveillance by intelligence services.[20]

6.1.2. Fear of terrorism prompts calls for increased powers for, and cooperation between, intelligence and law enforcement services

As noted above, the year's terror attacks served as a stark reminder of the security challenges faced by Member States and, by extension, the EU. For policymakers looking to devise effective responses and security measures, doing so while complying with fundamental rights was a central challenge.

On 23 March, one day after the attacks in Brussels, Commission President Juncker announced that, to counter terrorism effectively, the EU would need to establish a Security Union.[21] Reflecting the importance attached to security, in September 2016 the Council of the EU appointed Julian King to the newly created post of Commissioner for Security Union. The commissioner aims to create an effective and sustainable Security Union, with fundamental rights at the heart of the framework.[22]

From a data protection perspective, the calls and efforts to increase the interoperability of EU information technology (IT) systems appear to focus predominantly on technical matters, and have – so far – only cursorily addressed fundamental rights aspects. (For more on such systems, see Chapter 5.) FRA is a member of the Commission's High Level Expert Group on Information Systems and Interoperability, and in this role has sought to underline how fundamental rights should be embedded in any IT-based responses.[23] Another criticism of the proposed measures, voiced in the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, relate to their effectiveness.[24] The committee pointed out that perhaps it is not blanket collection and retention of data – mostly on people

who are not suspected of any crimes or involvement in terrorist activities – that is necessary to counter terrorism, but rather better analysis of existing data and more investment in local authorities' capacities.[25]

Regarding information exchanges between and among law enforcement and intelligence services, the Commission deemed urgent the need to address existing gaps between these two communities.[26] One option it suggested is opening the Counter Terrorism Group (CTG) to 'interaction' with law enforcement authorities through the existing Europol framework.[27] The CTG is a platform for informal cooperation among intelligence services, functioning outside the EU framework. It includes the services of EU Member States, Switzerland and Norway.[28] The Commission also emphasised the need for increased cooperation between these institutions and the EU Intelligence and Situation Centre (IntCen), with a view to creating an information exchange hub.[29]

In September, the European Council adopted the Bratislava Roadmap.[30] Key elements of this working programme include proposed measures to increase cooperation and intelligence exchanges between Member State security services to help the EU ensure the internal security of Member States and fight terrorism.[31]

Much activity also occurred at Member State-level throughout the year. A number of Member States enacted legislation that affects surveillance by intelligence services. In many, reform was in progress. Key subjects included the mandates of intelligence services and measures available to them; their cooperation with national law enforcement authorities; and the national oversight systems. Member States that took action faced the challenge of striking an appropriate balance between complying with their obligation to protect the life and integrity (security) of their citizens against ever more apparent threats, and respecting citizens' privacy in line with European standards. These balancing efforts often occurred amidst a trend Commission President Juncker had warned against:[32] simplification of issues and solutions, populism and disregard for evidence in decision-making.

Regulating surveillance at national level: consultation and transparency

One of the persisting issues at national level is a lack of transparency and public dialogue, whether relating to the adoption of new laws or to the functioning of the intelligence services. In **Poland**, for example, the new Anti-terrorist Act[33] was introduced in a fast-track legislative process, without official public consultation. The act substantially extends the powers of the intelligence services without providing any additional safeguards against the abuse of those powers. In **Romania**, although a public consultation took place, provisions expanding the powers of the Romanian Intelligence Service (RIS) (*Serviciul Român de Informații*, SRI) appeared only in the final version of the Emergency Ordinance[34] and were not part of the document submitted for public debate.

On the other hand, a number of Member States engaged in legislative and oversight reforms with a view to gaining trust via transparency. In the **United Kingdom**, extensive consultation preceded the passing of the Investigatory Powers Act. The Joint Committee on the Draft Investigatory Powers Bill heard 59 people in 22 public panels,[35] including public authorities, non-governmental organisations, academia and private companies.[36] The government also sought expert advice from the Independent Reviewer of Terrorism Legislation.[37]

The **Irish** government in January 2016 appointed a retired judge to carry out an independent review of a law relating to public authorities' access to communications data of journalists.[38] The **Belgian** parliament established a temporary 'Fight against Terrorism' Commission to examine the bills implementing some of the measures put forward by the government following the terrorist attacks in Paris.[39] After the March attacks in Brussels, a Parliamentary Investigative Commission was also set up to examine the circumstances that led to the attacks.[40]

Member States also endeavoured to increase the transparency and legality of the functioning of their intelligence services by regulating previously unregulated areas. For example, in **Germany**, a law regulating the German intelligence service's (BND) gathering of intelligence on foreigners abroad came into force – a substantial step towards transparency.[41] Similarly, in **Italy**, a draft law aims to regulate the police's and judicial authorities' use of wiretapping and 'Trojan programs', malicious programs used to hack computers.[42] The Chamber of Deputies has already approved the law. Moreover, in **Cyprus**, the Cyprus Intelligence Service (CIS) was also brought within a regulatory framework in April.[43]

Intelligence services' operations and oversight

As previously noted, Member State efforts to increase the effectiveness of security services involved two main approaches in 2016: expanding their powers, competences or resources; and facilitating cooperation between relevant actors, both at national and EU levels.

For example, in the **United Kingdom**, the Investigatory Powers Act gives the services the power to require the retention of internet connection records indiscriminately when it relates to any of a list of purposes, including national security. This means that internet providers must keep track of each connection to the internet through a website or an instant messaging application.[44]

In **Poland** and **Hungary**, measures to increase executive control and centralise information management were implemented. In **Poland**, a new law on the Prosecutor's Office was adopted in March 2016. Pursuant to its provisions, the previously independent office of the Prosecutor General is now held by the Minister of Justice. The legislation also allows the Prosecutor General to order the competent authorities to conduct surveillance if it is related to ongoing investigations. Thus, the minister is now responsible for both providing oversight of the special services and ordering operational surveillance.[45] **Hungary** established a new information centre – the Counter-Terrorism Information Analysis Centre (*Terrorelhárítási Információs és Bűnügyi Elemző Központ*, TIBEK) – to collect and systematise information derived from various surveillance operations conducted by the different national security services.[46]

Legislative changes and other measures also addressed the oversight systems for intelligence services. The **United Kingdom** Investigatory Powers Act creates a new oversight system with a single Investigatory Powers Commissioner, who is to be assisted by Judicial Commissioners.[47] The act introduces a so-called double-lock system: alongside approval by the Secretary of State, warrants for surveillance measures also need to be authorised by a Judicial Commissioner.[48]

Meanwhile, in **France**, the state of emergency introduced after the November 2015 Paris attacks was prolonged for a fourth time. According to the law enacted at the last extension, it is to be lifted on 15 July 2017.[49] The state of emergency extends intelligence services' powers relating to, for example, the real-time monitoring of individuals.[50]

Promising practice

Providing relevant advice before authorising certain surveillance efforts

A draft bill for a new Act on the Intelligence and Security Services is currently under discussion in the **Netherlands**. In the meantime, a temporary commission advises ministers before they authorise intelligence services to apply special powers to lawyers and journalists. It was established to comply with a domestic court judgment (District Court of The Hague (*Rechtbank Den Haag*), Case No. C/09/487229, 2015) as well as with an ECtHR judgment (*Telegraaf Media Nederland B.V. and others v. the Netherlands*, No. 39315/06, 2012). The commission is staffed by the Chair of the Review Committee and a deputy. Its advice is binding.

For more information, see Minister of the Interior and Kingdom Relations & Minister of Defence (Minister van Binnenlandse Zaken en Koninkrijksrelaties & Minister van Defensie) (2015), Tijdelijke regeling onafhankelijke toetsing bijzondere bevoegdheden Wiv 2002 jegens advocaten en journalisten

6.1.3. Encryption sparks debate

The issue of encryption dominated debates at international, European and national levels throughout 2016. Encryption is a privacy-enhancing technology that allows the secure processing of data. Data and communications are converted into a code that allows access only to those who have a key or password or, in case of end-to-end encryption, only to those for whom the data are intended.

The debate presently revolves around whether or not the interests of national security and crime prevention justify requiring companies to insert back doors into their programs to make the encrypted data accessible. The argument for access by intelligence and law-enforcement services is that terrorists or other criminals could otherwise avoid detection and police authorities could be prevented from obtaining crucial evidence. The counter-arguments, as developed by a group of pre-eminent cryptographers, computer scientists and security specialists, are that "the costs would be substantial, the damage to innovation severe, and the consequences to economic growth difficult to predict".[51]

Thus, weakening encryption software may have a number of unintended consequences. For example, it may adversely affect the security of online transactions, people's trust in these, and, consequently, the appropriate functioning of the EU's Digital Single Market. Another such consequence relates to the security of journalists' sources and so to journalism as a whole. Recognising this aspect of the encryption debate, in its resolution on 'The safety of journalists', the UN Human Rights Council called upon states not to interfere with the use of technologies providing encryption and anonymity.[52]

Likewise, the UN Special Rapporteur on the right to privacy condemned the direction of ongoing reforms in the field in the **United Kingdom**,[53] and stated that "the security risks introduced by deliberately weakened encryption are vastly disproportionate to the gains".[54] The rapporteur commended the **Dutch** government for accepting and endorsing the importance of encryption in providing internet security and thereby ensuring the protection of the privacy and confidentiality of communications, whether pertaining to citizens, the government or companies.[55]

The Council of Europe's Recommendation CM/Rec(2016)5 on Internet freedom noted that "[t]he State does not prohibit, in law or in practice, anonymity, pseudonymity, confidentiality of private communications or the usage of encryption technologies", adding that "[i]nterference with anonymity and confidentiality of communications is subject to the requirements of legality, legitimacy and proportionality of Article 8 of the [ECHR]."[56]

That encryption may hamper the prevention, detection and prosecution of all kinds of crime is recognised at EU level. So is its effectiveness in providing secure data processing, a key element of data protection.[57] The terrorist attacks and questions about whether encryption software may have helped the perpetrators particularly prompted debates on the issue. In August, the interior ministers of **Germany** and **France** identified encrypted communication as a major challenge for investigations. They underlined the need to identify solutions that permit both effective investigations and the protection of privacy and the rule of law. To that end, they called on the Commission to consider putting forward legislation imposing uniform obligations on internet and electronic communication providers in terms of cooperation with authorities and, in particular, law enforcement agencies.[58]

In November, concerns about encryption triggered two developments at EU level. First, the European Judicial Cybercrime Network (EJCN) was launched.[59] It aims to facilitate the exchange, among judicial authorities, of information and good practices regarding cybercrime and cyber-enabled crime.[60] Encryption is a key challenge in investigating and prosecuting such crime.[61] Second, the Slovak Presidency prepared a report with a survey on Member States' experiences with, and views on, encryption-related matters.[62] Of the 25 Member States that responded, the majority thought that the EU should play a practical and facilitative – rather than legislative – role, focusing on improving technical skills among national authorities, exchanging information, and cooperation between national police, Eurojust, Europol and the EJCN.[63] In this respect, the Commission's Joint Research Centre, together with Europol and national law enforcement authorities, is already engaged in developing solutions for decryption techniques compliant with EU law.[64]

Towards the end of 2016, the Commission established a working group to look at the role of encryption in criminal investigations. It asked FRA to contribute alongside Europol, Eurojust and ENISA. The issue is likely to remain high on the agenda in 2017.

6.1.4. PNR Directive adopted but implementation proceeds slowly

The PNR Directive entered into force in May 2016, and Member States have two years to transpose it.[65] The Commission emphasised the importance of quickly implementing the instrument, which it considers important for achieving an effective and sustainable Security Union.[66] To this end, as part of the European Security Agenda, the Commission provided € 70 million in additional funding for Member States to establish national PNR systems.[67]

Despite improvements, fundamental rights concerns remain

The final text of the directive reflects some of the recommendations FRA outlined in its 2011 opinion on the EU PNR data collection system.[68] As reported in FRA's *Fundamental Rights Report 2016*,[69] the directive includes an exhaustive list of what is considered serious crime for purposes of the directive, so that the grounds for law enforcement authorities' use of PNR data are foreseeable and accessible by every individual. That said – although the grounds permitting the use of PNR data are restricted to terrorist offences and serious crime – the list of offences is quite extensive, including 26 different offences.[70]

The directive also reflects some points FRA's 2011 opinion made concerning necessity, proportionality and data protection safeguards of the PNR system.[71] Data protection safeguards in the final text are more enhanced than in the Commission's initial proposal in 2011. A good example is the addition of the requirement for Member States to appoint data protection officers to their national Passenger Information Units.[72] However, despite considering necessity and proportionality, the text does not include fundamental rights-relevant indicators as part of the Commission's procedure for annually reviewing the statistical information on PNR data provided to the Passenger Information Units, as FRA initially recommended.[73] Accordingly, any interferences with the right to privacy and data protection or the right to non-discrimination when applying the directive are not reviewed.

For retention of PNR data to be proportionate and not go beyond what is necessary, legal frameworks must distinguish categories of data according to their usefulness and outline objective criteria that determine the duration of retention.[74] The PNR Directive envisages data retention for five years.[75] That said, it refers neither to specific categories of data nor to any specific grounds for such a long retention period. The Advocate General highlighted the absence of these elements, among others, in the Opinion on the *Agreement between the EU and Canada for transfer of PNR data*[76] when examining its compatibility with the EU Charter of Fundamental Rights.[77] The Advocate General concluded that, insofar as the agreement does not meet the necessity and proportionality requirements, as well as other data protection safeguards, it cannot enter into force in its current form. The CJEU will deliver its ruling in this case in 2017. Although it concerns the EU-Canada PNR scheme, the court's finding will certainly be relevant to the EU PNR scheme as well as the PNR Directive.

The application of the PNR Directive will ultimately depend on how Member States incorporate its provisions into national law. In light of the potential

deficiencies, Member States could, for example, add to their national laws the missing fundamental rights-relevant indicators for the review procedure by the Commission. Furthermore, the directive allows Member States to extend the application of the PNR system to flights within the EU at their own discretion.[78] It remains to be seen how Member States will exercise this discretion, considering that the right to free movement must be unequivocally respected and may be restricted only on grounds of public policy, public security or public health, taking into account necessity and proportionality.[79]

Implementation proceeds at slow pace

Despite the Commission's emphasis on fast implementation, the majority of Member States have not advanced particularly far in transposing the directive.

Of the 12 Member States that received financial support from the Commission in 2015 to establish national PNR systems,[80] only **Bulgaria**, **Latvia**[81] and **Slovenia** have proceeded to do so. **Bulgaria**'s new rules, in force since February 2016, include many provisions implementing the PNR Directive.[82]

Four Member States established national PNR systems before adoption of the PNR Directive: **Belgium**, **France**, **Hungary** and the **United Kingdom**. While Belgium and France are currently adjusting their legislation to the EU PNR system, the **United Kingdom** has not taken any steps towards implementation of the new directive. **Belgium** is finalising the legislation for its national PNR system; several members of the Belgian parliament and the European Commission have expressed concern about the legal text, questioning its appropriateness because it goes far beyond the European directive by including rail, maritime and road transport.[83] **France** finalised the technical adaptations to the PNR Directive; the new rules entered into force and will apply gradually from the end of 2016 onwards.[84] **Hungary** already adopted its first national PNR legislation in 2013[85] and the parliament adopted the necessary amendment for the implementation of the PNR Directive in November 2016.[86]

Of the Member States without national PNR systems, only four have already taken steps to initiate legislative procedures to implement the PNR Directive or are in the process of doing so. These are **Cyprus**, **Germany**,[87] **Luxembourg**[88] and **Slovakia**.

Although Member States pushed for the creation of an EU PNR data collection system as a response to 'foreign terrorist fighters' and the Paris attacks, 17 Member States do not appear to prioritise implementing the PNR Directive. The slow pace of implementation could relate to differing terrorism threat levels and the varying importance of personal data protection in Member States.

On 28 November 2016, the Commission published a detailed EU PNR implementation plan[89] "to tackle some of the problems that have emerged in preparing for effective implementation by spring 2018".[90] Meanwhile, the Council of Europe Consultative committee of the convention for the protection of individuals with regard to automatic processing of personal data in September adopted an opinion on the "Data protection implications of the processing of Passenger Name Records";[91] it provides complementary guidance on data protection safeguards applicable to third countries that are parties to the convention.

6.2. EU legal framework attunes itself to digitalisation, Member States slowly adapting

> *"Being European means the right to have your personal data protected by strong, European laws. Because Europeans do not like drones overhead recording their every move, or companies stockpiling their every mouse click. This is why Parliament, Council and Commission agreed in May this year a common European Data Protection Regulation. This is a strong European law that applies to companies wherever they are based and whenever they are processing your data. Because in Europe, privacy matters. This is a question of human dignity."*
>
> *European Commission, Juncker, J.-C. (2016), 'State of the Union address 2016', Speech/16/3043, 14 September 2016*

6.2.1. A modern and strengthened European data protection law

In April 2016, after more than four years of negotiation, the EU legislators adopted the data protection reform. The reform has the ambitious goal of adapting the European legal framework governing the protection of personal data to the realities and challenges arising from an ever more data-driven society. It consists of the General Data Protection Regulation (GDPR)[92] and the Police Directive.[93] The GDPR will apply as of 25 May 2018, and Member States have until 6 May 2018 to incorporate the Police Directive into national law.

The first crucial clarification brought about by the GDPR concerns the territorial application of EU law. The regulation now clearly states that it applies to all processing of EU residents' personal data, regardless of whether or not such processing takes place in the territory of the Union. The GDPR also simplifies several procedures. For example, it removes companies' obligation to notify data protection authorities (DPAs) of their processing activities: undertakings are now required to record such processing, and are to deliver them to DPAs only upon request. Small and medium-size businesses or organisations are exempted from this requirement, except in certain enumerated situations.

Moreover, the regulation increases the availability of effective remedies. Notable novelties include the possibilities for individuals to seek remedies in their country of residence and for third parties to initiate collective claims. DPAs are now also able to impose significant fines on data controllers: while current national legislation implementing the 1995 directive generally sets up maximum fines under € 1 million, the GDPR allows for compensation up to € 20 million or 4 % of the total worldwide annual turnover, whichever is greater.

The Police Directive seeks to facilitate information exchange in criminal law enforcement. Criteria for exchanges of information between national police and judicial authorities are harmonised to facilitate processes and ultimately increase efficiency in this field. The Police Directive includes many of the reforms introduced by the GDPR, such as the implementation of 'data protection by design' measures, the obligation to notify people of breaches, and clarifications of the processor's liability and requirements.

The reforms also enhanced the powers of DPAs. They emphasise cooperation and coordination among these authorities to ensure consistent application of the data protection legislation across EU Member States. Several mechanisms pursue this aim: the establishment of a lead supervisory authority (referred to as the 'one-stop-shop' principle); the consistency mechanism; and the replacement of the Article 29 Working Party with a new independent EU body, the European Data Protection Board (EDPB). The Police Directive also clarifies DPAs' tasks and powers. In particular, DPAs are granted corrective powers over controllers and processors, and they may impose temporary or permanent bans on illegal data processing. DPAs are also entrusted with dealing with complaints lodged by data subjects. While this broadened range of powers is welcome, it will require additional resources for DPAs.

Overall, the GDPR aims to eliminate most discrepancies in Member States' legal frameworks, such as regarding legally enforceable rights; obligations and responsibilities of data controllers and processors; powers and competences of DPAs; and available sanctions in case of violations. It reforms and enhances key principles ensuring effective personal data protection.

Moreover, the regulation will significantly affect any future developments in the data protection field. All new legislation has to reflect the changes brought by the GDPR – as, for instance, in the cases of the recently adopted Network and Information Systems (NIS) Directive[94] and the EU-US Privacy Shield, once the GDPR applies fully.[95] The CJEU will ultimately decide on the latter's compliance with the new principles of the GDPR in a case brought by the advocacy group Digital Rights Ireland in September 2016.[96] In the meantime, Maximilian Schrems is continuing his case[97] against Facebook before both the Irish courts and the CJEU – this time seeking to invalidate the ''Standard Contractual Clauses', the preapproved contractual agreements that Facebook uses to transfer the data of EU citizens to the USA.

6.2.2. Towards national reforms

The GDPR will apply uniformly across the EU. However, several opening clauses leave room for Member States to further develop some of the principles in the regulation. The **German** Ministry of the Interior has assessed the feasibility of making use of these clauses.[98] In most Member States, such as **Belgium**, **Finland**, **Germany**, **Greece** and **Sweden**, governments have set up working groups tasked with assessing whether or not new legislation will be needed.

Some Member States, such as **Bulgaria**, **Latvia** and **Poland**,[99] have announced that draft laws will be published in 2017 and are currently assessing the required adaptations, sometimes through stakeholder consultations (**Poland**). In **Belgium**, the government announced that the DPA will undergo an in-depth reform to ensure its transformation into a fully independent regulator.[100]

DPAs are both actors in, and beneficiaries of, the reform. Their mandate and responsibilities will expand. Therefore, most authorities are raising awareness about, and advising data controllers to facilitate, the reform. Recent studies in Lithuania, however, show that there is little awareness of the new regulation among both the general population and the private sector.[101]

In some Member States, such as **Hungary**,[102] **Lithuania**[103] and the **United Kingdom**,[104] DPAs developed a dedicated webpage on the regulation with special advice aimed at companies. Several DPAs, such as in **Lithuania**, **Luxembourg** and **Portugal**, organised public events or seminars on the reform. In some Member States, DPAs were already undergoing internal reforms prior to adoption of the GDPR, and are now continuing such reforms following the principles established by the new regulation. This is the case in **Ireland**, where the Data Protection Commissioner (DPC) is conducting an in-depth reform and expansion in terms of human, financial and operational resources.[105]

However, despite the large new set of competences granted to DPAs by the GDPR (see Section 6.2.1),[106] some Member States – such as **Croatia** and the **Czech Republic** – do not plan any reforms or adaptations of their DPAs.

6.2.3. An enhanced privacy framework

One of the key initiatives of the Digital Single Market (DSM) Strategy was to assess the e-Privacy Directive and adapt it to the digital and technological

developments of the market. The e-Privacy Directive was introduced in 2002 to address the requirements of new digital technologies and ease the advancement of electronic communications services by regulating spam, cookies, confidentiality of information and other specific issues that were not covered by the Data Protection Directive.

Between April 2016 and July 2016, the Commission conducted a public consultation and a Eurobarometer survey, aiming to assess the principles currently regulating electronic communication. The outcomes highlight the differences in the viewpoints of industry and civil society. Respondents from the industry were generally confident that the current directive is sufficient and has so far achieved its goals. Citizens and civil society, however, pointed out its narrow scope, the imprecision of the rules and the lack of strong enforcement incentives.[107] The failure to protect citizens from so-called 'cookie-walls', which prevent users from accessing online services if they do not consent to the storage of their data, was also noted.

A 2016 Eurobarometer survey on e-privacy showed that European residents value their privacy and expect it to be protected online. The privacy of their personal information, online communications and online behaviour was very important to the majority of the survey respondents.[108] This is in line with the 2015 Eurobarometer results, which showed that personal data protection is a very important concern for Europeans.

Eurobarometer survey underlines importance of e-privacy to Europeans

In a 2016 Eurobarometer survey on e-privacy, more than nine in 10 respondents said that it is important that personal information – such as pictures and contact lists – on their computer, smartphone or tablet can be accessed only with their permission, and that it is important that the confidentiality of their emails and online instant messaging is guaranteed (both 92 %). More than eight in 10 also said that it is important that tools for monitoring their activities online – such as cookies – can be used only with their permission (82 %). Six in 10 respondents already changed the privacy settings on their internet browser (e.g. to delete browsing history or cookies) (60 %). Respondents find it unacceptable to have their online activities monitored in exchange for unrestricted access to a certain website (64 %), or to pay not to be monitored when using a website (74 %). Almost as many say that it is unacceptable for companies to share information about them without their permission (71 %).

Source: European Commission (2016), Flash Eurobarometer 443: e-Privacy, Brussels, December 2016

The European Data Protection Supervisor (EDPS) and the Article 29 Working Party also agreed on the need to review the current legal framework with respect to e-privacy.[109] They highlighted the need to avoid any data retention requirement in the new legal framework, in conformity with the CJEU's *Digital Rights Ireland* ruling; pointed out that end-to-end encryption must be allowed; and recalled that consistency with, and non-duplication of, the GDPR standards should be ensured. To ensure such consistency and non-duplication, the EDPS recommended that legislators opt for a regulation instead of a directive as the legal basis for the updated act. The European Commission is expected to present a proposal in early 2017.

6.3. In search of a data retention framework

6.3.1. European regime on data retention still absent

As discussed in previous FRA Fundamental Rights Reports, whereas developments in 2014 focused on the question of whether or not to retain data, the prevalent voice among EU Member States in 2015 was that data retention is an efficient measure for ensuring national security and public safety and for fighting serious crime. In 2016, with an EU legal framework on data retention still lacking, the CJEU further clarified what safeguards are required for data retention to be lawful.

The joined cases *Tele2 Sverige* and *Home Secretary v. Watson*[110] scrutinised the conformity of the compulsory retention of electronic communications data with the e-Privacy Directive and the EU Charter of Fundamental Rights. The cases were brought as a consequence of the *Digital Rights Ireland* judgment, in which the CJEU laid down the requirements for data retention to be legal. The question was whether or not requiring telecommunication companies to store data on telephone calls, emails and websites visited by their clients violates the right to privacy and personal data protection. The court concluded that Member States cannot impose a general obligation on providers of electronic telecommunications services to retain data, but did not ban data retention altogether. Such retention is compatible with EU law if deployed against specific targets to fight serious crime. Retention measures must be necessary and proportionate regarding the categories of data to be retained, the means of communication affected, the persons concerned and the chosen duration of retention. Furthermore, national authorities' access to the retained data must be conditional and meet certain data protection safeguards. Table 6.1 presents an overview of the requirements.

This important judgment raises a number of questions in connection with other key acts, particularly the recently adopted PNR Directive (see Section 6.1.4). It provides guidance to legislators of the forthcoming proposed e-privacy reform but also further clarifies the safeguards needed in national or European data retention frameworks. In the absence of a European data retention regime, it remains to be seen how national legislators will react to the CJEU judgment, which could trigger additional litigation at Member State level.

Table 6.1: Data retention obligations in light of *Tele2 Sverige* and *Home Secretary v. Watson*

Targeted retention for purpose of fighting serious crime	
Required safeguards	**How to establish safeguards in national legislation**
Strictly necessary categories of retained data AND Strictly necessary means of communications affected AND Strictly necessary persons concerned AND Strictly necessary retention period	Clear and precise rules for scope and application of data retention measures AND Objective criteria establishing connection between data to be retained and objective pursued AND Objective evidence establishing a link with a public and serious crime, including by using a geographical criterion

Source: *FRA, 2017 (based on CJEU, Tele2 Sverige AB v. Post-och telestyrelsen and Secretary of State for Home Department v. Watson and Others, Joined Cases C-203/15 and C-698/15, 21 December 2016, paras. 108–112)*

The CJEU delivered another important judgment in *Breyer*,[111] which examined whether or not dynamic Internet Protocol (IP) addresses can qualify as personal data, and whether pursuing a legitimate interest can suffice to justify storing and processing personal data or this can be done only for the specific purposes outlined in the (now invalidated) Data Retention Directive. The CJEU concluded that such addresses may constitute personal data where the individual concerned can be identified, even where a third party must obtain additional data for the identification to take place.[112] (The French Court of Cassation similarly concluded in November 2016 that IP addresses constitute personal data.[113]) The CJEU also held that data retention is allowed as long as website operators are pursuing a legitimate interest when retaining and using their visitors' personal data. This is of major importance for data retention rules; it follows that online media service providers can lawfully store their visitors' personal data to pursue a legitimate interest, rather than just for the purposes previously outlined in the invalidated Data Retention Directive. Thus, the grounds justifying data retention have become broader.

6.3.2. Ambiguity persists at national level

Member States made only limited progress in adopting new legal frameworks for data retention to incorporate the requirements and safeguards set out in the CJEU's case law. Most seem reluctant to amend their national laws to conform to the *Digital Rights Ireland* and *Tele2* judgments. In the meantime, challenges against domestic data retention laws in Member States generally abated, though three characteristic cases challenging data retention were brought in **Germany**, the **Netherlands** and the **United Kingdom** in 2016.

In **Germany**, the Federal Constitutional Court rejected several expedited actions[114] brought by lawyers, doctors, journalists, members of parliament and media associations – i.e. professionals bound by professional secrecy – as users of telecommunication services for private or business purposes. The applicants were seeking to annul the new provisions on the retention of telecommunication metadata introduced by a 2015 law.[115] The court held that suspending the disputed provisions was not justified because the mere storage of data does not automatically cause serious disadvantages, even to persons bound by professional secrecy. The court further stressed that the conditions set out in the legislation for the use of data for criminal investigations meet the standards laid down in previous case law.

In the **Netherlands**, the Administrative Jurisdiction Division of the Council of State decided on an administrative action[116] against the Passport Act (*Paspoortwet*),[117] which allows the Dutch authorities to store in a database digital fingerprints obtained for new passports or identity cards. The Council of State referred the case to the CJEU for a preliminary ruling, but the court concluded that it could not review the matter because it does not fall within the scope of the European Passport Regulation.[118] The Council of State then decided that the long-term decentralised storage of digital fingerprints by the authorities is illegitimate.[119] However, this cannot prevent the authorities from refusing to issue a passport.

Finally, the **United Kingdom** Court of Appeal[120] reviewed a claim alleging that the retention of, and access to, sensitive personal data – in particular, on gender reassignment – by certain officials breached

the right to private life (Article 8 of the ECHR). The court dismissed the appeal, holding that although there was an interference with Article 8, it was proportionate. Specifically, the data were already in the public domain and would mostly be of no interest to those assessing them, and they would typically have no contact with the applicant. Additionally, disciplinary measures were provided for in case of any abuse of access by the officials.

Member States hesitant to revise national data retention laws

As previously noted, the majority of Member States consider data retention an efficient way to protect national security and public safety as well as to address crime. Given the CJEU's judgment in *Digital Rights Ireland*, although there is no strict legal obligation to do so, to ensure full respect for fundamental rights, the next step for Member States would be to reform their domestic legal frameworks and provide for the safeguards laid down by the CJEU. However, only four Member States enacted legislative amendments following the judgment and only six Member States are pursuing such amendments.

Figure 6.1 outlines the amendments in progress or enacted in 2016. As it illustrates, most governments responded to the CJEU's holding by introducing stricter access controls and specifying the types of crime justifying access to retained data. The remaining Member States have taken no steps to introduce fundamental rights safeguards in their domestic data retention regimes.

In **Belgium**, a new law has been in force since July 2016.[121] Given the concerns expressed during the legislative process,[122] it added strict safeguards and security measures. The law also clearly defines which authorities can access and retain data and for how long, and specifies the requirements for accessing three different categories of data.[123] However, the blanket retention of data by telecommunication providers has not been removed.[124] In **Slovakia**, a new law entered into force on 1 January 2016, abolishing the preventative blanket retention and storage of data by telecommunications companies and introducing all the safeguards prescribed by the CJEU.[125]

In **Denmark**, the government announced that preparations for revising data retention rules are underway, stating that the revised rules are currently under consideration and planned to be introduced in the fall of 2017.[126] The revised rules will take into consideration the CJEU's *Tele2* judgment.

In **Luxembourg**, the government introduced a bill amending the data retention regime in accordance with *Digital Rights Ireland* and restricting the possibilities of retaining data to the grounds specifically listed in the bill.[127] It was debated whether or not the bill contains a wider list of offences justifying retention beyond what is strictly necessary.[128] In the **United Kingdom**, the Investigatory Powers Act[129] provides for the Secretary of State to require communication service providers to retain relevant communications data for one or more of the statutory purposes for a period up to 12 months and specifies a number of safeguards in respect of data retention.

In **Hungary**, the government has not taken any steps to amend the Act implementing the Data Retention Directive.[130] However, the Hungarian parliament amended the Act on certain questions of electronic commercial services and information society services[131] to expand the scope of data retention. It introduced data retention obligations for electronic and IT service providers similar to those applicable under the Act implementing the Data Retention Directive. The new law obliges electronic and IT service providers that allow encrypted communication through their services to store all metadata related to such communications for one year.[132] It thus widens the scope of data retention.

All in all, Member States' progress on the issue since the CJEU's invalidation of the Data Retention Directive remains limited. This may partly be due to the absence of harmonised rules at EU level. Eurojust, the EU agency for judicial cooperation in criminal matters, has stated that, while data retention schemes are considered necessary tools in the fight against serious crime, there is a need to create an EU regime on data retention that complies with the safeguards laid down by the CJEU.[133] In any event, regardless of whether at European or national level: as long as data retention measures continue to be deployed, adequate protection measures must soon be implemented to prevent fundamental rights violations.

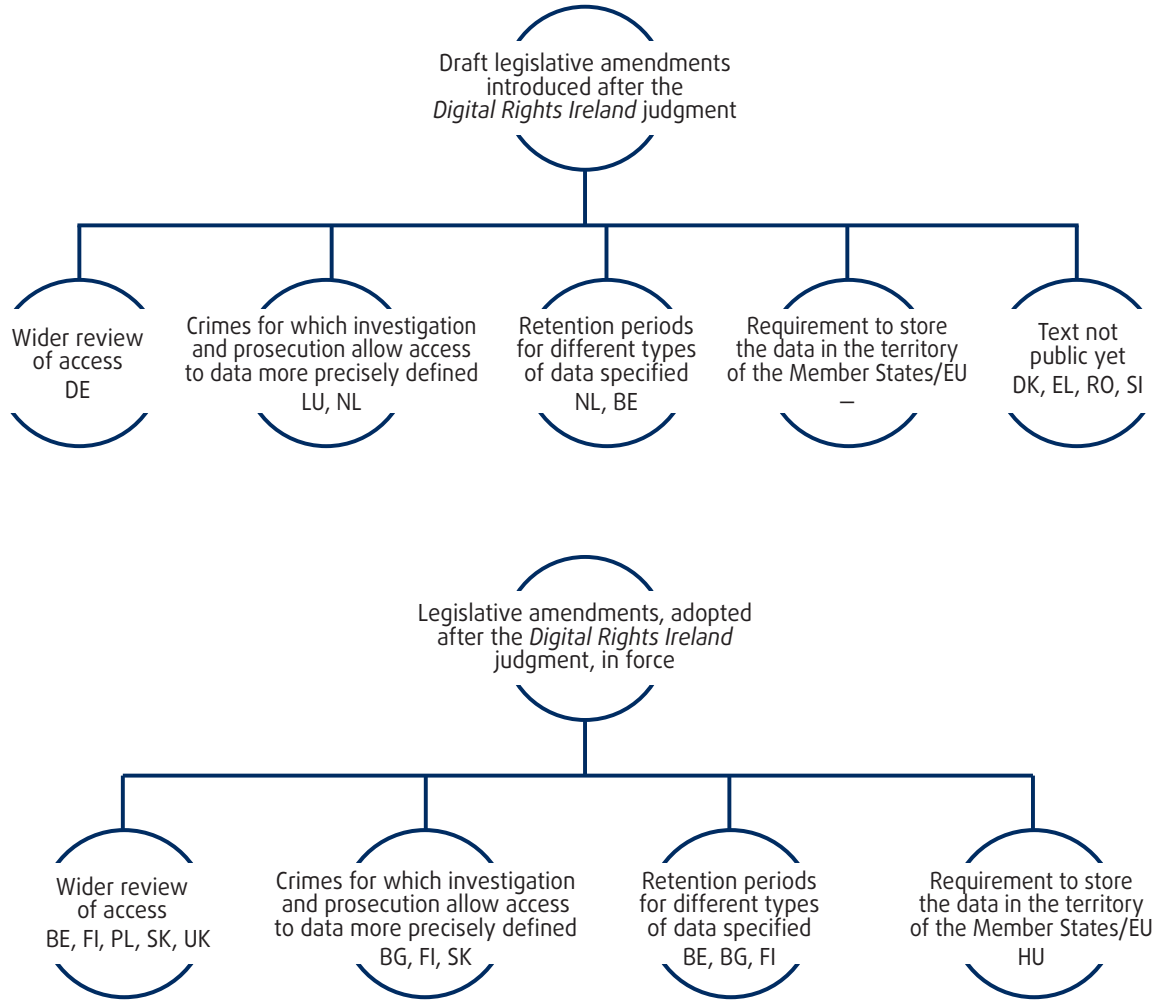
Promising practice

Auditing state bodies with access to communications data

In 2014, the Office of the Data Protection Commissioner (DPC) in **Ireland** completed an audit into the handling of information in the Garda Síorhána (police force), which included an examination of practices in relation to access to retained communications data. In 2016, the DPC expanded on this by auditing all state bodies with access to retained communications data. This is the first time that a comprehensive review of access to retained data has been carried out across the agencies.

For more information, see Lally, C. (2016), 'Garda use of powers to access phone data to be audited', Irish Times, 20 January 2016

Figure 6.1: Amendments to national data retention laws in 2016



Source: *FRA, 2017*

FRA opinions

FRA evidence, which builds on research on the protection of fundamental rights in the context of large-scale surveillance carried out at the European Parliament's request, shows that a number of EU Member States reformed their legal frameworks relating to intelligence gathering throughout the year. Enacted amid a wave of terrorist attacks, these changes enhanced the powers and technological capacities of the relevant authorities and may increase their intrusive powers – with possible implications for the fundamental rights to privacy and personal data protection. The Court of Justice of the European Union and the European Court of Human Rights provide essential guidance on how to protect best these rights. Legal safeguards include: substantive and procedural guarantees of a measure's necessity and proportionality; independent oversight and the guarantee of effective redress mechanisms; and rules on providing evidence of whether an individual is being subjected to surveillance. Broad consultations can help to ensure that intelligence law reforms provide for a more effective, legitimate functioning of the services and gain the support of citizens.

FRA opinion 6.1

EU Member States should undertake a broad public consultation with a full range of stakeholders, ensure transparency of the legislative process, and incorporate relevant international and European standards and safeguards when introducing reforms to their legislation on surveillance.

Encryption is perhaps the most accessible privacy enhancing technique. It is a recognised method of ensuring secure data processing in the General Data Protection Regulation (GDPR) as well as the e-Privacy Directive. However, the protection it provides is also used for illegal and criminal purposes. The spread of services providing end-to-end encryption further adds to the tension between securing privacy and fighting crime, as they, by design, prevent or make more difficult access to encrypted data by law enforcement authorities. To overcome this challenge, some Member States have started considering – or have already enacted – legislation that requires service providers to have built-in encryption backdoors that, upon request, allow access to any encrypted data by law enforcement and secret services. As noted by many, however, such built-in backdoors can lead to a general weakening of encryption, since they can be discovered and exploited by anyone with sufficient technical expertise. Such exposure could run counter to what data protection requires and could indiscriminately affect the security of communications and stored data of states, businesses and individuals.

FRA opinion 6.2

EU Member States should ensure that measures to overcome the challenges of encryption are proportionate to the legitimate aim of fighting crime and do not unjustifiably interfere with the rights to private life and data protection.

The General Data Protection Regulation, which will apply as of 2018, lays down enhanced standards for achieving effective and adequate protection of personal data. Data protection authorities will play an even more significant role in safeguarding the right to data protection. Any new legal act in the field of data protection will have to respect the enhanced standards set out in the regulation. For example, in 2016 the EU adopted an adequacy decision for the purpose of international data transfers: the EU-U.S. Privacy Shield. This decision explicitly states that the European Commission will regularly assess whether the conditions for adequacy are still guaranteed. Should such assessment be inconclusive following the entry into application of the General Data Protection Regulation, the decision asserts that the Commission may adopt an implementing act suspending the Privacy Shield. Furthermore, in 2016, the EU adopted its first piece of legislation on cyber security – the Network and Information Security Directive – and, in early 2017, in the context of the Digital Single Market Strategy, the Commission proposed an e-Privacy Regulation to replace the e-Privacy Directive.

FRA opinion 6.3

EU Member States should transpose the Network and Information Security Directive into their national legal frameworks in a manner that takes into account Article 8 of the EU Charter of Fundamental Rights and the principles laid down in the General Data Protection Regulation. Member States and companies should also act in compliance with these standards when processing or transferring personal data based on the EU-U.S. Privacy Shield.

Whereas developments in 2014 focused on the question of whether or not to retain data, it became clear in 2015 that Member States view data retention as an efficient measure for ensuring protection of national security, public safety and fighting serious crime. There was limited progress on the issue in 2016: while the EU did not propose any revised legislation in response to the Data Retention Directive's invalidation two years earlier, the CJEU developed its case law on fundamental rights safeguards that are essential for the legality of data retention by telecommunication providers.

FRA opinion 6.4

EU Member States should, within their national frameworks on data retention, avoid general and indiscriminate retention of data by telecommunication providers. National law should include strict proportionality checks as well as appropriate procedural safeguards so that the rights to privacy and the protection of personal data are effectively guaranteed.

The European Parliament Civil Liberties, Justice and Home Affairs Committee (LIBE) rejected the proposal for an EU Passenger Name Record (PNR) Directive in April 2013 due to concerns about proportionality and necessity, and a lack of data protection safeguards and transparency towards passengers. Emphasising the need to fight terrorism and serious crime, the EU legislature in 2016 reached an agreement on a revised EU PNR Directive and adopted the text. Member States have to transpose the directive into national law by May 2018. The adopted text includes enhanced safeguards that are in line with FRA's suggestions in its 2011 Opinion on the EU PNR data collection system. These include enhanced requirements, accessibility and proportionality, as well as further data protection safeguards. There are, however, fundamental rights protection aspects that the directive does not cover.

FRA opinion 6.5

EU Member States should enhance data protection safeguards to ensure that the highest fundamental rights standards are in place. This also applies to the transposition of the EU Passenger Name Record (PNR) Directive. In light of recent CJEU case law, safeguards should particularly address the justification for retaining Passenger Name Record data, effective remedies and independent oversight.

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UN & CoE

7 January – France ratifies Third Optional Protocol to the United Nations (UN) Convention on the Rights of the Child (CRC) on a communications procedure

29 January – UN Committee on the Rights of the Child issues its concluding observations on the periodic reports of France and Ireland

January

4 February – Italy ratifies Third Optional Protocol to the UN CRC on a communications procedure

12 February – Luxembourg ratifies Third Optional Protocol to the UN CRC on a communications procedure

February

1 March – Slovakia ratifies Council of Europe (CoE) Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Convention)

2 March – Committee of Ministers adopts CoE Strategy for the Rights of the Child (2016-2021)

7 March – CoE Commissioner for Human Rights issues a Human Rights comment on children and women refugees

9 March – UN launches 'High Time to End Violence against Children' initiative

March

4 April – CoE Strategy for the Rights of the Child launched in Sofia, Bulgaria

April

2 May – Czech Republic ratifies Lanzarote Convention

16 May – In *Soares de Melo v. Portugal* (72850/14), the European Court of Human Rights (ECtHR) finds a violation of the right to respect for family life (Article 8 of the ECHR) where authorities placed for adoption the applicant's seven youngest children due to her poverty and refusal to undergo sterilisation

19 May – In *D.L. v. Bulgaria* (7472/14), the ECtHR rules that not providing minors placed in a closed educational institution the possibility to ask for a review of the detention decision under domestic law violates Article 5(4) of the ECHR (right to review of lawfulness of detention), and that blanket and indiscriminate surveillance of the minors' correspondence and telephone conversations violates Article 8 of the ECHR (respect for correspondence)

May

9 June – UN Committee on the Rights of the Child issues its concluding observations on the periodic reports of Bulgaria, Luxembourg, Slovakia and the UK

June

20 July – Committee on the Rights of the Child issues CRC General comment No. 19 (2016) on public budgeting for the realization of children's rights (art. 4)

July

August

September

October

22 November – Estonia ratifies Lanzarote Convention

November

6 December – Committee on the Rights of the Child issues CRC General comment No. 20 (2016) on the implementation of the rights of the child during adolescence

December

EU

January

10 February – Communication from the European Commission to the European Parliament (EP) and the Council of the EU on the state of play of implementation of priority actions under the European agenda on migration; includes annex with actions for protecting children in migration

February

March

28 April – EP adopts resolution on safeguarding the best interests of the child across the EU on the basis of petitions addressed to the EP

April

2 May – EP adopts declaration on improving emergency cooperation in recovering endangered missing children and improving child-alert mechanisms in EU Member States

11 May – Council of the EU adopts Directive on procedural safeguards for children suspected or accused in criminal proceedings

18 May – European Commission issues country-specific recommendations to Member States under the European Semester process

19 May – Report from the European Commission to the EP and the Council of the EU on progress made in the fight against trafficking in human beings

May

16 June – Council of the EU adopts conclusion on 'Combating Poverty and Social Exclusion: an Integrated Approach'

20 June - Council of the EU adopts conclusion on child labour

June

July

August

September

October

November

8 December – Council of the EU adopts conclusions on the Youth Guarantee

16 December – European Commission adopts two reports on the transposition of Directive 2011/93/EU on combating sexual abuse and sexual exploitation of children and child pornography

December

7 Rights of the child

Almost 27 % of children in the EU are at risk of poverty or social exclusion. While this is a slight improvement compared with previous years, the EU 2020 goals remain unreachable. The new EU Pillar of Social Rights could play an important role in addressing child poverty. The adoption of a directive on procedural safeguards for children suspected or accused of crime is expected to improve juvenile justice systems and bring further safeguards for children in conflict with the law. Meanwhile, thousands of migrant and asylum-seeking children travelling alone or with their families continued to arrive in Europe in 2016. Despite EU Member States' efforts, providing care and protection to these children remained a great challenge. Flaws in reception conditions persisted, with procedural safeguards inconsistently implemented, foster care playing only a limited role and guardianship systems often falling short. These realities underscored the importance of replacing the expired EU Action Plan on unaccompanied children with a new plan on children in migration.

7.1. Child poverty rate improves marginally

The risk of poverty or social exclusion remains a reality for a high proportion of children in the EU. According to the latest available Eurostat data, in 2015, 26.9 % of children in the EU-28[1] were at risk of poverty or social exclusion (AROPE).[2] There was, however, some encouraging news: the percentage dropped slightly – from 27.8 % in 2014. This means that about 890,000 fewer children were at risk of poverty in the EU-28 in 2015 than in 2014.[3]

Significant variations exist between regions, underlining the urgent need to intensify support for Member States that are lagging behind. As discussed below, the European Semester and various other programmes can facilitate such efforts.

The highest proportions of children at risk of poverty or social exclusion range from 34.4 % in **Spain** up to 46.8 % in **Romania**, with **Bulgaria**, **Greece** and **Hungary** in between. In **Denmark**, **Finland**, the **Netherlands**, **Slovenia** and **Sweden**, meanwhile, fewer than 17 % of children are at risk. In 20 countries, the percentage of children at risk of poverty or social exclusion decreased between 2014 and 2015. In seven Member States, it increased, most significantly in **Cyprus** and **Lithuania** – by around 4 percentage points. In **Denmark**, **Greece**, **Italy** and **Slovakia**, it increased only slightly – by around 1 percentage point. (Eurostat data for Ireland were not yet available at the time of writing.)

Parents' educational levels strongly affect children's risk of poverty or social exclusion. The higher their educational level, the lower the children's risk.[4] Children with parents who have completed less than upper secondary education[5] are about six times more at risk of poverty or social exclusion (65.5 %) than children with parents who completed tertiary education[6] (10.5 %), and the risk is twice that of those with parents who benefitted from secondary or post-secondary education (30.3 %).[7]

The parents' country of birth also has a strong impact on the risk of poverty: 33.2 % of children whose parents were not born in the country of residence are at risk of poverty, compared with 18.4 % of those whose parents were born in the country of residence.[8] As the second wave of FRA's European Union Minorities and Discrimination Survey (EU-MIDIS II) on Roma shows, children's ethnic origin also affects access to basic services.[9] For more information on the situation of Roma, see Chapter 4.

The EU 2020 Strategy, adopted in 2010, aims to reduce the number of people in or at risk of poverty and social exclusion by at least 20 million people by 2020. This is far from being reached. Between 2005 and 2015, the percentage of children at risk of poverty or social exclusion in the EU decreased only slightly: from 28.1 % in 2005 to 26.9 % in 2015.[10] As shown in Figure 7.1, trends at the national level have been quite diverse – depending strongly on how Member States have been affected by the economic crisis and/or have been able to respond thereto.

In about one third of the countries, only minor changes can be observed between the situations in 2005 and 2015, increasing or decreasing by at most one percentage point. This is the case in **Belgium**, **Denmark**,[11] **Finland**, **Germany**, **Ireland**, **Luxembourg**, **Portugal**, **Slovenia**, **Sweden** and the **United Kingdom**. The lack of progress since 2005 is especially worrying in countries that had high rates that year – such as **Belgium** and **Luxembourg** at around 23 %, and **Ireland**, **Portugal** and the **United Kingdom** at around 30 %.

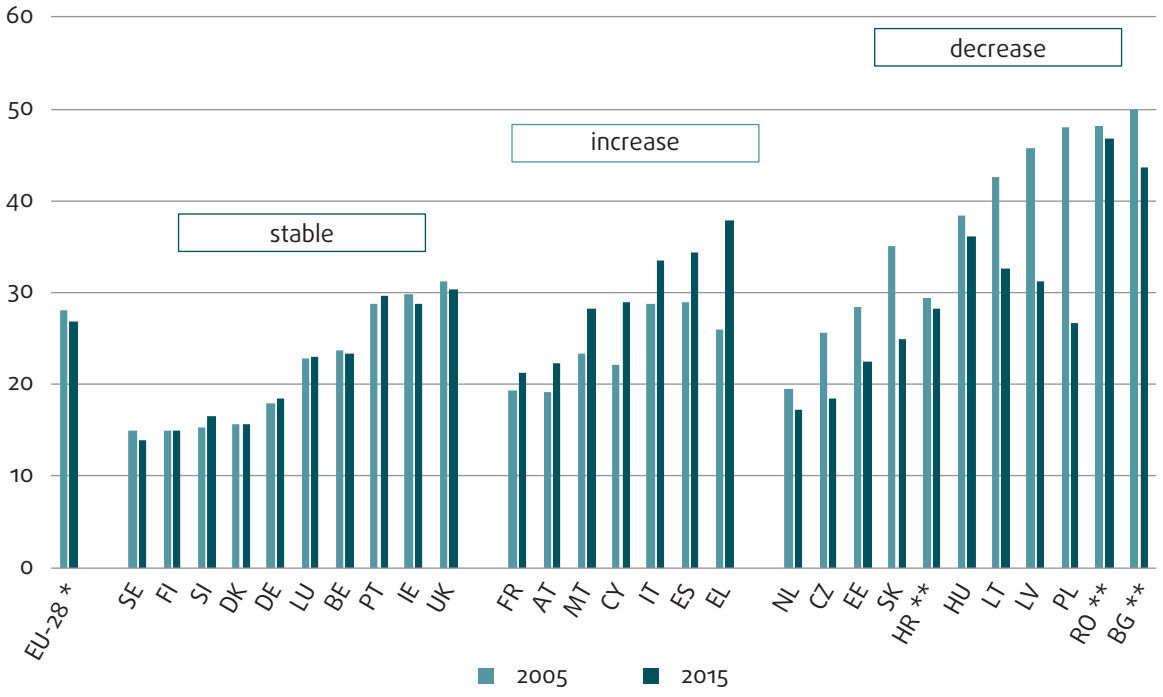
In seven countries, the proportions of children at risk of poverty or social exclusion increased by 2–12 percentage points over time: **Austria**, **Cyprus**, **France**, **Greece**, **Italy**, **Malta** and **Spain**. In **Greece**, the increase over the 10-year period in question was around 12 percentage points. In most cases, this was not a continuous process. In **Austria**, for example, the rate remained at the same level after an initial increase, while **Cyprus** experienced a strong increase only during the second half of the period.

One third of the countries achieved significant reductions in child poverty or social exclusion rates between 2005 and 2015: the **Czech Republic**, **Estonia**, **Hungary** and the **Netherlands** – between 1 and 7 percentage points; **Latvia**, **Lithuania** and **Slovakia** – between 10 and 15 percentage points; and, in particular, **Poland** – with a reduction of 21 percentage points. The risk of poverty or exclusion for children in **Bulgaria**, **Croatia** and **Romania** also decreased since 2010, the first year for which data are available for these countries.

7.1.1. Tackling child poverty via the European Semester

Understanding the links between economic fluctuations, policy interventions and poverty rates, and how all of these link to the European Semester – the EU's economic and fiscal policy coordination cycle – requires further analysis.[12] After countries receive country-specific recommendations (CSRs), they present National Reform Programmes (NRPs) the following year, detailing their concrete plans for complying with the CSRs. The links between policy measures included

Figure 7.1: Children at risk of poverty or social exclusion in 2005 and 2015, by EU Member State (%)



Notes: ** In 2005: EU-27 estimate*
*** EU Member States with data from 2010 onwards only*

Source: *Eurostat, European Union Statistics on Income and Living Conditions (EU-SILC) 2005 and 2015 [ilc_peps01]*

in NRPs and their impact remain blurry. Moreover, when looking at the CSRs adopted by the Council of the EU for each Member State, it is difficult to identify the rationale based on which countries receive recommendations. As noted in previous FRA Fundamental Rights Reports, the link between national child poverty rates, the CSRs formulated and the measures suggested in national NRPs is not always clear.

The overall number of CSRs adopted by the Council of the EU has decreased over the last few years, including those focusing on children. Figure 7.2 shows an overall decrease in the number of CSRs relating to children between 2014 and 2016. Although child poverty rates remain high, child poverty is the area least reflected in the recommendations given during this period.

In 2016, eight Member States received specific recommendations that directly referred to children: **Bulgaria** (on inclusive education), the **Czech Republic** (on early childhood education and inclusive education), **Hungary** (on inclusive education), **Ireland** (on child care services and child poverty), **Romania** (on inclusive education), **Slovakia** (on child care services, early childhood education and inclusive education), **Spain** (on child care services) and the **United Kingdom** (on child care services). In addition, Italy received a recommendation on the adoption and implementation of the national anti-poverty strategy, but with no reference to children.

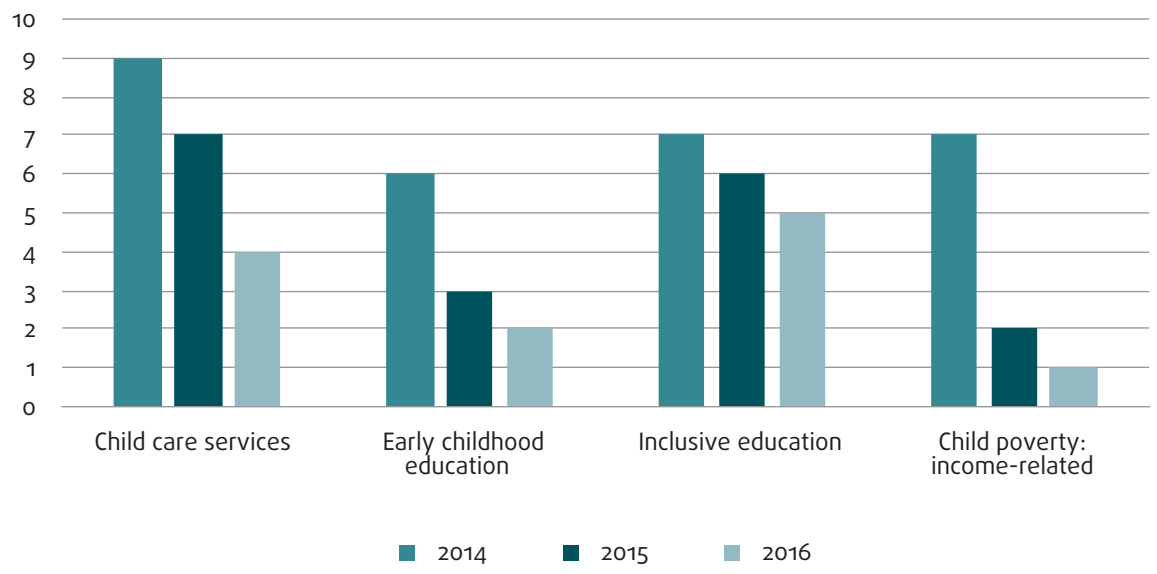
A link can indeed be observed between the NRPs presented by Member States during the European Semester process in 2016, and whether or not they received CSRs relating to children in 2015. Some civil society actors[13] believe, however, that only a few NRPs reflect the principles of the European Commission's *Recommendation on investing in children*,[14] a key policy document.

All 10 Member States with child-related CSRs in 2015 responded with child-related initiatives in their 2016 NRPs. For example, **Austria** received two CSRs on child-care services and inclusive education in 2015.[15] Its 2016 NRP elaborates in detail all the measures taken in this field – ranging from labour law reforms to family allowance increases – and provides specific budget figures.[16]

Of the 13 Member States that received no child-related CSRs in 2015, 10 nonetheless made references, to some extent, to child-related initiatives in their NRPs for 2016. For example, **Lithuania**'s NRP includes initiatives on deinstitutionalisation and on pre-primary education. Specifically, its NRP states that, in 2016, € 4 million will be allocated to developing an instrument to move children with disabilities and children without parental care from institutional care to family-based services.[17]

However, receiving no child-related CSR may lead a country to touch only briefly upon child-related initiatives in its NRP. In **Slovenia**, for example, current and new initiatives mentioned are restricted to promoting the Slovenian language among families with low socio-economic status and migrant backgrounds and social inclusion for vulnerable groups, as well as "establishing a concept for ensuring quality on the level of kindergartens and schools".[18] Since these were not part of the CSRs, there may not be any direct follow up on their execution.

Figure 7.2: Child-related country-specific recommendations, by area and year (number of recommendations)



Source: *FRA, 2016 (based on CSRs for 2014, 2015 and 2016)*

Given the risk that Member States without child-specific CSRs may not focus on children or identify particular positive policy efforts that target them, it is crucial that – as requested by the European Parliament[19] – the CSRs, and the European Semester as a whole, always and consistently address the situation of children. The European Semester is mainly a macro-economic coordination tool; it should not ignore the social impact on particularly vulnerable groups and children – especially when the Europe 2020 target on poverty reduction is, in contrast to other targets, still far from being reached.

> *"[The Council] encourages the Member States, taking into account their specific situations, to [...] address child poverty and promote children's well-being through multi-dimensional and integrated strategies, in accordance with the Commission Recommendation Investing in children."*
>
> *Council of the European Union (2016), Council Conclusions 'Combating poverty and social exclusion: an integrated approach', 16 June 2016, paragraph 13*

A number of developing initiatives could strengthen measures to address child poverty in line with Article 3(3) of the Treaty on the Functioning of the European Union, which identifies the protection of the rights of the child as a general EU objective. In 2016, the European Parliament discussed the Commission's proposal for the establishment of a Structural Reform Support Programme 2017–2020.[20] It has yet to be adopted by the Council, but is expected to improve the use of EU structural funds relating to children. Another important EU initiative that can affect the situation of children is the European Pillar of Social Rights, which details a number of essential principles to support labour markets and welfare systems within the Euro area. The Commission launched a consultation in March 2016[21] and organised a number of national and European events to exchange views thereon. The first preliminary outline[22] of the Pillar of Social Rights does cover the well-being of children, though in a rather fragmented and partial manner, within the chapters on equal opportunities and access to the labour market and on adequate and sustainable social protection. In the consultation, civil society organisations opined that the proposed outline insufficiently considers child rights.[23] For example, the EU Alliance for Investing in Children, a network of European civil society organisations, recommended mainstreaming children's rights, investing in children, promoting the voice of children and ensuring that children in vulnerable situations are also included in the pillar.[24]

Including a child rights perspective in national budgets is also highlighted in a new General Comment by the UN Committee on the Rights of the Child on 'Public budgeting for the realization of children's rights', which provides guidance on the interpretation of Article 4 of the Convention on the Rights of the Child (CRC).[25] The committee outlines detailed guidance and recommendations on how to promote children's rights in relation to each of the four stages of the public budget process: (a) planning, (b) enacting, (c) executing and (d) following up. At every stage, States parties are expected to demonstrate that they have made every effort to mobilise, allocate and spend budget resources to fulfil the economic, social and cultural rights of all children.

> *"The immediate and minimum core obligations imposed by children's rights shall not be compromised by any retrogressive measures, even in times of economic crisis."*
>
> *United Nations, Committee on the Rights of the Child (2016), General comment No. 19 on public budgeting for the realization of children's rights (art. 4), paragraph 31*

7.1.2. Member State efforts to counter child poverty

Member States continued to develop policies and programmes to combat child poverty and social exclusion. Some go beyond the actions presented in the NRPs, and fall within the framework of the Commission's *Recommendation on investing in children* and its three pillars: access to adequate resources; access to affordable quality services; and children's right to participate.[26]

Relevant legislative and policy changes introduced by Member States throughout the year include two new laws passed in **Portugal** – one on the 2016-2019 major planning targets[27] and one on the 2016 state budget.[28] The laws aim to allow for: an increase in family allowances and prenatal subsidies, with an additional rise in such subsidies for single-parent families; a reformulation of the income scales to increase the number of families who receive allowances; and activating school social programmes for children and young people living in seriously deprived social and economic conditions. The Portuguese NRP, published in October 2016, also has a strong focus on poverty, children and families.[29]

National policies regarding children living in poverty have to comply with fundamental rights, as a case involving **Portugal** underlines. In *Soares de Melo v. Portugal*, the European Court of Human Rights (ECtHR) concluded that Portugal violated the right to respect for family life protected by Article 8 of the European Convention on Human Rights.[30] The case concerned a family from which seven of a total of 10 children were forcibly taken into care with a view to their adoption because the mother did not provide the children with adequate material living conditions. This case adds to existing ECtHR jurisprudence establishing that poverty as such is not a reason to deprive a child of parental care, and that authorities need to sufficiently support families for them to be able to adequately care for their children.[31]

Romania has one of the highest child poverty rates. In 2016, the government announced an 'integrated package' as part of the implementation of the National Strategy on Social Inclusion and the Reduction of

Promising practice

Teaming up with the business sector to tackle child poverty

Involving the business sector in addressing poverty and social exclusion was a key theme at FRA's 2016 Fundamental Rights Forum. Examples of Member States joining forces with businesses to combat child poverty through public–private partnerships include:

In **Italy**, a new law introduced an experimental Fund to Combat Education Poverty (2016–2018) in cooperation with banking foundations. Banks that donate to the fund benefit from tax reductions.The fund will have an annual budget of € 100 million.

Sources: Italy, Law No. 208 on annual and multiannual national budgeting (Legge 2 dicembre 2015, n. 208, Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato, legge di stabilita' 2016), 28 December 2015; Decree No. 153 of the Ministry of Labour and Social Policies (Modalita' applicative del contributo riconosciuto sotto forma di credito di imposta, in favore delle fondazioni di cui al decreto legislativo 17 maggio 1999, n. 153), 1 June 2016

In **Ireland**, the Department of Children and Youth Affairs in partnership with a private funder, Atlantic Philanthropies, put in place the Area Based Childhood Programme (2013–2017), an innovative prevention and early intervention initiative with a € 34 million investment. It includes targeted interventions to break the cycle of child poverty in disadvantaged areas through services such as community-based prenatal care and education; improving literacy and numeracy; and promoting the mental health and well-being of young people. The effort includes the establishment of a learning group so that lessons learnt from this programme can be 'mainstreamed' in relevant policy and practice throughout Ireland.

For more information, see Atlantic Philanthropies; The Centre for Effective Services (CES), 'Area based childhood programme'

In **Hungary**, the K&H Bank, a financial institution, has implemented a programme to assist children living in poor villages since 2014. Under the programme, K&H has provided healthcare institutions with medical devices to treat children more effectively, organised training programmes on entrepreneurship for children, and equipped kindergartens and elementary schools with sports equipment. The bank published calls for proposals directly addressing local governments and local institutions in poor regions.

For more information, see K&H (2016), '5 dolog, amiről a szegény gyerek álmodik', 28 April 2016

Poverty 2015–2020.[32] It is aimed especially at families living in rural communities, poverty 'pockets' and Roma communities. Various services are planned – such as health and education services for children and teenagers, employment programmes for young people and vulnerable adults, and care for dependent adults and elderly people. Notably, the package appears to shift the national focus away from social benefits and towards a more community-based and preventative approach.[33]

A network of more than 100 civil society actors praised the **Irish** government for what they consider the first ever family-friendly budget in 2016[34] and the very positive number of measures for families and children included in the 2017 budget.[35]

7.2. Protecting rights of children accused or suspected of crimes

Every year over 1 million children face criminal proceedings in the EU, the European Commission calculates. They form 12 % of the European population facing criminal justice systems each year.[36] The minimum age of criminal responsibility varies greatly among Member States, from eight years of age in Scotland to 18 years in Belgium.[37]

Making justice systems in Europe more child-friendly is a key action point of the EU Agenda on the rights of the child.[38] The Council of Europe has provided useful guidance.[39] One major milestone of 2016 was the adoption of a new directive on procedural safeguards for children accused or suspected in criminal proceedings.[40] For more information on access to justice and the rights of suspects and accused persons across the EU more generally, see Chapter 8.

7.2.1. New directive enhances protection

The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings[41] came into force on 10 June 2016 and has to be incorporated into national law by 11 June 2019. The directive establishes minimum rules on procedural safeguards to ensure fair trials for children. It also aims to enhance Member States' 'mutual trust' in each other's criminal justice systems, prevent juvenile offenders from reoffending, and foster their social integration.

The directive is a legally binding instrument. Its introduction is a welcome development and will help EU Member States implement well-established human rights standards.[42] The directive will allow individuals to pursue alleged violations of the rights embedded

in it before domestic courts. It also regulates the right to information about proceedings in a comprehensive manner, and so addresses one of the gaps identified in Member States.[43] It addresses another identified gap[44] by requiring specific training or competences of the professionals involved in criminal proceedings with children, including judges, prosecutors and lawyers. The right to an individual assessment is one of the directive's most noticeable provisions. Such an assessment serves to identify the specific needs of a child in terms of protection, education, training and social integration, and could help identify child victims of trafficking or forced criminality, for example.[45] FRA is exploring this issue in a project entitled 'Return/transfer of children at risk who are EU nationals'.[46]

However, civil society actors contend that the directive falls short in several areas. They consider its language imprecise, allowing for different interpretations and possibly leading to inconsistent applications. Its scope is also considered too limited, in that it introduces certain exceptions relating to minor offences – precisely the kinds of offences that children most frequently commit. Furthermore, the directive applies only to persons who were below 18 at the start of the proceedings, excluding those who were under 18 at the time of the alleged offence and subsequently attained majority.[47]

Various research efforts offer insights that can help Member States develop initiatives to make justice more child-friendly – such as the European Commission's study on children and criminal justice[48] in the 28 Member States and other research showing the specific vulnerabilities of groups of children, such as Roma children.[49] In early 2017, FRA published its second report on child-friendly justice, which focuses on the experiences and perspectives of children involved in judicial proceedings as victims, witnesses or third parties in nine EU Member States. It complements FRA's May 2015 report on professionals' experiences and perspectives. Both reports show that the necessary legal framework is usually in place, but that its practical implementation poses difficulties. The reports indicate, for example, that professionals lack the practical tools, protocols and training needed to fully carry out their role. The findings of both reports, and the promising practices presented therein, can help Member States identify barriers, gaps or weaknesses in their respective judicial proceedings, especially in the process of incorporating EU directives into national law.

7.2.2. National developments

Member States introduced several legal and policy changes in 2016 that touched on matters addressed by the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. In addition, several legal decisions issued during the year referred to rights enshrined in the new directive.

Article 5 of the directive stipulates that the holder of parental responsibility for a child accused or suspected in criminal proceedings must be provided, as soon as possible, with the same information that the child has the right to receive pursuant to Article 4. In relation to the parents' right to information, the Supreme Administrative Court of **Bulgaria** ruled that a child may not waive the right to have a holder of parental responsibility informed. The case concerned a child who was detained in a police cell for 24 hours and signed a declaration stating that he did not want any family member or other person to be notified of his detention.[50] The court concluded that the police authority's obligation to notify parents and provide an attorney were imperative and could not be waived. In October 2016, **Finland** amended the Act on the Treatment of Persons in Police Custody to specify that, if a child is detained, his or her legal guardian has to be informed promptly, unless this conflicts with the child's best interest. Social services shall also be informed.[51]

Article 10 of the directive provides that Member States shall ensure that depriving a child of their liberty at any stage of the proceedings is limited to the shortest appropriate time period and imposed as a measure of last resort. It also establishes that detention decisions shall be subject to periodic review, at reasonable time intervals. In *D.L. v. Bulgaria*, the ECtHR ruled against **Bulgaria** for not providing for such review under domestic law. The case concerned a 14-year-old girl placed in a closed boarding school for an indefinite period up to three years, owing to her 'antisocial behaviour'.[52] For more analysis of European case law on the rights of the child, see FRA's *Handbook on European law relating to the rights of the child*.[53]

Article 11 of the directive requires Member States to use, where possible, alternative measures to detention. An amendment to the **Austrian** Juvenile Court Act[54] entered into force on 1 January 2016, establishing that pre-trial detention for child offenders is to be used only in exceptional cases, and is no longer permissible for children suspected of having committed a criminal offence punishable with a fine or imprisonment of up to one year; measures are also in place to encourage replacing pre-trial detention with less severe measures.[55] **Luxembourg**'s legal framework grants extensive powers to the youth tribunal to place children in conflict with the law in institutional care (even abroad),[56] and to transfer a child to a 'disciplinary institution' if the child behaves 'badly' (*mauvaise conduite*) or acts in a 'dangerous manner' (*comportement dangereux*). It is currently under revision.[57] Based on existing legislation, 1,354 children were placed in alternative care in 2015[58] – for various reasons, most not involving conflict with the law – and almost two thirds of them were placed in settings that partly or entirely deprived them of liberty. The national human rights institution in **Luxembourg** adopted an opinion on the proposed bill, expressing great

concern that the current practice of depriving children of their liberty is not used as a measure of last resort, and emphasising the need to revise the existing system.[59]

The UN Global study on the situation of children in detention, commissioned by the UN General Assembly in 2015, is also expected to cover alternatives to detention. It has moved a step forward with the appointment of a Special Rapporteur, who will lead the study.[60]

Promising practice

Municipal support for reintegrating juvenile offenders

In the **Netherlands**, in a joint pilot initiative of the municipality of Amsterdam and the Ministry of Security and Justice, juveniles aged 14 to 23 who face pre-trial detention in a youth detention centre are instead held in a pilot small-scale facility close to their homes. The unit has eight places for boys. Supervision and security are provided 24 hours a day. The pilot project makes it possible for the youngsters to go to school or work and maintain contact with their parents, while working with care professionals to avoid repeat offending. The pilot runs from 16 September 2016 to 1 July 2017. Comparable pilots are being run in Groningen and Nijmegen.

For more information, see the Government of the Netherlands' press release of 5 July 2015

In **Poland**, the municipality of Warsaw joined civil society in an effort to provide support for the reintegration of juvenile offenders after their release from detention centres. The programme was initiated in 2015 to support juvenile offenders with temporary transitional accommodation. Participants can stay up to one year, and receive personal assistance to support their reintegration into education, employment and the family environment.

For more information, see the Warsaw Foundation's webpage

Article 14 of the directive obliges Member States to ensure the protection of children's privacy during criminal proceedings. In relation to the privacy of children in conflict with the law, the District Court of Amsterdam in the **Netherlands** ruled that, in line with a minor's right to privacy, the police or public prosecution may not disclose images or closed-circuit television (CCTV) footage of suspects in the public domain when it is likely that the suspect is a child. In that case, the police, with the permission of the Public Prosecution Service, showed on public television CCTV footage of a young man assaulting an adult. The suspect was subsequently found and arrested. He turned out be a child, and claimed that his right to privacy, as laid down by Article 40 of the CRC, was violated. The court agreed and reduced his penalty for the crime.[61]

7.3. Protecting unaccompanied children poses tremendous challenge

More than 1,166,885 people applied for asylum in the EU in 2016. This included 376,835 children.[62] In the previous year, more than 1.3 million people sought refuge in EU Member States, 384,935 of whom were children.[63] Well-established standards provide that all children are entitled to special care and protection. Unaccompanied children – children who arrive without a parent or other primary caregiver – require special attention, as they face additional risks of exploitation or abuse. This section looks at policies and measures taken by EU Member States to address the situation of unaccompanied children, especially in terms of guardianship and foster care.

For more information on asylum and migration, see Chapter 5.

7.3.1. Limited data collection hampers policy initiatives

According to the latest available Eurostat data, 96,465 asylum applications were filed by unaccompanied children in 2015.[64] Almost 91 % of these applicants were male. This is a large increase from 2014, when asylum applications by unaccompanied children totalled 23,150. In 2015, the five EU Member States that received the highest numbers of asylum applications from unaccompanied children were **Sweden** (35,250 applications), **Germany** (22,255), **Hungary** (8,805), **Austria** (8,275) and **Italy** (4,070).[65]

Data on asylum and migration collected by EU Member States and international organisations are not always comparable and do not effectively illustrate the situation of migrant children, accompanied or not, in the EU. This is also especially true of separated children – children who are accompanied by adults who are not their parents or primary caregivers.[66] The number of unaccompanied and separated children currently in the EU is higher than the number of asylum-seeking children, since many children are not registered or do not apply for asylum. Identifying and registering vulnerable persons remains a challenge across Member States.[67]

Research carried out for this report revealed no official data on the number of unaccompanied children who do not seek asylum. Research on the issue is generally sporadic.[68] In **Sweden**, the County Administrative Board of Stockholm published a report on unaccompanied children. It contains some information on children who did not seek asylum but did visit transit accommodation

for rest and food. According to interviews with the children, they place very little trust in the authorities and are aware that their chances of remaining in Sweden are slim.[69] Meanwhile, UNHCR reported that, between January and September 2016, close to 20,000 unaccompanied children arrived in **Italy**,[70] but the Italian authorities identified and registered only 14,225 unaccompanied children.[71] Missing Children Europe states that inconsistent data management and collection by Member States generates poor information on the real numbers of unaccompanied children in the EU.[72] The issue of data on children in the migration context was also discussed at the 10th European Forum on the Rights of the Child, the key European-level event on children's rights, and will be the subject of follow-up actions and recommendations to Member States.[73]

> *"Improved data collection and statistics concerning child refugees and migrants will allow for better policy planning, targeted budget allocation and more effective responses. Eurostat, together with other EU institutions and Agencies and in partnership with international organisations including the UN, could develop an enhanced platform towards the provision of such data."*
>
> *FRA (2016), Fundamental Rights Forum 2016, Chair's Statement, paragraph 25*

The EU Charter of Fundamental Rights requires that all children receive the protection and care necessary for their well-being. The EU has developed several legislative instruments relevant to unaccompanied children, including, among others, the recast EU asylum instruments (2011–2013),[74] the Human Trafficking Directive (2011),[75] the Return Directive (2008)[76] and the Reception Conditions Directive (2013).[77] All of these instruments provide special measures for vulnerable groups, including children in general and unaccompanied and separated children in particular. Article 24 of the Reception Conditions Directive applies to unaccompanied children, harmonising their reception, protection, family reunification and the appointment of a representative.[78]

A Communication from the Commission on the implementation of the European Agenda on Migration touched upon child protection, guardianship and education.[79] A revision of the Action Plan on Unaccompanied Minors (2010–2014) was announced in 2015, but the plan has not yet been replaced by a new one.[80] Meanwhile, under the EU Relocation Programme, as of February 2017, only 248 unaccompanied children had been relocated from **Greece** to other EU countries, and one from **Italy**.[81]

The ongoing reform of the Common European Asylum System[82] includes a number of proposals – including regarding the Reception Conditions Directive and the Dublin Regulation – that will affect safeguards established for children. The proposal to review the Reception Conditions Directive includes positive changes to guardianship systems for unaccompanied children.[83] In 2016, FRA published an opinion, at the European Parliament's request, on the impact on children of the proposal for a revised Dublin Regulation. It acknowledges certain progress from a fundamental rights perspective, such as the extended right to information for children. However, it also recommends providing additional guarantees – for example, the appointment of a guardian. The document provides 22 opinions relevant to children, such as on the right to be heard and informed, guardianship, best interests assessments and family unity.[84]

FRA chaired the EU Justice and Home Affairs agencies' network in 2016. The network agreed to strengthen cooperation on implementing EU policies on migration, with a special focus on child protection.[85] As noted above, the 10th European Forum on the Rights of the Child was devoted to the protection of children in the migration context. Held in late November, it brought together over 300 people working in asylum and migration as well as child protection and child rights, from all EU Member States and Iceland and Norway. A one-day side event on guardianship for unaccompanied children preceded the forum. Formal follow up to the forum will set out EU actions and recommendations to EU Member States on protecting children in the migration context. A group of more than 70 organisations issued a statement proposing seven priority actions, among them the adoption of an EU Action Plan on all refugee and migrant children.[86]

Notwithstanding the existence of relevant measures and legal frameworks, children are often subject to violations of their fundamental rights. FRA continuously reported on this reality in its monthly overviews of the asylum and migration situation, which cover developments in 14 Member States. Such violations include depriving children of liberty in the migration context; this is further dealt with in ▶ Chapter 5. As the CRC Monitoring Committee stated in the context of the closure of the camp known as the Jungle at Calais in France: "The failures regarding the situation of children in Calais are not isolated events but highlight the shortcomings of a migration system built on policies that are neither developed nor implemented with child rights in mind."[87]

7.3.2. While weaknesses in reception systems persist, some Member States turn to foster care

The CRC, which all EU Member States have ratified, provides that children deprived of their family environment shall be entitled to special protection and assistance by the State.[88] The UN Guidelines for the alternative care of children[89] consider family-based settings the preferred option and residential

care facilities the exception.[90] The UN Committee on the Rights of the Child's General Comment No. 6 on the Treatment of unaccompanied and separated children outside their country of origin provides that mechanisms established under national law to ensure alternative care for unaccompanied or separated children shall also cover such children outside their country of origin.[91]

In line with international standards promoting family-based care options, the Reception Conditions Directive stipulates that unaccompanied children shall be placed (a) with adult relatives, (b) with a foster family, (c) in accommodation centres with special provisions for children or (d) in other accommodation suitable for children.[92] The directive also requires Member States to take measures to prevent assault and gender-based violence, including sexual assault and harassment within accommodation centres.

There are clear weaknesses in the reception system for unaccompanied children. Because there are not enough specialised facilities for unaccompanied children, despite Member States' efforts, children are often accommodated in crowded first reception and transit facilities. Conditions at first reception facilities were reported to be inadequate in almost all Member States covered by FRA's monthly overviews on the asylum and migration situation in 14 Member States.

There is a disconnection between child protection systems and asylum or migration systems. Some accommodation options, care and child protection measures are provided to children without parental care who are nationals of the country but are not equally offered to foreign unaccompanied children. According to the CRC,[93] and based on the non-discrimination principle, all children are entitled to the same protection regardless of their migration or residence status. In addition, for asylum-seeking children, Article 22 (2) of the CRC states that an unaccompanied child should be accorded the same protection as any other child deprived of his or her family environment.

Reception is severely flawed, especially in **Greece** and **Italy**,[94] given the high number of arrivals and the specific situation in the hotspots. FRA's opinion on the fundamental rights situation in the 'hotspots', requested by the European Parliament, outlines various challenges and suggestions in the area of child protection.[95] (For more information, see Chapter 5.) To address the situation in **Italy**, a new law regulates the minimum standards for first reception centres that provide care for unaccompanied children 24 hours a day, seven days a week.[96] The new law includes the possibility of creating temporary facilities with up to 50 places. Civil society organisations have criticised this, among other aspects of the new law, for contravening national frameworks on reception facilities, which promote communities of family-type care or small-scale facilities. They argue that the law could lead to the depersonalisation of relations, preventing the creation of a family-type atmosphere.[97]

The dismantling of the Calais camp in 2016 triggered a lot of media and policy attention. The CRC Monitoring Committee stated that the governments of **France** and the **United Kingdom** fell seriously short of their obligations under the CRC in relation to the Calais camp, where "hundreds of children have been subjected to inhumane living conditions, left without adequate shelter, food, medical services and psychosocial support, and in some cases exposed to smugglers and traffickers".[98] After the camp's demolition, the **United Kingdom** initiated the development of a strategy to be adopted in 2017.[99] However, the government's February 2017 announcement regarding the number of children to be accepted in the country prompted expressions of concern, including from the House of Commons.[100]

The lack of clear identification and registration procedures is a particular flaw in Member State reception systems. This has often led to children's disappearances, with the consequent risk of abuse, sexual exploitation or trafficking. Children are more likely to go missing from transit and temporary first reception facilities that do not meet child protection standards.[101] There is not enough research to provide an overview of how many children on the move go missing, in what phase they do so (first reception, transit, facility at which they applied for asylum), and for what reasons. On one hand, a number of unaccompanied children could be missing but not reported to the police; on the other hand, the absence of a central registry may result in double registrations.[102]

According to Europol, more than 10,000 unaccompanied children went missing in 2015.[103] Some figures are available for 2016: by September 2016, 427 unaccompanied children had gone missing in **Denmark**,[104] 77 in **Finland**[105] and 6,357 in **Italy**.[106] In February 2016, about 90–95 % of unaccompanied children in **Hungarian** reception centres went missing, as did 80 % of those in **Slovenia**.[107] In January 2016, 4,749 unaccompanied child and adolescent refugees in **Germany** were considered to be missing,[108] of whom 431 were younger than 13. In May 2016, 1,829 unaccompanied minors seeking asylum were registered as missing with the **Swedish** Migration Agency.[109] In **Slovakia**, "[a]lmost *all the children placed in foster homes in the past five years have disappeared and no specific effort has been made to find them*", the Committee on the Rights of the Child stated in its concluding observations.[110]

Responding to disappearances presents great challenges; only "27.1 % of the missing unaccompanied migrant children were found in 2015", according to a 2016 report by Missing

Children Europe.[111] The same NGO suggests that some children leave voluntarily with the aim of reaching another country – where their relatives live, where they know of a well-established community, or where they believe they have a better chance of being granted international protection or the care systems would be better.[112]

Establishing foster care programmes for unaccompanied children

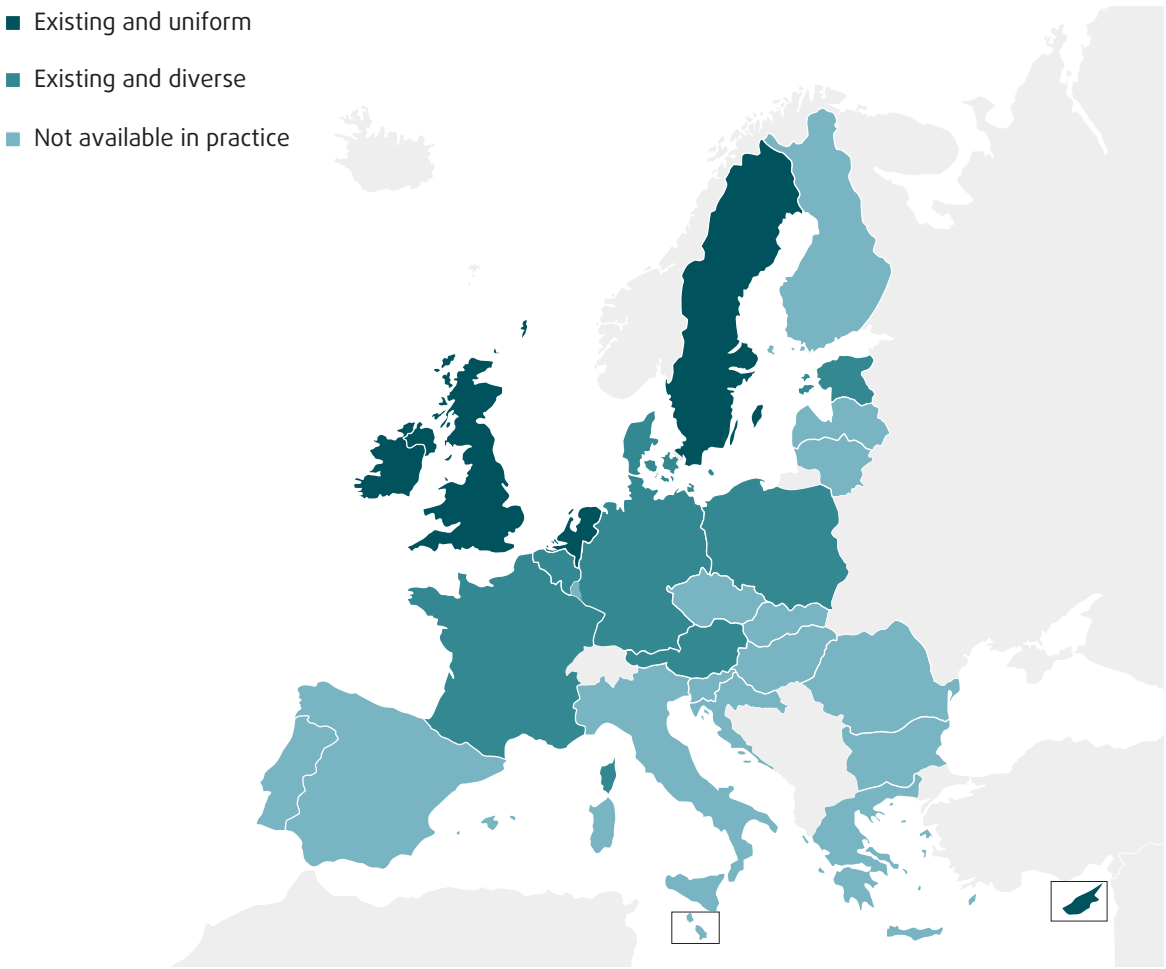
Over recent years, Member States have reformed their systems and are developing temporary and long-term family-based care options so that they can use residential care only as a temporary measure for children without parental care. However, in practice these alternative measures apply mainly to children from the host country, and most unaccompanied children in the EU still live in residential care.

Accommodation with a foster family is one of the options for unaccompanied children listed in the Reception Conditions Directive (Article 24(2)). However, in practice, foster care is available for unaccompanied children in only 12 Member States, as Figure 7.3 shows. Moreover, within some countries, practices are diverse and vary regionally or even locally.

In 16 Member States, foster care for unaccompanied children is not available or the placement of this particular group of children in foster families is extremely rare. For example, in **Greece**, competent national authorities do not provide foster care for unaccompanied children in practice. The NGO METAdrasi has developed a foster care project especially for very young children who are likely to be reunited with their family in another EU Member State. Since February 2016, 13 children have been placed in foster families, and five of them were subsequently reunited with their families in another EU Member State.[113]

Some countries are considering establishing foster care, such as Finland and Latvia. In **Finland**, the National Integration Programme for 2016–2019, which is based on the 2011 Integration Act,[114] lists among its action points

Figure 7.3: Availability of foster care for unaccompanied migrant children, by EU Member State (December 2016)



Source: FRA, 2016

the development of family care for unaccompanied children especially, but not exclusively, under the age of 12. In **Latvia**, the new Asylum Law, which entered into force in 2016, allows the Child Custody Court to place unaccompanied asylum seekers in foster families.[115]

In the 12 countries that provide foster care, practices are either diverse or uniform. Having diverse practices means that they may vary at regional, local or municipal level, because they are not harmonised nationally. This is the case in **Austria**, **Belgium**,[116] **Denmark**,[117] **Estonia**,[118] **France**,[119] **Germany**[120] and **Poland**.[121] Specifically, eight out of nine regions in **Austria**[122] allow the placing of unaccompanied children in foster families, but in practice foster care works only in some cities. For example, in Vienna, the Fonds Social Vienna, the Vienna City Department for Youths and Family, and SOS Children's Villages launched a joint project to create the possibility for families to host unaccompanied children older than 14, in addition to foster care families for children up to the age of 14.[123] By September 2016, almost 130 children had been placed in foster families in Austria.[124]

While FRA acknowledges the benefit of such efforts, these local and regional initiatives and project-based activities risk lacking sufficient safeguards. They should be the focus of particular attention. Some of these foster care programmes may not be an integral component of the child protection system, and may not observe national standards. In these cases, it becomes even more essential to monitor the services to ensure the children's protection and consideration of their best interests.

Some countries have more uniform systems in place at the national level – namely **Cyprus**, **Ireland**, the **Netherlands**, **Sweden**[125] and the **United Kingdom**. In **Ireland**, all newly arriving separated children under 12 years of age are placed in foster care on arrival.[126] However, according to the Irish Refugee Council, it can take weeks or months for children who are over 12 years old to be placed with foster families. In 2016, 59 out of 101 asylum-seeking unaccompanied children were placed in foster families.[127] On occasion, children remain in the residential home until the age of 18.[128] The **Netherlands** implemented a new model of reception, ensuring that all unaccompanied children up to 14 years of age are placed in foster families under the responsibility of the guardianship authority, Nidos, and those older than 14 are given accommodation in small-scale reception centres with 24-hour supervision, run by the Central Agency for the Reception of Asylum Seekers.[129] In the **United Kingdom**, fostering unaccompanied children requires going through the same process as fostering children who are nationals of the country, which is often quite a lengthy procedure. There is also a major shortage of foster care places.[130]

The Commission addressed the issue of foster care in a rights of the child call for proposals covering guardianship and foster care for unaccompanied children, launched in 2016. In 2017, it will launch a call for proposals covering preparations for leaving/ageing out of care, which includes children in migration in its scope.[131]

Promising practice

Promoting alternative care solutions for unaccompanied children

The European Commission, under the European Refugee Fund, co-funded a consortium of NGOs from different Member States to provide research and promote skills in developing family-based care for unaccompanied children. Initial findings provide a very good overview of the different family-based care models in use in the EU. The project also shows that social workers, reception professionals and – sometimes – guardians need training. Guardians are responsible for counselling host families who take care of unaccompanied children. All of these professionals need tools and specialised training on how to work with this group of children and their host families.

Under the Rights, Equality and Citizenship Programme, the EU co-funded a follow-up action project whereby Nidos (the **Netherlands**), in cooperation with Minor N'dako (**Belgium**), Jugendhilfe Süd Niedersachsen (**Germany**), OPU (**Czech Republic**), the **Danish** Red Cross and KIJA (**Austria**), has developed a training programme with supportive and online materials for professionals working with host families who take care of unaccompanied children. The training consists of different modules on recruitment, screening, matching and guidance of the host families. The project runs from 2015 to 2017.

For more information, see Nidos, Reception and living in families – Overview of family-based reception for unaccompanied minors in the EU Member States, February 2015; Alternative Family Care (ALFACA)

Meanwhile, the length and content of training for foster parents varies significantly both within and between Member States, as FRA showed in its mapping of child protection systems in 2015.[132] Social workers, reception professionals, guardians and foster families need tools and specialised training on how to work with unaccompanied children. A challenge for foster care is the risk of failing to consider the cultural needs of the child and the special support that foster parents might need. Foster families for unaccompanied migrant children should receive information about how to deal with a child who has a different cultural background or has experienced trauma and loss.[133]

Promising practice

Guiding foster carers on the asylum process

The Fostering Network in the **United Kingdom** launched a guide for foster carers supporting unaccompanied asylum-seeking children. The Fostering Network developed the guide in partnership with the Department for Education and the Refugee Council. It contains up-to-date information about the asylum process for children and provides links to support services. The guide includes an easy-to-understand flow chart of the asylum process, as well as a table that breaks down each stage and what foster carers need to do at each point.

For more information, see the Fostering Network, 'Looking after unaccompanied asylum seeking children in the UK'

7.3.3. Guardianship for unaccompanied children remains inadequate

All children deprived of parental care, including unaccompanied children, should have guardians appointed promptly to safeguard the children's best interests, ensure their overall well-being, facilitate child participation, exercise legal representation and complement the children's limited legal capacity.[134]

The concept of guardian is not clearly defined in EU law. EU directives use different terms, such as guardian, representative or legal representative (Article 24 of the Reception Conditions Directive, Article 25 of the Asylum Procedures Directive, Article 14 of the Anti-Trafficking Directive). The European Commission's 2016 proposal for the revision of the Reception Conditions Directive, however, enhances the concept of guardians for unaccompanied children.[135] Concretely, the proposal explicitly calls for the appointment of a guardian – instead of a legal representative, whose role is limited to the legal representation of the child in the proceedings. (As is further explained in FRA's opinion on the Dublin Regulation, the role of a guardian is generally broader and extends beyond pure legal representation, including promoting the best interests of the child.[136]) The proposal also specifies that a guardian should be appointed no later than five working days from the moment of application for international protection; ensures vetting of guardians; requires Member States to ensure that a guardian is not in charge of a disproportionate number of children; and obliges Member States to put in place monitoring and complaint mechanisms.[137] By contrast, the European Commission proposals for a revised Dublin Regulation and for the Asylum Procedures Directive do not require the appointment of a 'guardian', and refer only to the 'legal representative'.

Despite the migration trends of 2015 and 2016, national-level developments in the area of guardianship proceeded very slowly during 2016. Guardianships for unaccompanied children are not always the same as for children without parental care who are nationals of that Member State, or sometimes, even when they are the same, they do not work for unaccompanied children in practice. Occasionally, guardianship is implemented at a regional or local level, and different approaches may be applied in different parts of the country.[138]

The main challenges outlined in FRA's 2015 report on *Guardianship for children deprived of parental care* persist.[139] FRA's monthly migration reports for 2016 even point to deteriorations due to the increased number of unaccompanied children. Lengthy appointment procedures and timelines, difficulties in recruiting qualified guardians, a lack of independence and impartiality, and the high number of children assigned to each guardian top the list of challenges.[140]

Delays in appointing guardians for unaccompanied children were reported in several Member States in 2016. In some countries, the guardian is appointed immediately and no time elapses between identification of the child and appointment of the guardian – such as in the **Czech Republic**[141] and **Ireland**.[142] In other countries it takes longer, often due to the number of arrivals or asylum applications. In **Italy**, unaccompanied children live in emergency shelters for up to six months without having a guardian appointed or receiving any kind of specific assistance.[143] In **Germany**, in July 2016, the Federal Association for Unaccompanied Minor Refugees published a first evaluation of the implications of a law adopted in October 2015,[144] based on an online survey of 1,400 professionals working with unaccompanied children.[145] The findings show that the appointments of guardians in many cases exceeded the legal time limits provided for by law.

FRA's monthly migration reports also noted the high number of children allocated per guardian in some Member States.[146] This can hinder the functioning of the service and result in insufficient care being provided to the children. For example, in **Sweden**, a person may serve as guardian for up to 30 children.[147] In **Bulgaria**, the number of children per guardian varies, but, at the end of October 2016, about 600 unaccompanied children were assigned to the six directors of the six reception centres. This means that each director is the guardian of about 100 children. In addition, guardians continue to handle the case files of other children who have gone missing but whose files are still not closed.[148]

To address some of these challenges, several Member States amended their laws and policies in 2016. For example, in **Cyprus**, the Asylum Law was amended to incorporate the recast Asylum Procedures Directive 2013/32[149] and the recast Reception Conditions Directive.[150] However, the Commissioner for the Rights of the Child has criticised the amendments for lacking a comprehensive and efficient approach to the detention of unaccompanied children, family reunification, asylum application, access to education and guardianship.[151]

Denmark amended its Family Law in 2016 and changed the body responsible for appointing personal representatives (for asylum-seeking children) and temporary guardians (for unaccompanied children who have been granted a residence permit). The revised legislation provides that an independent authority – the National Social Appeals Board[152] – now appoints guardians instead of a government authority. In **Romania**, the revision of the Law on Asylum includes new procedures for assigning legal representatives to unaccompanied children.[153] Two other important amendments include the right of the unaccompanied child to be informed immediately about the appointment of a legal representative and the obligation of the legal representative to act according to the principle of the best interest of the child and to have expertise in this field.[154]

Greece lacks an efficient guardianship system, the European Commission concluded in the context of the Dublin Regulation.[155] In response, the Greek government began to reform its guardianship procedure, with the support of Nidos, FRA and other actors. A number of Member States – including **Bulgaria** and **Italy** – assign guardianship tasks to staff members of reception facilities at which children are placed to overcome delays. This raises concerns that guardians may experience conflicts of interest and lack independence and impartiality.[156]

FRA opinions

At almost 27 %, the proportion of children living at risk of poverty or social exclusion in the EU remains high. This being the EU average, the proportion is higher in certain Member States and among certain groups, such as Roma children or children with a migrant origin. The Europe 2020 target on poverty reduction is thus still far from being reached. Article 24 of the EU Charter of Fundamental Rights provides that "[c]hildren shall have the right to such protection and care as is necessary for their well-being". Nonetheless, EU institutions and Member States put little emphasis on child poverty and social exclusion in the European Semester. The EU has taken a number of initiatives that could strengthen Member States' legislative, policy and financial measures, including the 2013 European Commission Recommendation on 'Investing in children: breaking the cycle of disadvantage', the Structural Reform Support Programme 2017-2020 and the adoption of a child-focused European Pillar of Social Rights.

FRA opinion 7.1

The EU should place more emphasis on comprehensively addressing child poverty and social exclusion in the European Semester – making better use of the 2013 European Commission recommendation – as well as in upcoming initiatives, such as the European Pillar of Social Rights. This could include focusing attention in the European Semester on those EU Member States where child poverty rates remain high and unchanged in recent years.

EU Member States, with the support of the European Commission, could analyse and replicate, when appropriate, success factors in laws and economic and social policies of those Member States that managed in recent years to improve the situation of children and their families.

The Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings is an important milestone in a vital and often contentious field of justice. Existing research, as well as the case law of the European Court of Human Rights (ECtHR) and national courts, highlight the need for special protection measures for children in conflict with the law. FRA research on children and justice shows that the legal framework to safeguard children is usually in place, but that the practical implementation of such legislation remains difficult, mainly due to a lack of practical tools, guidance or training for professionals.

FRA opinion 7.2

EU Member States should undertake a national review to identify existing practice and barriers, gaps or weaknesses in their respective juvenile justice systems. A plan of action should follow this national review to define policy measures and the required resources for the full implementation of the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings. This could include training for judicial actors or the development of practical guidelines for individual assessments and for informing children in an age-appropriate manner.

Migrant and asylum-seeking children continued to arrive in Europe during 2016, alone or together with their families. Evidence collected by FRA shows that, despite Member States' efforts, there are clear weaknesses in the reception system for unaccompanied children – such as a lack of specialised facilities and crowded or inadequate first reception and transit facilities. Placing unaccompanied children with foster families is not yet a widely used option. Evidence suggests that providing adequate reception conditions is vital to prevent trafficking and exploitation of children, or children going missing. The European Commission has presented a number of proposals to reform the Common European Asylum System, while the 2011-2014 Action Plan on Unaccompanied Minors has not been renewed.

FRA opinion 7.3

The EU should develop an EU action plan on children in migration, including unaccompanied children, setting up clear policy priorities and measures to complement EU Member States' initiatives.

EU Member States should strengthen their child protection systems by applying national standards on alternative care to asylum-seeking and migrant children, focusing on the quality of care. This should include, as prescribed in the Reception Conditions Directive, placements with foster families for unaccompanied children. Furthermore, Member States should allocate enough resources to the municipal services that provide support to unaccompanied children.

Appointing a guardian for each unaccompanied child remains a challenge, as evidence collected by FRA shows. The main issues relate to lengthy appointment procedures and timelines, difficulties in recruiting qualified guardians, the high number of children assigned to each guardian, and a lack of independence and guarantees of impartiality of guardianship institutions in some EU Member States. The European Commission proposal to review the Reception Conditions Directive includes improvements to guardianship systems for unaccompanied children. The proposal requires appointing guardians who are responsible for looking after the child's best interests in all aspects of the child's life, not just for legally representing them. By contrast, the proposals for a revised Dublin Regulation and Asylum Procedures Directive require only the appointment of a "legal representative", and not of a "guardian".

FRA opinion 7.4

The EU legislator should put forward a coherent concept of guardianship systems with a clear role in safeguarding the best interests of unaccompanied children in all aspects of their lives.

EU Member States should ensure that child protection systems and guardianship authorities have an increased role in asylum and migration procedures involving children. Member States should develop or strengthen their guardianship systems and allocate necessary resources. They should ensure the prompt appointment of a sufficient number of qualified and independent guardians for all unaccompanied children. Finally, they could consider promising practices and existing research and handbooks, such as the European Commission's and FRA's joint Handbook on guardianship for children deprived of parental care*, to support this process.*

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UN & CoE

28 January – Council of Europe's Parliamentary Assembly (PACE) adopts Resolution 2093 (2016) on recent attacks against women: the need for honest reporting and a comprehensive response

January

February

4 March – Acting on behalf of PACE, the Standing Committee adopts Resolution 2101 (2016) on the systematic collection of data on violence against women

March

21 April – Council of Europe (CoE) launches its 2016-2021 Action plan on strengthening judicial independence and impartiality

April

2 May – Czech Republic ratifies the Council of Europe's Convention on Action against Trafficking in Human Beings

9-13 May – Sub-Committee on accreditation of the global alliance of national human rights institutions recommends that the Greek National Commission for Human Rights be downgraded to B status

May

19 June – In Resolution A/HRC/32/L.19, the UN Human Rights Council (UN HRC) welcomes the report of the UN High Commissioner for Human Rights on 'Improving accountability and access to remedy for victims of business-related human rights abuse' adopted on 10 May 2016

23 June – In *Baka v. Hungary* (No. 20261/12), the European Court of Human Rights (ECtHR) holds that the premature termination of the President of the Hungarian Supreme Court's mandate on account of his criticisms of legislative reforms violated his right to a fair trial in form of access to court and the right of freedom of expression (Articles 6 and 10 of the ECHR)

June

July

August

13 September – In *Ibrahim and Others v. United Kingdom* [GC] (No. 50541/08), the ECtHR holds that the right to access a lawyer can be restricted to protect the rights of others and that the right to be informed on one's defence rights is inherent in the right to a fair trial (Article 6 of the ECHR)

28 September – UN HRC adopts its annual resolution A/HRC/33/L.17/Rev.1, encouraging different bodies across the UN system to further enhance opportunities for NHRIs to contribute to their work

September

28 October – European Network of National Human Rights Institutions issues a statement to support the Commissioner for Human Rights, Polish NHRI, in its work to promote and protect human rights in Poland and urges all relevant actors to take prompt action to ensure that the commissioner has sufficient funding to support its independence and carry out its mandate in line with the UN Paris Principles

October

9 November – CoE's Goup of Experts on Action against Violence against Women and Domestic Violence (GREVIO) considers a state report submitted by Austria on implementation of the Istanbul Convention, under the evaluation procedure provided for under Article 68 (1)

19 November – CoE, the European Network of National Human Rights Institutions, the International Ombudsman Institute, the Office of the UN High Commissioner for Human Rights and the OSCE Office for Democratic Institutions and Human Rights issue a joint statement calling for support for strong and independent national human rights institutions in the OSCE region and highlighting the important role of NHRIs in times when human rights and fundamental freedoms are under threat

November

December

EU

January

February

4 March – European Commission proposes the EU's accession to the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), alongside Member States that ratified the convention

9 March – Council of the EU and European Parliament (EP) adopt Directive 2016/343/EU on strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings

March

5 April – In the joined cases *Aranyosi* (C-404/15) and *Căldăraru* (C-404/15) and the Court of Justice of the European Union (CJEU) rules that the execution of a European arrest warrant must be deferred if there is a real risk of inhuman or degrading treatment because of the conditions of detention of the person concerned in the Member State where the warrant was issued

April

11 May – Council of the EU and EP adopt Directive 2016/800/EU on procedural safeguards for children who are suspects and accused persons in criminal proceedings

May

9 June – In *Criminal Proceedings against István Balogh* (C-25/15), the CJEU clarifies the meaning of 'criminal proceedings' in Directive 2010/64/EU on the right to interpretation and translation

9–10 June – Justice and Home Affairs Council establishes an (informal) European Network on Victims' Rights based on Article 26 (1) of Directive 2012/29/EU, with the purpose of aiding, stimulating and recommending improvements on EU legislation regarding victims' rights; the European Commission will also be involved and other bodies and agencies can be invited

20 June – Council of the EU adopts Conclusions on business and human rights, reaffirming the EU's active engagement in preventing abuses and ensuring remedies worldwide, and to ensure implementation of the UN guiding principles on business and human rights

June

July

August

September

11 October – In *European Commission v. Italian Republic* (C-601/14), the CJEU states that Article 12 of Directive 2004/80/EC relating to the compensation of crime victims guarantees all EU citizens appropriate and fair compensation for injuries suffered from violent intentional crimes, as this is corollary to freedom of movement

25 October – EP adopts a resolution with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights; this mechanism should include objective benchmarks and lay down a gradual approach to remedying breaches

26 October – Council of the EU and EP adopt Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings

October

24 November – EP adopts a motion for a Resolution on the EU's accession to the Istanbul Convention, calling on the Council of the EU and the Commission to speed up negotiations on the signing and conclusion of the convention

27 November – Transposition deadline for Directive 2013/48/EU on the right to a lawyer in criminal proceedings and the right to have a third party informed upon deprivation of liberty

November

13 December – EP adopts a resolution on the situation of fundamental rights in the EU in 2015, reiterating its call for the establishment of a Union Pact on Democracy, Rule of Law and Fundamental Rights; this should include an annual report with country-specific recommendations based on a variety of sources - including FRA, Council of Europe and UN reports, should incorporate and complement existing instruments such as the Justice Scoreboard, and replace the Cooperation and Verification mechanism for Romania and Bulgaria

December

8

Access to justice including rights of crime victims

The EU and other international actors tackled various challenges in the areas of rule of law and justice throughout the year. Several EU Member States strengthened the rights of persons suspected or accused of crime to transpose relevant EU secondary law, and the EU adopted new directives introducing further safeguards. Many Member States also took steps to improve the practical application of the Victims' Rights Directive to achieve effective change for crime victims, including in the context of support services. The final three EU Member States – Bulgaria, the Czech Republic and Latvia – signed the Istanbul Convention in 2016, underscoring that all EU Member States accept the convention as defining European standards of human rights protection in the area of violence against women and domestic violence. Meanwhile, the convention continued to prompt diverse legislative initiatives at Member State level.

8.1. Confronting rule of law challenges and hurdles to justice

Effective and independent justice systems play a key role in upholding the rule of law. Together with respect for fundamental rights and democracy, the rule of law is listed in Article 2 of the Treaty on European Union (TEU) as one of the core values on which the Union is founded. As in the previous year, the EU, Council of Europe and United Nations (UN) pursued numerous actions in 2016 to strengthen judicial independence and the rule of law more generally.

In previous years, and as discussed in past FRA Fundamental Rights Reports, various actors called for the European Commission to take action concerning possible violations of the rule of law in several EU Member States, including **Poland**, **Romania** and **Hungary**.[1] In 2016 the Commission decided – for the first time – to carry out an assessment of the situation in a Member State, namely **Poland**, on the basis of its Rule of Law Framework, adopted in 2014.[2] The Commission first issued a formal opinion[3] setting out its concerns. These related to the failure to appoint lawfully nominated judges to the Polish Constitutional Tribunal; the lack of publication and full implementation of the tribunal's judgments; and the lack of safeguards to ensure that any reform of the Law on the Constitutional Tribunal respects the judgments of the tribunal and makes sure that its effectiveness as a guarantor of the constitution is not undermined. This opinion was followed by the second step provided for in the Rule of Law Framework: concrete rule of law recommendations to the Polish authorities on how to address these concerns, giving the Polish government three months to take appropriate actions.[4] The European Parliament joined the Commission's efforts to tackle these rule of law challenges and adopted resolutions calling on the Polish authorities to follow up on the Commission's Rule of Law Opinion and the recommendations.[5]

On 27 October, however, the Polish government rejected these recommendations as "groundless" and based on "incorrect assumptions".[6] In response to this rejection, and taking into account the latest developments in Poland, the Commission complemented its earlier recommendations with additional recommendations in December 2016, providing the Polish government with a two-month deadline to take appropriate actions.[7] In the supplemental recommendations, the Commission recommended that Poland ensure that:

- the Constitutional Tribunal can as a matter of urgency effectively review the constitutionality of the Law on the status of judges, the Law on organisation and proceedings and the Implementing Law,

and that these judgments are published without delay and implemented fully;

- the appointment of the new President of the Constitutional Tribunal does not take place as long as the Constitutional Tribunal's judgments on the constitutionality of the new laws have not been published and implemented fully, and as long as the three judges who were lawfully nominated in October 2015 by the preceding Sejm (lower house of the Polish parliament) of the seventh term have not taken up their judicial functions in the tribunal;

- until a new President of the Constitutional Tribunal is lawfully appointed, he is replaced by the Vice-President of the tribunal, and not by an acting president or by the person appointed as President of the Constitutional Tribunal on 21 December 2016.

If no satisfactory follow up is carried out within the set time limit, the procedure laid down in Article 7 of the TEU could be triggered based on a proposal by the Commission, the European Parliament or one third of the Member States.

The Council of Europe's European Commission for Democracy through Law – the Venice Commission – also adopted opinions in 2016, in which it deemed incompatible with the requirements of the rule of law the legislative changes concerning the functioning of the Polish Constitution Tribunal and the independence of its judges.[8] The Council of Europe's Commissioner for Human Rights, Nils Muižnieks, and the UN Human Rights Committee joined EU actors and the Venice Commission in urging the Polish government to find a solution to the country's current rule of law and human rights situation.[9]

Meanwhile, the European Parliament sought to enhance the effectiveness of different mechanisms available to the EU institutions to prevent and address rule of law concerns in Member States. It adopted a resolution in 2016 calling for a permanent mechanism on democracy, the rule of law and fundamental rights in the form of an agreement concluded among the EU institutions. It specified that such a mechanism should align with, and complement, existing mechanisms and end the current 'crisis-driven' approach to perceived breaches of democracy, the rule of law and fundamental rights in EU Member States.[10] The resolution further stated that such a EU mechanism should ensure that all EU Member States respect the values enshrined in the EU treaties and set clear, evidence-based and non-political criteria for assessing their records on democracy, rule of law and fundamental rights in a systematic way and on an equal footing.

Acknowledging the key role national justice systems play in upholding the rule of law, the European Commission in 2016 continued to support EU Member State efforts to strengthen the effectiveness of their national justice systems through its EU Justice Scoreboard, an informational tool via which it provides relevant data on an annual basis.[11] The scoreboard looks at civil, commercial and administrative cases, focusing on three main aspects: the efficiency of justice systems; quality indicators; and independence.

The Commission presented key findings from its 2016 EU Justice Scoreboard in April. It noted that some countries made progress in certain areas by shortening civil and commercial litigation processes and improving access to justice systems for citizens and businesses. This resulted particularly from allowing for the electronic submission of small claims and promoting Alternative Dispute Resolution methods. However, the findings also showed that there is still room for improvement in the availability of judgments online and in electronic communication between courts and parties. Moreover, training on judicial skills and the use of information and communication technologies in case management systems need to be improved.

The 2016 Scoreboard contained several new features. Its analysis for the first time referred to results of Eurobarometer surveys conducted to examine citizens' and businesses' perceptions of judicial independence. The scoreboard also used new indicators, in particular on judicial training, the use of surveys, the availability of legal aid and the existence of quality standards.

> *"Independent courts keep governments, companies and people in check. Effective justice systems support economic growth and defend fundamental rights. That is why Europe promotes and defends the rule of law."*
>
> *Jean-Claude Juncker, President of the European Commission, State of the Union 2016: Towards a better Europe – a Europe that protects empowers and defends,* 14 September 2016

The Council of Europe adopted a new 2016–2021 Plan of Action on strengthening judicial independence and impartiality in April 2016. This plan follows up on findings from a 2015 report by Thorbjørn Jagland – the Council of Europe's Secretary General – on the state of democracy, human rights and the rule of law in Europe.[12] It is based on three courses of action involving measures that aim to safeguard and strengthen the judiciary in its relations with the executive and legislature; protect the independence of individual judges and ensure their impartiality; and reinforce the independence of the prosecution service.

> *"It is vital that judicial independence and impartiality exist in practice and are secured by law. It is equally important that public confidence in the judiciary be maintained or restored. The measures proposed are designed to promote a culture of respect for judicial independence and impartiality, which is crucial in a democratic society based on human rights and the rule of law."*
>
> *Thorbjørn Jagland, Council of Europe Secretary General, Speech delivered at High-Level Conference of Ministers of Justice and representatives of the Judiciary, Sofia, 21 April 2016*

8.2. Protecting procedural rights in criminal proceedings

Protecting the human rights of individuals subject to criminal proceedings is an essential element of the rule of law. With freedom of movement resulting in increased mobility in the EU for study, travel or work purposes, and large movements of refugees and migrants continuing across the EU (see Chapter 5), there is a greater risk that people may find themselves involved in criminal proceedings in a country other than their own. Persons who are suspected or accused of crimes in countries other than their own are particularly vulnerable, so appropriate procedural safeguards are crucial. This reality prompted adoption of a Roadmap on procedural rights of suspects and accused persons in criminal proceedings in 2009 (see Figure 8.1), providing for various instruments that aim to make sure that individuals receive a fair trial anywhere in the EU.

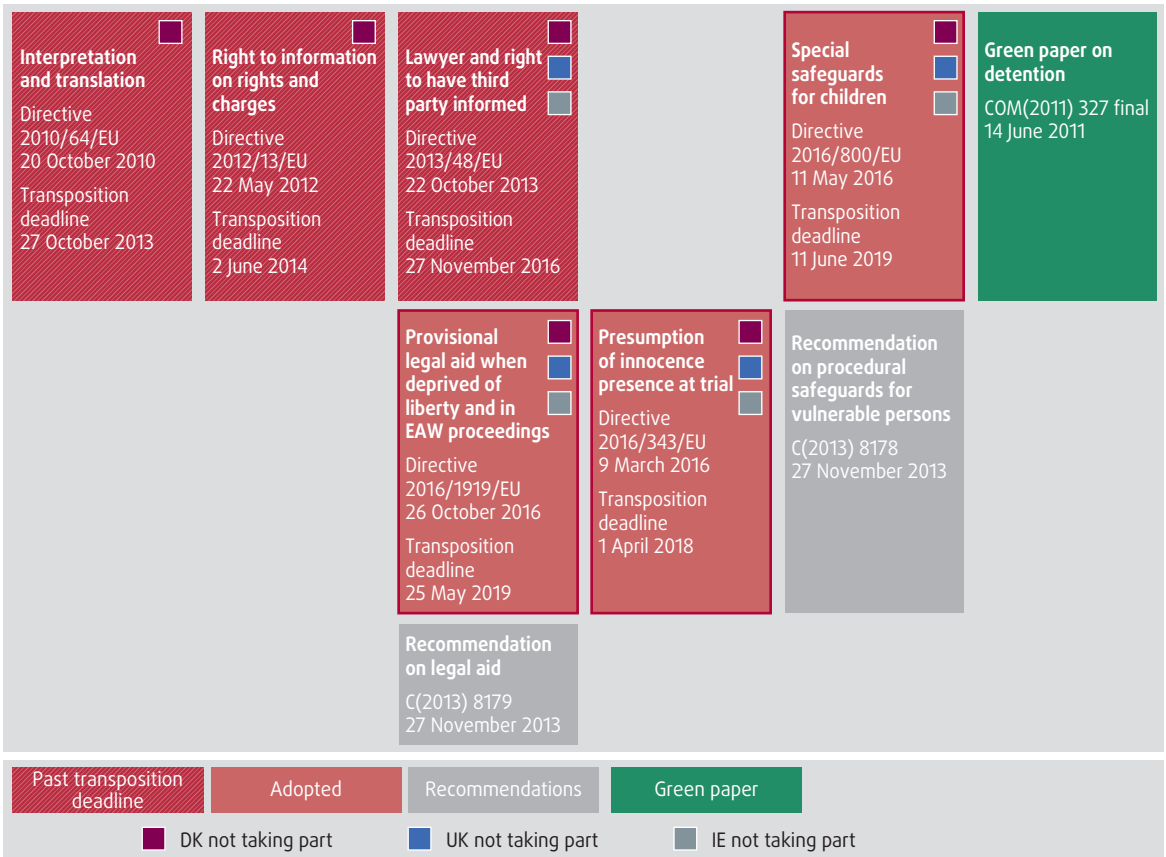
This section provides an overview of developments in the implementation of the 2009 Roadmap. It first looks at new legislative developments at EU level, highlighting three directives adopted in 2016. It then focuses on directives whose transposition deadlines have already passed, presenting relevant European case law and reviewing pertinent developments at Member State level.

New directives further strengthen procedural rights in criminal proceedings

In 2016, the EU completed implementation of the 2009 Roadmap by adopting three directives. These three directives afford suspects and accused persons procedural protection in the course of criminal proceedings in line with established international standards, in particular those arising from Article 47 of the EU Charter of Fundamental Rights (right to an effective remedy and to a fair trial) and Article 6 of the European Convention on Human Rights (ECHR) (right to a fair trial).

On 9 March, the Council and the European Parliament adopted Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.[13]

Figure 8.1: Roadmap on procedural rights of suspects and accused persons in criminal proceedings



Note: *Roadmap for strengthening procedural rights of suspects and accused persons in criminal proceedings, adopted by the Council of the EU on 30 November 2009 and incorporated into the Stockholm Programme.*

Source: *FRA, 2016*

It strengthens the right to a fair trial by laying down common minimum rules in these areas. The directive also affirms that the right to remain silent and the right not to incriminate oneself are important aspects of the presumption of innocence. Member States have to transpose this directive by 1 April 2018.

On 11 May, the Council and the European Parliament adopted Directive 2016/800/EU on procedural safeguards for children who are suspects and accused persons in criminal proceedings.[14] The directive aims to make criminal proceedings more understandable and easier to follow for children who are suspected or accused of crime, and to prevent them from reoffending by fostering their social integration. The transposition deadline for this directive is 11 June 2019. For more information on FRA's work on children as victims and witnesses in criminal proceedings, see Chapter 7 on the rights of the child.

The last directive envisaged in the roadmap – Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings[15] – was adopted on 26 October. This directive aims to ensure the effectiveness of the right of access to a lawyer provided for under Directive 2013/48/EU by making legal aid available to accused persons in criminal proceedings and to persons who are the subject of European arrest warrant proceedings. Member States have until 25 May 2019 to transpose this directive.

European courts on right to interpretation and translation, to information, and to access a lawyer

The 2009 Roadmap includes three other directives – on the rights to interpretation and translation, to information, and to access to a lawyer – which Member States were required to transpose by 2013, 2014 and late 2016, respectively. Because of its specific opt-out regime, **Denmark** is not bound by any of the three directives,[16] while **Ireland** and the **United Kingdom** are not bound by the directive on the right to access a lawyer.[17]

The Court of Justice of the European Union (CJEU) issued several decisions in 2016 that further clarified the scope of these directives. In June 2016, it delivered a preliminary ruling on the scope of Directive 2010/64/EU on the right to interpretation and translation.[18] The *Balogh* case[19] centred on the translation of a judgment in the course of a special procedure under Hungarian law used to recognise foreign convictions. The CJEU held that the special procedure did not constitute criminal proceedings and therefore did not fall within the scope of the directive. Given that the procedure's only purpose was to accord the foreign conviction the same status as convictions delivered by Hungarian courts, it did not form part of the main proceedings. Translation was not necessary to protect the convicted person's right to a fair hearing. Moreover, in the course of the main criminal proceedings, the person had already obtained a translation of the foreign judgment.

The European Court of Human Rights (ECtHR) took into account Directive 2013/48/EU on the right of access to a lawyer[20] and Directive 2012/13/EU on the right to information[21] in *Ibrahim and Others v. United Kingdom*.[22] In that case, the police arrested the applicants in connection with the July 2005 explosions in London. They were interviewed urgently, without the presence of a lawyer, to obtain information about further planned attacks. The ECtHR found that the right to access a lawyer could in certain circumstances be restricted, referring to, among others, the similar approach taken in Article 3 (6) of Directive 2013/48/EU. According to the court, authorities are allowed to interrogate individuals without a lawyer present to protect the rights of potential or actual victims. It follows that, when the life or security of others is at stake, urgent interrogation without a lawyer's presence to obtain information that could help prevent damage can be justified. The ECtHR also stated that the right to be informed of one's defence rights is inherent in the right to avoid self-incrimination, the right to silence and the right to access a lawyer. It ruled that, when suspects are not notified of their rights or access to a lawyer is delayed, there is a presumption of unfairness, which the government then has to rebut.

National developments on right to interpretation and translation, to information, and to access a lawyer

EU Member States continued to adopt legislative measures to comply with Directives 2010/64/EU (on interpretation and translation) and 2012/13/EU (on information) after their transposition deadlines. As in 2015, they mostly did so to clarify certain mechanisms put in place or to address issues that arose from implementation. With the transposition deadline for Directive 2013/48 (access to lawyer) expiring in November 2016, Member States also adopted new laws to transpose this directive. However, as outlined below, EU Member States still need to address various issues, particularly by way of targeted policy measures such as concrete guidance, to ensure that all of these instruments work effectively in practice.

Belgium adopted legislation transposing Directive 2010/64/EU only in November 2016.[23] Meanwhile, several other Member States amended existing implementing laws. For example, **Hungary** introduced a requirement for interpreters and translators to observe confidentiality regarding their services.[24] In **Italy**, new legislation partly reformed the 2014 implementation law by introducing the possibilities of interpretation via video-conference in criminal proceedings and of replacing written translations with oral translations. It also set up an

official national list of translators and interpreters and limited assistance from state-funded interpreters during conversations between clients and lawyers.[25]

Legislative proposals to amend the existing implementing laws were put forth in **Ireland** (on conditions for using Irish Sign Language in courts in a Private Members Bill)[26] and the **United Kingdom** (provision of live-link interpretation).[27] Additionally, **Cyprus** introduced some non-legislative measures. The Chief of Police issued circulars to all police stations to instruct members of the police on the procedure for appointing interpreters when investigating cases involving foreign witnesses or suspects.[28] The list of interpreters has also been posted on the police central portal, and the duties of the interpreter are now spelled out in a circular letter used during police investigations.[29]

Meanwhile, national courts in 2016 continued to provide guidance on interpreting the relevant implementing laws. In **Finland**, for example, the Supreme Court clarified that the obligation stemming from Directive 2010/64/EU requires the state to meet the costs of interpreting communications between suspects and their legal counsel when lodging an appeal, irrespective of the outcome of the proceedings and irrespective of the suspect's financial situation.[30]

The Appeals Penal Court of Athens in **Greece** confirmed that, in line with the directive, a bill of indictment is an essential document that has to be officially and fully translated and served to the defendant in a language that he or she understands; the procedure is otherwise absolutely null.[31] The Kaunas Regional Court in **Lithuania** also clarified the definition of 'essential documents'. It reiterated that there is no statutory obligation to translate all procedural documents; only those that have to be served on parties pursuant to the Criminal Code must be translated. The code does not require serving the accused with a prosecutor's appeal against a court's decision to refer the case back to the prosecutor to supplement the pre-trial investigation. Therefore, there is no statutory obligation for the prosecutor to provide a translation of such an appeal.[32] Courts in **Ireland** had the opportunity to examine the need for sign-language interpretation services in criminal proceedings; in one case, they allowed for an appeal because no sign-language interpreter was present.[33]

Finally, as part of an infringement procedure, the European Commission adopted a reasoned opinion requesting **Lithuania** to fully implement procedural rights on interpretation and translation during criminal proceedings. Lithuania was given two months to notify the Commission of measures taken to remedy the situation; otherwise, its case may be referred to the CJEU.[34] Some measures were already taken in December, with a draft amendment to the Criminal Procedure Code introduced that month.[35]

EU Member States in 2016 also continued their efforts to ensure the effective application of the rights set out in Directive 2012/13/EU (right to information), following the expiry of its transposition deadline in 2014.

A new law adopted in **Latvia** deals with proposals to remand persons in custody. It provides that, as soon as such a proposal is received and before the measure is actually applied, accused persons have the right to become familiar with the details on which the proposal is based.[36]

Member States also pursued pertinent non-legislative initiatives. **Cyprus** introduced a simplified version of the letter of rights, which is now available in 19 languages.[37] The Ministry of Justice in **Malta** launched a Quality Service Charter for persons accessing court services, which includes information on rights of accused persons who have been arrested.[38]

National courts provided further guidance on interpreting the right to information in light of relevant fundamental rights standards. For example, the Court of Cassation in **France** ruled on the right to remain silent in a case involving an event that took place before the law implementing Directive 2012/13/EU came into force. The court instead referred to Article 6 (3) of the ECHR. It declared that any person placed in police custody should be informed of their right to remain silent and be able to benefit from a lawyer's assistance. The case concerned a man convicted of sexual assault based on his own statements, which the police obtained without informing the suspect of his right to remain silent. It should be noted that there were additional procedural and material shortcomings in the case; the violation of the rights to remain silent and to assistance of a lawyer did not serve as the only basis for the judgment's annulment. The Court of Cassation remitted the case back to the Court of Appeal of Versailles.[39]

FRA ACTIVITY

Highlighting opportunities to bolster rights in criminal proceedings

The vast majority of EU Member States have adopted legislation transposing Directives 2010/64/EU and 2012/13/EU. FRA's 2016 report on the rights protected by these two directives outlines progress made in their implementation. Its findings identify concrete opportunities to further bolster protection of the rights to translation, interpretation and information.

For more information, see FRA (2016), Rights of suspected and accused persons across the EU: translation, interpretation and information, Publications Office of the European Union, Luxembourg

The deadline for transposing Directive 2013/48/EU (right to access a lawyer) passed on 27 November 2016. Many Member States adopted the necessary measures to do so: **Belgium**,[40] **Finland**,[41] **Hungary**,[42] **Italy**,[43] **Latvia**,[44] **Malta**,[45] **Slovakia**,[46] **Sweden**,[47] the **Netherlands**[48] and **Romania**.[49]

Draft legislative measures to transpose the directive are currently pending before the national parliaments of several other Member States: **Cyprus**,[50] the **Czech Republic**,[51] **Germany**,[52] **Greece**,[53] **Luxembourg**[54] and **Lithuania**.[55] In the **Netherlands**, the Public Prosecution Service published policy guidance on how to implement suspects' right to the assistance of a lawyer during questioning by the police or the Public Prosecution Service.[56]

8.3. Member States shore up victim support services

Several Member States continued to work towards adopting legislation to transpose the Victims' Rights Directive (2012/29/EU) in 2016, even though its transposition deadline already passed on 16 November 2015. However, the majority of Member States concentrated on applying national laws transposing the directive. They focused on issues such as improving victim support services, training, the provision of information, and individual assessments of victims.

The European Parliament's and Council's agreement on the Directive on combating terrorism in November 2016 was a notable development.[57] The directive was adopted on 7 March 2017. In addition to strengthening the EU's legal framework for preventing terrorist attacks, it reinforces the rights of victims of terrorism. Victims will have the right to immediate access to professional support services providing medical and psycho-social treatment, to receive legal or practical advice, and to receive assistance with compensation claims. It will also strengthen emergency response mechanisms following attacks. At the national level, **Belgium** and **France** stepped up support services to victims of terrorism in 2016 in response to the terrorist attacks that occurred in those countries. For example, victim support services in Brussels organised specific support for victims of terrorist attacks,[58] while France set up an Information and Accompaniment Centre to support victims of terrorism, led by the victims' assistance association *L'Institut national d'aide aux victimes et de méditation* (INAVEM).[59]

8.3.1. Reinforcing generic victim support services and reaching more victims

Developments in the provision of support to crime victims in 2016 related both to victims in general ('generic') and specifically to child victims. Throughout the year, Member States worked towards addressing gaps in their victim support infrastructures to meet the demands of the Victims' Rights Directive, improving the information provided to victims; reaching out to more victims and encouraging them to report; providing for the required individual assessment of victims by police to identify particularly vulnerable victims; and boosting the capacity and funding of victim support services.

Reaching more victims

To improve outreach to victims, **Croatia** (through the Association for Support to Victims)[60] and **Latvia** (through the non-governmental organisation Skalbes)[61] began providing support and information to victims through free helplines on 116 006, the free Europe-wide number for helplines for victims of crime.[62] The **French** Justice Ministry launched a website in May 2016 to help crime victims find the right court, obtain information on how to access justice, and assess their entitlement to legal aid.[63]

In an attempt to also reach out to victims from other countries, and to encourage reporting of crime, the Minister for the Interior in **Bulgaria** approved forms to assist people (including non-Bulgarians) to report 'typical' crimes to the police – for example, theft, injury or fraud.[64] These forms are available in five languages: Bulgarian, English, French, German and Russian.[65]

Some Member States registered an increase in the numbers of victims requesting support. For example, since January 2016, the police in **Croatia** have been providing victims with information on their rights and contact details of available support services, including court departments and local civil society support organisations. The cooperation resulted in an increase in the number of people contacting services. Victim Support **Finland** reported a clear increase in the number of support relationships – longer-term relationships, where the crime victim is in need of extended support[66] – in 2016. (As is further discussed below, funding to the organisation increased significantly in 2016.[67]) The number of longer-term support relationships was 3,572 in 2016, compared with 2,590 in 2015. Similarly, the number of contacts – for example, one-off queries from crime victims – was 44,046 in 2016, compared with 35,638 in 2015.[68] The **Czech Republic** also reported a higher number of victims supported in 2016 than in 2015.[69] Finally, in the hope that more victims will benefit from and make use of services, **Poland** extended the scope of victim support services in 2016 – for example, to cover help from interpreters, help in getting payments for medication refunded, and increasing vocational training.[70]

Promising practice

Providing online support for crime victims

In April 2016, Victim Support **Malta** launched a website called 'Victim Support Online' to provide professional support to crime victims in a confidential and anonymous manner. Providing online support is a way to encourage more victims to seek support and receive information relevant to their cases. The website also aims to raise awareness of rights.

For more information, see the website of Victim Support Online

Germany's largest victim support organisation, Weisser Ring, launched an online helpdesk in August 2016. A total of 17 trained support workers advise and assist crime victims who email them seeking help. They provide online advice in writing – currently in German only. Victims can remain anonymous if they wish.

For more information, see Weisser Ring, 'Onlineberatung des Weissen Rings'; Weisser Ring, 'Weisser Ring: Online helpdesk starts'

Providing for individual assessments of victims

As noted in the *Fundamental Rights Report 2016*, most EU Member States still need to adopt measures to ensure that victims are assessed individually to identify specific protection needs, as required by Article 22 of the Victims' Rights Directive. The directive specifies that such assessments are to be provided in accordance with national procedures; in practice, police often carry these out. There were several positive developments at Member State level regarding such assessments in 2016.

In **Ireland**, Police Victim Service Offices were put in place across all areas of the state in 2016. These offices provide a central point of contact for crime victims in local areas, and are staffed by specially trained police members and civilian personnel. **Bulgaria** formed a civic council and a working group to make proposals on guaranteeing vulnerable victims' rights to individual assessments and special protection measures in accordance with the directive. **Croatia** implemented a 'Targeted Early Victim Needs Assessment and Support' project from January 2016 to June 2017.

Boosting victim support services' capacity and funding

In a notably positive trend, a significant number of Member States increased state funding for victim support services in 2016. These include **Croatia**, **Finland**, **France**, **Ireland**, **Luxembourg**, **Malta**, the **Netherlands**, **Sweden** and the **United Kingdom**. In some Member States, such increases came about in direct response to obligations under the Victims' Rights Directive, or expectations – for example, in Ireland[71] – that more victims would seek assistance once the directive came into force.

In **France**, the budget for victim support has almost doubled – from € 10.2 million in 2012 to € 20 million in 2016. It increased by 18 % from 2015 to 2016.[72] There was also a substantial increase in the funds for victim support generated by the Council administering the **Danish** Victims Fund in 2016.[73] These funds are not subject to economic or political considerations but stem from victim payments made by, for example, persons who have been sentenced under criminal legislation or have violated the Danish Road Traffic Act. Many other Member States have similar schemes to ensure steady funding for victims of crime, as FRA has found previously – for example, **Belgium**, **Estonia**, **Finland**, **France**, **Lithuania**, **Poland**, **Portugal**, **Sweden** and the **United Kingdom**.[74] Similarly, the Ministry of Justice of **Croatia** in 2016 for the first time received lottery funds to finance civil society organisations that provide support to victims and witnesses in counties with no established offices for such support at courts.[75] Increased funding enabled Victim Support **Finland** to increase its staff by almost 40 %. This has made it possible for the organisation to focus more on advertising services and developing online chat services. 'RIKUchat' is an online service for victims, their families or others to ask questions (anonymously if they wish) and receive guidance and advice on crime victim issues from trained persons. The service began in 2012, and is increasingly being used, with the number of chat discussions more than doubling between 2015 and 2016.[76]

However, challenges remained with regard to the implementation of the Victims' Rights Directive. For example, while **Cyprus** incorporated the directive into national law in April, few structures were reportedly in place for its implementation. No services have been offered to victims under the incorporating legislation, nor has any budget been allocated for the services planned.

Finally, notwithstanding the important progress made in many Member States in 2016, not all Member States have yet set up effective victim support services that are available to all victims of crime, despite the obligation in Article 8 of the Victims' Rights Directive to establish such services.[77]

Establishing effective victim support services is among the most important provisions of the Victims' Rights Directive (Articles 8 and 9), as they enable victims to access other rights under the directive in practice. Previous Fundamental Rights Reports, as well as FRA's 2015 report on *Victims of crime in the EU: The extent and nature of support for victims*, make this point, and FRA evidence on hate crime published in April 2016 reinforces it. FRA's report on *Ensuring justice for hate crime victims: professional perspectives*[78] offers insights

into the reporting and recording of hate crimes from the perspective of professionals: courts, public prosecutors, police officers and victim support organisations. It analyses the specific factors that affect how and why hate crime victims do or do not seek justice and the barriers and drivers to victims' success in being acknowledged as victims of severe discrimination. The Victims' Rights Directive provides that all crime victims should have access to professional support services. This includes victims of hate crime, whom the directive recognises as a category of victims in need of special protection. However, the actual situation clearly falls short of this goal; of all the experts FRA interviewed, six in 10 highlighted a lack of such services. For more information on hate crime, see Chapter 3 on Racism, xenophobia and related intolerance.

8.3.2. Trends in support services for child victims

Taking account of the Victims' Rights Directive's special focus on child victims, Member States made efforts to increase support for such victims. This included working both on reaching more victims – for example, by increasing funding to victim support services – and on improving the quality of support – for example, by training more professionals.

In Denmark and Ireland, the number of child victims who received assistance substantially increased, according to their most recent statistics. The Department of Justice and Equality in **Ireland** indicated that the large increase (in 2016) was partly due to extra funding provided for a programme run by the organisation Children at Risk in Ireland (CARI).[79] **Denmark** has five specialised 'children's houses' – established in 2013 – to support child victims of violence or sexual abuse. In 2015, 27 % more children received support from these than in 2014. The increase reflects the rise in referrals from municipalities to the children's houses.[80]

Bulgaria initiated a project on child-friendly justice and training of professionals. Among other objectives, it aims to strengthen the participation of prosecutors and police officers in the coordination mechanisms for child victims and to improve the facilitation of child-friendly hearings for child witnesses and victims.[81] The State Agency for Child Protection (SACP) and the Bulgarian Paediatric Association (BPA) are planning to train paediatricians in recognising violence against children, as evidence shows that very few doctors report such cases. The SACP has recommended that such training become part of medical students' regular training.[82]

The Association for Victim Support (APAV) in **Portugal** launched a specialised support network for children and young people who are victims of sexual abuse (CARE network) in January 2016.[83] During the first half of 2016, the network supported an average of 17 children per month. Police in **Cyprus** established a special unit for investigating cases of child sexual abuse in December 2016. The unit, supported by specialised personnel, aims to provide professional child-centred services to protect and support victims.[84] The Commissioner for the Protection of the Rights of the Child issued a public statement applauding this decision, highlighting the prospect of conducting interviews with children who are victims or witnesses in the safe and child-friendly environment of the 'House for the Child', in collaboration and coordination with other public services and in line with international standards for investigating cases of sexual abuse.[85]

In the **United Kingdom**, the **Northern Ireland** Department of Justice launched a consultation on a new Witness Charter. It will state that witnesses and victims under the age of 18 are entitled to receive help from a Victim and Witness Care Unit to access support; be automatically considered eligible for special measures; and receive therapy/counselling from a trained person.[86] The effort includes a child-friendly version of the Witness Charter, entitled 'A guide for young people by young people'.[87]

Scotland held a consultation from March to June 2016 on raising the minimum age of criminal responsibility from eight to 12.[88] In its contribution, Victim Support Scotland highlighted the importance of maintaining support for young victims of crime regardless of the age of the offender – of particular concern because "a substantial proportion of offences committed by young people are perpetrated against another young person".[89] For further information on the rights of children, see Chapter 7; Section 7.2 discusses the rights of children accused or suspected of crime.

Despite positive developments, some Member States still need to make considerable progress to ensure adequate and effective victim support for children. The UN Committee on the Rights of the Child pointed out deficiencies in dealing with child victims of violence in **Slovakia**, especially with regard to the reporting of suspected physical or sexual abuse and the absence of exact data and monitoring of the quality of crisis centres for child victims.[90] The Coalition for Children Slovakia, a network of non-governmental organisations promoting the rights of children, also points to a lack of funding of facilities that provide support to child victims.[91]

8.4. Violence against women and domestic violence

The Istanbul Convention strongly influenced developments relating to violence against women at EU and national levels. While the EU moved towards ratifying the convention, there was also progress at

national level, with Member States either ratifying it or implementing its provisions.

8.4.1. Developments at EU level

In November 2016, the European Commission released the results of a Eurobarometer survey on gender-based violence.[92] Respondents – women and men – were asked about their opinions, perceptions and awareness concerning domestic violence, as well as their views on appropriate legal responses to different forms of gender-based violence.

A clear majority of respondents across the EU considers rape by an intimate partner to be wrong. Nevertheless, under 30 % of respondents in **Bulgaria**, **Italy**, **Lithuania**, **Portugal**, and **Spain** deemed it 'wrong and already against the law', while about half of the respondents in these countries said that rape by an intimate partner is wrong but they believe that it is not illegal.

About two in five respondents in **Malta** (47 %), **Cyprus** (44 %), **Lithuania** (42 %) and **Latvia** (39 %) agree with the statement that 'women often make up or exaggerate claims of abuse or rape'. Latvia, Lithuania and Malta are also the three countries with the highest percentages of respondents who agree with the statement that 'violence against women is often provoked by the victim' (57 %, 45 % and 40 %, respectively).

Awareness of support services listed in the survey ranged from close to 100 % of respondents in **Germany**, **Malta**, and **Sweden** to under 30 % in the **Czech Republic** and **Romania**.

The data were released as part of the Commission's launch of the year of focused actions to combat violence against women.[93] It aims to connect all efforts across the EU and engage and support all stakeholders – Member States, relevant professionals, and NGOs – to collectively combat violence against women. The focused actions involve local, national and EU-level action, with funding for national authorities and grassroots initiatives and complementary and supportive action at the EU level.

Meanwhile, on 24 November 2016, the European Parliament issued a resolution calling on the Council and the Commission to speed up negotiations on the signing of the Istanbul Convention and to ensure that the parliament would be fully engaged in the monitoring process following the EU's accession to the convention.[94]

In its *Fundamental Rights Report 2016*,[95] FRA highlighted the importance of recognising that violence against women constitutes a fundamental rights abuse and supported the Commission's initiative towards the EU's accession to the Istanbul Convention. In March 2016, the Commission proposed that the EU ratify the convention within its competences, and alongside the Member States that have already ratified it.[96] The EU's accession to the convention would ensure accountability for the EU at the international level because it would have to report to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the convention's monitoring body. It would also reinforce the EU's role in fighting gender-based violence.

The European Institute for Gender Equality (EIGE) in 2016 published selected good practices aimed at improving the quality of data on violence against women in the areas of police and criminal justice, health and social services, and on female genital mutilation.[97] In addition, EIGE published an analysis of the Victims' Rights Directive from a gender perspective.[98]

8.4.2. Improvements at Member State level

Last year saw significant progress in establishing the monitoring mechanism set out in the Istanbul Convention. In March 2016, the Group of Experts on Action against Violence against Women and Domestic Violence – GREVIO, the independent expert body responsible for monitoring the convention's implementation – adopted the questionnaire that serves as the measure applied when assessing the legislation and implementation measures that already exist as a baseline in countries that are parties to the convention. GREVIO envisages carrying out an initial round of baseline evaluation procedures from 2016 to 2020. As the first EU Member State evaluated and visited by GREVIO, **Austria** submitted a report in September 2016,[99] which Austrian NGOs followed up with a shadow report.[100] GREVIO plans to draw up and adopt its evaluation report on the relevant situation in Austria by the summer of 2017.[101]

Domestic violence can affect both women and men. It is mostly women who fall victim, but there is also recognition of the needs and rights of male victims. An example comes from **Portugal**, where a shelter for male victims of domestic violence opened in September 2016.[102] In the **Czech Republic**, a government working group conducted research on men and violence. The findings indicate that men perpetrate domestic violence in 90–95 % of cases, and that women are victims in 90 % of cases. The authors recommend introducing a sustainable, gender-sensitive educational system, which should enable people to identify gender-based and sexually motivated violence and take appropriate steps when facing it.[103]

In its *Fundamental Rights Report 2016*, FRA called on Member States to sign, ratify and effectively implement the Istanbul Convention. In this respect, 2016 was a good year. The last three Member States signed the convention (**Bulgaria**, the **Czech Republic** and **Latvia**) and two Member States ratified it (**Belgium** and **Romania**).[104] Several Member States – including **Bulgaria**,[105] **Croatia**,[106] **Greece**,[107] **Luxembourg**[108] and **Romania**[109] – established

working groups to identify the precise legislative reforms needed to meet the requirements of the Istanbul Convention, and in **Cyprus** the government has commissioned studies to the same end.[110]

Article 36 of the Istanbul Convention requires that any non-consensual act of a sexual nature be criminalised. **Austria**, **Germany** and **Malta** took initiatives to adapt national legislation to this requirement. In **Austria**, a new criminal law provision entered into force in January 2016, aiming to fill gaps left by previously existing provisions.[111] In **Germany**, as of November 2016, any significant sexual act undertaken against the apparent will of an affected person is treated as a crime.[112] In addition, an offence of 'sexual harassment' was introduced, criminalising bodily contacts for sexual purposes that are unwanted by the affected person. The new provision aims to criminalise, for instance, groping women in public transport.[113] In **Malta**, the government tabled a bill in parliament in November 2016 with the aim of bringing legislation up to the standards of the Istanbul Convention.[114]

Belgium amended its Criminal Code by criminalising the act of indecent assault. Previously, it was punishable only when accompanied by violence or threats.[115]

In **Spain**, parliament approved the establishment of a Subcommittee within the Equality Commission to form a 'State Pact on Gender-Based Violence'. One of the main objectives is to get all political actors involved in combating gender-based violence to agree that they need to take the standards of the Istanbul Convention into account seriously.[116]

A rather singular development happened in **Poland**. The government considered denouncing the Istanbul Convention, motivated by concerns that the convention's definition of 'gender' would run counter to the preservation of the traditional concept of the family. Such concerns already made ratification of the convention difficult.[117] This led to a public debate. The newspaper *Gazeta Wyborcza* reported that the Minister for Family, Labour and Social Policy pronounced herself in favour of denouncing the convention, and the ministry confirmed discussions of this matter.[118] However, on 10 January 2017, the Government Plenipotentiary for Equal Treatment informed the Commissioner for Human Rights that the government does not intend to denounce the convention.

Barring orders: protecting victims from repeat victimisation

In line with the Istanbul Convention and the Victims' Rights Directive, Member States are obliged to ensure that measures are available to protect victims from repeat victimisation. FRA's EU-wide survey on violence against women highlighted both the prevalence and the repetitive nature of intimate partner violence against women. Some of the results underline the importance of providing effective measures against domestic violence. One woman in five who has or has had a partner has experienced physical and/or sexual intimate partner violence since the age of 15, according to the survey.[119] Repeat incidents are also a widespread feature of intimate partner violence. Roughly half of women who have experienced physical or sexual violence by their current partner say that the partner used a particular form of physical or sexual violence more than once.[120]

By now, court orders are available in all Member States.[121] Where court orders are dealt with by civil law courts, specialised family courts are often responsible – for example, in **Austria**, **Belgium**, **Germany** and **Luxembourg**. In **Malta**, it appears that court protection is limited to divorce and separation cases. In July 2016, the Commission issued a reasoned opinion officially urging **Belgium** to communicate the national measures adopted to allow courts to recognise protection orders for victims of domestic violence issued by other Member States, as required by the Directive on the European Protection Order.[122]

Complementing court orders, emergency barring orders issued by the police are a means of immediately protecting victims against domestic violence. The requirement to provide them has gradually developed as a recognised standard and core element of a policy to counter violence against women. Five years after adoption of the Istanbul Convention, it is worth taking stock of what has been achieved in this regard. To date, 15 Member States have adopted relevant legislation enabling the police to swiftly remove a suspected violent offender from the victim's residence.

On closer inspection, the pertinent provisions enacted by Member States reveal significant differences. The time span covered by police barring orders ranges from 72 hours in **Hungary** up to several weeks (for example, in **Austria, Denmark**, **Germany** and **Slovakia**). Several Member States provide two time limits: one restricting the power of the police to issue a barring order without asking for the victim's consent; and a longer time limit for a barring order based on the victim's consent. For instance, in the **Czech Republic**, without the victim's prior consent, the police can remove an offender from the victim's home for 10 days. If the victim applies for a court order within this time period – thereby signalling the victim's wish to extend the time span of the protection granted by the barring order – the order stays in place until the court's decision. In **Slovenia**, the criminal court can extend the barring order from two to 10 days, and for another 60 days at the victim's request.

Table 8.1 maps Member State legislation on emergency barring orders, as required under Article 52 of the Istanbul Convention.[123]

Table 8.1: Emergency barring orders issued by police in cases of domestic violence

Member State	Legislation	Duration (in days)	Year(s) of significant law reform (since 1997)
Austria	Yes	14/28[a]	1997, 2009
Belgium	Yes[b]	10	2012
Bulgaria	No		
Croatia	No		
Cyprus	No		
Czech Republic	Yes	10/until court decision	2008
Denmark	Yes[c]	28	2004, 2012
Estonia	Yes	("temporary")	
Finland	Yes	(7)[a]	1998
France	No[d]		
Germany	Yes	7–14/20–28[e]	2002
Greece	No		2006
Hungary	Yes	3	2009
Ireland	No		
Italy	Yes[b]	10	2013
Latvia	Yes	Until court decision	2014
Lithuania	No		
Luxembourg	Yes[b]	14	2003
Malta	No		
Netherlands	Yes[c]	10/28	2009
Poland	No		
Portugal	No		
Romania	No		
Slovakia	Yes	10/until court decision	2008, 2016
Slovenia	Yes	2/10/72[a]	2005, 2008, 2013
Spain	No		2003, 2004
Sweden	Yes	No explicit limitation	2015
United Kingdom (England and Wales, Northern Ireland)	Yes[c]	No explicit limitation	2014, 2015

Notes: [a] *In several Member States, the duration of the emergency barring order is more or less automatically extended if the victim applies for a court order, to ensure the victim's protection until the court decides. In Finland, the duration of the emergency barring order is not restricted. However, the court is to decide within seven days. If the court cannot decide within that time, it must determine whether or not it remains in force. In Slovenia, the barring order issued by the police lasts for two days, but a judge can extend it to 10 days. If the victim applies for a court order, the duration is extended by another 60 days.*

[b] *In Belgium, Luxembourg and Italy, an emergency barring order requires authorisation by a public prosecutor. However, in Italy, the police can issue the barring order, which is then to be validated by the public prosecutor within 48 hours.*

[c] *In the Netherlands, the mayor, who has authority over the police, issues a temporary restraining order. In Denmark, the police commissioner decides on the emergency barring order. The police have powers to arrest a suspect for up to 24 hours to protect the victim until the police commissioner makes a decision. In England and Wales and in Northern Ireland, a Domestic Violence Protection Notice, issued by a police officer of the rank of superintendent or higher, can prohibit a person from entering premises or coming within a certain distance of premises. A police constable must then apply to the courts for a Domestic Violence Protection Order within 48 hours. As concerns Scotland, see the Joint Protocol between Police Scotland and Crown Office and Procurator Fiscal Service.*[124]

[d] *In France, the police are not authorised to issue a barring order, but other protection mechanisms have been introduced, including authorisations of the public prosecutor and the court to evict the violent spouse.*

[e] *In Germany, police legislation is dealt with by the federal states* (Länder). *Hence, various models exist.*

Source: *FRA, 2016*

Regarding the actual use of barring orders, figures from **Belgium** concerning incidents of partner violence indicate that police are hesitant to ask the public prosecutor to issue a barring order. In 2013 and 2014, 98,093 incidents of domestic violence were reported to the police, but only 65 of these incidents resulted in temporary barring orders.[125] As concerns **Estonia**, it has been claimed that the relevant police powers are rarely used in domestic violence cases.[126] In comparison, in **Austria**, police issued 8,466 barring orders in 2014 and 8,261 in 2015 (with some 8.6 million inhabitants, this amounted to about one barring order issued per 1,000 inhabitants).[127] In **Luxembourg**, 327 barring orders were issued in 2014 (0.6 barring orders per 1,000 inhabitants).[128] In

Hungary, police issued 1,792 barring orders in 2014, and 1,552 in 2015; hence, 0.2 barring orders per 1,000 inhabitants in 2015. However, as the protection offered by the police barring order in Hungary lasts for only 72 hours, NGOs have challenged the effectiveness of this regulation.[129]

Instead of introducing a barring order issued immediately by the police, a small group of Member States allow the police to arrest the potentially violent offender with a view to enabling the court or a public prosecutor to issue a protection order while the defendant is detained. A practice of this type exists in **Bulgaria**, **France**, **Ireland**, **Lithuania**, **Poland** and **Spain**.

8.4.3. Violence against asylum-seeking women

The ongoing reform of the Common European Asylum System includes a Commission proposal to strengthen the provisions on vulnerable applicants. This includes more ambitious provisions for assessing vulnerability and an obligation for Member States to take into account the specific needs of women applicants who have experienced gender-based harm. The strengthened provisions also aim to ensure that asylum applicants have access to medical care, legal support, appropriate trauma counselling and psycho-social care. The proposal for the new Asylum Procedure Regulation advocates gender-sensitive international protection. Women, for instance, should be given an effective opportunity to have a private interview, separate from their spouse or other family members. Where possible, they should be assisted by female interpreters and female medical practitioners, especially if they may have been victims of gender-based violence.[130]

In 2016, FRA provided evidence to GREVIO, focusing on the agency's findings concerning violence against female asylum seekers, both women and girls. That issue is covered in Article 60 of the Istanbul Convention, according to which parties to the convention shall – among others – develop gender-sensitive reception and asylum procedures. A recent field assessment of risks for refugee and migrant women and girls, carried out by the United Nations Refugee Agency (UNHCR), United Nations Population Fund (UNFPA) and the Women's Refugee Commission in Greece and the Former Yugoslav Republic of Macedonia, identified instances of sexual and gender-based violence in the country of origin and during the journey to Europe in 2016. They included early and forced marriage, transactional sex, domestic violence, rape, sexual harassment and physical assault.[131] The report identifies sexual and gender-based violence as both a reason why refugees and migrants are leaving countries of origin, and a reality for women and girls along the refugee and migration route. The report concludes that "the response to the European refugee and migrant crisis is currently not able to prevent or respond to survivors of sexual and gender-based violence in any meaningful way'".

In the same vein, Amnesty International reported in June 2016 that women staying in refugee camps in Greece continue to raise fears of not feeling safe. These fears are due to the mixed populations in the camps, the mixing of men and women in tents, in some cases, and the lack of proper lighting at night.[132] Similarly, the European Women's Lobby published a report indicating that "women and girls fleeing conflicts and travelling to or settling in Europe are at higher risk of suffering from male violence". The report calls for gender-sensitive asylum policies and procedures to help women and girls to escape male violence.[133]

Despite this evidence, there is a significant lack of data at the national level on the extent of violence against women and girls who are newly arrived or are in need of international protection. This lack of data may fuel the perception that violence against women is not a major feature of this crisis.

FRA ACTIVITY

Highlighting gender-based violence in the migration context

A number of factors contribute to migrant women and girls not being in a position to report abuse, notes FRA's thematic focus on gender-based violence, published alongside its June 2016 monthly report on the current migration situation in the EU. These include a lack of information on how to report such incidents, a lack of effective procedures to identify cases, and insufficient training of staff in charge of recognising gender-based violence. FRA noted that these shortcomings not only result in underestimation of this phenomenon but also prevent a coordinated and comprehensive response that addresses victims' needs.

Women and girls are also vulnerable to gender-based violence at reception centres and other facilities once they arrive in the EU. While governments, humanitarian actors, EU institutions and agencies, and civil society organisations are making efforts to address these issues, FRA's findings indicate that far more could be done to prevent and address continuing abuses against women and girls.

For more information, see FRA (2016), Thematic focus: gender-based violence, June 2016

FRA opinions

EU and other international actors in 2016 continued to tackle ongoing challenges in the area of justice and, in particular, the rule of law. The rule of law is part of and a prerequisite for the protection of all values listed in Article 2 of the Treaty on European Union (TEU). Developments implicating the rule of law and fundamental rights in Poland for the first time prompted the European Commission to carry out an assessment of the situation in a Member State based on its Rule of Law Framework. This resulted in a formal opinion, followed by recommendations on how the country should address the noted rule of law concerns. After the Polish government rejected these recommendations, the European Commission issued complementary recommendations, taking into account the most recent developments in Poland.

FRA opinion 8.1

All relevant actors at national level, including governments, parliaments and the judiciary, need to step up efforts to uphold and reinforce the rule of law. They all have responsibilities to address rule of law concerns and play an important role in preventing any erosion of the rule of law. EU and international actors are encouraged to strengthen their efforts to develop objective comparative criteria (like indicators) and contextual assessments. Poland should consider the advice from European and international human rights monitoring mechanisms, including the Commission's recommendations issued as part of its Rule of Law Framework procedure.

Many EU Member States continued to propose legislative amendments to comply with the requirements of Directives 2010/64/EU and 2012/13/EU – on the right to translation and interpretation, and to information in criminal proceedings – after the directives' transposition deadlines. Member States also adopted new laws to transpose Directive 2013/48/EU on the right to access to a lawyer. FRA's evidence from 2016 shows, however, that EU Member States still have work to do concerning these directives, particularly in adopting policy measures – such as concrete guidance and training on protecting the rights of suspected and accused persons. There is also untapped potential for the exchange of knowledge, good practices and experience concerning the three directives. Such exchanges could contribute to building an EU system of justice that works in synergy and respects fundamental rights.

FRA opinion 8.2

EU Member States – working closely with the European Commission and other EU bodies – should continue their efforts to ensure that procedural rights in criminal proceedings are duly reflected in national legal orders and effectively implemented across the EU. Such measures could include providing criminal justice actors with targeted and practical guidance and training, as well as increased possibilities for communication between these actors.

In 2016, many EU Member States focused on fulfilling the obligations imposed by the Victims' Rights Directive – such as reaching out to more victims and reinforcing the capacity and funding of victim support services, including specialised services for especially vulnerable victims such as children. A notable positive trend was that over a quarter of Member States increased funding to victim support services, leading to the expansion and improvement of services. Despite progress, one clear gap remains in several EU Member States: the lack of generic victim support services – meaning that not all crime victims across the EU can access support that may be vital for them to fulfil their rights.

FRA opinion 8.3

EU Member States should address gaps in the provision of generic victim support services. It is important to enable and empower crime victims to enjoy effectively their rights, in line with the minimum standards laid out in the Victims' Rights Directive. This should include strengthening the capacity and funding of comprehensive victim support services that all crime victims can access free of charge. In line with the directive, EU Member States should also strengthen specialised services for vulnerable victims, such as children and victims of hate crime.

In 2016, the final three EU Member States (Bulgaria, the Czech Republic and Latvia) signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). Meanwhile, in another Member State (Poland) statements were made on the possible renouncement of its commitments to the convention. When it comes to determining European standards for the protection of women against violence, the Istanbul Convention is the most important point of reference. In particular, Article 52 on emergency barring orders obliges parties to ensure that competent authorities are granted the power to order a perpetrator of domestic violence to leave the premises at which the victim resides. This is in line with the Victims' Rights Directive, which requires EU Member States to ensure that victims are protected against repeat victimisation. However, to date, only about half of the EU Member States have enacted legislation implementing this option in line with the Istanbul Convention. In addition, in Member States that have relevant legislation, assessments concerning its effectiveness are lacking.

FRA opinion 8.4

All EU Member States should consider ratifying the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) and implementing it. In line with Article 52 of the Istanbul Convention, and to ensure the immediate and reliable protection of domestic violence victims against repeat victimisation, EU Member States should enact and effectively implement legal provisions allowing the police to order a perpetrator of domestic violence to vacate the residence of a victim and stay at a safe distance from the victim. EU Member States that have such legislation should examine its actual effectiveness on the ground.

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113 See the new Art. 184i of the German Penal Code, according to the 50th Act Amending the Penal Code – Improving Protection of Sexual Self-Determination (*Fünfzigstes Gesetz zur Änderung des Strafgesetzbuches – Verbesserung des Schutzes der sexuellen Selbstbestimmung*), 4 November 2016.

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115 This legislation amends the Criminal Code by introducing a new Art. 371/1, which criminalises 'voyeurism'; see Belgium, House of Representatives, Law amending the Crminal Code concerning the criminalisation of indecent assault (*Loi modifiant le Code pénal en ce qui concerne l'incrimination de l'attentat à la pudeur/Wet tot wijziging van het Strafwetboek wat de strafbaarstelling van de aanranding van de eerbaarheid betreft*), 1 February 2016, Art. 8–9.

116 Spain, 'Equality Committee Proposal mandating a Subcommittee within the Equality Commission in order to form a State Pact on Gender-Based Violence' *(Propuesta de la Comisión de Igualdad, de creación de una Subcomisión, en el seno de la misma, para un Pacto de Estado en materia de Violencia de Género*), Press release, 16 December 2016.

117 Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, following his visit to Poland from 9 to 12 February, para. 133.

118 Grochal, R. (2016), '*Rząd wypowie konwencję o zwalczaniu przemocy wobec kobiet?*', *Gazeta Wyborcza*, 7 December 2016; Kowalski, R. (2016), '*Rząd PiS przygotowuje wypowiedzenie konwencji antyprzemocowej*', *Oko Press*, 2 December 2016.

119 FRA (2014), *Violence against women: An EU-wide survey*, Publications Office, p. 27.

120 *Ibid*., pp. 42–43.

121 For a detailed presentation and comparison of court orders, see van der Aa, S., Niemi, J., Sosa, L., Ferreira, A. and Baldry, A. (2015), *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, Oisterwijk, Wolf Legal Publishers.

122 European Commission (2016), *The July infringements package: key decisions*, Fact sheet, Brussels, 22 July 2016.

123 Compare van der Aa, S., Niemi, J., Sosa, L., Ferreira, A. and Baldry, A. (2015), *Mapping the legislation and assessing the impact of Protection Orders in the European Member States*, Oisterwijk, Wolf Legal Publishers.

124 The protocol can be accessed via the website of the Scotland police.

125 The Belgian authorities are currently evaluating the situation on the basis of the National Action Plan on combating all forms of gender-related violence 2015-2019; see the website of the Institute for Equality between women and men.

126 Vadim Poleshchuk, Mapping the legislation and assessing the impact of protection orders in the European Member States (POEMS) – National Report Estonia, p. 7.

127 The figures are based on data of the intervention centres ("*Interventionsstellen*") regarding the issued barring orders. *See* Annual Statistic for 2015, available on the website of Vienna's intervention centre.

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129 Wirth, J. (ed.) (2011), *System failure: Male violence against women and children as treated by the legal system in Hungary today*, Budapest, NANE Women's Rights Association and PATENT Association Against Patriarchy.

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131 UNHCR, United Nations Population Fund and Women's Refugee Commission, *Initial assessment report: Protection risks for women and girls in the European refugee and migrant crisis*.

132 Greece, Amnesty International, 'Nowhere safe: Refugee women on the Greek islands live in constant fear', 7 June 2016.

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UN & CoE

12 January – Special Rapporteur on the rights of persons with disabilities publishes report on right of persons with disabilities to participate in decision-making

January

February

March

29 April – CRPD Committee publishes concluding observations on the initial report of Portugal and publishes list of issues on the initial report of Italy

April

11 May – CRPD Committee publishes concluding observations on the initial report of Lithuania

17 May – CRPD Committee publishes concluding observations on the initial report of Slovakia

May

June

July

19 August – Special Rapporteur on the rights of persons with disabilities publishes report on disability-inclusive policies

26 August – CRPD Committee adopts General Comment No. 3 on Article 6 (Women with disabilities) of the CRPD and General Comment No. 4 on Article 24 (Education) of the CRPD, and publishes Guidelines on independent monitoring frameworks and their participation in the work of the committee

August

September

6 October – CRPD Committee finds that significant cuts to social benefits in the United Kingdom meet the threshold of grave or systematic violations of the rights of persons with disabilities

October

30 November – Council of Europe adopts Strategy on the Rights of Persons with Disabilities 2017-2023

November

December

EU

January

5 February – European Parliament (EP) publishes the European Implementation Assessment on the implementation of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) with regard to the concluding observations of the UN Committee on the Rights of Persons with Disabilities (CRPD Committee)

February

March

April

10 May – European Ombudsman opens an own-initiative inquiry (OI/4/2016/EA) on the treatment of persons with disabilities under the Joint Sickness Insurance Scheme (JSIS)

11 May – Finland ratifies the CRPD as 26th of the 28 EU Member States

May

14 June – the Netherlands ratifies the CRPD as 27th of the 28 EU Member States

June

7 July – EP adopts a resolution on the implementation of the CRPD with a special focus on the concluding observations of the CRPD Committee

July

August

8 September – Advocate General Wahl of the Court of Justice of the European Union (CJEU) delivers an opinion (Opinion Procedure 3/15) concluding that the EU has exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled

14 September – European Commission adopts its proposals for a regulation on the cross-border exchange of accessible format copies and directive on permitted uses of works for persons who are blind, visually impaired or print disabled

September

26 October – EP adopts Directive on the Accessibility of Websites and Mobile Applications of Public Sector Bodies

October

November

December

9 Developments in the implementation of the Convention on the Rights of Persons with Disabilities

Ten years after the United Nations (UN) General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD), the convention continues to spur significant legal and policy changes in the EU and its Member States. As attention gradually shifts from the first wave of CRPD-related reforms to consolidating progress made, the recommendations of review and complaints mechanisms at the international, European and national levels are increasingly important in identifying persisting implementation gaps. Monitoring frameworks established under Article 33 (2) of the convention can be essential tools to drive follow-up of these recommendations, particularly those stemming from reviews by the CRPD Committee – but they require independence, resources and solid legal foundations to carry out their tasks effectively.

9.1. The CRPD and the EU: following up on the concluding observations

In September 2015, the CRPD Committee published its assessment of the EU's progress in implementing the CRPD.[1] Developments at EU level in 2016 focused on efforts to follow up on the committee's wide-ranging recommendations (called 'concluding observations'). These developments highlight that, despite not being legally binding, concluding observations are important interpretative tools and provide clear guidance on fulfilling convention obligations to States parties, on which they can act. Further information on developments relating to discrimination based on disability is provided in Chapter 2 on Equality and non-discrimination.

Of particular importance in 2016 were steps to address the three recommendations on whose implementation the CRPD Committee requested that the EU report back by September 2016. These are the concluding observations on the declaration of competence; on the European Accessibility Act; and on the EU Framework to promote, protect and monitor the implementation of the CRPD (EU Framework) established under Article 33 (2) of the convention. In its response to the committee, sent in January 2017, the European Commission announced that an updated overview of EU legal acts referring to aspects of the CRPD would be published as an annex to the progress report on the European Disability Strategy 2010–2020. It also highlighted the publication of the proposal for the European Accessibility Act in December 2015. However, with discussions continuing in both the Council and the European Parliament, there is as yet no timeframe for its adoption. Section 9.3.1 covers issues relating to the European Commission's withdrawal from the EU Framework.

The CRPD Committee's recommendations, however, reach far beyond the three areas identified for urgent reform. Stretching across the full scope of EU competence, the concluding observations call for wide-ranging legal and policy initiatives that touch on the responsibilities and activities of all the EU's institutions and bodies. Moreover, it is a 'mixed agreement' covering some areas over which the EU has authority and some for which Member States are responsible, so responsibility for implementation rests with both the EU and the Member States, and requires close cooperation between them.[2]

Against this backdrop, a few examples of legislative, policy and complaints-related developments serve to highlight some of the steps EU institutions took in 2016

to respond to the CRPD Committee's recommendations within their respective mandates and activities. These examples underline two key ways in which the CRPD is driving processes of change at both the EU and national levels (see also Section 9.2):[3]

- Many initiatives specifically refer to individual recommendations from the CRPD Committee. This emphasises that the concluding observations can act as a blueprint for what the EU must do to fulfil its obligations under the CRPD.

- The activities and judgments of complaints mechanisms, both judicial and non-judicial, refer to the standards set out in the convention. This helps to clarify the scope of CRPD obligations and how they are to be met.

On the legislative side, the main developments concern accessibility of information and communications. Four years after the proposal was first presented, the EU adopted the Directive on the accessibility of websites and mobile applications of public sector bodies (Web Accessibility Directive) in October 2016.[4] Part of a package including the proposed European Accessibility Act and revision of the Audiovisual Media Services Directive,[5] the Web Accessibility Directive will require websites and apps of public sector bodies – ranging from public administrations and police departments to public hospitals and universities – to meet common accessibility standards.[6]

> *"Today, we have ensured that e-government is accessible to everyone. Just as physical government buildings should be accessible, so should the digital gateways. [...] But the internet is far more than government websites and apps. We need reform also for the private world of services, from banks to television stations to private hospitals. I hope that we can soon adopt the European Accessibility Act, so that both public and private services are accessible to all our citizens."*
>
> *Dita Charanzová, MEP, Rapporteur for the Directive of the European Parliament and of the Council on the accessibility of the websites and mobile applications of public sector bodies, 26 October 2016*

Reflecting concerns about possible implementation gaps, the directive includes a series of measures to ensure that its provisions become reality. Public sector bodies will have to regularly update an 'accessibility statement' on the compliance of their websites and apps with the directive, and establish a feedback mechanism to allow users to report compliance issues and request content that remains inaccessible. Moreover, they must provide a link to an 'enforcement procedure' for complaints about unsatisfactory responses to feedback or requests for information.[7] From its side, the European Commission will adopt implementing acts establishing a methodology for monitoring conformity with the directive. Member States have until 23 September 2018 to incorporate the directive into their national legislation.

In addition, in September the European Commission adopted two legislative proposals focused on helping people with visual impairments access published works, including special format books, audio books and other print material.[8] Part of the Commission's Digital Single Market Strategy,[9] the proposals would create exceptions to copyrights to increase the availability of publications in accessible formats. The explanatory memoranda for both proposals make specific reference to the CRPD and the EU Charter of Fundamental Rights, arguing that these commitments justify restrictions on the property rights of rights holders.

These proposals link directly to moves for the EU to become a party to the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled (Marrakesh Treaty).[10] In September 2015, the CRPD Committee specifically recommended ratifying it.[11] Although the EU signed the treaty in April 2014, seven EU Member States (the **Czech Republic**, **Finland**, **France**, **Hungary**, **Lithuania**, **Romania** and the **United Kingdom**) have opposed ratification, arguing that the EU does not have 'exclusive competence' to accept it.[12] Following a European Commission request to the Court of Justice of the European Union (CJEU) for an opinion, in September 2016 the Advocate General proposed that the court answer the Commission by finding that the EU "has exclusive competence to conclude the Marrakesh Treaty".[13] Should the CJEU follow this proposal in its final opinion, this would give significant impetus to finalising the EU's accession to the treaty, the second disability-related international agreement which the EU itself accepts.

The European Parliament adopted a relevant resolution in July 2016.[14] Although not legally binding, it gave a strong signal of the parliament's commitment to following up on the CRPD Committee's concluding observations. Addressing the full range of the committee's recommendations, the resolution covers both the importance of an overarching approach to CRPD implementation – such as taking measures "to mainstream disability in all legislation, policies and strategies" – and specific actions – for example, to support migrant women and girls with disabilities "to develop skills that would give them opportunities to obtain suitable employment".[15] Section 9.3 covers recommendations concerning the EU Framework. Importantly, organisations that represent persons with disabilities were actively involved throughout the process of preparing the report for adoption, reflecting the 'nothing about us, without us' philosophy enshrined in the CRPD.[16]

Promising practice

Promoting equal access for travellers with disabilities

The European Commission launched a pilot project implementing an EU Disability Card in eight EU Member States: **Belgium**, **Cyprus**, **Estonia**, **Finland**, **Italy**, **Malta**, **Romania** and **Slovenia**. The project aims to ensure mutual recognition of disability status between EU Member States, helping to increase access to certain benefits in the areas of culture, leisure, sport and transport for people with disabilities travelling to other EU countries.

For example, in Slovenia, the EU Disability Card project will run for 18 months from February 2016. After this point, all administrative units in Slovenia will begin to issue the card. The Ministry of Labour, Family, Social Affairs and Equal Opportunities is contributing 20 % of the funds, with the remaining costs met by EU Structural and Investment Funds.

For more information, see European Commission, 'EU Disability Card'

In terms of policy, the key focus was on the mid-term review, now termed progress report, of the European Disability Strategy 2010–2020.[17] The progress report was postponed until 2016 to allow it to take the CRPD Committee's concluding observations into account, and had not been published by year end. FRA contributed to the consultation on the review in March, highlighting several issues that could be taken into account in the review, including strengthening mechanisms for involving disabled persons' organisations (DPOs); specific measures addressing violence against women and children with disabilities; and actions targeting disability hate crime.

More broadly, the CRPD Committee's focus on the broad relevance of the convention across EU policymaking was reflected in the Commission's preliminary outline of the proposed European Pillar of Social Rights.[18] Acknowledging the barriers that persons with disabilities face in employment – particularly linked to inaccessible workplaces, tax-benefit disincentives and a lack of support services – the outline highlights the importance of ensuring enabling services and basic income security. While welcoming the outline in principle, several civil society organisations criticised the focus on disability benefits, and called for the rights of persons with disabilities to be mainstreamed throughout the proposed pillar, in line with the CRPD.[19]

EU institutions with a mandate to receive and investigate complaints also used these powers to respond to the concluding observations. These investigations help draw attention to the EU's obligations to implement the provisions of the CRPD within its own workings as a public administration, as well as through its law- and policymaking. For its part, the Committee of Petitions of the European Parliament (PETI Committee) updated its 2015 study on its protection role in the context of implementing the CRPD.[20] Complemented by a public workshop[21] and a PETI Committee debate on petitions about disability issues,[22] both now established as an annual practice, the study underlines the committee's increasing focus on disability issues.

The European Ombudsman's mandate is limited to investigating maladministration in the EU's institutions and other bodies. She initiated an own-initiative inquiry and two strategic initiatives explicitly linked to following up on the concluding observations. Such actions can serve as examples for ombudspersons at the national level.

In January and February, the Ombudsman twice wrote to the European Commission asking for information on how it will give effect to two concluding observations: one concerning accessibility for persons with disabilities of websites and online tools managed by the European Commission;[23] and the other concerning inclusive education at European Schools for children of EU staff.[24] In its response on website accessibility, the Commission stated that most of its websites are compliant with the Web Content Accessibility Guidelines, and it highlighted some of the steps it is taking to enhance accessibility.[25] On inclusive education, the Commission reiterated that the European Schools are not part of the EU public administration, but noted some of the additional support available for children with disabilities.[26]

In addition, in May the Ombudsman opened an own-initiative inquiry on whether or not the treatment of persons with disabilities under the EU's Joint Sickness Insurance Scheme (JSIS) complies with the CRPD.[27] The inquiry followed two complaints submitted by EU staff members whose children have disabilities. In writing to the President of the European Commission requesting information on how the Commission will follow up the CRPD Committee's recommendation in this area, the Ombudsman hinted that there is potential for a "more ambitious approach" on this issue than the "marginal scope for improvement" identified with regard to website accessibility and the European Schools.[28] The Commission's response highlighted that the JSIS is only one component of the EU's efforts to implement the CRPD with respect to its workforce, alongside other financial benefits to cover additional costs associated with an impairment.[29] Furthermore, the Commission announced its readiness to examine the application of the JSIS in relation to disability-related health needs, with the involvement of persons with disabilities and/or DPOs.

FRA ACTIVITY

FRA evidence supports UN work on rights of persons with disabilities

In addition to its reports, FRA draws on its body of evidence to provide country-specific and thematic input to the monitoring work and consultations of international bodies. In 2016, FRA submitted three contributions to the UN Special Rapporteur on the rights of persons with disabilities in relation to social protection, the right to participate in decision-making and provision of support to persons with disabilities. FRA also provided written input to the CRPD Committee on the right to live independently and be included in the community, and on national implementation and monitoring; and to the UN Office of the High Commissioner for Human Rights (OHCHR) on equality and non-discrimination for persons with disabilities.

All FRA input to the UN Special Rapporteur is available under the respective 'Issue in focus'; FRA input to the CRPD Committee is available on the committee's website; FRA input to OHCHR is available on the disability section of the OHCHR website.

9.2. The CRPD in EU Member States: a decade on, reflection drives reform

"Ten years ago the global community witnessed the adoption of the first international treaty on the rights of persons of disabilities from a human rights-based approach. [...] The Convention has given visibility to the rights of persons with disabilities at a local, national, and international level. However, [...] many persons with disabilities continue to face significant barriers in the enjoyment of their rights, in particular women with disabilities and those belonging to historically discriminated groups."

Catalina Devandas Aguilar, UN Special Rapporteur on the rights of persons with disabilities, Speech at 2016 Social Forum, 3 October 2016

The UN General Assembly adopted the CRPD in December 2006.[30] In the 10 years since then, the convention has consistently spurred significant legal and policy changes across the EU Member States. Evidence from 2016 illustrates that reforms are increasingly drawing on experience gained both nationally and internationally from developing and implementing measures to implement the CRPD. Thus, it reiterates the role of twin drivers of change: guidance from the CRPD Committee, whether as concluding observations, general comments or inquiries; and the growing body of national and European case law that makes reference to the convention.

This is reflected in the most prominent development in 2016: ratification of the CRPD by **Finland** – which also ratified the Optional Protocol to the Convention – and the **Netherlands**, leaving **Ireland** as the only Member State still to do so. Both ratifications mark the end of significant reform processes to bring national legal frameworks in line with the provisions of the CRPD. The Dutch Act implementing the CRPD included a package of legislative amendments in areas as varied as non-discrimination, elections, social support, participation and youth.[31] Similarly, before ratifying the convention, Finland finalised legislative amendments to the Act on special care for persons with intellectual disabilities, to meet the CRPD requirements on the right to liberty and security of the person.[32] This issue was discussed in FRA's *Fundamental Rights Report 2016*.[33]

FRA ACTIVITY

Highlighting barriers faced by migrants with disabilities

Article 11 of the CRPD, on situations of risk and humanitarian emergencies, requires States parties to the convention to "take, in accordance with their obligations under international law, including international humanitarian law and international human rights law, all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict [and] humanitarian emergencies".

Every month, FRA collects data on the fundamental rights situation of people arriving in Member States that are particularly affected by large migration movements. In August, FRA focused specifically on the situation of migrants with disabilities. The findings highlight that there is a lack of formal procedures to identify migrants and refugees with disabilities, with significant knock-on effects for the provision of targeted support and assistance. They also indicate that identification of, and support for, persons with disabilities relies heavily on the expertise and knowledge of individual staff. However, a lack of relevant training can impede the identification of impairments, particularly those that are less immediately visible.

For more information, see FRA's August 2016 Thematic focus on migrants with disabilities and Chapter 5 of the present report

9.2.1. Taking recommendations on board in law and policymaking

More broadly, the trend for reflection is exemplified by looking at reforms in five key areas:

- strategies and action plans for implementing the CRPD;
- education (Article 24);
- participation in political and public life (Article 29);

- accessibility (Article 9);
- living independently and being included in the community (Article 19).

These issues are the subject of existing or forthcoming general comments by the CRPD Committee, and they are increasingly addressed from the perspective of the general principle of non-discrimination.[34] Notably, they have also featured consistently in FRA's annual Fundamental Rights Reports, signifying their place at the heart of national efforts to implement the CRPD.One mainstay of national actions to implement the CRPD is strategies or action plans related to the rights of persons with disabilities. Rather than new national action plans, such as those adopted in **Bulgaria** and **Romania** (see Table 9.1), much activity now focuses on evaluating existing action plans and developing their successors. As part of the **Swedish** Strategy for the implementation of disability policy,[35] the country's Agency for Participation analysed developments in national disability policy across all state authorities during its 2011–2016 implementation period. The evaluation highlighted that, while there has been positive change in the areas of art and culture, media, information technology and transport, progress in improving physical accessibility and access to the labour market has been slow.[36]

One obvious way to take such evaluations further is to feed the results into the development of follow-up strategies. The **German** government built on the findings of the 2014 evaluation of its previous strategy, as well as the CRPD Committee's concluding observations,[37] in developing its second National action plan to implement the CRPD.[38] The plan is built around 175 measures in 13 areas, including work, education, mobility, rehabilitation and health, social and political participation, and – as a new area – awareness raising. The German Institute for Human Rights welcomed it as marking a "quantum leap" forward in conceptual terms. The institute, which is the monitoring body under Article 33 (2) of the convention, did however express concern that the plan lacks sufficient proposals to address issues such as coercion in the psychiatric system, reforms of electoral law – which excludes certain groups of persons with disabilities from the right to vote – and the scaling down of sheltered workshops.[39]

The Council of Europe's 2017–2023 Strategy on the Rights of Persons with Disabilities, adopted in November, can support efforts at the national level.[40] Drawing on the evaluation of the 2006–2015 strategy,[41] its priority areas (equality and non-discrimination; awareness raising; accessibility; equal recognition before the law; and freedom from exploitation, violence and abuse) and cross-cutting issues (participation, cooperation and coordination; universal design and reasonable accommodation; gender equality; multiple discrimination; and education and training) reflect FRA input during the development of the strategy.

Table 9.1: Strategies and action plans relevant to the CRPD adopted in 2016, by EU Member State

Member State	Strategy or action plan
BE	Walloon region, French-speaking community and Brussels-Capital region: Cross-sectional autism plan (*Plan Transversal Autisme*)
BG	National strategy for the persons with disabilities 2016–2020 (*Национална стратегия за хората с увреждания 2016–2020 г.*)
DE	Second National action plan to implement the UN Convention on the Rights of Persons with Disabilities (*Nationaler Aktionsplan 2.0 der Bundesregierung zur Umsetzung der UN-Behindertenrechtskonvention*)
ES	Comprehensive plan for supporting families 2015–2017 (*Plan Integral de Apoyo a la Familia 2015–2017*)
RO	National strategy: a society without barriers for persons with disabilities 2016–2020 (*Strategia națională 'O societate fără bariere pentru persoanele cu dizabilități' 2016–2020*)
SK	Updates to National programme for the development of living conditions for citizens with disabilities 2014–2020 (*Národný program rozvojaživotných podmienok občanov so zdravotným postihnutím na roky 2014 – 2020*)
UK	Scottish Government, A fairer Scotland for disabled people – our delivery plan to 2021 for the United Nations Convention on the Rights of Persons with Disabilities
	Northern Ireland physical and sensory disability strategy and action plan extended to 2017 Northern Ireland, Active living: no limits – 2016–2021
	Welsh Government, Together for mental health: delivery plan 2016–2019
	Action against hate: the UK government's plan for tackling hate crime

Source: FRA, 2016

Turning to specific articles of the convention, the CRPD Committee strengthened its guidance on obligations under the convention through the publication of two further general comments, on women and girls with disabilities (Article 6)[42] and on inclusive education (Article 24).[43] That on inclusive education reflects an area of persistent concern for the committee, which has repeatedly highlighted ongoing segregation of children with disabilities in the education systems of EU Member States.[44] Of particular note are the concrete measures to implement inclusive education at the national level spelled out by the committee. They include ensuring that responsibility for the education of persons with disabilities rests with the education ministry, rather than social welfare or health; introducing a substantive right to inclusive education within the legislative framework; and the development of an educational sector plan in conjunction with DPOs.[45]

> *"Inclusion involves access to and progress in high-quality formal and informal education without discrimination. [...] States parties should respect, protect and fulfil each of the essential features of the right to inclusive education: availability, accessibility, acceptability, adaptability."*
>
> *CRPD Committee, General comment No. 4 – Article 24: Right to inclusive education, CRPD/C/GC/4, 2 September 2016, paras. 9 and 38*

Ongoing developments within EU Member States reflect several of these measures. Corresponding to the general comment's focus on reasonable accommodation, a proposal by the French Community in **Belgium** aims to clarify how accommodations for pupils with 'special needs' are applied for and reviewed.[46] The country's equality body, however, highlighted that provision of reasonable accommodation is an obligation under the CRPD rather than a possibility, as the current proposal implies.[47] The equality body also expressed concern that that the proposal fails to reflect the human rights-based approach to disability and that it was not subject to accessible public consultation in line with Article 4 (3) of the convention. These reflect recurring criticisms of legislative and policy developments linked to CRPD implementation.[48]

Achieving inclusive education requires more than a robust legislative framework, however. One key task is devising and providing targeted training, a repeated recommendation in the general comment. In this vein, the **United Kingdom** Equality and Human Rights Commission developed an online training kit to help schools fulfil their duty to provide reasonable accommodations for learners with disabilities. Structured in several modules, it includes practical activities to increase knowledge of reasonable accommodation and inclusive teaching strategies.[49] A project in **Croatia** supported by the European Social Fund addresses another crucial element: adequate assistance from qualified staff. For the school year 2016/2017, the project will fund 2,030 teaching assistants supporting 2,268 students with disabilities in primary and secondary schools.[50]

Promising practice

Developing self-advocacy skills of persons with disabilities

The Foundation Institute of Regional Development in **Poland** has launched a project to develop the self-advocacy skills of persons with disabilities in cooperation with US DPOs. Drawing on the US organisations' expertise in strengthening awareness and use of self-advocacy, the project will map current Polish experience and develop two online training modules targeting persons with disabilities and their families.

For more information, see Baza Dobrych Praktyk, 'Rozbudowa ruchu self-adwokatów w Polsce. Doświadczenia polskich i amerykańskich organizacji osób z niepełnosprawnościami'

The potential for general comments to shape national legislation over the longer term is underlined by the ongoing influence of the CRPD Committee's first two comments on legal capacity (Article 12) and accessibility (Article 9), published in 2014. A case in point is reforms related to realising the right to political participation. On legal capacity, the committee forcefully reiterated the importance of ensuring that people deprived of legal capacity do not as a consequence lose the right to vote.[51] Concerning accessibility, it highlighted that people with disabilities cannot exercise the right to political participation without accessible voting procedures, facilities and materials.[52] FRA first looked at the legal capacity side in a 2010 report[53] and has tracked developments in both areas since, in particular through the development of human rights indicators on the right to political participation of persons with disabilities.[54]

Reforms in **Denmark** address both capacity and accessibility concerns. Legal amendments mean that persons under full legal guardianship are now entitled to vote and run for election in municipal, regional and European Parliament elections.[55] The amendment, however, highlights the challenge of severing often long-standing and deeply rooted links between legal capacity and the right to vote: it does not grant the right to vote in elections to the Danish Parliament or referendums, as this would, according to the Ministry of Justice, violate the country's constitution.

Although less likely to come up against such legal barriers, making elections more accessible has also proved a challenge. Further proposed reforms to Danish electoral law provide persons with "immediately ascertainable or documentable physical or mental disabilities" with the right to be assisted in

voting by a person chosen by them, without this being overseen by polling station officials, if they express this wish explicitly and unambiguously. Officials would nevertheless retain the power to judge whether or not persons with disabilities explicitly and unambiguously express this wish.[56] Moreover, one of the reforms tied to **Dutch** ratification of the CRPD obliges local authorities to make polling stations accessible to persons with disabilities.[57] This is an improvement on the previous requirement, highlighted in FRA's 2014 report, for at least one in four polling stations to be "as accessible as possible".[58] However, no detail is given on what makes a polling station accessible or what criteria will be used to assess accessibility.

Away from elections, the range of Member State action to improve accessibility reflects the role of accessibility in realising CRPD provisions across different areas of life. In line with calls from the CRPD Committee to view accessibility in the context of non-discrimination, the end of transitional provisions meant that it has been possible since January to claim compensation in **Austria** if buildings or transport facilities are not barrier-free, with exemptions where the removal of barriers would require disproportionate efforts.[59] In the area of housing, **Hungary** increased the value of the allowance for ensuring accessibility from HUF 150,000 (€ 490), claimable only once, to HUF 300,000 (€ 980), which can be requested every 10 years.[60]

Accessibility is also an area where national jurisprudence is giving further impetus to CRPD implementation. A **Bulgarian** applicant with physical impairments claimed financial compensation for damages suffered as a consequence of inaccessible court premises, which meant he – a wheelchair user – needed the help of two people to enter the building.[61] Again drawing on the principle of equal treatment, the court found that, as there was no way for persons using wheelchairs to enter or move around the building without help, the applicant's right to equal treatment had been violated. However, the court did not make reference to the CRPD, although the applicant explicitly mentioned its provisions concerning discrimination on the grounds of disability and accessibility.

The subject of the CRPD Committee's next general comment will be the right to live independently and be included in the community (Article 19). In preparation, the committee held a day of general discussion in April 2016, at which FRA joined a wide range of other stakeholders and presented its work on the transition from institutional to community-based support for persons with disabilities, or de-institutionalisation, and developing human rights indicators on Article 19.[62]

One issue likely to feature prominently in the general comment is appropriate and adequate funding to ensure individualised support in the community. This is particularly salient for the EU, given concerns expressed in a report prepared for the European Parliament that European Structural and Investment Funds (ESIF) have previously "been used to perpetuate the institutionalisation of people with disabilities".[63] The 2014–2020 ESIF funding period introduced ex ante conditions[64] – requirements that must be fulfilled before funds can be disbursed. They provide an important new set of safeguards. The next challenge is to heed the CRPD Committee's call for the Union "to strengthen the monitoring of the use of the ESIF [...] to ensure that they are used strictly for the development of support services for persons with disabilities [...] and not for the redevelopment or expansion of institutions".[65]

An essential aspect of effective monitoring will be thorough and systematic data on how ESIF are used. Several initiatives in 2016 show the range of possible evidence and relevant actors. In its complaints-receiving capacity, the PETI Committee investigated the use of ESIF in **Slovakia** and highlighted key considerations for achieving de-institutionalisation, ranging from close coordination of ESIF-funded projects to improving the accessibility of mainstream services.[66] From the civil society side, the independent initiative Community Living for Europe: Structural Funds Watch monitors the use of ESIF in the transition from institutional care to community-based living, including by collecting information on innovative uses of the funds in this area.[67] For its part, FRA's indicators and fieldwork on Article 19 both look extensively at the use of ESIF in de-institutionalisation.[68]

At the national level, too, funding for independent living remains a concern. Following complaints that cuts to social benefits in the **United Kingdom** disproportionately affected persons with disabilities, the CRPD Committee set up a confidential inquiry under Article 6 of the Optional Protocol to the CRPD, the first such process since the convention entered into force. Following wide-ranging consultations, the committee found that the consequences of welfare reforms enacted since 2010 meet "the threshold of grave or systematic violations of the rights of persons with disabilities".[69] Concerning independent living in particular, the committee found that the benefit cuts and stricter eligibility criteria had "limited the right of persons with disabilities to choose their residence on an equal basis with others" and hindered the de-institutionalisation process.[70] More positively, draft reforms to the law on long-term care insurance in **Luxembourg** aim to simplify current procedures for evaluating individuals' support needs and to better match services offered to the needs of each person, as part of a wider effort to reinforce individualisation at all levels of care.[71]

Promising practice

Preventing violence against persons with intellectual disabilities

The **Portuguese** National Federation of Social Solidarity Cooperatives and the Public Security Police (PSP), in partnership with the National Institute for Rehabilitation and the National Confederation of Social Solidarity Institutions, have developed a programme focused on preventing and responding to violence against people with intellectual disabilities. Under its auspices, security forces and organisations working with people with intellectual disabilities developed tailor-made training modules, which over 600 members of the PSP, professionals working with people with disabilities and disability organisations, have already taken. In addition, 130 police stations and 200 disability organisations have signed local cooperation agreements to improve coordination and develop needs-based responses.

For more information, see National Institute for Rehabilitation (Instituto Nacional para a Reabilitação), 'Ações de Formação no âmbito do Protocolo Significativo Azul'

Looking finally at national case law, two judgments concerning the definition of disability illustrate how interlinkages between national and European jurisprudence and the CRPD help to clarify the scope of the convention's obligations. Both cases concern discrimination based on disability in employment, and they draw directly on the CJEU's interpretation of the Employment Equality Directive in light of the CRPD. In the first, the Employment Appeal Tribunal in the **United Kingdom** relied on the definition of disability set out in Article 1 of the CRPD to interpret the much narrower concept of disability established in the 2010 Equality Act.[72] In his reasoning, the judge referenced the *HK Danmark v. Dansk Almennyttigt Boligselskab* judgment, in which the CJEU asserted that, with regard to the Employment Equality Directive, the "concept of 'disability' must be understood as referring to" Article 1 of the CRPD.[73]

The second case was brought by a man who had been rejected for a position as a driving instructor on account of his weight.[74] A **Belgian** labour tribunal employed the same judgment when ruling. Upholding his complaint, the judge stated that, while obesity is not itself a protected characteristic, the wording of Article 1 of the CRPD means that an employee's obesity can constitute a disability if it results in a limitation, resulting in long-term physical, mental or psychological impairment. That would make it a protected characteristic. Notably, the judge did not make reference to the 2014 *Kaltoft* case, which specifically addressed the question of when obesity can constitute disability for purposes of the Employment Equality Directive.[75] European Commission-funded training for members of the judiciary and legal practitioners on EU disability law and the CRPD builds capacity concerning the interlinkages between UN, EU and national standards.[76]

9.3. Further clarity needed on promoting, protecting and monitoring CRPD implementation

When the CRPD was adopted in 2006, the requirement for national monitoring set out in Article 33 (2) was identified as one of the new convention's most novel features. Understanding and implementing what is required of the bodies tasked under this article with promoting, protecting and monitoring CRPD implementation has long posed a challenge, both to States parties tasked with establishing these frameworks and to the frameworks themselves. Concluding observations consistently highlight issues regarding independence and resources.[77] Other difficulties include the need for a legal basis for frameworks and common understanding of their main tasks, as regularly illustrated in FRA's Fundamental Rights Reports as well as in the agency's legal opinion published in May 2016.[78]

Guidance from the CRPD Committee published in September 2016 sets out responses to many of these questions.[79] On resources and a legal basis, the committee's position is clear: the duty to maintain frameworks set out in Article 33 (2) requires States parties to ensure both that the "monitoring framework has a stable institutional basis which allows it to properly operate over time" and that it is "appropriately funded and resourced (technical and human expertise) through allocations from the national budget".[80]

On other issues, however, the guidelines reflect persistent difficulties in living up to the spirit of Article 33 (2). For example, frameworks should include tasks to promote, protect and monitor the implementation of the CRPD. The guidelines bring together previous suggestions for tasks put forth during the drafting of the convention and others that the Office of the High Commissioner for Human Rights made later (see Table 9.2).[81] These tasks include a wide range of research, scrutiny, complaints-based, advocacy and awareness-raising activities. Carrying them out is likely to prove challenging for frameworks, given the wide scope of the CRPD's provisions.

Similarly, questions remain regarding the requirement for independence. While the convention itself speaks of "a framework" including "one or more independent mechanisms, as appropriate", the guidelines refer

Table 9.2: Tasks of frameworks to promote, protect and monitor implementation of the CRPD

CRPD Committee Guidelines on independent monitoring frameworks and their participation in the work of the committee	
Promote	Raising awareness of the convention, capacity building and training initiatives
	Regular scrutiny of existing national legislation, regulation and practices as well as draft bills and other proposals, to ensure that they are consistent with convention requirements
	Encouraging the ratification of international human rights instruments
	Undertaking or facilitating research on the impact of the convention or of national legislation
	Providing technical advice to public authorities and other entities on implementing the convention
	Issuing reports at their own initiative, or when requested by a third party or a public authority
	Contributing to the reports that States parties are required to submit to United Nations bodies and committees
	Cooperating with international, regional and other national human rights institutions
Protect	Considering individual or group complaints alleging breaches of the convention
	Referring cases to the courts
	Participating in judicial proceedings
	Conducting inquiries
	Issuing reports related to complaints received and complaints processes
Monitor	Maintaining databases of activities undertaken to implementation the convention
	Developing indicators and benchmarks
	Developing a system to assess the impact of implementing legislation and policies

Source: *FRA, 2016 (based on CRPD Committee's 2016 Guidelines on Independent Monitoring Frameworks and their participation in the work of the Committee)*

throughout to "independent monitoring frameworks" when discussing Article 33 (2) bodies.[82] This shift in terminology seems to move the independence requirement from "one or more mechanisms" to the monitoring framework as a whole. This raises doubts about the composition of existing frameworks in which some but not all members are independent. This departure from the wording of the convention could risk undermining conceptual and operational clarity concerning Article 33 (2), as both FRA and the Global Alliance of National Human Rights Institutions highlighted in their contributions to the consultation on the draft guidelines.[83]

9.3.1. FRA highlights unresolved challenges

In the wake of the concluding observations on the EU, the Article 33 (2) framework at the EU level also faces questions concerning its scope of activities, financing and functioning, and lack of a solid legal basis, as FRA noted in its *Fundamental Rights Report 2016*. These are further exacerbated by the very different mandates and roles of its members: the European Parliament, the European Ombudsman, FRA and the European Disability Forum (EDF). To clarify the "requirements for full compliance with the CRPD as it relates to the status and effective functioning of the EU Framework, taking into account the specificities of the EU", in March the European Parliament requested a FRA opinion on "requirements under Article 33 (2) of the CRPD within the EU context".[84]

Drawing on existing institutional practice in EU Member States, FRA's opinion is clustered around four key areas of concern to Article 33 (2) frameworks: composition, legal basis and involvement of persons with disabilities; status and efficiency of the independent mechanism; framework tasks; and working arrangements (see Figure 9.1 and Table 9.2). Several of its findings are reflected in the European Parliament's resolution on implementation of the CRPD (see Section 9.1), which "calls on the budget authorities to allocate adequate resources to enable the EU Framework to perform its functions independently".[85] While the EU Framework itself could follow up some of the opinions, notably concerning working arrangements, many are reliant on actions by the EU legislature to clarify the framework's scope of activity and resources.

Against this backdrop, the EU Framework met representatives of the EU Member States during a meeting of the Council of the EU's Working party on human rights in July 2016.[86] In addition to highlighting the framework's important role in improving the lives of people with disabilities in the EU, framework members drew attention to two 'enablers' of a strong and impactful EU Framework: resources to perform the promotion,

protection and monitoring tasks; and a legal basis to ensure transparency, legal clarity and foreseeability.

The European Commission's reply to the CRPD Committee provides an indication of the Union's response to the concluding observation on the EU Framework. The Council is expected to endorse a revised proposal for the EU Framework in early 2017. That will formalise the Commission's withdrawal but not change the tasks and the requirement that activities be carried out within existing resources. Finding sustainable solutions to the questions raised by the concluding observations and the CRPD Committee's guidelines will require further strengthening the communication between the EU Framework and the EU institutions, in particular the European Commission as the focal point for implementing the CRPD.

Away from these underlying issues, the European Parliament, European Ombudsman, FRA and EDF continued to implement the EU Framework's work programme, in line with their commitment to participate actively in the follow-up of the EU review process within the means provided by their mandates.[87] Examples of four joint activities stemming from the work programme give a flavour of how members collaborate.[88] (Section 9.1 discusses activities of individual members.) These joint activities are:

- Updated EU Framework webpage (see Figure 9.2): the framework's webpage was transferred from the European Commission to FRA and relaunched in June. It includes a section on the EU review process, as well as updated information on the European Commission's withdrawal from the framework and FRA's taking over the chair and secretariat roles on an interim basis. Crucially, it helps to ensure transparency by acting as a depository for important documents, such as the work programme and minutes of framework meetings.[89]

- Events on follow-up of concluding observations on the EU: all EU Framework members took part in an exchange of views with the European Parliament's Committee on employment and social affairs. They gave their input to the preparation of the European

Figure 9.1: Revisiting the EU Framework under Article 33 (2) of the CRPD – key FRA opinions

Composition, legal basis and involvement of persons with disabilities

- To ensure transparency, legal clarity and foreseeability, the **EU Framework should be based on a legally binding act published in the Official Journal of the EU**.
- The legally binding act should **clarify the membership and key tasks** of the EU Framework.
- To facilitate pluralism and the involvement of the full range of relevant societal groups and actors, an **advisory board or consultative committee** could be established to support the EU Framework.

Status and efficiency

- Taking into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights, the **European Ombudsman and FRA are natural candidates to fulfil the role of independent mechanisms** within the EU Framework.
- The legal basis of the EU Framework **should enable it to issue opinions on draft EU legislation relevant to the rights of persons with disabilities, on its own initiative**.
- Efficiently and effectively promoting, protecting and monitoring the implementation of the CRPD by the EU constitute **new** and **additional** tasks for members of the EU Framework, which they should have **adequate resources to perform**.

Working arrangements

- To ensure efficient and effective fullfilment of its tasks, the EU Framework should **closely cooperate with the European Commission and the coordination mechanism** established under Article 33 (1) and **establish structured means of engagement with stakeholders**.
- The EU Framework should develop a **regular meeting schedule**, which could be complemented by **open meetings** with the participation of relevant stakeholders.
- Honouring the specific nature of the EU as a party to the CRPD, **regular exchange should take place between the EU Framework and national frameworks**, as well as other relevant networks.

Note: *Issues related to tasks of the EU Framework reflect those identified by the CRPD Committee and presented in Table 9.2.*

Source: *FRA, 2016 (adapted from its 2016 Opinion concerning requirements under Article 33 (2) of the CRPD within the EU context)*

Figure 9.2: Webpage of the EU Framework to promote, protect and monitor the implementation of the CRPD

Source: FRA, *Webpage on EU Framework for the UN Convention on the Rights of Persons with Disabilities*

Parliament's resolution on CRPD implementation (see Section 9.1).

- Annual meeting between EU Framework and national monitoring mechanisms in EU Member States, organised alongside the European Commission Work Forum: the latest meeting allowed both the EU and national frameworks to give updates on their respective activities and areas of focus, as well as to discuss in more detail challenges they face in their work and how to step up their cooperation.

- Development of work programme 2017–2018:[90] all members agreed the second EU Framework work programme at the end of 2016. It provides for the continuation of ongoing tasks such as awareness raising, complaints procedures and data collection. It also plans greater collaboration in the organisation of events, and development and dissemination of information and training material to increase awareness of the CRPD among the EU public administration.

9.3.2 National frameworks consolidate monitoring role

Four more EU Member States received concluding observations in 2016. Half of the Member States that have ratified the CRPD have now been subject to review by the CRPD Committee (see Table 9.3).

This growing body of country-specific guidance on monitoring coalesces around three recurrent themes: independence, adequate resources, and systematic participation and involvement of persons with disabilities. An overview of developments in 2016 suggests a mixed bag of progress and areas of concern.

On the positive side, the CRPD Committee's recommendations are reflected in the monitoring bodies designated by **Finland** (Human Rights Centre, Human Rights Delegation and Parliamentary Ombudsman) and the **Netherlands** (Netherlands Institute for Human Rights), which formally took up their monitoring responsibilities after the countries ratified the CRPD. Both frameworks comprise the independent national human rights institutions and received additional financial and/or human resources to fulfil their Article 33 (2) responsibilities.[91]

Other changes reflect the particular challenges faced by monitoring frameworks in federal states, where different levels of government are responsible for various areas of disability policy. Responding to recommendations from the CRPD Committee, states in **Austria** and **Germany** established their own monitoring bodies in 2016 to complement those already in place at the national level. The province of Salzburg established a monitoring committee, so all nine Austrian provinces now have their own Article 33 (2) bodies.[92] Some German federal states concluded contracts with the German Institute of Human Rights – the national Article 33 (2) body – to establish monitoring mechanisms at the state level. The creation of a body in North Rhine-Westphalia[93] was highlighted as a model for other German federal states.[94] Looking ahead, experience gained in ensuring effective coordination between these different national bodies can inform enhanced cooperation between the EU Framework and national monitoring frameworks, given their similarly complementary roles in monitoring the EU's implementation of the convention.

Nevertheless, familiar concerns remain. At the most basic level, 2016 saw no developments in the four EU Member States (**Bulgaria,** the **Czech Republic**, **Greece** and **Sweden**) still to appoint Article 33 (2) bodies.[95] In other Member States, ongoing parliamentary processes to designate monitoring frameworks continue. Legislation to extend the role of the **Estonian** Gender Equality and Equal Treatment Commissioner to cover the requirements of Article 33 (2) of the CRPD is being drafted and should be submitted to parliament in 2017. This leaves the country without a functioning monitoring framework.[96] Moreover, although the **Romanian** parliament passed legislation on Article 33 bodies in January,[97] doubts persist about their ability to operate effectively in practice. The inaugural president of the Monitoring Council for the implementation of the CRPD resigned her post in July, citing administrative

Table 9.3: CRPD Committee reviews in 2016 and 2017, by EU Member State

Member State	Date of submission of initial report	Date of publication of list of issues	Date of publication of concluding observations
CY	2 August 2013	6 October 2016	April 2017
IT	21 January 2013	29 April 2016	6 October 2016
LT	18 September 2012	1 October 2015	11 May 2016
LU	4 March 2014	March 2017	
LV	29 October 2015	March 2017	
PT	8 August 2012	1 October 2015	18 April 2016
SK	26 June 2012	1 October 2015	17 May 2016
UK	24 November 2011	April 2017	

Note: *Shaded cells indicate review processes scheduled for 2017.*
Source: *FRA, 2017 (using data from OHCHR)*

shortcomings that prevented her from finalising the process of establishing the council.[98] A new president was appointed in October.[99]

Involving DPOs is essential for successful monitoring. Evidence from 2016 also highlights how that is often intertwined with issues of their resources. For example, DPOs frequently struggle to find the resources required to put together their own assessments of CRPD implementation. Those are known as shadow reports and sent to the CRPD Committee alongside State party submissions. **Luxembourg** boosted such efforts by financial support from the country's National Disability Council to a leading DPO, enabling it to conduct interviews and legal analysis in preparation for its shadow report.[100] Less encouragingly, the **Slovenian** monitoring framework – the Council for Persons with Disabilities of the Republic of Slovenia (*Svet za invalide Republike Slovenije*) – a third of whose members are representatives of DPOs, continues to operate without resources to employ any full-time staff.[101] Meanwhile, the **Cyprus** Confederation of Organisations of the Disabled withdrew from the technical committees coordinating implementation of the CRPD in protest at a lack of political will and funding.[102]

The CRPD Committee has scheduled four further reviews (**Cyprus**, **Latvia**, **Luxembourg** and the **United Kingdom**) for 2017, meaning that additional country-specific guidance is forthcoming. This is likely to return to familiar themes of independence and resources, but the wider scope of the CRPD Committee's 2016 guidelines raises new questions for Article 33 (2) bodies. Chief among these could be whether or not they have a mandate to conduct the full range of activities required to promote, protect and monitor the implementation of the CRPD (see Table 9.2). Monitoring frameworks in a number of Member States – such as **Germany**, **Hungary** and **Italy** – are not able to receive complaints themselves, and others lack a mandate to participate in judicial proceedings. Further critical reflection and consolidation is on the cards for 2017.

FRA opinions

Following the 2015 review of the EU's progress in implementing the United Nations Convention on the Rights of Persons with Disabilities (CRPD), EU institutions took a range of legislative and policy measures to follow up on some of the CRPD Committee's recommendations, underlining the Union's commitment to meeting its obligations under the convention. The committee's wide-ranging recommendations set out a blueprint for legal and policy action across the EU's sphere of competence and are relevant for all EU institutions, agencies and bodies.

FRA opinion 9.1

The EU should set a positive example by ensuring the rapid implementation of the CRPD Committee's recommendations to further full implementation of the convention. This will require close cooperation between EU institutions, bodies and agencies – coordinated by the European Commission as focal point for CPRD implementation – as well as with Member States and disabled persons' organisations. Modalities for this cooperation should be set out in a transversal strategy for CRPD implementation, as recommended by the CRPD Committee.

Actions to implement the CRPD helped to drive wide-ranging legal and policy reforms across the EU in 2016, from accessibility to inclusive education, political participation and independent living. Nevertheless, some initiatives at EU- and Member State- level do not fully incorporate the human rights-based approach to disability required by the CRPD, or lack the clear implementing guidance required to make them effective.

FRA opinion 9.2

The EU and its Member States should intensify efforts to embed CRPD standards in their legal and policy frameworks to ensure that the rights-based approach to disability, as established in the CRPD, is fully reflected in law and policymaking. This could include a comprehensive review of legislation for compliance with the CRPD. Guidance on implementation should incorporate clear targets and timeframes, and identify actors responsible for reforms.

EU Structural and Investment Funds (ESIF) projects agreed in 2016 show that in many areas initiatives to implement the CRPD in EU Member States are likely to benefit from ESIF financial support. The ex-ante conditionalities – conditions that must be met before funds can be spent – can help to ensure that the funds contribute to furthering CRPD implementation. As ESIF-funded projects start to be rolled out, monitoring committees at the national level will have an increasingly important role to play in ensuring that the funds meet CRPD requirements.

FRA opinion 9.3

The EU and its Member States should take rapid steps to ensure thorough application of the ex-ante conditionalities linked to the rights of persons with disabilities to maximise the potential for EU Structural and Investment Funds (ESIF) to support CRPD implementation. To enable effective monitoring of the funds and their outcomes, the EU and its Member States should also take steps to ensure adequate and appropriate data collection on how ESIF are used.

Evidence collected by FRA in 2016 shows the important role that judicial and non-judicial complaints mechanisms can play in identifying gaps in CRPD implementation and clarifying the scope of the convention's requirements. Several cases concerning non-discrimination in employment serve to underline the complementarity and mutual relevance of standards at the UN, EU and national levels.

FRA opinion 9.4

The EU and its Member States should take steps to increase awareness of the CRPD among relevant judicial and non-judicial complaint mechanisms to enhance further the important role of the latter in securing CRPD implementation. This could include developing training modules and establishing modalities to exchange national experiences and practices.

By the end of 2016, only Ireland had not ratified the CRPD, although the main reforms paving the way for ratification are now in place. In addition, five Member States and the EU have not ratified the Optional Protocol to the CRPD, which allows individuals to bring complaints to the CRPD Committee and for the Committee to initiate confidential inquiries upon receipt of "reliable information indicating grave or systematic violations" of the convention (Article 6).

FRA opinion 9.5

EU Member States that have not yet become party to the CRPD and/or its Optional Protocol should consider completing the necessary steps to secure their ratification as soon as possible to achieve full and EU-wide ratification of these instruments. The EU should also consider taking rapid steps to accept the Optional Protocol.

Four of the 27 EU Member States that have ratified the CRPD had not, by the end of 2016, established or designated frameworks to promote, protect and monitor the implementation of the convention, as required under Article 33 (2) of the convention. Furthermore, FRA evidence shows that the effective functioning of some existing frameworks is undermined by insufficient resources, the absence of a solid legal basis, and a failure to ensure systematic participation of persons with disabilities, as well as a lack of independence in accordance with the Paris Principles on the functioning of national human rights institutions.

FRA opinion 9.6

The EU and its Member States should consider allocating the monitoring frameworks established under Article 33 (2) of the CRPD sufficient and stable financial and human resources. This would enable them to carry out their functions effectively and ensure effective monitoring of CRPD implementation. As set out in FRA's 2016 legal Opinion concerning the requirements under Article 33 (2) of the CRPD within an EU context*, they should also consider guaranteeing the sustainability and independence of monitoring frameworks by ensuring that they benefit from a solid legal basis for their work and that their composition and operation takes into account the Paris Principles on the functioning of national human rights institutions.*

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HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

Diverse efforts at both EU and national levels sought to bolster fundamental rights protection in 2016, while some measures threatened to undermine such protection. For refugees and migrants, legal avenues to reach Europe remained elusive, with authorities focusing on return policies, information technology systems to combat irregular migration, and on restricting family reunification. Racist and xenophobic reactions towards refugees and migrants persisted, prompting the introduction of diverse measures to counter hate speech and hate crime.

EU Member States once again did not reach agreement on the proposed Equal Treatment Directive, but several continued to extend protection against discrimination to different grounds and areas of life. Meanwhile, little progress was visible in achieving the ambitious goals set by national Roma integration strategies.

The year's terrorist attacks sparked both intensified debates and legislative developments, including on surveillance. The adoption of new EU-level data protection measures constituted a crucial step towards a modernised and more effective data protection regime.

The rate of children at risk of poverty or social exclusion remained high, and the continued arrival of migrant and asylum-seeking children posed additional challenges. The EU adopted several new directives introducing further safeguards for persons suspected or accused of crime, including children. Member State efforts to improve the practical application of the Victims' Rights Directive sought to bring effective change for crime victims, including in terms of support services. The Istanbul Convention also triggered diverse legislative initiatives at Member State level.

Ten years after adoption of the Convention on the Rights of Persons with Disabilities (CRPD), attention gradually shifted from the first wave of CRPD-related reforms to consolidating progress made. Meanwhile, courts, parliaments and governments continued to make only limited use of the EU Charter of Fundamental Rights, but awareness of the need to train legal professionals on Charter-related issues appeared to be growing.

FOCUS

This year marks the 10th anniversary of the EU Agency for Fundamental Rights. Such a milestone offers an opportunity for reflection on 10 years of fundamental rights in the EU – both on the progress that provides cause for celebration and on the remaining shortcomings that must be addressed.

The EU's commitment to fundamental rights has grown tremendously during the past decade, but recent developments underscore how quickly progress can be undone. Across the EU, the fundamental rights system is increasingly under attack – dismissed as political correctness gone awry, as benefitting only select individuals, or as hampering swift responses to urgent challenges. This year's focus section further explores these issues, providing a thorough review of the past decade's highlights and persisting shortfalls.

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