

ANNUAL REPORT 2012



Fundamental rights: challenges and achievements in 2012



FRA

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Acronyms

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

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

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

	Dignity
	Freedoms
	Equality
	Solidarity
	Citizens' rights
	Justice



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Fundamental rights: challenges and achievements in 2012

Foreword

Rising unemployment rates, austerity measures, public protest, social unrest and constitutional conflict all captured headlines across the European Union (EU) in 2012. The crisis that the EU has been facing since 2007 transcends issues of finance, with implications for democratic legitimacy and the rule of law, and therefore also for the respect of fundamental rights. This year's Focus section therefore looks at 'The European Union as a Community of values: safeguarding fundamental rights in times of crisis', thereby placing the EU's fundamental rights landscape, examined in last year's Focus section, in context.

What follows is a detailed report on developments in legislation, policy making and the situation on the ground in the fundamental rights field. The report throws light on key developments at both EU and national level in areas such as: the negotiation of the EU asylum instruments, the reform of the EU's data protection framework, the further ratification and implementation of the United Nations Convention on the Rights of Persons with Disabilities, as well as developments with regard to the 'Horizontal Directive', the fight against crimes motivated by racism, xenophobia and related intolerances, or the adoption of an EU Directive establishing minimum standards on the rights, support and protection of victims of crime.

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

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

Maija Sakslin
Chairperson of the Management Board

Morten Kjaerum
Director

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

FREEDOMS

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

EQUALITY

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

CITIZENS' RIGHTS

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

JUSTICE

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

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Introduction



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

In line with the agency's founding regulation, the European Union Agency for Fundamental Rights (FRA) is required to "publish an annual report on fundamental rights issues covered by the areas of the Agency's activity, also highlighting examples of good practice".¹ This annual report thus focuses on fundamental rights developments in the European Union (EU) and its 27 Member States as well as Croatia and not on the work of the FRA itself.²

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

The report's main ambition is to provide a relevant, timely, objective and comparative overview of key developments in the area of fundamental rights. It looks at the EU and the 27 EU Member States as well

as Croatia, while also including developments at the Council of Europe or even the United Nations (UN) level where these affect the EU, its Member States and Croatia. To briefly highlight the agency's contributions, the report includes yellow boxes entitled 'FRA activity' which sketch out some of its 2012 work in each field.

Areas covered in the report, including its Focus section

The agency's founding regulation requires the annual report to deal with the areas the FRA is focusing on as per the five-year Multi-Annual Framework determined by the Council of the European Union. The first framework covers the years 2007–2012 and tasks the FRA with work in the following nine areas: "(a) racism, xenophobia and related intolerance; (b) discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination); (c) compensation of victims; (d) the rights of the child, including the protection of children; (e) asylum, immigration and integration of migrants; (f) visa and border control; (g) participation of the citizens of the Union in the Union's democratic functioning; (h) information society and, in particular,

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

² See FRA (2013), *Annual activity report 2012*, Luxembourg, Publications Office of the European Union, available at: <http://fra.europa.eu/en/about-fra/what-we-do/annual-activity-programme>.

respect for private life and protection of personal data; (i) access to efficient and independent justice.”³

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

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

Chapter 10 was introduced as a separate chapter two years ago, following positive feedback from the European Parliament on the former annex on international obligations.⁴ The chapter is part of an effort to underline the multi-level relevance of fundamental rights: an efficient protection of fundamental rights is only possible if local, national, European and international norms and administrations all efficiently interact.

In light of the socio-economic crisis the EU has faced over the past five years and other developments that affect societies and the rule of law, this annual report’s Focus section looks at the European Community of values and how the protection of fundamental rights was affected by developments in 2012. In doing so, FRA

follows up on the wish of various stakeholders and the results of its consultation with the Fundamental Rights Platform, which was undertaken between 21 June and 14 September 2012.⁵ This year’s Focus section builds on the institutional approach taken in last year’s Focus section dedicated to the ‘Fundamental rights landscape of the European Union’ (preceded by the 2010 Annual report Focus section on ‘Roma in the EU – a question of fundamental rights implementation’).

The chapters of this Annual report cover a strict reporting period, reaching from 1 January to 31 December 2012. Only the horizontal Focus section will include some key developments in the fundamental rights field that took place at the beginning of 2013.

A multi-modular approach

Fundamental rights cover all areas of human life. Different groups of rights are of interest to different groups of persons. This report, therefore, applies a multi-modular approach allowing single chapters to stand alone. Every chapter has a separate introduction, which summarises the key developments over the past year in that field, as well as an outlook, which outlines the major fundamental rights challenges to be expected in the immediate future, in 2013 and just beyond. As in the past, emphasis is placed on properly substantiating and referencing all the statements in the report. Each chapter therefore also has a separate and full bibliography. This is important because 90 % of the non-governmental organisations (NGOs) which answered the 2012 consultation with civil society on the FRA Annual report, said that they use it as a reference for further analysis.

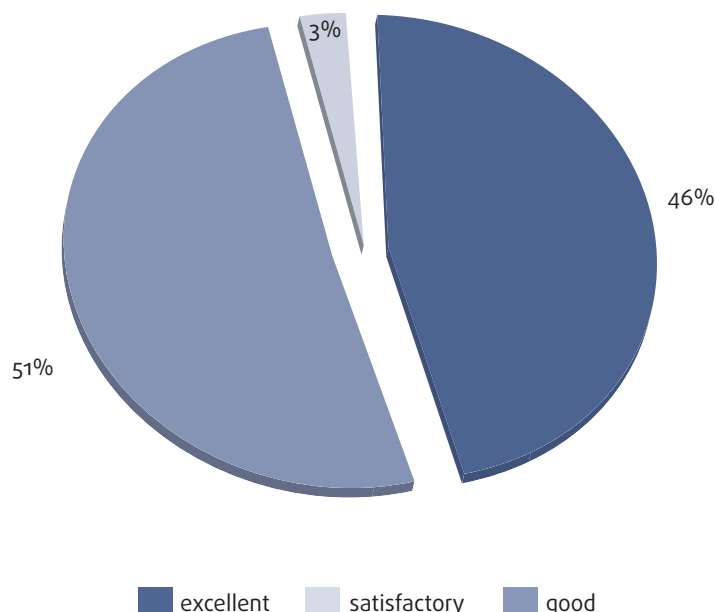
This multi-modular approach does not, however, change the fact that the chapters are interlinked and that many of them should be read in combination with others. The chapter on access to justice looks at a cross-cutting topic which is of relevance to all fundamental rights, while the chapter on racism and the one on equality are, of course, tightly interwoven. Other chapters are to be read in tandem with others because certain elements are covered in both but to a different degree or from a different angle. This is the case, for instance, with the chapter on the rights of the child and the chapter on the protection of victims; the chapter on asylum, immigration and integration and the chapter on racism and ethnic discrimination; or the chapter on equality and the chapter on racism and ethnic discrimination. All the chapters make reference to international agreements.

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

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

5 FRA (2012), Consultation on the Annual report of the European Union Agency for Fundamental Rights, available at: <http://fra.europa.eu/en/cooperation/civil-society/consultations>.

Figure 1: Overall quality of the report, as assessed by FRA stakeholders participating in the Fundamental Rights Platform



Source: FRP Consultation, Consultation on the Annual report of the European Union Agency for Fundamental Rights

A full overview of progress as regards ratification and signatures of the relevant international instruments is given in the chapter on international obligations.

The FRA Annual report is accompanied by a stand-alone summary entitled *Highlights 2012*. It reproduces the key developments of each area covered, which introduce every chapter in the annual report and are supplemented by issues and events of special importance for the year 2012. The *Highlights 2012* also contains yellow boxes, entitled 'FRA Publications', which reference 2012 FRA reports of relevance. The FRA Annual report 2012 and *Highlights 2012* are published in English, French and German.

FRA Annual report 2012: its drafting, coverage, scope and period

The report draws on data and information from in-house research and from the agency's Franet network, a multi-disciplinary research network composed of National Focal Points in each EU Member State and the acceding country Croatia. Franet supplies the FRA with objective, reliable and comparable socio-legal data on fundamental rights issues to facilitate the agency's comparative analyses. FRA 2012 research projects are referred to only when the findings are directly relevant to the thematic area covered. A first draft of the report is sent to the 28 liaison officers from

the governments of each EU Member State and from Croatia to check the information provided for factual accuracy. The draft subsequently undergoes an internal quality review at the FRA and is submitted to the FRA Scientific Committee for evaluation. As a general rule, the rapporteur within the Scientific Committee responsible for the annual report is the Committee Chair. After incorporating stakeholder comments, including those of FRA's Management Board, that Board adopted the report on 22 May 2013.

As already mentioned, with the exception of the Focus, the report looks at developments, events and debates in the area of fundamental rights that took place between 1 January 2012 and 31 December 2012. Geographically speaking, the report covers developments that took place in the EU and in its 27 Member States and the acceding country Croatia.⁶

"[It is] excellent that this information is all in one place and so accessible."

European Council on Refugees and Exiles (ECRE)

Last year's annual report underwent two assessments. In the 2012 consultation with the Fundamental Rights Platform, 64 civil society organisations participated in a detailed assessment of the FRA Annual report 2011. A total of 93 % of all respondents assessed the

⁶ See Decision No. 1/2010 of 25 May on the participation of Croatia as an observer of the FRA's work and the respective modalities thereof, OJ 2010 L 279, pp. 68-70.

overall quality of the Annual report as good (51 %) or excellent (42 %).

The independent external evaluation of the FRA, carried out in accordance with Article 30 of the agency's founding regulation,⁷ also examined the 2011 Annual report. The study concludes that it "is also evident from the interviews that the data material included in the annual report is both adequate and reliable" and that "it has a clear value as a background document for policy makers at the EU level", even if the annual report does not directly impact policy.

The FRA is committed to further improving this report. The annual report is evolving, with the aim of providing a central reference document which offers an annual update on the situation of fundamental rights in the EU. This is why FRA welcomes any feedback on it (annualreport@fra.europa.eu).

⁷ Council Regulation (EC) No. 168/2007 of February 2007 establishing the Fundamental Rights Agency, OJ 2007 L 53, p. 14.



The European Union as a Community
of values: safeguarding fundamental rights
in times of crisis

FOCUS
LOCAL

The European Union as a Community of values: safeguarding fundamental rights in times of crisis



Rising unemployment rates, fiscal consolidation and austerity measures across the European Union (EU), as well as public protest and constitutional conflicts in some EU Member States, all captured headlines in 2012. The crisis that the EU has been facing over the course of the past five years transcends issues of finance. It has implications for democratic legitimacy and the rule of law, and therefore also for the respect of fundamental rights. The seriousness of the situation prompted discussions about the nature, scope and future of the EU. The crisis and its consequences called for action from institutional and policy actors at all levels of governance, civil society organisations and the general public to ensure that the EU and its Member States uphold their fundamental rights obligations.

The term 'crisis' generally describes a situation in which there are a lot of problems that must be dealt with quickly to avoid the situation getting worse; in other words, it is a time of great difficulty or danger. The EU has been and is still witnessing various situations that have led to great difficulties within the Union and in Member States. These difficulties are neither an expression of one single crisis, nor are they all related. They rather coincided so that the year 2012 can be characterised as one with several crises of a different nature. Some of these crises, such as the socio-economic crisis, affected the majority of EU Member States, whereas others, like the constitutional crises in Hungary and Romania, were limited to single Member States. All of these crisis situations are, however, of concern to the EU – an entity that is built equally on all its Member States, and their political and economic systems.

The socio-economic downturn is the most enduring crisis facing the EU for the past five years. As the Directorate-General for Employment, Social Affairs and Inclusion at the European Commission stated already in 2009, "the financial crisis that hit the global economy since the summer of 2007 is without precedent in post-war economic history. Although its size and extent are exceptional, the crisis has many features in common with similar financial-stress driven recession episodes in the past [...] However, this time is different, with the crisis being global akin to the events that triggered

the Great Depression of the 1930s."¹ That depression led to a worldwide economic downturn, which many believe provided fertile ground for the rise of fascism and Nazism in Europe, and the fundamental rights violations perpetrated in the name of those doctrines.

That is not to say that the situation in the EU today can be compared with, or is even remotely similar to, the situation in Europe in the 1930s. The fundamental rights infrastructure that is now in place² constitutes an important difference to the previous period; this infrastructure and the values underpinning it guarantee a better level of protection for the population of the EU. Nevertheless, the question remains: what impact has this crisis had on the protection and promotion of fundamental rights.

The Focus of this FRA Annual report is not limited to the socio-economic crisis, nor does it aim to explore its origins.³ Instead, it looks at the different crisis situations, including the constitutional crisis that unfolded in single EU Member States. It emphasises responses taken at EU and Member State level to safeguard the values 'common' to both Member States and the EU.

¹ European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2009a), p. 1.

² FRA (2012a).

³ For more on the origins of the economic crisis, see: European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2009).

The European Community of values

The Treaty of Lisbon gave new impetus to a fundamental rights culture in the EU's institutional structure, including new internal procedures in the European Commission, European Parliament and Council of the European Union.⁴ The way the EU and its Member States, however, deal with threats to their shared values remains on the agenda.

The widespread socio-economic crises in the EU, plus the political and constitutional crises in specific EU Member States, have put the EU's commitment to shared values to the test. In this context, it is helpful to distinguish between a wider circle of values that address areas falling outside EU competence (Article 2 of the Treaty on European Union (TEU)) from an inner circle of fundamental rights obligations imposed on and by the EU (Article 6 of the TEU) and from socio-economic rights (especially Title IV 'Solidarity' of the Charter of Fundamental Rights of the European Union). Whereas, in their substance these values all overlap – social rights form part of fundamental rights and fundamental rights form part of the founding values in Article 2 TEU – the means to guarantee the respect for these rights appear to differ.

Observing the founding values in Article 2 of the TEU

When the European Council stressed in 1993 that EU membership requires "that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities",⁵ it was aiming to prepare the ground for a certain degree of "constitutional homogeneity"⁶ within an enlarged EU of increasingly diverse membership. All Member States forming the EU in 1993 shared this political commitment and those Member States that acceded to the Union in 2004 and 2007, respectively, explicitly adhered to this shared commitment.

With the entry into force of the Amsterdam Treaty and then the Lisbon Treaty, primary law explicitly provides for an EU "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities" (Article 2 of the TEU). These foundational values have normative implications for both candidate countries and EU Member States.

Countries that wish to apply for EU membership must ensure they "respect" Article 2 values and are "committed to promoting" them (Article 49 of the TEU). EU Member States must also remain 'Article 2 compliant'. This holds true not only for fields where Member States act on behalf of the EU but in all contexts.⁷

The sanctioning procedure laid down in Article 7 of the TEU "enables the Union to suspend the rights of a Member State if it seriously and consistently breaches fundamental rights, regardless of whether a Member State acts within or outside the framework of Union law."⁸ In this sense, the value-obligation in Article 2 of the TEU is decoupled from EU legislative competences. Member States are therefore also liable under Article 2 of the TEU in fields where they "act autonomously".⁹

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

Article 2 of the Treaty on European Union (TEU), OJ 2012 C 326, p. 17

To safeguard Article 2 values, Article 7 allows for three different interventions: the determination of a "clear risk of a substantial breach" of core EU values; the identification of a "serious and persistent breach" of these values; and, the imposition of political sanctions against the EU Member State concerned.

Since the threshold for setting any of these procedures in motion is high and the major players are political institutions, many consider Article 7 an 'atomic bomb' – designed to threaten but not to actually apply. Indeed, it has never been used. As a result, discussions, including at political level, have emerged questioning whether the mechanism available will suffice to safeguard the Union's founding values (see the section in this Focus on 'Observing social rights as laid down in the Charter of Fundamental Rights of the European Union').

Observing fundamental rights obligations in Article 6 of the TEU

Compared to the 'value obligations' in Article 2 of the TEU, the fundamental rights obligations in Article 6 of the TEU are more specific and equipped with more efficient enforcement mechanisms. In line with Article 6 of the TEU, the obligations are enshrined in three different legal sources.

4 See FRA (2012a).

5 European Council (1993), *Conclusions of the Presidency*, 21–22 June 1993, point 7.A.iii, p. 13.

6 Schorkopf, F. (2000).

7 De Witte, B. and Toggenburg, G. N. (2004), pp. 59–82.

8 Commission of the European Communities (2005), p. 13.

9 Commission of the European Communities (2003).

First, there are the “rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union”. These have the same legal value as the EU Treaties.¹⁰ Then, there is the European Convention on Human Rights (ECHR), to which the EU is currently negotiating its accession, thereby following up on the obligation laid down in paragraph 2 of Article 6 of the TEU. The EU may also ratify additional international human rights instruments as its ratification of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) shows. Finally, the obligation to respect fundamental rights arises “from the constitutional traditions common to the Member States” which shall constitute general principles of EU law.¹¹

In this respect, the EU is a fundamental rights community based on three different legal obligations combining an EU catalogue of rights with international obligations – such as the ECHR – and general principles of law that have their roots in the constitutional law of EU Member States. Therefore – as was presented in detail in the Focus of FRA’s 2011 Annual report – the community of values is to be seen in the wider context of a multilevel governance perspective with the UN, the Council of Europe and EU Member States all providing their respective shares in a joined-up system of fundamental rights protection.¹²

Under EU law, where an EU Member State is violating its fundamental rights obligations, the standard procedures – including infringement procedures brought by the European Commission or preliminary procedures initiated by national courts – can be brought before the Court of Justice of the European Union (CJEU). The obvious limitation here – in contrast with what was said with regard to the Article 2 values – is that these procedures can only be activated where an incident falls within the scope of EU law.

According to Paragraph 1 of Article 51 of the Charter of Fundamental Rights of the European Union, an issue falls under the scope of EU law when the Member States are “implementing Union law”.¹³ The CJEU, in line with its earlier case law on the fundamental rights obligations of the Member States, has interpreted this more widely as referring to situations that are “covered by European Union law”.¹⁴ The same wording is used in Article 19 of the TEU under which EU Member States are obliged to “provide remedies sufficient to ensure legal protection in the field covered by Union law”. More recently, the court established that the Charter’s wording of Article 51

(“only when they are implementing Union law”) “confirms the Court’s case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the legal order of the European Union”.¹⁵ In this sense, the CJEU might look at the fundamental rights compliance of national acts that do not explicitly implement or transpose Union law but share a specific purpose with a piece of Union law. Against such a wide reading of the Charter obligations, it was questioned whether each national measure, including national constitutions, must be pre-emptively ‘Charter-proofed’.¹⁶ On the other hand, cases relating to social rights have shown a different picture and suggest that the limitation to the scope of EU law as defined in Article 53 of the Charter is operational and of practical relevance (see the section in this Focus on ‘Observing social rights as laid down in the Charter of Fundamental Rights of the European Union’).

It can thus be assumed that the exact scope of application of fundamental rights obligations under EU law remains open to interpretation and discussion.¹⁷ It is up to the court, also in part to guarantee legal clarity, to fine-tune the limits of the fundamental rights review offered by EU law.

The European Commission has discretion over whether to launch an infringement procedure. It may opt not to bring an issue before the CJEU even in cases clearly covered by EU law. The European Commission has, however, announced a “zero tolerance policy”.¹⁸ In the informal phase of an infringement procedure, it can already exert pressure on EU Member States to effect a political change.¹⁹ The vast majority of issues are in fact solved at this stage.²⁰ Moreover, the political discretion of the European Commission as well as its limited resources are counterbalanced by the EU system’s reliance on ‘dual vigilance’. In other words, the European Commission’s institutional vigilance is complemented by ‘individual vigilance’: individuals may request national courts to refer questions related to obligations under EU law to the CJEU.

The EU thus disposes of a judicial system that allows for prosecuting violations of EU law. Infringement actions as well as annulment procedures can be, and increasingly are, used for safeguarding fundamental

¹⁰ TEU, Art. 6, para. 1.

¹¹ TEU, Art. 6, para 3.

¹² FRA (2012a).

¹³ Charter of Fundamental Rights of the European Union, OJ 2012 C 326, p. 406.

¹⁴ CJEU, C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, 15 November 2011, para. 72.

¹⁵ CJEU, C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, 26 February 2013, para. 18.

¹⁶ Morijn, J. (2013).

¹⁷ Groussot, X., Pech, L. and Petursson, G.T. (2011).

¹⁸ See, for example: Reding, V. (2010).

¹⁹ For criticism of the European Commission’s dual role as both the guardian of the Treaty and a political actor, see: Dawson, M. and Muir, E. (2011), pp. 751-775.

²⁰ In 2011, the European Commission received 3,115 new complaints; the CJEU had delivered 62 judgments under Article 258 of the TFEU. See: European Commission (2012a).

rights obligations as laid down in Article 6 of the TEU.²¹ Continuing uncertainties as regards the general reach of EU law have, however, implications for the awareness and clarity of EU-imposed obligations in terms of fundamental rights. National court requests to the CJEU for clarification of Charter-related questions grew to 41 requests²² in 2012 from 27²³ in 2011 and 18 in 2010. The number of CJEU judgements referring to the Charter double from year to year, while the overall numbers (87 in 2012)²⁴ remain rather low. This stems from limited awareness of EU law obligations and limited access to the CJEU for individuals. Even where cases reach the CJEU, there remain differences with the ECtHR, with the latter hearing a large number of third-party interventions providing on-the-ground information and evidence.²⁵

Observing social rights as laid down in the Charter of Fundamental Rights of the European Union

The EU was often applauded for agreeing on the Charter of Fundamental Rights as the first legally binding human rights instrument in Europe, which deals in one single text with civil and political rights, as well as with economic, social and cultural rights (here referred to as social rights). In principle, the Charter thereby provides these two groups of rights, which are often kept separate, with the same standing.

Title IV on solidarity is among the longest parts of the Charter and deals in 12 articles with important core rights, including: workers' right to information and consultation within the company; collective bargaining and action; access to placement services; protection in the event of unjustified dismissal; fair and just working conditions; the protection against child labour and of young people at work; social security and social assistance; healthcare and access to services of general economic interest.

To gain political consensus on the inclusion of all these rights in the Charter, the drafters included a cross-cutting provision in paragraph 4 of Article 52. This provision differentiates between rights and "principles". The latter are "judicially recognisable" only in the interpretation of implementing acts.²⁶ Moreover, half of the rights listed in the Charter's title on solidarity refer back to "national laws and practices". This is, for example, the case for Articles 30 and 34 on protection in the event of unjustified dismissal, and social security and social assistance, respectively.

This approach responds to the fact that EU Member States differ in their legal handling of social rights. Some grant these rights constitutional standing, while others leave their regulation to statutory law. There are also Member States that combine social rights, social objectives and social policy clauses in their constitutions.

However different the status of social rights may be under national constitutional law, social rights often play a more prominent role in statutory law and particularly in national courts' case law.²⁷ Indeed, there appears to be no direct link between the successful management of the implications of the socio-economic crisis and whether or not social rights are enshrined in constitutional law. Observers instead underlined that systems recognising social justice as an important principle implemented by a solid body of law have a good chance of efficiently addressing the social costs of the crisis.²⁸

All of these aspects underline the inclusion of social rights in the fundamental rights obligations under EU law. The way, however, in which social rights are integrated in the EU Charter of Fundamental Rights reflects the existing diversity with regard to the status of social rights at national level. Consequently, their implementation will not always offer the same degree of protection as other rights.

Crisis situations

The year 2012 revealed multiple crises that affected the EU and its Member States in varying manners and degrees. Some EU Member States suffered particularly from the socio-economic crisis but others less so. Some Member States showed elements of political crisis, others did not. Two EU Member States – Hungary and Romania – faced a wider constitutional crisis in 2012. Such crises put to the test the values of the EU as enshrined in Article 2 of the TEU and the EU Charter of Fundamental Rights.

Socio-economic crisis

The ongoing economic crisis led to increasing long-term unemployment. This bears a risk to result in marginalisation and poverty for groups that are at risk, as highlighted by the European Commission in its 2012 report on employment and social developments: "Groups already at a heightened risk of poverty, such as young

²¹ See FRA (2012a).

²² European Commission (2013a), p. 22.

²³ European Commission (2012b), p. 6.

²⁴ European Commission (2013a), p. 22.

²⁵ See Carrera, S., De Somer, M. and Petkova, B. (2012).

²⁶ Ladenburger, C. (2007), pp. 311–365.

²⁷ See, for example, Iliopoulos-Strangas, J. (2010).

²⁸ See, for example, Baron von Maydell, B. (2012), pp. 5–10.



adults, children and to some extent migrants, are now experiencing an even worse situation.”²⁹

Being unemployed and living in conditions of poverty and social marginalisation can have detrimental effects on the full enjoyment of rights and freedoms, as enshrined in the EU Charter of Fundamental Rights. Those rights and freedoms that are most at risk include: human dignity (Article 1); the freedom to choose an occupation and the right to engage in work (Article 15); non-discrimination (Article 21); protection in the event of unjustified dismissal (Article 30); social security and social assistance (Article 34); healthcare (Article 35); freedom of movement and of residence (Article 45).

Both the effects of the economic crisis on people living in the EU and of budget cuts driven by fiscal consolidation and austerity measures provide testimony to the potential vulnerability of these rights.³⁰

The situation on the ground

The impact of the economic crisis on the ground is perhaps most visible in unemployment and poverty figures. The unemployment rate in the EU-27 climbed to 10.7 %, or just under 26 million people, in December 2012 from 10 % in December 2011, Eurostat data show. Of these 26 million people, about 5.7 million were under the age of 25, which brought the young persons’ unemployment rate up to 23.4 % in December 2012 from 22.2 % the previous year.³¹

The crisis also increased the long-term unemployment rate. “[T]he number of people unemployed continuously for more than a year [...] increased by 14.3 % [by the second quarter of 2012] compared to the same quarter of the previous year to reach a total of close to 11 million.”³²

In addition, there is evidence to suggest that the “economic crisis is damaging labour market conditions [...] more rapidly and severely than initially thought. It is likely to hit immigrants and their families particularly hard, threatening most of the progress accomplished in recent years in terms of labour market outcomes,” as the Organisation for Economic Co-operation and Development (OECD) notes.³³

Unemployment can have detrimental effects not only on people’s quality of life, but also on their full enjoyment of rights and freedoms. Unemployed persons are likely to experience reduced life satisfaction and greater social exclusion, Eurofound reported.³⁴ The European Commission notes that long-term unemployment is closely linked with a high risk of poverty,³⁵ which in turn leads to financial and social exclusion, as Eurobarometer data confirm.³⁶ Lower income is linked to poorer health outcomes,³⁷ the European Commission showed, with almost one third of EU citizens saying that by December 2011 they had more trouble affording the costs of general healthcare than in October 2010.³⁸

“2012 has been another very bad year for Europe. After five years of economic crisis, recession has returned, unemployment has reached levels not experienced in nearly two decades and the social situation is also deteriorating.”

European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2012), Employment and social developments in Europe 2012, Brussels, Directorate-General for Employment, Social Affairs and Inclusion, available at: <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7315>

Large proportions of financially vulnerable Europeans face difficulties in accessing financial services, such as mortgages, loans or credit cards, Eurobarometer reports.³⁹ Financially vulnerable persons here are understood as those who have difficulty paying bills on time or making ends meet, the unemployed and persons living in poor households. “[F]inancially vulnerable Europeans report feeling left out of society far more often than respondents as a whole. While 16 % of Europeans overall feel excluded, around a third of ‘poor’ Europeans feel this way.”⁴⁰

These findings should be considered against the fact that almost one in four persons in the EU is at risk of poverty. Almost a quarter, 24.2 %, ⁴¹ of the EU population was at risk of poverty or social exclusion in 2011, up from 23.6 % in 2010 (see Figure for definitions and data). This represents about 116 million individuals.

Women are more likely than men to be at risk of poverty in the EU, with a rate of 25.2 % for the former and 23 % for the latter in 2011. The difference is even more pronounced among persons over the age of 55, with 25.1 % of women in that age group at risk of poverty in 2011, compared with 19.7 % of men.⁴²

29 European Commission, Directorate-General for Employment, Social Affairs and Inclusion (2012), p. 3. See also Chapter 4 on ‘The rights of the child and protection of children’ for more information on child poverty.

30 See Chapter 8 on ‘Access to efficient and independent justice’; and for more information on the impact of austerity measures on access to justice, see: FRA (2012b).

31 Eurostat (2013a).

32 European Commission (2013b), p. 15.

33 Organisation for Economic Co-operation and Development (2009), p. 2.

34 Eurofound (2012).

35 European Commission Directorate-General for Employment, Social Affairs and Inclusion (2012), p. 13.

36 Eurobarometer (2010).

37 European Commission (2013b), p. 44.

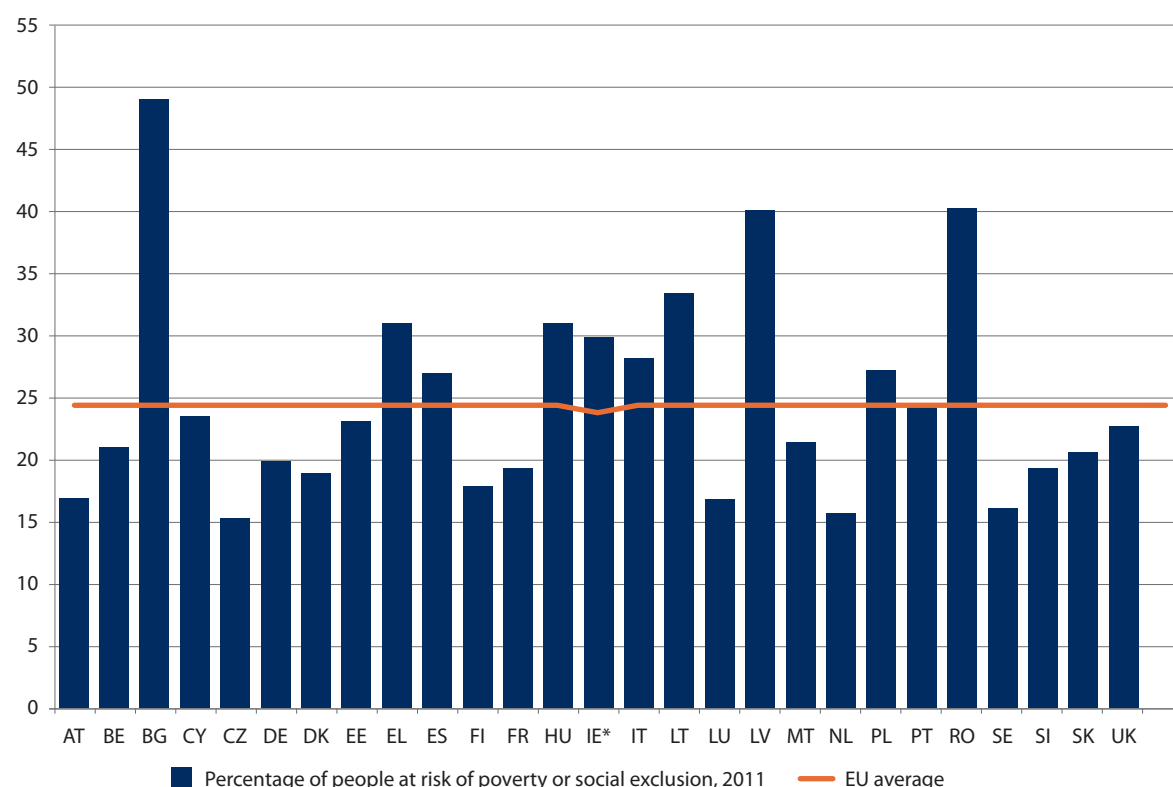
38 Eurobarometer (2012).

39 Eurobarometer (2010), p. 49.

40 *Ibid.*, p. 52.

41 Eurostat, *Headline indicators 2005-2012*.

42 *Ibid.*

Figure: Persons at risk of poverty or social exclusion, by EU Member State, 2011 (%)

Notes: * Data for Ireland cover 2010.

Eurostat defines the at-risk-of-poverty rate as "the share of people with an equivalised disposable income (after social transfer) below the at-risk-of-poverty threshold, which is set at 60 % of the national median equivalised disposable income after social transfers." – Eurostat (2012a), At-risk-of-poverty rate, available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:At-risk-of-poverty_rate.

Eurostat defines the "equivalised disposable income is the total income of a household, after tax and other deductions, that is available for spending or saving, divided by the number of household members converted into equalised adults; household members are equalised or made equivalent by weighting each according to their age." – Eurostat (2012b), Equivalised disposable income, available at: http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Glossary:Equivalised_disposable_income.

Source: Eurostat (2013), *ilc_peps11*, available at: http://epp.eurostat.ec.europa.eu/portal/page/portal/statistics/search_database

Nevertheless, "poverty or social exclusion for the older age group declined in most Member States between 2008 and 2011. The apparent improvement in the relative situation for the elderly reflects the fact that pensions have remained to a large extent unchanged during the crisis, and have in some cases brought pensioners' income above the poverty threshold due to the changes in the total income distribution while not altering in real terms their economic situation."⁴³ Child poverty is also an issue of concern, with 27 % of children in the EU at risk of poverty in 2011 (see Chapter 4 on 'The rights of the child and protection of children').⁴⁴

The fundamental rights dimension of poverty becomes evident when considering that those at risk of poverty are more likely to report housing problems, such as leaky

roofs, damp walls, floors or foundations, rot in window frames and floors.⁴⁵ Large numbers of households are experiencing material difficulties, with increased deprivation observed in the majority of EU Member States. Eurostat estimates that about 43.5 million people in the EU lived in a situation of severe material deprivation in 2011.⁴⁶

Data published by FRA in 2012 show that between 70 % and 90 % of the Roma surveyed report living in conditions of severe material deprivation.⁴⁷ The same research also interviewed non-Roma living in the same area as or in the closest neighbourhood to the Roma interviewed: the results show that the proportion of

⁴³ European Commission (2013b).

⁴⁴ Eurostat (2013b).

⁴⁵ European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (2009b), p. 7.

⁴⁶ Eurostat (2012c).

⁴⁷ See FRA (2012c).

non-Roma population living in conditions of severe material deprivation is significantly lower with substantial differences between EU Member States.⁴⁸

Whereas it is difficult to assess causal links between the socio-economic crisis and vulnerability, including of persons who do not necessarily belong to vulnerable groups, vulnerability rises in times of crisis. For instance, the “economic downturn [...] has had some impact on the overall extent of homelessness. For Greece, Ireland, Italy, Portugal, Spain, and the UK, the crisis was identified as a key driver of increased homelessness in the past 5 years,”⁴⁹ as the European Federation of National Organisations working with the Homeless (Feantsa) reports. Feantsa also highlights that the rate of homelessness has increased by 25 % to 30 % in Greece, Portugal and Spain since the beginning of the economic crisis. It observes a trend to more homeless migrants, due to “cuts in welfare, housing, health, probation services, education and training”.⁵⁰ Feantsa also saw an apparent increase of homeless persons in Lithuania who come from care institutions.

The socio-economic crisis created an “exogenous demand shock” for the social housing market. An increase in poverty rates and housing exclusion was observed in the majority of EU Member States.⁵¹ Ireland, for example, reported an increase in the number of people in need of local authority housing of 75 % since 2008, rising from 56,000 applicants to 98,000 in 2011. A growing demand for social housing resulted in an upward trend of people registered on social housing waiting lists in almost all EU countries.⁵²

“There is growing evidence that budget cuts are affecting persons with disabilities in a particularly harsh way. [I]t would be a tragic irony if the ratification of the CRPD [Convention on the rights of persons with disabilities] by EU Member States were to coincide with a dramatic decrease of the enjoyment of rights laid down in that very Convention. I urge European States to ensure that the most vulnerable in their societies aren’t seen as the ‘softest targets’, the groups to which cuts can be most easily applied.”

Statement by Navi Pillay, United Nations High Commissioner for Human Rights at the FRA Fundamental Rights Conference 2012, Brussels, 6 December 2012, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12885&LangID=E

The economic crisis may also put persons with disabilities at risk. As one example, the British government announced plans in December 2012 to introduce in April 2013 a new benefit called Personal Independence

Payment for eligible working age people from 16 to 64 years of age, replacing the Disability Living Allowance.⁵³ Civil society organisations criticised the new scheme, estimating that adopting it would significantly cut the benefits of about 300,000 persons with disabilities⁵⁴ (see also Chapter 5 on ‘Equality and non-discrimination’).

Which role for the European Community of values?

The EU and its Member States have responded to the socio-economic crisis by working “closely together to support growth and employment, ensure financial stability, and put in place a better governance system for the future”.⁵⁵ The EU and Member States also adopted measures within the framework of the Europe 2020 Strategy to tackle poverty and social exclusion, with the key challenges of eradicating child poverty, promoting active inclusion, especially that of Roma, overcoming discrimination and tackling financial exclusion.⁵⁶ Specifically concerning youth unemployment, the European Commission – acting upon a request from the Council of the European Union and the European Parliament – proposed a number of initiatives to tackle the issue in the Youth Employment Package⁵⁷ in December 2012, building on the Youth Opportunities Initiative it launched in December 2011.⁵⁸

At the same time, the crisis management agreed at European level (but partly outside the EU structures) provided the framework for budget cuts and what became labelled as ‘austerity measures’.

In times of austerity and rising unemployment, social rights become more relevant and any commitment to those rights is put to the test, as cases before the Council of Europe’s European Social Committee of Social Rights (ECSR) show.⁵⁹ Of the 12 cases filed in 2012, five are related to Greek pensioners’ organisations that considered that pension cuts violated social rights under the European Social Charter.⁶⁰

In view of the current context of austerity policies and soaring unemployment in many Council of Europe member states, the ECSR conclusions in 2012 under Article 1 of the European Social Charter, and more

⁵³ United Kingdom, Department for Works and Pensions (2012).

⁵⁴ See: United Kingdom, Disability Rights Watch (2012); United Kingdom, UK Disabled People’s Council (2012).

⁵⁵ European Commission (2013c); European Commission (2012c).

⁵⁶ European Commission (2010a).

⁵⁷ European Commission (2012e).

⁵⁸ European Commission (2011).

⁵⁹ See, for example, decision on Collective Complaint No. 65/2011 as of 23 May 2012, *General Federation of employees of the national electric power corporation (GENOP-DEI) / Confederation of Greek Civil Servants Trade Unions (ADEDY) v. Greece*.

⁶⁰ See Chapter 10 on ‘EU Member States and international obligations’ of this FRA Annual report.

⁴⁸ On the situation of Roma, see also Chapter 6 on ‘Racism and ethnic discrimination’ and FRA (2012c).

⁴⁹ European Federation of National Organisations working with the Homeless – Feantsa (2012), p. 21.

⁵⁰ *Ibid.*

⁵¹ European Parliament (2013), p. 6.

⁵² *Ibid.*, p. 15.

specifically under Article 1 paragraph 1, which obliges states to pursue a policy of full employment and to adequately assist the unemployed in finding work, are particularly noteworthy. It is perhaps not surprising that the ECSR found 12 countries to be in breach of this obligation, including five EU Member States (Bulgaria, Greece, Italy, Latvia, Slovakia) and Croatia. These states were found not to have demonstrated that their efforts in terms of job creation, training and assistance for the unemployed were adequate in the light of the economic situation and the level of unemployment, which was very high in most of these countries.

Under EU law, the exact reach of social rights was not entirely clear even before the crisis, with rulings by the CJEU largely showing that Common Market principles tended to trump concerns based on social rights.⁶¹ This might very well create frictions. In a well-known case in this regard – the *Laval* case – the Swedish follow-up legislation was challenged under the European Social Charter.⁶²

The crisis throws up the question of whether crisis-related measures must conform to the social rights enshrined in EU law. For instance, in early 2012, a Portuguese Court addressed the following question to the CJEU: “As a salary cut is not the only possible measure and is not necessary and fundamental to the efforts to consolidate public finances in a serious economic and financial crisis in the country, is it contrary to the right laid down in Article 31 (1) of the Charter of Fundamental Rights of the European Union to put at risk the standard of living and the financial commitments of employees and their families by means of such a reduction?”⁶³

Recent jurisprudence can help clarify the reach of social rights as enshrined in the EU Charter on Fundamental Rights. In the *Polier v. Najar* case, a similar question as the one mentioned above arose: the CJEU was asked to rule whether a new French law violated the EU Charter of Fundamental Rights, ILO Convention 150 and the European Social Charter. The law allows individuals to be dismissed without justification in certain circumstances during the first years of employment.

The CJEU acknowledged that the EU treaties cover the “protection of workers where their employment

contract is terminated”.⁶⁴ The CJEU stressed, however, that where a legislative basis in the treaties has not yet been used by the EU legislator, the situation cannot fall within the scope of Union law. And, whereas there are a number of directives which touch upon dismissal (for example, the Collective Redundancies Directive 98/59) this concrete case was not covered by Union law. Therefore, the CJEU concluded that it “manifestly does not have jurisdiction to answer the questions posed”.⁶⁵

The CJEU took a similar position in the *Corpul Național al Polițiștilor* case, when asked whether the reductions in remuneration, such as those imposed by the Romanian State under Law No. 118/2010 and Law No. 285/2010, violate the rights enshrined in the EU Charter of Fundamental Rights on property, equality and non-discrimination.

The Romanian national court wanted to know whether the state was obliged to compensate employees for a 25 % cut in remuneration due to the economic crisis and the need to balance the state budget. More concretely, the national court enquired whether the phrase “in the public interest” in the Charter provision on the right to property can be interpreted as relating to an economic crisis. The national court wanted to understand whether the Charter text: “use of property [...] in so far as is necessary for the general interest” could be interpreted as covering a 25 % cut in public sector employees’ salaries.⁶⁶

The CJEU did not enter into the substance of these questions, saying that it lacked jurisdiction to reply to the Romanian court’s questions because the laws at stake did not implement EU law (“la décision de renvoi ne contient aucun élément concret permettant de considérer que les lois n^{os} 118/2010 et 285/2010 visent à mettre en œuvre le droit de l’Union”).⁶⁷

There is also case law before national courts invoking the EU Charter of Fundamental Rights in the context of ► ‘austerity measures’ (see Chapter 8 on ‘Access to efficient and independent justice’). Recent national cases concerned, for example, the legality of: strikes;⁶⁸ a law

61 See CJEU, C-438/05, *International Transport Workers’ Federation and Finnish Seamen’s Union v. Viking Line*, 11 December 2007 and C-341/05, *Laval v. Svenska Byggnadsarbetareförbundet*, 18 December 2007.

62 The collective complaint was registered on 27 June 2012 (Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden, complaint No. 85/2012).

63 CJEU, C-128/12, *Sindicato dos Bancários do Norte and Others v. BPN – Banco Português de Negócios* (pending), lodged on 8 March 2012.

64 See Article 153 (1) (d) TFEU.

65 CJEU, C-361/07, *Polier v. Najar* EURL, Order, 16 January 2008.

66 See reference for a preliminary ruling from the Regional Court in Alba (*Tribunalul Alba*), Romania, in the case *Corpul Național al Polițiștilor – Biroul Executiv Central v. Ministerul Administrației și Internelor et al.*, lodged on 22 August 2011, OJ 2011 C 331, p. 10.

67 CJEU, C-434/11, *Corpul Național al Polițiștilor v. Ministerul Administrației și Internelor (MAI) and Others*, Order, 14 December 2011, para. 16. Another reference was rejected on similar grounds: CJEU, C-134/12, *Ministerul Administrației și Internelor (MAI), Inspectoratul General al Poliției Române (IGPR) and Inspectoratul de Poliție al Județului Tulcea (IPJ) v. Corpul Național al Polițiștilor -Biroul Executiv Central*, Order, 10 May 2012.

68 Lithuania, Constitutional Court, Decision in the Case 3K-3-81/2012, 6 March 2012.

abolishing special pensions paid to former army staff, police and prison staff, judges and court clerks, diplomatic personnel and deputies and senators;⁶⁹ an Act allowing the dismissal of government officials without employer justification;⁷⁰ dispositions covering the designation of a union delegate to inter-professional unions;⁷¹ a flat daily pay rate agreement concluded between an employer and his employee;⁷² or an entitlement to unemployment insurance under a constitution.⁷³

Courts responses ranged from ruling it lacked competence in the matter to establishing whether or not national law violated the Charter⁷⁴ to explicitly assessing the compatibility of national norms with the Charter.⁷⁵ Charter references appeared in cases which included references to applicable norms of EU secondary law as well as in those where no act of EU secondary law is applied. There were references to the Charter even in cases where EU law did not appear to be applicable.⁷⁶

Charter-related case law indicates that the EU Charter of Fundamental Rights does not offer judicial tools across the board to guarantee that austerity measures and other public interventions are 'social rights compliant'.

Admittedly, it is not a given that the possibility of directly invoking social rights would necessarily lead to better protection for all. This was for instance argued with regard to Article 30 of the Charter which protects against unjustified dismissal. An expert queried whether "trade unions and others [should] be able to challenge reforms – reductions – in labour law protection at a time when youth unemployment is crippling(ly) high in a number of Member States, including those in receipt of bail-outs (Spain, Portugal and Greece)". Such an approach might lead to "further protecting the insiders to the detriment of the outsiders?"⁷⁷ The divide between labour market insiders (or jobholders) and outsiders is something the European Commission has criticised in its Flexicurity Pathways.⁷⁸

Against this backdrop, the same expert proposes an alternative procedure-oriented approach based on consultation, under which the EU Charter of Fundamental Rights would require that the Member States engage "in appropriate discussions with interested parties prior to deciding on the reforms necessary".⁷⁹ In this sense, even if its reach might appear to be limited before courts, the Charter offers new political arguments and momentum to emphasise the social dimension in legal and political decisions – also and especially in times of crisis.

Political crises

The crisis situations in 2012 were not limited to the fields of employment or economic policies in general. The year 2012 saw a variety of situations that were critical for political systems. Some but not all EU Member States witnessed social unrest, public protest, anti-migrant initiatives by political parties, decreasing trust in government or neighbouring states, or the violent expression of extremist ideology (including murder) in 2012.

The situation on the ground

Greece serves an example of a country facing a threat to the overall political system. The seriousness of the situation was, for instance, recognised by the General Court in Luxembourg (GCEU), which referred to the risk of major crisis-induced social unrest in the context of the question of whether or not Greece was suffering a 'serious disturbance' in the sense of Article 107 paragraph 3 lit (b) of the TFEU. In September 2012, the Court found that Greece was indeed in the throes of such a disturbance and ordered the European Commission to suspend its decision requiring Greek authorities to recover sums paid to Greek farmers. The case involved € 425 million in compensation payments made to Greek farmers in 2009 and the question whether these payments violated the EU state aid regime.⁸⁰

The Court reasoned that in the climate of tension characterised by "violent demonstrations against the draconian austerity measures adopted by the Greek public authorities [and by] the marked advance of certain parties on the extreme right and the extreme left in the most recent parliamentary elections in Greece [...] may trigger demonstrations liable to degenerate into violence [...] It is evident that the perturbation of public order that is brought about by such demonstrations and by the excesses to which, as recent dramatic events have shown, they may give rise would cause serious

69 Romania, Constitutional Court, Decision No. 1471 in the Case 4.786-4790D/2010, 8 November 2011.

70 Hungary, Constitutional Court, Decision 8/2011, 18 February 2011.

71 France, Court of Cassation, Judgment in the Case No. 889, 14 April 2010.

72 France, Court of Cassation, Judgment in the Case No. 1656, 29 June 2011.

73 Estonia, Administrative Law Chamber of the Supreme Court, Judgment in the case 3-3-1-27-1, 11 November 2011.

74 Hungary, Constitutional Court, Decision 8/2011, 18 February 2011.

75 France, Court of Cassation, Judgment in the Case No. 889, 14 April 2010.

76 Estonia, Administrative Law Chamber of the Supreme Court, Judgment in the Case 3-3-1-27-1, 11 November 2011.

77 Barnard, C. (2013).

78 See, for example, European Commission, The Expert Group on Flexicurity Pathways (2007).

79 Barnard, C. (2013). She also mentions a "more radical version" of the *ex ante* control, namely to subject the proposed changes to national legislation to screening by the ILO, which has offered to provide this service.

80 See GCEU, Case T-52/12, *Hellenic Republic v. European Commission*, Order, 19 September 2012.

and irreparable harm, which the Hellenic Republic may legitimately invoke.”⁸¹

Two other examples illustrate another aspect of political crisis, namely the more open expression of xenophobic and discriminatory attitudes. The first comes from the Netherlands, where the Freedom party (*Partij voor de Vrijheid*, PVV) set up an internet hotline in February 2012, enabling people to report what they considered inappropriate behaviour on the part of central and eastern European migrants.

While EU⁸² and national⁸³ officials and bodies criticised the hotline, the PVV declared it a success, with more than 40,000 complaints registered against EU citizens from Bulgaria, Poland and Romania. The most common complaints related to the perception that these nationals were taking away housing and jobs from Dutch citizens.⁸⁴

A comparable development also occurred in Belgium where the Flemish interest party (*Vlaams Belang*) set up a hotline to denounce ‘illegality’ (*Meldpunt illegaliteit*). This scheme mainly targeted irregular migrants, whom the party describes as a nuisance to the general population because, in its view, they live in derelict buildings, take part in criminal activities and are a source of unfair competition on the marketplace as they work undeclared.⁸⁵

The crisis has also affected how people living in the EU view one another, straining solidarity, according to research carried out in the framework of the Pew Global Attitudes Survey.⁸⁶ This is particularly true as regards Greece, one of the EU Member States hardest hit by the economic crisis: just 27 % to 48 % of respondents in the Czech Republic, Germany, France, Italy, Poland, Spain and the United Kingdom said they viewed Greece favourably as a country. These figures are much less favourable than those towards other EU Member States (Table 1). The same survey shows that favourable ratings of Greece among inhabitants of other EU Member States declined between 2010 and 2012, with a drop of between 12 and 28 percentage points. Conversely, 21 % of Greek respondents surveyed said they viewed Germany favourably, far lower than the 67 % to 84 % ratings Germany earned in the other EU Member States surveyed.

The unfavourable ratings for Greece have implications for the value of solidarity, an important value of the European Community. There have, for instance, been

repeated calls, some vehement, in several EU Member States for Greece to be thrown out of the euro or the EU.⁸⁷

The policy reaction has, however, come to the aid of Greece through rescheduling and cutting its debt.⁸⁸ The consequence for Greece was a push for more austerity and fiscal consolidation measures, which many other EU Member States also took.

Table 1: Favourable rating of other EU Member States, April 2012 (%)

Favourable rating by ↓	Favourable rating for →					
	DE	EL	ES	FR	IT	UK
CZ	80	25	69	74	68	84
DE	82	27	71	80	66	67
EL	21	71	72	54	68	37
ES	75	34	45	68	58	70
FR	84	45	71	64	67	76
IT	67	30	59	53	57	69
PL	78	43	76	76	69	83
UK	72	48	74	64	67	78

Source: Pew Research Center (2012), European unity on the rocks – Greeks and Germans at polar opposites, available at: www.pewglobal.org/files/2012/05/Pew-Global-Attitudes-Project-European-Crisis-Report-FINAL-FOR-PRINT-May-29-2012.pdf, p. 35 and pp. 48-51.
Question: Please tell me if you have a very favourable, somewhat favourable, somewhat unfavourable or very unfavourable opinion of COUNTRY.

Against this backdrop, it should be considered that “Europe’s history demonstrates how economic depression can tragically lead to increasing social exclusion and persecution. We are concerned that in times of crisis, migrants, minorities and other vulnerable groups become ‘scapegoats,’” as FRA, the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) and the Council of Europe’s European Commission against Racism and Intolerance (ECRI) noted.⁸⁹

Although not a new phenomenon, elements of extremist ideology – particularly as regards views on migration and Islam – have gained a greater foothold in some EU Member States,⁹⁰ with some elements of the political rhetoric and policy positions advocated by parties and groups adhering to such ideologies⁹¹ gaining more widespread acceptance. In what is known as a contagion

⁸¹ *Ibid.*

⁸² Reding, V. (2012).

⁸³ Netherlands, *College voor de rechten van de mens* (2012).

⁸⁴ Netherlands, *Partij voor de Vrijheid* (2012).

⁸⁵ Belgium, *Vlaams Belang* (2012).

⁸⁶ Pew Research Center (2012).

⁸⁷ See: *Österreichische Presserat* (2011).

⁸⁸ See: European Commission, Directorate-General for Economic and Financial Affairs (2012); International Monetary Fund (2013); High-level Expert Group on reforming the structure of the EU banking sector (2012); Olivares-Caminal, R. (2011).

⁸⁹ FRA, ECRI, ODIHR (2009).

⁹⁰ See, for example: Jesse, E. and Thieme, T. (2011); Hainsworth, P. (2008).

⁹¹ See, for example: Fox, J.E., Moroşanu, L. and Szilassy, E. (2012), pp. 680–695.

effect, some of these parties and groups succeeded in getting some traditional parties to focus on aspects of their agendas, which resulted in a degree of policy overlap between ideologically different party families.⁹²

To counter the rise of parties with anti-immigrant, anti-foreigner and anti-Islam stances, some traditional parties (from across the spectrum of political families) began adopting 'tougher' stances on issues pertaining to security, migration, integration, social welfare or the accommodation of religious practices.⁹³ They generally called for barriers to be erected, often in relation to protecting national identity or in the name of national security, meaning that those concerned would face higher hurdles to achieve, for example, family reunification, access to social services or freedom to manifest religion or belief.⁹⁴

In addition to the economic crisis, a number of other factors contributed to creating a favourable climate for the mainstreaming of elements of extremist ideology in the public sphere. These factors include perceptions that: foreigners take jobs and resources away from nationals; the pressure of migration on EU Member States is too great; the burden of migration is not shared equitably among Member States; migrants are responsible for criminality; ethnic and religious minorities pose a threat to national identity; or, that the religious practices and identity of minority groups are incompatible with 'modern' societies.⁹⁵

Concerns such as these were aired more openly – sometimes violently – in the public sphere, especially by individuals and groups with anti-immigrant, anti-Islam or anti-foreigner feelings. To name but a few examples, in the last few years, the EU witnessed anti-Roma demonstrations in Bulgaria, the Czech Republic, Hungary and Slovakia; violent attacks against Roma in Greece, Hungary, Italy and Slovakia; violent attacks against migrants in Germany, Greece and Italy; murders motivated by racism and xenophobia in Germany, Greece and Italy; anti-Muslim attacks in several EU Member States; and continued manifestations of antisemitism.⁹⁶ All of these examples illustrate how changes in the

political discourse can spill over into criminal behaviour targeting certain groups in society.

What role for the European Community of values?

Where extremist movements lead to the erosion of social cohesion and finally result in violent attacks, they are violating fundamental rights. But softer imitation of such movements by traditional parties may also come into conflict with commonly agreed European values. The aforementioned example of higher hurdles to achieve family reunification, access to social services or freedom to manifest religion or belief represent barriers that may challenge principles and values upon which the EU is founded, such as the free movement of persons, goods and services; economic and social solidarity; and the maintenance of societies in which pluralism, non-discrimination, tolerance, justice and solidarity prevail.

Moreover, the political situation in the different EU Member States can no longer be seen as decoupled from that of their neighbouring states and the EU as a whole. Member States and the EU consist of an interdependent, semi-constitutional construction. In a system where judgments are handed down in one Member State but can automatically be executed in another, where asylum seekers are sent from state A to have their asylum procedure done in state B, or where persons are arrested in one Member State on the basis of an arrest warrant issued in another, the need for a shared set of core values is crucial in allowing all these mechanisms of exchange to be trustworthy.⁹⁷ Against this backdrop, major challenges to the principles of democracy or the rule of law in one or more Member States are thus likely to have repercussions on the functioning of the EU as a whole.

Considering these interdependencies, the EU is operating on the presumption that the values of Article 2 of the TEU are "common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". The implementation of a European Arrest Warrant, for example, "may be suspended only in the event of a serious and persistent breach by one of the Member States" of the principles set out in Article 2 of the TEU and only if the Council of the European Union has identified such a breach.⁹⁸

92 See, for example: van Spanje, J. (2010), pp. 563–586; Yilmaz, F. (2012), pp. 368–381.

93 See, for example: Çetin, E. (2012); de Koster, W., Achterberg, P. and van der Waal, J. (2013), pp. 3–20; Emery, M. (2010), pp. 115–129; Mavelli, L. (2013), pp. 159–181; Flood, C., Hutchings, S., Miazhevich, G. and Nickels, H.C. (2012).

94 See, for example: Centre for Equal Opportunities and Opposition to Racism (2011), pp. 128–131; Chakrabarti, N. and Zempi, I. (2012), pp. 269–284.

95 See, for example: Given, T.E. (2005), Ceobanu, A.M. (2011), pp. 114–131; Mawby, R.C. and Gisby, W. (2009), pp. 37–51; Lucassen, G. and Lubbers, M. (2011), pp. 547–574; Nickels, H.C., Thomas, L., Hickman, M.J. and Silvestri, S. (2012), pp. 135–151; Hervik, P. (2012), pp. 211–225.

96 See, for example, FRA (2012d); FRA (2012e); FRA (2012f); FRA (2012g); see also Chapter 6 on 'Racism and ethnic discrimination'.

97 See, for example, in the area of criminal law: Mitsilega, V. (2006), pp. 1277–1331.

98 See Consideration No. 10 in Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190, pp. 1–18.

The CJEU recently underlined the limits of such a presumption of compliance in the context of the Dublin regime, which regulates the transfer of asylum seekers from one EU Member State to another, and of the creation of an area of freedom, security and justice. A system truly based on fundamental rights must construe mutual recognition in a way that the presumption of full compliance with the relevant core standards can be challenged.⁹⁹

It is not only the right to an effective remedy and a fair trial or the right to a good administration, under Articles 47 and 41 of the Charter of Fundamental Rights, respectively, that create cross-cutting guarantees in areas beyond which the EU has legislated. Any major flaws in the electoral laws and processes at national level – including restrictions on media pluralism and media freedom – can, for example, have implications for elections to the European Parliament, since these are defined by national procedures and based on national political realities. This is even truer considering that extremist parties will tend to profit from the fact that the European elections are frequently misunderstood as being “second-order national contests” suitable for delivering a protest vote.¹⁰⁰ A change of the European Parliament’s composition, however, will have repercussions on other Member States where extremist parties do not play a role.

Where a political development is threatening not only the rather abstract values as listed in Article 2 TEU but risks violating a concrete provision of EU secondary law, the normal machinery designed for upholding respect for EU law kicks in. An example was the Roma crisis (*affaire des Roms*), which took place in France in 2010 and exemplifies how EU law plays into events that prompt major political discussions within EU Member States. The French government sparked the affair by announcing a package of measures calling for the removal from France of Roma and other *gens du voyage* (Travellers) – mainly EU citizens from Bulgaria and Romania. As a result of the package, French authorities dismantled 128 irregular settlements and expelled some 979 individuals by the end of August 2010,¹⁰¹ returning them to their countries of origin.

The case involved a clearly applicable norm of EU secondary law, the Free Movement Directive.¹⁰²

99 CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E., A.S.M., M.T., K.P. and E.H. v. Refugee Applications*, 21 December 2011, especially para. 83.

100 Hix, S. (2005), p. 193.

101 Carrera, S. and Atger, A. F. (2010).

102 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

The European Commission therefore announced that it would open a formal infringement procedure against France concerning its obligations under this directive. This pressure led France to amend legislation and make other commitments.¹⁰³

The European Commission’s intervention thus succeeded in toning down a policy measure that many believed infringed EU fundamental rights standards.¹⁰⁴ Nevertheless, the way in which this ‘political crisis’ played out – particularly the retroactive nature of the EU’s intervention – proved to a certain extent the limitations of EU enforcement mechanisms to provide “a swift and depoliticized response to national measures whose compliance with EU law and fundamental rights remains questionable”.¹⁰⁵

Constitutional crises

When an EU Member State changes its constitutional order, it is in principle acting autonomously, which is beyond any influence from the EU. According to the principle of conferral, the Union may act only within the limits of the competences conferred upon it by the Member States in the treaties to attain the objectives set out therein, as in paragraph 2 of Article 5 of the TFEU. The EU has to respect the national identities of its Member States, “inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government”. It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security (Article 4 (2) of the TEU).

It is also well established that Member States have to exercise those competencies reserved to them in a way that does not result in a violation of EU law. Constitutional “engineering” – that is, the changing of constitutional balances through a formal amendment of the national constitution – or a *de facto* shift in power structures can indeed under certain conditions threaten EU law. Such a constitutional change, which may generate a crisis, can call into question the EU’s fundamental values laid down in Article 2 of the TEU, even when it does not involve an alleged violation of a concrete part of the EU *acquis*. In 2012, two EU Member States, Hungary and Romania, confronted calls for the EU to initiate the sanctioning procedure under Article 7 in order to safeguard core European values.

The situation on the ground

Hungary – the former leading market reformer, which then became the hardest-hit economy in central

103 European Commission (2010b).

104 See, for example: Caitlin T. G. (2012), pp. 209–225.

105 Carrera, S. and Atger, A. F. (2010), p. 3.



Europe¹⁰⁶ – was at the epicentre of a debate over whether or not the new government risked pushing the country beyond the pale of what was acceptable within the EU community of values.

The *Fidesz* party won the 2010 elections with a two-thirds majority. This majority was instrumental in preparing a new constitution that took effect at the beginning of 2012 and drew strong criticism both at home and abroad. These criticisms concerned issues both of and beyond EU legislative competence, including transparency and legitimacy concerning the adoption of the new constitution; the use of ‘cardinal laws’, which require a two-thirds, rather than the typical simple majority, for passage in parliament; the limitation of the independence of three ombuds institutions; the protection of Hungarians living abroad; the exercise of government control over the media; and the free exercise of religion.

In a synergetic and complementary relationship with EU institutions, the Council of Europe’s Venice Commission delivered 11 different opinions on the situation in Hungary. One of the issues examined was judiciary independence, where the Venice Commission concluded that essential elements of the reform contravened

► European standards (see Chapter 8 of this report).¹⁰⁷

With regard to the law on religions, the Venice Commission criticised the selection procedure of organisations that can be officially recognised as churches. The process is political in nature and selects the officially recognised churches through a vote in Parliament, requiring a two-thirds majority, with legal redress against a negative decision provided. The Venice Commission found the range of requirements excessive and based on arbitrary criteria. It also commented that the act has “led to a deregistration process of hundreds of previously lawfully recognised churches, that can hardly be considered in line with international standards”.¹⁰⁸

“The significant number of matters relegated, for detailed regulation, to cardinal laws requiring a two-thirds majority, including issues which should be left to the ordinary political process and which are usually decided by simple majority, raises concerns. Cultural, religious, moral, socio-economic and financial policies should not be cemented in a cardinal law.”

Council of Europe, Venice Commission (2011), *Opinion CDL-AD(2011)016*, 20 June 2011, paragraph 145

Within the EU, the European Parliament discussed the situation in Hungary, with the Committee on Civil Liberties, Justice and Home Affairs (LIBE) holding

a special hearing dedicated to Hungary. The plenary adopted a resolution on the situation in Hungary, calling for consideration of “whether to activate necessary measures”, including the initiation of the sanctioning procedure as laid down in Article 7 of the TEU.¹⁰⁹

The EU did not, however, engage with the wider constitutional issues, even though they could have fundamental rights implications. In January 2012, when addressing the European Parliament on the matter, the President of the European Commission stressed that the Commission would treat the situation in Hungary at this stage “mainly as an issue of application of European Union law”; he recognised, however, that the issues at stake may go beyond the EU law matters that have been raised and referred to the ongoing analysis of the Council of Europe and the Venice Commission.¹¹⁰ Indeed, in January 2012 the European Commission focused on more specific aspects that have direct relevance for EU law.¹¹¹ However, following the presentation of the draft Fourth Amendment to the Hungarian Fundamental Law, in the beginning of 2013, the European Commission also expressed its concerns with respect to the principle of the rule of law.¹¹²

In January 2012, it launched infringement procedures against Hungary on three different grounds. The first concerned the independence of the national central bank, where the European Commission was concerned that the rules governing the dismissal of the governor and the members of the monetary council might be prone to political interference and misuse.

The second concerned the independence of the judiciary. The European Commission criticised that the retirement age for judges, prosecutors and notaries would be lowered radically and rapidly to 62 from 70 years of age. The Commission could find no objective justification for treating judges, prosecutors and notaries differently from other professional groups, especially at a time when retirement ages across Europe are rising not falling. These concerns could not be resolved at informal level and were thus brought before the CJEU; other justice-related issues were addressed at administrative level, including the newly established National Judicial Office, which was set up to take on significant powers to manage the courts’ operations, human resources, budget and allocation of cases.

Finally, the European Commission identified a lack of independence of the data protection supervisory authority. The newly established National Agency for

¹⁰⁶ European Economic Advisory Group (2012), pp. 115–130.

¹⁰⁷ Council of Europe, Venice Commission (2012a); Council of Europe, Venice Commission (2012b). See also Chapter 5 on ‘Equality and non-discrimination’.

¹⁰⁸ Council of Europe, Venice Commission (2012c).

¹⁰⁹ European Parliament (2012a).

¹¹⁰ Barroso, J.M. (2012), pp. 7–8.

¹¹¹ For a detailed analysis of the events, see: Hoffmeister, F. (2013).

¹¹² European Commission (2013d). For more information, see: European Commission (2013e).

Data Protection replaced the former Data Protection Commissioner's Office at the beginning 2012. This meant that the term of the Data Protection Commissioner was put to a premature end.¹¹³

Whereas the procedure with regard to the independence of the central bank was dropped due to changes announced in the law, the procedure on the judiciary ended with a judgment of 6 November 2012, when the CJEU found that the radical and rapid lowering of the retirement age infringed the EU Employment Directive.¹¹⁴ The case regarding the Data Protection Commissioner and the premature removal from office was still pending at the time of writing.¹¹⁵

"When assessing whether or not a Member State is at a clear risk of seriously breaching core values, it is important to look not only at one single development. For instance, it would not be sufficient to look in isolation at the appointment of judges. Other developments such as the introduction of new majorities to elect public officials, or new standard terms of public officials, or new electoral laws should be included in the assessment. Hence, we have to look at the combined effects of many developments. In this sense, the whole is greater than the sum of its parts."

Morten Kjaerum, Director of the FRA (2012), Speech given at the LIBE meeting on the situation in Hungary, 9 February 2012, available at: <http://fra.europa.eu/en/speech/2012/situation-hungary>

The second constitutional crisis that prompted a Europe-wide debate took place in Romania. The Romanian government, under Prime Minister Victor Ponta came into open conflict with President Traian Băsescu, which negatively affected the constitutional position of other state institutions, most prominently the Constitutional Court and the Ombudsman. The power struggle that erupted threatened the independence and competence of the Constitutional Court and concerned issues of constitutional relevance, including the question of whether the prime minister or the president represents the country in the European Council; the dismissal of the ombudsman; what the rules for the appointment of the general prosecutor or the chief prosecutor of the National Anti-Corruption Department were; and, whether the Official Journal could be placed under government oversight.¹¹⁶

A referendum on whether or not to remove President Băsescu from office was held on 29 July 2012. The Constitutional Court declared the result invalid, because the turnout at 46 % did not meet the 50+1 quorum

(87.5 % of the participants voted in favour of removing President Băsescu from office and 11.2 % against).

The Secretary General of the Council of Europe and the Prime Minister of Romania asked the Council of Europe's Venice Commission to express its views on the situation in Romania. In its opinion published at the end of 2012, the Venice Commission stressed that any constitution must work as a framework enabling "a smooth functioning of the institutions based on their loyal co-operation".¹¹⁷

The President of the European Commission addressed concerns about the role of the Constitutional Court and the necessity of checks and balances in a democratic system. He said that Romania "must restore the powers of the Constitutional Court and ensure that its decisions are observed, appoint an Ombudsman enjoying cross-party support, ensure a new open and transparent procedure for appointing a General Prosecutor and Director of the Anti-Corruption Directorate and make integrity a political priority".¹¹⁸

The European Commission in the report under the Cooperation and Verification Mechanism detailed recommendations covering seven areas: respect for the rule of law and the independence of the judiciary; reform of the judicial system; accountability of the judicial system; consistency and transparency of the judicial process; effectiveness of judicial action; integrity; fight against corruption.¹¹⁹ The Council of the European Union endorsed these recommendations, making reference to the fundamental values on which the EU is founded in "light of recent events in Romania".¹²⁰

"In the run-up to the elections, there has also been a discussion about possible Constitutional change. What is important is that the process of constitutional reform progresses in full respect of fundamental values such as respect for the rule of law and the separation of powers. This includes continued respect for the Constitutional Court as the guarantor of the supremacy of the Constitution, as well as the independence and stability of judicial institutions including the prosecution. It is also important that the debate about possible reform allows enough time and openness to secure through the appropriate constitutional procedure the widest possible consensus. It is also essential in this context to reassure judicial institutions that their independence is secured, and to avoid speculation creating a climate of instability."

European Commission (2013f), Report on Progress in Romania under the Co-operation and Verification mechanism, COM(2013) 47 final, 30 January 2013, pp. 3 and 4

¹¹³ European Commission (2012d).

¹¹⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ 2000 L 303, pp. 16-22; CJEU, C-286/12, *Commission v. Hungary*, 6 November 2012.

¹¹⁵ CJEU, C-288/12, *European Commission v. Hungary*, Action brought on 8 June 2012, pending.

¹¹⁶ Nicolescu, A. (2012).

¹¹⁷ Council of Europe, Venice Commission (2012d).

¹¹⁸ European Commission (2012f).

¹¹⁹ European Commission (2012g), pp. 20-23.

¹²⁰ Council of the European Union (2012).

The European Commission revisited the situation and published new recommendations at the beginning of 2013. It acknowledged that “the respect for the Constitution and the decisions of the Constitutional Court has been restored”. It underlined, however, that the lack of respect for the independence of the judiciary and the instability faced by judicial institutions remained a source of concern. The new recommendations also “underline the responsibility of Ministers and parliamentarians to set an example in terms of respect for integrity”.¹²¹ Comparing the two instances of constitutional crises, one may conclude that – due to the availability of the specific forum of the Cooperation and Verification Mechanism (CVM) – the European Commission was more outspoken in the Romanian than in the Hungarian crisis on issues that remain in the domestic sphere of the EU Member State concerned.¹²²

Which role for the European Community of values?

In Article 7 of the TEU, the EU has a sanctioning procedure should an EU Member State be seen to violate Article 2 values. The application of that procedure, which is the result of an Austrian-Italian initiative in the negotiations leading to the Amsterdam Treaty,¹²³ was discussed but not applied in 2012. In fact, the limitations of the Article 7 procedure had already become apparent in 2000 (*vis-à-vis* Austria) and in 2004 (*vis-à-vis* Italy). The 2012 events built on these earlier experiences.

In the context of what could be termed the ‘Austrian crisis’ of 2000, Article 7 of the TEU was not applied. Fourteen EU Member States instead imposed sanctions on Austria based on the view that the participation of the right-wing Freedom party (*Freiheitliche Partei Österreichs*, FPÖ) in the government could lead Austria to violate European values as listed in Article 2 of the TEU in future.¹²⁴ Imposing bilateral, albeit coordinated, sanctions proved to be problematic under EU constitutional law and contradictory to the spirit of the treaties.¹²⁵

Four years later, it was Italy’s turn to become a potential target of sanctions under Article 7 of the TEU. In contrast to the Austrian crisis, the allegations against then Prime Minister Silvio Berlusconi were not speculative and pre-emptive in nature; they referred to matters that had already occurred, including issues of media pluralism and interference with individual media.

Here, the European Parliament stressed “its deep concern in relation to the non-application of the law

and the non-implementation of judgments of the Constitutional Court, in violation of the principle of legality and the rule of law, and at the incapacity to reform the audiovisual sector, as a result of which the right of its citizens to pluralist information has been considerably weakened for decades; a right which is also recognised in the Charter of Fundamental Rights”.¹²⁶ However, neither Article 7 was applied, nor did the EU adopt a directive to safeguard media pluralism as the European Parliament proposed (the role of the Union *vis-à-vis* media surfaced again in 2012).¹²⁷

“On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.”

Article 7 Paragraph 1 of the Treaty on European Union, OJ C 326, 26 October 2012, pp. 13-47

In conclusion, the year 2012 reinforced the impression that the Article 7 procedure as such may not be enough to guarantee a regular and rational dialogue that is evidence based and solution oriented on the EU’s basic values that are both constituent and constitutional in nature. Both cases, the one of Hungary as well as that of Romania, generated a dialogue about constitutional issues. This dialogue was, however, crisis-driven. In the case of Hungary, in 2012, the EU intervention consisted mainly in launching infringement procedures, namely dealing with fundamental rights such as the prohibition to discriminate on the basis of age and the protection of personal data. In the case of Romania, EU reaction was more encompassing as it also addressed issues of a more constitutional nature, including general rule of law issues like judicial independence.

The EU’s outspoken approach to the Romanian crisis took place on a particular platform – a platform that was not available in the case of Hungary or any other Member State apart from Bulgaria and Romania – namely the Cooperation and Verification Mechanism (CVM). This mechanism, which was agreed upon in the run-up to the accession of Romania and Bulgaria to the EU in 2007,¹²⁸ establishes benchmarks in the areas of judicial reform, integrity, the fight against high-level corruption, and the prevention and fight against corruption in the public sector. The CVM allows the European Commission to report regularly on these objectives until

¹²¹ European Commission (2013f).

¹²² Compare Hoffmeister, F. (2013).

¹²³ The initial proposal underwent various changes, see: CONF 3940/96, 3 October 1996.

¹²⁴ See, for example: Happold, M. (2000), pp. 953–963.

¹²⁵ Toggenburg, G.N. (2001), pp. 735–756.

¹²⁶ European Parliament (2004), para. 66.

¹²⁷ See, for example: High Level Group on Media Freedom and Pluralism (2013).

¹²⁸ European Commission (2006a) and (2006b).

they are satisfactorily fulfilled. There might be a need to establish a platform for the discussion of broader constitutional issues, that is open to all EU Member States to the same extent.

Safeguarding European values: current developments and discussions

Where an EU Member State is criticised for violating shared European values outside areas covered by EU law, the room for manoeuvre is reduced. This is true even in cases where there is a clear risk of a substantial breach of the Article 2 values, such as was the case – according to some politicians¹²⁹ and expert observers¹³⁰ – in the ‘Hungarian crisis’.

“In recent months we have seen threats to the legal and democratic fabric in some of our European states. The European Parliament and the Commission were the first to raise the alarm and played the decisive role in seeing these worrying developments brought into check. But these situations also revealed limits of our institutional arrangements. We need a better developed set of instruments – not just the alternative between the “soft power” of political persuasion and the “nuclear option” of article 7 of the Treaty.”

President of the European Commission, State of the Union 2012 address, Plenary session of the European Parliament, Strasbourg, 12 September 2012

The Vice-President of the European Commission, Viviane Reding, responsible for justice, fundamental rights and citizenship therefore raised the ‘Copenhagen dilemma’ facing the EU: “We are very strict on the Copenhagen criteria, notably on the rule of law in the accession process of a new Member State but, once this Member State has joined the European Union, we appear not to have any instrument to see whether the rule of law and the independence of the judiciary still command respect.”¹³¹

To broaden its scope of analysis of EU Member States’ justice systems, the European Commission presented in March 2013 the ‘EU Justice Scoreboard’.¹³² It is a new comparative and non-binding tool presenting trends in the area of justice. The scoreboard is not a new rule of law mechanism that would as such address the Copenhagen dilemma.¹³³ It is rather part of the ‘European semester’, the yearly cycle of economic policy coordination, one of whose priorities is to improve the quality, independence and efficiency of judicial systems. This coordina-

tion provides a detailed analysis of EU Member States’ programmes of economic and structural reforms and respective recommendations for the next 12 to 18 months.

The Scoreboard provides information on the functioning of all national justice systems, in particular in civil, commercial and administrative cases. It builds on data that are mainly but not exclusively provided by the Council of Europe’s Commission for the Evaluation of the Efficiency of Justice (CEPEJ). The new tool allows for a comparison of all EU Member States on particular indicators relative to their justice systems. The indicators include the length of proceedings (days needed to resolve a case in court), the ‘disposition time’ (the number of unresolved cases divided by the number of resolved cases at the end of a year multiplied by 365 days), the clearance rate (the ratio of the number of resolved cases over the number of incoming cases) or the number of pending cases. The scoreboard also looks into whether monitoring mechanism exist at national level or whether information and communication technology (ICT) systems, alternative dispute resolution methods, training of judges or financial resources are available to the judicial systems. The scoreboard also provides data on the perceived independence of justice systems, based on findings of the World Economic Forum and the World Justice Project. Even though several Member states are among the top 10 worldwide leaders in terms of the perception of judicial independence, the figures show a rather low level of perception of judicial independence by business end-users of the justice system in certain Member States.

Indeed, the findings of the first EU Justice Scoreboard reveal remarkable disparities across the different indicators, in particular as regards the length of proceedings. The justice systems in certain EU Member States combine unfavourable factors such as lengthy first instance proceedings and low clearance rates and/or a large number of pending cases. The European Commission finds that such situations “merit special attention and a thorough analysis as they could be indicative of more systemic shortcomings for which remedial action should be taken.” The reduction of excessive length of procedure is identified as a priority “in order to improve the business environment and attractiveness for investment.”¹³⁴

The European Commission presented the EU Justice Scoreboard as a tool for economic growth, based on the assumption that solid justice systems are key to returning to competitiveness, trust, stability, restored confidence and growth. An efficient and independent justice system is seen as an important structural component “of an attractive business environment” since it maintains “the confidence for starting a business,

¹²⁹ See, for example, the speech of the leader of the ALDE group in the European Parliament Plenary on 13 March 2013.

¹³⁰ Hoffmeister, F. (2013).

¹³¹ Reding, V. (2012b).

¹³² European Commission (2013g).

¹³³ See European Commission (2013h).

¹³⁴ European Commission (2013a), p. 11.



enforcing a contract, settling private debt or protecting property and other rights".¹³⁵

At the same time, the European Commission underlines the developing aspect of the EU Justice Scoreboard, characterising it as an "evolving tool that will gradually expand in the areas covered, the indicators and the methodology, with the objective of identifying the essential parameters of an effective justice system. In dialogue with Member States, the Scoreboard could progressively cover other areas of the justice systems and other elements in the 'justice chain'".¹³⁶

Looking at the EU Justice Scoreboard from the angle of fundamental rights, the whole area of criminal justice seems to be a field where future extension appears desirable. In this field, fundamental rights concerns are affected in the most immediate manner. And even if criminal justice were to be covered by the scoreboard, it would still be limited to justice and not cover the rule of law and the 'Copenhagen dilemma' in a more general way.

Recent enlargement experiences show that there is a growing perception that accession treaties should make sure that enlargement instruments include "appropriate measures" in those cases where "commitments undertaken in the context of the accession negotiations" are not upheld by the new Member States.¹³⁷ As was stated above, the availability of an additional CVM allowed the EU to address the shared Article 2 values *vis-à-vis* Romania in 2012. Arguably, the expansion of such a mechanism to all EU Member States would require an amendment of the treaties. Moreover, some argue that, "in some of the older member states where populations are more ambivalent about the desirability of EU interference in their domestic affairs, a mechanism with such a politically high profile as the CVM may undermine rather than boost public confidence in the EU area of freedom, security and justice by confirming suspicions that the 'tentacles' of Brussels are reaching right into the heart of national sovereignty".¹³⁸

Indeed, a prominent role for the EU is to safeguard the rule of law; however, to do so, it faces a "limited normative basis" and a "certain political reluctance".¹³⁹ At the same time, developments in 2012 point in a different direction. The perception seems to be growing that what is missing at EU level is "a set of instruments allowing the direct and explicit 'cultivation' of the EU's most

fundamental values beyond fundamental rights and judicial independence".¹⁴⁰ Expert circles discussed different possible approaches: some of these discussions addressed the role of the European Commission, some the role of independent expert bodies and others the role of national courts or civil society.

With regard to the European Commission, it was stressed that whatever future tool might be available, "[s]peaking softly will not be enough to dissuade governments from undermining the rule of law unless they know that the Commission is carrying a big stick that it is not afraid to use".¹⁴¹

Article 7 of the TEU would become more operational if its activation were not made dependent on the necessary political majorities in the European Parliament or the Council of the European Union. In fact, the European Commission can also initiate an Article 7 procedure. This led some to argue that the Commission could act as "a political force in Europe", pointing to safeguards against any politically one-sided action, namely "the cross-party composition of the European Commission College and its practice to decide by consensus".¹⁴²

If the European Commission were to become more outspoken and assume the role of a "political force" in the context of Article 7 of the TEU, there would be an increased need for it to base any related moves on solid evidence. An independent body that is not perceived as being part of the political institutions of the EU machinery needs to provide this evidence. In this context, many experts pointed to the FRA and called for using FRA data, findings and services on a regular basis.¹⁴³ Some experts thought that the agency's current mandate would not be sufficient for it to play an efficient role under the Articles 2 and 7 of the TEU and thus called for a new body similar to the Venice Commission of the Council of Europe.¹⁴⁴ The European Parliament proposed at the end of 2012 that FRA's mandate "should be enhanced to include regular monitoring of Member States' compliance with Article 2 of the TEU, the publishing of annual reports on its findings and presentation of such reports in the European Parliament".¹⁴⁵

In addition to the role of the European Commission and the need for regular and independent expert input, experts also discussed the role of courts in the context of Article 2 values. With Article 7 of the TEU, a non-judicial procedure that political institutions – the European Parliament, the European Commission or the

¹³⁵ *Ibid.*, p. 2.

¹³⁶ *Ibid.*, p. 3.

¹³⁷ See Art. 38 of the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ 2012 L 112, pp. 21–34.

¹³⁸ Alegre, S., Ivanova, I., Denis-Smith, D. (2009), p. 5.

¹³⁹ Hillion, C. (2012), pp. 481–488.

¹⁴⁰ Dawson, M. and Muir, E. (2012), pp. 469–476.

¹⁴¹ Butler, I. (2012).

¹⁴² Hoffmeister, F. (2013).

¹⁴³ See, for example: Pinelli, C. (2012).

¹⁴⁴ See: Müller, J.-W. (2013), p. 25. On FRA's role *vis-à-vis* upholding EU Charter rights, see: Toggenburg, G.N. (2013).

¹⁴⁵ European Parliament (2012b), para. 44.

Council of the European Union – initiate ensures the defence of the EU’s foundational values in the area outside the scope of EU law.¹⁴⁶ Against this background, a group of experts proposed allowing individuals – in an Article 7 scenario – to bring EU Member States before the CJEU even in areas that fall outside the scope of EU law, such as media freedom, an area that stood at the centre of the debate *vis-à-vis* Hungary. This avenue – so the academics argued – could be grounded in EU citizenship and would open up only when an EU Member State was violating Article 2 values.¹⁴⁷

Others discussed access to justice in more general terms. To encourage more filings of fundamental rights relevant cases in areas falling in the scope of EU law, some proposed enabling more people to access courts, known as widening the forms of legal standing. FRA, for example, called for the new upcoming EU framework for data protection to relax legal standing rules to enable organisations acting in the public interest to lodge a complaint.¹⁴⁸ FRA made similar proposals in the context of EU equality law.¹⁴⁹

Finally, 2012 also saw calls for stronger civil society involvement when it comes to upholding European values. Some experts proposed complementing existing mechanisms of ‘vigilance’ within the EU with an intermediary dimension relying “neither on the affected individuals themselves nor on general political institutions, but instead on non-governmental bodies”.¹⁵⁰

Others underlined that: “[n]o judiciary can protect and uphold rights indefinitely in the absence of a healthy political culture where civil liberties and independent checks on executive power are uncontested” and therefore proposed the establishment of a European Civil Liberties Union taking inspiration from the American Civil Liberties Union and providing “a mix of grassroots activism, litigation, educational initiatives and public awareness-raising”.¹⁵¹

Conclusion

The year 2012 saw the EU awarded the Nobel Peace Prize. The award recognised the EU’s role in “the advancement of peace and reconciliation, democracy and human rights in Europe”.¹⁵² In this sense, 2012 was a moment of major pride for the project of European integration. The year, however, also witnessed major socio-economic, political and constitutional situations of crisis. The way in which these situations of crisis played out on the ground had serious implications as regards ensuring that the fundamental rights of all are fully respected and protected.

The most encompassing crisis continued to be socio-economic in nature. It led to high unemployment rates and to an increasing share of the population living in poverty or at risk of poverty. International organisations, the EU and its Member States all took measures to address the excessive debts that characterised many economies in the European Union.

Some EU Member State policy responses to the economic crisis, however, had an adverse effect on the level of social protection for people in the EU. The EU is a community also of social rights, to which the Charter of Fundamental Rights of the European Union testifies most eloquently. Whereas EU Member States retain the competence to legislate in the area of social protection, the Charter arguably invites Member States, as well as the EU itself, to keep social rights – as well as fundamental rights more generally – in mind when addressing the crisis. So far, however, the impact of the Charter appears limited in this regard.

Nevertheless, EU Member States should provide clear and transparent explanations as regards the degree of social protection provided during the economic crisis, underpinned by supporting evidence, thereby building consensus and ensuring social cohesion.¹⁵³ Moreover, the way this socio-economic crisis is handled cannot be seen in isolation from the overall political system: social cohesion within the societies at national level, as well as the political legitimacy of the EU as a whole, have to be taken into account when addressing the crisis.¹⁵⁴

Political discourse in 2012 witnessed a variety of different elements of crisis above and beyond the economic crisis. In various EU Member States and transnationally a ‘crisis jargon’ evolved into potentially divisive rhetoric, especially *vis-à-vis* vulnerable economies, labelling them with a derogatory shorthand.¹⁵⁵

¹⁴⁶ Antpöhler, C., Bogdandy, A.v., Dickschen, J., Hentrei, S., Kottmann, M. and Smrkolj, M. (2012), pp. 489–519.

¹⁴⁷ The “Reverse Solange doctrine”, see *Ibid.*

¹⁴⁸ FRA (2012h).

¹⁴⁹ FRA (2013).

¹⁵⁰ Dawson, M. and Muir, E. (2011), pp. 751–775, 766.

¹⁵¹ Brady, H. (2012). For the role of the civil society in the Fundamental Rights Platform, see Kjaerum, M. and Toggenburg, G.N. (2012), pp. 147–160.

¹⁵² The Nobel Peace Prize (2012); Jagland, T. (2012).

¹⁵³ FRA (2010), p. 26.

¹⁵⁴ Caritas Europa (2013), p. 5.

¹⁵⁵ For example: “Portugal, Ireland, Italy, Greece and Spain”, by some referred to as ‘PIIGS’.



At national level, 2012 witnessed further social polarisation, more open manifestations of discourses tinged with extremism, and to further erosion of trust within and between European societies. Anti-immigrant positions in political discourse have the potential to violate EU anti-discrimination law; actions directed against EU migrants run the risk of infringing upon the right to free movement as laid down in the Treaties and the Charter. A decrease in trust between societies, and in governments in a more general sense, is likely to have negative repercussions for the Common Market and the common Area of Freedom, Security and Justice that are both based on mutual recognition and hence depend on sufficient levels of trust. Vigilance and due scrutiny of developments in this field are essential.

The constitutional crisis that has unfolded in some EU Member States raised the question of what sort of vigilance the EU should exercise. The EU's scope for action hinges upon whether the situation is regulated by EU secondary law or whether it forms part of the 'non-EU-influenced' areas – the "domestic life of Member States"¹⁵⁶ that nevertheless risks affecting the EU as a whole. In the former case, the EU disposes over its day-to-day machinery, including infringement procedures. In the latter case, the EU means are more limited. In this regard, the EU witnessed in 2012 challenges similar to those seen in 2000 and 2004 where the EU's 'constitutional homogeneity' was challenged by single Member States: some observers perceived Hungary and Romania as being at risk of breaching the common values laid down in Article 2 of the TEU.

The experience in 2012 showed that a platform of regular and formalised exchange, such as the CVM, is a helpful tool to address such concerns. This mechanism is only available for Bulgaria and Romania.

The fact that other EU Member States face far less scrutiny of their adherence to Article 2 values made the 'Copenhagen Dilemma' a 2012 catchphrase: European values, including the rule of law and democracy, play a key role in the accession process but appear to move off stage once countries join the EU. Without any form of regular transnational exchange on how best to respect and promote EU values, European debates on single countries appear to be crisis-driven and ad hoc in nature; these discussions therefore run the risk of failing to rely sufficiently on comparative evidence.

In the area of justice, the first EU Justice Scoreboard presented in March 2013 provides comparable information on specific aspects of justice systems across all EU Member States. Whereas this instrument is as such

not meant to address the 'Copenhagen Dilemma', it can be seen as a first step in providing a comparison on the functioning of the justice systems in EU Member States at regular intervals.

To gain a fuller picture of the rule of law in the EU, including dimensions like criminal justice and others, a regular exchange of information and discussion would be needed. The aspiration of those who drafted the wording in Article 2 of the TEU may give guidance. Their ambition was a shared understanding among EU Member States of the "clear non-controversial legal basis" of Article 2 TEU and "the obligations resulting therefrom".¹⁵⁷ Such a common understanding is an aspiration that should guide the Union and its Member States alike. A regular dialogue would raise awareness about the shared European values and fine-tune both their concrete content as well as their scope in the national systems. The basis for such a dialogue is, on the one hand, an independent expert body providing objective and reliable data and analysis and, on the other hand, a solid set of indicators across the different areas listed in Article 2 of the TEU to ensure a comparative and regular assessment.¹⁵⁸

Stormy times might not be the best moment to introduce new procedures and new institutions. They are, however, an ideal moment to take founding values seriously and use them as a normative backbone to provide guidance and security. And, indeed, there is no need to reinvent the wheel: existing mechanisms and standards (see [Chapter 10](#) on 'EU Member States and international obligations') could be pooled to access and use data and analysis through an efficient 'one stop shop'. If this function is exercised by an independent body, the political EU institutions could guarantee that values enshrined in Article 2 of the TEU are addressed in a procedure that is based on evidence and applies to all EU Member States alike.

¹⁵⁷ Presidium of the European Convention (2003), p. 11.

¹⁵⁸ See in this regard, for example: The Hague Institute for Global Justice (2012); FRA (2011).

¹⁵⁶ Wojciech, S. (2010).

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Asylum, immigration and integration

Border control and visa policy

Information society and data protection

Freedom Eggs

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UN & CoE

January

2 February – European Court of Human Rights (ECtHR) provides clarifications in *I.M. v. France* on procedural safeguards in case of accelerated asylum procedures

February

March

April

May

26 June – ECtHR rules in *Kurić and Others v. Slovenia* that certain former citizens of Yugoslavia had been unlawfully ‘erased’ from the Slovenian permanent residence register in violation of Article 8 of the European Convention on Human Rights

June

July

August

21 September – UN High Commissioner for Refugees issues *Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention*

September

22–24 October – Delegation of the European Committee for the Prevention of Torture monitors a deportation operation of foreign nationals by air on a charter flight between London and Colombo

October

November

December

EU

January

February

March

24 April – Court of Justice of the European Union (CJEU) includes housing benefits among the core benefits to be provided to third-country nationals under the long-term residents directive in *Kamberaj*

26 April – CJEU rules in *European Commission v. Kingdom of the Netherlands* that the Netherlands had imposed excessive and disproportionate charges for granting residence permits to third-country nationals who are long-term residents, and to members of their families

April

May

19 June – European Commission adopts the *EU strategy towards the eradication of trafficking in human beings 2012–2016*

June

July

August

5 September – CJEU provides guidance in *Y and Z* on the definition of acts of persecution for religious reasons

27 September – CJEU clarifies in *CIMADE* that a Member State seeking to transfer an asylum seeker under the Dublin II Regulation is responsible for ensuring that asylum seekers have the full benefit of the Reception Conditions Directive until the applicant is physically transferred

September

29 October – European Migration Network presents its study on the impact of the Students Directive 2004/114/EC

October

6 November – CJEU clarifies in the case of *K v. the Bundesasylamt* that Article 15 of the Dublin II Regulation does not allow the transfer of an applicant who is caring for her seriously ill daughter-in-law

November

December

1

Asylum, immigration and integration



The year 2012 saw progress in the negotiation of the European Union (EU) asylum instruments under review, although no new legislation was formally adopted. Solidarity among EU Member States on asylum issues remained limited, with the United States resettling more refugees from Malta than all European states together. Increased attention was devoted to statelessness, an issue that has so far remained unexplored in many EU Member States. Certain protective provisions of the Return Directive, such as the need to provide alternatives to detention or forced return monitoring, are, in practice, only slowly being implemented. As of year-end, 16 EU Member States had national-level action plans on integration, and nine of those monitored integration via the use of indicators.

The issues covered in this chapter and the next, on borders and visa policies, are affected by proposed changes to EU funding in the area of home affairs for the years 2014 to 2020, tabled by the European Commission in 2011 and under negotiation in 2012. The proposal foresees a consolidation of currently existing funds into two major funds – the Asylum and Migration Fund and the Internal Security Fund – and an almost 40 % budget increase to €10.9 billion. The proposed Asylum and Migration Fund will be a core source of funding for many government and non-governmental organisation (NGO) projects implemented in the EU.

1.1. Asylum

The EU's five-year plan in the field of justice and home affairs that covers asylum, known as the Stockholm Programme, required the EU to agree on a Common European Asylum System (CEAS) by the end of 2012. A number of components are required to finalise the CEAS, including the revision of six regulations or directives, two of which were dealt with in 2011, as well as enhanced practical cooperation through the European Asylum Support Office (EASO).

Key developments in the area of asylum, immigration and integration

- The European Parliament and the Council of the European Union reach a compromise following intense negotiations on solutions for most of the provisions of the asylum *acquis* subject to revision, but they leave formal publication of the revised instruments to 2013.
- The European Asylum Support Office (EASO) publishes its first two country-of-origin reports describing the situation in Afghanistan and develops the first EU-wide methodology on country-of-origin information.
- The Court of Justice of the European Union (CJEU) delivers preliminary rulings on five asylum cases in 2012, bringing to 15 the total number of preliminary rulings on asylum matters to date.
- Two more EU Member States adopt national legislation in 2012 on alternatives to detention, leaving only one EU Member State with a mandatory detention policy. The use of detention for immigration-related reasons, however, remains widespread and alternatives to detention are still little used.
- Two more EU Member States introduce return monitoring systems under the Return Directive, bringing the number of countries with an effective return monitoring system to 15.
- The European Commission enhances the European Web Site on Integration, providing a virtual platform to kick-start public discussion, policy initiatives and dialogue amongst stakeholders, in both non-governmental and governmental organisations.
- The Immigrant Citizens Survey, which covered 15 cities in seven EU Member States, finds that most immigrants are interested in voting and that three out of four want to become citizens.

Table 1.1: EU asylum-related instruments to be reviewed by the end of 2012

EU instrument	Original document	Revision
Extension to refugees of the Long-Term Residents Directive	Council Directive 2003/109/EC	2011/51/EU
Qualification Directive	Council Directive 2004/83/EC	2011/95/EU
Dublin II Regulation	Council Regulation (EC) No. 343/2003	pending
Eurodac Regulation	Council Regulation No. 2725/2000	pending
Reception Conditions Directive	Council Directive 2003/9/EC	pending
Asylum Procedures Directive	Council Directive 2005/85/EC	pending

Source: FRA, 2013

In 2012, political agreement was reached on most of the proposed amendments for three of the remaining instruments, although the revisions were not formally completed by year-end.

Informal tripartite meetings attended by representatives of the European Parliament, the Council of the European Union and the European Commission on Eurodac started in December 2012 (see Table 1.1). Separately, a rise in asylum applications by nationals from visa-free western Balkan countries in various EU Member States persuaded the EU to work on introducing a mechanism to ► suspend visa-free travel (see [Chapter 2](#)).

As to the work still needed on the instruments to complete the CEAS, the EU completed negotiations in 2012 on the recast Reception Conditions Directive (2003/9/EC). This directive describes common standards of reception and treatment of asylum seekers. The recast contains a list of grounds for detention and regulates detention conditions. It will have revised provisions on access to the labour market and identification of persons with special needs. Detention of children seeking asylum remains possible; separated children can only be detained under exceptional circumstances.

In December 2012, an agreement was reached between the European Parliament and the Council of the European Union in the revision negotiations for the Dublin II Regulation – the EU’s legal instrument to determine which EU Member State is responsible for examining any given asylum application.

The system of responsibility established by the Dublin Convention in 1990, and which was subsequently incorporated into EU law by Regulation 343/2003 (Dublin II Regulation), has undergone several adjustments. These include introducing a range of protection-related provisions regarding the applicants under this procedure, such as the: right to information; guaranteed effective remedy and free legal assistance; a single ground for, and limited duration of detention; and enlarged reunification possibilities for unaccompanied minors and dependent persons. A mechanism for early warning preparedness and crisis

management – replacing the European Commission’s proposal for a mechanism for suspension of transfers – was introduced in the final compromise.

The European Commission published a further proposal in May 2012, which would amend the existing Eurodac Regulation ((EC) No. 2725/2000). The European Parliament and the Council are still discussing this matter. The current Eurodac Regulation allows Member States to collect and compare asylum applicants’ fingerprints, which makes the application of the Dublin II Regulation possible in practice. In December 2012, the European Parliament voted in favour of giving the police access to Eurodac for law-enforcement purposes, albeit under strict safeguards. The negotiations on detailed rules concerning access to the Eurodac database, as well as other provisions of the regulation, are still on-going.

Negotiations also advanced on the proposed changes to the Asylum Procedures Directive (2005/85/EC), although no agreement was reached by year-end on a number of substantive points, such as safeguards for traumatised persons.

1.1.1. EU solidarity in the field of asylum

EU funding in the field of asylum, which was under review in 2012, is supplemented by other solidarity measures. These include, among others, EASO’s work and a voluntary relocation scheme from Malta.

EASO further expanded its activities in 2012, working not only on the ground, but also on the development of early-warning tools, training materials and quality initiatives. On the operational side, EASO asylum support teams were deployed to Luxembourg in spring 2012, when the country was faced with a substantial increase in asylum applications. Asylum support teams also continued to work in Greece throughout the year.

EASO launched the development of an early warning and preparedness system on asylum, which makes it possible to gather information on asylum flows and assess the preparedness of EU Member States’ asylum

Table 1.2: Relocation from Malta (departures), 2008–2012

Year	Departures to EU Member States and Schengen-associated countries	Departures to the US	Departures to other countries	Total number of departures
2008	0	175	0	175
2009	106	188	0	294
2010	221	244	0	450
2011	164	176	4	344
2012	105	307	8	420
Total (last five years)	596	1,090	12	1,698

Source: United Nations High Commissioner for Refugees Malta, 2013

systems. It managed the European Asylum Curriculum, a core training tool primarily aimed at national asylum officers, and began supporting EU Member States to improve the quality of their asylum systems, starting with the personal eligibility interview.

Member State experiences on age assessments were collected with a view to possibly developing guidance on the matter in 2013. EASO published its first two country-of-origin reports on Afghanistan in July and December 2012,¹ produced the first EU-wide guidance on the methodology for such reports² and published its first annual report on the EU asylum situation.³ Moreover, EASO promoted practical cooperation among EU Member States and civil society organisations, particularly in light of the increased arrivals from Afghanistan and Syria.

The EU continued to implement a voluntary intra-EU relocation scheme for beneficiaries of international protection in Malta in 2012, a pilot project established to support Malta and known as Eurema. However, as Table 1.2 shows, the number of persons relocated to EU Member States and Schengen-associated countries has consistently been smaller than those resettled from Malta to the United States (US). In 2012, in particular, almost three times as many persons left for the US as resettled in a European country.⁴

1.1.2. Case law developments

The CJEU played an increasingly important role in clarifying the meaning of unclear provisions in EU asylum law, issuing six judgments in 2012 on asylum cases referred by national courts for a preliminary

ruling.⁵ The six 2012 decisions brought to 15 the total number of preliminary rulings the CJEU has made on asylum matters (two in 2009, four in 2010, three in 2011 and six in 2012), with an additional seven cases pending at year end. Table 1.3 provides an overview of all CJEU referrals for preliminary rulings and of the decisions taken in the field of asylum to date.

Three of the six decisions taken by the CJEU in 2012 are described in greater detail. In the joined case of *Y and Z*,⁶ the CJEU was called upon to define which acts may constitute persecution on the ground of religion. Specifically, the Court confirmed that the definition of acts of persecution for religious reasons also covered interferences with the freedom to manifest one's faith. It further noted that an asylum seeker cannot reasonably be expected to give up religious activities that can put his or her life in danger in the country of origin.

In *CIMADE*,⁷ the CJEU clarified how to apply the Reception Conditions Directive (2003/9/EC) in transfer requests under the Dublin II Regulation (343/2003). The CJEU held that an EU Member State seeking to transfer asylum seekers under the Dublin II Regulation is responsible, including financially, for ensuring that the asylum seekers have the full benefit of the Reception Conditions Directive until they have physically been transferred. The directive aims at ensuring the application of the articles on human dignity and the right to asylum of the Charter of Fundamental Rights of the European Union. Therefore, EU Member States must also grant minimum reception conditions to asylum seekers awaiting a Dublin II Regulation decision.

¹ EASO (2012a); EASO (2012b).

² EASO (2012c).

³ EASO (2012d).

⁴ For a more comprehensive analysis of the Eurema project, see: EASO (2012e).

⁵ CJEU, Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, 5 September 2012; CJEU, C-277/11, *M.M. v. Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, 22 November 2012; CJEU, C-179/11, *Cimade and GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012; CJEU, C-620/10, *Kastrati*, 3 May 2012; CJEU, C-245/11, *K v. the Bundesasylamt*, 6 November 2012.

⁶ CJEU, Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v. Y and Z*, 5 September 2012, paras. 72 and 80.

⁷ CJEU, C-179/11, *Cimade and GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27 September 2012.

Table 1.3: CJEU case law on asylum

Year		Referring court	Case reference	Legal issue(s)
Referral	Ruling			
Qualification Directive 2004/83/EC				
2007	2009	<i>Raad van State</i> – Netherlands	Case C-465/07, <i>Elgafaji</i> , decision of 17 February 2009	Person eligible for subsidiary protection, assessment of the risk of suffering serious harm
2008	2010	<i>Bundesverwaltungsgericht</i> – Germany	Joined Cases from C-175 to C-179/08, <i>Abdulla</i> , decision of 2 March 2010	Cessation and revocation of refugee status due to change of circumstances
2009	2010	<i>Fővárosi Bíróság</i> -- Hungary	Case C-31/09, <i>Bolbol</i> , decision of 17 June 2010	Right of Palestinians to be recognised as refugees – meaning of receiving protection or assistance by the UN Relief and Works Agency (UNRWA)
2009	2010	<i>Bundesverwaltungsgericht</i> – Germany	Joined Cases C-57/09 and C-101/09, <i>Bundesrepublik Deutschland v. B and D</i> , decision of 9 November 2010	Possible exclusion from refugee status due to membership in an organisation involved in terrorist acts
2010	2010	<i>Korkein oikeus</i> – Finland	Case C-105/10 PPU, <i>Gataev and Gataeva</i> , removal order of 3 April 2010	Possibility for judicial authority to refuse to execute a European Arrest Warrant on persons who have applied for asylum in that state
2011	2012	<i>Fővárosi Bíróság</i> – Hungary	Case C-364/11, <i>El Kott and Others</i> , decision of 19 December 2012	Right of Palestinians to be recognised as refugees – meaning of when protection or assistance by UNRWA has ceased entitling a person to the benefits of the directive
2011	2011	<i>Oberverwaltungsgericht für das Land Nordrhein-Westfalen, Münster</i> – Germany	Case C-563/10, <i>Khavand</i> , removal order of 11 March 2011	Conditions for recognition as a refugee: homosexuality as a reason for persecution
2011	2012	<i>Bundesverwaltungsgericht</i> – Germany	Joined Cases C-71/11 and C-99/11, <i>Bundesrepublik Deutschland v. Y and Z</i> , decision of 5 September 2012	Definition of acts of persecution on account of religion
2011	2012	High Court – Ireland	Case C-277/11, <i>M. M.</i> , decision of 22 November 2012	Subsequent examination for refugee status and for subsidiary protection, right of the applicant to be heard
2012	Pending	<i>Raad van State</i> – Netherlands	Joined Cases C-199, 200 and 201/12, <i>X, Y, Z</i> , pending reference	Persecution on ground of homosexuality: concept of particular social group and interpretation of the discretion requirement
2012	Pending	<i>Conseil d’Etat</i> – Belgium	Case C-285/12, <i>Aboubacar Diakite</i> , pending reference	Whether the reference to a situation of ‘internal armed conflict’ contained in the definition for persons eligible for subsidiary protection must be interpreted in accordance with international humanitarian law (Common Article 3 to the Geneva Conventions)

Year		Referring court	Case reference	Legal issue(s)
Referral	Ruling			
			Asylum Procedures Directive 2005/85/EC	
2010	2011	<i>Tribunal administratif</i> – Luxembourg	Case C-69/10, <i>Samba Diouf</i> , decision of 28 July 2011	Accelerated asylum procedure and right to an effective judicial review
2011	Pending	High Court – Ireland	Case C-175/11, <i>HID and BA</i> , pending reference	Accelerated procedure for applicants of a particular nationality; effective remedy
			Reception Conditions Directive 2003/9/EC	
2011	2012	<i>Conseil d'État</i> – France	Case C-179/11, <i>Cimade</i> , decision of 27 September 2012	Obligation to guarantee asylum seekers minimum reception conditions during the Dublin procedure
			Dublin II Regulation (EC) No. 343/2003	
2008	2009	<i>Kammarrätten i Stockholm</i> , <i>Migrationsöverdomstolen</i> – Sweden	Case C-19/08, <i>Petrosian</i> , decision of 29 January 2009	Start of the period for implementation of transfer of the asylum seeker where an appeal has suspensive effect under national law
2010	2011	Court of Appeal (England & Wales) (Civil Division) – United Kingdom and High Court of Ireland – Ireland	Joined Cases C-411/10 and C-493/10, <i>N.S. and M.E. and others</i> , decision of 21 December 2011	Obligation to transfer an asylum seeker to the Member State responsible and issue of compliance by that Member State, with fundamental rights
2010	2012	<i>Kammarrätten i Stockholm</i> – <i>Migrationsöverdomstolen</i> – Sweden	Case C-620/10, <i>Kastrati</i> , decision of 3 May 2012	Withdrawal of an application for asylum before the Member State responsible for examining that application has agreed to take charge of the applicant
2011	2012	<i>Asylgerichtshof</i> – Austria	Case C-245/11, <i>K</i> , decision of 6 November 2012	Interpretation of the humanitarian clause in the case where a daughter-in-law and her new-born baby are dependent on the asylum seeker
2011	Pending	Court of Appeal (Civil Division) – United Kingdom	Case C-648/11, <i>MA and Others</i> , pending reference	Determination of the responsible Member State when the applicant is an unaccompanied minor
2011	Pending	Административен съд София-град – Bulgaria	Case C-528/11, <i>Halaf</i> , pending reference	Use of the sovereignty clause where Member State legislation does not comply with the EU Charter's right to asylum
2011	Pending	<i>Hessischer Verwaltungsgerichtshof</i> – Germany	Case C-4/11, <i>Federal Republic of Germany v. Kaveh Puid</i> , pending reference	Obligation of Member States to take responsibility where there is a risk of violation of EU Charter rights or procedural guarantees
2011	Pending	<i>Oberverwaltungsgericht für das Land Nordrhein-Westfalen</i> – Germany	Case C-666/11, <i>M and Others</i> , pending reference	Time limits to effect a transfer, meaning of 'absconding' within Dublin Regulation

Note: 2012 decisions in grey.

Source: CJEU database

In *K*,⁸ the CJEU applied the humanitarian clause in Article 15 of the Dublin II Regulation. Ms K submitted an asylum request in Poland and subsequently moved to Austria, where her son was living with his family. Her daughter-in-law was dependent on Ms K's assistance, as she suffered from a serious illness, had a disability and would risk violent treatment at the hands of male members of the family, on account of cultural traditions seeking to re-establish family honour. The CJEU affirmed that where the conditions listed in Article 15 (2) are satisfied, the humanitarian clause must be interpreted as meaning that a Member State that is not responsible for examining an application for asylum pursuant to the criteria laid down in Chapter III of the Dublin Regulation becomes so responsible, even though the Member State responsible under the Dublin criteria did not make a request as required by Article 15 (1).

The European Court of Human Rights' (ECtHR) also made a number of key related rulings, including *I.M. v. France*⁹ on accelerated asylum procedures. The case concerned a Sudanese person from Darfur who, after receiving a removal order, applied for asylum and was therefore automatically processed under an accelerated procedure without sufficient safeguards. The accelerated procedure had much narrower filing windows than the regular procedure, with the time limit for lodging the application reduced, for example, to five from 21 days. Nevertheless, despite the stricter time limit and the fact that he was in detention awaiting removal, the applicant was still expected to adhere to the requirements of the normal procedure – submitting a comprehensive application in French, with supporting documents. While the applicant could have challenged his deportation order before an administrative court, under the accelerated procedure he had only 48 hours to do so, as opposed to the ordinary procedure's two months. The ECtHR concluded that the applicant's asylum application was rejected without the domestic system, as a whole, offering him a remedy concerning his complaint under Article 3 of the European Convention on Human Rights (ECHR), which prohibits torture and inhuman or degrading treatment.

8 CJEU, C-245/11, *K v. the Bundesasylamt*, 6 November 2012.

9 ECtHR, *I.M. v. France*, No. 9152/09, 2 February 2012, paras. 136–160.

FRA ACTIVITY

Presenting EU and Council of Europe law on asylum, borders and immigration

To acquaint legal practitioners who are not specialists in asylum, borders and immigration law with the field, FRA and the ECtHR drafted a joint handbook in 2012 to provide a first point of reference on both EU and ECHR law on these subject areas. The handbook explains how EU law, the ECHR, the European Social Charter and other relevant Council of Europe instruments regulate these issues. The *Handbook on European law relating to asylum, borders and immigration* breaks down the relevant laws by topic, showing where the EU and the Council of Europe legal systems converge and where they differ. The handbook, which follows a 2011 joint publication with the ECtHR on European non-discrimination law, is expected to be released in June 2013.

For more information, see: FRA and ECtHR (2013), *Handbook on European law relating to asylum, borders and immigration*, Luxembourg, Publications Office

1.2. Stateless persons

The latest available Eurostat statistical data show that some 35,000 stateless persons, 200,000 persons of unknown nationality and 325,000 recognised non-citizens – primarily Russian speakers in the Baltics¹⁰ – were staying in the EU in 2011.¹¹ A stateless person is a person who is not considered a national by any state under the operation of its law.¹²

The United Nations High Commissioner for Refugees' (UNHCR) statistics – which are based on the definitions included in the 1954 Convention relating to the Status of Stateless Persons and therefore do not report 'recognised non-citizens' separately – refer to some 450,000 stateless persons in the EU, mainly in Latvia and Estonia.¹³ In 2011, 2,425 stateless persons and 3,095 persons with unknown citizenship applied for asylum in the EU, numbers similar to 2010.¹⁴

10 In Latvia, recognised non-citizens in Latvia, who do not hold Latvian nationality, have a broad set of rights, including permanent residence status, consular protection abroad and are protected from expulsion. In Estonia, most have long-term resident status under Directive 2003/109/EC of 25 November 2003.

11 Eurostat (2013a).

12 UN, 1954 Convention relating to the Status of Stateless Persons, 28 September 1954, Art. 1 (1).

13 UNHCR, Statistical online population database, data extracted on 22 January 2013; database available at: <http://www.unhcr.org/pages/4a013e06.html>.

14 Eurostat (2013b).

The international legal regime on statelessness is composed of two core instruments, the 1954 Convention Relating to the Status of Statelessness (1954 Convention) and the 1961 Convention on the Reduction of Statelessness (1961 Convention). These are integrated at the Council of Europe level by the 1997 European Convention on Nationality and by the 2006 Convention on the avoidance of statelessness in relation to State succession. In June 2012, the ECtHR ruled that it was a violation of the ECHR¹⁵ to 'erase' former citizens of Yugoslavia who were still permanent residents of Slovenia but who had failed to request Slovenian citizenship within a six-month time limit.

To mark the 50th anniversary of the adoption of the 1961 Convention as well as the 60th anniversary of the 1951 UN Refugee Convention, the UNHCR organised a ministerial meeting in Geneva on 7 and 8 December 2011. In the run-up to the meeting, many states pledged to take action to reduce or prevent statelessness.¹⁶

Half of the EU's Member States – **Austria, Belgium, Bulgaria, Denmark, France, Hungary, Luxembourg, the Netherlands, Portugal, Romania, Spain, Sweden** and the **United Kingdom** – as well as **Croatia** committed themselves to taking action in the area of statelessness. Such commitments ranged from considering joining the 1961 Convention (**Belgium, Luxembourg, Portugal and Spain**) to reviewing the implementation of the 1954 Convention (for example, **Austria** and the **United Kingdom**).

Hungary, one of the few states with a formal operational statelessness determination procedure, agreed to share its good practices, tools and experiences with all interested states. In addition, between February and September 2012, in cooperation with UNHCR, Hungary conducted a Quality Assurance and Development Project resulting in the preparation of a handbook for eligibility officers as guidance in the statelessness determination procedure. Moreover, declarations made to Articles 23 and 24 of the 1954 Convention were lifted in July.

Croatia committed to facilitating access to civil registration and documentation to reduce the number of stateless persons and planned to pay particular attention to Roma in this process. The EU committed to supporting UNHCR efforts and to prevent and end statelessness in compliance with the principles of the 1961 Convention. In fulfilment of this commitment, **Bulgaria** and **Portugal** acceded to the 1954 Convention Relating to the Status of Statelessness and the 1961 Convention on the Reduction of Statelessness in March and October 2012, respectively.

¹⁵ ECtHR, *Kurić and Others v. Slovenia* [GC], No. 26828/06, 26 June 2012.

¹⁶ UNHCR (2012a).

In 2012, the UNHCR issued four guidelines covering the definition of stateless persons, statelessness determination procedures, the status of stateless persons at a national level and the right of every child to a nationality.¹⁷ Reports mapping statelessness in the **United Kingdom** as well as in the **Netherlands** and in **Belgium** were published in late 2011–2012; revealing gaps in the identification and protection of stateless persons.¹⁸ In the EU, civil society engagement in the field of statelessness also grew significantly. The European Network on Statelessness (ENS) – a coalition of NGOs and academics – was established in 2012 and by year-end had 64 members, 51 of which were from the EU.¹⁹

EU law does not regulate the acquisition of citizenship, which also includes the acquisition of EU citizenship as enshrined in Article 20 of the Treaty on the Functioning of the EU (TFEU).²⁰ Loss of citizenship, however, may trigger EU law, if this also entails loss of EU rights.²¹ In this context, the provisions of the 1961 Convention on the withdrawal, renunciation and loss of citizenship provide important benchmarks. Half of the EU Member States are party to this convention and more have expressed their intention to ratify it. In addition, at the UN High-level Meeting on the Rule of Law held in September 2012, the EU and its Member States collectively pledged to accede to the 1954 Convention and consider accession to the 1961 Convention.²²

1.3. Immigration and return

1.3.1. Legal migration

The need to facilitate legal migration and mobility in response to the ageing of the EU's population continued to guide migration policy in 2012, despite the EU economic situation. In 2012, the EU made progress on two draft directives in support of more coherent admission systems: the proposed Directive on Intra-corporate Transferees²³ and the Seasonal Workers Directive.²⁴

¹⁷ UNHCR (2012b); UNHCR (2012c); UNHCR (2012d); UNHCR (2012e). For more information, see also: Molnár, T. (2012).

¹⁸ UNHCR (2011a); UNHCR (2011b).

¹⁹ See: www.statelessness.eu.

²⁰ Under para. 1 "Citizenship of the Union shall be additional to and not replace national citizenship"; see also: European Court of Justice (CJEU), C-369/90 [1009] I-4239, *Micheletti*, 7 July 1992; CJEU, C-192/99 [2001] ECR I-01237, *The Queen v. Secretary of State for the Home Department ex parte Kaur*, 20 February 2001.

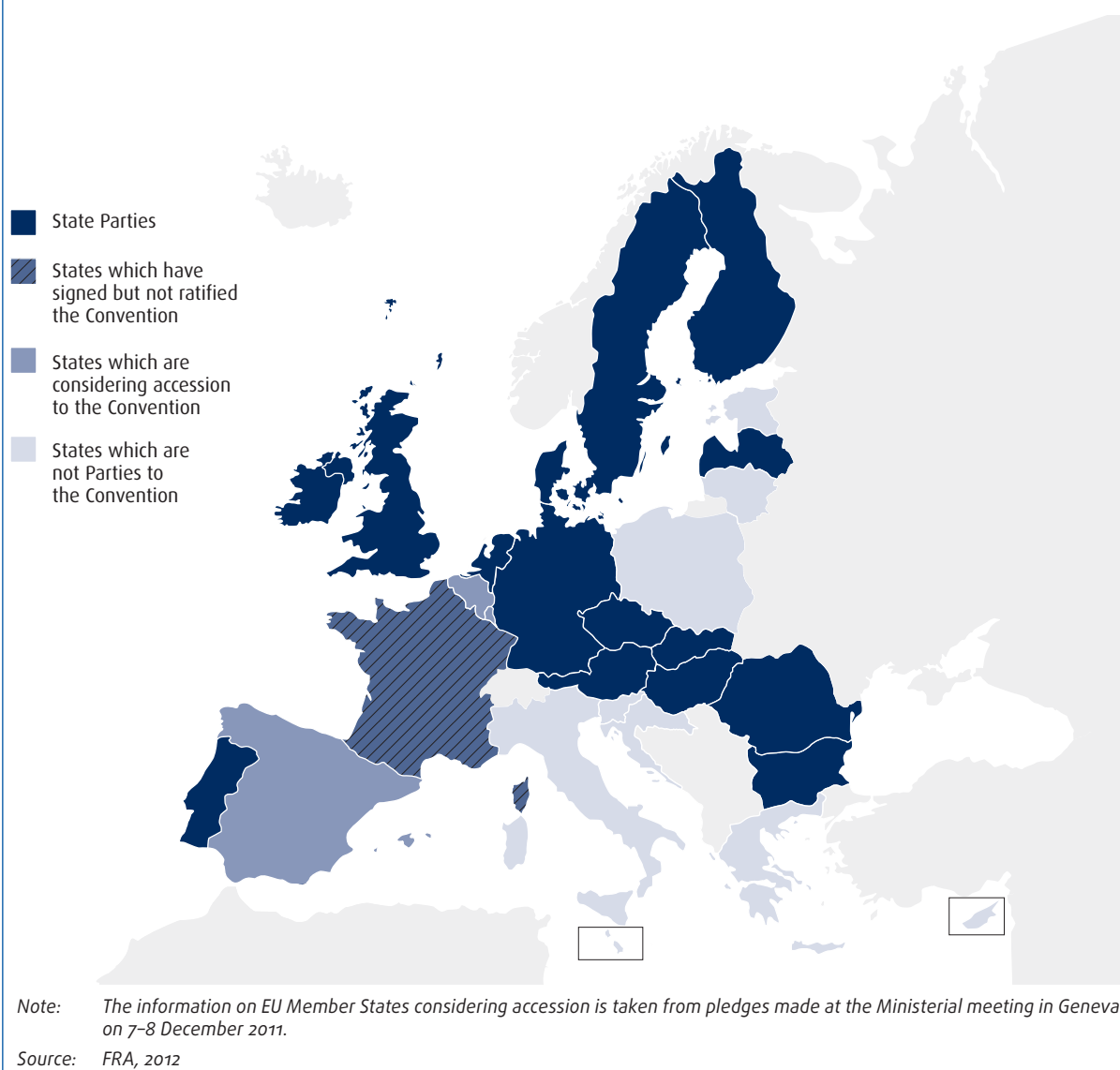
²¹ CJEU, C-135/08 [2010] ECR II-05089, *Rottmann v. Freistaat Bayern*, 2 March 2010, paras. 41–45.

²² Delegation of the European Union to the United Nations (2012).

²³ European Commission (2010a).

²⁴ European Commission (2010b).

Figure 1.1: State Parties to the 1961 Convention on Reduction of Statelessness, EU-27 and Croatia, December 2012



Once adopted, the proposed Directive on Intra-corporate Transferees will facilitate the secondment of key personnel of third-country companies to a branch of the same company in the EU. The Seasonal Workers Directive will enable seasonal workers, upon presentation of a work contract or a binding job offer, to benefit from simplified admission rules. This directive will entitle them to certain minimum standards of working and living conditions and access to a complaint mechanism if employers violate their rights.

The European Commission published a *Green Paper on the right to family reunification of third-country nationals living in the European Union* followed by public consultations on various aspects of the Family Reunification Directive (2003/86/EC).²⁵ Consultation topics included:

²⁵ European Commission (2011a).

the scope of the application of the directive; requirements for family reunification such as eligibility and integration measures; waiting periods and rules for entry and residence of family members; asylum-related questions; fraud; abuse and procedural issues.

Most EU Member States did not advocate reopening the Family Reunification Directive. Many participating international organisations, social partners and NGOs called for guidance on the implementation of the directive as well as better enforcement, including through infringement procedures.²⁶ In follow-up to the consultation, the European Commission decided to convene a group of experts to improve the implementation of the directive and related cooperation among Member States.²⁷

²⁶ European Commission (2012).

²⁷ Council of the European Union (2012a).

The rights of family members are an important aspect of the Blue Card Directive (2009/50/EC), which regulates the entry and residence in the EU of highly qualified third-country nationals. The directive foresees conditions for family reunification and access to the labour market (Article 15) that are more favourable than those applied under the Family Reunification Directive.

At the end of 2012, family members of Blue Card holders in most EU Member States thus benefited from certain advantages over other third-country nationals in acquiring residence and work permits, such as simpler and swifter issuance procedures, exemptions from certain requirements, longer validity of permits, and immediate effect of family reunification and access to employment and more permanent residency.

Specifically, family members may join a Blue Card holder, independent of his/her prospects of obtaining permanent residence and having a minimum period of residence. They are exempt from integration requirements in advance of family reunification and may access the labour market without any time limit. Family members' residence permits, which are to be issued within six months of an application, should be valid for as long as those of the Blue Card holder.

In some Member States, there are no specific rules for family members of Blue Card holders and the same procedures apply as for other third-country nationals under the Family Reunification Directive (for example, **Italy**²⁸ or **Poland**.²⁹ In others, family members of Blue Card holders are entitled to favourable conditions as the following examples illustrate.

The Employment Act in **Bulgaria** explicitly provides that family members of Blue Card holders who usually reside in Bulgaria are equal to Bulgarian nationals in terms of labour, social security and employment rights.³⁰ In **Austria**, a 'red-white-red card plus' grants unlimited access to the labour market.³¹ **France** provides a temporary residence permit allowing unlimited access to the labour market under the 'accompanying family' procedure.³² **Germany** waives pre-entry requirements on age and proof of German language skills for spouses of Blue Card holders and also grants family members of Blue Card holders unlimited access to the labour

market.³³ **Latvia** simplifies the rules concerning work permits³⁴ and does not introduce any waiting period or requirements for family reunification allowing for immediate family reunification. **Croatia** harmonised its provisions of the Aliens Act on the eligibility of entry and residence of third-country citizens for the purposes of employment of highly qualified labour force with the Directive. The harmonised provisions will enter into force on the day Croatia accedes to the EU.

Another public consultation at EU level in 2012 dealt with the migration of international students and researchers. In view of a revision of the two directives on admitting third-country national students and researchers³⁵ foreseen in the 2012 Commission Work Programme, the consultation collected opinions on the future rules on the entry and residence of non-EU researchers, students, pupils, trainees and volunteers. The European Migration Network carried out a study in 2012 that analysed the immigration of international students to the EU. The study concluded that the Student Directive 2004/114/EC led to a certain approximation of national legislation on conditions for admission and stay of third-country national students. However, international students are still facing barriers during and after their studies, most prominently in freely accessing the labour market, in obtaining visa and residence permits, in accessing public healthcare and in the right to be accompanied by family members.

The CJEU considered specific provisions of the Long-term Residents Directive (2003/109/EC) in 2012. In *Kamberaj*,³⁶ the CJEU included housing benefits among the core benefits to be provided to third-country nationals by interpreting Article 11 (4) of the directive in light of Article 34 of the EU Charter on social security and social assistance. In *Commission v. the Netherlands*,³⁷ the CJEU held that the Netherlands had imposed excessive and disproportionate charges for granting residence permits to third-country nationals who are long-term residents, and to members of their families.

1.3.2. Rights of migrants in an irregular situation

EU Member States took further steps to implement the Employers Sanctions Directive (Directive 2009/52/EC).

28 Italy, Legislative Decree No. 108, 28 June 2012.

29 Poland, Act amending the Act on foreigners and the Act on employment promotion and labour market institutions, 27 April 2012.

30 Bulgaria, Employment Act, 1 January 2002, new Art. 74b, amendment from 15 June 2011.

31 Austria, Federal Act concerning the settlement and residence in Austria, para. 41 a; Austria, Migration platform of the federal government (2013).

32 France, Law No. 2011-672 on immigration, integration and nationality, 16 June 2011.

33 Germany, Residence Act, 8 June 2012; Germany, Federal Ministry of the Interior (2012); and Germany, Regulations on the Procedure and the Admission of Foreigners Living in Germany to Engage in Employment, para. 3 (1).

34 Latvia, Cabinet of Ministers, Regulation No. 553 on work permits for third-country nationals, 21 June 2010.

35 Council Directive 2004/114/EC, OJ 2004 L 375/12; Council Directive 2005/71/EC, OJ 2005 L 289/15.

36 CJEU, C-571/10 [2012], *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, 24 April 2012.

37 CJEU, C-508/10, *European Commission v. Kingdom of the Netherlands*, 26 April 2012, para. 70.

The European Commission addressed reasoned opinions to **Belgium, Cyprus, Lithuania, Luxembourg, Finland, Poland, Portugal, Slovenia** and **Sweden** in 2012 for failing to transpose the directive on time. New legislation transposing the directive entered into force in several Member States, including **Cyprus**,³⁸ **Italy**,³⁹ **Poland**,⁴⁰ **Portugal**⁴¹ and **Slovenia**.⁴² In contrast, **Belgium**,⁴³ **Luxembourg** and **Sweden** could not fully complete the legislative process to transpose the directive in 2012.

The Employers Sanctions Directive contains provisions aimed at protecting the rights of migrants in an irregular situation. According to Article 6, EU Member States must make mechanisms available to ensure that migrant workers in an irregular situation may either introduce a claim against an employer for any remuneration due or may call on a competent authority of the EU Member State concerned to start recovery procedures. In addition, Article 13 (4) of the directive envisages temporary residence permits to child victims, as well as to victims of particularly exploitative working conditions who cooperate with the justice system.

In practice, however, these protective provisions have not yet shown tangible results. While not all EU Member States may experience situations of particularly exploitative working conditions to the same degree, of the eight EU Member States that provided information on the number of residence permits issued to victims of particularly exploitative working conditions in 2012 (**Austria**, the **Czech Republic**, **Estonia**, **Greece**, **Hungary**, **Latvia**, **Slovenia** and **Slovakia**), only **Austria** actually issued such permits, providing them to one man and eight women. Even in this case, however, it is unclear if these cases would also have qualified for a temporary residence permit under the 2004 Trafficking Directive (2004/81/EC).

The situation appears to be similar regarding claims to recover any remuneration due to a worker, where successful court cases – such as the one submitted by a worker without a residence permit in the **Netherlands**⁴⁴ – remained rare.

Throughout 2012, the European Commission continued to support EU Member States in the transposition of the Return Directive (2008/115/EC), including by organising two Contact Committee meetings in March and September.

The Commission also launched an organised programme of work on the transposition of the Directive in 2012, including an in-depth analysis of national legislation and bilateral talks with Member States to discuss specific transposition-related issues. These discussions also covered those provisions in the Return Directive that provide for safeguards and rights of migrants in return procedures, such as detention orders and conditions.

The CJEU issued an additional ruling on the Return Directive in December 2012, relating to the imposition of fines as a criminal sanction for irregular stays.⁴⁵ This brings to four the number of cases the CJEU has already ruled on with respect to the Returns Directive, with two requests for a preliminary ruling still pending.⁴⁶ Table 1.4 provides an overview of these cases.

The European Committee of Social Rights (ECSR) adopted a statement of interpretation of Article 17 (2) of the European Social Charter on education for children in January 2012.⁴⁷ The Committee noted that access to education is crucial for every child's life and development and that the child's life would be adversely affected by the denial of access to education. It concluded that States Parties are required, under Article 17 (2) of the Charter, to ensure that children unlawfully present in their territory have effective access to education equal to that of any other child.

Access to healthcare for migrants in an irregular situation continued to be a topic of policy discussions in some EU Member States. In **Spain**, the Foreigners Act was amended in April, limiting equal access to healthcare for undocumented migrants to emergency assistance, healthcare for persons under 18 years of age and care during pregnancy, childbirth and postpartum.⁴⁸

In **Sweden**, the government agreed to provide access to healthcare for migrants in an irregular situation at the same level as for asylum seekers. This covers healthcare which cannot be postponed, including maternity care.⁴⁹ Children will have full healthcare access. Regional governments (*landsting*) may further regulate access on a par with residents. The new rules are expected to enter into force on 1 July 2013.

38 Cyprus, Amendments to the Aliens and Immigration Law (N 100(I)/2012), 6 July 2012.

39 Italy, Legislative Decree No. 109 of 16 July 2012, entered into force 9 August 2012.

40 In Poland, the law implementing the Employers Sanction Directive entered into force on 21 July 2012.

41 Portugal, Law 29/2012, 9 August 2012.

42 Slovenia, Act amending the Prevention of undeclared work and employment act, 18 July 2012.

43 The proposal for an implementing law was approved by the Council of Ministers in May 2012 and was pending before the Federal Parliament at year-end. It was subsequently adopted on 11 February 2013 and published on 22 February 2013. See: Delafortrie, S. and Springael, C. (2012).

44 See: Netherlands, LJN: BX0143, *Sector kanton Rechtbank Zwolle*, 591648 CV 12-1394.

45 CJEU, C-430/11, *Md Sagor*, 6 December 2012.

46 CJEU, C-534/11, *Arslan*, pending; CJEU, C-297/12, *Filev and Osmani*, pending.

47 ECSR (2012).

48 Spain, Royal Decree Act 16/2012, 20 April 2012.

49 Sweden, Decision by the Swedish government, 28 June 2012.



A different discussion on healthcare – though not limited to migrants in an irregular situation – emerged in **Greece**, as it presented amendments to immigration legislation in April 2012, which would allow detention of asylum seekers and possible deportation of third-country nationals who have an infectious disease or belong to a group at high risk of infection. Such groups included sex workers, people who inject drugs, people ‘who live in conditions which do not fulfil the elementary rules of hygiene’ and people at risk ‘because of their country of origin’. There was no assessment as to whether a person posed an actual public health risk.⁵⁰ UNAIDS stressed the discriminatory nature of the new immigration law and called for its immediate review.⁵¹

In addition, in May 2012 the Greek Police disclosed the names and photographs of HIV-positive sex workers, some of whom were in an irregular situation, after having arrested them and subjected them to compulsory HIV testing. This raised a number of concerns about breaches of confidentiality of personal health data, imposition of criminal charges based on HIV status and discrimination. The Greek Ombudsman said that publishing the photos and personal data of the HIV positive women “not only violates rights inextricably linked to the respect of human dignity and status of the patient but is also an ineffective means of prevention and protection of public health”.⁵² On 20 April 2012, the European Commission asked the European Centre for Disease Prevention and Control (ECDC) to carry out a risk assessment mission on the HIV situation in Greece. FRA participated as an observer.⁵³

Some EU Member States took steps related to the detection and apprehension of migrants in an irregular situation. **France** abolished the ‘crime of solidarity’, the legal provision that sanctioned natural and legal persons who lent support to irregular migrants. The revised Article L622-4 of the Code of entry and stay of foreigners and asylum rights, as modified by Law No. 2012-1560, excludes the criminalisation of humanitarian and non-profit based acts.⁵⁴

To facilitate the apprehension of migrants in an irregular situation, the **United Kingdom** Border Agency introduced a database to allow anyone who knows of a person in an irregular situation to report that person to the authorities.⁵⁵

The criminalisation of migrants in an irregular situation raised concern within the Council of Europe and the UN Office of the High Commissioner for Human Rights (OHCHR).⁵⁶ To reduce the risk that apprehensions of migrants in an irregular situation unduly affect fundamental rights, FRA prepared guidance.

FRA ACTIVITY

Safeguarding fundamental rights when apprehending irregular migrants

In collaboration with EU Member States, in 2012 FRA drew up a list of dos and don’ts in 2012 to avoid disproportionate interference with a person’s human rights when detecting and apprehending migrants in an irregular situation. The operational guidance – developed together with immigration law enforcement authorities in EU Member States, relevant ministries, the European Commission and other stakeholders – follows up work on migrants in an irregular situation carried out by FRA in 2011.

Migrants in an irregular situation should not, for example, be targeted for apprehension at or near medical facilities when seeking medical assistance. Nor should such establishments be required to share migrants’ personal data with immigration law enforcement authorities for potential return purposes.

FRA presented the guidance on 26 September to the Council Working Party on Integration, Migration and Expulsion (Expulsion Formation) and on 28 September to the Contact Committee of EU Member State representatives, which the European Commission convenes to discuss issues related to the Return Directive.

For more information, see: FRA, Apprehension of migrants in an irregular situation – fundamental rights considerations, available at: http://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf

The EU’s anti-trafficking strategy

In June 2012, the European Commission adopted the *EU Strategy towards the eradication of trafficking in human beings 2012–2016*. The strategy suggests a number of measures to be implemented in five priority areas, namely (continued on p. 26):

⁵⁰ Greece, Law 4075/2012, Art. 59, paras. 1–2.

⁵¹ UNAIDS (2012).

⁵² Greece, Ombudsman (2012).

⁵³ ECDC (2012).

⁵⁴ France, Law No. 2012-1560 on detention for verification of the right to stay in France and amending the offence of aiding an illegal entry or stay, in order to exclude humanitarian and non-vested interest actions, 31 December 2012, Art. 8–12.

⁵⁵ The Telegraph (2012).

⁵⁶ Council of Europe, Commissioner for Human Rights (2012); see also expert meeting ‘Human Rights at International Borders: Exploring Gaps in Policy and Practice’ organised by the OHCHR, in cooperation with the Global Alliance Against Traffic in Women (GAATW), available at: <http://www.ohchr.org/EN/Issues/Migration/Pages/OHCHRExpertconsultationExploringGapsinPolicyandPractice.aspx>.

Table 1.4: CJEU case law on the Return Directive

Year		Referring court	Case reference	Legal issue(s)	Follow up by EU Member States
Referral	Ruling				
2009	2009	Административен съд София – град – Bulgaria	Case C-357/09 PPU, <i>Kadzoev</i> , decision of 30 November 2009	Concept of ‘reasonable prospect of removal’ – Maximum duration of detention when the execution of a removal decision was suspended – Conditions for immediate release	The 2009 Law on foreigners allows extension of detention beyond six months if the person poses a threat to national security or public order. Bulgaria prepared legislative proposals according to which national security will as such not be a ground for prolonging the period of detention.
2011	2011	Corte d'appello di Trento – Italy	Case C-61/11 PPU, <i>El Dridi</i> , decision of 28 April 2011*	Prison sentence for illegally staying third-country nationals in the event of refusal to obey an order to leave the territory of a Member State	A fine substituted the prison sentence: Article 14 (5-ter) (5-quater) of the Italian Immigration Law was amended by Law Decree, No. 89 of 23 June 2011, [converted into law by Law No. 129 of 2 August 2011, which entered into force on 6 August 2011].
2011	2011	Cour d'appel de Paris – France	Case C-329/11, <i>Achughbadian</i> , decision of 6 December 2011	National legislation repressing illegal stays by criminal sanctions – Previous exhaustion of coercive measures referred to in Article 8 of the Return Directive – third-country national staying illegally in that territory with no justified ground for non-return	The Court of Cassation, Criminal Chamber (opinion of 5 June 2012, No. 9002) and the Court of Cassation, Civil Chamber (judgments Nos. 959 and 965 of 5 July 2012) recognised that the application of custody on remand (<i>garde à vue</i>) for the sole reason of irregular stay was not anymore allowed. Detention for verification of the right to stay in France (maximum 16 hours) was introduced by Law No. 2012-1560 on detention for verification of the right to stay in France and amending the offence of aiding an illegal entry or stay, in order to exclude humanitarian and non-vested interest actions of 31 December 2012 (Article L 611-1-1 CESEDA)
2011	2012	Tribunale di Rovigo – Italy	Case C-430/2011, <i>Md Sagor</i> , decision of 6 December 2012**	National legislation repressing illegal stay by means of a fine which may be replaced by an expulsion order – Home detention order – Compatibility as long as the enforcement of that order comes to an end as soon as it is possible to physically transport the individual concerned out of that Member State	In a similar case (No. 2560/2012 filed with the registry on 17 December 2012) the Tribunal of Monza, Criminal Chamber acquitted the accused of the crime of illegal stay under Article 10bis of the Italian Immigration Law, in that such conduct was no longer to be considered a crime under the Italian legislation. The case is now pending with the Court of Cassation.

Year		Referring court	Case reference	Legal issue(s)	Follow up by EU Member States
Referral	Ruling				
2011	Pending	Nejvyšší správní soud – Czech Republic	Case C-534/11, <i>Arslan</i> , pending reference (hearing held on 7 November 2012)	Detention for the purpose of removal – Grounds for detention in case the foreign national applied for international protection	-
2012	Pending	Amtsgericht Laufen – Germany	Case C-297/12, <i>Filev and Osmani</i> , preliminary reference of 3 August 2012	National legislation providing that expulsions/deportations have unlimited effect, unless the person concerned lodges an application within a certain time limit – Criminal sanctions related to expulsion/deportation which occurred more than five years prior to re-entry	-
2012	2012	Bundesgerichtshof – Germany	Case C-83/12 PPU, <i>Minh Khoa Vo</i> , decision of 10 April 2012 (This case, which is on the Visa Code, also relates to the Return Directive)	Notion of illegal stay within the scope of application of the Visa Code – National legislation under which assisting illegal immigration constitutes a criminal offence in cases where the persons smuggled hold visas which they obtained fraudulently	-

Notes: 2012 decisions highlighted in grey.

* Following this judgment, a number of pending references lodged in the course of 2011 by Italian courts to the CJEU concerning the same legal matter were withdrawn by the submitting judges and then struck off the list: Case C-113/11, *Cherni*, removal order of 26 May 2011; Case C-50/11, *Enegor*, removal order of 21 June 2011; Case C-60/11, *Mrad*, removal order of 21 June 2011; Case C-63/11, *Austine*, removal order of 21 June 2011; Case C-156/11, *Music*, removal order of 21 June 2011; Case C-140/11, *Ngagne*, removal order of 29 June 2011; Case C-43/11, *Samb*, removal order of 6 July 2011; Case C-187/11, *Vermisheva*, removal order of 6 July 2011; Case C-120/11, *Kwando*, removal order of 13 July 2011. An identical preliminary reference was declared inadmissible as the facts of the case were not sufficiently clear: Case C-364/11, *Abdallah*, inadmissibility order of 8 September 2011.

** The same preliminary issues examined in the *Sagor* case were also raised in other preliminary references submitted by Italian judges to the CJEU in the course of 2012; however, they were declared inadmissible as the facts of the case were not sufficiently clear: Case C-73/12, *Ahmed Ettaghi*, inadmissibility order of 4 July 2012, Case C-74/12, *Abd Aziz Tam*, inadmissibility order of 4 July 2012 and Case C-75/12, *Majali Abdel*, inadmissibility order of 4 July 2012.

Source: CJEU database

- identifying, protecting and assisting victims of trafficking;
- stepping up the prevention of trafficking in human beings;
- working to increase prosecution of traffickers;
- enhancing coordination and cooperation among key actors and policy coherence;
- increasing knowledge of, and effective response to, emerging concerns related to all forms of trafficking in human beings.

In October, the Council of the European Union endorsed these areas, and invited EU Member States to implement these recommendations.⁵⁷ EU agencies mentioned in the strategy (EASO, European Police College, European Institute for Gender Equality, Europol, Eurojust, FRA and Frontex) were invited to further coordinate their work in the field of trafficking in human beings, in partnership with Member States, EU institutions and other parties. EU agencies were also invited to develop relevant best practice guides to assist Member States in tackling the problem.

EU Action Plan on unaccompanied minors

In September 2012, the Commission adopted the mid-term report on the implementation of the Action Plan on unaccompanied minors 2010–2014. The report shows how a common EU approach has enabled more effective cross-cutting policy reflections on how to address the situation of children, regardless of their migratory status. Challenges still remain, such as the collection of comparable data to properly assess the situation, age assessment, family tracing, funding or cooperation with third countries.

1.3.3. Alternatives to detention

EU law allows for the detention of a migrant in an irregular situation to implement a return decision, provided certain conditions are fulfilled. While detaining irregular migrants remains a common EU practice, it is one that raises concerns among international organisations and civil society actors.⁵⁸

According to Article 15 of the Return Directive, deprivation of liberty is only lawful in order to prepare a return or removal, in particular where there is a risk of absconding or fear that the migrant would otherwise jeopardise his or her removal.

In cases where no such risk exists, migrants should be allowed to continue to stay and live in the community. Where such a risk is found to exist, authorities must examine, under Article 15 (1) of the Return Directive read in conjunction with Recital 16, whether such a risk can be effectively mitigated by resorting to non-custodial measures – known as alternatives to detention – before issuing a detention order.

The UNHCR issued revised guidelines in 2012 on the detention of asylum seekers and refugees. The revised guidelines stress that asylum seekers should in principle not be detained, and outlines the exceptional circumstances under which deprivation of liberty can occur, provided certain safeguards are in place.⁵⁹

Alternatives to detention, which reduce the need for custodial measures, include a wide set of measures, such as residence restrictions, the duty to report regularly to the police or release on bail. Custodial measures led to violent incidents again in 2012, resulting, for example, in the death of a Malian in **Malta** in June⁶⁰ and a protest in Igoumenitsa, **Greece** in October.⁶¹

Efforts to reduce child detention continued. In its 2012 report to the Government of the **Netherlands**, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recommended, for example, that the Dutch authorities avoid, as far as possible, detaining families with children. If, in exceptional circumstances, detention cannot be avoided, its period should not exceed the maximum duration provided by law, that is, 28 days.⁶²

Croatia introduced several alternatives to detention in its national legislation in 2012, namely the duty to surrender documents, to deposit sureties, designated residence and regular reporting.⁶³

At the end of 2011, **Cyprus** also added the possibility to apply alternatives to detention to its national law, without, however, defining any concrete alternative.⁶⁴ **Malta** is the only remaining EU Member State to maintain a mandatory detention policy, allowing for the application of alternatives to detention only when release is considered.

The **Netherlands** launched four small-scale pilot projects, which will be evaluated in 2013. These include, for example, imposing an obligation to report to the Aliens Police in combination with the provision of

⁵⁷ Council of the European Union (2012b).

⁵⁸ See, for example: Council of Europe, CPT (2012a); UNHCR (2012f); Human Rights Watch (2012); Pro Asyl (2012).

⁵⁹ UNHCR (2012f).

⁶⁰ Council of Europe, Parliamentary Assembly (PACE) (2012).

⁶¹ Platform for International Cooperation on Undocumented Migrants (PICUM) (2012).

⁶² Council of Europe, CPT (2012b).

⁶³ Croatia, Aliens Act, 1 January 2012, Art. 136 (3).

⁶⁴ Cyprus, Aliens and Migration Law, 2011, Art. 18ΠΣΤ (1).



Table 1.5: Types of alternatives applied by EU Member States, EU-25 and Croatia

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

Notes: **Bold/blue** indicates changes that occurred in 2012. Cyprus and Malta not included: Cyprus does not name any alternatives in its law and in Malta, alternatives operate only when release is considered.

* Concerns minors whose guardianship is entrusted to an agency or an individual (Article 115.2.3, Lithuanian law on legal status of aliens, Dutch Aliens Circular para. A6/5.3.3.3).

** In the United Kingdom, the duty to surrender documents is imposed on all individuals who do not have permission to stay and is therefore not an alternative to detention per se.

Sources: Austria, Alien Police Act 2005, Section 77 (3) (release on bail introduced on 1 July 2011); Belgium, Aliens Act, Art. 74 (5)–74 (8); Bulgaria, Law on Foreigners, Art. 44 (5); Croatia, Aliens Act, Art. 136/3; Czech Republic, FORA, Art. 123; Denmark, Danish Aliens Act, Art. 34 (1) (i) (ii) (iii) and (iv) as well as Art. 34 (2)–(5), and Art. 34a (1); Estonia, Obligation to Leave and Prohibition on Entry Act, Section 10; Finland, Finnish Aliens Act 301/2004, Art. 118, 119 and 120; CESEDA, Art. L 552-4, L 552-4.1 (electronic monitoring introduced in 2011 for persons caring for a child) and L 552-5; Germany, Residence Act (AufenthG) at Sections 50 (5) and 61; Greece, Law 3907/2011, Art. 30 (1) in conjunction with Art. 22 (3); Hungary, Admission and Right of Residence of Third-Country Nationals Act II, Sections 62 and following; Ireland, Immigration Act 2004, Section 14 (1), and Immigration Act 2003, Section 5 (4); Italy, Law Decree No. 89 of 23 June 2011 (Official Gazette No. 129 of 23 June 2011), Art. 3 (1) (d) (2); Latvia, Immigration Law, Section 51 (3); Lithuania, Law of the Legal Status of Aliens Act, Section 115.2; Luxembourg, Loi du 1^{er} juillet 2011 modifiant la loi du 29 août 2008 sur la libre circulation des personnes, amendements to Art. 120 and 125; Netherlands, Aliens Act, Art. 52 (1), 54 and 56–58 as well as Aliens Circular, para. A6/1.1 and para. A6/5.3.3.3; Poland, Act on Aliens, Art. 90.1 (3); Portugal, Law 23/2007 of 4 of July, Art. 142 (1); Romanian, Aliens Act, Art. 102–104 (applicable to tolerated persons); Slovakia, Act No. 404/2011 of 21 October 2011 on residence of foreigners (in force since 1 January 2012); Slovenia, 2011 Aliens Act, Art. 73, 76 and 81 (2); Spain, Act 4/2000, Art. 61; Sweden, Aliens Act, 2005:716, Chapter 10, Sections 6 and 8; United Kingdom, Immigration Act 1971, Schedule 2, paras. 4, 21, 22 and 29–34 and for electronic monitoring see Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s. 36

assistance by the Repatriation and Departure Service to aliens obliged to return who are staying with reliable private individuals or organisations. Another pilot consists in the payment of a deposit by or on behalf of

aliens obliged to leave the country, which is refundable upon verification that the alien has left EU territory.⁶⁵

⁶⁵ Netherlands, Parliament, Second Chamber (2011). See also: Netherlands, National Ombudsman (2012); and Netherlands, Government (2012).

Slovakia's new Law on Residence of Foreigners came into force in January 2012, introducing two alternative measures to detention with designated residence and the possibility of financial sureties.⁶⁶

Table 1.5 provides an overview of the types of alternatives provided for in national law, although some countries also use other additional alternatives.⁶⁷

The inclusion of alternatives to detention in national legislation is not itself a guarantee that alternatives are used in practice. Several EU Member States do not yet collect statistics on alternatives to detention, which makes it difficult to assess the extent to which they are actually used. In other Member States, 2012 statistics were not available at the time this report went to print.

Table 1.6 provides a comparison between persons subjected to detention and those subjected to alternatives to detention in the eight EU Member States for which this information could in part be collected, as well as in **Croatia**. In all these countries, detention is more common than the use of alternatives. While some EU Member States (for example **Austria**, the **Czech Republic** or **Romania**) make regular use of alternatives, this does not appear to be the case in others.

1.3.4. Forced return monitoring

Third-country nationals who do not fulfil the conditions for entering or staying in the EU receive a return decision, which the authorities may enforce if it is not complied with voluntarily. Frontex-coordinated operations alone returned 2,110 persons in 2012, roughly the same as in 2011 when 2,059 persons were returned.

The Return Directive requires EU Member States to establish an effective return monitoring system. Fundamental rights concerns during forced returns may relate, for example, to the treatment of returnees by the authorities enforcing return, returnees' access to information, legal remedy and communication, holding conditions and safeguards for vulnerable persons.

Effective monitoring benefits both the person to be removed as well as the removing agency.⁶⁸ It reduces the risk of ill-treatment by law enforcement authorities during the return process, provides feedback on the operation, increases accountability, helps to de-escalate tensions, identifies and verifies possible infringements immediately and can thus reduce the need for litigation and improve public acceptance of returns.

For the first time, the Committee for the Prevention of Torture (CPT) examined the treatment of foreign nationals during a removal operation by air. A CPT delegation monitored a charter flight between London

Table 1.6: Number of detained migrants and of persons to whom alternatives to detention were imposed in 2012, eight EU Member States and Croatia

Country	Persons in detention	Persons to whom alternatives were applied	Period covered	Number includes asylum seekers	Number includes detention in transit zones
AT	4,561	924	2012	Yes	No
BG	685	15	Jan-June	Yes	No*
CZ	152	59	Jan-June	No	Yes
LT	234	1	Jan-June	No	No
LV	207	34	2012	No	No
RO	668	206	2012	No	No
SI	359	21	2012	No	No
SK	72	1	Jan-June	No	No
HR	784	6	2012	No**	No

Notes: * Indicates that figures on detention do not include asylumseekers but figures on alternatives may.

** Indicates that the total number of detained persons includes asylum seekers, but the number of persons to whom alternatives to detention were imposed excludes asylum seekers.

Source: National statistics, 2013

⁶⁶ Slovakia, Law No. 404/2011 on Residence of Foreigners that alters and amends certain laws, 21 October 2011.

⁶⁷ FRA (2012), pp. 50–51.

⁶⁸ *Ibid.*, p. 51 and following.

and Colombo, Sri Lanka, in the context of an ad hoc visit to the **United Kingdom** from 22 to 24 October.⁶⁹

Establishment of effective monitoring systems in 2012

Systems of forced return monitoring can be effective and operational if they cover all activities undertaken in respect of removal, from pre-departure to arrival and reception in the destination country, and if they are carried out on an on-going basis by an organisation which is independent of the authorities enforcing return.⁷⁰

In late 2011 and 2012, two EU Member States, **Belgium** and **Cyprus**, introduced an independent monitoring system by law.⁷¹ **Belgium** designated the General Police Inspection service, albeit without structural funding, whereas **Cyprus** named no specific entity, instead appointing the Ombudsman for this function who demanded that additional staff be appointed to her Office as a prerequisite.

Portugal designated the Aliens Service (*Serviço de Estrangeiros e Fronteiras*) as the authority responsible for return monitoring.⁷² The Aliens Service cannot, however, be considered independent, as it is the same agency implementing returns.

Romania consolidated the monitoring system in 2012 following amendments to the Aliens Act adopted in the second half of 2011. In **Poland**, the Helsinki Foundation for Human Rights was invited to accompany a return flight in a pilot project supported by an EU fund which supports Member States in improving return management, the Return Fund. In **Estonia**, following an agreement with the Red Cross made in 2011, return monitoring became operational. In August 2012, the return monitor at Düsseldorf airport in **Germany** and the Serbian National Preventive Mechanism cooperated in monitoring all phases of a return flight from Germany to Belgrade, except for the flight itself, according to information from the *Diakonie Rheinland-Westfalen-Lippe e.V.*

As illustrated in Figure 1.2, at the end of 2012, legislation or cooperation agreements between the authorities and the monitoring body in 15 Member States, including the **United Kingdom** which is not bound by the Return Directive, provide for independent return monitoring. These either provide a legal basis for monitoring returns in general or designate a specific institution for this function. EU Member States where monitoring is designated to an agency belonging to the branch of government

responsible for the return (**Portugal**,⁷³ **Sweden**⁷⁴ and Member States where monitoring is carried out on an ad hoc or informal basis (such as pilot projects in **Finland**⁷⁵ and **Poland**⁷⁶)) have not been included among these 15 EU Member States.

In **Slovakia**, independent monitoring by NGOs is possible by law,⁷⁷ although no mechanism is in place and independent monitoring has not yet been performed systematically in practice.⁷⁸

Six EU Member States – **Bulgaria**, **France**, **Greece**, **Italy**, **Slovenia** and **Spain** – have no effective monitoring system and **Ireland** is not bound by the Return Directive. Although National Human Rights Institutions (NHRIs) may monitor the pre-departure phase in detention centres where persons pending return are held, as, for example, in **Belgium**, **Bulgaria** and **Portugal**, they generally do not act as forced return monitoring bodies.

Bulgaria proposed that national and international NGOs and the Ombudsman regulate the mandatory monitoring of removals, but these amendments to the Aliens Act were still pending at the end of 2012.

Despite a legal provision for external monitoring of removals introduced in **Greece** in 2011, it has not yet issued the joint ministerial decision needed to establish the monitoring system by the Ombudsman and NGOs.⁷⁹ In the context of supervision of the execution of the judgment *M.S.S. v. Belgium and Greece* by the Council of Europe Committee of Ministers, the Greek authorities were invited to update the Committee on the implementation of the procedure of forced returns in light of the ECHR requirements.⁸⁰

In **Spain**, the setting up of an independent monitoring system is not mentioned in the Aliens Act. The Ombudsman in its capacity as the National Preventive Mechanism (NPM) monitored for the first time the

⁷³ *Ibid.*

⁷⁴ Sweden, Aliens Act 2005:716, 29 September 2005.

⁷⁵ In Finland, the law only provides for monitoring the legality of forced returns by the Parliamentary Ombudsman, the Chancellor of Justice and the Ombudsman for Minorities. There is also an ad hoc monitoring system, based on an oral agreement between the Municipal Police of Helsinki and the District Court of Helsinki. A person working at the District Court has on some occasions accompanied actual removals by aircraft.

⁷⁶ Information provided by the Helsinki Foundation for Human Rights, November 2012.

⁷⁷ Slovakia, Law No. 404/2011 on Residence of Foreigners that alters and amends certain laws, 21 October 2011, Section 84 (8).

⁷⁸ Statement by the Human Rights League, 10 September 2012.

⁷⁹ Greece, Law 3907/2011, 26 January 2001, Art. 23 (6).

⁸⁰ Decision adopted at the 1144th Human Rights meeting, 4–6 June 2012; see also Council of Europe, Committee of Ministers (2012).

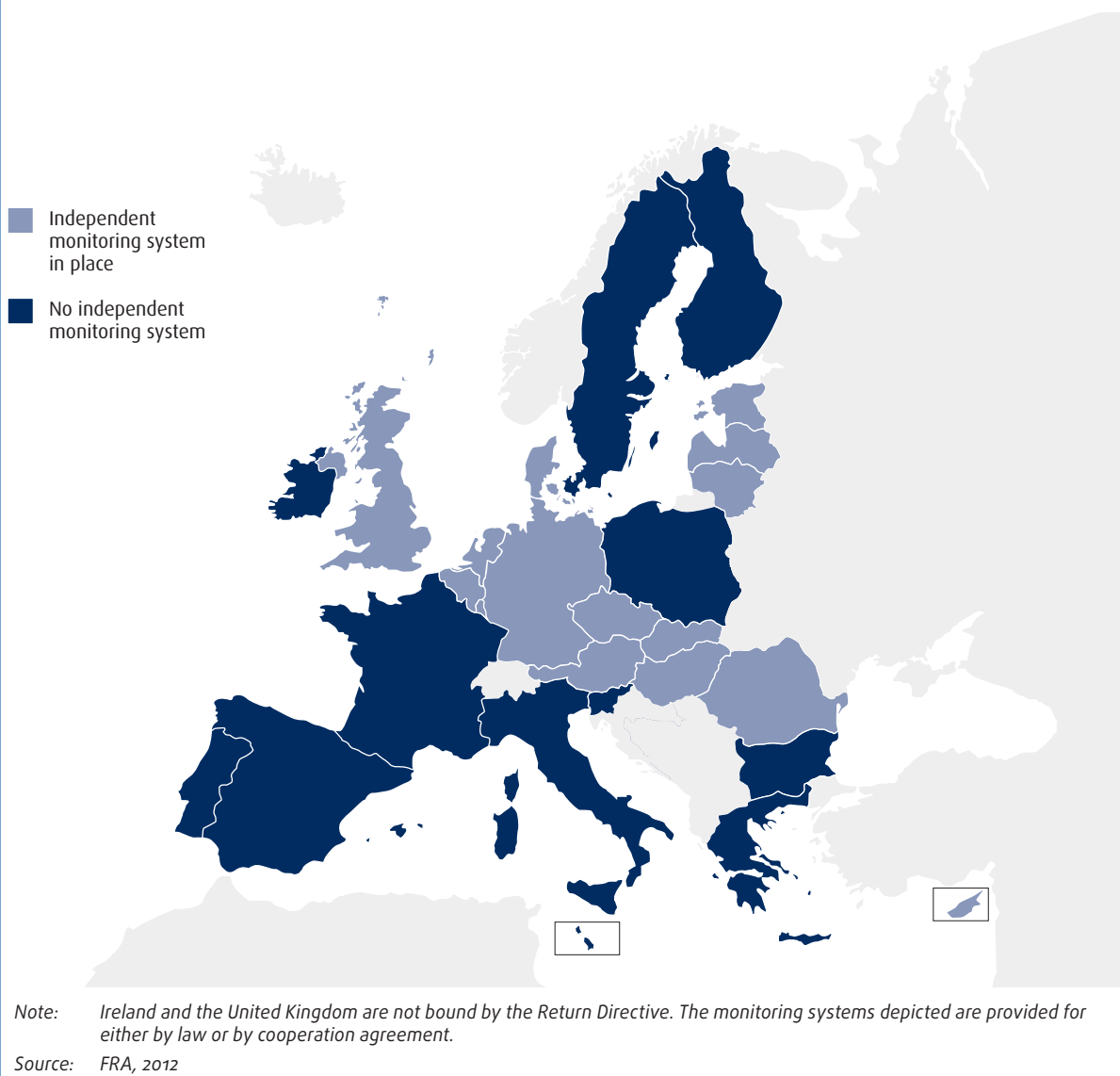
⁶⁹ Council of Europe, CPT (2012c).

⁷⁰ See: FRA (2012), p. 51 and following.

⁷¹ Belgium, Royal decree of 19 June 2012 on forced return, 19 June 2012; Cyprus, Aliens and Immigration Law, 2011, Art. 180F–8ΠΘ.

⁷² Portugal, Law 29/2012, 9 August 2012.

Figure 1.2: Independent forced return monitoring systems, EU-27



embarkation of two Frontex-coordinated return flights in 2012, organised by **Spain** and the **Netherlands**.⁸¹

Not all EU Member States that participate in Frontex-coordinated return operations have, according to FRA's assessment, an effective system for return monitoring (**Finland, Italy, Spain** and **Sweden**). In 2012, three of these Member States organised 14 of a total 38 joint return operations (**Italy, Spain** and **Sweden**).

Monitoring systems are operational to different degrees. In a minority of EU Member States, the monitors accompany the actual return flight. Of the 15 Member States where FRA considers that effective monitoring systems are in place, only seven (**Austria, Belgium, Czech Republic, Denmark, Estonia, Luxembourg** and

the **United Kingdom**) monitored a return flight in 2012, while monitoring in the other Member States remained limited to the pre-departure process. In **Lithuania**, the Red Cross plans to join a return flight in 2013.⁸² Member States with monitors who are not independent from the authority implementing the removal (**Portugal** and **Sweden**) also carry out in-flight monitoring.

The European Return Fund provides funding for monitoring forced returns. Seven Member States made use of this option in 2012: among these in two Member States (**Sweden** and **Slovakia**), authorities enforcing the return carry out the monitoring; in three others (**Lithuania, Latvia** and **Romania**), the Fund fully or significantly finances the monitoring projects which in practice remained limited to pre-return procedures.

81 Spain, Ombudsman (2012).

82 Lithuania, Lithuanian Red Cross Society (2012).

Promising practice

Providing independent return monitoring

Even those EU Member States not subject to the Return Directive and thus not required to establish an effective return monitoring system recognise the benefits of such monitoring. In the **United Kingdom**, Her Majesty's Inspectorate of Prisons (HMIP), for example, monitors forced return operations on a regular basis. In 2011 and 2012, this included four monitoring missions where full-time independent HMIP monitors accompanied returnees from immigration removal centres to the point of disembarkation in the destination country, conducting inspections in line with prescribed guidelines, called *Expectations*. HMIP also reviews records of previous flights and other documentation relevant to the particular flight in order to identify and suggest improvements.

Removals were generally well managed and most detainees treated respectfully, according to the findings, which are always published. Issues raised included a lack of interpretation, unnecessary use of force, the lack of specific training on the use of force in the confined space of an aircraft, some use of offensive and racist language by escort staff and aggressive behaviour by home country officials on arrival at destinations.*

In addition, Independent Monitoring Boards (IMBs) are involved in return monitoring in an effort to ensure proper standards of care and decency. IMBs comprise members of the general public appointed by the Secretary of State to carry out independent monitoring work a few days per month on a voluntary basis. The volunteers have unrestricted access to detention facilities and can talk in private to any detainee they wish to.

The IMB regularly publishes reports on issues of concern. IMBs traditionally focus on conditions in immigration removal centres and some short-term holding facilities at airports and, for some years, have monitored removals up to boarding at the point of departure from the United Kingdom. From 2010, in response to an invitation from the Home Secretary to monitor enforced removals by charter flights, the volunteers accompanied detainees on six return flights to various destinations as part of a feasibility study, which is expected to become a routine part of their monitoring activities in the near future.

For more information, see: www.justice.gov.uk/about/hmi-prisons/inspection-and-appraisal-criteria and www.justice.gov.uk/about/hmi-prisons and www.justice.gov.uk/about/imb

*Information provided by the HMIP in January 2013 as well as HMIP, Detainees under escort: Inspection of escort and removals to Afghanistan, 25-26 June 2012

While the proposed regulation establishing the Asylum and Migration Fund as of 2014 does not explicitly mention return monitoring, building such capacities might be eligible for community funding if understood to support the setting up of "systems ensuring smooth return procedures".⁸³

Reporting

Reporting monitoring results ensures the accountability of government agencies and the credibility of the monitoring organisation. Four of the seven EU Member States where independent monitoring organisations were fully operational in 2012 publish the findings of the monitoring missions, at least in part (the **Czech Republic**, **Germany**, the **Netherlands** and the **United Kingdom**). In other Member States, the findings are shared internally with the institutions involved in the return.

Reporting takes place on a regular, usually annual, basis. The publicly available reports describe the actors involved in the return, the return procedures and any shortcomings observed during the return process. Such reports raise recurrent problem areas, including, for example:

- the lack of means necessary to reach the final destination in the return country;
- food and water pending return; the repetition of procedures delaying return;
- avoidable last-minute cancellations; the deportation of sick and suicidal persons;
- the separation of families; lack of time allowed for packing by the authorities;
- the detention of returnees together with criminal offenders; purposefully not informing the person of the imminent return, for example to avoid complicating the return;
- language difficulties;
- children who are overburdened emotionally and must translate for their parents in a way that is not age appropriate;
- elderly persons who are often destitute or sick leaving behind their families;

⁸³ European Commission (2001), Art. 11.

- returns to crisis countries; return of unaccompanied children to other Member States where they may be considered adults; and
- the return of Roma who fear discrimination in the destination country.

Promising practice

Reporting on monitoring results

The Forum for Monitoring Forced Returns at the Airport in Frankfurt (*Forum Abschiebungsbeobachtung am Flughafen Frankfurt am Main*, FAFF) meets quarterly, bringing together authorities, UNHCR and civil society initiatives. The Forum reports annually on the number of returns, reasons for aborting returns and the behaviour of police during the enforcement. The report describes general problem areas, which are illustrated by individual cases and includes accounts of the responses provided by the monitors and the institutions responsible for a specific return.

Source: FAFF Annual Reports, available at: <http://diakonie-hessen-nassau.de/arbeitsfelder/migration-flucht-und-interkulturelle-arbeit/abschiebungsbeobachtung.html>

Standards used

The EU does not yet have detailed binding standards to use for monitoring return processes. Such common standards among observers, as well as joint training of operational and monitoring teams would help ensure the responsibility of the actors involved in the return, including police, immigration, escorts and authorities in stop-over and destination countries.⁸⁴ At present, observers rely on experience, paying attention to the procedure, facilities and the treatment of the returnee in line with human dignity.

A number of EU Member States have developed specific guidelines and checklists, some of which are in the public domain (**Austria**, **Germany**, the **Netherlands**,⁸⁵ and the **United Kingdom**).⁸⁶

Several Member States refer to legal and policy documents, among them the Council Decision on Organisation of Joint Flights for Removals (2004/573/CE), International Air Transport Association (IATA)

Guidelines for the Removal of Inadmissible Passengers,⁸⁷ the Council of Europe Twenty Guidelines on Forced Return,⁸⁸ the CPT standards on the deportation of foreign nationals by air,⁸⁹ the study on Best Practice in Return Management by the International Organization for Migration (IOM),⁹⁰ the Frontex Best Practices for the Removal of Illegally Present Third-country Nationals⁹¹ and the Frontex Code of Conduct.⁹²

In the context of returning trafficked persons, the basic principles of return prepared by the OSCE/ODIHR in 2012 may contain guidance to consider when monitoring returns of third-country nationals in general, especially in the field of post-return monitoring, including by the authorities in the country of origin.⁹³

1.4. Integration of migrants

1.4.1. Key developments

In line with the Europe 2020 strategy for inclusive growth to improve opportunities in employment, education and social inclusion for all people residing in the EU,⁹⁴ the European Commission launched several initiatives to address issues of migrant integration and support monitoring and actions at EU and national level.

In 2012, the European Web Site on Integration was thus revamped.⁹⁵ This site offers a virtual platform to kick-start public discussion, policy initiatives and dialogue amongst stakeholders, both in non-governmental and governmental organisations. The website has a collection of examples of good integration practices from EU Member States and an online library of key legislation, policy papers and conference reports.⁹⁶

The Immigrant Citizens Survey, co-funded by the European Commission, explored experiences across the EU of integration policies by first-generation migrants who have resided in an EU Member State for more than one year, in the fields of employment, languages, political and civic participation, family reunification, long-term residence, citizenship and the link between participation and positive settlement outcomes. The survey, published in 2012 by the King Baudouin

⁸⁴ Council of Europe, European NPM Project (2012).

⁸⁵ See, for example, inspection form of the Dutch Supervisory Commission on Repatriation, available at: www.commissieterugkeer.nl/publicatie/toezichtkader.

⁸⁶ For more information, see: 'Expectations: inspection criteria' for police custody, prisons, immigration detention, children and young people, Military Corrective Training Centre and court custody, available at: www.justice.gov.uk/about/hmi-prisons/inspection-and-appraisal-criteria.

⁸⁷ IATA, Control Authorities Working Group (2002).

⁸⁸ Council of Europe, Committee of Ministers (2005).

⁸⁹ Council of Europe, CPT (2003).

⁹⁰ IOM (2005).

⁹¹ Frontex (2009).

⁹² Frontex (2011).

⁹³ OSCE/ODIHR (2012).

⁹⁴ Europe 2020, Youth on the Move, available at: http://ec.europa.eu/youthonthemove/index_en.htm.

⁹⁵ Launched in 2009, see: http://europa.eu/rapid/press-release_IP-09-593_en.htm.

⁹⁶ See the European Web Site on Integration, available at: http://ec.europa.eu/ewsi/en/Integration_in_other_policy_areas.cfm.

Foundation and the Migration Policy Group,⁹⁷ covered 15 cities in seven EU Member States (**Belgium, France, Germany, Hungary, Italy, Portugal and Spain**), and 7,473 immigrants born outside the EU participated.

The data showed that for most of the immigrants surveyed, job security remains the major issue and that 25–33 % of immigrants feel overqualified for their jobs. Yet “participating in the labour market is one of the best and most concrete ways to integrate in society”, according to the European Agenda for the Integration of Third-Country Nationals.⁹⁸

The Immigrant Citizens Survey further highlights that immigrants generally tend to speak more languages than the average person in their new country, which demonstrates the potential contributions of migrants to a diverse and inclusive EU. They also highly value the language courses offered in several Member States as part of national action plans on migrant integration (see Table 1.7. for more information on such plans).

The Immigrant Citizens Survey shows that in the area of political and civic participation, most immigrants are interested in voting, particularly at a local level, and that three out of four participants want to become citizens of the country in which they reside. Nonetheless, immigrants’ broader participation in civic life varies depending on the city and participation in an immigrant NGO depends heavily on the local and national context.

The number of people who acquired citizenship in an EU Member State rose 4 % to 810,000 in 2010 from 2009, the first time that this number exceeded 800,000, according to the 2012 Eurostat report *Population and social condition*.⁹⁹

France, Spain and the **United Kingdom** awarded the lion’s share, together granting 57 % of all new EU citizenships. By including **Germany and Italy**, which award the next largest numbers of new citizenships, these five EU Member States account for about 78 % of the EU total. The overall EU increase was due to a rise of 55 % to 44,000 new citizenships that Spain awarded in 2010 over 2009.¹⁰⁰

Youth remains one of the priorities of integration policies. Although discrimination is prohibited by law in EU Member States, national and international reports show that young people with a migrant background and other socially excluded young people experience discrimination on a regular basis in most EU Member States.¹⁰¹

The European Commission highlighted that migrant youth should be a priority within the domains of education and employment, since they are vulnerable and more exposed to discrimination.¹⁰² Social inclusion of young people with emphasis on those with a migrant background is also a central feature of the November 2012 conclusions on the participation and social inclusion of young people of the Council of the European Union and of the Representatives of the Governments of the Member States.¹⁰³

Because integration primarily takes place at the local level, it is important to involve a variety of stakeholders, such as NGOs, trade unions and other actors to support service delivery and facilitate integration in day-to-day life.

An expert conference on the integration of immigrants, held by the **Cyprus** Presidency in November 2012, focused on the role of local and regional authorities in shaping and implementing national integration policies. By the end of 2012, however, only six EU Member States (**Denmark, Estonia, Finland, Italy, the Netherlands and Sweden**) had ratified the Council of Europe’s Convention on the Participation of Foreigners in Public Life at Local Level.¹⁰⁴

The *Good Ideas from Successful Cities: Municipal Leadership in Immigrant Integration*¹⁰⁵ report shares good practices from cities in eight EU Member States (**Austria, France, Germany, Ireland, the Netherlands, Portugal, Spain** and the **United Kingdom**) on topics including city charters, programmes of inclusion, participation and belonging, as well as welcoming communities. A tendency to cut costs and reduce social benefits for third-country nationals is observed at the national level. In some cases courts were asked to intervene. As an illustration, the Federal Constitutional Court in **Germany** issued two rulings concerning social inclusion issues. On 10 July 2012, the court declared unconstitutional the exclusion of foreign citizens with a humanitarian residence status from federal parental benefits for child-raising and care.¹⁰⁶ A few days later, the same court also ruled the Asylum Seekers Benefit Act unconstitutional, because it did not comply with the constitutional right to a minimum standard of living.¹⁰⁷ Under that act, asylum seekers and tolerated persons received an allowance 40 % below the standard rate. This last judgment is particularly relevant not only because it clearly affirms that all persons residing in

¹⁰² European Commission (2011c).

¹⁰³ Council of the European Union (2012c).

¹⁰⁴ Council of Europe, Convention on the Participation of Foreigners in Public Life at Local Level, CETS No. 144, 1992.

¹⁰⁵ Maytree Foundation and Cities of Migration (2012).

¹⁰⁶ Germany, Federal Constitutional Court, Karlsruhe/1 BvL 2/10, 10 July 2012.

¹⁰⁷ Germany, Federal Constitutional Court, Karlsruhe/1 BvL 10/10, BvL 2/11, 18 July 2012.

⁹⁷ King Baudouin Foundation and Migration Policy Group (2012).

⁹⁸ European Commission (2011b).

⁹⁹ Eurostat (2012).

¹⁰⁰ *Ibid.*, pp. 1 and 2.

¹⁰¹ European Commission and Cypriot EU Presidency (2012).

Germany have a right to a dignified minimum existence, but because it argues that migration-policy considerations may not be used to undermine human dignity. The court said: "Migration-policy considerations of keeping benefits paid to asylum seekers low to avoid incentives for migration [...] may generally not justify any reduction of benefits below the physical and socio-cultural existential minimum."¹⁰⁸

1.4.2. National action plans on integration

The European Integration Forum, a platform that involves stakeholders at all levels to discuss integration issues, stressed that one of the policies favouring integration is the adoption of "clear policy documents, e.g. clear national action plans on integration".¹⁰⁹ Action plans on a national level identify responsible authorities and hence should increase accountability, easing the monitoring phase.

Table 1.7 provides an overview of the 16 EU Member States that have adopted and are implementing one or more action plans. The absence of a national action plan may indicate that migrant integration is not on the political agenda due to the low number of migrants living in any given Member State, as may be the case in **Hungary** and **Lithuania** where, according to Eurostat, foreigners represent, respectively, only 0.1 %, and 1.2 % of the population.¹¹⁰

Other Member States may have adopted strategies or policy documents that, while addressing integration, fall short of being national action plans (for example **France**,¹¹¹ **Poland**¹¹² or the **United Kingdom**¹¹³). At year-end **Greece** had not yet adopted its plan.¹¹⁴

Most EU Member States adopted their action plans between 2006 and 2010, although the **Czech Republic** and **Estonia** published their first plans in 2000. By and large, the plans cover a period up to 2014, with the exception of the **Bulgarian** and **Estonian** plans, which run to 2020.

With regard to target groups, the action plans listed in Table 1.7 take two different approaches. Some Member states (**Austria, Estonia, Finland, Germany, Ireland, Latvia, Luxembourg, Portugal** and **Spain**) aim to be all-encompassing, including nationals and non-nationals, as well as first- and second-generation migrants. Other Member States concentrate specifically on third-country nationals (**Cyprus, Czech Republic, Netherlands** and **Romania**) or on very specific groups, such as refugees in **Bulgaria**.¹¹⁵ **Austria** and **Germany** specifically emphasised migrant women in their 2012 policies.¹¹⁶

Some action plans target a thematic area of integration, such as employment or education. The **Slovak** action plans, for example, concern migration policies in the field of employment.¹¹⁷ Action plans might also cover a number of thematic areas, such as those in **Austria**,¹¹⁸ **Cyprus**,¹¹⁹ **Germany**,¹²⁰ **Latvia**¹²¹ and **Spain**.¹²²

Apart from programmes on pre-school and primary school education, existing action plans rarely address the second generation of migrants, that is the immediate descendants of migrants. This gap is particularly significant since, in absolute terms, a substantial part of the EU population is composed of second-generation migrants, with some six million persons aged 25–54 born in the EU with one parent born abroad, and with more than four million with both parents born abroad.¹²³ To illustrate this, the rate of early school-leavers among persons with a foreign background is more than four percentage points higher than for those with native-born parents, a 2011 Eurostat study revealed.¹²⁴

The European Council's Common Basic Principles for Immigration Integration Policy in the EU from November 2004 refers to integration as "a dynamic two-way process of mutual accommodation by all immigrants and residents of the Member States".¹²⁵ Therefore, programmes should not only address migrants themselves but also the wider community, enhancing interactions and intercultural contacts between the majority population and migrant groups.

¹⁰⁸ *Ibid.*, available at: www.escri-net.org/node/364979.

¹⁰⁹ European Integration Forum (2010).

¹¹⁰ Eurostat (2011a).

¹¹¹ France, Ministry of Interior (2012), pp. 111–119.

¹¹² In Poland, on 31 July 2012, the government accepted the document called: 'The Polish migration policy: current state of play and further actions'.

¹¹³ United Kingdom, Department for Communities and Local Government (2012).

¹¹⁴ The drafting of the National Strategy for Third-Country Nationals' Integration 2012–2015 by the Ministry of Interior is still on-going. From early 2012 to April 2012, the Ministry of Interior (General Secretariat for Population & Social Cohesion) held a public consultation on the draft with different stakeholders, including civil society.

¹¹⁵ Bulgaria, State Agency for Refugees (2011).

¹¹⁶ Austria, Federal Ministry for the Interior (2012), p. 29 and following; Germany, Federal Ministry of Interior (2011).

¹¹⁷ Slovakia, Ministry of Labour, Social Affairs and Family of the Slovak Republic (2012).

¹¹⁸ Austria, Federal Ministry for the Interior (2012).

¹¹⁹ Cyprus, Ministry of Interior, Special Experts Committee on Integration (2010).

¹²⁰ Germany, Federal Office for Migration and Refugees (2011), pp. 19, 28 and 30.

¹²¹ Latvia, Ministry of Education and Science (2012).

¹²² Spain, Ministry of Employment and Immigration (2011).

¹²³ Eurostat (2011a).

¹²⁴ *Ibid.*, p. 125.

¹²⁵ Council of the European Union (2004), p. 19.

A number of Member States (**Austria**, the **Czech Republic**, **Estonia**, **Finland**, **Germany**, **Ireland**, **Latvia**, **Luxembourg**, **Portugal**, **Romania**, **Spain** and **Sweden**) thus include programmes with majority involvement in their action plans or policy papers. Such involvement may encompass activities including: increasing awareness for diversity, initiating intercultural contacts, addressing attitudes among the wider public or providing intercultural training and awareness-raising in the public administration, relevant institutions and support services.

The absence of a plan does not necessarily mean that the countries in question have not implemented any programme aiming at migrant integration. In September 2012, **Croatia**, for example, adopted a Croatian language curricula for asylum seekers, refugees and persons under subsidiary protection who are older than 15.¹²⁶ The curriculum aims at providing the migrants with sufficient language competence to enable them to enrol in secondary schools and adult education programmes. The learning programme is expected to last from six to nine months, and will also include Croatian culture and history. In **Greece** initiatives have been taken by municipalities and civil society actors.

In spite of its small number of migrants, **Lithuania** enacted measures to promote communication with the host society, funded by the European Fund for the Integration of Third-country Nationals (EIF) and the European Refuge Fund (ERF).¹²⁷ **SOS Malta** in partnership with the Maltese Public Broadcasting Services and the Institute of Maltese Journalists developed Media InterAct Project, a 12-month project aimed at presenting the diversity and integration of migrants in the Maltese media.¹²⁸

Promising practice

Launching recognition of qualifications procedures before arrival

A German Federal Law on the Recognition of Foreign Qualifications (*Berufsqualifikationsfeststellungsgesetz*)¹²⁹ came into force on 1 April 2012. This law makes it possible for third-country nationals, including potential labour migrants, to seek recognition of their qualifications before arriving in **Germany**.

The main feature of this new provision is the possibility of claiming a qualification assessment within a specific time frame, generally three months. If formal recognition is denied, the provision makes it possible to obtain instead a positive written assessment of skills and qualifications. It also allows non-formal qualifications, such as work experience, to count towards requirements if the formal foreign qualification does not satisfy the authorities.

For more information, see: Internationale Handelskammer (IHK) – Foreign Skills Approval (FOSA), available at: www.ihk-fosa.de

1.4.3. Monitoring integration

Indicators have increasingly become part of international and national policy making, including the assessment of migrant integration. In March 2011, following the Zaragoza Declaration adopted by the EU JHA Council in April 2010,¹³⁰ Eurostat published a pilot study¹³¹ examining the availability and quality of data from agreed harmonised sources to calculate migrant integration indicators in the four areas identified by the Zaragoza Declaration: employment, education, social inclusion and active citizenship.

Table 1.8 lists what are known as the Zaragoza indicators, which are designed to monitor policy outcomes rather than processes towards those outcomes (such as action plans).¹³² In line with what was stated in the Council Conclusions of 3–4 June 2010 and the European Agenda for the Integration of Third-Country Nationals (COM(2011) 455 final), in 2012 the European Commission launched a pilot project to further explore the development of European indicators for monitoring the results of integration policies. The project, carried out by the consortium of the European Services Network (ESN) and

¹²⁶ Croatia, Decision on the Curricula of Croatian language for asylum seekers, asylees and persons under subsidiary protection who are older than 15 to be able access the secondary educational system and the system of education of adults, 5 September 2012.

¹²⁷ The list of the projects financed by the EIF is available at: <http://esf.socmin.lt>.

¹²⁸ See also: <http://sosmalta.org/mediainteract>.

¹²⁹ Germany, Federal Law on the Recognition of Foreign Qualifications, 6 December 2011.

¹³⁰ Council of the European Union, European Ministerial Conference on Integration (2010).

¹³¹ Eurostat (2011b).

¹³² See also: FRA (2011).

Table 1.7: National-level action plans on integration, 16 EU Member States

	Year of the first edition	Responsible ministry	Target group	Focus area(s)	Are some actions also targeting the majority population?
AT	2010	Ministry of Interior, and State Secretariat for integration	EU nationals and third-country nationals	Education, recognition of foreign qualification, children, women in the labour market	yes
BG	2008	Ministry of Labour and Social Policy	Third-country nationals (focus on refugees)	Language courses, professional training and orientation	no
CY	2010	Ministry of Interior	Third-country nationals	Information, employment, housing, education, health, culture, civic participation	no
CZ	2000	Ministry of Interior	Third-country nationals	Language, employment, orientation in society, relations between immigrants and majority society, migrants' awareness of rights and duties with adaptation-integration courses, language courses, pre-departure information packs	yes
DE	n.a	Federal Ministry of Interior	EU nationals and third-country nationals	Education, professional training, healthcare, language courses, social inclusion	yes
EE	2000	Ministry of Culture	EU nationals and third-country nationals	Educational and cultural integration, social and economic integration and legal and political integration	yes
ES	2007	Ministry of Employment and Social Security and Secretary General of Immigration and Emigration, General Director of Migrations	EU nationals and third-country nationals	Employment, education, healthcare, social integration, housing, children and youth	yes
FI	n.a	Ministry of Employment and the Economy	EU nationals and third-country nationals (focus on newly arrived migrants)	Training and support, employment/labour market	yes
IE	2008	Office for the Promotion of Migration Integration, Department of Justice and Equality	EU nationals and third-country nationals	Language courses, education, professional training	yes

	Year of the first edition	Responsible ministry	Target group	Focus area(s)	Are some actions also targeting the majority population?
LU	2006	Ministry for Family and Integration, and Luxembourg Reception and Integration Agency	EU nationals and third-country nationals	Employment, language courses, education, social inclusion	yes
LV	2007	Ministry of Culture	EU nationals and third-country nationals, including non-citizens	Education, cultural, social and economic integration, and legal and political integration	yes
NL	n.a.	Minister of Social Affairs and Labour	Third-country nationals	Integration agreement	no
PT	2007	High Commission for Immigration and Intercultural Dialogues	EU nationals and third-country nationals	Language courses, employment, professional training, housing	yes
RO	n.a.	Ministry of Administration and Interior	Third-country nationals	Education, language courses	yes
SE	2008/2010	Ministry of Employment	Third-country nationals with focus on newly arrived migrants	Anti-discrimination, language courses, housing, entrepreneurs, diversity; employment	yes
SK	n.a.	Ministry of Interior, Ministry of Labour, Social Affairs and Family	Foreign workers	Employment	no

Note: n.a. = not available.

Source: FRA, 2012; based on the national action plans on integration listed at the end of this chapter

Table 1.8: Zaragoza indicators

Policy area	Indicators
Employment	<ul style="list-style-type: none"> • employment rate • unemployment rate • activity rate
Education	<ul style="list-style-type: none"> • highest educational attainment (share of population with tertiary, secondary and primary or less than primary education) • share of low-achieving 15-year-olds in reading, mathematics and science • share of 30-to-34-year-olds with tertiary educational attainment • share of early leavers from education and training
Social inclusion	<ul style="list-style-type: none"> • median net income – the median net income of the immigrant population as a proportion of the median net income of the total population • at risk of poverty rate – share of population with net disposable income of less than 60 % of the national median • the share of population perceiving their health status as good or poor • ratio of property owners to non-property owners among immigrants and the total population
Active citizenship	<ul style="list-style-type: none"> • the share of immigrants that have acquired citizenship • the share of immigrants holding permanent or long-term residence permits • the share of immigrants among elected representatives

Source: *European Ministerial Conference on Integration, Zaragoza, 15 and 16 April 2010*

Migration Policy Group (MPG), based its work on a pilot study, presented by Eurostat in 2011,¹³³ and reporting on the availability and quality of the data necessary.

These proposed common indicators of migrant integration can be drawn from data currently available from the EU Labour Force Survey (EU-LFS), the EU Statistics on Income and Living Conditions (EU-SILC) and Eurostat's migration statistics. In consideration of the UN OHCHR framework on Human Rights Indicators,¹³⁴ the Zaragoza indicators refer to actual results on the ground – the extent to which rights holders perceive that they are able to enjoy their rights.

Table 1.9 provides an overview of policy areas for which the 16 Member States that have adopted action plans have developed indicators. As most indicator systems have only recently been developed, data collection to populate these indicators is not yet systematic. In future, FRA intends to review information and data collected in the various areas for which Member States have drawn up indicators.

Eight EU Member States (**Austria**,¹³⁵ the **Czech Republic**,¹³⁶ **Estonia**,¹³⁷ **Germany**,¹³⁸ **Ireland**,¹³⁹ the

Netherlands,¹⁴⁰ **Romania**¹⁴¹ and **Sweden**¹⁴² have developed indicators to monitor integration and **Finland**¹⁴³ is introducing them. A variety of data sources such as national statistics, registry and micro-census data, as well as surveys including different migrant groups (EU nationals, non-EU nationals, first- and second-generation migrants), which provide data by country of citizenship and country of birth are used to populate these indicators. However, the availability and quality of data varies depending on the Member States and the area covered. Some EU Member States that do not have any public monitoring are debating the use of indicators (**Latvia** and **Portugal**).¹⁴⁴

Spain has not introduced formal indicators, but uses annual reports published by an independent research institute, the Centre for Sociological Research annually.¹⁴⁵ The development of indicators is also discussed in Member States which do not (yet) have an action plan, as is the case for example in **France** and **Greece**.¹⁴⁶

¹³³ Eurostat (2011a).

¹³⁴ UN, OHCHR (2012).

¹³⁵ Austria, Federal Ministry for the Interior (2012).

¹³⁶ Czech Republic, Research Institute for Labour and Social Affairs (2011).

¹³⁷ Estonia, Ministry of Culture, Praxis Centre for Policy Studies (2012).

¹³⁸ Germany, Federal Commissioner for Migration, Refugees and Integration (2011), p. 198 and following.

¹³⁹ Ireland, Office of the Minister of Integration (2008).

¹⁴⁰ Bijl, R. and Verweij, A. (eds.) (2012).

¹⁴¹ Romania, Ministry of Internal Affairs (2011); Romania, Government Decision No. 498/2011 to approve the National Strategy on Immigration for 2011–2014.

¹⁴² Sweden, Ministry of Integration and Gender Equality (2009).

¹⁴³ In Finland, the indicators have not yet been formally accepted. Information provided to Franet by the Ministry of Employment and the Economy on 16 August 2012.

¹⁴⁴ For Latvia, see: Latvia, Cabinet of Ministers (2011); for Portugal, see: Portugal, High Commission for Immigration and Intercultural Dialogue (2010).

¹⁴⁵ Cea D'Ancona, M.A., Valles Martínez, M.S. (2011).

¹⁴⁶ France, Ministry of Interior, General Secretariat of Immigration and Integration (2010).

Table 1.9: Indicators used for integration monitoring in EU Member States with migrant integration action plans, 16 EU Member States

EU Member State	Indicators	Education	Employment	Social inclusion	Citizenship	Political participation	Civic/social participation	Subjective indicators	Security	Programmes
AT	Yes	x	x	x			x	x	x	
BG	No									
CY	No									
CZ	Yes	x	x	x	x					
DE	Yes	x	x	x		x	x		x	
EE	Yes	x	x	x		x	x			
ES*	No		x							x
FI	being introduced	x	x	x	x			x		
IE	Yes	x	x	x	x	x	x			
LU	No									
LV*	No	x	x		x	x				
NL	Yes	x	x	x					x	
PT	No									
RO	Yes	x	x	x						x
SE	Yes	x	x							x
SK	No									

Note: * Spain and Latvia have not yet implemented indicators but have already started to monitor integration in the identified areas.

Source: FRA, 2012, based on data sources including national statistics registry and micro-census data

Some of the national indicators go much further than the Zaragoza indicators. The German indicators,¹⁴⁷ for example, include the intercultural openness of public institutions, memberships to clubs and associations, social transfers, public health or the dynamics of bi-national marriages. **Austria, Germany** and the **Netherlands** collect data on safety-related issues such as crime rates, also in relation to racism.

Table 1.9 shows that education, employment and social inclusion are covered the most whereas active citizenship, political as well as civic/social participation or subjective indicators on perceptions and attitudes, e.g. on perceived discrimination, are much less covered.

The focus of the monitoring systems lies in measuring results indicators to give evidence of people's actual experiences. Process indicators, in contrast, are used to a lesser extent to monitor the successful implementation of integration programmes such as participation rates

and the evaluation of, for example, language courses in **Sweden**¹⁴⁸ or cultural orientation courses in **Romania**.¹⁴⁹

In general terms, most data available on employment and education identifies barriers that continue to exist but also some positive developments. The second **German** report on integration indicators, for example, showed that young persons with a migrant background obtain university graduation certificates more often than earlier migrant generations.¹⁵⁰ In **Austria**,¹⁵¹ twice as many migrant students with highly educated mothers go to disadvantaged schools than non-migrant students, with the emphasis on German language identified as the main barrier.

More data should become available within the next years as monitoring systems are put in place and the reporting periods for the implementation of the action plans come to an end in several EU Member States.

¹⁴⁸ Sweden, Ministry of Employment (2012).

¹⁴⁹ Romania, Ministry of Internal Affairs (2011).

¹⁵⁰ Germany, Federal Commissioner for Migration, Refugees and Integration (2011), pp. 198 and following.

¹⁵¹ Organisation for Economic Co-operation and Development (2012), p. 92; Austria, Statistik Austria (2012), p. 10.

¹⁴⁷ Germany, Federal Commissioner for Migration, Refugees and Integration (2011).

Outlook

In the area of asylum in 2013, the EU will continue its efforts to complete the revision process of the Dublin and the Eurodac regulations, as well as of the Reception Conditions and the Asylum Procedures Directives.

The many unclear provisions in the existing asylum *acquis* are likely to lead to further referrals to the CJEU for preliminary rulings.

EASO activities will expand further, providing an impulse towards an increased quality of asylum systems in the EU. EASO is also likely to release its first guidance on a specific topic – age assessment.

In spite of the increased attention to the situation and the rights of migrants in an irregular situation, tangible changes are likely to be limited in 2013. Provisions on access to justice in the Employers Sanctions Directive, including cases of particularly exploitive working conditions, have not yet brought about real change for those concerned.

However, depending on its final wording, the Seasonal Workers Directive could help reduce the reliance on undeclared work in sectors such as agriculture and tourism, and thus indirectly reduce the risk of exploitation, given that migrants in an irregular situation run a higher risk of exploitation than regular workers.

In the field of return and removals, the review of the implementation of the Return Directive provides an opportunity to draw attention to the slow implementation by Member States of some of its protective provisions, such as, Article 8 (6) on return monitoring and Articles 16 and 17 on conditions of detention.

Attention is likely to remain focused on the monitoring of migrant integration. In 2013 a pilot study carried out by the Migration Policy Group (MPG) for the European Commission will be completed and further reflection will be devoted, in cooperation with Member States, to the development of EU migrant indicators to support integration monitoring. This could go hand-in-hand with evaluating the implementation of national action plans to identify good practices to support. Focus on political, social and civic participation is likely to increase. The discourse on migrant integration is also focusing on the links between growth and mobility and how migrants can contribute to a more diverse, vibrant, energetic and inclusive society.



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UN & CoE

January

23 February – European Court of Human Rights (ECtHR) rules in *Hirsi Jamaa and Others* that Italy violated the rights of migrants by intercepting them and sending them back to Libya

February

29 March – UN General Assembly adopts resolution on the protection of migrants, A/RES/66/172

March

24 April – Council of Europe Parliamentary Assembly adopts Resolution 1872 *Lives lost in the Mediterranean Sea: Who is responsible?*

April

May

June

July

August

September

8 October – UN Special Rapporteur on the human rights of migrants concludes his country visit to Italy for his regional study on the human rights of migrants at the borders of the European Union

October

27 November – ECtHR concludes in *Stamose v. Bulgaria* that a two-year travel ban and seizure of passport for violating US immigration laws had violated the right to leave one's country

November

3 December – UN Special Rapporteur on the human rights of migrants concludes his country visit to Greece for a regional study on the human rights of migrants at the borders of the European Union

December

EU

January

15 February – European Parliament and the Council of the European Union adopt Regulation No. 154/2012 amending the provisions on airport transit visas in the Visa Code

February

23 March – New EU agency for managing large-scale EU information systems is inaugurated

March

April

10 May – Visa Information System (VIS) is launched in the second region of deployment, the Near East (Israel, Jordan, Lebanon and Syria)

May

June

July

28 August – European Commission issues a third report on Post-Visa Liberalisation Monitoring for the western Balkan Countries

August

5 September – Court of Justice of the European Union annuls Council Decision 2010/252/EU, which provided fundamental rights guidance for Frontex operations at sea

20 September – European Commission launches proposals allowing for an increase in the Union co-financing rate under the Solidarity Funds – COM(2012) 526 final and COM(2012) 527 final

September

2 October – VIS starts operations in the Persian Gulf region (Afghanistan, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen)

16 October – Frontex Consultative Forum holds its inaugural meeting

October

7 November – European Commission issues a report on the functioning of Local Schengen Cooperation during the first two years of implementation of the Visa Code, COM(2012) 648 final

7 November – European Commission issues a Communication on the implementation and development of the common visa policy to spur growth in the EU, COM(2012) 649

November

15 December – Frontex Fundamental Rights Officer starts her work

December

2

Border control and visa policy



At the EU level, there was an increased trend in 2012 towards the use of databases and information technology tools for border management and visa processing purposes. Negotiations on the Eurosur Regulation advanced substantially and Visa Information System (VIS) continues to be rolled out. The Frontex Fundamental Rights Officer and the Frontex Consultative Forum both began work in 2012. Council Decision 2010/252/EU, containing guidance for Frontex operations at sea that are relevant from a fundamental rights perspective, was annulled but will remain in force until it is replaced. During the first half of 2012, the land border between Greece and Turkey continued to be one of the main entry points for persons crossing the external EU land border in an irregular manner. Visa applicants increasingly made use of the right to appeal a negative Schengen visa decision.

2.1. Border control

The activities of Frontex – the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union – continued to be scrutinised from a fundamental rights perspective in 2012, as was the case with the European Ombudsman’s own-initiative inquiry into how Frontex implements its fundamental rights obligations.¹ At the end of the reporting period the inquiry had not yet been closed.

Frontex’s Consultative Forum held its inaugural meeting on 16 October 2012. Through this forum, external partners will assist Frontex and its Management Board with fundamental rights expertise. The forum is composed of 15 organisations:

- four international organisations: the United Nations High Commissioner for Refugees (UNHCR); the International Organisation for Migration; the Council of Europe; and the Organization for Security and Co-operation in Europe’s Office for Democratic Institutions and Human Rights (OSCE/ODIHR);

Key developments in the area of border control and visa policy

- Negotiations on the Eurosur Regulation, introducing a European surveillance system, advance quickly and 18 Member States are connected to the network by year-end.
- The Court of Justice of the European Union (CJEU) annuls Council Decision 2010/252/EU, containing guidance for Frontex operations at sea, because the decision does not respect the ordinary legislative procedure under which the European Parliament acts as co-legislator. The guidelines will remain in force until they are replaced.
- The Frontex Fundamental Rights Officer and the Frontex Consultative Forum start their work in the second half of 2012.
- Irregular border crossings by sea in the Central Mediterranean drop to some 15,000 persons in 2012 from almost 65,000 in 2011 while in the eastern Aegean they increase substantially.
- Visa applicants increasingly make use of the right to appeal a negative Schengen visa decision.
- The European Commission highlights the role of cooperation, not just in preventing irregular migration but also in supporting the fair and equal treatment of visa applicants.
- The VIS is launched in the Near East and in the Gulf regions.

¹ European Ombudsman (2012).

- two EU Agencies: the European Asylum Support Office (EASO) and the European Union Agency for Fundamental Rights (FRA); and
- nine civil society organisations: Amnesty International European Institutions Office; Caritas Europa; Churches' Commission for Migrants in Europe; European Council for Refugees and Exiles (ECRE); International Catholic Migration Commission; International Commission of Jurists; Jesuit Refugee Service; Platform for International Cooperation on Undocumented Migrants and the Red Cross EU Office.

The FRA representative and Jesuit Refugee Service representative were elected as co-chairs of the Consultative Forum.

In addition, the Frontex Fundamental Rights Officer began her work on 15 December 2012, as envisaged in Article 26 of the revised regulation (Regulation 1168/2011). Her tasks include monitoring and reporting on a regular basis to the Consultative Forum, as well as to the Frontex Management Board and the Executive Director of the Agency.

The increased attention to fundamental rights is mirrored in operational plans governing operations coordinated by Frontex. In 2010, operational plans started to contain some language regarding fundamental rights. It was only in 2012, however, that more concrete references to fundamental rights were made. For example, host Member States are obliged to provide the appropriate disciplinary, or other measures, when fundamental rights or international protection obligations are violated. The operational plans contain a clear duty to report, via the appropriate chain of command, all observations of fundamental rights violations.

In September 2012, the CJEU annulled Council Decision 2010/252/EU, which contained guidance for Frontex operations at sea. The CJEU nevertheless stated that the guidelines should remain in force until they are replaced.²

The CJEU pointed out that the adopted rules contained essential elements of external maritime border surveillance, thus entailing political choices that must be reached through the ordinary legislative procedure with the European Parliament as co-legislator. It also noted that the new measures contained in the contested decision were likely to affect individuals' personal freedoms and fundamental rights and therefore again required the ordinary procedure.

The surveillance of maritime borders was also the subject of a landmark European Court of Human Rights (ECtHR)

ruling in February 2012. In *Hirsi Jamaa and Others v. Italy*³ the ECtHR found that Italy was violating Article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment, by handing over migrants intercepted at sea to the Libyan authorities. The applicants in *Hirsi* were 11 Somali and 13 Eritrean nationals, part of a group of about 200 migrants, including asylum seekers and others, which the Italian authorities intercepted on the high seas in 2009.

Italy summarily returned the migrants to Libya, without giving them an opportunity to apply for asylum. The ECtHR contended that whenever state agents exercise control and authority over an individual, that state is obliged to safeguard the individual's rights and freedoms, protected under the ECHR, even if the state is operating outside its own territory.⁴ In this case, the ECtHR found that the Italian authorities exercised full control over the persons who were on board the Italian ships.⁵ It also clarified that a state "cannot circumvent its 'jurisdiction' under the ECHR by describing the events at issue as rescue operations at high seas".⁶

During the first half of 2012, the land border between Greece and Turkey continued to be one of the main entry points for persons crossing the external EU land border in an irregular manner. Between January and September 2012, authorities detected approximately 59,000 irregular border crossings at the external EU border. Three out of four (some 44,000 persons) were at the land border.⁷

In the late summer of 2012, Greece deployed an additional 1,800 police officers to that border as part of operation *Xenios Zeus*. Subsequently, the number of land crossings dropped to fewer than 100 in the last week of August from some 2,100 during the first week of the month, according to Frontex.

Greece completed the construction of a border fence along 12 kilometres of land border with Turkey in December 2012, with a view to stopping irregular border crossings despite concerns about its appropriateness.⁸ National funds covered the estimated €3 million in costs.⁹ As the following pictures illustrate, the fence can be compared to the two Spain constructed in Ceuta

² CJEU, C-355/10 [2012], *European Parliament v. Council*, 5 September 2012, paras. 63–85.

³ ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], No. 27765/09, 23 February 2012.

⁴ *Ibid.*, paras. 74, 75, 180 and 181.

⁵ *Ibid.*, para. 81.

⁶ *Ibid.*, para. 79.

⁷ Frontex (2012a), *FRAN Quarterly*, Issue 3, July–September 2012, p. 56.

⁸ Pro Asyl (2012); UN Special Rapporteur on the Rights of Migrants (2012); Council of Europe, Parliamentary Assembly (PACE), Committee on Migration, Refugees and Displaced Persons (2013), para. 21.

⁹ Council of Europe, PACE, Committee on Migration, Refugees and Displaced Persons (2013), para. 21.





Fence in Evros (Greece)
Source: Hellenic Police



Fence in Ceuta (Spain)
Source: FRA

and Melilla. They are a few metres high and equipped with barbed wire.

In Greece, irregular crossings at the land border declined but arrivals by sea increased. Deadly incidents continued to take place in the Eastern Aegean Sea. On 6 September 2012, 61 persons including children died when a boat with Syrians and other nationals capsized near Izmir on the Turkish coast.¹⁰ In the central Mediterranean, a boat with 130 passengers coming from Sfax in Tunisia sank about 12 nautical miles away from Lampedusa on 7 September 2012. The Italian Coast Guard, the Italian tax and financial police (*Guardia di Finanza*) and North Atlantic Treaty Organization (NATO) vessels responded, rescuing 56 migrants, but at least one died and several dozen remained missing.¹¹ Figure 2.1 shows trends concerning arrivals by sea to southern Europe over the past five years in the four Member States affected, namely **Greece, Italy, Malta and Spain**.

To improve the sharing of operational and analytical information on the EU's external maritime and land border among EU Member States, the EU is creating a European Border Surveillance System (Eurosur). It will serve as a platform to exchange border management information among Member States and with Frontex. Eurosur will not extend to Ireland and the United Kingdom, while Denmark must decide whether to apply the Eurosur Regulation within six months of its adoption.¹² Over time, and in conjunction with other available information, Eurosur will enhance knowledge of smuggling patterns and enable a more targeted deployment of assets. In 2012, negotiations on its legal basis, as tabled by the European Commission in late 2011,¹³ progressed considerably. The creation of Eurosur runs in parallel with the negotiation of its legal basis. By the end of 2012, 18 EU Member States had connected to Eurosur by signing a Memorandum of Understanding with Frontex.

¹⁰ Euronews (2012).

¹¹ Amnesty International (2012); La Repubblica (2012); BBC News (2012); Council of Europe, PACE (2012).

¹² See: European Commission (2011a), preambles 10–11.

¹³ European Commission (2012a).

Eurosur potentially raises two main fundamental rights concerns: that information on migrants shared with third countries might expose them to the risk of, for example, *refoulement* or inhuman treatment, and that personal data might be used inappropriately.

FRA ACTIVITY

Researching fundamental rights conditions at Europe's southern sea borders

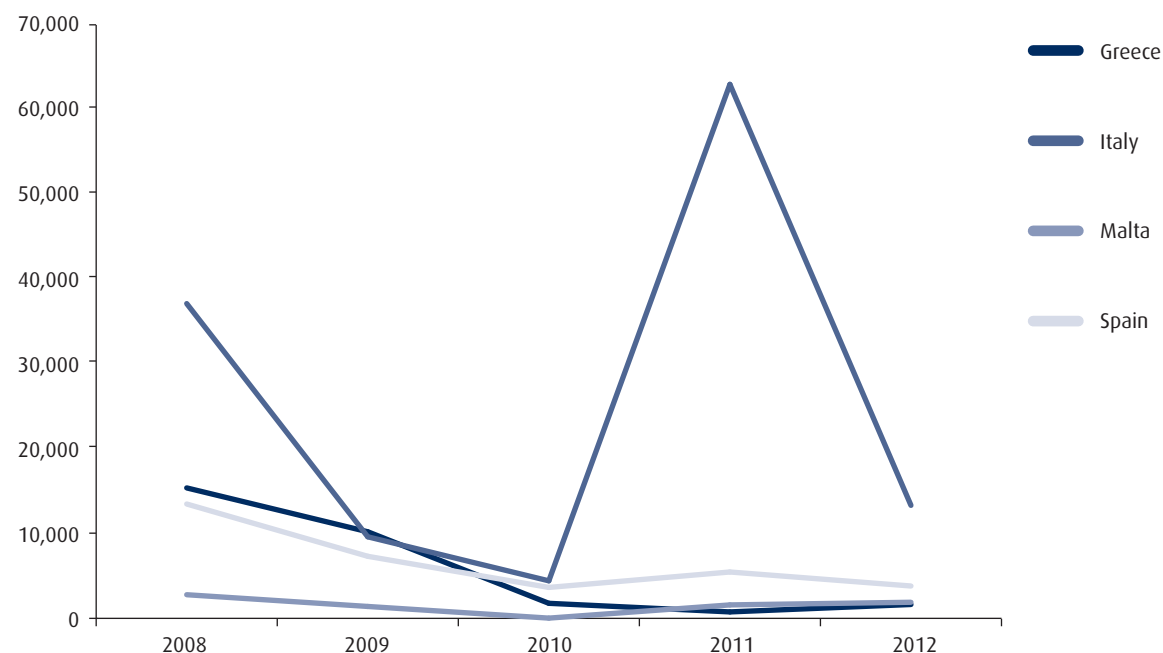
The first component of a FRA project on the treatment of third-country nationals at the EU's external borders examined fundamental rights challenges in the context of maritime border surveillance and immediately upon the disembarkation of intercepted or rescued migrants and refugees.

To that end, interviews were conducted in Cyprus, Greece, Italy, Malta and Spain with authorities, migrants, fishermen, international organisations, NGOs and other persons dealing with migrants arriving at sea. Interviews were also conducted in three countries with boat departures: Morocco, Tunisia and Turkey.

In addition, the FRA visited Frontex-coordinated sea operations in Greece and Spain, where FRA observed maritime patrols and the processing of rescued persons upon disembarkation. The research results, which will be published in March 2013, show that Council Decision 2010/252/EU, containing guidance for Frontex operations at sea, improved the fundamental rights adherence of Frontex-coordinated operations at sea.

For more information, see: FRA (2013), *Fundamental rights at Europe's southern sea borders*, Luxembourg, Publications Office

While the proposal for the Eurosur Regulation foresees the prohibition of the exchange of information with third countries when such information could be used to expose third-country nationals to a possible risk of inhuman or degrading treatment or punishment

Figure 2.1: Irregular crossings of the sea border, 2008-2012, four EU Member States

Source: National police data, 2012

(Article 18 (2)) the implementation of this safeguard, in practice, may be challenging. Although, Eurosur is in principle not intended to exchange personal data, practical steps need to be taken to avoid personal data being stored and shared unintentionally. Finally, it also remains to be seen whether the life-saving potential of the system will be fully utilised.

The EU inaugurated the new EU agency for managing large-scale EU information systems in March 2012 and in December it became operational.¹⁴ Located in Tallinn, Estonia, the agency will manage large-scale IT systems in the area of freedom, security and justice, including the Schengen Information System (SIS), its successor SIS II, the VIS and Eurodac. The agency's core task is to ensure continuous, uninterrupted service of these IT systems.¹⁵

Discussions continued in 2012 in the Council of the European Union and at the European Parliament, on developing new EU funding instruments for home affairs.¹⁶ The proposed Internal Security Fund for 2014–2020 (€4.65 million) will include two instruments: one on external borders and visas (€1.13 million) and another on police cooperation (€3.52 million). This represents an almost 40 % overall budget increase compared to the previous period of 2007–2013.

The Committee of the Regions and the Social Committee issued opinions proposing the inclusion of more fundamental rights language in the regulation establishing the instrument on borders and visa.¹⁷ They suggested including references to rescue obligations, the right to access asylum at borders and victim identification should be included, and it highlighted the need to evaluate whether policies and actions funded by the EU are compatible with fundamental rights.

Outside the scope of the Internal Security Fund, a separate amount of €822 million has been set aside for the management of SIS II, VIS and Eurodac. The instrument on borders and visa should support a common visa policy to facilitate legitimate travel, ensure the equal treatment of third-country nationals and tackle irregular migration (Article 3 (2) (a)). It should also support a high level of protection of external borders and contribute to the smooth crossing of these in conformity with the Schengen *acquis* (Article 3 (2) (a)).

2.1.1. Schengen evaluations

Efforts to revise the current Schengen evaluation system – under which a Member State's ability to join the Schengen area or, for Schengen States, its implementation of Schengen rules is assessed – continued without agreement in 2012. The system increasingly factors in fundamental rights considerations.

¹⁴ European Commission (2012b); European Commission (2012c).

¹⁵ Regulation (EU) No. 1077/2011.

¹⁶ European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2011).

¹⁷ European Union, Committee of the Regions (2012).

The European Parliament and the Council of the European Union could not reach an agreement on the revision of the evaluation mechanism in 2012. This revision has been pending since September 2011. This process of revision followed intense discussions on Schengen governance kick-started against the backdrop of the 2011 Arab Spring and the resulting migration flows, the severe challenges faced by Greece's asylum protection systems and issues concerning Schengen governance in general.¹⁸ The Commission subsequently amended its proposal on the Schengen Evaluation Mechanism¹⁹ and, as part of the same legislative package, introduced the possibility of temporarily reintroducing border controls at internal borders as a last resort in exceptional circumstances.²⁰

The key roadblock in discussions was a lack of consensus on the legal basis foreseen for the evaluation mechanism and consequently the different future roles for the European Parliament, the European Commission and the Council of the European Union. The Cyprus Presidency proposed a revised compromise text, but the Parliament had not accepted it by year-end.

The European Parliament has suspended its cooperation pending agreement on the new evaluation mechanism. The dispute has paralysed new legislation on cyber-crime, air passenger name records and other issues, and hindered the final vote on a file introducing a basis for joint border checks on road traffic and other technical amendments to the Schengen Borders Code.²¹

A team of border police officers from Member States currently carry out evaluations using a peer-to-peer review system managed by the Schengen Evaluation Working Party within the Council of the European Union.²² According to the current mandate, all aspects of the Schengen *acquis* may be covered. Specific attention is placed on: external borders; police cooperation; data protection; visa regulations; the Schengen Information System (SIS), a shared database containing entries on wanted and missing persons; lost and stolen property and entry bans; and Sirene, which allows Schengen states to exchange additional information on alerts.

Teams of EU Member State experts, the General Secretariat of the Council of the European Union and the European Commission carried out 21 evaluations in 17 Member States regarding sea and air borders, police cooperation, data protection, SIS and visas.²³ The Council

followed up on the shortcomings detected in Greece during evaluations at the external land and sea borders in 2010 and 2011, while the Commission and EASO drew up an action plan to deal with shortcomings in the field of asylum and migration.

The Council also continued to closely follow a number of Romanian and Bulgarian measures, including those on fighting smuggling and trafficking in human beings, which are expected to facilitate the inclusion of these two Member States in the Schengen area.²⁴

Schengen evaluations include fundamental rights aspects, which also affect other practical issues. According to information provided to FRA by the Council General Secretariat, some issues covered in 2012 that implicitly relate to fundamental rights include:

- verification of adequate infrastructure allowing for sufficient privacy of persons undergoing further checks;
- availability of information on further checks (Article 7 of the Schengen Borders Code) in the necessary languages;
- inter-agency cooperation among national border agencies, asylum and migration offices and human rights agencies;
- conditions in holding facilities;
- risk analysis that does not resort to ethnic profiling;
- dignity and clarity in communication with passengers;
- knowledge of procedures related to victims of trafficking, asylum seekers and children, as well as in relation to body searches, data handling and visas;
- cooperation with countries of origin in case of refused entry;
- fundamental rights training and compliance with the Frontex Common Core Curriculum.

Evaluations increasingly took fundamental rights concerns into account in 2012 following the development of an indicators list, with FRA expertise, as a supplementary tool for evaluators. The tool helps evaluators to consider fundamental rights consistently and during various tasks of border management. Evaluations foreseen for 2013 are expected to consider these issues.

¹⁸ European Commission (2010).

¹⁹ European Commission (2011a).

²⁰ European Commission (2006).

²¹ European Commission (2011b); EU, European Economic and Social Committee (2012).

²² EU (1998).

²³ European Commission (2012d); European Commission (2012e).

²⁴ Council of the European Union (2012a).

FRA ACTIVITY

Framing fundamental rights in Schengen evaluations

FRA helped develop a list of fundamental rights indicators and good practices to raise awareness among evaluators and facilitate a more systematic approach to fundamental rights in the application of the Schengen *acquis*.

The indicators and good practices, put together in collaboration with the Frontex Board of Experts for the Training of Schengen evaluators, the General Secretariat of the Council of the European Union and the European Commission, provide evaluators with fundamental rights guidance to use during their work, paying particular attention to the following tasks:

- first- and second-line border checks at border crossing points;
- border surveillance patrols;
- apprehensions and placement in waiting areas and holding facilities;
- receiving asylum applications;
- readmission, removal and return measures.

In the context of controls and procedures, the indicators refer to issues related to human dignity, the use of force, *non-refoulement*, the identification of vulnerable persons and refusal and handling of personal data. Other practices and indicators refer to staff and training, cooperation with protection services, cooperation with third countries, risk analysis, infrastructure, the needs of passengers stranded in transit zones, the conditions in holding facilities, and expulsion and re-admission.

The list also outlines specific issues to be observed during border surveillance, for example the prohibition on push-back operations, the existence of systems catering for the humanitarian needs of persons apprehended after the border crossing and the interviewing procedure.

For more information, see: FRA project on border control and fundamental rights (2012) available at: <http://fra.europa.eu/en/project/2011/treatment-third-country-nationals-eus-external-borders-surveying-border-checks-selected>

2.1.2. Persons held in airport transit zones – access to food, water and a place to rest

FRA research carried out in 2012, at selected airports, highlighted the plight of passengers stranded in airport transit zones. Every year, a number of persons remain confined for days and sometimes weeks in the international transit zones of airports in EU Member States.

As an illustration, a citizen of the Democratic Republic of Congo refused entry at Tallinn airport in **Estonia** stayed in the airport guest room for two weeks in April 2012, as Russia refused to take the person back.²⁵

Passengers may become stranded at airports when they do not fulfil entry requirements, for example, when border guards identify problems with travel documents, visas or proof of means of subsistence, or their return is delayed because there is not an immediate return flight. Persons seeking asylum at airports may also have to remain in a transit zone.

Passengers must have regular access to food, water and a place to rest during their stay in transit, especially if they lack sufficient means to acquire them, to ensure that their fundamental rights to life and human dignity are respected. Despite the critical significance of the rights at stake, information on passengers held in transit zones is limited.²⁶

Carriers, airport companies and authorities at many airports set up specific mechanisms to provide food and water. FRA research on the treatment of third-country nationals found that in practice these mechanisms are not always sufficient.

In some cases, border guards may not know the passenger's arrival airline as the passengers either conceal it or do not know how they arrived. Airline reimbursements to airport companies or authorities may take a long time, especially when the carriers are not based in the destination country. In other cases, responsibility for the passengers' stay while in transit falls outside the airline's responsibility and lies with different authorities, such as when passengers are eventually admitted or pending transfer to reception, detention or protection facilities.

Cooperation between airport companies and immigration authorities is another factor determining whether facilities to rest and access food and water are effectively provided or are reserved for paying passengers only. As a result, passengers held in transit may face difficulties in getting food and water unless they have sufficient means to sustain themselves while in transit.

Passengers denied entry

For persons who are denied entry, the carrier responsible for transport must cover the costs of the departure

²⁵ Estonia, *Postimees* (2012).

²⁶ For information on temporary holding facilities at airports, see the reports on the visits carried out by the Council of Europe, European Committee for the Prevention of Torture or Degrading Treatment or Punishment (CPT) as well as the 7th (1996) and 19th (2008–2009) General Reports on the CPT's Activities, see: <http://www.cpt.coe.int/en/default.htm>.

and, if this is not possible within a reasonable time, the carrier must also cover any costs related to the passenger's stay, including the provision of food and water, according to various international aviation agreements.²⁷ This means that airports rather than states usually set up the mechanisms to provide for stranded passengers, and that varying airlines may provide different supplies.

Many airport operating companies set up specific agreements obliging carriers to cover the costs for passengers who are refused entry, either directly or by reimbursing the airport company later on. Such agreements, however, only work if the immigration authorities are able to identify the airline that transported the passenger denied entry. When this is not the case, the authorities are ultimately responsible for ensuring basic subsistence.

At airports in **Austria**, for example, if the agreements between airport companies and carriers do not function, the police try to provide food and water through their canteen or through *ad hoc* purchases via the Red Cross or the municipality and then claim the costs back from the carrier.²⁸ In addition, the social services of Caritas provide basic services, such as food, healthcare and clothes to persons in need, as well as help in contacting embassies, airlines and family members.²⁹

At Frankfurt airport in **Germany**, border guards can purchase food in the canteen for passengers without resources, either upon passenger request or, after two to three hours, upon offer by the police, which is then later charged to the airline.³⁰ In **Portugal**, the Aliens Service (*Serviço de Estrangeiros e Fronteiras*) acquires supplies and distributes them to passengers.

At airports in at least eight Member States (**Bulgaria**, **Cyprus**, **Denmark**, **France**, **Italy**,³¹ **Lithuania**, **Poland** and **Romania**) alternative systems do not appear to exist if carriers fail to comply with their obligation to take care of passengers' basic needs. Destitute passengers depend on *ad hoc* solutions or do not receive food and water at all while in transit, unless they are detained.

At airports in **Bulgaria**, for example, detained persons receive food based on general daily nutrition needs

determined for a 24-hour arrest regime,³² however NGOs consider this insufficient.³³ Beyond the initial 24 hours, food and water are not provided and border guards refer passengers to NGOs such as the Red Cross or Caritas.

In general terms, facilities and mechanisms to provide basic necessities to persons staying in the transit zone are usually limited compared to those in special holding facilities at airports. As FRA observed at Fiumicino airport in Rome, **Italy**, for example, the general transit area serves a primarily commercial purpose and provides only limited facilities beyond bars. Only two windowless rooms are available in the international arrivals area for non-admitted passengers: one for families and another for large groups.

Other airports may, if necessary, adopt *ad hoc* solutions to cope with special situations. In Frankfurt, **Germany**, for example, the police may at times provide field beds to inadmissible passengers waiting for their return flight.

Further checks

Further border control inspections may last from 15 minutes to a number of days, depending on the number and complexity of issues to be verified, such as confirmation of nationalities. Persons undergoing a further check usually fall under the responsibility of the immigration or police authorities. Officers may, however, have a limited or no specific budget for providing food and water. The time span after which authorities must make food and water available varies considerably: two to three hours in **Germany** and **Latvia**;³⁴ four to five hours in **Slovenia**,³⁵ six hours in **Lithuania**³⁶ and **Slovakia**³⁷ and 12 hours in **Finland**.³⁸ In other cases, such as in **Bulgaria** and the **Czech Republic**, the police provide food and water only if the person is considered to be detained.

The provision of adequate food to passengers undergoing further checks at the border also emerged as an issue in interviews carried out for the FRA project on the treatment of third-country nationals at external borders. At Fiumicino airport in Rome, **Italy**, for example, passengers said that they did not get food regularly while awaiting the outcome of further checks. Meal vouchers for sandwiches and a beverage were distributed but not to all persons who were entitled to receive them. This can be particularly problematic at times of increased numbers of arrivals, such as during the Arab

27 United Nations (UN), International Civil Aviation Organisation (1944), Convention on International Civil Aviation, Annex 9, Chapter 5 'Inadmissible persons and deportees', with subsequent IATA agreements; Regulation (EC) No. 261/2004.

28 Austria, Alien Police Act, 113 (4).

29 Caritas (2013).

30 Some of the information supplied in this chapter is based on the FRA project on the treatment of third-country nationals at the EU's external borders, which involved fieldwork and desk research.

31 *LasciatCIEntrare* promoted in parallel with the European campaign 'Open Access Now', *Il Manifesto* (2012).

32 Bulgaria, Ministry of Interior, Table 1.

33 Bulgaria, Jesuit Refugee Service Europe (2010), para. 3-12.

34 Latvia, State Border Guard.

35 Slovenia, Ministry of Interior (2013).

36 Lithuania, Ministry of Interior (2012).

37 Slovakia, Act on Residence of Foreigners, Art. 91.

38 Finland, Government bill to the Act on Treatment of Persons in Police Custody, Chapter 3, Section 4.

Spring, and can lead to extended waiting times and overcrowded waiting facilities.

At Charles de Gaulle airport in Paris, **France**, interviews with passengers held pending the outcome of further checks made clear that they were very dissatisfied with the quality of food provided. In one case, a consul had to negotiate for the provision of vegetarian food.

2.1.3. Automated Border Control (ABC) gates and smart borders

The increasing trend in the use of new technologies for border control purposes and the possible related fundamental rights implications, which the 2011 FRA Annual report noted, continued in 2012. The European Commission had not presented the smart border package announced in 2011³⁹ by year-end 2012.

The package includes an 'Entry/Exit System', which is designed to record the time, place of entry and exit, and the length of authorised stay, as well as the 'Registered Travellers Programme'. The latter should allow certain groups of frequent travellers to enter the EU using simplified border checks at Automated Border Control (ABC) gates. Travellers registered within the programme are expected to still have access to booths attended by border guards.

ABC gates verify whether a travel document is authentic and whether the passenger is the rightful holder of the document by comparing the biometric information stored in the passport with the actual holder of the passport. Most ABC systems currently use facial recognition as the main biometric authentication method. The second-generation e-passports, however, carry both facial and fingerprint data. The system queries border control records stored in databases and automatically determines eligibility for border crossing.⁴⁰

EU institutions continued to assess and evaluate the smart borders concept in 2012. A European Parliament study thus analysed its fundamental rights implications, given that large amounts of information are generated, retained and used but remain largely hidden from view.⁴¹ This study also refers to concerns expressed by the European Data Protection Supervisor (EDPS) about the necessity and proportionality of a smart borders proposal.⁴² Preparations are under way for two large-scale EU-funded ABC demonstration projects, namely Fastpass and ABC4EU.

Frontex organised the First Global Conference and Exhibition on future ABC developments in 2012. It coordinated an exchange of experiences and lessons learned on ABC-related issues. Frontex has also elaborated operational and technical best practice documents to provide guidance to Member States using ABC gates.⁴³ With respect to fundamental rights, the operational guidelines mention that "if a traveller is unable, for any reason, to use the ABC, and is redirected to a manual border control booth, due attention MUST be paid to ensure that the ensuing procedures are in full compliance with fundamental rights".⁴⁴

The Schengen Borders Code already permits EU Member States to introduce ABC gates and a number have done so, primarily for EU/European Economic Area and Swiss passport holders, in order to cope with increasing passenger flows without major staff increases.

Nine EU Member States have introduced ABC gates, primarily at airports: **Bulgaria**, the **Czech Republic**, **Finland**, **France**, **Germany**, the **Netherlands**, **Portugal**, **Spain** and the **United Kingdom**.⁴⁵ **Austria**, **Belgium**, **Denmark**, **Estonia**, **Hungary**, **Latvia** and **Romania** plan to introduce ABC gates at the airports in their respective capitals.⁴⁶ Figure 2.1 provides an overview of EU Member States that have introduced ABC gates.

ABC gates raise a number of fundamental rights issues. When querying border control records stored in databases, due diligence by the responsible administration needs to be respected and privacy by design reflected in the development of the systems. There are also concerns regarding the identification of victims of trafficking, the protection of the rights of the child, the rights of persons with disabilities, and those of elderly persons.

According to the Frontex Operational Guidelines, a border guard should always be present to monitor the functioning of the ABC gates.⁴⁷ The ABC gates themselves cannot identify potential victims of trafficking or persons seeking asylum. The challenge for the border guard is how to identify persons in need of protection. ABC gates are not (yet) in use for citizens from countries of origin from which asylum seekers usually originate.

In the case of children, a challenge for the border guard is to confirm the genuineness of the relationship with the accompanying adult, as required by Annex VII, paragraph 6 of the Schengen Borders Code. According to the Frontex Operational Guidelines, the operator must be alerted when a minor is using the ABC gates. The border

39 European Commission (2011c).

40 Frontex (2012b), p. 7.

41 European Parliament, DG for internal policies, Policy Department C (2012).

42 European Data Protection Supervisor (EDPS) (2008), p. 3.

43 Frontex (2012b); Frontex (2012c).

44 Frontex (2012b), p. 11.

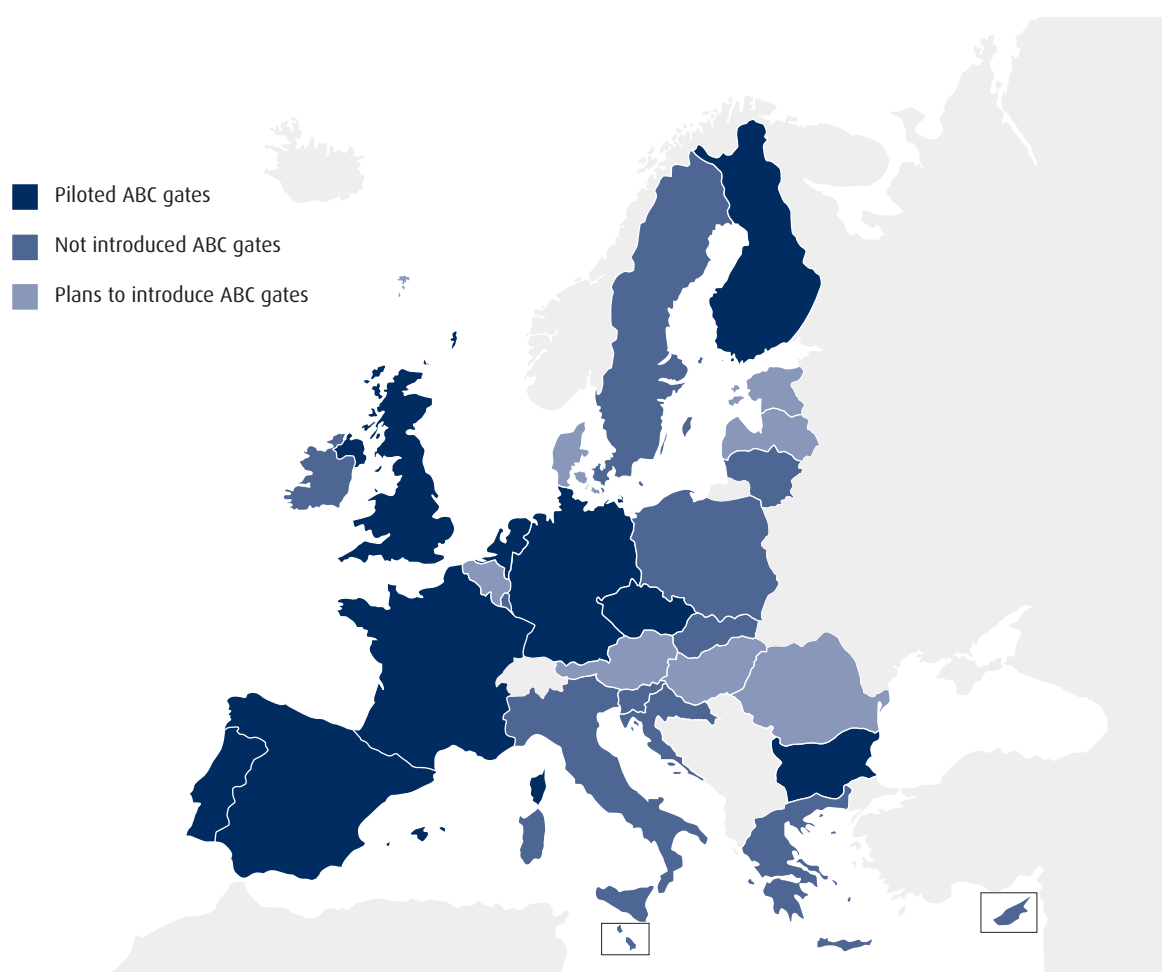
45 Information provided by Frontex.

46 Information provided by Frontex.

47 Frontex (2012b), p. 23.



Figure 2.2: Automatic Border Control (ABC) gates in EU Member States and Croatia, as at the end of 2012



Source: Frontex data, provided in 2013

guard must carry out a further investigation in order to detect any inconsistencies or contradictions in the information where there are serious grounds for suspecting that minors may have been unlawfully removed from the custody of the person(s) legally exercising parental care over them.⁴⁸

Most EU Member States do not allow children who are younger than 18 years old, or families with children, to use the gates. Finland allows children under 18 to use the gates, but the gates cannot accommodate persons under 120 centimetres high. If a child uses the gates, the birth date triggers an automatic alert and border guards can undertake a manual inspection if they deem it necessary.

ABC gates are designed in such a way that they are generally unsuitable for persons in wheelchairs, having implications for the rights of persons with disabilities.

Sometimes narrow wheelchairs can fit through. Some persons with disabilities may, however, have difficulty raising their heads to the required height for the ABC gate to scan their faces and compare that image to their passports' biometric information, according to disability groups in the **United Kingdom**.⁴⁹ The Frontex Operational Guidelines recognises that ABC gates do not provide full access for all travellers with disabilities. It recommends adapting ABC systems to cater for them. E-Gates, for example, should be made wider or lower to enable wheelchair users to access the system. **Germany** plans to test ABC gates that have been designed for wheelchairs.⁵⁰

⁴⁹ Information provided by the United Kingdom Border Force.

⁵⁰ Information provided by the German Federal Ministry of Justice.

⁴⁸ *Ibid.*, p. 24.

Promising practice

Consulting with disability groups in designing ABC gates

The United Kingdom Border Force consulted disability groups when introducing ABC gates. The Border Force will continue to consult with disability groups and advisory bodies when designing the next generation of ABC gates. Equality impact assessments will be undertaken during the development as part of the design and assurance process.

Source: Information provided by the United Kingdom Border Force

Designing ABC gates with respect for the rights of the elderly⁵¹ would mean taking into account their needs, by, for example, providing for slower reaction times and using large font size for text or signs.

Border guards should, in the performance of their duties, fully respect human dignity and not discriminate on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation according to Article 6 of the Schengen Borders Code. When ABC gates replace manual border checks, the risk of a border guard treating a traveller in a discourteous, undignified or discriminatory manner is no longer an issue. A certain number of passengers who have passed through the ABC gates may, however, still be singled out for further checks, a procedure which is not immune to the risk of discriminatory ethnic profiling.

ABC gates may refuse to allow a passenger through for a number of reasons, such as the way the traveller uses the gate, variable lighting conditions depending on how the ABC gate is positioned, the quality of the travel document and the biometric information it includes, or differences between the traveller's appearance and the biometric information, such as due to aging. In these cases the check should be exactly the same as for other travellers and the border guard needs to be aware of the potential for discriminatory treatment.

In addition, national courts in Germany and the Netherlands submitted preliminary questions to the CJEU in 2012 on the proportionality of the central storage of biometric data in passports and travel documents at the national level and their use for purposes other than
► border control⁵² (see **Chapter 3** on biometric passports for further details).

51 European Union, Council and European Commission (2000), Charter of Fundamental Rights of the European Union, Art. 25.

52 CJEU, C-448/12; CJEU, C-291/12.

2.1.4. Immigration liaison officers (ILOs)

The FRA Annual Report 2011 highlighted efforts to move border control activities beyond the external borders of the EU. In 2012 the Immigration Liaison Officers (ILOs) acted upon a reinforced mandate under the amended ILO Network Regulation (Regulation 493/2011). The immigration services or other competent authorities of EU Member States post ILOs abroad to cooperate with the host country on irregular immigration, returns and the management of legal migration. Such externalisation of border control has fundamental rights implications. In cases where ILOs, involved in pre-departure document checks in third-country airports, stop a passenger, for example, they may prevent a person in need of international protection from reaching a safe place.

In 2004, the EU set up an ILO network to enhance coordination among ILOs posted by EU Member States to the same third country.⁵³ Some of the changes introduced through the 2011 amendment are important from a fundamental rights point of view.⁵⁴ First, ILOs deployed in the same host country are now asked to exchange information on asylum seekers' access to protection in the host country (Article 4). Second, each semester, the ILO networks must report to the European Parliament, the Council of the European Union and the European Commission on their activities in specific countries and/or regions of particular interest to the EU, taking into consideration all relevant aspects, including human rights (Article 6). The reporting template, however, remains security oriented, only mentioning asylum seekers under the heading of risks and threats at the host country borders.⁵⁵ Third, EASO, Frontex and UNHCR may be invited to participate in ILO network meetings held in the host country (Recital 5 and Article 4 (2)).

In line with its work programme, Frontex reinforced its links to the ILO network in 2012 to enhance risk analysis and facilitate operational cooperation between EU Member States and third countries.⁵⁶ Frontex staff participated in relevant ILO meetings and conferences held in some third countries and Member States, while ILOs also took part in Frontex activities.

Frontex can exchange information on irregular migration and other related issues with the ILOs via ICONet, a secure website where early warnings on irregular migration and facilitator networks, as well as information on the use of visas, borders and travel documents

53 Council Regulation (EC) No. 377/2004.

54 Council Regulation (EC) No. 493/2011.

55 Reporting in accordance with the model established by European Commission Decision 2005/687/EC (European Commission (2005)).

56 Frontex (2012d), p. 14.

is shared.⁵⁷ Frontex can post ILOs to third countries in which border management practices comply with minimum human rights standards, according to its revised Regulation (Regulation 1168/2011, Article 14 (3)). Frontex has not yet used this option, primarily due to a lack of human and financial resources.

By 2012, approximately two thirds of EU Member States as well as **Croatia** had posted immigration liaison officers abroad: **Austria, Belgium, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, Latvia, the Netherlands, Poland, Portugal, Spain, Sweden** and the **United Kingdom**.

Others, such as **Bulgaria**, have been looking for an experienced Member State partner agency to advise it on establishing an ILO network and arrangements, regulations and training. The ILOs of **Germany, the Netherlands, and the United Kingdom**, for example, may provide advice and training on the security features of travel and identity documents and on visas and document examination to airline companies and EU consular staff.⁵⁸ They also perform pre-boarding document checks on persons in cooperation with local authorities and/or airline staff and they may also take part in in-depth interviews at the borders. In such cases, their decisions affect whether a person may travel to the EU; in practice there are only limited remedies if they prevent a person's departure.

An important fundamental rights question emerges concerning the potential of an ILO in preventing the departure of a person seeking asylum. In the context of air borders, the IATA Code of Conduct for Immigration Liaison Officers⁵⁹ explicitly states that ILOs may advise airline staff but cannot compel compliance. It also states that airline staff should direct persons requesting asylum to UNHCR, to the appropriate diplomatic mission(s) or to an appropriate local NGO.

Only a few EU Member States have instructed ILOs on how to handle requests for asylum. The **Austrian** ILOs, for instance, are instructed in regular trainings to refer all people requesting asylum to the Austrian Embassy for further information.⁶⁰ The **Dutch** ILO must refer a request for asylum to headquarters to get further instructions on how to proceed.⁶¹ A possible

instruction in such an event is to refer the person to the UNHCR office in the host country. In 2012, persons who said they were in need of protection approached the **United Kingdom** ILO in Kuala Lumpur who referred them to UNHCR.⁶²

2.2. A common visa policy

The common visa policy has the dual aim of preventing irregular migration and facilitating legitimate travel. During 2012, the focus on the need to facilitate travel and for the transparent, fair and equal treatment of visa applicants was heightened in the European Commission report on local Schengen cooperation⁶³ and the report on facilitating travel for nationals from emerging markets.⁶⁴ Discussions continued about suspending the visa waiver for the western Balkan countries. Changes were made to the rules on airport transit visas.

The Visa Code lays down rules for short-term visas and airport transit visas. By doing so, it also sets standards linked to fundamental rights: reception arrangements for visa applicants in consulates should have due respect for human dignity and the processing of visa applications should be conducted in a professional and respectful manner and be proportionate to the objectives pursued (Recital 6). Staff conduct should be courteous, respect human dignity and be proportionate to the objectives pursued – both to facilitate legitimate travel and counteract irregular immigration (Recital 3). Staff should not discriminate against persons on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation (Article 39 (3)).

To understand the scope and implications of EU visa policies, it should be noted that the nationals of 125 states, entities and territorial authorities require a visa if they wish to come to the EU. Figure 2.3 provides an overview of nationals who require a visa. Nationals from some 12 countries require an airport transit visa to transit through an airport in any Schengen country. In individual Member States, however, citizens of additional third countries are also subject to airport transit requirements.⁶⁵

The Visa Code was amended on 15 February 2012 as regards airport transit visas.⁶⁶ EU Member States have drawn up lists of third-country nationals who are required to hold an airport transit visa⁶⁷ to reduce the

57 European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' rights and constitutional affairs (2011), p. 21.

58 Information provided by the German Federal Ministry of Interior; European Migration Network (EMN) (2012), p. 57; Information provided by the United Kingdom Border Agency.

59 The International Air Transport Association (IATA), Control Authorities Working Group (CAWG) (2002).

60 Information provided by the Austrian Federal Ministry of Interior.

61 Information provided by the Dutch Ministry of Interior and Kingdom Relations.

62 Information provided by the United Kingdom Border Agency.

63 European Commission (2012f).

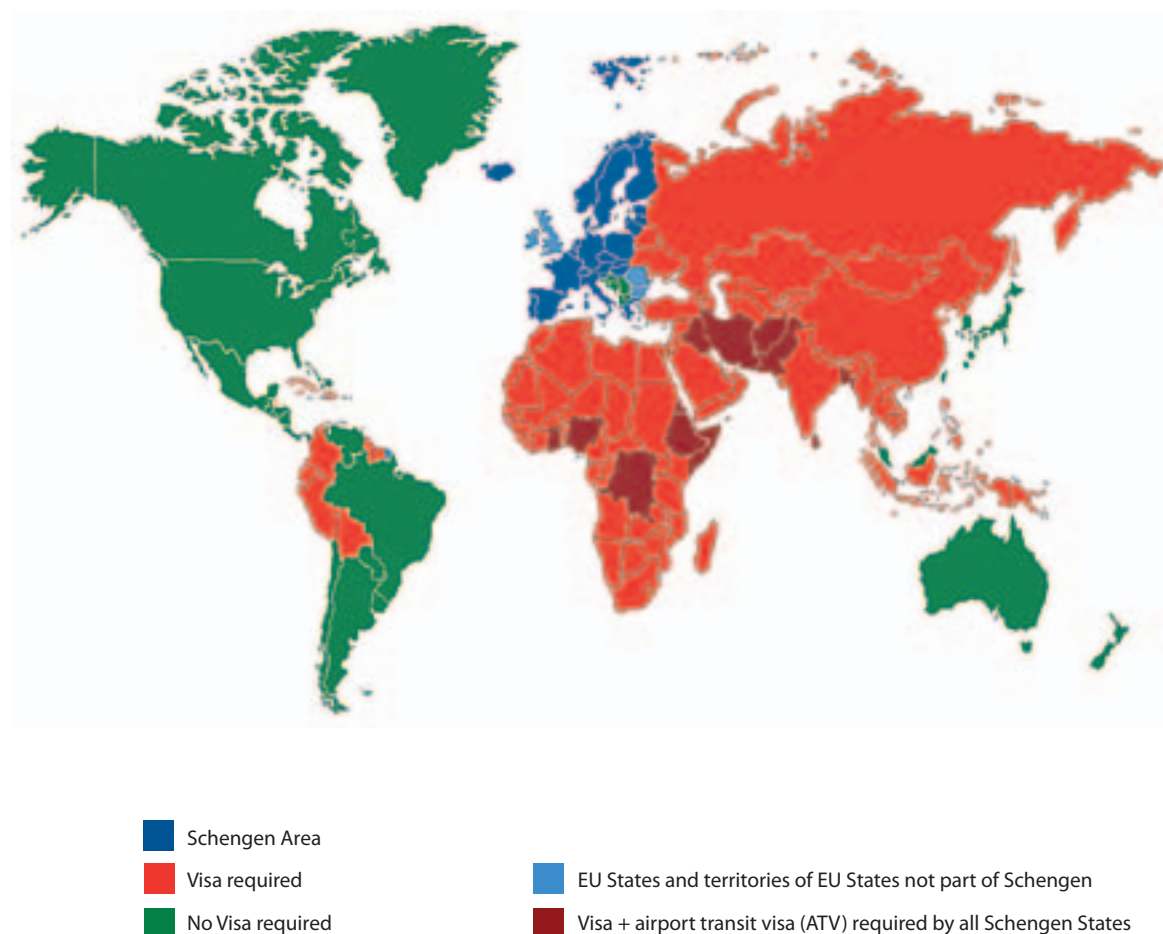
64 European Commission (2012g).

65 European Commission (2013).

66 Regulation (EU) No. 154/2012.

67 Regulation (EU) No. 810/2009, Annex IV.

Figure 2.3: Nationals requiring a visa to enter or transit through the EU



Source: European Commission, online map available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm

risk that they may remain in the country through which they are transiting.

The amended regulation exempts third-country nationals from an airport transit visa if they hold a valid residence permit, or a visa, issued by an EU Member State that is not (**Ireland and the United Kingdom**) or not yet fully part (**Bulgaria, Cyprus and Romania**) of Schengen. The likelihood that third-country nationals resident in one of these EU Member States pose an immigration risk appears limited.

In addition, this amendment is in the interest of free movement within the EU as reflected in the Schengen Borders Code, which entitles a third-country national in possession of a residence permit or a visa to enter the EU (Article 5). The amendment will also facilitate legitimate travel.

Discussions continued on legal possibilities for individual EU Member States to suspend the visa waiver

for countries whose citizens Member States believed were “abus[ing] the visa liberalisation”, by amending the Visa Regulation 539/2001.⁶⁸ An increase in irregular migration through a rise in over-stayers and asylum applications – mostly with a low recognition rate⁶⁹ – in some EU Member States after the visa liberalisation for the western Balkan countries triggered the visa reintroduction debate. In 2011, 8,295 Serbian nationals applied for asylum in Belgium, Germany and Sweden and this number increased to 17,815 in 2012. During 2012, Austria, Belgium, France, Germany, Italy and Sweden registered a total of 38,080 applications lodged by citizens of Albania (5,635), Bosnia and Herzegovina (5,300), the Former Yugoslav Republic of Macedonia (9,330) and Serbia (17,815).⁷⁰

⁶⁸ European Commission (2011d).

⁶⁹ European Commission (2012h).

⁷⁰ Eurostat (2013).

The 2012 *EU Action on Migratory Pressures – A Strategic Response* also focuses on visa liberalisation, which it claims has contributed to an increase in irregular migration.⁷¹ In 2012, the European Commission published its report on the post-visa liberalisation monitoring of the western Balkan countries.⁷² The report said that poor community integration, in particular for persons of Roma origin, continues to be a push factor behind the vast majority of asylum applications. It recommends substantially increasing assistance to minority populations, in particular Roma communities, and targeting assistance to the countries of origin.

The report also confirms that the large majority of persons from the visa-free western Balkan countries travelling to the EU are bona fide travellers. Thus, the ultimate purpose of visa liberalisation – to facilitate people-to-people contacts, enhance business opportunities and cultural exchanges and enable the people of the region to get better acquainted with the EU – continues to be achieved.

The European Commission monitoring report calls for further strengthening of exit controls in western Balkan countries and entry controls at EU borders, in line with the Schengen *acquis*.⁷³ When border guards assess the extent to which citizens from western Balkan countries fulfil the entry conditions under the Schengen Border Code (Article 5), they must remain vigilant against the risks of discriminatory profiling and of preventing access to asylum procedures (Article 6).

The conclusions of the Balkans Ministerial Forum on Justice and Home Affairs held on 5–6 November 2012 reflect the need for closer cooperation between western Balkan countries and EU Member States to control the external border, in compliance with the fundamental rights of western Balkan citizens. The fundamental rights concerns related to exit controls include the right to leave any country, including one's own,⁷⁴ and the risk of discriminatory profiling.⁷⁵

The recent ECtHR *Stamose*⁷⁶ judgment concluded that **Bulgarian** exit controls had violated the right to leave one's country. Bulgaria had imposed a two-year travel ban on one of its nationals and seized the applicant's passport for violating US immigration laws. The ECtHR noted that these measures had been adopted in the course of negotiations with the EU on visa liberalisation in the 1990s and aimed at restricting the abuse of visa-free travel.

⁷¹ Council of the European Union (2012b), p. 17.

⁷² European Commission (2012h).

⁷³ *Ibid.*

⁷⁴ Council of Europe, European Convention on Human Rights (ECHR), Art. 2, Protocol No. 4.

⁷⁵ Regulation (EC) No. 562/2006, Art. 6.

⁷⁶ ECtHR, No. 29713/05, *Stamose v. Bulgaria*, 27 November 2012.

In 2012, the European Commission issued a report assessing the functioning of cooperation among the Schengen embassies/consulates at a specific duty station – usually referred to as local Schengen cooperation – during the first two years of the Visa Code's application.⁷⁷ The aim of local Schengen cooperation is to ensure a harmonised application of the Visa Code, in light of the local circumstances, to prevent visa shopping and different treatment for visa applicants (Recital 18, Visa Code). The report notes that the "EU is often perceived negatively by third countries because of its arcane and non-transparent visa issuing procedures". Equality in treatment will be promoted through harmonised lists of supporting documents.⁷⁸

Knowledge in EU Member States and at the European Commission on how the Visa Code is actually implemented remains spotty and complaints from third countries cannot be properly assessed, the report says. It therefore suggests that EU delegations in third countries should collect information from third-country nationals on how the Visa Code is implemented by opening, for example, a 'complaint mail box'. The results of such an initiative, if properly analysed, would yield an increased awareness among Member States and the European Commission of the fundamental rights implications of the common EU visa policy. The report also suggests that Member States' diplomatic missions organise information events with host country authorities on the regional roll-out of the Visa Information System (VIS), to prevent or clarify possible misconceptions about it.

To promote EU growth as outlined in the Europe 2020 strategy, a European Commission Communication issued in November 2012 suggests facilitating travel for nationals from emerging markets, such as China, India and Russia. Nationals from these countries are required to hold a visa when entering the Schengen area.⁷⁹ The tourism industry identified several measures needed, such as facilitating visa-issuing procedures, clear deadlines for granting an appointment for lodging the visa application and application forms available in the host-country language.

2.2.1. Visa Information System (VIS)

The VIS stores visa applicants' personal data, including biometric data, and allows Schengen states to exchange data on issued visas.

In October 2011, the VIS⁸⁰ became operational in North Africa (Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia), as reported last year. On 10 May 2012,

⁷⁷ European Commission (2012f).

⁷⁸ *Ibid.*, p. 9.

⁷⁹ European Commission (2012g).

⁸⁰ Regulation (EC) No. 767/2008.

Schengen-participating countries⁸¹ introduced VIS in the near East (Israel, Jordan, Lebanon and Syria)⁸² and on 2 October 2012 in the Gulf region (Afghanistan, Bahrain, Iran, Iraq, Kuwait, Oman, Qatar, Saudi Arabia, United Arab Emirates and Yemen). The VIS will be rolled out to all third countries, in future.⁸³

By 4 November 2012, the VIS had recorded about 1,800,000 visa applications, of which more than 1,500,000 were issued and about 220,000 refused.⁸⁴ Table 2.1 provides an overview of the visas with biometric identifiers (fingerprints) issued in 2012 in five Member States. As part of the consular representation, Member States may also cooperate on the collection of biometric identifiers.⁸⁵ In Istanbul, for instance – the Member States of Estonia, Portugal and Slovenia as well as Norway are represented by the Hungarian embassy, which collects the biometric identifiers on behalf of these countries.⁸⁶ This explains the relatively high numbers of visas with biometric identifiers issued by Hungary in Istanbul.

The main fundamental rights challenges are gauging whether the interference with data protection and privacy is necessary and proportionate, and if the personal data are collected for a specified, explicit and legitimate purpose.⁸⁷ In relation to this, in 2012 the

European Commission published a list of authorities who have access to VIS, as required by Article 6 of the VIS Regulation.⁸⁸ Authorities responsible for external and internal border controls as well as asylum and visa authorities have access to VIS.

In addition, authorities responsible “for the prevention, detection or investigation of terrorist offences or of other serious criminal offences” have access to VIS data, if there are reasonable grounds to consider that consulting VIS data will substantially contribute to the prevention, detection or investigation of any of the criminal offences in question.⁸⁹ Once the decision applies the European Police Office (Europol) would also be allowed access to VIS data (Articles 5, 6 and 7). For an analysis of data protection issues, see [Chapter 3](#) of this Annual report.

Each EU Member State must, according to the VIS Regulation, request its National Supervisory Authority to monitor the lawfulness of its personal data processing, including VIS data.⁹⁰ This means independently monitoring the lawfulness of the processing of personal data, including their transmission to and from the VIS (Article 41). The European Data Protection Supervisor will monitor VIS-related activities at the EU level (Article 42). Therefore, in practice, the activities

Table 2.1: Schengen visas issued with biometric identifiers (2012), by EU Member State

EU Member State	Total number of short-term Schengen visas (C) issued with biometric identifiers	Short-term Schengen visas (C) with biometric identifiers issued per diplomatic mission or consular post
DK	2,670	Cairo 1,774; Tehran 427; Dubai 283; other 186
EE	90	Cairo 84; Tel Aviv 6
HU	32,139	Kiev 16,505; Istanbul 8,191; Cairo 2,357; other 5,086
LV	95	Egypt 77; Israel 18
SI	630	Cairo 361; Tehran 168; Tel Aviv 11; other 90

Note: The table only includes EU Member States from which FRA could obtain reliable statistics when this report was drafted.

Source: FRA, 2013

⁸¹ Twenty-six countries, i.e. all the EU Member States except Bulgaria, Cyprus, Ireland, Romania and the United Kingdom, and the non-EU countries Iceland, Liechtenstein, Norway and Switzerland.

⁸² VIS was first deployed in the North African region (Algeria, Egypt, Libya, Mauritania, Morocco and Tunisia) on 11 October 2011.

⁸³ Council of the European Union (2012c).

⁸⁴ European Commission (2012i).

⁸⁵ Regulation (EC) No 801/2009, Art. 8.

⁸⁶ Hungary, Consular services (2012).

⁸⁷ Council Directive 95/46/EC Art. 6 (1) (b); Council of Europe; Convention 108, Art. 5 (b).

⁸⁸ European Commission (2012j).

⁸⁹ Council of the European Union (2008), Art. 3 (4).

⁹⁰ Council Regulation (EC) No. 767/2008, Art. 41.

of the EU agency for large-scale IT-systems in Tallinn will also be monitored.

The VIS stores the fingerprints of all 10 digits collected for each applicant, with the exception of children under 12 and people who cannot physically provide finger scans. Once finger scans are stored in VIS, they can be reused for additional visa applications over a five-year period.⁹¹

The quality of the fingerprints stored remains important as they will be matched against the visa holder's finger scans at the border when entering EU territory.⁹² Although a mismatch does not mean that entry will automatically be refused, it will lead to further traveller identity checks.⁹³

EU Member States have a duty under Article 38 (3) of the Visa Code to train their relevant staff in visa processing. EU Member States must ensure that appropriate procedures guaranteeing the dignity of the applicant are in place when there are difficulties in taking the fingerprints, according to Article 13 (7) (b) of the Visa Code. The texture of the skin, hardened skin or mistakes in collecting the fingerprints could cause such difficulties. In some cases, difficulties could affect different groups of people, as certain professions might cause more wear and tear on finger tips.

Promising practice

Creating awareness among staff, as well as applicants, on the process for collecting biometric identifiers

Training consular staff in collecting biometric identifiers

In **Germany** detailed training materials as well as a training video are provided to consular staff and service providers collecting biometric identifiers. The training materials explicitly refer to how to guarantee the dignity of the applicant, particularly persons with physical constraints. (Federal Foreign Office (*Auswärtiges Amt*), FRA 2012))

Information video on the biometric data-taking process

In the waiting areas at the **Hungarian** consulates a short film is shown to the applicants on how pictures and fingerprints will be taken. It informs the applicants step-by-step on the procedure to ensure a smooth biometric data collection process. The project was financed by the External Border Fund. (FRA National Liaison Officer, Hungary)

The right to be informed at decisive moments in a process is an important element of procedural fairness and is included in Article 37 of the VIS Regulation.⁹⁴ Procedures adopted in **Estonia** illustrate how this can be done effectively in practice. Estonian embassies make available information material on VIS. When registering an application, the consular officer explains to the applicant why fingerprinting is a requirement. The officer ensures that it is possible to take all 10 fingerprints. The prints and their quality are then shown on the computer screen to both the official and the applicant. If the quality is poor, then the applicant is asked for another imprint.⁹⁵

The Charter of Fundamental Rights of the European Union guarantees everyone the right to an effective remedy and to a fair trial. In each EU Member State all persons must have the right to bring an action or a complaint before the competent authorities or the courts of the Member State that refused either the right of access to or the right of correction or deletion of their data as per the VIS (Article 38 (1) and (2)). EU Member States did not register any formal complaints during 2012 on the inclusion of biometric identifiers in the VIS.⁹⁶

2.2.2. The right to appeal a negative visa decision

This section provides information on visa appeals for 2012 for selected EU Member States (see Table 2.2), updating and adding to information given in the FRA Annual report 2011.

In **Slovenia** the appeals body is, in the first instance, the embassy or the consulate. In the second instance an appeal is automatically forwarded to the Slovenian Ministry of Foreign Affairs. The decision of the Ministry of Foreign Affairs is final, but a complaint can be filed at the Administrative Court.

In the **Netherlands** the purpose of the visa determines the appeals body. The Immigration and Naturalisation Service of the Ministry of Interior and Kingdom Relations is the appeals body for visas issued for tourism and family visits and to artists with work permits, trainees and fellows. The Consular Affairs and Migration Policy Department of the Ministry of Foreign Affairs is the appeals body for visas issued for business visits, work visits by installation and service technicians, academic or political visits, participation in conferences or sporting events, and by holders of diplomatic passports.

Family members of EU, EEA or Swiss citizens may in some EU Member States turn to other appeals bodies.

⁹¹ European Commission (2012k).

⁹² European Commission (2012e).

⁹³ European Commission (2012k).

⁹⁴ Regulation (EC) No. 767/2008.

⁹⁵ European Commission (2012f).

⁹⁶ *Ibid.*

Table 2.2: Number of visas issued, visa appeals lodged and decisions not upheld in 2012, 11 EU Member States

EU Member State	Number of short-term Schengen visas (C) issued	Appeals body	Number of visas appealed	Decision reversed/to be re-examined
BE	190,635	Council for Alien Law Litigation	303	2
CZ	582,531	The Appeals Commission on Residence of Foreign Nationals	500	116
EE	173,448	Ministry of Foreign Affairs	160	32
FI	1,377,664	Ministry of Foreign Affairs	160	about 45
HU	315,489	Ministry of Foreign Affairs	341	58
LT	229,948	Administrative Courts	11	0
LU	10,436	Administrative Tribunal and further to the Administrative Court	1	0
LV	180,981	Ministry of Foreign Affairs and, in case of a further appeal to the next instance, the Administrative Court	61	9
NL	277,484	Ministry of Foreign Affairs	463	39
SI	40,421	Embassy/Consulate/Ministry of Foreign Affairs and, in case of a further appeal to the next instance, the Administrative Court	1	0
SK	70,927	Remonstrance Commission	55	35

Note: The table only includes EU Member States from which the FRA could obtain reliable statistics when this report was drafted.

Source: FRA, 2013

In **Austria**, for instance, any citizen may file a complaint with one of the nine Independent Administration Tribunals (*Unabhängige Verwaltungssenate*, UVS) and in **Finland** with the Administrative Court of Helsinki.

According to the European Commission, appeals bodies should be judicial bodies which respect Article 47 of the Charter of Fundamental Rights of the EU on the right to an effective remedy and to a fair trial. The Commission has also informed the Member States on its interpretation.

The applicant may appeal against a decision that was refused, annulled or revoked (Visa Code, Articles 32 and 34). The Visa Code includes a standard form requesting information on why a visa was refused, annulled or revoked. The form includes 11 categories of broadly formulated reasons.⁹⁷

Examples of such categories are the presentation of a false, counterfeit or forged document; failure to provide justification for the purpose and conditions of

the intended stay; presence of an SIS alert; absence of travel medical insurance (see also Visa Code, Article 32). The Visa Code requires states to inform the applicant by means of this standard form (Article 32 (2)).

In February 2012, the Berlin Administrative Court (*Verwaltungsgericht*) submitted a set of questions to the CJEU on the scope of discretion that Member States have to refuse a visa when the applicant fulfils the necessary requirements.⁹⁸ More specifically, the CJEU was asked whether the national court must satisfy itself that the applicant intends to leave before the expiry of the visa for which he or she is applying, or whether it suffices that the court does not have doubts on that account; and perhaps most importantly, whether the Visa Code establishes a non-discretionary right to the issue of a Schengen visa if the entry conditions are satisfied and there are no grounds for refusing the visa under the Code.

⁹⁷ Regulation (EC) No 801/2009, Annex VI 'Standard Form for Notifying and motivating refusal, annulment or revocation of a visa', p. 35.

⁹⁸ CJEU, C-84/12 [2012], *Ezatollah Rahmanian Koushkaki v. Federal Republic of Germany*, reference for a preliminary ruling from the Administrative Court (*Verwaltungsgericht*, Berlin, Germany), lodged on 17 February 2012.

Appeals against refusal of visa

Several national appeals against refusal of visas have concerned doubts precisely with regard to the applicants' intention to leave the territory of the Member States (Visa Code, Article 32 (1) (b)).

In a Lithuanian case, for instance, the embassy initially refused a visa, claiming that the purpose and conditions for the intended stay were not justified, as the applicants could not clarify their relationship to the persons they intended to visit in **Lithuania**, their subsistence during their stay there, their legal status in Armenia where they applied for the visa and their intention to return to Armenia.⁹⁹

The Vilnius Regional Administrative Court (first instance) and the Administrative Court of Lithuania (second instance) concluded that although the applicants could not prove their means of subsistence during their stay in Lithuania, they were not asked for additional documents proving their income. Other circumstances that raised suspicions could also have been clarified during the examination of the visa application. Moreover, inconsistencies of information submitted by the applicants could be attributable to or influenced by their use of a foreign language, Russian.

In contrast, appeals bodies in **Germany** and **Italy** upheld visa refusals, sharing the embassies' conclusions that the applicant might not leave the territory of those Member States before visa expiry.

The case in Germany concerned the application for a visa by a Pakistani national whose father and brother were living in Germany but whose mother and another brother still lived in Pakistan. The Administrative Court in Berlin (*Verwaltungsgericht*) upheld the embassy's decision, sharing doubts as to the applicant's intention to return. The Court made reference to Article 7 of the EU Charter of Fundamental Rights on the respect for private and family life and argued that the applicant could stay in touch with his family members in Germany, as they can visit him in Pakistan, as well as through other means. The fact that the applicant and the brother had reached the age of majority impacted on the decision as well.¹⁰⁰

Similarly, the Lazio Regional Administrative Court in **Italy** said that the applicant must demonstrate that circumstances exist that would make it reasonable to presume that the foreigner has an interest in returning to his or her country of origin and/or if there is a risk of

irregular stay.¹⁰¹ The applicant had not submitted any documents proving income, employment or property in the country of origin that would support the visa application and prove that the centre of the applicant's interests was in the country of origin.

Appeals against visa refusal have also concerned the right to be heard. The **Austrian** embassy, for instance, refused a visa, because the information submitted regarding the stay's intended purpose – to take part in his divorce proceedings – and its conditions, was not reliable. The Austrian appeals body, the Administrative Court (*Verwaltungsgerichtshof*) ruled that not granting the applicant the right to be heard before the visa is refused constitutes a violation of procedural rules.¹⁰²

However, in a **Dutch** case, the District Court of The Hague (second instance) upheld the embassy's refusal, confirmed in the first instance by the Ministry for Foreign Affairs, saying that the embassy can refrain from hearing an applicant if he does not attempt to provide further evidence on the purpose and conditions of the intended stay during the appeals phase.¹⁰³ The embassy had refused the visa doubting that the applicant would leave the Netherlands before the visa expired because his social and economic ties with Morocco were insufficient.

Appeals against a revoked or annulled visa

According to the Visa Code, a visa can be: revoked if it becomes evident that the conditions for issuing it are no longer met (Article 34 (2)); or, annulled if it becomes evident that the conditions for issuing it were not met at the time when it was issued, in particular if there are serious grounds for believing that the visa was fraudulently obtained (Article 34 (1)).

A visa shall, in principle, be revoked or annulled by the competent authorities of the Member State which issued it. A visa may be revoked or annulled by the competent authorities of another Member State, in which case the authorities of the Member State that issued the visa shall be informed of such revocation or annulment (Article 34 (1) and (2)).

In a first case, the **Lithuanian** embassy revoked a visa because the property that the applicant owned in Lithuania, and which was the justification for travel, had become uninhabitable. The Supreme Administrative Court in Lithuania decided in favour of the applicant stating that even if the embassy used the standard form when revoking its previous decision to grant a visa, it is

99 Lithuania, Supreme Administrative Court of Lithuania, No. A662-372/2012, *K. M., H. M., L. M. and S. M. v. Ministry of Foreign Affairs of the Republic of Lithuania*.

100 Germany, Administrative Court Berlin, 35th Chamber, 35 K 468.10 V.

101 Italy (2012), *TAR Lazio* 3223/2012.

102 Austria, High Administrative Court, 2011/21/0232.

103 Netherlands, District Court The Hague, LJN: BW6771, No. 12/118.

obliged to have a proper and clear basis for such a decision, as the applicant was prevented from realising his right to an effective remedy.¹⁰⁴

In another case, **German** authorities annulled a visa issued to a Ukrainian citizen by Polish authorities. The visa holder entered Germany to buy a car, which he needed to do business in Poland. The German authorities annulled the visa as they had doubts about his business needs. The Ukrainian citizen appealed against the decision to the Administrative Court (*Verwaltungsgericht*) in Dresden, which decided in his favour. The state then brought the case to the Higher Administrative Court of Saxony, which said that an initial suspicion that the visa was fraudulently obtained was in this case insufficient to reach the required degree of probability of 'serious grounds' for visa annulment, according to Article 34 (1) of the Visa Code.¹⁰⁵

Outlook

Several legislative proposals on borders or visa matters will be negotiated and possibly adopted during 2013. The proposals relate to the Schengen evaluation process, the temporary reintroduction of internal border controls, suspending the visa waiver, the Internal Security Funds, Eurosur and amendments to the Schengen Borders Code. They also include Council Decision 2010/252/EU containing guidance for Frontex operations at sea, which the CJEU annulled and which is expected to be replaced. All these proposals entail important fundamental rights aspects. The same is true for the announced European Commission proposal on the smart border package, tabled for early 2013.

The trend towards increased use and reliance on databases and IT tools for border management and visa processing procedures is expected to continue, as illustrated by several of the proposals in this chapter.

The smart borders package will send alerts on visa over-stayers. There are also data protection challenges, such as purpose limitation, which need to be carefully evaluated, particularly as some EU Member States consider an irregular stay an administrative offence, but others criminalise it.

Considering the data protection concerns involved, the CJEU is expected to provide legal guidance on the proportionality of the storage of biometric data in passports and travel documents and their use for purposes other than border control.

It remains to be seen how the design and usage of ABC gates will evolve with experience and the exchange of good practices to address challenges relating to protecting victims of trafficking in human beings, as well as concerns related to the rights of children and persons with disabilities.

Due to the civil war in Syria and the unstable situation in North Africa, the EU must be prepared for a continued flow of arrivals via Turkey, Greece and throughout the Mediterranean. The fundamental rights aspects of this situation are subject to further analysis, with 2013 seeing studies launched on the EU's southern border.

The UN Special Rapporteur on the human rights of migrants is expected to present his report on the management of the external borders, including findings made during his visits to Greece, Italy, Tunisia and Turkey. FRA will issue a report on the fundamental rights at Europe's southern sea borders in March 2013.

In 2012, Frontex appointed a Fundamental Rights Officer as well as the members of the Consultative Forum, and the European Ombudsmen had an on-going inquiry into Frontex and its human rights obligations. This increased focus in 2012 on fundamental rights in Frontex activities has raised expectations that fundamental rights be reflected in the day-to-day running of operational activities.

In the Schengen cooperation on external border control, fundamental rights concerns are expected to be mainstreamed within the evaluations foreseen for 2013, in light of the increased attention to fundamental rights in the training of Schengen evaluators.

The fundamental rights of passengers who are held in airport transit zones have largely remained off the fundamental rights radar. As FRA research, forthcoming in 2013, indicates not enough attention is paid to their situation and possible violations of their right to human dignity.

To spur economic growth, the EU has increasingly begun to view migrants, as well as visitors, including those required to hold visas, as potential contributors to the EU economy. The common visa policy will therefore continue not only to focus on migration control but also to facilitate legitimate travel. As indicated above, a detailed analysis could be done on issues related to applicants' dignity and their fair and professional treatment – also within the context of the harmonisation of visa issuing procedures. The proposed complaint mail boxes could, if properly used, inform the EU in greater detail about the situation of visa applicants, including VIS.

Visa applicants are making increasing use of their right to appeal a refused, revoked or annulled visa and this trend is expected to continue. CJEU legal guidance on this issue is also expected.

¹⁰⁴ Lithuania, Supreme Administrative Court of Lithuania, *D. V. v. Ministry of Foreign Affairs of the Republic of Lithuania*.

¹⁰⁵ Germany, Higher Administrative Court of Saxony, 3rd Senate, 3 B 151/12t, OVG Saxony; Administrative Court Dresden, 3rd Chamber, 3 K 168/11.



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UN & CoE

18 January – Council of Europe publishes the first proposal for the modernisation of Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data

January

February

15 March – Council of Europe adopts an internet governance strategy

March

4 April – Council of Europe adopts the Recommendation to member states on the protection of human rights with regard to search engines

April

May

June

July

August

September

23 October – UN Office on Drugs and Crime issues a report on *The use of the Internet for terrorist purposes* arguing for more surveillance and retention of data on all communications

October

29 November – Consultative committee adopts the modernisation proposals for Convention 108, which will be examined by an inter-governmental Council of Europe committee in 2013 in view of their submission for adoption to the Committee of Ministers

November

December

EU

6 January – Article 29 Data Protection Working Party publishes a letter to the European Parliament's Civil Liberties, Justice and Home Affairs (LIBE) Committee about the new draft agreement on the transfer and use of Passenger Name Records (PNR), initialised by the European Commission and the United States (US)

25 January – European Commission proposes a comprehensive reform of data protection rules

January

16 February – Court of Justice of the European Union (CJEU) rules in *Sabam v. Netlog* (C-360/10) that a social network cannot be obliged to install a general filtering system covering all its users in order to prevent the unlawful use of musical and audiovisual work.

February

7 March – European Data Protection Supervisor issues an opinion on the European Commission's data protection reform package

19 March – European Commission Vice-President Viviane Reding and US Secretary of Commerce John Bryson issue a joint European Union (EU)-US statement on data protection at the High Level EU Conference on privacy and protection of personal data

23 March – Article 29 Data Protection Working Party adopts its opinion on the data protection reform proposals of the European Commission

March

19 April – CJEU rules in *Bonnier Audio AB and Others v. Perfect Communication Sweden AB* on the lack of applicability of the EU Data Retention Directive in the enforcement of intellectual property rights

April

3-4 May – Spring Conference of the European Data Protection Commissioners issues a resolution on European data protection reform

10 May – European Commission submits a request to the CJEU for an opinion on the Anti-Counterfeiting Trade Agreement (ACTA)

23 May – European Economic and Social Committee issues an opinion on the General Data Protection Regulation

29 May – Body of European Regulators for Electronic Communications releases net neutrality findings

May

8 June – European Commission brings Hungary before the CJEU, requesting the court to declare that Hungary failed to fulfil its obligations under the Data Protection Directive (1995/46/EC) by prematurely removing the data protection supervisor from office

June

4 July – European Parliament rejects ACTA

11 July – European Commission brings Germany before the CJEU for non-transposition of the Data Retention Directive (2006/24/EC)

July

August

September

1 October – FRA (European Union Agency for Fundamental Rights) issues an opinion on the proposed data protection reform package

5 October – Article 29 Data Protection Working Party issues its opinion on the data protection reform package, providing further input to the discussions

10 October – Committee of the Regions adopts its opinion on the data protection reform package at the October plenary session

16 October – CJEU rules that the Austrian Data Protection Authority does not fulfil the requirements of independence as outlined in the Data Protection Directive

October

November

20 December – European Commission withdraws its request to the CJEU for an opinion on ACTA

December

3

Information society and data protection



The European Commission launched a drive in 2012 to modernise the European Union's (EU) data protection framework, the most far-reaching reform of EU data protection legislation in 20 years. The importance of personal data protection, an area of EU responsibility, to key business sectors and third countries across the globe has made this reform package one of the most important EU legislative files in the civil liberties area. The Court of Justice of the European Union contributed to the reform package by elaborating case law on a key aspect of the package: the requirement of independence for data protection authorities. Work originating in previous years in two other important areas remained on the EU's agenda in 2012: balancing security and privacy, especially in the context of data retention, Passenger Name Records (PNR) and biometric passports; and ongoing debates about the fundamental rights implications of developments in information and communication technology, including with respect to the Anti-Counterfeiting Trade Agreement (ACTA), social media and internet-based services.

3.1. Reform of EU data protection legislation

On 25 January 2012, the European Commission proposed the most important reform of EU data protection legislation in 20 years.

In its policy communication,¹ the European Commission explains that its main aim is to put individuals in control of their personal data. The Commission seeks to ensure that consent is given explicitly and freely when it is required; internet users have an effective right to be forgotten and a right to data portability; and administrative and judicial remedies serve to reinforce the rights of data subjects.

The European Commission also explains that it wants to ensure that data protection rules support a single digital market across the EU. The Commission is therefore proposing to lay down data protection rules at EU level through a regulation which is directly applicable in all Member States and does not require further

Key developments in the area of information society and data protection

- EU institutions launch the most far-reaching reform of EU data protection legislation in 20 years and stress the need for uniform rules across the EU to regulate this policy area.
- Various voices raise concerns in a number of EU Member States about certain aspects of the European Commission's reform proposals, such as over-regulation or whether such proposals need to be made at EU level. They take issue, for example, with the Commission's decision to use a regulation, which sets immediately applicable rules, rather than a directive, which defines common minimum EU standards, but permits national implementation that takes into account different legal traditions.
- The Court of Justice of the European Union (CJEU) develops its line of jurisprudence on the complete independence of data protection authorities.
- The revision of the EU Data Retention Directive is postponed, while national implementing legislation continues to face constitutional challenges in a number of Member States. The CJEU is asked to deliver an opinion on the fundamental rights compliance of the Directive.

¹ European Commission (2012a).

- The Council of the European Union reaches political agreement on the proposed PNR Directive, but the European Parliament suspends cooperation on a number of legislative files including this one during the second half of 2012, delaying the legislative procedure.
- The European Parliament rejects the ACTA, which means that neither the EU nor its individual Member States can join the agreement.
- The responsible national data protection authority audits Facebook at its European headquarters and expresses satisfaction at the progress achieved, but fundamental rights concerns persist in other EU Member States.
- A national data protection authority investigates Google's new privacy policy, pursuing a mandate from the Article 29 Working Party on behalf of the 27 EU Member States.

transposition into national law. Thus, the Commission wishes to achieve uniformity of the data protection legal framework across the EU and estimates that this would lead to net savings for companies of about €2.3 billion a year alone in administrative burdens. The Commission also wishes to simplify the regulatory environment by doing away with formalities such as general notification requirements; the Commission estimates that would lead to net savings of €130 million a year in administrative burdens. The Commission is also proposing to set up a 'one-stop-shop' system for data protection in the EU: data controllers (including natural or legal persons

and public authorities which determine the purposes, conditions and means of the processing of personal data) in the EU will deal with a single data protection authority (DPA) alone, namely the DPA of the Member State in which the company is based.

"In this new digital environment, individuals have the right to enjoy effective control over their personal information. Data protection is a fundamental right [...] and needs to be protected accordingly. Lack of confidence makes consumers hesitant to buy online and accept new services. Therefore, a high level of data protection is also crucial to enhance trust in online services and to fulfil the potential of the digital economy, thereby encouraging economic growth and the competitiveness of EU industries."

European Commission (2012), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Safeguarding privacy in a connected world – A European Data Protection Framework for the 21st Century, COM(2012) 9 final, Brussels, 25 January 2012

All the main European bodies and institutions working in the field of privacy and data protection – the European Data Protection Supervisor (EDPS),² Article 29 Working Party,³ the European Economic and Social Committee (EESC),⁴ the Committee of the Regions,⁵ the FRA,⁶ the European Data Protection Commissioners,⁷ the EU Member States and different associations and non-governmental organisations active in the field of data protection⁸ – have commented on the proposed reform. FRA submitted an opinion on the fundamental rights aspects of the reform package at the request of the European Parliament (see box p. 74).

Table 3.1: Elements of the data protection reform package

EU instrument	Title	Reference
Communication	<i>Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Safeguarding privacy in a connected world, A European Data Protection Framework for the 21st century</i>	COM(2012) 9 final, Brussels, 25 January 2012
Draft regulation	<i>Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)</i>	COM(2012) 11 final, Brussels, 25 January 2012
Draft directive	<i>Proposal for a Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data</i>	COM(2012) 10 final, Brussels, 25 January 2012

² EDPS (2012a).

³ Article 29 Data Protection Working Party (2012a) and Article 29 Data Protection Working Party (2012b).

⁴ European Economic and Social Committee (2012).

⁵ Committee of the Regions (2012).

⁶ FRA (2012a).

⁷ European Data Protection Commissioners (2012).

⁸ European Digital Rights (EDRI) (2012a) and EDRI (2012b).

The EDPS welcomed the regulation, which sets immediately binding standardised rules for all EU Member States, because it will eliminate differences in the current national implementing laws. The rules will strengthen the rights of individuals and make those who control personal data more accountable for how they handle such data. The regulation also reinforces the role and powers of national data protection authorities by empowering them to issue significant fines. The EDPS is particularly pleased to see that the instrument of a regulation is proposed for the general rules on data protection.

The EDPS expressed concerns that the European Commission has chosen to regulate data protection in the law enforcement area through a separate, self-standing legal instrument that provides less protection than the proposed regulation. The EDPS also remarked that the main overall weakness of the data protection package is that it fails to remedy the patchiness of EU data protection rules. According to the EDPS, the reform package leaves many EU data protection instruments unaffected, such as the data protection rules for EU institutions and bodies. It also leaves aside all specific instruments adopted in the area of police and judicial cooperation in criminal matters, such as the rules on Europol and Eurojust and the Prüm Decision.⁹

The data protection reform was on the agenda of the Informal Meeting of the Justice and Home Affairs Ministers which took place in Nicosia on 23–24 July 2012.¹⁰ The main discussion points were the potential to further develop the digital single market without imposing disproportionate administrative burdens on those processing personal data; and a review on a case-by-case basis of the empowerment of the Commission to adopt the delegated and implementing acts contained in the proposals.¹¹

In some EU Member States, especially in the national parliaments, the European Commission proposals raised concerns. One such concern related to the principle of subsidiarity, or whether such proposals needed to be made at EU level and might not better be addressed nationally, and another to the impression that the European Commission proposals were too far reaching and too detailed, thus posing the risk of overregulation.

These concerns were, for instance, voiced in **Belgium**,¹² the **Czech Republic** (especially in relation to the draft

directive),¹³ **Estonia**,¹⁴ **Germany**,¹⁵ **Slovenia**¹⁶ and **Sweden**.¹⁷ In **Lithuania**, in contrast, the prevailing view was that the proposals did not contradict the principle of subsidiarity.¹⁸

FRA ACTIVITY

Exploring fundamental right aspects of data protection

At its third annual Symposium in May 2012, FRA brought together 50 experts to focus on the fundamental rights dimension of the data protection reform package. The experts, who represented national government agencies and specialised bodies, international and non-governmental organisations, data protection authorities, universities and companies, split into three working groups at the symposium to examine:

- the 'right to be forgotten', which would allow people to require organisations that hold their data to delete them unless there are legitimate grounds to keep them;
- the right to portability, which would allow people to transfer their electronic information, such as a Facebook friend lists or iTunes music, to a competitor's account without hindrance;
- the independence and powers of data protection authorities; and
- profiling, which, according to the proposed regulation's definition, is a method that uses automated processing to evaluate personal aspects or analyse or predict a natural person's performance or behaviour.

For more information, see: FRA (2012), FRA Symposium report – European Union data protection reform: new fundamental rights guarantees, 10 May 2012, available at: http://fra.europa.eu/sites/default/files/fra_uploads/2280-FRA-Symposium-data-protection-2012.pdf

In other Member States, the issue of subsidiarity was coupled with the perceived lack of consistency between the proposed regulation and the proposed directive. This and other arguments were often combined with the suggestion to adopt a single legal instrument instead; preferably a directive that would define common minimum standards, but permit better standards at national level. This line of argument surfaced in the

⁹ EDPS (2012b).

¹⁰ The agenda is available at: www.statewatch.org/news/2012/jun/eu-jha-informal-jul-agenda.pdf.

¹¹ Cyprus, Cyprus Presidency of the Council of the European Union (2012).

¹² Belgium, Chamber of Representatives (2012).

¹³ Czech Republic, Committee for EU Affairs of the Senate of the Parliament of the Czech Republic (2012).

¹⁴ Estonia, State Chancellery (2012).

¹⁵ Germany, Federal Council (2012).

¹⁶ Slovenia, Ministry of Justice and Public Administration (2012).

¹⁷ Sweden, Swedish Parliament (2012).

¹⁸ Lithuania, Committee on Legal Affairs of the *Seimas* of the Republic of Lithuania (2012).

Czech Republic,¹⁹ **Estonia,**²⁰ **Germany,**²¹ **Lithuania,**²² **Slovenia**²³ and **Sweden.**²⁴

FRA ACTIVITY

Highlighting the fundamental rights implications of the proposed data protection reform package

The data protection reform package is the first legislation proposed since the entry into force of the Charter of Fundamental Rights of the European Union in 2009 that explicitly aims at comprehensively guaranteeing a fundamental right, namely the fundamental right to data protection. At the request of the European Parliament, FRA issued an opinion on the proposed EU data protection reform package, suggesting ways to strengthen its fundamental rights safeguards.

In its opinion, FRA suggests inserting a general fundamental rights clause and an explicit guarantee that delegated and implementing acts, which are specific legislative powers given to the European Commission, cannot limit fundamental rights in any manner contrary to Article 52 of the Charter, which sets out the scope and principles of Charter rights.

The opinion also suggests concrete amendments to the draft text to ensure a better balancing of key fundamental rights, such as freedom of expression, freedom of the arts and sciences, freedom to conduct a business, the rights of the child or access to documents with the fundamental right of data protection.

Moreover, the opinion highlights the need to incorporate 'sexual orientation' into the list of sensitive data, thus qualifying it for a higher level of protection, with a specific reference to Article 21 of the Charter on non-discrimination to enable the collection of sensitive data for statistical research purposes, thereby clarifying the legality of such data collection to support the fight against discrimination.

For more information, see: FRA (2012), Opinion of the European Union Agency for Fundamental Rights on the proposed data protection reform package, FRA Opinion 2/2012, Vienna, 1 October 2012; available at: <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>

Another strand of argument focused on the economic impact of the proposals, drawing attention to

the administrative burdens for the private sector and alleged excessive sanctions. These concerns were raised in the **Czech Republic,**²⁵ **Estonia,**²⁶ the **Netherlands,**²⁷ **Slovenia,**²⁸ **Sweden**²⁹ and the **United Kingdom.**³⁰

Individual EU Member States gave specific topics special attention. For instance, in **Germany,** the Federal Commissioner for Data Protection and Freedom of Information (*Der Bundesbeauftragte für den Datenschutz und die Informationsfreiheit*) raised concerns that the proposed regulation would only oblige companies with more than 250 staff to appoint data protection officers, thereby only covering 0.3 % of companies in Germany.³¹

At the European Parliament, the responsible rapporteur presented a draft report on the draft directive forming part of the data protection reform package to the Civil Liberties, Justice and Home Affairs (LIBE) Committee.³² The rapporteur for the draft regulation published his report on the draft regulation in January 2013.

While these discussions maintained momentum for the important process of modernising the EU data protection legislation, a similar process was also taking place in the Council of Europe, mainly in the Consultative Committee (T-PD) of the Convention for the Protection of Individuals, with regard to the Automatic Processing of Personal Data (hereafter referred to as 'Convention 108') which prepared the modernisation of Convention 108.³³

The objectives of this modernisation exercise are to better address challenges for privacy resulting from the use of new information and communication technologies and to strengthen the potential of the Convention to serve not just as a European standard, but as a global standard as well, in the area of data protection.³⁴

19 Czech Republic, Senate of the Parliament of the Czech Republic (2012).
20 Estonia, Estonian Data Protection Inspectorate (2012).
21 Germany, Federal Commissioner for Data Protection and Freedom of Information (2012a).
22 Lithuania, Committee on Human Rights of the Seimas of the Republic of Lithuania (2012).
23 Slovenia, Ministry of Justice and Public Administration (2012).
24 Sweden, Parliament (2012).

25 Czech Republic, Senate of the Parliament of the Czech Republic (2012).
26 Estonia, State Chancellery (2012).
27 Netherlands, Minister for European Affairs and International Cooperation (2012), pp. 3-7.
28 Slovenia, Ministry of Justice and Public Administration (2012).
29 Sweden, Parliament (2012).
30 United Kingdom, Ministry of Justice (2012).
31 Germany, Federal Commissioner for Data Protection and Freedom of Information (2012a).
32 European Parliament, Committee on Civil Liberties, Justice and Home Affairs (2012a).
33 Council of Europe, Bureau of the Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data (2010).
34 Council of Europe, Consultative Committee of the Convention for the protection of individuals with regard to automatic processing of personal data (2012).

FRA ACTIVITY

Ensuring the independence of data protection authorities

The FRA opinion on the data protection reform package specifically addresses the independence of national data protection authorities. The opinion recalls that it would be advisable for the independence criteria to be detailed to guarantee their practical effectiveness, and to include a reference to the 'Paris Principles', which set forth the independence criteria for National Human Rights Institutions (NHRIs), and other available standards to offer a more comprehensive definition of independence.

The FRA opinion argues that while data protection authorities have a more focused and narrow mandate than NHRIs, both types of institutions are meant to function as independent monitoring bodies in the fundamental rights field.

The opinion lists the factors that ensure independence under the Paris Principles:

- pluralism in the composition of an institution, reflecting society's composition;
- a suitable infrastructure, in particular adequate funding and budget autonomy;
- a stable mandate of the institution's members expressed through appointment and dismissal conditions and the exclusion of voting rights for government representatives within the governing bodies of institutions.

Moreover, the opinion observes that the proposed consistency mechanism contained in the draft regulation gives the Commission not only the power to adopt a reasoned opinion aimed at the suspension of the draft measures of the national data protection authorities, but also the power to adopt implementing acts.

FRA concludes that these proposed powers of the Commission may be difficult to reconcile with the guarantees of independence under Articles 8 (3) and 47 of the Charter of Fundamental Rights of the European Union and other international standards of independence.

For more information, see: FRA (2012), Opinion of the European Union Agency for Fundamental Rights on the proposed data protection reform package, FRA Opinion- 2/2012, Vienna, 1 October 2012; available at: <http://fra.europa.eu/sites/default/files/fra-opinion-data-protection-oct-2012.pdf>

3.2. Complete independence of Data Protection Authorities

The CJEU continued to develop the concept of complete independence of data protection authorities under EU law in 2012, further delineating the precise requirements regarding independence in relation to influence and supervision, for instance, in the case of the Austrian Data Protection Authority. The CJEU, which first dealt with this issue in *Commission v. Germany*³⁵ in 2010, stressed that although the Austrian authority enjoys functional independence – meaning that no instruction can lawfully be issued to it – this alone is insufficient to protect it from all external influence. The independence required under EU law is intended to preclude not only direct influence in the form of instructions, but also any indirect influence which may affect the DPA's decisions.³⁶

"The independence required under the second subparagraph of Article 28(1) of Directive 95/46 is intended to preclude not only direct influence, in the form of instructions, but also, [...] any indirect influence which is liable to have an effect on the supervisory authority's decisions."

CJEU, C-614/10, European Commission v. Republic of Austria, 16 October 2012, paragraph 43

³⁵ CJEU, C-518/07, *European Commission v. Federal Republic of Germany*, 9 March 2010.

³⁶ CJEU, C-614/10, *European Commission v. Republic of Austria*, 16 October 2012.

The European Commission also brought an action before the CJEU against **Hungary**, asking the court to declare that Hungary had failed to fulfil its obligations under the EU Data Protection Directive³⁷ by removing the data protection supervisor from office prematurely.³⁸ The case was still pending at the end of 2012.

3.3. Data retention

The EU Data Retention Directive,³⁹ which has been the subject of fundamental rights concerns ever since its adoption in 2006, promotes the fight against terrorism and serious crime through the retention of traffic (mainly traffic data on telephone calls made and received, emails sent and received and websites visited) as well as location data (mainly the telephone number or internet protocol address used).

The directive prescribes that the national laws of EU Member States must require providers of publicly available electronic communications services and public communications networks to retain traffic and location data for a period of between six months to two years from the date of the communication.

³⁷ Directive 95/46/EC of the European Parliament and of the Council, OJ 1995 L 281.

³⁸ CJEU, C-288/12, *European Commission v. Hungary*, action brought on 8 June 2012.

³⁹ Directive 2006/24/EC of the European Parliament and of the Council, OJ 2006 L 105.

The transposition of the directive continued to face difficulties that resulted in proceedings both before the CJEU, and before national constitutional courts. On 11 July 2012, the European Commission brought **Germany** before the CJEU for only partially and insufficiently transposing the directive.⁴⁰ This followed a March 2010 German Federal Constitutional Court ruling in which it held that the Federal Republic's transposition measures were unconstitutional and void. Since then, Germany has failed to meet its obligation to transpose the directive in full, the European Commission argued. The European Commission contends that the CJEU should impose a penalty of €315,036.54 a day against Germany.

Separately, on 31 May 2012, the European Commission formally decided to end infringement proceedings against Austria, which had notified it that it had fully transposed the Data Retention Directive. The Commission also decided to withdraw the request for a penalty payment from the CJEU against Sweden while maintaining before the court the request sentencing Sweden to pay a lump sum for the directive's late transposition.⁴¹

In **Ireland**, the High Court referred a case to the CJEU with questions concerning the compatibility of the data retention directive with key fundamental rights, specifically freedom of movement, freedom of expression and the right to privacy, data protection and good administration.⁴²

National Constitutional Courts became involved in Austria and in Slovakia. In **Austria** 11,139 persons filed a joint complaint to the constitutional court.⁴³ In December 2012, the Austrian Constitutional Court expressed doubts about the compatibility of the EU Data Retention Directive with the EU Charter of Fundamental Rights and referred the case to the CJEU.⁴⁴ Moreover, a petition with 106,067 signatures against data retention was submitted to the parliament.⁴⁵

In **Slovakia**, a group of Members of Parliament filed a complaint against the national implementation of data retention before the Constitutional Court on 9 October 2012. The complaint asks the Constitutional Court to refer the case to the CJEU for a preliminary ruling, if necessary, questioning it on the validity of the Data Retention Directive.⁴⁶

In the **Netherlands**, the need to use data retention to solve serious crimes was questioned. The Ministry of Security and Justice invited Bits of Freedom, an organisation specialising in digital civil rights like data protection and privacy, to submit its review evaluating the Data Retention Telecommunication Act, which implemented the directive.⁴⁷

Bits of Freedom points out that neither the Dutch government, nor the European Commission has been able to empirically prove that data retention has led to a significant increase in the number of serious criminal cases solved. The prosecution and secret services frequently seize data when competence is lacking and procedural safeguards are not met. Additionally, Bits of Freedom warns of function creep – the use of data for other purposes than those foreseen by law.⁴⁸

3.4. Passenger Name Record (PNR) data

In 2011, the European Commission introduced a new proposal for a PNR Directive,⁴⁹ concerning data that include information such as passenger names and details on their contacts, ticketing and itinerary. The PNR Directive would complement the various PNR agreements with third countries.

The Council of the European Union reached a general approach on establishing an EU-PNR system in April 2012, which permitted the Council to start negotiations with the European Parliament under the ordinary legislative procedure.⁵⁰ The discussion in the Council touched, among other things, on two main issues.

The first concerned whether the proposed new rules should cover the collection of PNR data only for flights from and to third countries or whether they should also cover flights within the EU. The proposed compromise would allow, but not oblige, EU Member States to also collect PNR data concerning selected intra-EU flights. The proposed system potentially affects the right to privacy, the right to data protection and the prohibition of non-discrimination.

The second key question was the retention period of PNR data (whereas the Data Retention Directive discussed earlier traffic and location data concerns). The initial European Commission proposal provides for a total retention period of five years. After 30 days, however, the PNR data would have to be masked out, so that the recognisable person-related elements of the PNR would

40 CJEU, C-329/12, *European Commission v. Federal Republic of Germany*, action brought on 11 July 2012.

41 European Commission (2012b).

42 CJEU, C-293/12, Reference for a preliminary ruling from the High Court of Ireland, lodged on 11 June 2012 – *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, The Commissioner of the Garda Síochána, Ireland and the Attorney General*, 25 August 2012.

43 Austria, AK Vorrat (2012a).

44 Austria, Constitutional Court (2012).

45 Austria, AK Vorrat (2012b).

46 EDRI (2012c).

47 Netherlands, Bits of Freedom (2012), p. 1.

48 *Ibid.*, pp. 2–9.

49 European Commission (2011).

50 European Commission (2012c).



no longer be visible to a 'front-desk' law enforcement officer but only to a few specially authorised individuals.

A number of EU Member States considered that this initial 30-day storage period was too short from an operational point of view. The Council agreed to prolong the first period of fully accessible data to two years and maintain the overall retention period of five years.⁵¹

In the European Parliament, the rapporteur of the committee responsible for this proposal, the Committee on Civil Liberties, Justice and Home Affairs (LIBE), presented a draft report on 14 February 2012⁵² that agreed with the bulk of the European Commission's approach to the transmission and use of PNR data. The rapporteur also agreed that the Commission and law enforcement bodies had presented persuasive evidence of the PNR system's effectiveness and contended that such a system was necessary, proportional and of added value.

The rapporteur was convinced that the inclusion of intra-EU flights would add clear value. He proposed no changes to the controversial definitions of 'terrorist offence' and 'serious crime' or to the proposed retention period of five years in order to ensure the necessity and proportionality of the measure, but he did suggest adding a definition to clarify the term 'masking of data'.

Members of the LIBE committee tabled 489 amendments to his draft.⁵³ The Committee on Transport and Tourism⁵⁴ and the Committee on Foreign Affairs⁵⁵ also contributed opinions that differed substantially from the LIBE rapporteur's draft report and expressed caution regarding the proposal based on fundamental rights considerations.

In June 2012, the European Parliament suspended its cooperation with the Council of the European Union on the EU PNR dossier and four other legislative dossiers.⁵⁶ The work in the LIBE committee on the draft report only resumed towards the end of 2012.

3.5. Biometric passports

The EU Regulation on Biometric Passports⁵⁷ has raised fundamental rights concerns since its inception in 2004. In the aftermath of the tragic events of 11 September 2001, EU Member States asked the European Commission to take immediate action to improve document security. The Council of the European Union decided to integrate biometrics into European passports. Passports and travel documents now include a high-security storage medium for memorising computerised data, with sufficient capacity to guarantee the integrity, authenticity and confidentiality of the data included. The storage medium contains a facial image and two fingerprints.

On 12 June 2012, the **German** Administrative District Court of Gelsenkirchen referred a question for preliminary ruling to the CJEU, asking it to determine whether the EU Regulation on Biometric Passports was valid.⁵⁸ Some three months later, in September 2012, the highest **Dutch** administrative court also referred four cases to the CJEU, asking it whether the same regulation infringes citizens' right to privacy and whether the fingerprints could be collected if used only for passport or identity card issuance.

In all these cases, authorities refused to issue passports/ID cards to the applicants because they declined to provide their fingerprints.⁵⁹ The issue raises two key fundamental rights concerns: fingerprints are taken not just of suspects but of every citizen, raising questions of necessity and proportionality with regard to data protection and privacy protection; and concerns that these fingerprints are not used just to check the authenticity of identity documents but for other purposes as well.

In the Council of Europe, the 2005 progress report on the application of the principles of Convention 108⁶⁰ to the collection and processing of biometric data⁶¹ is being updated in order to be in line with the modernisation proposals of Convention 108, as well as to deal with developments in biometric technology (see also

► **Chapter 2** in this Annual report).

⁵¹ *Ibid.*

⁵² European Parliament, LIBE committee (2012b).

⁵³ European Parliament, LIBE committee (2012c).

⁵⁴ European Parliament, Committee on Transport and Tourism (2011).

⁵⁵ European Parliament, Committee on Foreign Affairs (2012).

⁵⁶ European Parliament (2012a).

⁵⁷ Council Regulation (EC) No. 2252/2004.

⁵⁸ CJEU, C-291/12, Reference for a preliminary ruling from the *Verwaltungsgericht Gelsenkirchen* (Germany) lodged on 12 June 2012 – *Michael Schwarz v. Stadt Bochum*, 8 September 2012.

⁵⁹ CJEU, References for preliminary rulings from the *Raad van State* (Netherlands) in C-446/12, *Willems v. Burgemeester van Nuth* lodged on 3 October 2012; C-447/12, *H.J. Kooistra v. Burgemeester van Skarsterlân*, lodged on 5 October 2012; C-448/12, *Roest v. Burgemeester van Amsterdam*, lodged on 8 October 2012; and C-449/12, *van Luijk v. Burgemeester van Den Haag*, lodged on 8 October 2012.

⁶⁰ Council of Europe, Convention for the protection of individuals with regard to automatic processing of personal data, CETS No. 108, 1981.

⁶¹ Council of Europe (2005).

3.6. The protection of intellectual property rights

3.6.1. Anti-Counterfeiting Trade Agreement (ACTA)

The Anti-Counterfeiting Trade Agreement (ACTA) is a controversial international trade agreement whose purpose is to establish international standards for intellectual property rights enforcement. The agreement aims to establish an international legal framework for combating intellectual Property Rights (IPRs) infringements, namely counterfeiting and copyright infringements on the internet (piracy).⁶² Besides the EU and its Member States, ACTA signatories are Australia, Canada, Japan, Mexico, Morocco, New Zealand, Singapore, South Korea, Switzerland and the United States.⁶³

“The goal of the ACTA negotiations is to provide an international framework that improves the enforcement of intellectual property right (IPR) laws. It does not purport to create new intellectual property rights, but to create improved international standards as to how to act against large-scale infringements of IPR.”⁶⁴ For its opponents, ACTA is controversial for a number of reasons.⁶⁵

ACTA is a mixed agreement – it contains different sets of provisions, which partly fall under the EU’s exclusive competence and partly under its shared competence with Member States.⁶⁶ The entry into force in the EU, therefore, requires all EU Member States to ratify it and the European Parliament and Council of the European Union to consent to it.⁶⁷ On 26 January 2012, the EU and 22 EU Member States (excluding Cyprus, Estonia, Germany, the Netherlands and Slovakia which were “expected to do so on the completion of their respective domestic procedures”) signed ACTA.⁶⁸

Due to the growing concerns, the EDPS issued a second opinion on ACTA⁶⁹ on 24 April 2012, complementing its earlier February 2010 opinion. The second opinion provides guidance on the privacy and data protection issues ACTA raises and assesses some of its legal provisions.

The opinion holds that ACTA fails to spell out precisely the measures to be deployed to tackle infringements of intellectual property rights on the internet, a failure which could have side effects on individuals’ fundamental rights if the measures are implemented improperly. It underlines that many of the measures to strengthen the enforcement of intellectual property rights online could involve the large-scale monitoring of users’ behaviour and of their electronic communications.

Because such measures intrude significantly into persons’ private spheres, they should only be implemented if they are necessary and proportionate to the aim of enforcing intellectual property rights.

The opinion also argues that ACTA does not sufficiently take into account effective judicial protection, due process, the principle of the presumption of innocence, and the right to privacy and data protection.⁷⁰

The Committee on International Trade delivered a negative recommendation concerning ACTA. The recommendation says that: “the intended benefits of this international agreement are far outweighed by the potential threats to civil liberties”.⁷¹ The European Parliament received numerous petitions asking Members of the European Parliament to vote against ACTA. More than 2.8 million internet users from across the globe⁷² signed one of the petitions against ACTA.⁷³ Those who signed the petitions fear that the agreement will pose a threat to a free and open internet.

In July 2012 the European Parliament rejected the agreement in plenary session. This rejection means that neither the EU nor its individual Member States can join the agreement.⁷⁴

Although the European Commission has said it is convinced that ACTA is fully in line with EU standards and does not interfere with citizens’ fundamental rights of freedom of expression and data protection, it nevertheless asked the CJEU on 10 May to rule on whether ACTA violates those rights and freedoms.⁷⁵ Whereas the European Parliament rejected ACTA, the European Commission still intends to seek the CJEU’s legal opinion. However, on 19 December 2012, a Commission spokesperson announced that the Commission had decided to withdraw its referral to the CJEU.⁷⁶

62 European Parliament (2012b).

63 ACTA is open for signatures until 1 May 2013 and it would enter into force in countries that ratified it after ratification by six countries.

64 European Commission, Trade (2008); see also European Parliament (2012c).

65 European Parliament, Directorate-General for External Policies, Policy Department (2011), p. 6.

66 European Parliament (2012b).

67 European Parliament (2012c).

68 European Parliament (2012b).

69 EDPS (2012c); see also EDPS (2012d).

70 EDPS (2012e).

71 European Parliament (2012c).

72 European Parliament (2012d).

73 Text of the petition available at: www.europarl.europa.eu/pdfs/news/public/focus/20120220FCS38611/20120220FCS38611_en.pdf.

74 European Parliament (2012b).

75 European Commission (2012d); see also European Commission (2012e).

76 See video at: www.youtube.com/watch?v=VCBTFh3lhQY.

3.6.2. CJEU analyses the limits of the protection of intellectual property rights

The CJEU also analysed the limits of the protection of intellectual property rights in 2012. In the *Sabam (Société Belge des Auteurs, Compositeurs et Editeurs)* case, the CJEU ruled that a social network “cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical and audiovisual work”.⁷⁷

Sabam, the Belgian society for collecting music royalties, brought the social network Netlog, which allows users to create and exchange content, to court to require it to install filtering systems aimed at preventing infringements on its website by Netlog’s large Belgian membership. Sabam asked the **Belgian** Court to impose a penalty payment of €1,000 per day if the injunction was not respected. But much user-generated content re-works copyrighted material to produce new creations, making assessments of legality particularly difficult and inappropriate for automatic filtering systems.

On 10 July 2010, the Brussels Court of First Instance denied the penalty payment request and asked the CJEU to rule whether or not a national judge may require a hosting service provider to filter most of the information stored on its servers in order to identify electronic files containing musical, cinematographic or audiovisual work, and subsequently to block the exchange of such files. The injunction that Sabam requested covered all Netlog customers to avoid any potential future abuses.

On 16 February 2012, the CJEU decided that it is against EU law to order such a measure. The judgment contains important interpretations of the following fundamental rights: intellectual property; freedom to conduct a business; data protection and freedom of information. The court held that the protection of intellectual property is a fundamental right protected by Article 17 (2) of the Charter of Fundamental Rights of the European Union, but remarked that this right is not absolute. According to the court, an injunction requiring the installation of a filtering system is complicated and costly, and for this reason an infringement of the freedom to conduct a business of the hosting service provider protected by Article 16 of the EU Charter of Fundamental Rights. The court held that such a measure also infringes the fundamental rights of the users of the services of the hosting service provider, namely the protection of personal data protected by Article 8 of the Charter and freedom of information protected by Article 11 of the Charter. All these fundamental rights need to be balanced with the protection of intellectual property and can, as a consequence, serve as a justification for its limitation.

⁷⁷ CJEU, C-360/10, *Sabam v. Netlog NV*, 16 February 2012.

“Indeed, the injunction requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified [...]”

CJEU, C-360/10, *Sabam v. Netlog NV*, paragraph 49

3.7. Social media and internet-based services

Social media and other internet-based services raise fundamental rights concerns regarding the scope of the data collected and their use, concerns which are not always clear to users of these services. The consent of users could, therefore, be called into question as they are not always fully informed and cannot always assess the consequences of their consent.

In 2012, the Council of Europe adopted two recommendations in this area: a recommendation on the protection of human rights with regard to search engines⁷⁸ and a recommendation on the protection of human rights with regard to social networking services.⁷⁹

The latter recommendation specifically suggests that social networking services seek the informed consent of users if they wish to process new data about them, share their data with other categories of people or companies and/or use their data in ways other than those necessary for the specified purposes for which they were originally collected.⁸⁰

3.7.1. Facebook

As Facebook’s European headquarters is based in Dublin (Facebook Ireland), Irish data protection law is applicable to the social network’s dealings with all its users in the EU. On 21 September 2012, the Office of the **Irish** Data Protection Commissioner published the outcome of its review of how well Facebook Ireland had implemented recommendations made in the commissioner’s December 2011 audit, which had assessed Facebook Ireland’s compliance with Irish Data Protection law and, by extension, EU law in this area.

The audit report finds that Facebook Ireland had implemented the great majority of the recommendations to the satisfaction of the commissioner, particularly in the following areas:

⁷⁸ Council of Europe, Committee of Ministers (2012a).

⁷⁹ Council of Europe, Committee of Ministers (2012b).

⁸⁰ *Ibid.*

- the provision of better transparency for users in how their data are handled;
- the provision of increased user control over settings;
- the implementation of clear periods for the deletion of personal data or an enhanced ability for the user to delete items;
- the enhancement of the user's right to have ready access to their personal data and the capacity of Facebook Ireland to ensure rigorous assessment of compliance with Irish and EU data protection requirements.

Those recommendations which Facebook Ireland had not yet implemented by the time of the audit report were highlighted with a clear timeframe for implementation.

*"I am satisfied that the Review has demonstrated a clear and ongoing commitment on the part of Facebook Ireland to comply with its data protection responsibilities by way of implementation, or progress towards implementation, of the recommendations in the Audit Report. I am particularly encouraged in relation to the approach it has decided to adopt on the tag suggest/facial recognition feature by in fact agreeing to go beyond our initial recommendations, in light of developments since then, in order to achieve best practice."*⁸¹

Billy Hawkes, Irish Data Protection Commissioner, 21 September 2012

The Irish Data Protection Authority invited the student group Europe-v-facebook.org, whose detailed complaints about Facebook Ireland were addressed as part of the audit, to indicate if the changes brought about by the audit dealt adequately with their complaints, and the group provided detailed comments. The group⁸² concluded that the Irish Data Protection Authority had taken very important first steps but that full compliance with the law was not yet ensured. The group noted that the Irish Data Protection Authority did not have a technical expert or a single legally trained official while it faced "a whole armada of lawyers from Facebook".⁸³

Not all data protection authorities in the EU shared the opinion of the Irish Data Protection Authority. The Independent Centre for Privacy Protection of Schleswig-Holstein, Germany, publicly criticised the Irish authority's audit report and announced that it would continue its efforts to ensure full compliance with the law.⁸⁴

⁸¹ Ireland, Office of the Data Protection Commissioner (2012).

⁸² Europe-v-facebook.org (2012).

⁸³ *Ibid.*

⁸⁴ Germany, Independent Centre for Privacy Protection Schleswig-Holstein (2012).

Promising practice

Providing data protection guidelines for direct marketing companies

The Estonian Data Protection Inspectorate has produced another update to its non-binding guidelines on data protection rules to help companies involved in direct marketing improve their practical implementation of these rules. The guidelines do not offer legal analysis; they aim instead to inform the data processors of their responsibilities in detailed and easy-to-understand language. The guidelines are intended to prevent breaches of data protection rules. Direct marketers have previously made use of earlier versions of the guidelines.

For more information, see: *Estonian Data Protection Inspectorate, The use of electronic contact information in direct marketing. Guidelines, available at: www.aki.ee/download/2025/Elektrooniliste%20kontaktandmete%20kasutamine%20otseturustuses.pdf*

3.7.2. Google

In March 2012, Google opted to merge 60 separate privacy policies for individual Google-owned sites into one single policy for all its services. The move allowed it to combine data from different sites – including YouTube, social network Google+ and smartphone system Android – in order to better target its advertising.

The Article 29 Working Party mandated the **French** data protection authority, Commission on Information Technology and Liberties (*Commission nationale de l'informatique et des libertés*, CNIL) to carry out an investigation into Google's new privacy policy. The EU Data Protection Authorities published their common findings in a joint letter on 16 October 2012.⁸⁵

They established that Google's changes had neglected to give users an opt-out option. In addition, Google had failed to place any limit on the "scope of collection and the potential uses of the personal data", meaning that it might be in breach of several data protection principles, such as purpose limitation, data quality, data minimisation, proportionality and right to object. They further highlighted the wide range of potential uses that Google might have for the data, including product development or advertising. EU data protection laws place limits on such activities, they said.

Although Google has not been directly accused of acting illegally, EU Data Protection authorities have expressed concerns about "insufficient information to its users (especially its passive users)" and "about the

⁸⁵ Article 29 Data Protection Working Party (2012c).

combination of data across services”.⁸⁶ They therefore instructed Google to give clearer information about what data are collected for what purpose. They also instructed Google to: modify its tools in order to avoid excessive data collection and to take effective and public measures to comply quickly with the recommendations. Otherwise authorities in several countries could take action against it.⁸⁷

Promising practice

Recognising the best and the worst in privacy and data protection

In Belgium, the NGOs *Ligue des droits de l’Homme* and *Liga voor Mensenrechten* gave awards in January for the best and worst annual initiatives in privacy and data protection. As innovations that threaten privacy enter society each year, an awards ceremony for the best and worst initiative, a Winston and a Big Brother, respectively, can serve as a useful watchdog. Nominees sent spokespersons to defend and justify their positions. Citizens can vote for their candidates. In 2012, the Belgian Data Protection Authority took part, as did the media.

For more information, see: www.bigbrotherawards.be/index.php/fr; www.liguedh.be; and www.mensenrechten.be

Following an investigation,⁸⁸ Google promised to delete collected data that remained from its Street View service as part of their Wi-Fi mapping exercise in the United Kingdom. This latter practice, which resulted in the gathering and storage of fragments of personal data including emails, complete URLs and passwords, raised fundamental rights concerns because under data protection principles only specific data for specific purposes may be collected.

The company, in a letter dated 27 July 2012 to the United Kingdom Data Protection Authority, the Information Commissioner’s Office (ICO), admitted that a “small portion” of the information that had been collected from its Street View cars when they had toured the United Kingdom was still “in its possession”.⁸⁹ In response, the ICO said it would examine the contents of the information Google had discovered. The ICO said that Google may have breached the terms of the agreement following a 2010 investigation into the issue.

“We are also in touch with other data protection authorities in the EU and elsewhere through the Article 29 Working Party and the GPEN [Global Privacy Enforcement Network] network to coordinate the response to this development. The ICO is clear that this information should never have been collected in the first place and the company’s failure to secure its deletion as promised is cause for concern,” the ICO added.⁹⁰

Outlook

EU institutions are expected to debate the reform of EU data protection legislation in 2013, particularly in the Council Working Party on Information Exchange and Data Protection and in the European Parliament’s LIBE committee. It remains to be seen to what extent EU institutions will take up the fundamental rights concerns expressed by FRA, EDPS and Article 29 Working Party.

Besides the discussion surrounding this major reform package, more specific policy measures will also continue to dominate data protection debates.

Since the evaluation of the Data Retention Directive found that there was a need to clarify the relationship between the Data Retention Directive and Article 15 of the EU e-Privacy Directive 2002/58/EC, it is likely that the revision of the Data Retention Directive will only take place once the Data Protection Reform has been adopted.

With regard to the draft PNR directive, the European Parliament has ended its suspension of cooperation and the debate in the European Parliament will thus gain momentum in 2013. It remains to be seen if the LIBE committee, and the Plenary of the European Parliament, will align themselves with the draft report of the rapporteur and support the proposed PNR directive or oppose it on fundamental rights grounds.

Important signals can also be expected from the CJEU in Luxembourg. The CJEU is expected to deliver a judgment in the case against Hungary addressing once more the requirement of independence for data protection authorities and to further develop and elaborate its line of jurisprudence on this aspect of effective data protection in practice. Cases on data retention referred to the CJEU might offer further insights into the fundamental rights dimensions of this EU measure. Rulings concerning biometric passports will play an important role in determining the legality of including biometrics in EU passports and travel documents.

Apart from such developments in EU legislation, policies and case law, the wider public will continue to see debates on the data protection dimension of internet-based services.

⁸⁶ *Ibid.*

⁸⁷ France, CNIL (2012).

⁸⁸ United Kingdom, Information Commissioner’s Office (ICO) (2010).

⁸⁹ Letter of Google France SARL to ICO, available at: www.ico.gov.uk/news/latest_news/2012/~/_media/documents/library/Corporate/Notices/20122707_letter_Google_to_ICO.ashx.

⁹⁰ United Kingdom, ICO (2012).

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The rights of the child and protection of children

Equality and non-discrimination

Racism and ethnic discrimination

Equality
Education

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UN & CoE

January

15 February – Council of Europe adopts a Strategy for the Rights of the Child (2012–2015)

February

28 March – Council of Europe Committee of Ministers adopts the *Recommendation on the participation of children and young people under the age of 18*

March

April

May

13 June – Council of Europe Committee of Ministers adopts the *Recommendation on the protection and promotion of the rights of women and girls with disabilities*

June

20 July – United Nations Committee on the Rights of the Child issues its Concluding observations on Greece regarding the Optional Protocols on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict

July

10 August – United Nations Committee on the Rights of the Child issues its Concluding observations on Cyprus

13 August – UN Committee on the Rights of the Child issues its Concluding observations on Greece

August

28 September – United Nations Committee on the Rights of the Child dedicates its Annual Day of General Discussion to “the rights of children in the context of international migration”

September

October

November

December

EU

January

February

March

April

2 May – European Commission adopts a Communication on a European Strategy for a better internet for children

May

8 June – Council of the European Union issues conclusions on a Global Alliance against Child Sexual Abuse Online

19 June – European Commission adopts a *European Strategy towards eradication of trafficking in human beings*

27 June – European Commission’s Social Protection Committee adopts a report *Tackling and preventing child poverty, promoting child well-being*

June

July

August

28 September – European Commission adopts the mid-term report on the implementation of the Action Plan on unaccompanied minors

September

4 October – European Parliament and Council of the European Union approve the Directive establishing minimum standards on the rights, support and protection of victims of crime

4 October – Employment, Social Policy, Health and Consumer Affairs Council adopts conclusions on child poverty

11 October – European Parliament adopts report on child protection in the digital world

October

13–14 November – 7th European Forum on the Rights of the Child is dedicated to “supporting child protection systems through the implementation of the EU Agenda for the rights of the child”

November

December

4

The rights of the child and protection of children



More children could be at risk of poverty or social exclusion in many EU Member States as a result of the economic crisis, a topic that continued to be at the forefront of European Union (EU) policy debates in 2012. EU Member States had to take measures to address cases of malnutrition, as well as make budgetary cuts that had an impact on education, healthcare and social services, which are important for children. Despite EU and Member State efforts, domestic violence, sexual abuse and trafficking continued to affect children living in the EU. In addition, children continued arriving in the EU as asylum seekers with or without their families. Almost one out of three asylum seekers arriving in the EU in 2012 was a child and there is concern in some Member States that their protection remains a challenge.

The new Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure¹ was opened for signature in February 2012. The Optional Protocol provides children, groups of children or their representatives with the possibility to bring a complaint before the UN Committee on the Rights of the Child. As of 31 December 2012, 13 EU Member States (Austria, Belgium, Cyprus, Finland, Germany, Italy, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia and Spain,) ▶ had signed the Optional Protocol (see also [Chapter 10](#) on EU Member States and international obligations).²

In relation to the EU's accession to international instruments, the European Parliament³ recommended that the EU explore how to accede to the United Nations Convention on the Rights of the Child (CRC),⁴ as it has done with the United Nations Convention on the Rights of Persons with Disabilities.⁵

The Council of Europe Strategy for the Rights of the Child⁶ (2012–2015), a part of its cross-cutting programme

Key developments in the area of children's rights

- The European Parliament and Council of the European Union adopt a Directive establishing minimum standards on the rights, support and protection of victims of crime, strengthening the protection of children who are victims of crime.
- The European Commission addresses the issues of child trafficking and sexual abuse of children on the internet through the adoption of two European strategies: the EU Strategy towards the Eradication of Trafficking in Human Beings and the European Strategy for a Better Internet for Children.
- Eurostat data show that in 2011 children were at greater risk of poverty or social exclusion than the rest of the population: 27 % of children faced that risk. To help address this problem, the European Commission is preparing to adopt a Recommendation on Child Poverty with a focus on access to resources, services and child participation.
- EU Member States continue to prepare legal and policy reforms in the fields of crime, family and child protection. A number of reforms have been stopped or delayed, however, in part because of the economic crisis.

¹ UN, Optional protocol to the Convention on the Rights of the Child on a communications procedure (CRC-OP3), 9 June 2011.

² *Ibid.*

³ European Parliament (2012).

⁴ UN, Convention on the Rights of the Child (CRC), 2 September 1990.

⁵ UN, Convention on the Rights of Persons with Disabilities (CRPD), 13 December 2006.

⁶ Council of Europe, Committee of Ministers (2012a).

'Building a Europe for and with children', was adopted on 15 February 2012. The strategy aims to achieve the effective implementation of existing standards on children's rights and will provide guidance, advice and support on how best to:

- bridge gaps between standards and practice in promoting child-friendly services and systems in the areas of justice, health and social services;
- eliminate all forms of violence against children;
- guarantee the rights of children in vulnerable situations, such as those with disabilities, in detention, in alternative care, migrant or Roma children; and
- promote child participation.

Several national parliaments have debated the explicit inclusion of the rights of the child in national constitutions. For example, a number of legislative proposals were under discussion in **Germany**,⁷ while in November 2012 referendum the Irish approved an amendment to the constitution giving voice to children in legal proceedings affecting them and recognising children's rights in general.⁸

4.1. Violence against children

Violence against children in the form of physical, sexual or psychological abuse occurs in diverse settings, including in the family, in the community or on the internet. In 2012, EU Member States addressed violence against children through legislation, policies or by improving service delivery.

- The EU adoption of a comprehensive strategy on violence against women and girls⁹ is, however, still pending. The directive establishing minimum standards on the rights, support and protection of victims of crime, which was adopted in 2012 (see also **Chapter 9** on rights of crime victims),¹⁰ supplements the 2011 EU directive, which helps combat sexual abuse and sexual exploitation of children and child pornography.¹¹ The 2012 directive establishes protection guarantees for child victims of crime, such as special consideration for the vulnerability of children in court proceedings, the use of appropriate methods to avoid the risk of victimisation and the need for trained professionals.

7 Germany, *Entwurf eines Gesetzes zur Änderung des Grundgesetzes – Gesetz zur grundgesetzlichen Verankerung von Kinderrechten*, 26 June 2012; Germany, *Stellungnahme der Bundesregierung zu der Entschließung des Bundesrates Kinderrechte im Grundgesetz verankern*, 19 July 2012.

8 Irish Times (2012).

9 European Commission (2010b).

10 Directive 2012/29/EU, OJ 2012 L 315/55.

11 Directive 2011/92/EU, OJ 2011 L 335/1.

On 1 June 2012, **Finland** ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. With the exception of the **Czech Republic** and **Ireland**, all EU Member States and **Croatia** have now ratified this instrument. The UN High Commissioner for Human Rights presented a thematic report on violence against women and girls with disabilities, which highlights the lack of systematised and disaggregated data.¹²

FRA ACTIVITY

Combating hostility and violence against children with disabilities

FRA is conducting research on hostility and violence against children with disabilities in the EU. This will contribute to filling data gaps in this under-researched area (see also **Chapter 5** on equality and non-discrimination and **Chapter 9** on rights of crime victims).

The FRA project, *Children with disabilities: targeted violence and hostility*, seeks to address the under-reporting of abuse, lack of support and poor awareness of rights among disabled children, which FRA research has uncovered.

The project will identify the related legal and policy framework and determine how information about such hostility is collected. The project will look for promising practices to see how some EU Member States are addressing the problem.

For more information, see: *Children with disabilities: targeted violence and hostility*, available at: <http://fra.europa.eu/en/project/2012/children-disabilities-targeted-violence-and-hostility>

- The 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence, which also covers violence against girls, is the only legally binding instrument on the matter at European level. Six Member States signed the Convention in 2012, but none had ratified by the end of the year (see also **Chapter 10**).¹³

The Council of Europe Policy guidelines on integrated national strategies for the protection of children from violence¹⁴ also aim at promoting the development and implementation of a holistic national framework for safeguarding the rights of the child and protecting children from all forms of violence.

The Council of Europe Committee of Ministers approved a recommendation in June 2012 on the protection

12 UN, Human Rights Council (HRC) (2012).

13 Council of Europe, *Convention on preventing and combating violence against women and domestic violence*, CETS No. 210, 2011.

14 Council of Europe, *Committee of Ministers* (2009).

and promotion of the rights of women and girls with disabilities, noting the need to improve their access to justice and their protection from exploitation, violence and abuse¹⁵ (for more information on access to justice, ► see **Chapter 8** of this Annual report).

“Where the social integration of persons with disabilities is concerned, a conceptual and methodological sea change has taken place in international law since the end of the 20th century, as people with disabilities are no longer considered as patients or objects of charity but as holders of rights and full citizens who, when interacting with social and environmental barriers, may be prevented from participating in society.”

Recommendation CM/Rec(2012)6 of the Committee of Ministers to Member States on the protection and promotion of the rights of women and girls with disabilities (Adopted by the Committee of Ministers on 13 June 2012)

The European Committee of Social Rights published its conclusions on Articles 17 and 7, paragraph 10, of the Revised European Social Charter in January 2012. Article 17 concerns the right of children and young persons to social and legal protection, including against all forms of corporal punishment in all settings, rights of children in institutions, young offenders, and effective right to education. Article 7, paragraph 10, guarantees special protection against the physical and moral dangers to which children are exposed, such as sexual exploitation of children.

As regards the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, known as the Lanzarote Convention, the Committee of the Parties to the Convention agreed in 2012 that the first monitoring round would focus on “sexual abuse of children in the circle of trust”. A questionnaire to be addressed to the Parties was expected to be adopted in March 2013.

The Lanzarote Committee is also mandated to facilitate the collection, analysis and exchange of information, experience and good practices between states to improve their capacity to prevent and combat sexual exploitation and sexual abuse of children. The committee thereby plays an observatory role on the protection of children against sexual exploitation and sexual abuse.

The protection of children from sexual abuse and exploitation on the internet remains an important concern in the EU. The European Commission adopted a European Strategy for a better Internet for Children¹⁶ in May 2012. The strategy aims at:

- stimulating quality content online for young people;

- stepping up awareness and empowerment; creating a safe environment for children online; and
- fighting child sexual abuse and child sexual exploitation.

The European Economic and Social Committee¹⁷ welcomed the strategy, noting the need for more precise rules and adequate sanctions to tackle child pornography more effectively and to address data protection and privacy issues.

“The Internet is an extraordinary place for children – yet while online exploration opens a world of possibilities, it can also expose unwary users to possible dangers. We have a shared vision of the opportunities and of the steps that should be taken to empower and protect children online and better secure our public and private networks.”

Joint Declaration, US Department of Homeland Security and the European Commission, 20 November 2012

Promising practice

Fighting sexual abuse on the internet

Vihjeliin is a free online service of the Estonian Union for Child Welfare, which enables internet users to report illegal content online, such as sexual abuse or exploitation of children and child trafficking. This service is developed in cooperation with several non-government organisations (NGOs), the Ministry of Social Affairs, Police and Border Guard Board and it is part of the Estonian Development Plan for Reducing Violence 2010–2014.

The statistical data provided by this service show that from August 2011 to the end of 2012 there was a decline in the number of reports received regarding child sexual abuse images, from 63 to 10, and in adult pornography (18 years and over), from 505 to 60.

Vihjeliin is a member of the networks INHOPE and INSAFE, which are, respectively, an international network of organisations that provide online solutions to prevent the internet distribution of illegal content and an EU-funded network which unites organisations promoting the safer use of the internet.

For more information, see: <http://vihjeliin.targaltinternetis.ee>, www.inhope.org, www.saferinternet.org and Estonia, Ministry of Justice (Justiitsministeeriumi) (2010), Development plan for reducing violence for the years 2010–2014 (*Vägivalla vähendamise arengukava aastateks 2010–2014*), available at: www.just.ee/orb.aw/class=file/action=preview/id=49975/V%E4givalla+v%E4hendamine+arengukava+aastateks+2010-2014.pdf

¹⁵ Council of Europe, Committee of Ministers (2012b).

¹⁶ European Commission (2012a).

¹⁷ European Economic and Social Committee (2012).

In March 2012, the European Commission proposed establishing a new European Cybercrime Centre (EC3) at Europol, which would further strengthen child protection on the internet.¹⁸ In November, a new European Financial Coalition against Commercial Sexual Exploitation of Children Online (EFC), co-financed and supported by the European Commission, was launched to fight the sexual exploitation of children online through measures addressing online payments.¹⁹

The European Parliament adopted its own-initiative report *Protecting children in the digital world*²⁰ in November, calling for improved checks on children's privacy when using mobile phones, for filtering software and for better education of parents and teachers.

EU Member States undertook a number of legislative reforms relating to the rights of the child and the protection of children in 2012. **Romania** amended its Law on the prevention and combating of domestic violence,²¹ improving protection for children suffering domestic violence by allowing courts to inform local authorities on their own initiative when they consider that a child needs special protection.

Italy ratified the Lanzarote Convention on 19 September 2012 with a law²² that provides for increased penalties for perpetrators of domestic violence. The law also introduces a new provision concerning female genital mutilation (FGM); if a child's parents or guardian perpetrates this crime it can lead to loss of custody. **Portugal** also ratified the Lanzarote Convention in 2012.²³

In **Belgium**, a relevant decree for ratification is awaiting publication²⁴ after ratification by the

Flemish, German-speaking, Walloon Region and Brussels community institutions.²⁵

In **England and Wales**, the Domestic Violence, Crime and Victims (Amendment) Act 2012,²⁶ which took effect on 2 July 2012, extended the offence of causing or allowing the death of a child or vulnerable adult to include causing or allowing serious physical harm to a child or vulnerable adult. The 2012 Act is intended to fill a recognised gap in the law in cases where, although it is clear that serious injuries short of death must have been sustained at the hands of one of a limited number of members of the household, there is insufficient evidence to point to the particular person responsible. It is intended to prevent those accused of causing serious physical harm to a child or vulnerable adult from escaping justice by remaining silent or blaming someone else.

Bulgaria,²⁷ the **Netherlands**,²⁸ **Slovenia**²⁹ and **Croatia**³⁰ all adopted national action plans to combat general domestic violence or specifically violence against children.

A number of EU Member States continued to investigate the issue of violence in institutions and compensation schemes for victims. **Bulgaria's** State Agency for Child Protection inspected institutions for children deprived of parental care in May–June 2012 and found 46 cases of violence.³¹ **Germany** established a Residential Institution Fund in January 2012 to mitigate the damage suffered by persons abused in residential institutions.³²

A number of reforms of the criminal code initiated by Member States in 2011 entered into force or continued to be discussed during 2012. For instance, an amendment to the **Austrian** Criminal Code (*Strafgesetzbuch*)³³

¹⁸ European Commission (2012b).

¹⁹ For more information on the European Financial Coalition against Commercial Sexual Exploitation of Children Online, see: www.europeanfinancialcoalition.eu/.

²⁰ European Parliament (2012).

²¹ Romania, Law No. 25/2012 amending Law 217/2003 on the prevention and combating of domestic violence, 9 March 2012.

²² Italy, Law No. 172 on the ratification and execution of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, 23 October 2012.

²³ Council of Europe, Convention on the protection of children against sexual exploitation and sexual abuse, CETS No. 201, (2007).

²⁴ Belgium, Proposal for a law approving the Treaty with the Council of Europe on the protection of children against sexual exploitation and sexual abuse, 2 December 2011.

²⁵ Belgium, Walloon Region, Decree on the approval, as concerns the matters for which the execution was transferred from the French Community to the Walloon Region, of the Treaty of the Council of Europe on the protection of children against sexual exploitation and sexual abuse, 26 April 2012; Belgium, Brussels Capital Region, Ordinance on the approval of the Council of Europe's Treaty on the protection of children against sexual exploitation and sexual abuse, 1 March 2012; Belgium, German-speaking Community, Decree on the approval of the Council of Europe's Treaty on the protection of children against sexual exploitation and abuse, 28 March 2011; Belgium, Flanders, Decree on the approval of the Council of Europe's Treaty on the protection of children against sexual exploitation and sexual abuse, 12 February 2012.

²⁶ United Kingdom, Domestic Violence, Crime and Victims (Amendment) Act 2012, 2 July 2012.

²⁷ Bulgaria, State Agency for Child Protection (2012a).

²⁸ Netherlands, State Secretary for Health, Welfare and Sport & Minister of Security and Justice (2011).

²⁹ Slovenia, Resolution of National Programme of Family Violence Prevention, 27 May 2009.

³⁰ Croatia, (2011), '*Nacionalna strategija zaštite od nasilja u obitelji, za razdoblje od 2011. do 2016. godin'*', February 2011.

³¹ Bulgaria, State Agency for Child Protection (2012b).

³² Germany, Residential Institution Funds (2012).

³³ Austria, Federal law by which the Criminal Code is amended – Criminal Code Amendment 2011.



enabled Austrian jurisdiction to apply to a number of offences, including genital mutilation, if the offence was committed abroad by an Austrian citizen or by a person with a habitual residence in Austria.

In Austria, it is a crime to intentionally view child pornography and carries prison sentences of up to two years.³⁴ The international police operation 'Carole' against child pornography identified 272 suspects in Austria.³⁵

Several operations were conducted in **Greece** in 2012 leading to the identification of websites with child pornographic material, for example on 31 August the police announced the results of operation 'Trojan Horse' which led to the arrest of 17 people and the confiscation of half a million electronic files containing child pornographic material.³⁶ Operation 'Cyber-touch' held in October 2012 led to the arrest of eight people,³⁷ with operation 'Gridlock' held in November 2012 leading to the arrest of a further eight.³⁸ The Greek police's cybercrime unit operates the 11012 hotline for confidential anonymous information on internet child pornography.

In **Italy**, the law ratifying the Lanzarote Convention addresses the acts of soliciting³⁹ and the incitement to commit crimes of paedophilia and child pornography. In the **United Kingdom**, registered sex offenders must notify the police of any foreign travel.⁴⁰ New legislation or amendments to the existing laws covering sexual abuse or exploitation were being discussed or pending approval in **Belgium, Lithuania, Luxembourg** and **Spain**.

Data availability is key to developing effective policies. The Office of the Children's Commissioner for England published an interim report⁴¹ in October 2012, relating to its Inquiry into Child Sexual Exploitation in Gangs and Groups. This report shows that at least 16,500 children were at risk of child sexual exploitation, between April 2010 and March 2011, while 2,409 children were confirmed as victims of sexual exploitation in gangs and groups in the period from August 2010 to October 2011.⁴²

These children came from a variety of social and ethnic backgrounds. Most were white girls, although there

was a higher rate of victimisation amongst black and minority ethnic children (28 %) than had been previously identified.⁴³ The majority of perpetrators were white males, according to the report.⁴⁴ Mobile phones, social networking sites and other forms of technology were identified as often being used in the grooming, control and pursuit of victims.⁴⁵

The **Greek** government announced the establishment of an Observatory for the Prevention of School Violence and Intimidation in November 2012. This observatory will design and implement measures for the prevention of school violence and bullying. It will also identify and refer such incidents to the competent authorities and publish relevant statistical data annually.⁴⁶

In a March 2012 referendum, **Slovenia** rejected the new Family Code (*Družinski zakonik*), adopted in 2011 by the Slovenian National Assembly, which outlawed any form of corporal punishment and degrading treatment of children, and ensured the right to an advocate in proceedings. The law also stipulated that registered same-sex as well as non-registered same-sex partners should be treated on an equal footing with opposite-sex partners in all legal matters except in regard to marriage and joint adoptions.

The European Court of Human Rights (ECtHR) underlined the obligation of national authorities to ensure the effective criminal investigation of sexual abuse cases concerning children.

In *C.A.S. and C.S. v. Romania*, the ECtHR found a violation of Article 3 (prohibition of inhuman or degrading treatment and effective investigation) and of Article 8 (right to respect for private and family life and the home) of the European Convention on Human Rights,⁴⁷ concerning a five-year investigation into the rape of a seven-year-old boy. In its final judgment, the ECtHR recognised that states have an obligation to ensure the effective and prompt criminal investigation of cases involving violence against children.

4.2. Child trafficking

Following the 2011 Directive on preventing and combating trafficking in human beings and protecting its victims,⁴⁸ the European Commission adopted a strategy for the period 2012–2016. This strategy envisages

³⁴ *Ibid.*

³⁵ Austria, Ministry of Interior (2012).

³⁶ Greece, Greek Police Headquarters (2012).

³⁷ Greece, Ministry of Public Order and Citizen Protection (2012a).

³⁸ Greece, Ministry of Public Order and Citizen Protection (2012b).

³⁹ Italy, Law No. 172 on the ratification and execution of the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, 23 October 2012.

⁴⁰ United Kingdom, The Sexual Offences Act 2003 (Notification Requirements) (England and Wales), 2012.

⁴¹ Berelowitz S., et al., The Office of the Children's Commissioner (2012).

⁴² *Ibid.*, pp. 9–10.

⁴³ *Ibid.*, p. 14.

⁴⁴ *Ibid.*, pp. 15–16.

⁴⁵ *Ibid.*, p. 12.

⁴⁶ Greece, Ministry of Education and Religion, Culture and Sports (2012).

⁴⁷ ECtHR, *C.A.S. and C.S. v. Romania*, No. 26692/05, 20 March 2012.

⁴⁸ Directive 2011/36/EU, OJ 2011 L 101/1.

two concrete actions related to child trafficking: developing guidelines on child protection systems and preparing best practice models on the role of guardians and/or representatives of child victims of trafficking.

Promising practice

ConTratTo: Taking an integrated approach to tackle human trafficking

In **Italy**, the Tuscany regional administration has set up an integrated system against human trafficking that supports victims, who are often very young, and promotes good practice tackling trafficking in the region, *ConTratTo* (*Contro la tratta in Toscana*, Against human trafficking in Tuscany).

The project brings together the public and private sectors, as well as non-governmental organisations to tackle the problem using a global approach and move away from separate and uncoordinated measures targeting only specific groups.

The system includes a toll-free regional phone line (800-186086) that is open 24 hours a day, helps victims and provides information to all interested parties. The region also provides first assistance and care for victims in appropriate structures and supports them with appropriate healthcare, psychological, linguistic and legal assistance.

Other important actions within the ConTratTo integrated system include: mapping and monitoring the human trafficking phenomenon, organising awareness raising campaigns and offering training for the operators working with victims.

For more information, see: www.minori.it/minori/lotta-alla-tratta-la-risposta-della-toscana

Finland, **Germany** and **Lithuania** ratified the Council of Europe Convention on Action against Trafficking in Human Beings, adding to the earlier ratifications by 20 EU Member States and Croatia. In addition, **Austria**,⁴⁹ **Latvia**,⁵⁰ the **Netherlands**,⁵¹ **Slovenia**⁵² and **Croatia**,⁵³ put in place national action plans against trafficking.

A number of EU Member States either amended or were in the process of amending their legislation in

2012 to comply with the Directive on trafficking, which must be transposed into national law by 6 April 2013. More specifically Cyprus submitted an action plan aimed at preventing human trafficking and ensuring its prosecution, which sets out the measures taken to execute the judgement in the *Rantsev v. Cyprus and the Russian Federation* case.⁵⁴

Even if **Denmark** did not take part in the adoption of this directive and is therefore not bound by it or subject to its application, the Danish Government still decided to align national law with the directive by amending the Criminal Code.⁵⁵ The amendment expands the forms of trafficking that are criminalised and allows the prosecution of cases of human trafficking and sexual exploitation of children committed abroad by Danish citizens and by persons with a permanent residence in Denmark. Lithuania also amended its Criminal Code⁵⁶ to broaden the definition of trafficking.⁵⁷ **Estonia** enacted a law criminalising trafficking in March 2012.

4.3. Child-friendly justice

The EU Agenda on the Rights of the Child⁵⁸ adopted in 2011 recognised the promotion of child-friendly justice and the use of the Council of Europe Guidelines on Child-friendly Justice⁵⁹ as EU priorities in the field of the rights of the child.

In October 2012, the European Network of Ombudspersons for Children dealt particularly with child-friendly justice in its annual conference under the Cyprus Presidency of the Council of the European Union.⁶⁰

Several EU Member States amended their procedural laws to make children's involvement in justice procedures more child-friendly. In **Hungary**, for example, a new law requires that courts use language appropriate to age when they communicate with children through summons, warnings or notices.⁶¹ In the **Czech Republic**, the legislative procedure for the new law on victims of criminal offences was in its final stage in 2012. This law considers children to be particularly vulnerable and therefore requires the use of specially trained staff in

49 Austria, Federal Ministry for European and International Affairs, Task Force on Anti-Trafficking (2012).

50 Latvia, Ministry of the Interior (2009).

51 Netherlands, Ministry of Justice and Security (2011).

52 Slovenia, Inter-departmental working group for combating trafficking in human beings (2012).

53 Croatia, National Committee for Combating Trafficking in Human Beings (2012).

54 Council of Europe, Committee of Ministers (2012c).

55 Denmark, Act No. 275 of 27 March 2012 amending the criminal code, 23 September 2012.

56 Lithuania, Lithuanian Criminal Code, 147, 147-1, 157, 303 and the Annex and Supplement 147-2 of the Code, 30 June 2012.

57 Lithuania, Government of Lithuania (2012).

58 European Commission (2011).

59 Council of Europe, Committee of Ministers (2010).

60 For more information about the 16th Annual Conference of the European Network of Ombudspersons for Children, see: www.cy2012.eu/index.php/en/political-calendar/event-728.

61 Hungary, Act LXII of 2012 on the Amendment of Certain Laws Connected to the Implementation of Child-friendly Justice Norms, 30 May 2012.

questioning children, as well as allowing for the use of audiovisual equipment.

FRA ACTIVITY

Is justice 'just' for children?

FRA carried out fieldwork research in close collaboration with the European Commission in 2012 to assess how the Council of Europe Guidelines on Child-Friendly justice are applied.

The research included interviews with 574 judges, lawyers, social workers, psychologists and other professionals on the involvement of children in justice proceedings and sought to identify practices and procedures of child participation as victims or witnesses in court proceedings in 10 EU Member States (Bulgaria, Estonia, Finland, France, Germany, Poland, Romania, Spain and the United Kingdom) and Croatia. At the interviews researchers gave respondents the Council of Europe Guidelines, which have now been translated into 22 EU languages.

The research findings will feed into the European Commission's work on collecting statistical data on children's involvement in judicial proceedings in the EU.

For more information, see: <http://fra.europa.eu/en/project/2012/children-and-justice>

In other EU Member States, concerns were raised over the way children were treated in judicial procedures. This was the case in **Spain**, where a report published by Save the Children⁶² in November 2012 argues that judicial procedures need to be better adapted to children's needs.

Financial and human resource issues hampered efforts to improve the involvement of children in judicial procedures in **Romania**. In October 2012, the Superior Council of Magistracy decided, due to a lack of resources, against establishing specialised children's tribunals.⁶³

Promising practice

Listening better to children in court proceedings

In **Poland**, the NGO 'Foundation Nobody's Children' and the Ministry of Justice established a system of visiting, inspecting and certifying institutions with child-friendly hearing rooms.

The certification is granted to institutions that comply with a standardised set of criteria.

The programme, established in 2007, has certified 54 institutions.

For more information, see: <http://dzieckoswiadek.fdn.pl/przyjazny-pokoj-przesluchan>

Sweden's Barnahus ('Children's house') is a programme under which the judicial system, social services and health services collaborate in joint investigative interviews of child victims of abuse. Trained expert staff conduct such interviews in purpose-built interview rooms that allow observation by representatives of the police, prosecution and defence and child protection services via closed-circuit television.

The Department of Sociology of Law at Lund University evaluated the practice, showing that it had strengthened children's evidence submitted in court.

For more information, see: The Swedish Association of Local Authorities and Regions (SALAR), available at: www.skl.se/vi_arbetar_med/socialomsorgochstod/barn-och-unga/nyhetsarkiv/ifo_barn_och_unga

4.4. Asylum-seeking and migrant children

The European Commission adopted its first interim report on the implementation of the Action Plan on Unaccompanied Minors 2010–2014 in September 2012.⁶⁴ The report takes stock of the progress made and identifies the main areas for improvement in the best interests of the child, such as the need for collecting data on the situation of these children, the need for preventing unsafe migration and trafficking, the need to provide better access to procedural guarantees and the need to find durable solutions.

In 2012, the main areas of concern across EU Member States included guardianship or legal representation and the administrative detention of children alone or with their families (see also the section on alternatives to ► detention in **Chapter 1** of this Annual report). The Council of Europe Committee of Ministers is closely supervising the issue of detention of unaccompanied minors in the

⁶² Save the Children Spain (2012).

⁶³ Romania, Superior Council of Magistracy (2013).

⁶⁴ European Commission (2010a).

Table 4.1: Asylum applicants by age group (*), 2012 (%), by EU Member State

EU Member State	Total	Distribution of age groups as a share of total (in %)					
		0–13	14–17	18–34	35–64	64 and over	Unknown
EU-27	319,185	20.7	6.8	51.1	20.3	0.9	0.2
AT	17,425	22.4	12.1	49.4	15.6	0.5	0.0
BE	28,105	21.2	7.5	50.6	20.1	0.6	0.0
BG	1,385	11.3	8.0	60.4	19.0	1.3	0.0
CY	1,635	9.4	2.9	66.4	20.6	0.4	0.4
CZ	740	17.4	2.2	41.6	37.6	1.2	0.0
DE	77,540	28.4	7.5	43.0	20.0	1.0	**
DK	6,045	17.8	8.5	53.5	19.2	0.9	0.0
EE	75	7.8	6.5	50.6	35.1	0.0	0.0
EL	9,575	2.9	2.4	82.7	11.9	0.1	0.0
ES	2,565	13.3	4.4	61.5	20.3	0.5	0.0
FI	3,095	18.5	7.1	52.8	20.5	0.7	0.3
FR	60,560	19.1	3.1	52.3	24.7	0.9	0.0
HU	2,155	18.1	11.4	57.7	12.4	0.3	0.0
IE	955	24.6	4.6	49.3	21.2	0.3	0.0
IT	15,715	6.3	5.3	73.4	14.9	0.1	0.0
LT	645	9.9	3.4	59.6	26.8	**	0.0
LU	2,050	29.5	4.9	45.5	19.7	0.4	0.0
LV	205	13.1	2.9	55.8	28.2	0.0	0.0
MT	2,080	3.4	8.2	80.0	8.1	**	0.3
NL*	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
PL	10,750	35.6	4.3	39.1	20.2	0.7	0.0
PT	295	8.5	9.9	58.0	23.5	0.0	0.0
RO	2,510	3.8	5.9	78.2	12.0	0.2	0.0
SE	43,865	22.1	10.6	45.0	20.7	1.6	0.0
SI	305	14.8	17.8	46.7	20.4	**	0.0
SK	730	6.3	6.8	71.0	15.9	0.0	0.0
UK	28,175	13.8	5.6	55.3	21.7	1.0	2.5

Notes: * Data not available for the Netherlands (due to the transition to a new computing system, since January 2012, the Netherlands has been temporarily unable to provide statistics on asylum applications disaggregated by citizenship, age and on first instance decision. n.a. means data are not available.

** Two or fewer applicants recorded in the reference period.

Source: Eurostat (2013), Data in focus 5/2013: Population and social conditions, p. 6, available at: http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-13-005/EN/KS-QA-13-005-EN.PDF

context of execution of the judgment in the case of *M.S.S v. Belgium and Greece*.⁶⁵

In **Cyprus**, the Ombudsman's Office published a report on legal representation of unaccompanied asylum-seeking children in May 2012.⁶⁶ The report recommended changes in legislation to ensure the legal representation of unaccompanied asylum-seeking children.

With respect to administrative detention, Human Rights Watch reported in 2012 that unaccompanied children in **Malta** were still kept in detention pending the outcome of age determination procedures.⁶⁷

In the **United Kingdom**, the Children's Commissioner for England raised a number of concerns about the treatment of unaccompanied asylum-seeking children upon

⁶⁵ See Council of Europe, Committee of Ministers (2012d).

⁶⁶ Cyprus, Ombudsman (2012).

⁶⁷ For more information on the Human Rights Watch report, see: www.hrw.org/node/108990.

arrival in its report, *Landing in Dover*.⁶⁸ The report found that children were detained for a significant time period while interviews were carried out, and that children who did not claim asylum during their interview were returned to France. The United Kingdom's Border Agency has since ceased this practice of returning children.

The Children's Commissioner recommended that, except for gathering basic information, no interviews should be conducted with children upon arrival. Interviews should instead wait until children have been referred to local child protection services and have had adequate rest and time for recovery, as well as the opportunity to obtain legal advice and representation.

4.5. Family and parental care

The EU's role regarding family matters is limited and mainly concerned with ensuring that judicial decisions in one Member State can be implemented in another and used for establishing relevant jurisdiction. Council Regulation 2201/2003 (known as Brussels II bis) regulates such issues on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.⁶⁹ The European Commission continued its assessment of how the regulation is applied, with a view to amending it in 2013.

A number of reforms in the area were in evidence in EU Member States in 2012, but in some cases, budgetary constraints limited the level of public spending available to implement them. In **Poland**, for example, the new Act on Family Support and Substitutional Care⁷⁰ entered into force on 1 January 2012, aiming to offer support to vulnerable families through family assistants, aid families and coordinators of the family substitutional care. Due to budgetary constraints the local governments claimed not to be able to fulfil some of the new obligations. In consequence, the government proposed to delaying some of the new obligations until 2015 in an amendment to the Act, which was adopted in March 2012.⁷¹

A number of reforms in other EU Member States concern the placement of children in foster care in preference to institutional settings. In **Finland**, a new law entered into force at the beginning of 2012 stipulating that in decisions on the placement of children, family care homes should be preferred to institutional care.⁷² The Finnish National Audit Office in its review of child protection sys-

tems found shortcomings in foster care, family support and the availability of mental healthcare services.⁷³

The **Czech Republic's** Chamber of Deputies voted in favour of a draft amendment⁷⁴ to the Law on Social and Legal Protection of Children in November 2012, which the president had previously vetoed.⁷⁵ The proposed changes aim at improving social care for vulnerable children in their own families or in foster care families by improving foster parents' training, as well as support and relief services.

In **Hungary**, an amendment to the Child Protection Act⁷⁶ foresees that state care for children under 12 (except in special cases, such as children with disabilities) should be provided in foster families and not in institutions.⁷⁷

The Office of Public Defender of Rights in **Slovakia** released a report in November 2012⁷⁸ on the protection of the rights of children found abroad unattended by their parents. The report found that in some cases, public authorities had failed to act in a timely fashion in a child's best interest.

In October 2012, the **Danish** government announced⁷⁹ that from 1 November 2013 it would enforce a reform of the social supervision system (*socialtilsyn*) responsible for institutions including childcare facilities and homes for children with disabilities would be enforced to ensure high-quality services.

In **Croatia**, the Foster Care Act⁸⁰ was enacted in July 2012 and was harmonised with the Social Care Act,⁸¹ in an attempt to enhance the number of foster families by making the criteria they must fulfil more accessible.

In the **United Kingdom**, the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children entered into force on 1 November 2012.⁸²

68 Matthews, A., The Office of the Children's Commissioner (2012).

69 Council Regulation (EC) No. 2201/2003, OJ 2003 L 338.

70 Poland, Act on Family Support and Substitutional Care, 9 June 2011.

71 Poland, Act on amendments to the act Family Support and Substitutional Care, 27 April 2012.

72 Finland, Child Welfare Act 417/2007.

73 Finland, National Audit Office (2012).

74 Czech Republic, Amendment to the law on social and legal protection of children, 1 January 2013.

75 Czech Republic, President of the Czech Republic (2012).

76 Hungary, Act CXII of 2012 on the Taking Over of Certain Specialized Social and Child Protection Service Provider Institutions by the State and on the Amendment of Certain Laws.

77 Hungary, Act XXXI of 1997 on Child Protection and the Operation of Guardianship Authorities.

78 Slovakia, Office of Public Defender of Rights (2012).

79 Denmark, Danish government, *et al.* (2012).

80 Croatia, Act on Amendments to the Foster Care Act, 13 July 2012.

81 Croatia, Social Care Act, 16 March 2012.

82 United Kingdom, Ministry of Justice (2012).

4.6. Child poverty

The European Commission's Social Protection Committee endorsed the advisory report *Tackling and preventing child poverty, promoting child well-being* in 2012.⁸³ The report presents an in-depth analysis of key EU and national policy tools and developments in relation to child poverty and social exclusion. It proposes that the future European Commission Recommendation, initially planned for 2012, should support EU and national efforts to contribute to enhancing political commitment, strengthen the evidence base of policy development, drive policy change by mainstreaming child poverty issues, and structure and prioritise EU action to create synergy.

Child poverty in the EU is an issue of growing concern. According to 2011 Eurostat⁸⁴ figures, 27 % of children are at risk of poverty or social exclusion, a higher percentage than the rest of the population. The situation in Member States is particularly affected by the economic crisis. On 24 October 2012, the European Commission proposed⁸⁵ setting up a fund with a budget of €2.5 billion for the period 2014–2020 to help the most deprived persons, including children, in the EU by supporting Member State schemes to provide food, clothing and other essential goods. The issue of child poverty was also the theme of conferences organised during 2012 by the Presidencies of the EU Council (Denmark⁸⁶ and Cyprus⁸⁷).

"We therefore must maintain a focused and dedicated approach to fighting child poverty. Our choices today will – quite literally – shape the future of Europe, where today's children have grown up. We must not abandon or diminish our ambitions because of the economic crisis. Or because the task ahead of us seems too overwhelming."

Karen Hækkerup, Danish Minister of Social Affairs and Integration, Conference on children's rights and the prevention of child poverty, EU Presidency, Copenhagen, 19 March 2012

The economic crisis affected children in a number of EU Member States, both through the reduction of family incomes and through budgetary cuts in state social expenditures. A United Nations Children's Fund (Unicef) study, *Childhood in Spain 2012–2013: The impact of the crisis on children*,⁸⁸ argued that budgetary cuts were affecting services for children, including health, education and social services.

In **Portugal** a decree adopted in June 2012 significantly reduced various benefits with severe financial implications for families with children.⁸⁹

The Italian Society of Paediatrics,⁹⁰ major children's medical networks and children's rights associations raised concern over the impact of budgetary cuts in the social and healthcare sectors in **Italy**. The President of the Authority for Childhood and Adolescence⁹¹ said that almost two million children were living in families in poverty in Italy, drawing on data⁹² published by ISTAT, the national statistical office.

The economic situation in **Greece** became particularly difficult in 2012. The UN Committee on the Rights of the Child in its Concluding Observations on the State Report of Greece⁹³ expressed deep concern about the right to life, survival and development of children and adolescents whose families are quickly losing their livelihoods and access to state-funded social services, including healthcare and social security. The Committee noted in particular its concern about youth unemployment and school drop-out rates, especially among Roma children.

The Greek Ombudsman's Parallel Report to the UN Committee on the Rights of the Child notes an increase in child beggars or children working as street vendors.⁹⁴ The Greek National Committee of Unicef published a report in March 2012⁹⁵ that expresses particular concern regarding child poverty and malnutrition, noting incidents of students fainting at school.

The **Finnish** government announced on 22 March 2012 that the annual index-based increase in child benefits would be discontinued between 2013 and 2015, as part of the government's efforts to save €1.2 billion in public spending for 2013–2016. The Constitutional Law Committee considering the proposal concluded that the economic recession is an acceptable reason for reducing social benefits provided that this does not infringe on constitutional obligations. It considered the reduction of child benefits, estimated at 8 % by 2015, as acceptable. The amendment of the Child Benefits Act (*lapsilisäläki/barnbidragslag*, Act No. 796/1992, legislative amendment Act No. 713/2012) takes effect as of 1 January 2013.

In the **United Kingdom**, a report by the Secretary of State for Work and Pensions⁹⁶ shows that a target to halve child poverty by 2010 has not yet been met, although the number of children living in relative income poverty

83 Social Protection Committee (2012).

84 For more information, see: http://europa.eu/rapid/press-release_STAT-13-28_en.htm.

85 European Commission (2012c).

86 For more information, see: <http://eu2012.dk/en/Meetings/Conferences/Mar/Europe-de-l-Enfance>.

87 For more information, see: <http://www.cy2012.eu/en/events/child-poverty-and-well-being-conference>.

88 UNICEF (2012a).

89 Portugal, Decree-Law 133/2012, 27 June 2012.

90 Italy, Italian Society of Pediatrics (2012).

91 Italy, National Authority for Children (2012).

92 Italy, National Institute for Statistics (2012).

93 UN, Committee on the rights of the child (2012).

94 Greece, Greek Ombudsman (2012).

95 UNICEF (2012b).

96 United Kingdom, Department for Work and Pensions; Department for Education (2012).

in 2010–2011 was reduced to 2.3 million, 600,000 short of the target.

4.7. Child participation

Child participation is a right enshrined in the UN CRC and the Charter of Fundamental Rights of the European Union.

The Council of Europe issued a Recommendation on the participation of children and young people under the age of 18 in March 2012,⁹⁷ setting out a number of key principles and measures for EU Member States, such as sharing good practices regarding participation; the provision of child-friendly mechanisms for children to make complaints; the organisation of public information and education programmes to raise awareness about the right to participate; and the improvement of professional capacity.

To support member states with the implementation of the Recommendation, the Council of Europe began developing a self-assessment tool on the participation of children and young people under the age of 18. FRA is contributing to the development of the tool's draft indicators to enable the collection and subsequent evaluation of the inclusion of children's participation in relevant sectors (justice, health, education) where decisions may affect children directly.

Denmark amended the law regulating the National Council for Children (*Børnerådet*),⁹⁸ which now states explicitly that the Council should involve children's views in its work. In 2012, the Council of the European Union published the outcome of its initiative to ask more than 1,000 children aged five and six years about their views on kindergartens.⁹⁹

One of the indicators for effective child participation is children's direct access to human rights complaints mechanisms. Only a few EU Member States collect data broken down by age to reflect complaints directly from children.

The French Public Defender of Rights reported in 2012 that, for example, the office received a total of 1,496 complaints regarding violations of the rights of the child in 2011, out of which 120 were made by children themselves.¹⁰⁰

The Dutch Children's Ombudsman was contacted 690 times between April and December 2011 about

human rights infringements, with children lodging 128 of these complaints on issues including youth care, education, police and justice, divorce and the situation of migrant children.¹⁰¹

Promising practice

Meeting the Minister: asking children about their views on new laws and policies

The Office of the Children's Rights Director in England facilitated a series of meetings between the Children's Minister and groups of children to enable the Minister to hear directly children's views on a range of topics that concern them. Meetings have focused on such issues as the new Children's Homes Charter, the separation of children in care from their siblings and contacts, education of children in care, adoption, fostering and residential care.

The meetings' results can be found on the website of the Office of the Children's Rights Director. These outcomes also feed directly into official policy documents and reports, such as consultation papers and white papers, allowing the voice and views of children to be openly heard and considered in the government's work. Government policy that departs from the views expressed by the children consulted will require careful justification. It is therefore possible to track the views expressed by children and their impact on policy and legislative developments.

For more information, see: www.rights4me.org/

Outlook

Acknowledging the fact that investing in children and breaking the chain of disadvantage across generations is the way forward, the EU legislature is expected to continue its efforts to minimise the damaging effects of the economic crisis on children. An upcoming Recommendation on Child Poverty and Well-Being is likely to provide the EU Member States with a set of common principles for effective action in key areas like: access to adequate resources, access to affordable quality services and children's right to participation. A set of indicators is also envisaged to be developed in order to monitor child poverty and social exclusion at the national level. As austerity measures resulted in serious cuts to services such as childcare, it is expected that this recommendation will reinforce social investments.

Actions targeting unaccompanied and separated children will continue in 2013, on the basis of the

⁹⁷ Council of Europe, Committee of Ministers (2012e).

⁹⁸ Denmark, Act No. 598 of 18 June 2012 amending Act on the Rule of Law and Administration within the Social Field, 18 June 2012.

⁹⁹ Denmark, National Council for Children (2012).

¹⁰⁰ France, Defender of Rights (2012).

¹⁰¹ Netherlands, Children's Ombudsman (2012).

Action Plan on Unaccompanied Minors (2010–2014). The European Asylum Support Office (EASO) with the support of FRA will publish in 2013 a handbook on age assessment targeting this particular vulnerable group. EASO will also develop a new module on interviewing children as part of the European Asylum Curriculum to train officials working in the field of asylum across the EU. The FRA has been invited to join the Reference Group providing advice on the module.

Turning the rights of the child into reality in the field of justice is an essential action item under the EU Agenda for the Rights of the Child and the Council of Europe Strategy for the Rights of the Child (2012–2015). A directive on special safeguards for suspected or accused persons who are vulnerable, including children, is planned to be tabled in 2013. It recognises the multiple challenges that confront child offenders. These legislative initiatives will be complemented by extensive research at the EU level. The European Commission is planning to launch its report on criminal justice in the second quarter of 2013 and next year FRA will expand its fieldwork research within its Child-Friendly Justice project by interviewing children who have been involved in justice procedures.

The protection of children on the internet from all forms of violence remains a challenge for the year to come. In this regard, the adoption of a European Strategy for a better Internet for children was an important accomplishment in 2012. Still, challenges remain at the implementation level, as more precise rules and provisions regarding sanctions to tackle child pornography more effectively and to address data protection and privacy issues are needed. An important development foreseen for 2013 is the inauguration of a new European Cybercrime Centre that will coordinate at EU level the fight against cybercrime.



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UN & CoE

January

February

14 March – Turkey becomes the first Council of Europe member state to ratify the Convention on Preventing and Combating Violence against Women and Domestic Violence (*Istanbul Convention*)

21–23 March – Council of Europe Steering Committee on Human Rights installs a drafting group comprised of experts from member states (CDDH-AGE) to explore possibilities for adopting a non-binding document on the human rights of the elderly

March

April

May

13 June – Council of Europe Committee of Ministers adopts the Recommendation on the protection and promotion of the rights of women and girls with disabilities

26 June – Council of Europe Parliamentary Assembly adopts the Resolution Multiple discrimination against Muslim women in Europe: for equal opportunities

June

July

21–24 August – United Nations Open-ended working group on ageing calls for better protection for older people's rights

August

14 September – United Nations Human Rights Office publishes booklet, *Born free and equal*, on the human rights of Lesbian, Gay, Bisexual and Transgender (LGBT) persons worldwide

September

22 October – United Nations Committee on the Rights of Persons with Disabilities publishes its Concluding observations on Hungary

October

November

11 December – United Nations Secretary-General calls for an end to violence and discrimination based on gender identity and sexual orientation

December

EU

18 January – 'European Year for Active Ageing and Solidarity between Generations' opening conference is held

January

February

5 March – European Commission issues progress report on *Women in economic decision-making in the EU*

13 March – European Parliament adopts the Resolution on equality between women and men in the European Union – 2011

29 March – European Parliament adopts the Resolution on the EU citizenship report 2010: Dismantling the obstacles to EU citizens' rights

March

April

24 May – European Parliament adopts the Resolution on the fight against homophobia in Europe

24 May – European Parliament adopts the Resolution with recommendations to the Commission on the application of the principle of equal pay for male and female workers for equal work or work of equal value

May

11 June – FRA issues opinion on proposed EU regulation on property consequences of registered partnerships

11 June – European Commission issues report on *Discrimination against trans and intersex people on the grounds of sex, gender identity and gender expression*

19 June – European Commission adopts the *EU strategy towards the eradication of trafficking in human beings 2012–2016*

June

July

August

September

25 October – European Parliament and Council of the European Union adopt a directive on establishing minimum standards on the rights, support and protection of victims of crime in the EU (*EU Victims' Directive*, 2012/29/EU)

26 October – European Parliament publishes study on a potential EU Roadmap for LGBT equality

29 October – Council of the European Union adopts an EU-level framework as required by Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities (CRPD)

October

6 November – European Parliament Civil Liberties, Justice and Home Affairs Committee (LIBE) adopts annual resolution on fundamental rights

6 November – Court of Justice of the European Union (CJEU) rules that national provisions in Hungary requiring the sudden compulsory retirement of judges, prosecutors and notaries when they reach the age of 62 violate the Employment Equality Directive (2000/78/EC).

8 November – European conference on domestic violence against women takes place in Cyprus

November

7 December – Council of the European Union makes a Declaration on the European Year for Active Ageing and Solidarity between Generations (2012): The Way Forward

December

5

Equality and non-discrimination



The European Union (EU) and its Member States took concrete steps in 2012 to promote equality and non-discrimination in the EU. Several EU Member States ratified the UN Convention on the Rights of Persons with Disabilities, and the Council of the European Union adopted a framework for EU-level monitoring of the convention's implementation. The 2012 Year of Active Ageing highlighted the challenges and obstacles faced by older persons, including those with a disability, and policies were initiated to address these challenges. The European Parliament repeated its call to the European Commission for more comprehensive action regarding the fundamental rights of lesbian, gay, bisexual and transgender persons. The proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, known as the Horizontal Directive, continued to be discussed. Finally, governments, civil society and equality bodies in many EU Member States continued their efforts to promote equality and non-discrimination despite the challenges of austerity measures.

5.1. Key developments: European aspects

Adoption and ratification of legal instruments

The Lisbon Treaty made the prohibition of discrimination an issue that cuts across all areas of EU legislation and policy. In this spirit, two EU directives were adopted explicitly recognising the cross-cutting relevance of equality and non-discrimination. Firstly, in December 2011, the Asylum Qualification Directive ► (recast) was adopted (see also **Chapter 1** on asylum, immigration and integration). This directive includes a greater acknowledgment of non-discrimination and gender-specific forms of persecution, including the inclusion of gender identity as an element to account for when defining a 'particular social group'.¹

Secondly, the Directive establishing minimum standards on the rights, support and protection of victims of crime ► was adopted in 2012 (see also **Chapter 9** on rights of

Key developments in the area of equality and non-discrimination

- The Council of the European Union adopts on 29 October 2012 the EU-level framework for the implementation and monitoring of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), following the EU's ratification of the CRPD in December 2010. The framework comprises the European Commission, the European Ombudsman, the Petitions Committee of the European Parliament, FRA (European Union Agency for Fundamental Rights) and the European Disability Forum.
- Five EU Member States ratify the CRPD in 2012, bringing the total to 24 EU Member States, as well as Croatia. A large majority of Member States identify focal points under the CRPD and either extend the mandate of existing bodies or set up new bodies as CRPD monitoring mechanisms.
- The European Parliament Civil Liberties, Justice and Home Affairs Committee (LIBE) publishes a feasibility study on a possible Lesbian, Gay, Bisexual and Transgender (LGBT) persons Roadmap. At national level a variety of measures are adopted and case law continues to play an important role.

¹ Directive 2011/95/EU, OJ 2011 L 337, Art. 10.

- The European Commission proposes that women should fill at least 40 % of non-executive board member positions in publicly-listed companies. Some Member States address the gender pay gap in legislative and policy measures.
- The 2012 European Year of Active Ageing and Solidarity between Generations raises the visibility of the challenges and obstacles that an ageing society faces, as well as the opportunities to address such issues.

crime victims).² This directive provides for specialist support services, assistance and protection for victims of crime who “should be recognised and treated in a respectful, sensitive and professional manner without discrimination of any kind based on any ground such as 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, gender, gender expression, gender identity, sexual orientation, residence status or health”.

This is the first time that an EU directive refers to gender expression or gender identity. This reference offers explicit legal protection to the manifestation of one’s gender identity.³

EU Member States also continued to sign and ratify existing international conventions with an equality dimension in 2012. Six additional Member States, namely **Belgium, Italy, Malta, the Netherlands, Poland** and the **United Kingdom**, signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention).⁴

Five EU Member States (**Bulgaria, Estonia, Greece, Malta** and **Poland**) ratified the CRPD in 2012, bringing the total ratifications to 24 EU Member States and Croatia, among which 19 have also ratified its Optional Protocol. Those EU Member States that have ratified the convention but not its Optional Protocol are: **Bulgaria, the Czech Republic, Denmark, Poland** and **Romania**. **Estonia** and **Poland** made formal declarations upon ratification with regard to Article 12 of the CRPD on equal recognition before the law, interpreting this article to allow restriction of a person’s legal capacity according to the provisions of existing national legislation.⁵ **Finland, Ireland** and the **Netherlands** have yet to ratify the CRPD, but they have indicated that they are

in the process of amending their legislation to ensure compliance before ratifying.⁶

In keeping with the EU’s obligations under Article 33 (2) of the CRPD, the Council of the European Union adopted a proposal in October 2012 designating the members of the EU-level framework to promote, protect and monitor the implementation of the Convention.⁷

The entities comprising the EU framework are the European Parliament’s Petitions Committee, the European Ombudsman, the European Commission, FRA and the European Disability Forum. In addition, a majority of EU Member States have established the bodies defined under Article 33 of the CRPD for implementing and monitoring the CRPD at the national level. An overview of these bodies is presented in Table 5.1.

Legislative initiatives under discussion in 2012

In 2012, several discussions continued on legislative initiatives with an equality dimension. In 2011, the European Commission submitted its proposal for the EU structural funds legislative package for 2014–2020.⁸ According to the proposal, at least a quarter of the cohesion budget should be dedicated to the European Social Fund, amounting to €84 billion. The aim is to combat youth unemployment, promote active ageing, social innovation and social inclusion, and support disadvantaged groups such as Roma.

The proposal contained seven general conditions that must be met before EU Member States can receive funding, namely: anti-discrimination, gender equality, disability, public procurement, state aid, environmental legislation, and statistical systems/result indicators. Discussions in the Council of the European Union under the Danish Presidency of the EU in 2012 resulted in the removal of the conditions on anti-discrimination, gender equality and disability.⁹

The European Commission, as well as civil society organisations, called upon the Council to reverse this decision, saying that removing these conditions could undermine the full participation of the most vulnerable

2 Directive 2012/29/EU, OJ 2012 L 315/57.

3 *Ibid.*, Recital 56.

4 Council of Europe, Istanbul Convention.

5 UN, CRPD, Declarations and reservations. For the Estonian explanatory note to the ratification act see: Estonia, Ministry of Social Affairs (2012).

6 For Finland: A working group on the ratification of the CRPD will present a proposal by December 2013, for more information see: http://www.hare.vn.fi/mHankePerusSelaus.asp?h_iID=17591&tVNO=1&sTyp=Selaus; for Ireland: Dáil Éireann Debate ‘Written Answers – Human Rights Issues’, 28 February 2012, available at: <http://debates.oireachtas.ie/dail/2012/02/28/00076.asp>; Netherlands, House of Representatives (2012a).

7 Council of the European Union (2012a), p. 20.

8 European Commission (2011).

9 Council of the European Union (2012b).

social groups in the EU and the attainment of the Europe 2020 goals.¹⁰

In November 2012 under the Cyprus Presidency of the EU, the Council agreed on a fourth partial general approach to the structural funds legislative package, which did not include the conditions on anti-discrimination, gender equality and disability.¹¹

Disagreements have hampered discussions on the draft Maternity Leave Directive proposed by the European Commission in 2008.¹² These disagreements arose from the Council's position¹³ in 2011 on the length of maternity leave and the amount of allowance foreseen in the European Commission proposal, following a 2010 Parliament resolution.¹⁴ The Commission is not planning to withdraw the proposal and rather aims at continuing to make efforts to achieve further progress.

The discussion on the proposed Horizontal Directive continued in the Council of the European Union in 2012.¹⁵ The main issues concerned the division of competences between the EU and the Member States, the overall scope of the directive and the principle of subsidiarity.¹⁶

The European Parliament made repeated calls that have been widely supported by civil society, to 'unblock' the decision-making process.¹⁷

Some EU Member States are already implementing aspects that would be required for adopting such a horizontal directive. The anti-discrimination legislation in place, for example, in **Belgium, Bulgaria, the Czech Republic, Ireland, Malta, the Netherlands, Spain** and the **United Kingdom** as well as **Croatia**, extends the duty to provide reasonable accommodation for persons with disabilities beyond the field of employment, such as to the provision of goods and services.¹⁸

FRA ACTIVITY

Launching joint European non-discrimination handbooks

FRA and the European Court of Human Rights (ECtHR) produced an update in English and French to its 2011 co-publication on European non-discrimination law. The handbook, which offers a comprehensive guide to non-discrimination law and relevant key concepts, is now available in 24 languages on both the FRA and the ECtHR websites. On 10 December 2012, FRA staff participated in the launch of the Swedish version of the handbook at an event organised by the Equality Ombudsman.

The handbook language versions and update are available at: <http://fra.europa.eu/en/publication/2012/handbook-european-non-discrimination-law> and at: www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+analysis/Handbook+on+non-discrimination

Non-legislative initiatives introduced in 2012

The 2012 European Year for Active Ageing and Solidarity between Generations was designed to raise awareness of the contribution that older people make to society, and of the opportunities for strengthening solidarity between generations – building on previous EU and Council of Europe activities in this area. Active ageing has been defined as meaning growing old in good health and as a full member of society, feeling more fulfilled at work, more independent in daily life and more involved as a citizen.¹⁹

A Council of the European Union Declaration in 2012 incorporated the 'Guiding principles for active ageing and solidarity between generations adopted by the Employment and Social Protection Committees. These principles refer to specific areas of action, including vocational education and training, healthy working conditions, age management strategies, employment services for older workers and prevention of age discrimination.²⁰

The Age Platform Europe has also highlighted initiatives within the EU, and established a Roadmap beyond the European Year.²¹

The European Year has stimulated debate on the challenges created by an ageing society, as well as those involved in supporting the efforts of Member States, regional and local authorities, social partners,

10 Joint statement of a coalition of European NGOs, *Important provisions under threat in Council discussions on the Structural Funds legislative package for 2014–2020*, Brussels, 24 April 2012. For more information, see: http://www.edf-feph.org/Page_Generale.asp?DocID=13854&thebloc=29831.

11 Council of the European Union (2012c).

12 European Commission (2008a).

13 Council of the European Union (2011a), p. 10; see also Council of the European Union (2011b).

14 European Parliament (2010).

15 European Commission (2008b).

16 Council of the European Union (2011c).

17 European Parliament (2011).

18 For more information see: FRA (2011).

19 For more information, see: <http://europa.eu/ey2012/>.

20 Council of the European Union (2012d), pp. 7–11.

21 For more information, see: EY2012 Stakeholder Coalition (2012).

civil society and the business community to promote active ageing and mobilise the potential of the rapidly growing older population.²² The European Year has also served as a framework to discuss the need to raise the participation of older people in the labour market.²³

Upon the occasion of the European Year, the European Commission published the report *Older workers, discrimination and employment*, produced by the Network of socio-economic experts in the anti-discrimination field. The report highlights the main issues faced by older people in accessing and progressing in employment.²⁴

Prime among these issues is the lack of prospects for career advancement. This lack of prospects especially affects men aged 50 to 59. Many believe that they will no longer be able to do the same job at age 60, a key belief that drives the intention to leave the labour market as soon as possible,²⁵ Eurofound discovered. This is against the background that the majority of Europeans reject the increase in retirement ages by 2030, according to the Eurobarometer special survey on active ageing. Only in **Denmark** (58 %), **Ireland** (53 %), the **Netherlands** (55 %) and the **United Kingdom** (51 %) did the majority of respondents recognise the need for the official retirement age to rise.²⁶

In parallel, the Council of Europe's Drafting Group on the Human Rights of Older Persons (CDDH-AGE) initiated the drafting of a reloaded instrument. CDDH-AGE decided to gear its initial work towards the adoption of a Recommendation on this topic. CDDH-AGE also discussed the definition of 'older persons' but postponed the matter as it did not reach an initial agreement.²⁷

The EU also continued to implement specific action plans, strategies and other instruments in 2012 to promote non-discrimination and equality in other areas of discrimination. The European Commission continued to implement the EU Strategy on equality between men and women 2010–2015, as well as the European Disability Strategy 2010–2020.²⁸

The implementation of the EU Strategy towards the eradication of trafficking in human beings 2012–2016²⁹ began in 2012 following the 2011 adoption of the

EU anti-trafficking directive, a directive that also includes a gender perspective. The strategy highlights that women and girls account for 79 % of victims of trafficking and underlines the gender differences in trafficking types and possible responses (see also

► **Chapters 1 and 4** of this Annual report).

The Equality Summit 2012 provided evidence that equality and accessibility policies can help support growth, economic development and prosperity. The summit, co-organised by the Cyprus Presidency of the Council of the European Union and the European Commission in Nicosia on 22–23 November, highlighted the importance of equality policies and legislation for the most vulnerable groups in the current difficult financial context.³⁰

The Eurobarometer on Discrimination, published on the same occasion, showed that discrimination is still considered common in the EU. The three most widely perceived grounds are ethnic origin (56 %), sexual orientation (46 %) and disability (46 %). In the employment area, people over 55 years of age are seen as the most vulnerable group in terms of discrimination. This Eurobarometer explored for the first time perceptions on discrimination against transsexual and transgender people.³¹

The European Institute for Gender Equality noted an increase in the introduction of protection orders and the adoption of national action plans to tackle violence against women in 25 EU Member States.³²

Finally, several European Parliament resolutions called on the European Commission to take further action in the area of fundamental rights of LGBT persons. A feasibility study on an EU LGBT Roadmap requested by the European Parliament's LIBE Committee recommends envisaging an EU action plan that would draw together new laws and policies to strengthen equality and non-discrimination for LGBT people in the EU.³³ The call for more action was repeated in the European Parliament's annual report on the situation of fundamental rights in the EU.³⁴

22 Decision No. 940/2011/EU of the European Parliament and the Council, OJ 2011 L 246/5.

23 Although there is no clear definition of the concept 'older people', the Employment Committee and the Social Protection Committee in their 'Guiding Principles' refer to statistics relating to "people over 65".

24 Van Balen, B. *et al.* (2011).

25 Eurofound (2012a), p. 80.

26 European Commission (2012a).

27 Council of Europe, Steering Committee for Human Rights, Drafting Group on the Human Rights of Older Persons (CDDH-AGE) (2012), p. 2.

28 European Commission (2010a).

29 European Commission (2012b).

30 European Commission and Cypriot EU Presidency (2012).

31 European Commission (2012c).

32 European Institute for Gender Equality (2012).

33 European Parliament (2012a).

34 European Parliament (2012b).

5.2. Key developments: national aspects

5.2.1. Legislative and non-legislative developments: cross-cutting aspects

Legislative developments aimed at combating discrimination in employment occurred in 2012 in **Latvia**, where a new law regulates the prohibition of discrimination in self-employment.³⁵ Latvia also adopted another piece of legislation with a view to implementing EU Directive 2010/41/EC³⁶ prohibiting unequal treatment of natural persons conducting independent paid activities in private or public. The law broadens the list of protected discrimination grounds by adding age, political and other belief, religion, sexual orientation, and disability to those areas covered by the law previously in force: sex, race and ethnic origin.

2012 also saw developments concerning equality legislation covering areas beyond employment. In **Slovakia**, the government approved a draft amendment to the Anti-discrimination Act, which extends the grounds upon which positive measures can be adopted to cover age, disability, 'race', nationality and ethnicity, sex and gender. The proposal also clarifies indirect discrimination as including the risk of discrimination arising from a provision appearing to be neutral.³⁷

In **Austria**, a draft amendment to the Equal Treatment Act was debated in 2012. The amendment would address unequal treatment in access to goods and services to include and expand the protection offered to further grounds of discrimination such as age, sexual orientation and religion.³⁸

Non-legislative actions were also initiated in several EU Member States. Some Member States set up, implemented and/or monitored programmes specifically related to combating discrimination in employment. **Germany**, for example, completed the pilot project Depersonalised application procedures³⁹ in 2012 (see **Chapter 6** on discrimination testing in this Annual report).

In other cases, programmes to combat discrimination in employment were part of more general strategies on non-discrimination and integration of vulnerable

groups. **Bulgaria**, for example, set up programmes to provide professional training aimed at ensuring better access to employment for Roma.⁴⁰ New **Slovenian** policies aimed at reducing differences in employment rates for members of groups that more often face discrimination and to combat harassment at the workplace.⁴¹

There were also initiatives that specifically addressed the monitoring process, for example in **Luxembourg**, where the Centre for Equal Treatment (*Centre pour l'égalité de traitement*) monitored job postings published in the press since April 2011 to raise awareness of possible infractions of discrimination legislation.

Some of these monitoring programmes have led to the publication of comprehensive reports: the report *Diversity barometer at work* in **Belgium**⁴² 'measured' discrimination based on age, disability and sexual orientation at work and in access to work, while the Ministry of Employment and the Economy in **Finland** published a research report that was based partly on a large-scale national survey.⁴³

Other EU Member States set up or further implemented national action plans. **Lithuania** produced the Inter-institutional *Action plan for the promotion of non-discrimination, 2012–2014* (*Nediskriminavimo skatinimo 2012-2014 metų tarpinstitucinio veiklos planas*)⁴⁴ and the **Netherlands** announced the Action programme *Combat discrimination* (*Actieprogramma Bestrijding van discriminatie*).⁴⁵ **Slovenia** produced guidelines for the integration of the principle of non-discrimination in relevant policies (*Smernice za integracijo načela nediskriminacije*), while the **United Kingdom's** government published on 22 May 2012 *The Equality Strategy – Building a Fairer Britain: Progress Report*.⁴⁶

5.2.2. Discrimination on the ground of religion or belief

Article 10 of the Charter of Fundamental Rights of the European Union confirms the right to freedom of thought, conscience and religion. Article 21 of the Charter prohibits any discrimination including on grounds of religion or belief.

35 Latvia, Law on Prohibition of Discrimination of Natural Persons Engaged in Economic Activity, 29 November 2012, entered into force on 2 January 2013.
36 Directive 2010/41/EU of the European Parliament and of the Council, OJ 201 L 181/1.
37 Slovakia, National Government (2012).
38 Austria, National Parliament (2012).
39 Germany, Federal Anti-Discrimination Agency (2012a).

40 Bulgaria, National Assembly (2012).
41 Slovenia, Office for Equal Opportunities (2011).
42 Belgium, Centre for Equal Opportunities and Opposition to Racism (2012).
43 Larja, L., et al. (2012).
44 Lithuania, Ministry of Social Security and Labour (2012).
45 Netherlands, Ministry of Security and Justice (2011).
46 United Kingdom, Home Office (2012a).

Key developments in national case law and other legislative aspects

In 2012, cases of alleged discrimination on the ground of religion or belief arose in several EU Member States. These issues often concentrated around highly publicised topics such as ritual slaughtering, wearing face-covering clothing and male circumcision.

On 6 December 2012, the **Belgian** Constitutional Court rejected a claim lodged to annul the ban on face coverings that came into force on 13 July 2011. In its judgment, the court concluded that the imposed ban does not violate fundamental rights provided that it does not apply to places of worship or their vicinity.⁴⁷ On 6 February 2012, the Minister of Interior and Kingdom Relations of the **Netherlands** submitted a legislative proposal to the Dutch Parliament establishing a general ban on the wearing of face-covering clothing,⁴⁸ but due to the collapse of the government the proposal was not further debated. The new government, after the general elections, has put in its coalition agreement that “clothing that covers the face will be banned in education, the care sector, public transport and in public-authority buildings”.⁴⁹

In the **Netherlands**, the Dutch Parliament debated the ritual slaughter of animals, leading a member of parliament of the Party for Animals (*Partij voor de Dieren*) to table a legislative proposal in 2011 to ban this practice. In 2012, however, the Senate rejected the proposed law.⁵⁰ In June, the State Secretary for Agriculture found a compromise with relevant stakeholders by means of a covenant. This covenant aims at allowing ritual slaughter under animal welfare conditions, thus avoiding an outright ban.⁵¹ On 27 November 2012, the **Polish** Constitutional Court ruled that the ritual slaughter of animals is illegal as of January 2013.⁵²

In **Finland**, the National Discrimination Tribunal did not consider as discriminatory the prohibition of Islamic prayers during breaks in common areas shared by all workers under the Non-Discrimination Act. It rejected the application.⁵³

The District Court of Cologne in **Germany**⁵⁴ found that, despite the the parents’ agreement, circumcision of an infant boy constituted bodily harm and should be penalised. This judgment sparked debates in a number of

countries on the legality of circumcisions. A wide range of actors expressed criticism on the topic, including several faith-based communities.

A **German** draft proposal clarifying legal questions on the matter was published in autumn and the law entered into force in December 2012.⁵⁵ The law says that parents are entitled in their care of a child, who is not sufficiently developed to understand and assess the issue himself, to agree to a circumcision even if it is not medically required, provided that it is carried out according to up-to-date medical standards and respects the child’s best interests. If a child opposes the circumcision then the procedure might not be in his best interests, depending on his state of development.

The **Slovenian** Human Rights Ombudsman issued a non-binding opinion stating that circumcision based solely on religious grounds is not allowed by law and that the child’s consent is necessary because of the interference with his bodily integrity. In the case of conflict between freedom of religion and children’s rights, the Ombudsman concluded that the latter prevails, relying on the constitutional provisions on the best interest of the child.⁵⁶

Registration requirements for faith communities also emerged as a fundamental rights matter in some EU Member States. A church law came into force in **Hungary** that significantly changes registration requirements for all existing churches.⁵⁷ Registration of a denomination now falls under the Parliament’s competence, which may deny registration even if the criteria set by church law have been met. More than 300 denominations lost their legal status in January 2012.

In February 2012, 84 Hungarian denominations submitted requests for their recognition, of which 66 were unsuccessful. The Council of Europe European Commission for Democracy through Law (Venice Commission) issued an opinion on this law, concluding that “The Act sets a range of requirements that are excessive and based on arbitrary criteria [which] can hardly be considered in line with international standards”.⁵⁸ The Hungarian Government said it plans to introduce amendments that bring the law into line with international standards.

A **Lithuanian** law regulating registration procedures of religious communities and associations and their real estate property for religious purposes came into

47 Belgium, Constitutional Court (2012).

48 Netherlands, Minister of the Interior and Kingdom Relations (2012).

49 Netherlands, Netherlands government coalition agreement.

50 Netherlands, House of Representatives (2011); Senate (2012).

51 Netherlands, Minister for Agriculture and Foreign Trade (2012).

52 Poland, Constitutional Tribunal (2012).

53 Finland, National Discrimination Tribunal (2011).

54 Germany, Regional Court Cologne (2012).

55 Germany, Civil Code, 27 December 2012; and Germany, Federal Parliament (2012a).

56 Slovenia, Human Rights Ombudsman (2012).

57 Hungary, Act CCVI of 2011 on the Right to Freedom of Conscience and Religion, and on the Legal Status of Churches, Religious Denominations and Religious Communities, 30 December 2011.

58 Council of Europe, Venice Commission (2012), paras. 108–110.



force on 1 July 2012.⁵⁹ This law simplifies registration procedures for religious communities and associations when privatising their properties, which were nationalised before independence but are still in use by religious communities.

On 4 September 2012, the ECtHR held a public hearing on the admissibility and merits of four religious discrimination cases originating in the **United Kingdom**. Four practising Christians claimed workplace discrimination, arguing that the national law did not sufficiently uphold their right to freedom of religion under Article 9 of the European Convention on Human Rights (ECHR).

In *Chaplin v. the United Kingdom*⁶⁰ and *Eweida v. the United Kingdom*,⁶¹ the complainants raised the issue of wearing crucifixes at work, as a manifestation of their faith. In *Ladele v. the United Kingdom*,⁶² the plaintiff, employed as a registrar, refused to officiate civil partnership ceremonies for homosexual couples, as homosexual relationships in her view are not compatible with God's law. For the same reason, in *McFarlane v. the United Kingdom*,⁶³ the applicant was unwilling to offer sex advice to homosexual couples in his role as an employee at the national counselling service. Judgments are expected in 2013.

Key developments in national policies and practices

In **Germany**, following the 2011 North-Rhine Westphalia Law on the introduction of Islamic religious education as a regular school subject (*Gesetz zur Einführung von islamischem Religionsunterricht als ordentliches Lehrfach*), Islamic religious education courses constituted part of the school curriculum in 44 primary schools. The law enables a committee, consisting of experts in Islamic theology and education, to act on behalf of a religious community.⁶⁴ In addition, centres of Islamic theology (*Zentren für Islamische Theologie*) have been established at four German universities. As part of a modern integration policy, the newly created courses will train teachers for Islamic religious education, religious studies and theology.⁶⁵

The planning and construction of mosques has caused debates in a number of EU Member States, such as **Austria**.⁶⁶ In the **Netherlands**, the University of Amsterdam conducted a study on *Islamophobia and discrimination (Islamofobie en discriminatie)*,⁶⁷ which documents 117 incidents at Dutch Mosques between 2005 and 2010. The incidents include vandalism, daubing slogans on walls, arson, telephone threats and, in one instance, the hanging of a dead sheep from a building.⁶⁸

5.2.3. Discrimination on the ground of age

The economic crisis has brought to the fore inequalities in Europe, as different groups vary substantially in their perceptions of their financial security and their prospects of finding a job with a similar salary if they lose their current position, a Eurofound report showed. Workers aged 50 to 64 years old were most likely (60 %) to believe that they would not find a job with a similar salary. Older people were also more likely than younger people to expect that their households' financial situation would worsen in the next 12 months (38 % among 50–64 year olds; 35 % among people aged 65 and older).⁶⁹

The European Year for Active Ageing and Solidarity between Generations helped spotlight the challenges older persons face regarding retirement. Compulsory retirement, and the conditions under which it can constitute discrimination or justified differential treatment, is an important related debate.

Key developments in national case law and other legislative aspects

Following **Hungary's** adoption of a legislative scheme which entered into force on 1 January 2012, and required the compulsory retirement at age 62 of judges, prosecutors and notaries, the European Commission successfully filed an application before the Court of Justice of the European Union (CJEU) seeking to establish that the scheme breached the Employment Equality Directive. The CJEU ruled that the scheme did indeed breach the Directive (Articles 2 and 6 (1)) as it gave rise to a difference in treatment on the ground of age which was disproportionate to the objectives pursued.⁷⁰

In the CJEU's view, the persons concerned were obliged to leave the labour market automatically and definitively without having had time to take measures, particularly

59 Lithuania, Law on the procedure for the restoration of the rights of religious communities to the existing real property, No. XI-1835, 21 December 2011.

60 ECtHR, *Chaplin v. the United Kingdom*, No. 59842/10, 4 September 2012.

61 ECtHR, *Eweida v. the United Kingdom*, No. 48420/10, 4 September 2012.

62 ECtHR, *Ladele v. the United Kingdom*, No. 51671/10, 4 September 2012.

63 ECtHR, *McFarlane v. the United Kingdom*, No. 36516/10, 4 September 2012.

64 Germany, Ministry of School and Further Education North-Rhine (2012).

65 Germany, Federal Ministry of Education and Research (2012).

66 Kleine Zeitung (2012).

67 Van der Valk, I. (2012).

68 *Ibid.*, pp. 62–63.

69 Eurofound (2012b).

70 CJEU, C-286/12, *European Commission v. Hungary*, 6 November 2012, para. 82.

of an economic and financial nature, required by such a situation. For, under the new legislation, the retirement pension would be at least 30 % lower than their remuneration. In addition, the final working dates did not take the contribution periods into account and therefore did not guarantee the right to a pension at the full rate.⁷¹ The CJEU also considered the provisions at issue as inappropriate to achieving the Hungarian government's stated goal of a more balanced 'age structure',⁷² since they led, in fact, to a deterioration in the prospects of young lawyers entering the professions of the judicial system.⁷³

Similarly, relevant cases brought before national courts on discrimination on the ground of age particularly concerned unequal treatment in the area of employment. The Supreme Court in the **United Kingdom** rendered a judgment establishing that it was indirectly discriminatory on the ground of age to require a law degree to obtain certain benefits, because certain age groups, such as those approaching compulsory retirement age, were no longer in a position to acquire such a degree.⁷⁴

National courts also examined a legal issue related to mandatory retirement at a certain age. A court in **Sweden** (*Södertörns tingsrätt*), for instance, requested for a preliminary CJEU ruling on Swedish national legislation providing for automatic termination of an employment contract on the sole ground that the employee had reached the age of 67, without taking into account the amount of retirement pension the person concerned would receive.

The CJEU, interpreting Article 6 (1) of the Employment Equality Directive, ruled that such legislation could be permitted if it was objectively and reasonably justified by a legitimate aim relating to labour-market policies and if it served as an appropriate and necessary means to achieve that aim.⁷⁵ In contrast to the Hungarian judicial mandatory retirement age legislation described earlier, the Swedish national legislation, which provided for automatic termination of an employment contract upon reaching the retirement age, was long-standing. It therefore allowed the person concerned sufficient time to take the necessary measures, in particular of an economic and financial nature. In this case, the CJEU found that the retirement age enabled retirement pension regimes to be adjusted to ensure that income received over the full course of a career was taken into account.⁷⁶

The **United Kingdom** Supreme Court adopted a similar approach in a case concerning the mandatory retirement of a partner in a law firm as he turned 65. The Supreme Court drew on CJEU jurisprudence regarding retirement ages when it noted that staff retention and workforce planning constituted legitimate aims for compulsory retirement, as they related to the legitimate social policy aim of fairly spreading out professional employment opportunities across generations.

Similarly, the court also considered legitimate the aim of limiting the need to expel partners by reason of performance management as this contributed to protecting a person's dignity.⁷⁷ This latter argument, however, may lead to a situation where older people are dismissed for age rather than performance reasons, which would amount to discrimination.

The Council Declaration on the European Year is relevant to these issues as it calls for preventing negative age-related stereotypes and discriminatory attitudes.⁷⁸ It also calls for ensuring equal rights for older workers in the labour market and refraining from using age as a decisive criterion for assessing whether or not a worker is fit for a certain job.

A parallel trend in some EU Member States has been to extend or eliminate the age of compulsory retirement. In the **United Kingdom**, the age of compulsory retirement was eliminated following the phasing out of the default retirement age at 65. If an employer wishes to dismiss an employee at the 'justified retirement age', he or she must be able to show that the retirement age is objectively justified, in other words that it is a proportionate means of achieving a legitimate end. The employee is free to retire voluntarily, subject to providing appropriate notice, but continues to enjoy the same protection against dismissal and other related rights after reaching pensionable age.⁷⁹

In addition to highlighting specific issues related to age discrimination in the area of employment, the Council Declaration on the European Year highlighted the key role that independent living plays in avoiding discrimination on the ground of age. Some EU Member States have adopted legislation to facilitate independent living.⁸⁰

However, legislation that tightens the criteria for receiving social services benefits in the promotion of independent living can make institutional care

71 *Ibid.*, para. 70.

72 *Ibid.*, para. 76.

73 *Ibid.*, para. 78.

74 United Kingdom, Supreme Court, *Homer v. Chief Constable of West Yorkshire Police*, 25 April 2012, para. 17.

75 CJEU, C-141/11, *Torsten Hörnfeldt v. Posten Meddelande AB*, 5 July 2012, para. 47.

76 *Ibid.*, paras. 26 and 33.

77 United Kingdom, Supreme Court, *Seldon (Appellant) v. Clarkson Wright and Jakes (A Partnership) (Respondent)*, 25 April 2012, para. 67.

78 Council of the European Union (2012c).

79 European Association of Labour Court Judges (2012); for more information, see: <http://www.ecu.ac.uk/law/age-key-legislation>.

80 Council of the European Union (2012c), p. 4.



unaffordable for a large proportion of the elderly. It can also cause a public stir, as in **Slovakia** in 2012.⁸¹

Key developments in national policies and practices

Some EU Member States have developed policies or practices to fulfil the aim of the European Year to raise the labour market participation of older people, enabling them to be active in society for longer. Only 41 % of Europeans believe that it should be compulsory for people to stop working at a certain age, according to the 2012 Eurobarometer Special Survey on Active Ageing.⁸²

In **Latvia**, the Ministry of Welfare in cooperation with the Ministry of Education and Science prepared a report on the involvement of persons above the age of 50 in life-long education and active labour market policy measures.⁸³ The level of employment among persons aged 50–64 in Latvia used to far exceed the EU average for the same age group, with 67.5 % in Latvia in 2008 against the EU's 56.5 %, according to the report. But the economic crisis brought the fourth-quarter 2011 Latvian rate of 60.1 % closer to the EU's 57.8 % for the same period.

In 2012, many unemployed persons above the age of 50 in Latvia were involved in various active labour market policy activities provided by the State Employment Agency (SEA). To encourage life-long learning – considered the main support measure for maintaining skills and prolonging labour market participation – pre-pension age persons, or those of 57-to-61 years of age, are exempt from providing a 30 % co-financing contribution to education expenses.

Several EU Member States also developed policies promoting independent living. In **Germany**, for instance, a demography strategy⁸⁴ includes goals such as the self-determined living of old persons. The strategy devotes one chapter to the independent living of older people and accessibility, including recommendations for specific steps and for involving civil society organisations and governmental actors on all levels.

In **Finland**, the Ministry of Environment led a broad-based working group that developed 16 proposals for promoting independent living for older people, including a plan for their implementation.⁸⁵

In March 2012, the Senate of **Ireland** published a Report on the Rights of Older People.⁸⁶

In **Poland**, the Council of Ministers adopted a *Governmental Programme on Social Activity of Elderly People 2012–2013*.⁸⁷ The programme aims at strengthening the integration of elderly people by providing wide access to all forms of education, promoting solidarity across generations as well as developing services designed for an ageing society. Polish people over 55 are little involved in public life and just 10 % declare their involvement in volunteer work. The programme therefore focuses on strengthening their civic participation, including in decision making.

5.2.4. Discrimination on the ground of disability

Although the CRPD relates to fundamental rights in a broad sense, this section focuses on developments related to discrimination on the ground of disability. Policy and legislative developments in 2012 reflect the paradigm shift marked by the CRPD from a medical to a human rights-based model of disability, and testify to the harmonising effect of the convention on national legislation in the EU.

Policy changes in EU Member States have focused on four key areas: equal recognition before the law; independent living and deinstitutionalisation; accessibility; and employment. These areas reflect key CRPD provisions as well as areas for action set out in the *European Disability Strategy 2010–2020*. While the topic of disability is central to this section, many of the issues discussed are also relevant to other areas such as discrimination on the ground of age.

Implementation of the CRPD

EU Member States continued to implement and monitor the CRPD during 2012. Article 33 of the convention sets out States Parties' obligations to: designate a focal point for matters related to the CRPD and to consider setting up a coordination mechanism to facilitate alignment between different sectors (paragraph 1); maintain, strengthen, designate or establish a framework including independent mechanism(s) to promote, protect and monitor the implementation of the CRPD (paragraph 2); and ensure that persons with disabilities and their representative organisations are involved and participate fully in the monitoring process (paragraph 3).

81 Slovakia, Act No. 50/2012 Coll. entered into force amending Law No. 448/2008 on Social Services), 31 January 2012, see Art. 35.1.1.

82 European Commission (2012a), p. 11.

83 Latvia, Ministry of Welfare (2012), *Informatīvais ziņojums 'Par personu, kuras vecākas par 50 gadiem, iesaisti mūžizglītībā un aktīvās darba tirgus politikas pasākumos'*, 6 August 2012.

84 Germany, Federal Ministry of Interior (2012).

85 Finland, Ministry of Environment (2012).

86 Ireland, Houses of the Oireachtas (2012).

87 Poland, Ministry of Labour and Social Policy (2012).

Table 5.1: Structures set up for the implementation and monitoring of the CRPD, by EU Member State and Croatia

EU Member State	Ratified in	Optional Protocol	Focal points within government for matters relating to the implementation of the CRPD – Article 33 (1)	Coordination mechanism – Article 33 (1)	Framework to promote, protect and monitor implementation of the CRPD – Article 33 (2)
AT	2008	Yes	Federal Ministry for Labour, Social Affairs and Consumer Protection (<i>Bundesministerium für Arbeit, Soziales und Konsumentenschutz</i>)		Monitoring committee (<i>Monitoringausschuss</i>)
BE	2009	Yes	Federal Public Service Social Security (sub-focal points designed by the seven independent entities)		Centre for Equal Opportunities and Opposition to Racism (<i>Centrum voor gelijkheid van kansen en voor racismebestrijding</i>)/ <i>Centre pour l'égalité des chances et la lutte contre le racisme</i>)
BG	2012	No	Ministry of Labour and Social Policy (<i>Министерство на труда и социална политика</i>)	not established/designated	not established/designated
CY	2011	Yes	Department for Social Inclusion of People with Disabilities	The Pancyprrian Council for Persons with Disabilities	Office of the Commissioner for Administration (Ombudsman)
CZ	2009	No	Ministry of Labour and Social Affairs (<i>Ministerstvo práce a sociálních věcí</i>)	Ministry of Labour and Social Affairs in cooperation with Ministry of Foreign Affairs, the Government Board for People with Disabilities and the Czech National Disability Council	not established/designated
DE	2009	Yes	Federal Ministry for Labour and Social Affairs (<i>Bundesministerium für Arbeit und Soziales</i>) (16 federal states (<i>Länder</i>) designated their own sub-focal points)	Federal Government Commissioner for Matters relating to Persons with Disabilities	German Institute for Human Rights (<i>Deutsches Institut für Menschenrechte</i>)
DK*	2009	No	Ministry of Social Affairs and Integration (<i>Social- og Integrationsministeriet</i>)	Inter-ministerial Committee of Civil Servants on Disability Matters	Danish Institute for Human Rights (<i>Institut for Menneskerettigheder</i>), Danish Disability Council and Danish Parliamentary Ombudsman
EE	2012	Yes	Ministry of Social Affairs (<i>Sotsiaalministeerium</i>)		Estonian Chamber of Disabled Persons (<i>Eesti Puuetega Inimeste Koda</i>)
EL	2012	Yes	not established/designated	not established/designated	not established/designated
ES	2007	Yes	Ministry of Health, Social Services and Equality (<i>Ministerio de Sanidad, Servicios Sociales e Igualdad</i>); Ministry of Foreign Affairs and Cooperation (<i>Ministerio de Asuntos Exteriores y Cooperación</i>)	National Disabilities Council (<i>Consejo Nacional de la Discapacidad</i>)	Spanish Committee of Representatives of People with Disabilities (<i>Comité Español de Representantes de Personas con Discapacidad</i>)
FR	2010	Yes	Ministry of Social Affairs and Health, together with Interministerial Committee for Disability (<i>Comité interministériel du handicap</i>)	Interministerial Committee for Disability, which consists of representatives of all concerned ministries	Defender of Rights (<i>Le Défenseur des Droits</i>); National Advisory Council for Human Rights (<i>Commission Nationale Consultative des Droits de l'Homme</i>) and National Advisory Council of Disabled Persons (<i>Conseil national consultatif des personnes handicapées</i>)
HU	2007	Yes	Ministry of Human Resources	National Council of Disability	National Council of Disability (<i>Országos Fogyatékosügyi Tanács</i>)
IT	2009	Yes	Ministry of Labour and Social Policies (<i>Ministero del Lavoro e delle Politiche Sociali</i>)		National Observatory on the Situation of Persons with Disabilities (<i>Osservatorio Nazionale sulla condizione delle persone con disabilità</i>)

EU Member State	Ratified in	Optional Protocol	Focal points within government for matters relating to the implementation of the CRPD – Article 33 (1)	Coordination mechanism – Article 33 (1)	Framework to promote, protect and monitor implementation of the CRPD – Article 33 (2)
LT	2010	Yes	Ministry of Social Security and Labour (<i>Socialinės apsaugos ir darbo ministerija</i>) (additional sub-focal points in other public authorities)		Council for Disability Affairs (<i>Neįgalųjų reikalų taryba</i>) at the Ministry of Social Security and Labour and the Equal Opportunities Ombudsman (<i>Lygių galimybių kontrolieriaus tarnyba</i>)
LU	2011	Yes	Ministry of Family Affairs and Integration (<i>Ministère de la Famille et de l'Intégration</i>)	Ministry of Family Affairs and Integration	Luxembourg Consultative Commission of Human Rights (<i>Commission consultative des Droits de l'Homme du Grand-Duché de Luxembourg</i>); Centre for Equal Treatment (<i>Centre pour l'égalité de traitement</i>); and the National Ombudsman (<i>Médiateur au service de citoyens</i>)
LV	2010	Yes	Ministry of Welfare (<i>Labklājības ministrija</i>)		Ombudsman of the Republic of Latvia (<i>Latvijas Republikas Tiesībsargam</i>)
MT	2012	Yes	Ministry for Social Policy (<i>Ministeru tal-Politika Soċjali</i>)		National Commission for Persons with Disability (<i>Kummissjoni Nazzjonali Persuni b'Dizabilità</i>)
PL	2012	No	not established/designated	not established/designated	not established/designated
PT	2009	Yes	Ministry of Foreign Affairs; and Ministry of Solidarity and Social Security	National Council for the Rehabilitation and Integration of the People with Disabilities (<i>Conselho Nacional para a Reabilitação e Integração das Pessoas com Deficiência</i>)	not established/designated
RO	2011	No	Ministry of Labour, Family and Social Protection (<i>Ministerul Muncii, Familiei și Protecției Sociale</i>)		not established/designated
SE	2008	Yes	Ministry of Health and Social Affairs (<i>Social- och hälsovårdsministeriet</i>)	High Level Interministerial Working Group	not established/designated
SI	2008	Yes	Ministry of Labour, Family and Social Affairs (<i>Ministrstvo za delo, družino in socialne zadeve</i>)	not established/designated	Council for persons with disabilities (not functional yet). Until it is set up, the Government Council for the Disabled (<i>Svet Vlade Republike Slovenije za invalide</i>) carries out its functions
SK	2010	Yes	not established/designated	not established/designated	not established/designated
UK	2009	No	Office for Disability Issues, Department of Work and Pensions		Equality and Human Rights Commission (England and Wales), Scottish Human Rights Commission, Northern Ireland Human Rights Commission and Equality Commission for Northern Ireland
HR	2007	Yes	not established/designated		not established/designated
EU	2010	No	European Commission	See provisions of the Code of Conduct between the Council, the Member States and the Commission setting out internal arrangements for the implementation by and representation of the EU relating to the United Nations Convention on the Rights of Persons with Disabilities	European Commission, European Parliament's Petitions Committee, European Ombudsman, European Union Agency for Fundamental Rights, European Disability Forum

Notes: * The Danish Disability Council and the Danish Parliamentary Ombudsman were not designated, however, the explanatory text to Parliamentary Decision B 15 of 17 December 2010 provides that they are to be part of the framework.

Source: FRA, 2012

As a first step, a large majority of Member States have identified focal points, with the Ministry responsible for social affairs typically assuming this role. About a third of those Member States that have specified a national focal point have also given it the role of coordination mechanism (see Table 5.1).

Secondly, EU Member States typically take one of two approaches regarding mechanisms set up to promote, protect and monitor the implementation of the CRPD: either extending the mandate of existing bodies to incorporate this role, or setting up new bodies tasked specifically with CRPD monitoring.

Reflecting the first approach, National Human Rights Institutions (NHRIs) in **Belgium, Denmark, Germany, Luxembourg** and **Great Britain** (England, Scotland and Wales) have been designated as the independent mechanism required under Article 33 (2) of the CRPD. Three of these, in Belgium, Denmark and England and Wales, are both NHRIs and equality bodies. In **Cyprus, Latvia** and **Lithuania**, respective national equality bodies were designated as independent monitoring bodies, while in **France, Luxembourg** and in Scotland and Northern Ireland (**United Kingdom**) both the respective national equality body and the NHRI are included in the monitoring frameworks.

Seven EU Member States, namely **Austria, Estonia, Hungary, Italy, Malta, Slovenia** and **Spain**, adopted the second approach and created new mechanisms dedicated to monitoring CRPD implementation. Many of these new mechanisms also systematically involve persons with disabilities through their representative organisations.

A further eight Member States (**Bulgaria**, the **Czech Republic, Greece, Poland, Portugal, Romania, Slovakia** and **Sweden**, as well as **Croatia**) are in the process of establishing monitoring mechanisms. The **Bulgarian**,⁸⁸ **Polish**⁸⁹ and **Slovakian**⁹⁰ proposals involve NHRIs, equality bodies and ombudsman institutions. In **Sweden**, the government commissioned a delegation to examine which institution should be designated as monitoring body. The delegation concluded that Sweden should establish an NHRI with this mandate.⁹¹ The national Equality Ombudsman and the Swedish Agency for Disability Policy Co-ordination can, within their mandate, take on the monitoring role until an independent mechanism is set up.

In some cases, civil society organisations, including disabled persons organisations, have expressed concerns

regarding the national frameworks set up or proposed under Article 33 (2) of the CRPD. For instance, the **Hungarian** Disability Caucus, a national network of disabled persons organisations and human rights organisations, submitted a shadow report to the CRPD Committee. The report expressed the view that the designated monitoring body in Hungary, the National Disability Council (*Országos Fogyatékosügyi Tanács*), was not independent according to the criteria of the Paris Principles:⁹² the body is chaired by the responsible Minister and 13 out of 27 members are government representatives.⁹³

The caucus also questioned the lack of effective civil society participation in policy and decision making. The Office of the Commissioner for Fundamental Rights (*Alapvető Jogok Biztosa Hivatalának*), the independent Hungarian NHRI, is mandated to pay “special attention to promoting, protecting and monitoring the implementation of the CRPD” and plays an important role in monitoring CRPD implementation but is not part of the Article 33 (2) framework.⁹⁴ The CRPD Committee, in its concluding observations, called upon Hungary to designate an independent mechanism and ensure the involvement of civil society.⁹⁵

Concerns have also been raised about the lack of effective participation of persons with disabilities and their representative organisations in CRPD monitoring. NGOs in **Lithuania**, for example, reported a lack of effective communication and cooperation between civil society and the Ministry of Social Security and Labour (*Lietuvos Respublikos socialinės apsaugos ir darbo ministerija*).⁹⁶

In **Belgium**, a report presented to the Flemish Minister of Equal Opportunities concluded that there is no structure in place in Flanders for including the participation of persons with disabilities in CRPD implementation.⁹⁷

Key developments in national case law and other legislative aspects

New legislation and policies adopted at the national level following CRPD ratification, reflects the potential for the convention to drive the harmonisation of the rights of persons with disabilities across the EU. The **German** Passenger Transport Act (*Personenbeförderungsgesetz*), for example, entered into force on 1 January 2013,

88 Bulgaria, Council of Ministers (2012a). The plan envisages the setting up of a national monitoring body by December 2013.

89 Poland, Ministry of Labour and Social Policy (2012).

90 Slovakia, Bill to amend Law No. 575/2001 on the Organization of Government and Central State Administration Organs as amended, 31 May 2012. See also: European Commission (2012d).

91 Sweden, Delegation for Human Rights (2010).

92 The Paris Principles are the primary source of standards required for NHRIs to be able to effectively protect and promote human rights. For more information, see: FRA (2012a).

93 Hungary, Hungarian Disability Caucus (2012), p. 4. See also: UN, OHCHR, Regional Office for Europe (2012), p. 7.

94 Hungary, Act CXI of 2011 on the Commissioner for Fundamental Rights, Article 1 (3).

95 UN, Committee on the Rights of Persons with Disabilities (CRPD Committee) (2012a).

96 Lithuania, Committee on Human Rights of *Seimas* (2012).

97 Belgium, Equal Opportunities Flanders (2012).

implementing Regulation (EC) No. 1370/2007 on public passenger transport services by rail and by road.⁹⁸ The act obliges city councils to ensure barrier-free local public transport by January 2022.⁹⁹

“The [CRPD] Committee recommends [...] [the] move from substituted decision-making to supported decision-making, which respects the person’s autonomy, will and preferences and is in full conformity with Article 12 of the Convention, including with respect to the individual’s right, on their own, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, to work, and to choose their place of residence.”

Committee on the Rights of Persons with Disabilities (2012), Concluding Observations on Hungary, CRPD/C/HUN/CO/1, 27 September 2012, paragraph 26

Legal capacity – the law’s recognition of the decisions that a person makes¹⁰⁰ – is one particular area of focus for legislative reform, reflecting that “the right of persons with disabilities to make choices about their lives and enjoy legal capacity on an equal basis with others is one of the most significant human rights issues in Europe today”.¹⁰¹ On 29 November 2012, the **Latvian** Parliament approved amendments to the Civil Law and Civil Procedure Law, which took effect from 1 January 2013. The new laws abolish full guardianship of persons with disabilities and introduce two forms of guardianship: provisions for a person and guardian to make decisions together; and partial restriction of legal capacity under which a guardian is entitled to make decisions alone in certain areas of life. The amendments also require the review of all pre-existing cases of persons deprived of legal capacity.

Additionally, the **Maltese** Civil Code was amended in December 2012 to introduce a system of guardianship providing that “a major [adult] who has a mental disorder or other condition, which renders him incapable of taking care of his own affairs may be subject to guardianship”.¹⁰²

Legislative changes are also under way in **Bulgaria**,¹⁰³ **Finland**,¹⁰⁴ **Ireland**,¹⁰⁵ and **Poland**¹⁰⁶ as governments seek to bring existing legislation in line with CRPD standards.

Recent ECtHR case law concerning equal recognition before the law has made reference to the CRPD,¹⁰⁷ reflecting the ECtHR’s acknowledgment of “the growing importance which international instruments for the protection of people with mental disorders are now attaching to granting them as much legal autonomy as possible”.¹⁰⁸

In *Stanev v. Bulgaria*,¹⁰⁹ the ECtHR considered an applicant’s complaint that he had been partially deprived of his legal capacity and placed in a psychiatric hospital. The court found in its judgment that the applicant’s long-term institutionalisation violated the right to liberty set out in Article 5 (1) of the ECHR, which was the first time it had reached such a conclusion.

Moreover, the ECtHR ruled that the applicant’s inability to directly access the court for review of the measure taken on his legal incapacitation marked a violation of Articles 5 (4) and 5 (5) of the ECHR. The court also judged that the applicant had been subject to degrading treatment in violation of Article 3 of the ECHR, which was the first case in which the court found a violation of this article in a social care setting.

Following this judgment, the Ministry of Justice in Bulgaria formed a working group on the implementation of Article 12 of the CRPD, composed of experts from the Ministries of Justice and Labour and Social Policy, as well as representatives of NGOs and academia. The working group published a concept paper that recognises that the *Stanev* judgment requires the “amendment of Bulgarian legislation in its entirety to reflect the standards of the Convention”¹¹⁰ and envisages the replacement of substituted decision-making, where a guardian is authorised by a court to take decisions on an individual’s behalf, by supported decision-making, in which individuals are assisted in the decision-making process by a person of their own choosing.¹¹¹

98 Regulation (EC) No. 1370/2007, OJ 2007 L 315/1.

99 Germany, Passenger Transportation Act, 26 September 2012.

100 For more information, see: FRA (forthcoming).

101 Council of Europe, Commissioner for Human Rights (2012), p. 4.

102 Malta, XXIV of 2012 – Code of Organization and Civil Procedure and the Civil Code (Amendment) Act, Art. 188A.

103 Bulgaria, Ministry of Justice (2012).

104 Finland, Finnish Government’s register of projects (2010).

105 Ireland, The Law Reform Commission (2005).

106 Poland, Helsinki Foundation for Human Rights (2012a).

107 See for example: ECtHR, *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012, para. 244; *D.D. v. Lithuania*, No. 13469/06, 14 February 2012, para. 84; *Sýkora v. the Czech Republic*, No. 23419/07, 22 November 2011, para. 41; *Lashin v. Russia*, No. 33117/02, 22 January 2013, para. 66.

108 ECtHR, *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012, para. 244.

109 ECtHR, *Stanev v. Bulgaria*, No. 36760/06, 17 January 2012.

110 Bulgaria, Ministry of Justice (2012), p. 3.

111 *Ibid.*

FRA ACTIVITY

Realising equal recognition before the law for persons with disabilities

Article 12 of the CRPD is based on equal recognition of persons with disabilities before the law and includes a specific obligation for states to provide access to the support persons with disabilities may require to exercise their legal capacity. FRA will publish a comparative report in October 2013 analysing the current legal situation across the 27 EU Member States regarding the legal capacity of persons with disabilities.

For more information, see: FRA (forthcoming)

Key developments in national policies and practices

Austria,¹¹² **Bulgaria**,¹¹³ **Lithuania**,¹¹⁴ **Luxembourg**,¹¹⁵ and **Spain**¹¹⁶ introduced national action plans to develop policies in the area of disability. The Austrian National Action Plan for persons with disabilities sets out 250 measures, including provisions on accessibility, personal assistance and employment, to be implemented in the period to 2020. Similarly, the Luxembourg plan, which was elaborated in collaboration with persons with disabilities and their representative organisations, addresses awareness-raising, employment, education and non-discrimination among other issues.

A number of EU Member States have introduced legislation and policies regarding independent living and deinstitutionalisation, the transition from institutional to community-based care and support.

In July 2012, the **United Kingdom** government published a draft Care and Support Bill¹¹⁷ designed to implement reforms outlined in the policy paper *Caring for our future: reforming care and support* in England.¹¹⁸ The draft bill would oblige local authorities to ensure that a person receiving care and support can move to another local authority without interruption to the support they receive. The **Finnish** government has continued to implement programmes to provide individual housing and community services for persons with intellectual disabilities and has set a deadline of 2020 for the full deinstitutionalisation of persons with disabilities.¹¹⁹

¹¹² Austria, Federal Ministry of Labour, Social Affairs and Consumer Protection (2012).

¹¹³ Bulgaria, Council of Ministers (2008).

¹¹⁴ Lithuania, National Government (2012).

¹¹⁵ Luxembourg, Ministry of Family Affairs and Integration (2011).

¹¹⁶ Spain, Ministry of Health, Social Services and Equality (2011).

¹¹⁷ United Kingdom, Draft Care and Support Bill, July 2012.

¹¹⁸ United Kingdom, Home Office (2012b).

¹¹⁹ Finland, Ministry of Social Affairs and Health (2012a).

Civil society organisations and bodies responsible for monitoring CRPD implementation also focused on the issue of independent living. The German Institute for Human Rights (*Deutsches Institut für Menschenrechte*), addressed the cost reservation clause in the German Social Code (*Sozialgesetzbuch*). The clause provides that municipalities may refuse requests to finance independent flats for persons with disabilities if the costs of independent living exceed those of living in an institution.¹²⁰ The institute repeated its view that this clause is contrary to Article 19 of the CRPD.¹²¹

In Croatia, seven NGOs working in the area of disability formed a coalition, Platform 19 – Coalition for the right to live in a community (*Platforma 19 – Koalicija za pravo na život u zajednici*), which contacted the relevant persons in municipalities and cities to raise awareness of deinstitutionalisation at the local level in 2012.¹²²

Promising practice

Supporting the transition from institutional to community-based care

The European Expert Group on Transition from Institutional to Community-based Care, a coalition of European stakeholder organisations active in the field of social inclusion, non-discrimination and fundamental rights, ran a joint project that resulted in the Common European guidelines and a toolkit on the transition from institutional to community-based care. The guidelines and toolkit target officials and organisations working with the EU's Cohesion Policy to promote the use of EU structural funds for the transition from institutional to community-based and family-based care and support.

For more information see:
www.deinstitutionalisationguide.eu

Policy developments across the EU Member States addressed the accessibility of buildings, public transport and communication and information technology, mirroring some of the target areas of the European Disability Strategy. A 2012 Eurobarometer survey on accessibility found that more than a third of respondents who said that they or a member of their household have a disability experienced difficulties entering a building or public space, and using public transport. A fifth of respondents experienced difficulties using official authorities' websites.¹²³

¹²⁰ Germany, XII Social Code, Section 13, para. 1; Germany, Federal Parliament (2012b).

¹²¹ Germany, German Institute for Human Rights (2012).

¹²² For more information about Platform 19, see the website of the Croatian Association for Promoting Inclusion (*Udruga za promicanje inkluzije*) at: <http://inkluzija.hr/>.

¹²³ European Commission (2012e).

In **Estonia**, the Ministry of Social Affairs published a handbook including guidelines on how to improve the accessibility of buildings and other facilities for persons with disabilities and older people,¹²⁴ while plans to promote accessibility are ongoing in several municipalities in **Portugal**.¹²⁵

In **Germany**, the Federal Anti-Discrimination Agency (*Anti-Diskriminierungsstelle des Bundes*) developed a 'Signing Question and Answer Tool' allowing persons with hearing impairments to communicate with the agency in sign language using a webcam.¹²⁶

In September 2012, the **French** Minister in charge of disability issues announced that France would not be able to fulfil a 2005 law¹²⁷ which requires all public buildings to be fully accessible to people with disabilities by 1 January 2015. A report by the General Inspectorate of Social Affairs estimated that 15 % of public buildings fulfilled the objectives at the end of 2011.¹²⁸

The employment of persons with disabilities remains a key issue for policy makers, particularly in light of the economic crisis. The Institute of Labour and Family Research, an organisation subsidised by the Labour Ministry in **Slovakia**, conducted a study that found more compensation policy tools, such as benefits, than active integration and pro-employment policies and linked this to an employment rate of just 10 % for persons with disabilities.¹²⁹

Many EU Member States including **Bulgaria**,¹³⁰ the **Netherlands**¹³¹ and the **United Kingdom**¹³² recognised that employment was an issue and set up policies to increase the participation of persons with disabilities in the labour market. The Access to Work scheme in the United Kingdom, for example, aims to enable under-represented groups, such as persons with intellectual disabilities or psychosocial disabilities, to enter and remain in employment through the provision of grants for specialist equipment, support workers, disability awareness training for colleagues or transport to work if the person is unable to use public transport.

To live independently and participate in community life, persons with disabilities may require reasonable accommodation, that is: "necessary and appropriate

modification and adjustments [...] to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" (Article 2 of the CRPD).

FRA ACTIVITY

Making choice and control a reality for persons with disabilities

The 2012 FRA report *Choice and control: the right to independent living* examines how persons with mental health problems and persons with intellectual disabilities experience the principles of autonomy, inclusion and participation in their day-to-day lives. Interviews were conducted in nine EU Member States (**Bulgaria, France, Germany, Greece, Hungary, Latvia, Romania, Sweden and the United Kingdom**), and the report found that barriers and disabling systems often exclude persons with mental health problems and persons with intellectual disabilities from the mainstream of community life.

While most efforts to date have focused on deinstitutionalisation, the report shows that achieving true independent living also requires a range of social policy reforms in the areas of education, healthcare, employment, culture and support services. The report concludes by identifying key initiatives in policy, law and practice that can facilitate progress towards realising the right to independent living of persons with disabilities throughout the EU.

This report on independent living was launched alongside a second FRA report on *Involuntary placement and involuntary treatment of persons with mental health problems* at a major conference organised by FRA together with the Danish Ministry of Social Affairs and Integration and the Danish Institute for Human Rights in Copenhagen in June 2012.

For more information, see: FRA (2012b), FRA (2012c) and the dedicated conference page at: <http://fra.europa.eu/en/event/2012/conference-autonomy-and-inclusion-people-disabilities>

In addition to those EU Member States where such provisions are already in place, **Denmark** and the **Netherlands** extended or indicated an intention to extend the duty to provide reasonable accommodation set out in the Employment Equality Directive beyond the labour market.

In the Netherlands, the Act on equal treatment on the grounds of disability or chronic illness¹³³ was extended

¹²⁴ Levald, A., et al. (2012).

¹²⁵ See, for example, Portugal, Procedure Announcement 2473//2012; and www.sulinformacao.pt/2012/04/tavira-prepara-plano-municipal-de-promocao-da-acessibilidade.

¹²⁶ Germany, Federal Anti-Discrimination Agency (2012b).

¹²⁷ France, Law No. 2005-102 for equal rights and opportunities, for participation and for citizenship of persons with disabilities, 11 February 2005.

¹²⁸ France, General Inspectorate of Social Affairs (2011).

¹²⁹ Repková, K. and Kešelová, D. (2012).

¹³⁰ Bulgaria, Council of Ministers (2012b).

¹³¹ Netherlands, National Government (2012).

¹³² United Kingdom, Department for Work and Pensions (2012).

¹³³ Netherlands, *Besluit van 19 april 2012, houdende vaststelling van het tijdstip van inwerkingtreding van de artikelen 7 en 8 van de Wet gelijke behandeling op grond van handicap of chronische ziekte en inwerkingtreding van het Besluit toegankelijkheid van het openbaar vervoer*, 19 April 2012.

to housing and public transport.¹³⁴ The State Secretary for Health, Welfare and Sport also commissioned a study on the procedural and financial impact of further extending the act to other fields, including access to goods and services.¹³⁵

Moreover, the Danish CRPD monitoring body, the Danish Institute for Human Rights, recommended that the government introduce a legal act that goes beyond the labour market in ensuring protection against discrimination on the grounds of disability.¹³⁶

5.2.5. Discrimination on the grounds of sexual orientation and gender identity

This section examines developments and trends in legislation, policy, practice and case law relating to the fundamental rights of LGBT persons in 2012. It highlights changes in the areas of hate crime, non-discrimination, asylum and civil law.

Key developments in national case law and other legislative aspects

Poland had two related cases of discrimination in employment. The first concerned a shop manager who harassed an employee by repeatedly using insulting terms and publically offending him. Both the first and second instance courts referred to the anti-discrimination provisions of the Polish Labour Code which prohibit discrimination on the ground of sexual orientation and underlined the importance of respecting the human dignity of employees.¹³⁷ The second case concerned the dismissal of a university employee following her gender reassignment; the Court dismissed the complaint.¹³⁸

A similar case with a different outcome arose in **Finland**, where a newly appointed Head of Division at the Financial Supervisory Authority was removed from office after communicating her intention to identify herself in her preferred gender. The court found the employer's conduct to be in violation of the Act on Equality between Women and Men (*Laki miesten ja naisten välisestä tasa-arvosta/lag om jämställdhet mellan kvinnor och män*, No. 609/1986). This was the

first court ruling on discrimination against a transgender employee based on this Act.¹³⁹

Following a preliminary ruling lodged by a Romanian court, a case on discrimination based on sexual orientation under the Employment Directive 2000/78 is now pending before the CJEU.¹⁴⁰ The case concerns a discriminatory statement a shareholder managing a football club made to the media, saying that a homosexual player would never be accepted on the team.

Regarding discrimination and the right to access goods and services, the Advocate of the Principle of Equality in **Slovenia** found discrimination on the ground of sexual orientation in a case concerning information in a tourist catalogue negatively affecting same-sex couples.¹⁴¹ Both **Portugal** and **Hungary** reported instances of refusal to provide services. An advertising¹⁴² instance was reported in Portugal while the Hungarian example referred to access to a campsite.¹⁴³

In 2012, new or amended legislation in 2012 with respect to combating hate crimes and hate-motivated violence now covers sexual orientation and/or gender identity under 'bias-motivated crime' in **Malta** (both grounds included),¹⁴⁴ **Austria** (sexual orientation)¹⁴⁵ as well as **Croatia** (gender identity).¹⁴⁶

In **Poland**, three draft laws on hate crimes and hate speech motivated by sexual orientation or gender identity were submitted to the Parliament and are under discussion.¹⁴⁷ In **Estonia**, a bill was introduced which envisages an amendment to the Penal Code (*Karistusseadustik*) that would allow hate motivation to be an aggravating circumstance for a crime and would include sexual orientation and gender identity as protected grounds (see also **Chapters 6 and 9** in this Annual report).¹⁴⁸

¹³⁴ Netherlands, Ministry of Health, Welfare and Sport (2012).

¹³⁵ Netherlands, State Secretary for Health, Welfare and Sport (2011).

¹³⁶ Denmark, Danish Institute for Human Rights (2012).

¹³⁷ Poland, District Court in Słubice, 4th Department of Labour, IVP 30/11, 18 June 2012; and Poland, Regional Court in Gorzów Wielkopolski, VI Pa 56/12, 27 November 2012.

¹³⁸ Poland, Regional Court in Warsaw, 21st Department of Labour and Social Social Insurance, XXI P 291/11, 15 October 2012. Case not reported yet.

¹³⁹ Sweden, District Court of Helsinki, Dnro 10/44974, 20 December 2011.

¹⁴⁰ CJEU (2012), C-81/12, *Asociația ACCEPT v. Consiliul Național pentru Combaterea Discriminării*, reference for a preliminary ruling from the *Curtea de Apel București* (Romania) lodged on 14 February 2012.

¹⁴¹ Slovenia, Advocate of the Principle of Equality (2012).

¹⁴² Soares, A. (2012).

¹⁴³ Hungary, Equal Treatment Authority (2012). More details on the case are available at: www.egyenlobanasmod.hu/jogesetek/hu/107-2012.pdf.

¹⁴⁴ Malta, Act VIII of 2012 entitled the Criminal Code (Amendment) Act, 26 June 2012.

¹⁴⁵ Austria, Criminal Code.

¹⁴⁶ Croatia, Criminal Code, 21 December 2012; and Gender Equality Act, 15 July 2008.

¹⁴⁷ See drafts of the Act on amendments on Criminal Code dated 7 March 2012, 20 April 2012, and 27 November 2012.

¹⁴⁸ The public database of draft laws includes the first version of the law. The first version of the draft was changed following a consultation with relevant stakeholders organised by the Ministry of Justice.

On a policy level, some EU Member States took measures to tackle violence and abuse targeting LGBT persons. The Council of Ministers in **France**, for example, adopted a *Government programme of action against violence and discrimination on grounds of sexual orientation and gender identity*.¹⁴⁹

NGOs denounced violence and abuse in **Belgium** following the murders of two gay men in homophobic crimes¹⁵⁰ and in **Poland**.¹⁵¹ and In **Bulgaria**, an attack after a pride march was allegedly not reported due to lack of trust in the police – a problem Amnesty International also identified in a 2012 report on the issue.¹⁵²

Courts in **Belgium** and the **United Kingdom** convicted defendants for abusive behaviour targeting people on the ground of their sexual orientation. In Belgium, one teenager was convicted for beating up a gay man in a pub but the court did not apply the aggravating circumstance of homophobic motivation.¹⁵³

In another case, a Belgian court applied aggravating circumstances to a case concerning the assault of a young man seen in the company of a cross-dresser in a nightlife district where LGBT persons have been targeted in the past.¹⁵⁴ In a United Kingdom case related to 'hate speech', three men were convicted for distributing a series of leaflets in Derby County that referred to gay sex and condemned such practices. This was the first conviction in Britain for the offence of stirring up hatred on the grounds of sexual orientation.¹⁵⁵

In a landmark ECtHR ruling, *Vejdeland v. Sweden*,¹⁵⁶ four people convicted under Swedish law for homophobic speech invoked Article 10 of the ECHR on freedom of expression. The applicants claimed that the Swedish Supreme Court's decision to convict them of agitation for leaving homophobic leaflets in pupils' lockers at an upper secondary school constituted an illegitimate interference with their freedom of expression.

The ECtHR found no violation of Article 10, noting that even if the applicants' conviction amounted to an interference with their freedom of expression as guaranteed by Article 10 (1) of the ECHR, such an interference served

a legitimate aim, namely "the protection of the reputation and rights of others". The national authorities could therefore reasonably regard this as a necessary interference in a democratic society.

Promising practice

Reporting homophobic violence via mobile devices

'Bashing', a smartphone application developed by the Belgian LGBT movement, enables victims to report incidents of homophobic violence. Victims wishing to report a homophobic incident indicate on a map the location where the incident took place and whether the violence was verbal or physical. An incident can also be reported anonymously.

The so-called 'Bashmap' collects all complaints, with an overview available at www.bashing.eu. The 'Bashing' application also offers information about equality bodies. The application was conceived as an awareness-raising tool and therefore does not serve as an entry point for formal complaints, which must be lodged with competent bodies.

For more information, see: <http://bashing.eu>

The Supreme Court found that the leaflets were "unnecessarily offensive" and contained serious and prejudicial allegations that could induce homophobic attitudes.

Despite the lack of direct EU competence in the area of family and private life, observing developments in this field helps in understanding the application of the EU right to free movement for all, including same-sex couples wishing to move between Member States. Some EU citizens have claimed that there are obstacles to the right of free movement as a result of either the absence of provisions on legal recognition of same-sex couples or the lack of harmonisation throughout the EU.

A case pending in **Poland** concerns the refusal to grant entry to Poland to the third-country national partner of a Polish citizen after their civil partnership was concluded in the United Kingdom.¹⁵⁷ The case is similar to that of a claim filed by a Polish couple to the ECtHR in September 2012 with respect to a possible violation of their ECHR rights.¹⁵⁸

By contrast, the Immigration Office in **Latvia** granted residence rights to the third-country national spouse of a Latvian citizen. The couple married in Portugal in 2012

¹⁴⁹ France, Ministry of Women's Rights (2010).

¹⁵⁰ ILGA Europe (2012a) and (2012b).

¹⁵¹ Makuchowska, M. and Pawłęga, M. (2012).

¹⁵² Amnesty International (2012).

¹⁵³ Belgium, Court of First Instance Antwerp, AN43.L6.4237-10, 18 January 2012. A youth court judgment in the same case against two minors also prosecuted for the crime, sentenced them to community service but did not apply the aggravating circumstance.

¹⁵⁴ Belgium, Court of First Instance Dendermonde, DE. 43.1.4.7810/11/7, 2 April 2012.

¹⁵⁵ United Kingdom, Derby Crown Court, *R v. Ihjaz Ali, Razwan Javed and Kabir Ahmed*, 10 February 2012.

¹⁵⁶ ECtHR, *Vejdeland and others v. Sweden*, No. 1813/07, 9 February 2012.

¹⁵⁷ The case was submitted to the Province Governor Administrative Court in Warsaw. More information about the case is available at: Poland, Helsinki Foundation for Human Rights (2012b).

¹⁵⁸ Poland, Helsinki Foundation for Human Rights (2012c).

and applied for residence rights in Latvia under EU law, namely the freedom to provide services throughout the EU granted to the Latvian citizen.¹⁵⁹

In **Estonia**, a claim submitted to the Chancellor of Justice (*Õiguskantsler*) is under assessment. It concerns the current Aliens Act (*Välismaalaste seadus*) with respect to the alleged unequal treatment of same-sex partners of Estonian citizens.¹⁶⁰ The applicant said that the Aliens Act does not list the existence of a long-term same-sex registered partnership with an Estonian citizen as among the grounds for issuing a temporary residence permit, putting it in conflict with Article 27 of the Constitution of the Republic of Estonia (*Eesti Vabariigi Põhiseadus*), as well as with the Citizen of European Union Act (*Euroopa Liidu kodaniku seadus*) and relevant provisions of the ECHR.

Some EU citizens have also filed petitions regarding another EU Member State not recognising a civil partnership contracted in a person's country of origin.¹⁶¹ As noted in the Commission's *Green Paper on mutual recognition of civil status*,¹⁶² the absence of a common understanding among EU Member States on the legal recognition of same-sex couples may affect national efforts.

In **Luxembourg**, for example, a bill to open up marriage to same-sex couples was introduced in 2010, but a parliamentary committee in 2012 amended the bill to make marriage conditional upon both future spouses fulfilling the conditions for marriage under the law of their countries of nationality.¹⁶³

But the growing number of EU Member States introducing registered partnership schemes may reduce the potential obstacles to free movement. While **Denmark** was the only country during the reporting period to adopt an act to open marriage to same-sex couples,¹⁶⁴ a legislative motion in **Finland** pertaining to the amendment of the Marriage Act (*Avioliittolaki/äktenskapslag*, Act No. 234/1929), which would open marriage to same-sex couples, was submitted to the government and the Legal Affairs Committee is currently considering it.¹⁶⁵

In addition, the legislatures in **Cyprus**, **France**, **Malta** and **Croatia**¹⁶⁶ drafted or introduced bills in 2012 to afford rights to cohabiting couples, set up registered partnership schemes and/or eliminate any differential treatment remaining between registered partnerships and marriage.

Luxembourg and the **United Kingdom** took steps in the same direction. In Luxembourg, a draft bill on marriage and adoption was introduced,¹⁶⁷ while in the United Kingdom, a consultation was launched.¹⁶⁸ In contrast, a referendum held in **Slovenia** in March 2012 rejected the draft Family Code (*Družinski zakonik*, DZ), which contained several provisions on same-sex families. In **Poland**, a parliamentary committee found the draft bill on registered partnerships to be unconstitutional.¹⁶⁹

Higher national courts have also dealt with the topic of same-sex partnerships. The Constitutional Court in **Austria** stressed that the differences in the institutional settings for the marriage of a heterosexual couple and the registered partnership of a same-sex couple do not violate the principle of non-discrimination. They also do not violate Articles 9 and 21 of the Charter of Fundamental Rights of the European Union, which can only be invoked when EU law is applied. The difference in treatment, according to the Austrian court, lies within the legislators' margin of appreciation.¹⁷⁰

Other national courts have instead played a proactive role in equalising the treatment of same-sex couples with that of heterosexual couples. In **Germany**, a Constitutional Court decision prompted the equalisation of registered partnerships and marriage.¹⁷¹ The Spanish Constitutional Court recently upheld an existing law on same-sex marriage in **Spain** by rejecting a challenge filed in 2005 by the conservative Popular Party against the law authorising such unions.¹⁷²

In **Hungary**, the Constitutional Court annulled Articles 7 and 8 of the Family Protection Act¹⁷³ because of the 'excessively narrow' definition of 'family' as based on

159 CJEU, C-60/00, *Carpenter v. Secretary of State for the Home Department*, 11 July 2002, ECR I-6279.

160 Estonia, Chancellor of Justice (2012); and Estonia, Ministry of Social Affairs (2012).

161 European Parliament, Committee on Petitions (2011).

162 European Commission (2010b).

163 Luxembourg, Ministry of Justice (2012).

164 Denmark, Act No. 1288 of 19 December 2012 and Act No. 1383 of 23 December 2012.

165 Finland, *Lakialoite 2/2012 vp*, 8 February 2012.

166 See respectively: France, Bill opening marriage to couples of the same sex, 7 November 2012; Cyprus, Ministry of Interior, Draft law introducing a civil partnership for both different and same sex couples; Croatia, Ombudsperson for Gender Equality (2012); Malta, Bill 120 of 2012 – Civil partnerships and rights and obligations of cohabitants act.

167 Luxembourg, Ministry of Justice (2012).

168 United Kingdom, Government Equalities Office (2012).

169 See drafts of the Act on the registered partnerships, from 16 February 2012 (No. 552) and 22 May 2012 (No. 554). The debate on the legislation introducing registered partnerships is still ongoing.

170 Austria, Constitutional Court, B 121/11-113, 9 October 2012; see also previous rulings 17.098/2003 and 19.492/201.

171 Germany, Federal Constitutional Court, 2 BvR 1397/09, decision, 19 June 2012.

172 Spain, *Tribunal Constitucional* (2012).

173 Hungary, Act CCXI of 2011 on Family Protection, 23 December 2011.



marriage between a man and a woman, which limits the same-sex partner of the deceased from full enjoyment of inheritance rights.¹⁷⁴ In **Italy**, higher courts are taking a proactive role in filling the gaps in the existing legal framework and in prompting the legislature to remedy the lack of provisions on legal recognition of same-sex couples.¹⁷⁵

EU Member States continued to combat discrimination by introducing gender identity or gender expression as autonomous protected grounds in national equality legislation, expanding the protection offered. In the framework of the adoption of a national plan to combat homophobia, foreseen for 2013, **Belgium** is expected to soon introduce gender identity and gender expression as protected grounds in federal antidiscrimination law and regional and community decrees,¹⁷⁶ while in **Finland** a draft bill on the renewal of the Equality Act between women and men (*laki naisten ja miesten välisestä tasa-arvosta/lag om jämställdhet mellan kvinnor och män*) was circulated. The Finnish bill includes a new prohibition against discrimination on the basis of gender identity and gender expression, and new obligations for authorities, employers and educational institutions to promote the equality of transgender persons.¹⁷⁷

Securing legal gender by modifying official documents was also a trend in 2012. A draft bill in the **Netherlands** would allow transgender people to change their gender markers in official documents without undergoing sterilisation or genital surgery.¹⁷⁸ The requirement of sterilisation to change legal sex should soon be removed, according to a Dutch government agreement of October 2012.¹⁷⁹

In **Ireland**, the government renewed its commitment to finalise a bill on gender reassignment and legal recognition. It is expected to be published in 2013¹⁸⁰ despite criticism from NGOs and human rights experts on the proposed conditions for legal gender recognition.

The Swedish parliament adopted a law banning the forced sterilisation of transgender people that will enter into force on 1 July 2013.¹⁸¹

In 2012, at both national and EU level there was case law in 2012 related to the legal recognition of transgender persons, in particular their right to marry, given the 'divorce requirement', which requires transgender persons to divorce before their gender is legally recognised. In **France**, for example, the Appeals Court in Rennes accepted a gender change on the civil registrar of a married transsexual woman and parent to three children.¹⁸² French courts usually require dissolution of an existing marriage before legal recognition of a new gender can be obtained. At the time of drafting this report, French law does not allow the marriage of same-sex couples, but in this case the court maintained that the applicant could not be denied recognition of her reassigned gender because she was married.

In a similar case, *H v. Finland*,¹⁸³ the ECtHR examined a situation in which the applicant refused to accept that her marriage to a woman would be turned into a civil partnership after she underwent male-to-female gender reassignment surgery and applied to have her female gender indicated in her official documents. In its judgment, the court agreed with the applicant that this could constitute an illegitimate interference with her right to private life as set out in Article 8 of the ECHR read in conjunction with Article 14 which lays out a non-discrimination clause in the enjoyment of rights and freedoms guaranteed by the ECHR.

The court, however, ultimately rejected the applicant's claim, stressing that civil partnerships for same-sex couples in Finland had "almost identical" implications as marriages and that the "rights and obligations arising either from paternity or parenthood would not be altered". Another pending ECtHR case is against **Malta**. It concerns the right to marry of post-operative transgender persons who have changed their names and gender in official documents.¹⁸⁴

Some EU Member States continued efforts to establish shorter and simpler procedures for legal gender recognition. In **Poland**, a draft law is under parliamentary scrutiny,¹⁸⁵ while in **Lithuania**, a legislative proposal is going through the government and parliamentary approval processes.¹⁸⁶

Further legislative initiatives include a new bill introduced in **Malta** on the modification of sex and name markers in official documents,¹⁸⁷ which makes it

174 Hungary, Constitutional Court, No. II/3012/2012, 7 December 2012.

175 See for example: *Corte di Cassazione*, sez. I civile, 15 March 2012, decision No. 4184, *Tribunale di Reggio Emilia*, X c. *Ministero dell'Interno*, 13 February 2012, *Corte di Appello di Milano*, sez. lavoro, 31 December 2012, decision No. 407.

176 European Commission (2012f).

177 Finland, Ministry of Social Affairs and Health (2012b).

178 Netherlands, Ministry of Security and Justice (2012).

179 Netherlands, House of Representatives (2012b).

180 Ireland, Department of the Taoiseach, Gender Recognition Bill, 18 September 2012.

181 Sweden, *Lag (2012:456) om ändring i lagen (1972:119) om fastställande av könstillhörighet i vissa fall*.

182 France, Court of Appeal in Rennes, Case No. 11/08743, decision of 16 October 2012.

183 ECtHR, *H.v. Finland*, No. 37359/09, 13 November 2012.

184 ECtHR, *Joanne Cassar v. Malta*, No. 36982/11, 18 June 2012. For further details on the case, see European Centre for Law and Justice (2012).

185 Poland, Draft act on gender recognition, 9 May 2012.

186 Lithuania, Bill on Civil Status Acts Registry.

187 Malta, Act XV of 2012 – Civil Code (Amendment) Act, 24 July 2012.

possible to present sworn medical records as proof of 'irreversible gender reassignment' rather than undergoing a medical examination by court experts.

The **Croatian** legislature is considering a draft of the Act on Amendments to the State Registry Act.¹⁸⁸

A number of recent cases drew attention to the granting of asylum or refugee status to applicants seeking protection on grounds of persecution due to sexual orientation or gender identity (see also **Chapter 2** in this Annual report). The matter concerns the interpretation and application of relevant EU law, particularly the Qualification Directive.¹⁸⁹

In **Luxembourg**, protection was denied a gay Serbian applicant,¹⁹⁰ while **Poland** granted refugee status for the first time specifically to a gay applicant.¹⁹¹ In backing the Ugandan applicant's case for Polish refugee status, the Refugee Council underlined that homophobic laws in Uganda raised well-founded fears of persecution on account of sexual orientation or gender identity. The council also stressed that the credibility of the applicant's sexual orientation should be based on his statement rather than on checks by medical experts.

The Refugee Council in Poland has another case pending concerning a gay Ugandan asylum seeker,¹⁹² after the Province Governor Administrative Court in Warsaw revoked a dismissal by the first instance administrative bodies.¹⁹³

In **Belgium**, sexual orientation and gender identity were among the main motives put forward in 2011 in gender-related asylum applications.¹⁹⁴ In **Italy**, the Supreme Court ruled that the mere existence of provisions criminalising homosexual acts constitutes a deprivation of the fundamental right to respect for private life.¹⁹⁵ The CJEU also has a case pending; the **Netherlands** Council of State requested a preliminary ruling. The Dutch case concerns the interpretation of the Qualification Directive as well as the definition of acts of persecution and the elements to be taken into

account when assessing the reasons for persecution within the meaning of the directive.¹⁹⁶

Key developments in national policies and practices

Public administrations in at least six EU Member States have strengthened their institutional capacity to combat discrimination on grounds of sexual orientation and gender identity.

In **Slovakia**, a proposal was adopted for the establishment of a Committee for the Rights of LGBT and Intersex (LGBTI) persons (*Výbor pre práva lesbič, gejev, bisexuálnych, transrodových a intersexuálnych osôb*); the committee is to be a permanent expert body of the Government Council and a platform for discussing ways to improve LGBTI persons' statuses and the observance of their human rights.¹⁹⁷

A **Finnish** network of contact persons for fundamental and human rights, comprised of representatives from all the Finnish ministries, was set up.¹⁹⁸ The network will focus on cross-administrative issues not assigned to a particular ministry, including questions concerning the rights of LGBT people.

The State of Berlin in **Germany** nominated a focal point for homophobic hate crimes which should harness the Public Prosecutor Office's ability to prosecute crimes committed with a homophobic intent.¹⁹⁹

In the **United Kingdom** a governmental Action Plan on transgender equality was adopted.²⁰⁰ The Human Rights Centre, a national NGO in **Estonia**, finalised a report that analyses the situation of LGBT people in Estonia with respect to the implementation of the Council of Europe Recommendation CM 2010(5).²⁰¹

A working group was established at the **Italian** Council of Ministers Department for Equal Opportunities as part of a national programme of activities drafted in collaboration with the Council of Europe. The group includes both civil society representatives and governmental

¹⁸⁸ Croatia, Act on Amendments to the State Registry Act, July 2012.

¹⁸⁹ Council Directive 2004/83/EC, OJ 2004 L 304.

¹⁹⁰ Luxembourg, Administrative Court of the Grand Duchy of Luxembourg, Third Court, Case No. 30447, 13 June 2012.

¹⁹¹ Poland, Office for Foreigners, DPU-420-4-/SU/2011, 6 April 2012; and Refugee Council, RdU-178-1/S/12, 25 July 2012.

¹⁹² Poland, Province Governor Administrative Court in Warsaw, V SA/WA/1048/12, 29 August 2012.

¹⁹³ Poland, Office for Foreigners, DPU-420-3062/SU/2009, 3 October 2011; Refugee council, RdU-495/2/S/11, 12 March 2012; Province Governor Administrative Court, V SA/WA 1048/12, 20 November 2012.

¹⁹⁴ Belgium, Office of the Commissioner General of Refugees and Stateless Persons (2011), pp. 12–13.

¹⁹⁵ Italy, *Corte di Cassazione*, sez. VI civile, order No. 15981, 20 September 2012.

¹⁹⁶ Netherlands, Reference for a preliminary ruling from the *Raad van State* (Netherlands) lodged on 27 April 2012, *Minister voor Immigratie en Asiel v. X*, Case C-199/12; *Minister voor Immigratie en Asiel v. Y*, Case C-200/12; and *Z v. Minister voor Immigratie en Asiel*, Case C-201/12; available at: <http://eur-lex.europa.eu/JOHtm1.do?uri=OJ:C:2012:217:SOM:en:HTML>.

¹⁹⁷ Slovakia, Ministry of Foreign Affairs (2012).

¹⁹⁸ Finland, Ministry of Justice (2012).

¹⁹⁹ For more information, see: www.berlin.de/sen/justiz/ansprechpartnerin-homophobe-hasskriminalitaet/startseite.php.

²⁰⁰ United Kingdom, Home Office (2011); for more information, see also the Home Office website, available at: <https://www.gov.uk/government/organisations/home-office>.

²⁰¹ Estonia, Human Rights Centre (2012).



bodies and aims at elaborating guidelines for combating discrimination on the grounds of sexual orientation and gender identity in key areas of life.²⁰²

These developments testify to the growing number of initiatives undertaken by public authorities to respect and promote the fundamental rights of LGBT persons, thus giving practical follow up to the adoption of the Council of Europe CM Recommendation 2010(5).

One of the most vocal expressions of this trend took place in a March 2012 governmental conference organised by the United Kingdom Chairmanship of the Council of Europe.²⁰³ Ministers from **Finland**, the **Netherlands**, the **United Kingdom**, Albania and Montenegro, among others, participated in the conference. The Council of Europe works closely with six member states – partners in the project aimed at the implementation of the recommendation: **Italy**, **Latvia**, **Poland**, Albania, Montenegro and Serbia.²⁰⁴

Various initiatives concerned discrimination beyond employment. In the **Netherlands**, education on sexual diversity, including homosexuality and gender identity, became obligatory on 1 December 2012 for all students in primary and secondary education. Such issues will be integrated into the Core Goals (*Kerndoelen*).²⁰⁵ In both **Finland** and **Greece** special government-supported youth initiatives have strived to provide support for LGBT teenagers and students: there is a Child and Youth Policy Programme in Finland²⁰⁶ and a hotline in Greece²⁰⁷. In the **United Kingdom**, the government adopted a charter against homophobia and transphobia in sports.²⁰⁸

Reported episodes of violence or obstacles to LGBT events or marches in 2012 in **Lithuania**,²⁰⁹ **Poland**,²¹⁰ **Romania**,²¹¹ and **Slovenia**²¹² affected LGBT people's right to freedom of assembly and freedom of expression.

Similarly, in **Hungary**, police banned the Budapest Pride parade, but on 13 April 2012, the Metropolitan Tribunal (*Fővárosi Törvényszék*) overruled and repealed the

decision. The tribunal established that there was no legal reason to prohibit Budapest Pride.²¹³

Conversely, in **Croatia**, the government expressed its support for the Pride parade, and peaceful demonstrations took place.²¹⁴ Some promising initiatives on freedom of expression of LGBT people were identified: in **Latvia**, the Baltic Pride did not encounter the obstacles faced in previous years; in **Croatia**, the governmental Office for Gender Equality welcomed the International Day against Homophobia and Transphobia;²¹⁵ in the **Czech Republic**, a festival addressing horizontal equality issues was organised.²¹⁶

FRA ACTIVITY

Surveying LGBT people in the EU and Croatia

On 2 April 2012, FRA launched its European LGBT survey, in response to a European Commission request. More than 93,000 respondents participated in the survey, which aimed at recording the experiences of discrimination and violence of those who identify themselves as LGBT and reside in the EU and Croatia.

The overall picture that emerges from the survey results is one of serious obstacles to LGBT persons' enjoyment of their fundamental rights. The results show that a large number of respondents had experienced discrimination in various areas of social life. Many respondents had also been victims of violence and serious harassment. They rarely, however, reported the discrimination or incidents of violence or serious harassment to the authorities. Almost half of respondents had experienced discrimination or harassment on the ground of sexual orientation in the 12 months preceding the survey.

The European Parliament's annual report on fundamental rights calls on the European Commission to use the FRA survey results to follow up on the European Parliaments' repeated calls for an EU Roadmap for equality on the grounds of sexual orientation and gender identity.

For more information, see: <http://fra.europa.eu/en/survey/2012/european-lgbt-survey>

202 Italy, National Office Against Racial Discrimination (2012).

203 Council of Europe, Committee of Ministers (2011); see also United Kingdom, Home Office (2012c).

204 For more information about the Council of Europe LGBT project, see: http://www.coe.int/t/dg4/lgbt/Project/Description_EN.asp.

205 Netherlands, Minister of Education, Culture and Science (2011).

206 Finland, Ministry of Education and Culture (2012).

207 Greece, General Secretariat for Youth (2012), pp. 27–28.

208 United Kingdom, Home Office (2012d).

209 Lithuania, Informal communication with the Human Rights Committee of *Seimas*, 30 July 2012.

210 Poland, Dean of the Warsaw University Law and Administration faculty (2012).

211 Romania, ACCEPT Association (2012).

212 Slovenia, Narobe (2012).

213 Hungary, Metropolitan Tribunal, 27.Kpk.45.385/2012/2, 13 April 2012.

214 Croatia, National Government (2012), p. 26.

215 Croatia, Office for Gender Equality (2012).

216 Czech Republic, Prague Pride (2012).

5.2.6. Discrimination on the ground of sex

The policy and legislative developments in 2012 related to the ground of sex addressed in this section focus on gender equality, political and economic decision-making positions and the gender pay gap. These are only a few elements of this topic; other chapters of this Annual report have mainstreamed gender aspects: gender inequality in political decision-making still constitutes

- ▶ a reality in many EU Member States (see **Chapter 7**);
- ▶ violence against women remains a concern in the EU (see **Chapter 9**); and many victims of trafficking are
- ▶ women and young girls (see **Chapter 1**). The European Institute for Gender Equality (EIGE) also works on other issues of gender-based discrimination.

Key developments in national case law and other legislative aspects

Several discrimination cases on the ground of sex due to pregnancy or maternity were reported in 2012. In **Malta**, an employee's contract was terminated a week after she informed the company of her pregnancy. The Industrial Tribunal awarded compensation to the claimant on the grounds that the law does not give a company the right to dismiss an employee during pregnancy.²¹⁷

In a similar case, the Supreme Court of **Latvia** ruled that "less favourable treatment due to maternity should always be regarded as direct discrimination; worse working conditions, including a reduction in pay, will be direct discrimination based on sex". The court cited several CJEU judgments on the reversal of the burden of proof in cases of alleged discrimination based on sex.²¹⁸

Key developments in national policies and practices: gender pay gap

The gender pay gap is the relative difference of the average gross hourly earnings of women and men in the economy as a whole. It is one of the main indicators of gender discrimination and of inequalities in the labour market.²¹⁹

The EU's average gender pay gap is estimated at 16.4 %, according to the most recently available data, which cover the year 2010.²²⁰ The European Parliament called upon the European Commission to measure and

tackle the gender pay gap more effectively.²²¹ In 2012, **Austria** and **Belgium**²²² enacted legislative measures in this area. In Austria, for example, an amendment to the Equal Treatment Act introduces financial sanctions for omitting the salary on offer when advertising employment.²²³ **Estonia**²²⁴ and **Finland**,²²⁵ introduced 'softer' measures in the context of their national action plans in the area of equality, including raising awareness, analysing the gender pay gap as well as the effects of taxation and transfer payments on the economic equality of women and men.

The gender pay gap can also result in poverty for older women.²²⁶ In June 2012, **Estonia** adopted legislative measures which aim to compensate a parent's decrease in future pension due to child rearing.²²⁷ Since women are more likely to take parental leave than men, this measure is expected to particularly improve women's future pensions.²²⁸

Similarly, a CJEU decision ruled that **Spain** (indirectly) discriminates against women in terms of pension rights by penalising part-time jobs, since women hold more part-time jobs than men due to their greater share of domestic responsibilities. The CJEU calculated that, to receive a pension, part-time workers would need to work a significantly greater number of years than full-time workers – specifically 100 more years in the complainant's case.²²⁹

5.2.7. Multiple and intersectional discrimination

This section presents legal and policy developments that took place in the area of multiple discrimination in 2012. At the end of the section, the main findings of the new FRA report *Inequalities and multiple discrimination in access to and quality of healthcare* are presented.

Key developments in national case law and other legislative aspects

Discrimination based on more than one ground is addressed in legislation in six EU Member States:

²¹⁷ Malta, Industrial Tribunal (2012), *Tracey Camilleri v. John's Garage Ltd & Travel Smart Ltd.*, No. 28877/FM, No. 2159, 9 May 2012.

²¹⁸ Latvia, Supreme Court, No. SKC-84/2012, 6 June 2012.

²¹⁹ See European Commission, DG Justice, *Gender pay gap – The situation in the EU*, available at: http://ec.europa.eu/justice/gender-equality/gender-pay-gap/situation-europe/index_en.htm.

²²⁰ *Ibid.*

²²¹ European Parliament (2012c).

²²² Belgium, Law to fight the pay gap in Belgian companies, 8 March 2012.

²²³ Austria, Equal Treatment Act BGBl. I Nr. 66/2004 last modified by BGBl. I Nr. 7/2011, Art. 9 (2) in conjunction with Art. 10 (2).

²²⁴ Estonia, National Government (2012).

²²⁵ For more information on the 'Equal pay programme', see: www.stm.fi/en/gender_equality/equal_pay.

²²⁶ European Parliament (2012c).

²²⁷ Estonia, Act on Changing the Funded Pensions Act, State Pension Insurance Act and Other Related Laws, 6 June 2012.

²²⁸ Estonia, Ministry of Social Affairs (2012).

²²⁹ CJEU, C-385/11, *Isabel Eibal Moreno v. Instituto Nacional de la Seguridad Social (INSS) and Tesorería General de la Seguridad Social (TGSS)*, 22 November 2012.

Austria, Bulgaria, Germany, Greece, Italy, Romania and in **Croatia**.²³⁰ No legislative developments, however, were observed in 2012. **Finland** alone had discrimination cases involving more than one ground brought before a national court.²³¹

In 2012, national equality bodies in **Bulgaria**, the **Czech Republic**, **Estonia**, **Ireland**, **Luxembourg**, the **Netherlands**, **Slovakia** and **Slovenia** processed complaints on more than one ground, according to informal communications with those bodies. The equality body in **Finland** announced that it would start processing such claims in 2013.

In July 2012, for example, the Equality Ombudsman of **Sweden** reached a settlement with a taxi company regarding a woman of African origin employed in a group service home for people with disabilities. A taxi driver harassed the woman while she accompanied a resident, and the Equality Ombudsman determined that the harassment was based on the grounds of ethnicity and sex.²³²

While the ECtHR has not explicitly pronounced itself on the issue of multiple discrimination, several cases, including on forced sterilisation, have raised the issue of vulnerability based on multiple grounds. In June 2012, the ECtHR case, *NB v. Slovakia*,²³³ involved the forced sterilisation of a Roma woman in a public hospital and her subsequent failure to obtain redress. Although the applicant complained that she was discriminated against on more than one ground, race/ethnic origin and sex, the court did not make any explicit reference to multiple discrimination.

The ECtHR did, however, state that “the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups” and that the State failed “to secure to the applicant a sufficient measure of protection enabling her, as a member of the vulnerable Roma community, to effectively enjoy her right to respect for her private and family life in the context of her sterilisation”.²³⁴ The ECtHR found violations of three articles of the ECHR: Article 3 on the prohibition of torture, Article 7 on no punishment without law and Article 9 on the freedom of thought, conscience and religion.

The ECtHR decision in *B. v. Romania* shed light on the intersectional vulnerability of women with disabilities and the positive obligations of the state.²³⁵

The case concerned a woman with a psycho-social disability who had been repeatedly involuntarily confined in hospital due to her mental state. The applicant reported that she had been subject to an attempted rape, but she was not heard during the criminal proceedings. After the case was dismissed, the applicant filed with the ECtHR.

The court based its interpretation on the positive obligations set out in Article 3 of the ECHR on the prohibition of torture and ill-treatment, which requires EU Member States to provide adequate protection and carry out prompt and effective investigation of any claim related to alleged ill-treatment of which the authorities had or ought to have had knowledge, in particular of vulnerable persons. The ECtHR found that the national authorities’ actions were affected by the prejudice that the applicant’s allegations were unreliable due to her mental health state, affecting the effectiveness of their actions and in turn violating Article 3 of the ECHR. The court also found that the positive obligation to ensure special protection to the victim in light of her vulnerable condition had not been fulfilled.

In July 2012, the ECtHR delivered another relevant judgment in *B.S. v. Spain* where the claimant alleged that she had been discriminated against on the grounds of her profession, skin colour and sex. The ECtHR found a violation of Article 3 of the ECHR in conjunction with Article 14 of the ECHR on non-discrimination. Although the court did not explicitly acknowledge multiple discrimination, it found that the national courts had not taken into account the special vulnerability inherent in the applicant’s situation as an African woman working as a sex worker. The court also stated that the authorities had not taken all measures to ascertain whether a discriminatory attitude might have played a role in the incident.²³⁶

Key developments in international, EU and national policies and practices

In 2012, the Council of Europe Committee of Ministers adopted a recommendation on the protection and promotion of the rights of women and girls with disabilities which called for member states to adopt appropriate legislative measures and positive actions likely to encourage the participation of women and girls with disabilities in all areas of life.²³⁷

²³⁰ FRA (2012d) and Croatia, Anti-discrimination Act, enacted 15 July 2008, amendments entered into force on 28 September 2012.

²³¹ Aaltonen, M. (2012), *Tasa-arvolain ja rikoslain työ syrjintäsäännöksen soveltaminen oikeuskäytännössä vuosina 2008–2011*, Helsinki, Ihmisoikeusliitto.

²³² Sweden, Equality Ombudsman (2012), Case NB ANM 2010/1289, 12 July 2012.

²³³ ECtHR, *N.B. v. Slovakia*, No. 29518/10, 12 June 2012.

²³⁴ *Ibid.*, paras. 121–122.

²³⁵ ECtHR, *B. v. Romania*, No. 42390/07, 10 January 2012.

²³⁶ ECtHR, *B.S. v. Spain*, No. 47159/08, 24 July 2012.

²³⁷ Council of Europe, Committee of Ministers (2012), p. 4.

FRA ACTIVITY

Exploring multiple discrimination in healthcare

The FRA report on *Inequalities and multiple discrimination in access to and quality of healthcare* focuses on how multiple discrimination, or the interplay of the protected grounds of age, sex, ethnic origin and disability, prevents access to healthcare services. The report explores the barriers, the experiences of discrimination and the healthcare needs of different groups of migrant and ethnic minority healthcare users.

Respondents face unequal treatment in relation to access to and quality of healthcare, the report shows. They experience this either as a form of direct discrimination, including multiple discrimination, or as barriers to accessing healthcare, such as when they were treated equally, but inappropriately, for their specific situation.

The report builds draws on more than 300 interviews conducted with healthcare users, healthcare professionals, legal experts and policy makers in five EU Member States (**Austria**, the **Czech Republic**, **Italy**, **Sweden** and the **United Kingdom**).

Language barriers are one example of the obstacles faced, particularly by migrant women, older migrants and children with intellectual or psycho-social disabilities belonging to migrant/ethnic minorities. Linguistic barriers may keep them from being diagnosed in an appropriate and timely way.

The report shows that the factors that can discourage service use are a lack of consideration for and accommodation to the cultural practices of specific groups which share more than one protected characteristic. More than any other form of discriminatory practice, healthcare users have emphasised that they might experience treatment lacking in dignity and respect when communicating and interacting with healthcare staff. Recurrent stereotypes linked to specific intersectional groups, compounded by failures in communication and trust between patients and medical staff, surfaced in different countries.

Based on this evidence, the report suggests introducing EU legislative provisions to prevent and combat multiple and intersectional discrimination. It also calls on EU Member States to adopt specific measures to further the right to health on an equal basis, including positive actions for persons belonging to groups at risk of intersectional discrimination.

Such measures could include: accommodating the needs of women belonging to ethnic minorities who want to be treated by female healthcare professionals; funding community-based mobile outreach programmes targeting different ethnic communities and groups – including elderly people, women and persons with various disabilities – to promote healthcare and raise awareness of entitlements and available health services; and allocating more time for medical consultations with persons belonging to these groups to address special needs.

For more information, see: FRA (2013), *Inequalities and Multiple discrimination in access to and quality of healthcare*, available at: <http://fra.europa.eu/en/publication/2013/inequalities-discrimination-healthcare>

In June 2012, the Council of Europe Parliamentary Assembly adopted a resolution²³⁸ and a report on *Multiple discrimination against Muslim women in Europe: for equal opportunities*,²³⁹ which finds that Muslim women face discrimination on the multiple grounds of sex, religion and, at times, ethnic origin. The resolution calls on Member States to introduce legal provisions against multiple discrimination in their legislative frameworks. The same opinion was expressed in the FRA report, *Inequalities and multiple discrimination in access to and quality of healthcare*.

Several EU Member States addressed the situation of more vulnerable groups of women and Roma women in their national action plans on gender, social inclusion and/or Roma. In **Hungary**, for example, the *Action Plan of the Strategy for Social Inclusion 2012–2014* contains one measure specifically targeting Roma women by

promoting their employment in institutions providing social and child welfare.²⁴⁰ In **Finland**, the *Government Action Plan for Gender Equality 2012–2015* aims to pay wider attention to discrimination on multiple grounds by monitoring the experiences of women and men of immigrant origin and other persons liable to encounter multiple discrimination. In **Greece**, the General Secretariat for Gender Equality established a Working Group on Migration Policy in order to develop a policy for combating multiple discrimination against migrant women.²⁴¹

Research and policy papers on multiple discrimination published in 2012 included a policy paper on older LGBT persons by the European region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) and AGE Platform Europe. The lack of recognition

²³⁸ Council of Europe, Parliamentary Assembly (2012a).

²³⁹ Council of Europe, Parliamentary Assembly (2012b).

²⁴⁰ Hungary, National News Agency – Ministry for Human Resources (2012).

²⁴¹ Greece, General Secretariat for Gender Equality (2012), p. 30.

of same-sex couples is a particular challenge, because it undermines their financial security and makes it more difficult for them to access social protection, the paper said. This becomes particularly worrying when people get older and cannot ensure that their partner will have access to their pensions and assets.²⁴²

Research conducted in the **Czech Republic**²⁴³ looked into the specific situation of men and women with disabilities. In the **United Kingdom**,²⁴⁴ a parliamentary inquiry into the unemployment of female ethnic minorities found that Pakistani, Bangladeshi and black women are far more likely to be unemployed than either white men or white women.

Discrimination based on both sex and ethnicity takes place in job interviews, the inquiry found. Muslim women who wear the hijab reported discrimination, and women from all three ethnic groups reported questions asked about their intentions regarding marriage and children, based on the assumption that these women would want to stop working after having children.

The Equality Authority conducted research in **Ireland**²⁴⁵ on national population census data. Analysis related to gender and disability showed that membership in two disadvantaged groups does not necessarily result in 'double disadvantage'. For example, both people with disabilities and women have a higher risk of being outside the labour market. Men with a physical disability, however, are more likely than women with a physical disability to be outside the labour market other things being equal, the results of the analysis show. The report suggests that this may arise because physical disabilities limit men's participation in less-skilled manual occupations – jobs men tend to fill more than women. The report findings highlighted the need to consider how the processes involved may interact for each particular group.

Outlook

Intense debate on the EU equality and non-discrimination legal and policy framework in 2012 and in 2013 is expected to yield important developments. The European Parliament,²⁴⁶ which has repeatedly called for the adoption of the proposed Horizontal Directive, will draft its own initiative report on the implementation of the Employment Equality Directive.²⁴⁷ The European Commission plans to publish a report in October 2013 on the implementation of the Racial Equality Directive and the Employment Equality Directive. Discussions will also continue on the Commission's proposal for the EU structural funds legislative package for 2014–2020.

There will also be discussions in 2013 on gender-based discrimination, including a proposed revision of the Pregnant Workers Directive.²⁴⁸ With particular regard to the issue of violence against women, EU Member States have until 6 April 2013 to put into place all the legal and administrative provisions necessary to give full effect to the Directive on preventing and combating trafficking in human beings and protecting its victims.²⁴⁹ In addition, following a European Parliament resolution,²⁵⁰ the European Commission is expected to review and propose amendments to the Gender Recast Directive²⁵¹ at the latest by 15 February 2013, focusing in particular on the gender pay gap issue. With regards to 'women in decision-making', the European Parliament and the Council of the European Union are expected to review the European Commission's legislative proposal in 2013.²⁵²

The European Accessibility Act will be published in 2013. This is expected to ensure the equal treatment of persons with disabilities and the elderly. The act will complement existing EU legislation by providing clarity on what accessibility means for the provision of goods and services in the EU.

²⁴⁶ European Parliament (2011).

²⁴⁷ Impact Assessment of 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 (COM(2008) 0426) as well as of amendments 37 (Multiple Discrimination) and 41 (Discrimination based on assumptions) of the European Parliament to this proposal as adopted in plenary on 2 April 2008.

²⁴⁸ European Commission (2008c).

²⁴⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101/1, 15 April 2011.

²⁵⁰ European Parliament (2012d).

²⁵¹ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ 2006 L 204, 26 July 2006.

²⁵² European Commission (2012g).

²⁴² ILGA and AGE Platform Europe (2012).

²⁴³ Healthy Parenting Association (2011).

²⁴⁴ United Kingdom, All Party Parliamentary Group on Race and Community (2012).

²⁴⁵ Watson, D. *et al.* (2012).

Regarding discrimination based on sexual orientation and gender identity, ongoing debates in the area of family life which are linked to the Stockholm Programme and the 2013 European Year of Citizens may result in developments at EU level. The report on the evaluation of the Free Movement Directive may affect the issue of free movement of same-sex couples.²⁵³ The European Commission is expected to launch the report in May 2013, in light of the European Parliament's renewed calls for the need to ensure freedom of movement for all EU citizens and their families, without discrimination on, among others, the ground of sexual orientation.²⁵⁴

In 2013, a European Commission proposal is expected to amend the existing regulation on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility.²⁵⁵ In addition, the European Commission is expected to make two legislative proposals in 2013 that tackle the issue of civil status documents, as envisaged by the Green Paper of 2010 on promoting free movement.²⁵⁶

253 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L 158, 30 April 2004.

254 European Parliament (2012e).

255 Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, OJ 2003 L 338.

256 European Commission (2010b).



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UN & CoE

January

1 February – Council of Europe Committee of Ministers adopts a Declaration on the Rise of Anti-Gypsyism and Racist Violence against Roma in Europe

21 February – European Commission against Racism and Intolerance (ECRI) issues conclusions on the implementation of the recommendations in respect of Hungary subject to interim follow-up

21 February – ECRI issues conclusions on the implementation of the recommendations in respect of Bulgaria subject to interim follow-up

21 February – ECRI issues its fourth reports on Italy, on Latvia and on Luxembourg

27 February – Council of Europe Commissioner for Human Rights publishes report on Human Rights of Roma and Travellers in Europe

February

9 March – United Nations Committee on the Elimination of Racial Discrimination (CERD) issues its Concluding Observations on Italy and on Portugal

March

April

22 May – ECRI issues its fourth report on Denmark

22 May – ECRI issues conclusions on the implementation of the recommendations in respect of Belgium, of the Czech Republic, of Germany, and of Slovakia subject to interim follow-up

May

16 July – United Nations Human Rights Council issues the *Report of the Working Group of Experts on People of African Descent on its eleventh session*

June

July

3 August – United Nations Human Rights Council issues the *Report of the Working Group of Experts on People of African Descent on its eleventh session – Addendum: draft programme of action for the decade of people of African descent*

13 August – United Nations Human Rights Council issues the *Report of the Working Group of Experts on People of African Descent on its eleventh session – Addendum: Mission to Portugal*

31 August – CERD issues its Concluding Observations on Austria and on Finland

August

12 September – Council of Europe Committee of Ministers adopts a recommendation to Member States on mediation as an effective tool for promoting respect for human rights and social inclusion of Roma

25 September – ECRI issues its fourth reports on Croatia and on Sweden

25 September – ECRI issues conclusions on the implementation of the recommendations in respect of Greece subject to interim follow-up

September

October

November

December

EU

January

2 February – European Parliament adopts a resolution on the European dimension in sport, which also relates to combating racism

February

15 March – European Parliament adopts a resolution on discriminatory internet sites and government reactions, which also relates to combating racism and xenophobia

March

April

10 May – European Parliament issues a declaration on support for the establishment of a European Day of Remembrance of the Righteous

21 May – European Commission issues a communication on National Roma Integration Strategies: a first step in the implementation of the EU Framework

May

June

July

August

September

October

November

December

6

Racism and ethnic discrimination



Crimes motivated by racism, xenophobia and related intolerances, the mainstreaming of elements of extremist ideology in political and public discourse and ethnic discrimination in healthcare, education, employment and housing persist throughout the European Union (EU). Roma populations in particular continue to face discrimination, as evidence collected by FRA and other bodies demonstrates. EU Member States made efforts to develop comprehensive approaches to Roma integration. Nevertheless, more still needs to be done when it comes to securing sufficient funding for Roma inclusion and ensuring that it benefits targeted groups, putting robust and effective monitoring mechanisms in place, and fighting discrimination and segregation, the European Commission concluded in its assessment of National Roma Integration Strategies.

6.1. Developments and trends in officially recorded crimes motivated by racism, xenophobia and related intolerances

Despite the long-standing commitments and efforts of EU Member States to counter crimes motivated by racism, xenophobia and related intolerances, these crimes continue to take place across the EU.¹ Member States continued addressing these crimes, either by changing their approach to such crime or through changing or enhancing data collection systems.

Changes in the approach to racist, xenophobic and related crimes included: enhancing penalties for crimes motivated by such biases (**Belgium**,² and the **United Kingdom**³); moves to begin legally recognising

Key developments in the area of racism and ethnic discrimination

- A number of EU Member States address crimes motivated by racism, xenophobia and related intolerances, by redefining what constitutes such crimes, and changing and enhancing their data collection systems.
- Increases in recorded crimes motivated by racism, xenophobia and related intolerances are observed in 11 EU Member States that publish data on these crimes, with decreases observed in another six Member States.
- Elements of extremist ideology increasingly join mainstream political and public discourse in EU Member States.
- Several EU Member States begin implementing policies at the national level to improve Roma integration, but the overall situation of Roma remains critical with respect to discrimination in healthcare, housing, education and employment.
- Members of ethnic minorities, migrants, refugees and irregular migrants continue to face discrimination and inequalities in healthcare, housing, education and employment across the EU, as exemplified by spatial segregation, discriminatory advertisements and differential treatment in access to services.
- A number of EU Member States take steps to enable the collection of data disaggregated by ethnicity, thereby allowing for better recording and identification of potentially discriminatory practices.

¹ FRA (2012a); FRA (2012b); (FRA 2012c); Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights (OSCE-ODIHR) (2012).

² Belgium, Federal public service 'Justice' (2012). A draft law was adopted on 14 January 2013.

³ United Kingdom, Parliament (2012).

bias motivations as aggravating factors (**Cyprus**,⁴ and **Estonia**⁵); or, ensuring that the criminal code better recognises crimes motivated by racism, xenophobia and related intolerances (**Bulgaria**,⁶ **Malta**,⁷ and **Croatia**;⁸ see also **Chapter 9** of this Annual report).

Greece, which witnessed an upsurge in racist and anti-immigration violence in 2012,⁹ responded by establishing, under a presidential decree departments and bureaus for combating racist violence in December.¹⁰ This decree provides for the establishment of two departments to counter racist violence in the sub-directorates of state security in Athens and Thessaloniki, as well as bureaus to counter racist violence in all security sub-directorates and departments of the country.

The tasks of these departments and bureaus include, among others, investigating complaints of crimes concerning the perpetration, preparation or public incitement, provocation or stimulation in the commission of actions that may result in discrimination, hatred or violence against persons or group of persons because of their race, colour, religion, descent and national or ethnic origin; collecting data on racist violence; informing victims or complainants about their rights; informing the prosecutor's office of complaints; and setting up a hotline for filing complaints.

In November 2012, Spain reinforced existing systems of data collection. The Secretary General for Immigration and Emigration of the Ministry of Employment and Social Security and the Secretary of State for Security of the Ministry of Interior jointly published a *Handbook for training security forces in identifying and recording racist or xenophobic incidents*.¹¹ Changes made to the crime statistics system meant that security forces in Spain record crime statistics on racist and xenophobic offences, as well as on offences motivated by religious intolerance, sexual orientation, gender identity and disability. The statistics include data on the characteristics of victims and offenders as well as on the type and location of the crimes.

Data on racist and antisemitic crimes collected and published by the Association of Chief Police Officers covering **England, Northern Ireland and Wales** now

include data collected by the British Transport Police. These data relate to "offences that have been perceived as hate crimes by the victim or any other person".¹²

Data published by relevant authorities across EU Member States¹³ show great fluctuation in recorded crime with racist, xenophobic, anti-Roma, antisemitic, Islamophobic/anti-Muslim or (right-wing) extremist motives (See Tables 6.1–6.6).

When considering trends, care must be taken not to confuse the rate of recorded incidents of racist, xenophobic and related crime with the actual rate of crime. Not only is it widely acknowledged that this type of crime is grossly under-recorded (as are many forms of inter-personal crime), but variations observed within EU Member States from one year to the next could be the result of:

- how these crimes are defined in criminal law;
- changes in how (the characteristics of) incidents are recorded;
- the willingness of victims and/or witnesses to report incidents; and,
- the actual occurrence of racist, xenophobic and related crime.

Tables 6.1–6.6 should therefore be read as indicative of fluctuations in recorded crime. They should not be taken to reflect the prevalence of racist, xenophobic and related crime in any given EU Member State.

4 Cyprus, Law No. 134(I)/2011 transposing the Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, 21 October 2011.
5 Estonia, Parliament (2012).
6 Bulgaria, Ministry of Justice (2012).
7 Malta, Justice Services (2012).
8 Croatia, Criminal Code, 21 December 2012.
9 Greece, Racist Violence Recording Network (2012a); Human Rights Watch (2012).
10 Greece, Ministry of Public Order and Citizen Protection (2012).
11 Spain, Ministry of Employment and Social Security (2012).

12 United Kingdom, Association of Chief Police Officers (2012).
13 Austria, Ministry of Interior, Federal Agency for State Protection and Counter-Terrorism (2012); Belgium, Federal Police (2012); Croatia, Ministry of Interior (2012); Czech Republic, Ministry of Interior (2012); Denmark, Danish Security and Intelligence Service (2013); Finland, Police College of Finland (2012); France, CNCDH (2012); Germany, Federal Foreign Office (2010); Germany, Federal Foreign Office (2012); Germany, Ministry of Interior (2012); Greece, Racist Violence Recording Network (2012b); Ireland, Office for the Promotion of Migrant Integration (2012); Lithuania, Ministry of Justice, Information Technology and Communications Department (2012a); Lithuania, Ministry of Justice, Information Technology and Communications Department (2012b); Luxembourg, Police Luxembourg (2012); for the Netherlands see Tierolf, B. and Hermens, N. (2012); Poland, Police (2012); Poland, Prosecution General (2012); Spain, Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin (2012a); Slovakia, Ministry of Interior (2012); Sweden, Swedish National Council for Crime Prevention (2012); United Kingdom, Association of Chief Police Officers (2012); United Kingdom, Crown Office and Procurator Fiscal Service (2012); United Kingdom, Crown Prosecution Service (2012); United Kingdom, Home Office (2012a) and (2012b); United Kingdom, Police Service of Northern Ireland (2012); United Kingdom, Scottish Government (2012).

Table 6.1: Variation in officially recorded racist, anti-Roma, antisemitic, Islamophobic/anti-Muslim and (right-wing) extremist crime in EU Member States between 2010 and 2011, published data

	Racist crime	Anti-Roma crime	Antisemitic crime	Islamophobic/ Anti-Muslim crime	Extremist crime (right-wing)
AT	↘		↘	↘	↘
BE	↗		=*		
CY					
CZ	↘	n/c	↘		
DE	↗		↘		↗
DK	↗				↗**
ES	↗				
FI	↗		↘	↗	
FR	↘		↘	↗	↘
IE	↘				
LT	↗				
LU	↗				
NL	↗		↗		
PL	↗				↗
SE	↗	↗	↗	↗	↗
SK	n/c				
UK	↘		n/c		
HR	=				

Notes: Blank entries: no data are collected or published.
 ↗ indicates a rise in numbers of recorded incidents.
 ↘ indicates a decline in numbers of recorded incidents.
 = indicates the same number of incidents recorded between 2010 and 2011.
 * Recorded crimes of Holocaust denial or revisionism.
 ** Includes crimes motivated by either right-wing or left-wing extremism.
 n/c: data are not comparable with the previous year.

Source: FRA, 2012

For those EU Member States that publish data on more than one bias motivation, **Austria** and the **Czech Republic** witnessed decreases in all forms of recorded crime between 2010 and 2011, while **Denmark**, the **Netherlands**, **Poland** and **Sweden** saw increases in every category (Table 6.1). **Germany** experienced increases for racist, xenophobic and right-wing extremist crimes, and a decrease in antisemitic crimes. In **Finland**, increases were observed for racist and Islamophobic/anti-Muslim crimes but a decrease was seen in antisemitic crime. Recorded racist, antisemitic and extremist crimes appeared to be on the decrease in **France**, while recorded Islamophobic/anti-Muslim crimes appeared to be on the increase. Recorded racist crime was on the increase in **Belgium**, while the same number of crimes of Holocaust denial or revisionism was recorded there between 2010 and 2011. Note that the data for Belgium only cover incidents of Holocaust denial or revisionism and should therefore not be taken as representative of antisemitic crime as a whole.

Tables 6.2–6.6 provide more detail on trends over time in officially recorded and published data on crimes with racist, anti-Roma, antisemitic, Islamophobic/

anti-Muslim and (right-wing) extremist motivations in EU Member States. Direct comparisons between Member States cannot and should not be made here, because any observed variations are a reflection of data collection practices at the national level.

The data presented in these tables are collected from official reports relating to crimes motivated by racism/xenophobia, antisemitism and extremist crime published by relevant authorities.¹⁴ The focus on published reports reflects FRA's opinion that data on these types of crime should be freely available in the public domain to increase the visibility of hate crime in the EU, thereby contributing to acknowledge the rights of victims of crime.¹⁵

Member States with high numbers of officially recorded racist and related crimes do not necessarily have the highest rates of such crime. High number demonstrate,

¹⁴ For more information on hate incidents, see OSCE/ODIHR (2012).

¹⁵ FRA (2012c).

instead, the willingness and ability of these Member States to record the incidence of such crime and to publish the related data. In contrast, Member States where few incidents are reported, recorded and therefore prosecuted can be said to be failing in their duty to effectively tackle racist and related crime.

Official reports by law enforcement agencies and criminal justice systems in EU Member States show decreases in officially recorded data on racist crime between 2010 and 2011 in **Austria**, the **Czech Republic**, **France**, **Ireland** and throughout the **United Kingdom** (Table 6.2). These reports show increases in recorded racist crime in **Denmark**, **Finland**, **Germany**, **Lithuania**, **Luxembourg**, **Poland**, and **Sweden**; in the number of individuals sentenced for racist crimes in the **Czech Republic**; and, in the number of charges of 'race crime' in **Scotland**.

The authorities in two Member States published data on anti-Roma crime in 2012: the **Czech Republic** and **Sweden** (Table 6.3). These data show an increase in anti-Roma crime recorded in Sweden between 2010 and 2011, while the Czech Republic published such data for the first time in 2012. Although the **Dutch** police record data on anti-Roma crimes, it is no longer possible to extract the number of anti-Roma crimes from the report on criminal acts of discrimination published in 2012 by the police's national expertise centre on diversity¹⁶ as these data are now subsumed under generic categories.

Concerning recorded antisemitic crime, the authorities in **Austria**, the **Czech Republic**, **Finland**, **France** and **Germany** reported decreases between 2010 and 2011, with increases reported in the **Netherlands** and **Sweden** (Table 6.4).¹⁷

The authorities in five EU Member States published data on Islamophobic/anti-Muslim crime in 2012: **Austria**, **Denmark**, **Finland**, **France** and **Sweden** (Table 6.5). The Austrian authorities reported a decrease in Islamophobic/anti-Muslim crime between 2010 and 2011, while those in France and Sweden reported increases during that period. The National Consultative Commission on Human Rights (CNC DH) in France attributes the large increase in recorded anti-Muslim actions and threats in that same period to the general application of the recording rules,¹⁸ a clear indicator of the extent to which changes in counting rules can affect the analysis of trends in recorded crime. The rate of Islamophobic/anti-Muslim crime recorded in Finland has remained steady over the years, with 14 cases recorded in 2009, 15 in 2010 and 14 in 2011.

The authorities in seven EU Member States published data on crimes motivated by extremism: **Austria**, **Czech Republic**, **Denmark**, **France**, **Germany**, **Poland** and **Sweden** (Table 6.6). **Denmark**, **Germany**, **Poland** and **Sweden** reported increases, while all other Member States reported decreases.

Promising practice

Joining forces to combat anti-Muslim attacks

Muslims, one of the largest groups defined by religious affiliation in the EU, frequently fall victim to racist and xenophobic abuse, but evidence of Islamophobia or anti-Muslim sentiment often remains anecdotal because few data collection mechanisms record this form of prejudice.

One such mechanism is Tell MAMA, a United Kingdom-wide "public service for measuring and monitoring anti-Muslim attacks". It was developed by Faith Matters, a charity, "which works on reducing extremism and developing platforms for discourse and interaction between Muslim, Sikh, Christian and Jewish communities right across the UK". Tell MAMA is partly funded by the Department for Communities and Local Government. Victims of attacks can report these through a number of channels, including the Tell MAMA website, by phone, by text message, by email or through social networking platforms such as Facebook or Twitter.

The Community Security Trust, a United Kingdom-wide Jewish organisation with extensive experience in recording antisemitic crime, sits on the advisory group to Tell MAMA and assisted it in developing its data collection system.

The Deputy Prime Minister announced in November 2012 that the state would provide Tell MAMA with GBP 214,000 (some €266,000) further funding from the state to support its activities. "The recording of [anti-Muslim] incidents will give the police, the Government and the communities involved the knowledge they need to combat hate crime in Britain, as well as giving support to victims where appropriate".

For more information, see: <http://tellmamauk.org>; www.faith-matters.org; www.thecst.org.uk; www.dpm.cabinetoffice.gov.uk/news/deputy-prime-minister-extends-funding-tackle-hate-crime-against-muslims

¹⁶ Netherlands, Tierolf, B. and Hermens, N. (2012), p. 10.

¹⁷ For more information on the situation of antisemitism in the EU, see FRA (2012a).

¹⁸ France, CNC DH (2012), p. 76.



Table 6.2: Trends in officially recorded data on racist crime in the EU and Croatia, 2006–2011, published data

	Recording authority – Source of data	Recorded data								
		2006	2007	2008	2009	2010	2011			
AT	Federal Agency for State Protection and Counter-terrorism – <i>Verfassungsschutzbericht</i>	28	48 ↗	56 ↗	n/a	64	37 ↘			
	Federal Agency for State Protection and Counter-terrorism – <i>Verfassungsschutzbericht</i>	419	752 ↗	835 ↗	791 ↘	1,040 ↗	963 ↘			
BE	Federal Police – Police statistics on crime	1,359	1,317 ↘	1,190 ↘	1,084 ↘	927 ↘	995 ↗			
CY	Cyprus Police – Archived statistical data	18	3 ↘	6 ↗	8 ↗	32 ↗	n/a			
CZ	Ministry of Interior, Security Policy Department – Annual Report: <i>Zpráva o problematice extremism na území České Republiky</i>	217	155 ↘	192 ↗	178 ↘	288 ↗	268 ↘			
	Ministry of Interior, Security Policy Department – Annual Report: <i>Zpráva o problematice extremism na území České Republiky</i>	96	72 ↘	97 ↗	103 ↗	96 ↘	158 ↗			
	Ministry of Interior, Security Policy Department – Annual Report: <i>Zpráva o problematice extremism na území České Republiky</i>	221	204 ↘	200 ↘	194 ↘	225 ↗	218 ↘			
	Ministry of Interior, Security Policy Department – Annual Report: <i>Zpráva o problematice extremism na území České Republiky</i>	192	197 ↗	185 ↘	183 ↘	213 ↗	209 ↘			
	Ministry of Interior – <i>Verfassungsschutzbericht</i>	484	414 ↘	395 ↘	351 ↘	285 ↘	350 ↗			
DE	Federal Foreign Office – <i>Bericht der Bundesregierung über ihre Menschenrechtspolitik</i>	n/a	n/a	423	428 ↗	433 ↗	484 ↗			
	Federal Foreign Office – <i>Bericht der Bundesregierung über ihre Menschenrechtspolitik</i>	n/a	n/a	3,048	2,564 ↘	2,163 ↘	2,528 ↗			
DK	Security and Intelligence Service – Annual Report: <i>Kriminelle forhold med mulig ekstremistisk baggrund</i>	227	35 ↘	113*	73 ↘	62 ↘	70 ↗			
EL	Racist Violence Recording Network – Press releases	n/a	n/a	n/a	n/a	n/a	63**			
ES	Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin – Annual Report: <i>Informe anual sobre la situación de la discriminación y la aplicación del principio de igualdad de trato por origen racial o étnico en España</i>	n/a	n/a	n/a	93	92 ↘	224 ↗			
FI	Police College of Finland – Annual Report: <i>Poliisin tietoon tullut viharikollisuus Suomessa</i>	748	698 ↘	1,163*	1,385 ↗	1,168 ↘	1,229 ↗			
FR	Ministry of Interior – Annual Report of the National Consultative Commission on Human Rights: <i>La lutte contre le racisme, l'antisémitisme et la xénophobie</i>	923	723 ↘	864 ↗	1,026 ↗	886 ↘	865 ↘			
IE	Central Statistics Office – Office for the Promotion of Migrant Integration website	173	214 ↗	172 ↘	128 ↘	127 ↘	142 ↗			

Table 6.2: Trends in officially recorded data on racist crime in the EU and Croatia, 2006–2011, published data (continued)

	Recording authority – Source of data	Recorded data	2006	2007	2008	2009	2010	2011
LT	Ministry of Interior – Information Technology and Communications Department website	Discrimination based on ethnicity	n/a	n/a	n/a	n/a	1	2 ↗
	Ministry of Interior – Information Technology and Communications Department website	Incitement to hatred motivated by race	n/a	n/a	n/a	n/a	0	12 ↗
	Ministry of Interior – Information Technology and Communications Department website	Incitement to hatred motivated by ethnicity	n/a	n/a	n/a	n/a	15	48 ↗
	Luxembourg Police – <i>Rapport d'activité de la Police grand-ducale</i>	Offences against persons, racial discrimination	14	17 ↗	21 ↗	28 ↗	24 ↗	40 ↗
NL	Police's National Expertise Centre on Diversity – <i>Criminaliteitsbeeld discriminatie</i>	Incidents of criminal discrimination – racist	n/a	n/a	898	762 ↗	774 ↗	925 ↗
PL	General Prosecutor – website	Cases of racist and/or xenophobic crime registered by the General Prosecutor	48	41 ↗	98 ↗	124 ↗	146 ↗	272 ↗
	Polish Police – Crime Statistics	Number of proceedings initiated in relation to public insult or assault on the grounds of nationality, ethnicity, race or beliefs	39	37 ↗	53 ↗	46 ↗	43 ↗	66 ↗
	Swedish National Council for Crime Prevention – Annual Report: <i>Statistik över polisinsatningar med identifierade hatbrottsmotiv</i>	Number of xenophobic/racist hate crime offences	2,189	2,489 ↗	4,224*	4,116 ↗	3,786 ↗	3,936 ↗
SE	Ministry of Interior – monthly report on crime statistics: <i>Štatistika kriminality v. Slovenskej republike</i>	Number of prosecuted and investigated persons in relation to racially motivated crime	143***	129*** ↗	218*	79 ↗	53 ↗	97***
UK								
England, Northern Ireland, Wales	Association of Chief Police Officers – Total of recorded hate crime from regional forces	Recordable racist crimes under Home Office counting rules – calendar year	n/a	n/a	n/a	43,426	39,311 ↗	35,875* (incl. data from the British Transport Police)
	Home Office – Annual data release on racist incidents	Racist incidents recorded by the police – fiscal year (April to March)	62,071	58,445 ↗	55,714 ↗	55,134*** ↗	51,585*** ↗	47,648*** ↗
England, Wales	Home Office – Data release on hate crime	Racist hate crimes – fiscal year	n/a	n/a	n/a	n/a	n/a	35,816
	Ministry of Justice – Biennial Report on statistics on race and the criminal justice system	Racist incidents recorded by the police – fiscal year	62,071	58,445 ↗	55,714 ↗	54,872 ↗	51,487 ↗	n/a
	Ministry of Justice – Biennial Report on statistics on race and the criminal justice system	Racially and religiously motivated criminal offences – fiscal year	42,554	38,351 ↗	36,762 ↗	35,705 ↗	31,486 ↗	n/a
	Crown Prosecution Service (CPS) – Annual Report: <i>Hate crimes and crimes against older people</i>	Number of defendants referred to the CPS by the police – racially aggravated hate crimes – fiscal year	13,201***	12,996*** ↗	11,845*** ↗	12,927*** ↗	13,038* ↗	12,537 ↗
	Crown Prosecution Service (CPS) – Annual Report: <i>Hate crimes and crimes against older people</i>	Number of cases prosecuted by the CPS – racially aggravated hate crimes – fiscal year	11,713***	13,008*** ↗	11,624*** ↗	12,131*** ↗	12,711* ↗	11,774 ↗
	Crown Prosecution Service (CPS) – Annual Report: <i>Hate crimes and crimes against older people</i>	Number of cases successfully prosecuted by the CPS – racially aggravated hate crimes – fiscal year	9,071***	9,115*** ↗	8,673*** ↗	9,214*** ↗	10,566* ↗	9,933 ↗

Table 6.2: Trends in officially recorded data on racist crime in the EU and Croatia, 2006–2011, published data (continued)

	Recording authority – Source of data	Recorded data	2006	2007	2008	2009	2010	2011
Northern Ireland	Police Service of Northern Ireland – Annual Bulletin on trends in hate motivated incidents and crimes	Hate motivated incidents – racism (fiscal year)	1,047	976 ↘	990 ↗	1,038 ↗	842 ↘	696 ↘
	Police Service of Northern Ireland – Annual Bulletin on trends in hate motivated incidents and crimes	Hate motivated crimes – racism (fiscal year)	861	757 ↘	771 ↗	712 ↘	531 ↘	458 ↘
Scotland	Scotland Police – Statistical Bulletin, Crime and Justice Series	Racially aggravated offences – fiscal year	n/a	4,543	4,564 ↗	4,513 ↘	4,173 ↘	3,468 ↘
	Scotland Police – Statistical Bulletin, Crime and Justice Series	Racist incidents – fiscal year	5,124	5,322 ↗	5,247 ↘	5,145 ↘	4,960 ↘	4,907 ↘
	Scotland Police – Statistical Bulletin, Crime and Justice Series	Racist crimes – fiscal year	6,439	6,654 ↗	6,676 ↗	6,617 ↘	6,470 ↘	6,169 ↘
	Crown Office and Procurator Fiscal Service – Annual Report on hate crime in Scotland	Charges of race crime – fiscal year	4,361	4,365 ↗	4,334 ↘	4,320 ↘	4,178 ↘	4,518 ↗
HR	Ministry of Interior – Pregled temeljnih sigurnosnih pokazatelja i rezultata rada	Reported criminal offences, racial or other discrimination	9	5 ↘	8 ↗	6 ↘	11 ↗	11 =

Notes: Comparisons can only be made within, and not between, EU Member States. For the United Kingdom, comparisons cannot be made among all the data collected in the four nations (England, Northern Ireland, Scotland, Wales) as they use different counting rules.

↗ indicates a rise in numbers of recorded incidents.

↘ indicates a decline in numbers of recorded incidents.

= indicates the same number of incidents recorded between 2006 and 2011.

* Not comparable with previous years due to changes in recording procedures.

** Data cover the period between 1 October 2011 and 31 December 2011.

*** Crimes motivated by racism and by extremism.

**** Data referring to the period prior to the fiscal year 2009/10 replicate the data from the Ministry of Justice reported in this table. Data on racist incidents in England and Wales published by the Home Office in September 2012 provide different totals compared to the data published by the Ministry of Justice on racist incidents in England and Wales.

***** Racially and religiously aggravated hate crime.

Source: FRA, 2012, compiled from reports published by the institutions referred to in Table 6.2

Table 6.3: Trends in officially recorded data on anti-Roma crime in the EU, 2006–2011, published data

	Recording authority – Source of data	Type of data recorded	2006	2007	2008	2009	2010	2011
CZ	Ministry of the Interior, Security Policy Department – Annual Report: <i>Zpráva o problematice extremism na území České Republiky</i>	Crimes motivated by hatred towards the Roma	n/a	n/a	n/a	n/a	n/a	69
NL	Police's National Expertise Centre on Diversity – <i>Criminaliteitsbeeld discriminatie</i>	Incidents of criminal discrimination – anti-Roma	n/a	n/a	0	1 ↗	4 ↗	n/a
SE	Swedish National Council for Crime Prevention – Annual Report: <i>Statistik över polisanmälningar med identifierade hatbrottsmotiv</i>	Number of anti-Roma hate crime offences	n/a	n/a	178	163 ↘	145 ↘	184 ↗

Notes: Comparisons can only be made within, and not between, EU Member States.

↗ indicates a rise in numbers of recorded incidents.

↘ indicates a decline in numbers of recorded incidents.

Source: FRA, 2012, compiled from reports published by the institutions referred to in Table 6.3

Table 6.4: Trends in officially recorded data on antisemitic crime in the EU, 2006–2011, published data

	Recording authority – Source of data	Type of data recorded	2006	2007	2008	2009	2010	2011
AT	Federal Agency for State Protection and Counter-terrorism – <i>Verfassungsschutzbericht</i>	Committed crimes	8	15 ↗	23 ↗	12 ↘	27 ↗	16 ↘
BE	Federal Police – Police statistics on crime	Recorded crimes of Holocaust denial or revisionism	1	4 ↗	9 ↗	11 ↗	2 ↘	2 =
CZ	Ministry of Interior, Security Policy Department – Annual Report: <i>Zpráva o problematice extremism na území České Republiky</i>	Antisemitic offences	14	18 ↗	27 ↗	48 ↗	28 ↘	18 ↘
DE	Ministry of Interior – <i>Verfassungsschutzbericht</i>	Politically motivated anti-semitic criminal offences with a right-wing extremist background	1,636	1,541 ↘	1,477 ↘	1,502 ↗	1,166 ↘	1,162 ↘
	Federal Foreign Office – <i>Bericht der Bundesregierung über ihre Menschenrechtspolitik</i>	Politically motivated antisemitic crimes	n/a	n/a	1,559	1,690 ↗	1,268 ↘	1,239 ↘
DK	Security and Intelligence Service – Annual Report: <i>Kriminelle forhold med mulig ekstremistisk baggrund</i>	Extremist crimes targeting Jews	n/a	n/a	n/a	n/a	n/a	5
FI	Police College of Finland – Annual Report: <i>Poliisin tietoon tullut viharikollisuus Suomessa</i>	Antisemitic crimes reported to the police	n/a	n/a	1	10 ↗	4 ↘	6 ↗
FR	Ministry of Interior – Annual Report of the National Consultative Commission on Human Rights: <i>La lutte contre le racisme, l'antisémitisme et la xénophobie</i>	Actions and threats with an antisemitic character	571	402 ↘	459 ↗	815 ↗	466 ↘	389 ↘
NL	Police's National Expertise Centre on Diversity – <i>Criminaliteitsbeeld discriminatie</i>	Incidents of criminal discrimination – antisemitic	n/a	n/a	141 ↗	209 ↗	286 ↗	298 ↗
LT	Prosecutor General's Office – Periodic report: <i>Daugėja nusikalstamų veikų asmenų lygiateisiškumui ir sąžinės laisvei</i>	Cases of antisemitism – pre-trial investigations	n/a	n/a	n/a	6	9*	n/a
SE	Swedish National Council for Crime Prevention – Annual Report: <i>Statistik över polisanmälningar med identifierade hatbrottsmotiv</i>	Number of antisemitic hate crime offences	134	118 ↘	159**	250 ↗	161 ↘	194 ↗
UK								
England, Northern Ireland, Wales	Association of Chief Police Officers – Total of recorded hate crime from regional forces	Recordable antisemitic crimes under Home Office counting rules – calendar year	n/a	n/a	n/a	703	488 ↘	440

Notes: Comparisons can only be made within, and not between, EU Member States.

↗ indicates a rise in numbers of recorded incidents.

↘ indicates a decline in numbers of recorded incidents.

* First four months of 2011.

** Not comparable with previous years due to changes in recording procedure.

*** Includes data from the British Transport Police.

Source: FRA, 2012, compiled from reports published by the institutions referred to in Table 6.4

Table 6.5: Trends in officially recorded data on Islamophobic/anti-Muslim crime in the EU, 2006–2011, published data

	Recording authority – Source of data	Type of data recorded	2006	2007	2008	2009	2010	2011
AT	Federal Agency for State Protection and Counter-terrorism – <i>Verfassungsschutzbericht</i>	Committed crimes	n/a	2	12 ↗	n/a	8	4 ↘
DK	Security and Intelligence Service – Annual Report: <i>Kriminelle forhold med mulig ekstremistisk baggrund</i>	Extremist crimes targeting Muslims	n/a	n/a	n/a	n/a	n/a	11
FI	Police College of Finland – Annual Report: <i>Poliisin tietoon tullut viharikollisuus Suomessa</i>	Islamophobic/anti-Muslim crimes reported to the police	n/a	14	17 ↗	14 ↘	15 ↗	14 ↘
FR	Ministry of Interior – Annual Report of the National Consultative Commission on Human Rights: <i>La lutte contre le racisme, l'antisémitisme et la xénophobie</i>	Actions and threats with an anti-Muslim character	n/a	n/a	n/a	n/a	116	155 ↗
NL	Police's National Expertise Centre on Diversity – <i>Criminaliteitsbeeld discriminatie</i>	Incidents of criminal discrimination – Islamophobic	n/a	n/a	116	96 ↘	93 ↘	n/a
SE	Swedish National Council for Crime Prevention – Annual Report: <i>Statistik över polisanmälningar med identifierade hatbrottsmotiv</i>	Number of Islamophobic hate crime offences	252	206 ↘	272* ↗	194 ↘	272 ↗	278 ↗

Notes: Comparisons can only be made within, and not between, EU Member States.

↗ indicates a rise in numbers of recorded incidents.

↘ indicates a decline in numbers of recorded incidents.

* Not comparable with previous years due to changes in recording procedure.

Source: FRA, 2012, compiled from reports published by the institutions referred to in Table 6.5

Table 6.6: Trends in officially recorded data on (right-wing) extremist crime in the EU, 2006–2011, published data

	Recording authority – Source of data	Type of data recorded	2006	2007	2008	2009	2010	2011
AT	Federal Agency for State Protection and Counter-terrorism – <i>Verfassungsschutzbericht</i>	Committed crimes	204	280 ↗	333 ↗	n/a	335 –	282 ↘
CZ	Ministry of Interior, Security Policy Department – Annual Report: <i>Zpráva o problematice extremism na území České Republiky</i>	Crimes with extremist features	248	196 ↘	217 ↗	265 ↗	252 ↘	238 ↘
DE	Ministry of Interior – <i>Verfassungsschutzbericht</i>	Politically motivated criminal offences – right-wing	17,597	17,176 ↘	19,894 ↗	18,750 ↘	15,905 ↘	16,142 ↗
DK	Security and Intelligence Service – Annual Report: <i>Kriminelle forhold med mulig ekstremistisk baggrund</i>	Incidents motivated by perpetrators' extremist positions*	n/a	n/a	n/a	64	37 ↘	78 ↗
FR	Ministry of Interior – Annual Report of the National Consultative Commission on Human Rights	Violent actions and threats formally imputed to right-wing extremists	26	26 =	37 ↗	25 ↘	25 =	17 ↘
NL	Police's National Expertise Centre on Diversity – <i>Criminaliteitsbeeld discriminatie</i>	Incidents of criminal discrimination – fascism or right-wing extremism	n/a	n/a	85	113 ↗	134 ↗	n/a
PL	Polish Police – Crime Statistics	Number of proceedings initiated in relation to public promotion of fascism and incitement to hatred	50	70 ↗	63 ↘	53 ↘	46 ↘	86 ↗
SE	Swedish National Council for Crime Prevention – Annual Report: <i>Statistik över polisanmälningar med identifierade hatbrottsmotiv</i>	Number of hate crime offences motivated by ideology	304	408 ↗	695**	555 ↘	444 ↘	517 ↗
SK	Ministry of Interior – monthly report on crime statistics: <i>Štatistika kriminality v Slovenskej republike</i>	Number of prosecuted and investigated persons in relation to racially motivated crime	n/a***	n/a***	n/a	n/a	51	n/a***

Notes: Comparisons can only be made within, and not between, EU Member States.

↗ indicates a rise in numbers of recorded incidents.

↘ indicates a decline in numbers of recorded incidents.

= indicates the same number of incidents recorded between 2006 and 2011.

* Includes crimes motivated by either right-wing or left-wing extremism.

** Not comparable with previous years due to changes in the recording procedure.

*** Data on extremist crimes are collated in the category of racist crime (See Table 6.3, above).

Source: FRA, 2012, compiled from reports published by the institutions referred to in the Table 6.6

Table 6.7: Status of official data collection on racist, anti-Roma, antisemitic, Islamophobic/anti-Muslim and (right-wing) extremist crime in EU Member States, December 2012

Limited data available	Good data available	Comprehensive data available
Bulgaria	Austria	Finland
Cyprus	Belgium	Netherlands
Estonia	Czech Republic	Sweden
Greece	Denmark	United Kingdom
Hungary	Germany	
Italy	France	
Latvia	Ireland	
Luxembourg	Lithuania	
Malta	Poland	
Portugal	Slovakia	
Romania	Spain	
Slovenia		
	Croatia	

Source: FRA, 2012

On the basis of the data presented in Tables 6.2–6.6, EU Member States' official data collection mechanisms on crimes with racist, anti-Roma, antisemitic, Islamophobic/anti-Muslim and (right-wing) extremist motivations can be classified into three broad categories (Table 6.7), which relate to the scope and transparency of the data that are recorded:

- Limited data available – data collection is limited to a few incidents, and data are, in general, not published.
- Good data available – different bias motivations are recorded and data are, in general, published.
- Comprehensive data available – different bias motivations are recorded, as are characteristics of victims and perpetrators, where criminal victimisation has occurred, and the types of crimes that were committed, such as murder, assault or threats. Data are always published.

FRA ACTIVITY

Countering hate crime

Violence and crimes motivated by racism, xenophobia, religious intolerance or by a person's disability, sexual orientation or gender identity – often referred to as 'hate crime' – remain a daily reality throughout the EU, as data collected by FRA and other inter-governmental organisations, such as the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), consistently show. Such crimes harm not only the victim, they also generally prejudice fundamental rights, especially human dignity and with respect to non-discrimination.

FRA and the Intergroup on Anti-Racism and Diversity at the European Parliament co-hosted a roundtable at the European Parliament in Brussels on 29 November 2012, where the European Commission and ODIHR joined them for a discussion on hate crime.

The roundtable's objectives were to reflect on the situation of hate crime in the EU and to engage in a discussion on possible practical initiatives to combat hate crime and on the review of the Framework Decision on racism and xenophobia.

The panel discussion brought FRA together with key institutional actors working to combat hate crime in the EU and beyond: the European Parliament, the European Commission, ODIHR, equality bodies and civil society organisations combating hate crime in a variety of areas such as racism, xenophobia, LGBT or disability.

The roundtable concluded that the EU and its Member States can take action through legislation, policy and practices to increase the visibility of hate crime and allow victims to seek redress. The roundtable also served to reinforce cooperation between EU institutions, international organisations and civil society organisations to counter hate crime effectively and decisively.

For more information, see: <http://fra.europa.eu/en/news/2012/fra-presents-hate-crime-reports-european-parliament>

6.2. Developments concerning extremism in the EU in 2012

When considering the data presented in the previous section, it must be remembered that crimes motivated by racism, xenophobia and related intolerances need not be carried out by persons belonging to extremist groups. "Most incidents of assault or threat [against members of minority or ethnic groups] were not committed by members of right-wing extremist groups. Only 13 % of Turkish victims and 12 % of Roma victims of assault or threat, for example, identified perpetrators as members of these groups," FRA research on minorities as victims of crime shows.¹⁹ Offences such as these are often motivated by more or less diffuse feelings of hostility or racism held by persons in no way associated with right-wing extremism.

Nevertheless, elements of right-wing extremist ideology and associated intolerant attitudes are found across all members of the general population, as evidence from **Austria**,²⁰ **France**,²¹ **Germany**,²² **Slovakia**²³ and **Sweden**²⁴ indicates. Racist and xenophobic attitudes in EU Member States are, though, becoming less associated with biological traits or 'traditional' supremacist considerations and are instead growing increasingly dominated by cultural considerations and intolerance of difference, as manifested, for example, in the expression of anti-Roma, antisemitic, anti-Muslim or anti-migrant feelings.²⁵ In these cases, racist and xenophobic attitudes reflect perceptions that Roma, Jewish people, Muslims or migrants are incapable of, or unwilling to integrate into society and that they represent a threat to society.²⁶

The mainstreaming of elements of extremist ideology in the public sphere is evidenced across EU Member States. The Federal Agency for State Protection and Counter-terrorism in **Austria**, for instance shows that: "Of the 341 persons against whom reports were filed in 2011, 29 belonged to a right-wing extremist scene. 91.5 %, i.e. 312 of the persons against whom reports were filed, were not attributed to the right-wing extremist milieu."²⁷

Similarly, while it is difficult to establish an exact profile of perpetrators, the CNCDH in **France** says that disenfranchised youths often make racist or xenophobic threats without any true ideological motivation underlying these threats. The CNCDH shows that property damage in the form of symbols or slogans associated with extreme right-wing ideology, for example, is not necessarily done by people belonging to the extremist scene.²⁸

In Greece, the electoral success in June 2012 of the Golden Dawn party (*Χρυσή Αυγή*) with an extreme nationalist agenda, which includes anti-immigrant and anti-foreigner elements was striking. Whereas this party polled 0.3 % of the popular vote in the 2009 general elections and had no representation in parliament, it polled 7 % at the June 2012 elections, gaining 18 seats to become the fourth-largest party in parliament.

Golden Dawn enacted programmes of social assistance excluding non-Greek nationals²⁹ and has allegedly sanctioned attacks against migrants,³⁰ but the party did not lose popularity as a result. On the contrary, a poll released in October 2012 put public support for the party at 21 %, ³¹ far higher than its 7 % showing at national elections four months earlier. This could testify to the reach of extremist nationalist ideology and the threat this could pose to fundamental rights.

The Hellenic Ministry of Interior took action to counteract these influences, including through projects under the European Integration Fund aimed at combating racism and promoting multicultural living and understanding. One such project, the *Intercultural Mediation programme in selected hospitals in Athens and Thessaloniki*, "facilitated communication between immigrants and hospital staff, thereby reducing cultural misunderstandings and promoting non-discriminatory access to public health services".³²

The *Front National* in **France** is another party with anti-immigrant, anti-foreigner or anti-Islam leanings that has made significant gains since the last general election. It polled 13.6 % of the popular vote at the 2012 elections for the national assembly, it gained two seats, when compared to 4.3 % at the last elections held in 2007, when it gained no seats. But other parties with such leanings lost votes in 2012 elections, most notably the *Partij voor de Vrijheid* in the **Netherlands**, whose voting share dropped to 10.1 % in 2012 from 15.5 % in

19 FRA (2012b), p. 3.

20 Austria, Ministry of Interior, Federal Agency for State Protection and Counter-Terrorism (2012).

21 France, CNCDH (2012).

22 Decker, O. et al. (2012); see also FRA (2012c).

23 Gallová Kriglerová, E. and Kadlečíková, J. (2012).

24 Sweden, Government Office (2012).

25 See: FRA (2012a).

26 See also: Hickman, M. J. et al. (2012); Nickels, H.C. et al. (2012a); Nickels, H.C. et al. (2012b).

27 Austria, Ministry of Interior, Federal Agency for State Protection and Counter-Terrorism (2012), p. 14.

28 France, CNCDH (2012).

29 See, for example, Rights Equality and Diversity European Network (2012).

30 Human Rights Watch (2012).

31 Public Issue (2012).

32 For more information, see: http://ec.europa.eu/dgs/home-affairs/financing/fundings/projects/stories/greece_eif_01_en.htm.

2010, while **Slovakia's** *Slovenská Národná Strana* lost its nine seats in parliament.

Next to the mainstreaming of elements of extremist ideology, the violent actions of those who actively belong to the right-wing extremist scene continue to pose a threat, as Europol shows in its annual report on terrorism in the EU.³³ Such groups are steadily making more use of online platforms to propagate and circulate their ideas.³⁴ As Jugendschutz.net, a non-governmental organisation that monitors right-wing extremism online, points out, "Right-wing extremists step up their agitation in social media services. They do so [because] media sharing websites attract more and more interest, specifically among young persons who are their number one target audience and their keenest users."³⁵

6.3. Developments relating to ethnic data collection

The formulation of policies to target ethnic discrimination effectively and decisively requires reliable and comparable data, including data disaggregated by self-identified ethnicity. The need for such data is confirmed by the special Eurobarometer on discrimination in the EU in 2012, which shows that discrimination on the ground of ethnic origin is the most widespread type in the EU: "while, on average, 3 % of Europeans reported feeling discriminated against on grounds of ethnic origin, this figure rises to 27 % for Europeans who say that they belong to an ethnic minority group."³⁶ In addition, 37 % of those who self-identify as belonging to a minority group report that they had witnessed or heard of discrimination against that group happening, in their view, more than average.³⁷

The usefulness of disaggregated data can be illustrated with the example of the Roma, a group that three out of four Europeans consider at risk of discrimination, the Eurobarometer survey shows.³⁸ The acknowledgement among Europeans that they harbour negative attitudes toward Roma and their perception that efforts to fight discrimination against Roma are less efficient than other such efforts, points to the need for new and more targeted policies addressing the integration of Roma in European societies. Without the benefit of specific data on the Roma or other minority groups, policy makers

across the EU will continue to struggle to implement effective policies to address the situation of groups that are discriminated against.

The need for specific data is supported by evidence on the matter collected by, for example, the Equality & Health (Ethealth) group in Belgium, the Swedish Equality Ombudsman and the Court of Auditors in France.

The Ethealth group in **Belgium** – an expert group on health issues – recommended that ethnic data collection in relation to healthcare should be done in a way that enables the "identification of migrants and ethnic minorities in [the] systematic healthcare register."³⁹ This would increase the statistical power of the National Health Interview Survey for Migrants and ethnic minorities.

The Swedish government asked the Equality Ombudsman to conduct preliminary study concerning the development of national equality data.⁴⁰ The need for such disaggregated data stemmed from critiques of **Sweden** by international organisations, which highlighted that not having disaggregated data to hand could prevent shedding light on the living conditions of different minority groups in the country.

The need also arose from the lack of disaggregated data constituting a barrier to formulating and following up the state's policies on anti-discrimination and recognised national minorities, namely Jews, Roma, Sami, Swedish Finns and Tornedalers. The Equality Ombudsman highlights in its conclusions that the comparability of methods and data is a prerequisite for monitoring the measures taken in the fight against discrimination and in work relating to national minorities.

Similarly, the lack of specific data on *gens du voyage* in **France** complicates needs-assessment exercises and the definition of activities and measures that would benefit this group of persons, as the Court of Auditors argues.⁴¹ This is particularly the case in relation to access to healthcare and to preventive medical care, education and employment of *gens du voyage*. The Court of Auditors therefore recommended that, to increase knowledge about their situation in France, surveys dedicated to providing information about the main characteristics of this population group, such as their number, social status, profession, mobility and housing conditions should be conducted.

The CNCDH concluded that, while it does not favour the disaggregation of statistics by 'ethnic group', it did recommend that the 'ethnic origin' of individuals should

33 Europol (2012), pp. 28–29. See also: Czech Republic, Ministry of Interior (2012); Fekete, L. (2012); Organization for Aid to Refugees (2012).

34 Bartlett et al. (2011); Bartlett et al. (2012a); Bartlett et al. (2012b); Bartlett et al. (2012c); Bartlett et al. (2012d); Bartlett et al. (2012e); Bartlett et al. (2012f); Sweden, Government Office (2012).

35 Jugendschutz.net (2012), p. 1.

36 European Commission (2012a), p. 65.

37 Ibid., p. 71.

38 Ibid., p. 11.

39 Dauvrin, M. et al. (2012), p. 5.

40 Sweden, Equality Ombudsman (2012a).

41 France, Court of Auditors (2012).



be defined by objective elements such as their or their parents' birthplace and nationality, in order to shed light on inequalities found in France.⁴²

FRA ACTIVITY

FRA Roma Programme – Building consensus on how to measure progress

The European Commission asked FRA to “work with Member States to develop monitoring methods which can provide a comparative analysis of the situation of Roma across Europe”, in its 2011 Communication on an EU Framework for National Roma Integration Strategies (COM(2011) 173 final). In response, FRA set up an ad hoc working party of experts from national authorities, the European Commission, and international bodies to pool knowledge on indicator development, data collection, monitoring and statistical analysis on Roma issues.

The working party serves to exchange experience and develop promising practices on ways to measure Roma integration. Ten EU Member States plus Croatia take part in the working party, together with the European Commission, the United Nations Development Programme, Eurofound and FRA. Lessons learned will be provided to all Member States through the network of National Contact Points on Roma. In 2012, the working party held two meetings and agreed to collaborate on a set of activities to improve Roma integration monitoring:

- identifying core indicators that could be used to assess the impact of measures and policies aimed at Roma integration across Member States;
- mapping data sources and collection methods in Member States; and
- sharing information regularly on challenges and achievements in developing methods at Member State-level to monitor the impact of national Roma integration strategies.

6.4. Developments in ethnic discrimination in healthcare, housing, education and employment in the EU

Various legal instruments guarantee the prohibition of ethnic discrimination in healthcare, education,

employment and housing, including: the Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Economic, Social and Cultural Rights; the Charter of Fundamental Rights of the European Union; the Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; and the European Social Charter (revised). In addition, adequate housing is recognised as one element of the right to an adequate standard of living in the Universal Declaration of Human Rights.

6.4.1. Ethnic discrimination in healthcare

Ethnic minorities continue to face barriers in equal access to healthcare across the EU, with the European Network Against Racism (ENAR) pointing out that “manifestations include prejudice by staff and patients, significantly lower health outcomes, language and cultural barriers, as well as legal challenges especially in the case of migrants.”⁴³

The **Belgian** Ministry of Public Health commissioned the Ethealth group to formulate relevant recommendations to the public authorities with a view to reducing health inequalities among ethnic minorities. Ethealth identified three groups that are most at-risk and vulnerable among migrants and ethnic minorities: irregular migrants and asylum seekers; migrants and ethnic minorities with mental health problems; and women. These “groups have several risk factors for having a poorer health status than the native population and experiencing discrimination due to the multiplication of risks”.⁴⁴ Ethealth recommended that public authorities fight discrimination by improving socio-economic opportunities and access to preventive healthcare for migrants and ethnic minorities.

The **Swedish** Equality Ombudsman said that the health complaints the office deals with predominantly concern patients who are refused healthcare or access to healthcare or who experience discriminatory treatment, such as lack of respect, bias and stereotyping, when interacting with healthcare professionals.⁴⁵ Examples of patients' cases filed with the Equality Ombudsman include perceived discrimination of patients on the grounds of their ethnicity, religion and sexual orientation.

The Equality Ombudsman notes that in the majority of cases it is difficult to prove whether discrimination actually occurred, but the complaints as such are an indication of dissatisfaction with healthcare and

⁴³ ENAR (2012), p 19.

⁴⁴ Dauvrin, M. *et al.* (2012), p. 8.

⁴⁵ Sweden, Equality Ombudsman (2012b).

⁴² France, CNCDH (2012).

social services, which should be taken into consideration in and of themselves. The Equality Ombudsman emphasises that bias of treatment by healthcare professionals might persuade some persons to refrain from contacting healthcare providers because of their own or other people's experiences of discrimination.

The National Health Service Confederation in the **United Kingdom** reports that the links between discrimination, disadvantaged groups and poor mental health are well documented. The rates of admission to inpatient mental health units, as well as rates of detention, continue to be higher for 'Black African', 'Black Caribbean' and 'Black Other' groups than for other population groups.⁴⁶ It also points out that "whilst numerous national and local initiatives have aimed to improve access [to healthcare], experience and outcomes for [black and minority ethnic] service users, concrete evidence of improvements remains lacking."⁴⁷ The National Health Service Confederation therefore stresses the need for better monitoring, collection and use of data on ethnicity and culture in this context.

6.4.2. Ethnic discrimination in housing

Minority ethnic groups, migrants and asylum seekers regularly confront barriers in access to the housing sector, as evidence from international human rights monitoring mechanisms, national equality bodies and research in several EU Member States shows.

Examples include discriminatory housing advertisements in **Austria**⁴⁸ and **Romania**;⁴⁹ ethnic discrimination in the rental market in **Belgium**,⁵⁰ **Malta**,⁵¹ **Poland**⁵² and **Slovenia**;⁵³ discrimination by real estate agents and housing associations in **Spain**;⁵⁴ and residential segregation in **Hungary**,⁵⁵ **Slovakia**⁵⁶ or **Sweden**, which "particularly affects Roma, Muslims, Afro-Swedes and asylum seekers."⁵⁷

Unequal access to housing for ethnic minorities and migrants increases their risk of social exclusion and contributes to spatial segregation, which the European Commission against Racism and Intolerance (ECRI)

considers a particularly serious form of discrimination.⁵⁸ Spatial segregation is often accompanied by precarious living conditions, especially for Roma, as is the case in **Hungary**⁵⁹ and **Slovakia**,⁶⁰ among others.

In its concluding observations on **Austria**,⁶¹ the United Nations Committee on the Elimination of Racial Discrimination (CERD) expressed concerns about discriminatory advertisements, such as "reports of racist advertisements in the media, particularly relating to housing and employment opportunities that require applicants to be 'Austrians only' and "that such advertisements foment existing racial prejudice and stereotypes against certain minority groups". Similarly, the **Romanian** national equality body found that an advertisement for a studio to let – specifying 'Students and Roma excluded' – to be discriminatory.⁶²

The results of the longitudinal Group-focused Hostility survey (*Gruppenbezogene Menschenfeindlichkeit*) conducted by the Interdisciplinary Institute for Conflict and Violence Research of the University of Bielefeld (*Interdisziplinäres Institut für Konflikt- und Gewaltforschung*) in **Germany**, show that around 40 % of the respondents would have a problem with Sinti and Roma living in their neighbourhood.⁶³

Similarly, the results of a public opinion survey in **Lithuania**, show that swathes of the majority population would not rent their accommodation to Roma, migrants or Muslims.⁶⁴ For more information on evidence of discrimination against Roma populations in housing, see Section 6.5.2 of this chapter.

Evidence from **Malta** shows that migrants experience discrimination in the housing market,⁶⁵ while evidence from **Poland**⁶⁶ and **Spain**⁶⁷ demonstrates that migrants faced unequal treatment when trying to access social housing or the private rental market, as was established in Spain through discrimination testing.

Similarly, the European Committee on Social Rights found, in its conclusions on the situation regarding the implementation of the European Social Charter (revised), that the **Slovenian** situation did not conform to Article 19 (4) of the European Social Charter (revised) on the grounds that "equal treatment and adequate

46 Sewell, H. and Waterhouse, S. (2012a).

47 *Ibid.*; see also Mental Health Network National Health Service (NHS) Confederation (2012).

48 UN, CERD (2012a), p. 6.

49 Romania, National Council for Combating Discrimination, Decision No. 103/28.03.2012.

50 Belgium, Centre for Equal Opportunities and Opposition to Racism (CEOR) (2012), pp. 84–85.

51 Gauci, J.P. (2012).

52 Mikulska, A. And Patzer, H. (2012), p. 145.

53 Council of Europe, European Committee on Social Rights (2012a), p. 23.

54 SOS Racismo and CEAR-Euskadi (2012), pp. 38–41.

55 Hungary, Habitat for Humanity Hungary (2012).

56 World Bank (2012a), pp. 31–32.

57 Council of Europe, ECRI (2012), p. 8.

58 Council of Europe, ECRI (2012).

59 Hungary, Habitat for Humanity Hungary (2012).

60 World Bank (2012a), pp. 31–32.

61 UN, CERD (2012a), p. 6.

62 Romania, National Council for Combating Discrimination, Decision No. 103/28.03.2012.

63 Heitmeyer, W. (2012).

64 Lithuania, Institute for Ethnic Studies (2012).

65 Weave Consulting (2011); see also Gauci J.P. (2012).

66 Mikulska, A. and Patzer, H. (2012), p. 145.

67 SOS Racismo and CEAR-Euskadi (2012), pp. 38–41.

conditions are not secured for migrant workers with respect to access to housing".⁶⁸

The national equality body in **Belgium** echoed these findings, reporting that it had opened about 100 files concerning discrimination in housing, about half of which concerned discrimination on the basis of racial and ethnic criteria.⁶⁹ These results resonate with findings from the discrimination testing experiment in rental housing and apartment market in Antwerp and Ghent conducted by the Minorities Forum (*Minderhedenforum*). Their findings show that candidate-tenants with a foreign-sounding name are significantly less frequently invited for a visit than candidates with a native-sounding name.⁷⁰

Promising practice

Preventing and combating discrimination in the housing sector

On 11 June 2012, the Italian Equality Body (*Ufficio nazionale antidiscriminazioni razziali*, UNAR) and the Italian Federation of Professional Real Estate Agents signed a Memorandum of Understanding aimed at preventing and combating all forms of discrimination in the housing sector. The two-year agreement, which applies to both real estate agents and customers, includes training and the development of an awareness-raising campaign. The initiative seeks to promote better knowledge of anti-discrimination legislation and remedies in procedures for buying or renting accommodation. UNAR and FIAIP committed to:

- establishing and promoting joint activities to raise awareness on anti-discrimination issues in the housing sector on an annual basis;
- launching initiatives to improve citizens and estate agents' knowledge of legal instruments and strategies for combating and preventing discrimination;
- organising training courses for real estate agents and members of FIAIP;
- producing a guide on how to proceed with buying accommodation and guidelines on how to combat discrimination in the housing sector;

For more information, see: <http://cercacasa.it/stop-al-razzismo-per-compravendite-e-affitti.html>

Similarly, in **Finland** a study based on discrimination testing revealed that there was a significant degree

of discrimination against Roma and migrants when applying for housing either by public or private housing providers.⁷¹ The results of the study show that both Roma and migrant applicants were discriminated against as applicants, the former in 15 % of the test cases, the latter in 16 % of the test cases.

6.4.3. Ethnic discrimination in education

Ethnic discrimination in education and segregation in schools on ethnic grounds remain a problem in the EU. International and national human rights monitoring bodies highlighted barriers in access to equal education in a number of EU Member States, with members of ethnic groups and migrants continuing to face difficulties due to discrimination on ethnic grounds in **Spain**⁷² or segregation in schools in **Denmark**,⁷³ **Germany**⁷⁴ and **Italy**.⁷⁵

The UN Committee on Economic, Social and Cultural Rights, in its concluding observations on **Spain**, expressed its concerns "that, despite the measures adopted by the State party, immigrants and gypsies continue to suffer from discrimination in the enjoyment of economic, social and cultural rights, particularly in the areas of employment, housing, health and education."⁷⁶ This confirms findings of the *Annual Study on discrimination based on racial or ethnic origin: the perception of the potential victims 2011* in Spain, which showed that around one in four migrants who had attended an educational centre or who had children studying in the previous year experienced discriminatory treatment on racial or ethnic grounds.⁷⁷

ECRI recommended that the "Danish authorities shall take measures to combat school segregation by devising, in consultation with all the parties concerned and taking into account the socio-economic dimension (employment and housing) policies to avoid, in the best interests of the child, pupils from minority groups being overrepresented in certain schools."⁷⁸

The Open Society Justice Initiative argues that several primary and secondary schools in Berlin, **Germany**, are segregating migrant children in separate classes that provide vastly inferior education. It notes that this segregation from native-born German students is

71 Joronen, M. (2012).

72 UN, Committee on Economic, Social and Cultural Rights (2012a), p. 3.

73 Council of Europe, ECRI (2012b), p. 9.

74 Germany, Open Society Justice Initiative (2012).

75 UN, CERD (2012b), p. 7.

76 UN, Committee on Economic, Social and Cultural Rights (2012a), p. 3.

77 Spain, Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin (2012b).

78 Council of Europe, ECRI (2012b), p. 9.

68 Council of Europe, European Committee on Social Rights (2012a), p. 23.

69 Belgium, CEOOR (2012), pp. 84–85.

70 Lahlali, M. et al. (2012).

supposedly carried out because the students' German language skills are inadequate for regular classes, but it contends that this is "a proxy for discrimination on the basis of ethnicity or other suspect criteria."⁷⁹

Finally, CERD recommended that **Italy** "ensure[s] that the administrative measure limiting to 30 % the number of children with non-Italian nationality in each class does not negatively affect the enrolment in education of children from the most vulnerable groups."⁸⁰

6.4.4. Ethnic discrimination in employment

Barriers in access to employment for minority and ethnic groups due to discriminatory treatment and prejudices of employers remain in the EU, as shown by evidence published in **Denmark**⁸¹ and **France**.⁸² In addition, the role of social partners, such as employers and trade unions, on raising awareness of anti-discrimination legislation and policies on ethnic grounds at work remains weak and in need of reinforcement, as is the case in **Latvia**⁸³ or **Sweden**.⁸⁴

According to the Danish Institute of Human Rights (DIHR) ethnic minorities have a weaker link to the **Danish** labour market than ethnic Danes. DIHR therefore recommends that the government consider revising its anti-discrimination legislation to urge employers to promote equal treatment regardless of racial or ethnic origin. It also recommends that the government map any institutional barriers that could prevent ethnic minorities from accessing the labour market and to ensure that they are employed in positions that match their educational qualifications and gain promotion on an equal basis with ethnic Danes.⁸⁵

ECRI stressed the need for more awareness-raising programmes among Danish authorities to alert employers about issues of ethnic discrimination and about the substance of relevant legal requirements.⁸⁶ It made similar recommendations for **Latvia**, saying that the authorities there should "carry out training aimed at raising employers' and trade unions' awareness of racial discrimination at work",⁸⁷ and for **Sweden**, where the "authorities [should] step up their efforts to combat employers' prejudices and the resulting discrimination, particularly in access to employment".⁸⁸

In its report on Sweden, ECRI further recommended that "the Swedish authorities amend Chapter 6, section 2, paragraph 3 of the Discrimination Act to put on an equal footing all persons qualified to provide legal assistance to victims of discrimination and represent them, in particular by removing the requirement for victims of workplace discrimination belonging to an employees' organisation to consult this organisation first, to the exclusion of other possible defenders".⁸⁹

The **French** Defender of Rights notes that discrimination on the ground of ethnic origin in employment occurs most often during the recruitment of staff with indefinite contracts or within the framework of career development, remuneration and promotion exercises.⁹⁰

It also co-published the results of the fifth survey on discrimination in employment with the International Labour Organization. The survey results showed that 16 % of employees in the private sector and 9 % of civil servants reported experiences of ethnic discrimination, while 35 % of private sector employees and 26 % of civil servants reported having witnessed ethnic discrimination at work.⁹¹

The Expert Council of **German** Foundations on Integration and Migration (*Sachverständigenrat deutscher Stiftungen für Integration und Migration*) conducted a survey published by the German Federal Anti-discrimination Agency (*Antidiskriminierungsstelle des Bundes*) in July 2012. The survey findings show that about one in two migrants interviewed said they had experienced discrimination in everyday life. Most migrants said they had experienced unequal treatment on the labour market (10 %), when searching for housing (9.4 %) and in the area of education (6.5 %).⁹²

The **Spanish** Equality Body issued its *Annual Study on discrimination based on racial or ethnic origin: the perception of the potential victims 2011*, whose findings reveal that ethnic minorities perceive that they experience the highest rate of discrimination in the area of employment, with 46.7 % of those surveyed saying they had experienced discrimination on ethnic or racial grounds.⁹³

⁷⁹ Germany, Open Society Justice Initiative (2012), p. 2.

⁸⁰ UN, CERD (2012b), p. 7.

⁸¹ Denmark, DIHR (2012), pp. 10–13.

⁸² France, CSA Institute (2012).

⁸³ Council of Europe, ECRI (2012c), p. 21.

⁸⁴ Council of Europe, ECRI (2012a), p. 31.

⁸⁵ Denmark, DIHR (2012), p. 1.

⁸⁶ Council of Europe, ECRI (2012b), p. 24.

⁸⁷ Council of Europe, ECRI (2012c), p. 21.

⁸⁸ Council of Europe, ECRI (2012a), p. 31.

⁸⁹ *Ibid.*, p. 21.

⁹⁰ France, Defender of Rights (2012).

⁹¹ France, CSA Institute (2012).

⁹² Germany, Expert Council of German Foundations on Integration and Migration (2012), p. 12.

⁹³ Spain, Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin (2012b), p. 45.



Promising practice

Racial discrimination: achieving change through cooperation

The European Commission funded a project to increase awareness of racial discrimination and promote a more active role for cities in reducing it. The project, *Discrimination in Cities: Achieving Change through Cooperation*, was implemented in eight cities in Italy and Germany to promote awareness, information sharing and dialogue amongst local stakeholders and authorities within and between cities.

The project, co-funded by the European Commission's Fundamental Rights and Citizenship Programme, specifically worked to: stimulate awareness and increase sensibility towards discrimination amongst local authorities and social partners; establish a national dialogue involving local authorities, social partners and potential subjects of discrimination in each partner country; establish a cross-national dialogue and working relationship between local authorities and social partners in partner countries; and improve medium-sized cities' capacity to develop and implement anti-discrimination and pro-inclusion policies.

The project ran from January 2010 to October 2012.

For more information, see: www.di-ci.eu/index.php/en/project/dici-project

The Belgian Federation of Human Resource Service Providers (Federgon) reports that 29 % of temporary employment offices still accept employment requests from customers that are discriminatory towards migrants.⁹⁴ The national equality body in **Belgium** reports similar figures, with 29 % of temporary employment offices monitored found to discriminate against migrants.⁹⁵

As highlighted in previous FRA Annual reports, discrimination testing is a useful means of countering ethnic discrimination in the field of employment. Discrimination tests were conducted in **Finland, Germany, the Netherlands** and in **Croatia**, with similar results.

The Ministry of Employment and Entrepreneurship in Finland thus presented findings of the first Finnish experiment on discrimination in recruitment on the grounds of ethnicity and sex when applying for semi-skilled office, restaurant, driver or construction jobs using

this method.⁹⁶ The results show that Russian-named job seekers needed to send twice as many applications as Finnish-named applicants before being invited for a job interview.

Similarly, the findings of a study in Zagreb, **Croatia**, showed discrimination on the labour market against job applicants of Serbian origin. Candidates with Serbian-sounding names and surnames had fewer chances for a positive outcome in the first round of selection than equivalent Croatian candidates.⁹⁷

Likewise, the **Netherlands** Institute for Social Research (*Sociaal en Cultureel Planbureau*, SCP) conducted a situation test and found that native Dutch applicants had a 46 % chance of receiving a job offer, while those with an immigrant background had just a 28 % chance.⁹⁸

Another method of discrimination testing in the field of employment uses curriculum vitae (CVs) with the applicants' names withheld to veil their presumed ethnic or national origins. The **German** Federal Anti-discrimination Agency presented the results of an evaluation study on a nationwide pilot project of testing anonymous job applications. The pilot project filed 8,550 anonymous job applications. Different companies, state agencies and municipalities implemented this method for a 12-month period. Using anonymous CVs had an anti-discriminatory impact on the first selection of applicants, with women and migrants in particular more likely to be invited to interviews if they applied anonymously.⁹⁹

6.5. The situation of Roma populations in the EU

The situation of Roma in EU Member States continues to be a cause of concern as Roma are often the victims of discrimination and social exclusion, live in deep poverty and lack access to healthcare and decent housing. This is confirmed by the findings of two combined household surveys conducted by FRA and the United Nations Development Programme (UNDP) – in association with the World Bank and with funding from the European Commission – on the situation of Roma populations in 2011, hereafter referred to as FRA/UNDP surveys. In total, 22,203 persons who self-identify as Roma and non-Roma persons living in close proximity to Roma populations were interviewed in **Bulgaria, the Czech Republic, France, Greece, Hungary, Italy, Poland, Portugal, Romania, Slovakia** and **Spain**, covering 84,287 household members.¹⁰⁰

⁹⁶ Larja, L. et al. (2012).

⁹⁷ Seršić, D.M. and Vukelić, A. (2012), pp. 31–59.

⁹⁸ Andriessen, I. et al. (2012).

⁹⁹ Germany, Anti-discrimination Agency (2012).

¹⁰⁰ For more information, see FRA's thematic page on Roma people: <http://fra.europa.eu/en/theme/roma>.

⁹⁴ Belgium, Department of Work and Social Economics (2012); see also: De Standaard (2012).

⁹⁵ Belgium, CEOOR (2012).

The FRA/UNDP surveys show that one in three Roma are unemployed, 20 % are not covered by health insurance, 90 % are at risk of poverty and about half had experienced discrimination in the past 12 months because of their Roma background.¹⁰¹

The special 2012 Eurobarometer on discrimination in the EU confirmed these findings, with three out of four Europeans viewing Roma as a group at risk of discrimination. All different groups of Europeans as well as an absolute majority in most EU Member States share this view.¹⁰²

The use of the term 'Roma' in this annual report follows the approach of the Council of Europe, which uses the term to refer to "Roma, Sinti, Kale and related groups in Europe, including Travellers and the Eastern groups (Dom and Lom), and covers the wide diversity of the groups concerned, including persons who identify themselves as Gypsies".¹⁰³

In May 2012, the European Commission, with its *Communication on Roma Integration Strategies: a first step in the implementation of the EU Framework*, called on EU Member States to implement their national strategies to improve the economic and social integration of Roma.¹⁰⁴ The Member States developed these strategies in response to the Commission's EU Framework for national Roma integration strategies adopted on 5 April 2011, which the Council of the European Union endorsed soon afterwards.

By March 2012, all EU Member States had presented a National Roma Integration Strategy or a corresponding set of policy measures within their broader social inclusion policies. The European Commission's assessment focused on evaluating the Member States' approaches to the four key areas of healthcare, housing, education and employment, and on how structural requirements (cooperation with civil society, with regional and local authorities, monitoring, anti-discrimination and establishment of a national contact point) as well as funding were addressed.

The European Commission assessment concluded that despite EU Member States' efforts to develop a comprehensive approach to Roma integration, much more needs to be done when it comes to securing sufficient funding for Roma inclusion, putting monitoring mechanisms in place and fighting discrimination and segregation. The European Commission stressed in particular that the "socio-economic inclusion of Roma remains

first and foremost the responsibility of the Member States and they will need stronger efforts to live up to their responsibilities, by adopting more concrete measures, explicit targets for measurable deliverables, clearly earmarked funding at national level and a sound national monitoring and evaluation system".¹⁰⁵

The European Commission's assessment chimes with the findings of the special Eurobarometer on discrimination, which show that national efforts for the integration of the Roma population are seen as less effective than efforts to fight discrimination in general; 45 % of Europeans think that efforts to integrate Roma are ineffective, against 31 % for efforts to fight discrimination in general.¹⁰⁶

In addition, this survey reveals that the majority of Europeans (53 %) believe that their society could benefit from better Roma integration. This view is stronger for 71 % of Europeans with Roma friends or acquaintances than for 49 % of Europeans without Roma friends or acquaintances.¹⁰⁷

6.5.1. Discrimination against Roma populations in healthcare

The European Commission noted that "some Member States included measures to reduce health inequalities between the Roma and non-Roma population involving a range of preventive actions which go beyond those highlighted in the EU Framework. However, only a few Member States defined a comprehensive approach to improve the health of Roma," in its assessment on the national Roma integration strategies.¹⁰⁸

The findings of the FRA/UNDP surveys show that one out of three Roma respondents aged 35 to 54 report health problems limiting their daily activities and on average, about 20 % of Roma respondents are not covered by medical insurance or do not know if they are covered.¹⁰⁹

Other evidence confirms that members of Roma populations experience discrimination in healthcare, as survey research conducted in **Romania**¹¹⁰ and **Spain**¹¹¹ reveals. The results concerning Romania show that among 607 adults aged 18 and over who self-identified as Roma, 32 % reported having experienced discrimination when accessing medical care in case of sickness, need of treatment or surgery in the 12 months preceding

¹⁰¹ FRA/UNDP (2012).

¹⁰² European Commission (2012a), p. 8.

¹⁰³ See Council of Europe, Descriptive glossary of terms relating to Roma issues, version dated 12 May 2012, available at: <http://hub.coe.int/web/coe-portal/roma/>.

¹⁰⁴ European Commission (2012b).

¹⁰⁵ European Commission (2012b), p. 12.

¹⁰⁶ European Commission (2012a), p. 8.

¹⁰⁷ *Ibid.*, p. 22.

¹⁰⁸ European Commission (2012b), p. 8.

¹⁰⁹ FRA/UNDP (2012), p. 16.

¹¹⁰ Romani CRIS and TOTEM Communications (2011).

¹¹¹ *Fundación Secretariado Gitano* (2012).



the survey, and 27 % reported having experienced discrimination when accessing emergency healthcare.

The results from Spain show that among 1,497 Roma Spanish nationals and 361 Eastern European Roma from Romania and Bulgaria, aged 16 and over, 53.9 % of the Spanish Roma and 33.9 % of the Eastern European Roma respondents perceived that they had been discriminated against in health centres and hospitals in the 12 months preceding the survey.

The European Committee of Social Rights (ECSR) found in the *Médecins du Monde - International v. France* case that the national authorities had failed to: provide access to health-care for migrant Roma, in spite of their residence status, provide information, awareness-raising, counselling and screening on health issues, take measures for the prevention of diseases and accidents, provide medical assistance for migrant Roma lawfully resident or working regularly in France, and provide emergency medical assistance to migrant Roma not residing lawfully or not working regularly in France.¹¹² The ECSR unanimously found that this amounted to violations of Article 11 (right to protection of health) and Article 13 (right to social and medical assistance) in conjunction with Article E, non-discrimination clause, of the Revised European Social Charter.

The forced sterilisation of Roma women is a particularly grave issue. The European Court of Human Rights (ECtHR) ruled in two such cases concerning **Slovakia** in 2012, finding that the involuntary sterilisation of Roma women is a major human rights violation.¹¹³ In both cases, the forced sterilisation occurred between 1999 and 2002. Although the ECtHR found that Article 14 on non-discrimination raised no separate issues in either of these cases and that it did not therefore examine the state's compliance with its duty to investigate whether the applicants' sterilisation were racially motivated, the ECtHR did find that sterilisation without full and informed prior consent violated the applicants' right to be free from inhuman and degrading treatment (Article 3) and their right to respect for private and family life (Article 8).

Not long before the ECtHR ruled in these cases, the Slovak Government Council for Human Rights, National Minorities and Gender Equality adopted Resolution No. 37 on reported cases involving unlawful sterilisations of women. This resolution recommended that the government, among other steps, charge the Ministry of Healthcare with drafting a regulation on

creating conditions that guarantee informed consent to sterilisation on the part of the women concerned, in line with guidelines adopted by the International Federation of Obstetrics and Gynaecology in 2011 on the performance of contraceptive sterilisation.¹¹⁴

6.5.2. Discrimination against Roma populations in housing

Roma populations in the EU face inadequate standards of living, as the FRA/UNDP surveys show. About 45 % of the Roma surveyed live in households that lack at least one of the following basic housing amenities: indoor kitchen, indoor toilet, indoor shower or bath and electricity.¹¹⁵

Similarly, reports of human rights monitoring bodies and other organisations concerning **Hungary**,¹¹⁶ **Italy**,¹¹⁷ **Lithuania**,¹¹⁸ **Portugal**¹¹⁹ and **Slovakia**¹²⁰ show that Roma remain at risk of discrimination in housing and spatial segregation.

The Roma in **Lithuania** "continue to suffer from discrimination, poverty, low educational attainment, large-scale unemployment, and inadequate standards of living, in particular as regards housing," according to the UN Human Rights Committee.¹²¹

Similar concerns have been raised for **Portugal**, where public housing policies have failed to address the spatial segregation affecting many Roma, because of a lack of targeted measures to promote their access to mainstream social housing and because local authorities have taken steps that are not in line with international and European standards relating to the right to adequate housing, as the Commissioner for Human Rights of the Council of Europe notes.¹²²

Likewise, CERD encourages **Italy** "to intensify efforts to avoid residential segregation of Roma and Sinti communities, both citizens and non-citizens, and to develop social housing programmes for them".¹²³

¹¹⁴ Slovakia, Government office (2012).

¹¹⁵ FRA/UNDP (2012), p. 16.

¹¹⁶ Habitat for Humanity Hungary (2012).

¹¹⁷ UN, CERD (2012b), p. 4.

¹¹⁸ UN, Human Rights Committee (2012), p. 2.

¹¹⁹ Council of Europe, Commissioner for Human Rights (2012a).

¹²⁰ World Bank (2012), pp. 31–32.

¹²¹ UN, Human Rights Committee (2012), p. 2.

¹²² Council of Europe, Commissioner for Human Rights (2012a).

¹²³ UN, CERD (2012b), p. 4.

¹¹² Council of Europe, European Committee of Social Rights (2012b).

¹¹³ ECtHR, *N.B. v. Slovakia*, No. 29518/10, 12 June 2012; ECtHR, *I.G. and Others. v. Slovakia*, No. 15966/04, 13 November 2012. See also: ECtHR, *V.C. v. Slovakia*, No. 18968/07, 8 November 2011.

“If consumers are normally provided with free electricity meters which are installed in or on buildings, such that they are accessible for visual checks, whilst in districts inhabited primarily by people belonging to the Roma community such electricity meters are attached to electricity poles at an inaccessible height of 7 m, there is a prima facie case of indirect discrimination based on ethnic origin within the meaning of Article 2 (2) (b) in conjunction with Article 8 (1) of Directive 2000/43.”

Opinion of Advocate General Juliane Kokott in C-394/11, Valeri Hariev Belov v. ChEZ Elektro Balgaria AD and ChEZ Raspredelenie Balgaria AD

The French Constitutional Council held that several provisions of Law No. 69-3 of 3 January 1969 on the exercise of ambulatory activities and the arrangements applicable to persons travelling in **France** without a fixed abode or residence¹²⁴ did not comply with constitutional principles. Although the Constitutional Council found that the requirement for circulation permits (*titres de circulation*) for *gens do voyage* was not discriminatory, it did rule that several other provisions of the law breached the constitution, including requirements for: proof of regular income to guarantee normal living conditions; three-monthly validation of circulation documents; and three years of uninterrupted association with the same municipality to enable registration on the electoral list. The Constitutional Council also found a prison sentence foreseen for *gens do voyage* circulating without a circulation booklet to be in breach of the constitution.

The European Committee of Social Rights (ECSR) found in *International Federation of Human Rights (FIDH) v. Belgium* that the national authorities had failed to: rectify the lack of sites for Travellers; address problems stemming from non-recognition of caravans as homes; respect required conditions when carrying out evictions; and, undertake a global and coordinated policy to combat poverty and social exclusion of Travellers.¹²⁵ The ECSR unanimously found that this amounted to violations of Article 16 (right of the family to social, legal and economic protection) and Article 30 (right to protection against poverty and social exclusion) in conjunction with Article E, non-discrimination clause, of the Revised European Social Charter.

Roma populations continue to face forced evictions, the dismantling of settlements and repatriation, as was the case in **Bulgaria**, the **Czech Republic**, **France**, **Italy**, **Romania** and **Slovakia**. In a landmark ruling, the ECtHR held in *Yordanova and Others v. Bulgaria*¹²⁶ that any future forced evictions of Roma would violate Article 8, the right to private and family life. The case concerned

the authorities' plan to evict Roma from a settlement situated on municipal land in Sofia. The applicants were 23 Bulgarian nationals of Roma origin who arrived and settled on this land in the 1960s and 1970s. The ECtHR found that, as they had lived there in makeshift houses for many years with their families, these houses had become their homes, irrespective of whether they occupied them lawfully or not. Expelling the applicants from their settlement and community would therefore negatively affect their private and family lives.

The ECtHR emphasised that, in the context of Article 8 (right to private and family life), the national authorities must consider the Roma's status as a socially disadvantaged group and their particular needs in the proportionality assessment they are obliged to undertake, but which had not been conducted. The ECtHR held, unanimously, that in the event of any future enforcement of the removal order against the applicants, there would be a violation of Article 8 of the ECHR. In the context of the execution of the judgment in the case of *Yordanova*, the Bulgarian authorities informed that the removal order was still suspended and that the competent domestic authorities were looking for suitable alternative accommodation for the persons concerned.

Forced evictions of Roma were reported in the **Bulgarian** municipalities of Maglizh¹²⁷ and Vratsa.¹²⁸ Forced evictions were also reported in the **Czech Republic**, where about 200 Roma inhabitants were moved from their homes in the locality of Přednádraží in Ostrava-Přívoz, in August 2012. Some of them were evicted even though they were paying rent regularly. The local authorities claimed that their households did not comply with hygienic standards. The Human Rights Commissioner in the Czech Republic criticised the municipal authorities for failing to fix the poor sewage system and thereby address the hygienic and sanitary conditions at the locality of Přednádraží by fixing the poor sewage system. The commissioner called on them to make alternative affordable housing solutions available for the evicted families.¹²⁹ Similarly, the European Roma Rights Centre (ERRC) reported forced evictions in **Slovakia** where Roma families were evicted under the pretext of environmental law.¹³⁰

The European Association for the Defense of Human Rights (AEDH) reports that 11,803 EU citizens who are Roma were forcefully evicted in **France** in 2012, up from 9,396 in 2011,¹³¹ and a number of settlements were dismantled.¹³² Forced evictions and the dismantling of settlements prompted a group of United

¹²⁴ France, Constitutional Council (2012).

¹²⁵ Council of Europe, European Committee of Social Rights (2012b).

¹²⁶ ECtHR, *Yordanova and Others v. Bulgaria*, No. 25446/06, 24 April 2012.

¹²⁷ Hristov, H. (2012).

¹²⁸ Medipol (2012).

¹²⁹ ROMEA.cz (2012).

¹³⁰ ERRC (2012a).

¹³¹ AEDH (2013); see also: ERRC (2012b).

¹³² Amnesty International (2012a).

Nations human rights experts to call on the French Government to ensure that its policies and practices conform in all respects to European and international human rights non-discrimination law.¹³³

The Secretary General of the Council of Europe also stressed that “simply moving Roma families around within or between states merely worsens their conditions and only comprehensive policies that ensure fair treatment and proper access to human rights will turn the situation around.”¹³⁴

The French government adopted a circular setting out the framework for state action when clearing (*évacuation*) illicit camps on 26 August 2012.¹³⁵ In September 2012, France and Romania signed a two-year agreement aiming at the reinsertion of 80 families of Romanian Roma in Romania.¹³⁶

The European Roma Rights Centre reported that **Italian** authorities also carried out forced evictions of Roma.¹³⁷ The Commissioner for Human Rights of the Council of Europe emphasised that “segregated camps and forced evictions are diametrically opposed to the text and spirit of the National Roma Inclusion Strategy” that was adopted in February 2012 and said that “the camp-based approach and the evictions associated with it were hallmarks of the ‘Nomad emergency’ policy, and should be overcome together with the corresponding Decree”.¹³⁸

Amnesty International, in its report *Unsafe foundations. Secure the right to housing in Romania* argues that **Romania** does not effectively respect, protect or fulfil the right to adequate housing for all its citizens, either in law or in practice. Marginalised communities, such as the Roma, frequently suffer systematic abuses of their right to housing, Amnesty International emphasised.¹³⁹ The forced eviction and relocation of about 300 Roma families to a disused chemical factory in Baia Mare serves as a telling example.¹⁴⁰ Twenty-two children and two adults had to be taken to hospital due to contact with toxic substances left in the buildings. “The relocation [of Roma] into the former chemical factory buildings is clearly not an adequate, alternative housing solution.”¹⁴¹

6.5.3. Discrimination against Roma populations in education

Despite the adoption of policies aimed at promoting Roma inclusion in education, Roma children are especially prone to experience segregation in education in several EU Member States. The segregation of Roma children in education can take several forms, with evidence showing that they can be over-represented in special remedial schools for children with intellectual and other disabilities as is the case, for example, in the **Czech Republic, Hungary, Romania or Slovakia**. Alternatively, they may be put in special classes or schools as is the case, for example, in **Austria, Finland, Greece, Latvia, Portugal or Spain**.

The Roma Education Fund reported on *Pitfalls and bias: entry testing and the overrepresentation of Romani children in special education* in the **Czech Republic, Hungary and Slovakia**.¹⁴² It found that Roma pupils are disproportionately present in special education in these EU Member States, accounting for a majority of pupils in practical schools in the Czech Republic; between 20 % and 90 % of children in special education in Hungary; and, approximately 60 % of children in special primary and secondary education in Slovakia.

Similarly, in a report on the ethnic composition of pupils of former special schools, the Public Defender of Rights in the **Czech Republic** found that “the ratio of Romany pupils to pupils of non-Romany origin in the schools monitored is wholly incommensurate in relation to the proportion of Romany people in Czech society. The proportion of Romany pupils at the ratio of 32 %, or 35 % in the schools monitored is proof of the persistent indirect discrimination against them in terms of access to education, despite the fact that the whole of the core sample was not surveyed, that is, all former special schools.”¹⁴³

In its decision of 6 December 2012, on the case of *D.H. and others v. the Czech Republic*, the Council of Europe Committee of Ministers’ Deputies noted “that according to the statistics presented in the consolidated action plan the overall percentage of Roma pupils educated in programmes for pupils with a ‘slight mental disability’ remains disproportionately high even if a slight decrease in this percentage is recorded.” The committee nevertheless acknowledged that a consolidated action plan was submitted and measures were proposed by the Czech authorities to “remove the possibility for pupils without a disability to be educated in a class for pupils with disabilities”.¹⁴⁴

¹³³ UN, Office High Commissioner for Human Rights (2012).

¹³⁴ Council of Europe (2012).

¹³⁵ France, Inter-ministerial circular on anticipation and accompanying of illegal camps evacuation, 26 August 2012.

¹³⁶ France, Ministry of Foreign Affairs (2012).

¹³⁷ ERRC (2012c).

¹³⁸ Council of Europe, Commissioner for Human Rights (2012b), p. 20.

¹³⁹ Amnesty International (2012b), p. 2.

¹⁴⁰ AEDH (2012).

¹⁴¹ Council of Europe, Commissioner for Human Rights (2012c).

¹⁴² Roma Education Fund (2012); see also: Czech Republic, Ombudsman (2012).

¹⁴³ Council of Europe, Secretariat of the Committee of Ministers (2012).

¹⁴⁴ Council of Europe, Committee of Ministers (2012).

As the Commissioner for Human Rights of the Council of Europe argues, “‘practical schools’ in the Czech Republic perpetuate segregation of Roma children, inequality and racism. They should be phased out and replaced by mainstream schools that need to be properly prepared to host and provide support to all pupils, irrespective of their ethnic origin”.¹⁴⁵

The Council of Europe Ad Hoc Committee of Experts on Roma Issues (CAHROM) endorsed two thematic reports on Roma education-related issues in May and November 2012 respectively. The first report on “inclusive education for Roma children as opposed to special schools” followed a thematic visit to the Czech Republic and Slovakia as requesting countries and Hungary, Slovenia and United Kingdom as partner countries concludes that: the system of ‘elementary practical schools’ should be radically downsized and children with special educational needs should in principle be enrolled in mainstream education, higher normative rules for socially excluded children should be defined by law; and external and internal monitoring regarding school enrolment of Roma children should be improved. The other report focused on school drop-out/ absenteeism of Roma children, following a thematic visit to the Netherlands as a requesting country and Hungary, Spain and Sweden as partner countries.¹⁴⁶

The **Hungarian** Commissioner for Fundamental Rights presented a report on the findings¹⁴⁷ of his investigation in a public school in *Jászapáti*, where pupils of Roma origin are taught in segregated classes because of supposed behavioural disorders. The Commissioner considered the practice direct discrimination and unlawful segregation, and asked the government to take measures to eliminate this kind of ethnic discrimination.¹⁴⁸

Research conducted in 23 schools located in four **Spanish** cities (Badajoz, Barcelona, Córdoba and Madrid) shows that although the Roma population in the 11 neighbourhoods covered by the research did not exceed 50 % of the inhabitants, Roma pupils in eight of the 23 schools that were part of the research made up over 80 % of the total number of pupils.¹⁴⁹

Reports from international and national human rights monitoring bodies also show that Roma children continue to be enrolled in special needs schools and segregated classes. In its concluding observations on **Austria**, CERD raised concerns about the “high dropout rates in schools among Roma students and children with a migration background”, as well as about the

“over-representation of Roma and non-citizen children in special needs schools.”¹⁵⁰ CERD nevertheless acknowledged Austria’s efforts to improve accessibility and the quality of education.

Similarly, CERD’s concluding observations on **Finland** state “that around 50 % of Roma children are enrolled in special education classes”.¹⁵¹ This is also the case for **Latvia**, where ECRI stresses that schools with separate classes for Roma remain and a large proportion of Roma children find themselves in special needs schools.¹⁵² Concerning **Portugal**, the Council of Europe Commissioner for Human Rights stressed that Roma pupils continued to be taught in separate classes.¹⁵³

The Advisory Committee on the Framework Convention for the protection of minorities, in its opinion on **Romania**, stated that “cases of Roma children being placed in schools for children with disabilities, in separate schools or in separate classrooms continue to be reported” and that a “number of decisions of the National Council for Combating Discrimination have found this conduct to be of a discriminatory nature.”¹⁵⁴

In its Chamber judgment in the case *Horváth and Kiss v. Hungary*, in January 2013, which was not final when this publication went to print, the ECtHR found that placing Roma children in schools for persons with intellectual disabilities was discriminatory.¹⁵⁵ The complaint concerned two young men of Roma origin who had been wrongly placed in schools for persons with mental disabilities and claimed that their being placed in such schools amounted to discrimination.

The ECtHR underlined the long history of wrongful placement of Roma children in special schools in Hungary. It found that the applicants’ schooling arrangement indicated that the authorities had failed to take into account their particular needs as members of a disadvantaged group. As a result, the applicants had been isolated and had received an education that made their integration into society at large difficult. The ECtHR held unanimously that the wrongful placement violated Article 2 of Protocol No. 1 (right to education) read in conjunction with Article 14 (prohibition of discrimination) of the ECHR.

In its Chamber judgment in the case of *Sampani and Others v. Greece*, in December 2012, which was not final by the beginning of May 2013, the ECtHR found

¹⁴⁵ Council of Europe, Commissioner for Human Rights (2012d).

¹⁴⁶ For more information on the work of CAHROM, see: <http://hub.coe.int/web/coe-portal/cahrom1>.

¹⁴⁷ Hungary, Commissioner for Fundamental Rights (2012).

¹⁴⁸ *Ibid.*

¹⁴⁹ Santiago, C. and Maya, O. (2012).

¹⁵⁰ UN, CERD (2012a), p. 7.

¹⁵¹ UN, CERD (2012c), p. 4.

¹⁵² Council of Europe, ECRI (2012), p. 8.

¹⁵³ Council of Europe, Commissioner for Human Rights (2012a).

¹⁵⁴ Council of Europe. Advisory Committee on the Framework Convention for the protection of minorities (2012), p. 8.

¹⁵⁵ ECtHR, *Horváth and Kiss v. Hungary*, No. 11146/11, 29 January 2013.



that authorities' failure to integrate Roma children into the ordinary education system amounted to discrimination against them.¹⁵⁶

The case concerned the provision of education for Roma children at the 12th primary school in Aspropyrgos, Greece. The complaint was brought by 140 Greek nationals of Roma origin belonging to 38 families who, at the time of the events, lived at the Psari residential site near Aspropyrgos. Some of them were also applicants in an earlier case that gave rise to the ECtHR's *Sampanis and Others v. Greece* judgment.¹⁵⁷

The applicants complained that they or their children had been enrolled at the 12th primary school, which was attended exclusively by children from their own community and provided a lower standard of education than other schools. The applicants also complained that the authorities had refused to abide by the *Sampanis and Others v. Greece* judgment delivered in 2008.

The ECtHR, noting the lack of significant change since the *Sampanis and Others v. Greece* judgment, found that Greece had not taken into account the particular needs of the Roma children of Psari as members of a disadvantaged group and that the operation between 2008 and 2010 of the 12th primary school in Aspropyrgos, which was attended solely by Roma pupils, had amounted to discrimination against the applicants. The ECtHR held unanimously that there had been a violation of Article 14 (prohibition of discrimination) of the ECHR in conjunction with Article 2 of Protocol No. 1 (right to education).

Under Article 46 (binding force and execution of judgments), the ECtHR recommended enrolling those applicants who were still of school age at another state school and those who had reached their majority at 'second chance schools' or adult education institutes that the Ministry of Education set up under the Lifelong Learning Programme.

Court proceedings in EU Member States illustrate the types of discrimination and segregation Roma pupils experience in education. In October 2012 the Prešov Regional Court,¹⁵⁸ Slovakia, confirmed a January 2012 district court verdict¹⁵⁹ of discrimination against Roma in the education system.¹⁶⁰

The court ruled that an elementary school in Šarišské Michaľany discriminated against Roma pupils by creating segregated classrooms on different floors for them. School representatives explained that they did not segregate children because of their ethnicity, but because they came from a socially disadvantaged environment. The majority of pupils classified in this way came from a nearby Roma settlement in Ostrovany.

The Office of the Government Plenipotentiary for Roma Communities described this practice as inappropriate, explaining that natural segregation, which occurs in places where only Roma children are born, differs from artificial segregation, where teachers separate children mainly because of their social and ethnic status.¹⁶¹ To combat segregation in schooling, the Slovak Ministry of Education issued guidelines, recommending schools eliminate segregationist practices for children from socially disadvantaged environments.¹⁶²

The Supreme Court in Hungary concluded in May 2012 that keeping an arrangement where children are segregated in a school setting, thereby affecting pupils with multiple disadvantages – such as a pupil with a Roma minority background and low socio-economic status – violates the principle of equal treatment.¹⁶³ The Supreme Court, however, repealed part of the revised sentence, which had obliged the defendant to take measures to eliminate the consequences of the unlawful practice.

In the United Kingdom, the Progress Report of the ministerial working group on tackling inequalities experienced by Gypsies and Travellers noted that: "there is considerable anecdotal evidence that bullying and prejudice against Gypsy, Roma and Traveller pupils are contributing to their poor attendance and behaviour – leading to disproportionately high levels of exclusion".¹⁶⁴

6.5.4. Discrimination against Roma populations in employment

Roma populations in the EU continue to face discrimination in access to employment, evidence from the FRA/UNDP surveys shows. The survey findings reveal that more than half of the Roma respondents looking for work reported that they experienced discrimination because of their Roma background in the 12 months preceding the survey. The survey findings also show that only 40 % of the Roma surveyed are aware of laws forbidding discrimination against ethnic minority people when applying for a job.¹⁶⁵

¹⁵⁶ ECtHR, *Sampani and Others v. Greece*, No. 59608/09, 11 December 2012.

¹⁵⁷ ECtHR, *Sampanis and Others v. Greece*, No. 32526/05, 5 June 2008.

¹⁵⁸ Slovakia, Prešov Regional Court No. 20, Co 125/2012, 30 October 2012.

¹⁵⁹ Slovakia, *Rozhodnutie Okresného súdu v. Prešove*, č. konania 25C 133/2010, 5 December 2011.

¹⁶⁰ *Ibid.*

¹⁶¹ The Slovak Spectator (2012).

¹⁶² Slovakia, Ministry of Education, Science and Sports (2012).

¹⁶³ Hungary, Supreme Court, Pfv.IV.20.068/2012/3.szám.

¹⁶⁴ United Kingdom, Department for Communities and Local Government (2012), p. 10.

¹⁶⁵ FRA/UNDP (2012), p. 12.

In September 2012, the World Bank launched its report on *Reducing vulnerability and promoting the self-employment of Roma in Eastern Europe through financial inclusion*.¹⁶⁶ The report shows that a substantial share of Roma adults reported that they had experienced discrimination because of their ethnicity over the last five years in all five countries covered by the survey: **Bulgaria, Czech Republic, Hungary, Romania and Slovakia**.

Discrimination occurred in various areas, ranging from education to healthcare, housing and the labour market, the report shows. With regards to the labour market, Roma respondents in Slovakia reported the highest levels of ethnic discrimination among job seekers (78 %), closely followed by the **Czech Republic** (73 %) and **Bulgaria** (55 %). In comparison, Roma respondents in **Hungary** (45 %) and **Romania** (30 %) reported the lowest levels of discrimination.¹⁶⁷

Similarly, a study on the situation of Roma in **Germany** argues that Sinti and Roma are systematically insulted as well as disadvantaged in the labour market. The study remarks that their often poorer situation in employment, healthcare and education stems from discrimination processes, exclusion and persecution.¹⁶⁸

The Commissioner for Human Rights of the Council of Europe highlights that Roma in a number of Member States are denied employment on discriminatory grounds, due to their ethnicity.¹⁶⁹

In its concluding observations on **Finland**, CERD expressed its concerns that the Roma continue to face discrimination in the enjoyment of social and economic and cultural rights, in particular in access to employment.¹⁷⁰ Similarly, the UN Committee on Economic, Social and Cultural Rights expressed its concerns that the Roma continue to suffer discrimination in employment in **Slovakia**.¹⁷¹

The Council of Europe Committee of Ministers stressed that despite efforts from **Italian** authorities, Roma and Sinti still face poverty, extreme hardship and discrimination on a daily basis in all social areas including employment.¹⁷²

Similarly, the Advisory Committee on the Framework Convention for the Protection of National Minorities notes that although **Spanish** authorities at national and

regional level have continued to implement comprehensive plans to promote equal opportunities for Roma, the data available indicate that a significant proportion of the Roma population continues to face important disadvantages in all social areas including employment.¹⁷³

ECRI's report on **Sweden** echoes this finding, stressing that, "according to civil society, Roma continue to be particularly vulnerable to discrimination in access to employment."¹⁷⁴

Outlook

The review of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law foreseen under its Article 10 by the end of November 2013 will provide an opportunity to assess the performance of EU Member States in combating racism and xenophobia.

The European Commission's report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (*Racial Equality Directive*) is expected for autumn 2013 and will provide an opportunity to assess the policies and legal measures EU Member States have taken to combat ethnic and racial discrimination.

The deterioration of the situation in Greece and the scape-goating of migrant and minority populations that accompanied it must serve as a warning signal to EU institutions and other EU Member States to actively counter the mainstreaming of extremist ideology in a timely, decisive and effective fashion.

EU Member States' adoption of National Roma Integration Strategies begins a process that will continue and be monitored until at least 2020. When implementing these strategies, Member States will identify specific measures to implement their strategies, develop projects and actions, establish clear timetables and allocate appropriate funding to ensure their success and the better inclusion of Roma in EU society. To achieve significant progress in the near future, Member States shall ensure that regional and local integration policies focus on Roma in a clear and specific way, and address the needs of Roma with explicit but not exclusive measures to prevent and compensate for the disadvantages they face.

¹⁶⁶ World Bank (2012b).

¹⁶⁷ *Ibid.*

¹⁶⁸ End, M. (2012); Ataman, F. (2012); and Spiegel (2012).

¹⁶⁹ Council of Europe, Commissioner of Human Rights (2012e).

¹⁷⁰ UN, CERD (2012c).

¹⁷¹ UN, Committee on Economic, Social and Cultural Rights (2012b).

¹⁷² Council of Europe, Committee of Ministers (2012b).

¹⁷³ Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities (2012), p. 7.

¹⁷⁴ Council of Europe, ECRI (2012a), p. 31.



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Participation of EU citizens in the
Union's democratic functioning

Citizens' rights

Citizens' rights

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UN & CoE

January

February

March

April

22 May – European Court of Human Rights (ECtHR) concludes in *Scoppola v. Italy* that the loss of voting rights in Italy after a criminal conviction is compliant with the European Convention on Human Rights

May

June

2–3 July – Council of Europe Venice Commission organises a conference on The European electoral heritage: ten years of the code of good practice in electoral matters

July

August

26–27 September – United Nations Committee on the rights of persons with disabilities adopts its concluding observations on Hungary, which include recommendations on the right to vote for persons with disabilities

September

3 October – Council of Europe Parliamentary Assembly (PACE) adopts a Resolution on ensuring greater democracy in elections

3 October – PACE adopts a Resolution on political parties and women's political representation

October

November

10 December – United Nations High Commissioner for Human Rights designates 'Inclusion and the right to participate in public life' as the theme for International Human Rights Day 2012

December

EU

January

February

9 March – European Commission publishes its *Report on the application of Directive 94/80/EC on the right to vote and to stand as candidates in municipal elections by citizens of the Union residing in a Member State of which they are not nationals*

13 March – European Parliament adopts a Resolution on women in political decision-making – quality and equality

29 March – European Parliament adopts a Resolution on the EU citizenship report 2010: Dismantling the obstacles to EU citizens' rights

March

1 April – Start of the application of the European citizens' initiative

April

9 May – First registered European citizens' initiative: 'Fraternité 2020 – Mobility. Progress. Europe'

10 May – European Commission publishes a study on *Participatory Citizenship in the European Union*

May

June

July

August

9 September – European Commission closes the consultation on EU citizens and their rights as Europeans

September

October

21 November – European Parliament and Council of the European Union issue a decision on the European Year of Citizens (2013)

22 November – European Parliament adopts a Resolution on the elections to the European Parliament in 2014

28 November – Committee of the Regions organises a forum on regions and cities ready for the European Year 2013: citizens' agenda going local

November

3–4 December – European Day of Persons with Disabilities Conference focuses on the active participation of persons with disabilities in different areas of public life

20 December – Council of the European Union adopts a directive on the right to vote and stand as candidates in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (2013/1/EU, replacing 93/109/EC of 6 December 1993)

December

7

Participation of EU citizens in the Union's democratic functioning



In 2012, the European Parliament and the Council of the European Union prepared for the 2014 European Parliament elections. They adopted a European Commission proposal to amend European Union (EU) law governing the participation of non-national Union citizens in European Parliament elections. The European Commission assessed the implementation of EU citizens' electoral rights at municipal level. Enhanced participation and the identification of difficulties in effectively participating in civic and political life were issues discussed ahead of the European Year of Citizens 2013. Several citizens' groups embraced the European Citizens' Initiative, a new tool of participatory democracy at EU level, with the European Commission registering a number of initiatives after the 1 April 2012 start date. EU Member States also undertook reforms to make elections more accessible for persons with disabilities, thereby acknowledging the importance of the standards set by the United Nations Convention on the Rights of Persons with Disabilities.

In their decision to make 2013 the European Year of Citizens, the European Parliament and the Council of the European Union wanted to celebrate the 20th anniversary of EU citizenship, a concept introduced by the Maastricht Treaty.¹ EU citizenship is conferred automatically on any national of an EU Member State in addition to national citizenship.²

Participation of EU citizens in the EU's democratic functioning, including voting rights and limitations, as well as the right to engage in participatory democracy, are rights and responsibilities attached to EU citizenship. This chapter addresses these rights in turn.

7.1. Voting rights in the EU

7.1.1. The implication of EU citizens' right to vote

Articles 20 (2) (b) and 22 of the Treaty on the Functioning of the European Union (TFEU), as well as Articles 39 (1)

Key developments in the area of participation of EU citizens in the Union's democratic functioning

- The European Citizens' Initiative takes effect on 1 April 2012 and provides the basis for participatory democracy at EU level. The European Commission registers 12 such initiatives in 2012.
- Preparations for the European Year of Citizens 2013 prompt discussions and consultations on the future of citizens' participation in EU decision-making processes.
- The European Parliament and the Council of the European Union discuss reforming electoral rules to facilitate non-national EU citizens' participation in European Parliament elections.
- Various EU Member States take steps to facilitate the participation of persons with disabilities in elections in line with the UN Convention on the Rights of Persons with Disabilities (CRPD).
- EU Member States generally continue to link the loss of voting rights to the loss of legal capacity for persons with psycho-social disabilities and persons with intellectual disabilities.

¹ Decision No. 1093/2012/EU of the European Parliament and the Council, OJ 2012 L 325/1; for more information, see: <http://europa.eu/citizens-2013/>.

² European Commission (2012a).

and 40 of the European Union Charter of Fundamental Rights confer on EU citizens, wherever they reside in the EU, the rights to vote in and to stand as candidates for EU parliamentary and municipal elections.

Ahead of 2013, the Year of Citizens, which celebrates and commemorates 20 years of EU citizenship and the rights deriving from it, the European Commission launched a broad EU-wide consultation on EU citizens, Your rights, Your future.³ The consultation will contribute to a second EU citizenship report to be published in 2013,⁴ following an initial report in 2010.⁵

The consultation was open to the public, with responses welcomed from all citizens and organisations concerned with developing EU citizenship.⁶ Around 12,000 people took part, informing the European Commission about obstacles they had encountered when exercising their rights as EU citizens, in particular their voting rights in municipal and European Parliament elections.⁷

“The European Parliament elections in 2014 are an occasion for a broad debate: should we move towards a full-fledged political union? Can we do it with all Member States or just with euro area countries? European political parties should develop their visions and propose candidates to become the next President of the Commission.”

Vice-President Viviane Reding, speech on a New Deal for Europe, 14 March 2012

In 2012, efforts were made to reform the European Parliament electoral system before the 2014 elections. On 2 February 2012, the European Parliament Committee on Constitutional Affairs (AFCO) adopted a second report on a proposal for a wide-reaching reform of the act concerning electing members of the European Parliament by direct universal suffrage of 20 September 1976.⁸ Due to a lack of political support across the parties represented in the European Parliament, however, the debate in plenary was delayed.⁹

The European Parliament adopted in November 2012, by a wide majority, a non-binding resolution on the 2014 elections to the European Parliament.¹⁰ The resolution calls on political parties to nominate candidates for the presidency of the European Commission and expresses the hope that members of the future commission would be elected Members of the European Parliament. The

resolution furthermore suggests holding the European elections in May 2014, instead of June, to ensure that the new commission can take office on 1 November 2014.

The Council of the European Union adopted on 20 December 2012 a Directive amending Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals.¹¹ These amendments are not as far reaching as the European Parliament had originally hoped. They do not allow, in particular, for a candidate to stand for election in more than one constituency, or in other words, in more than one EU Member State, during the same election.¹²

The amendments alleviate some of the burden placed on national authorities and non-national EU citizens who wish to stand as candidates for the European Parliament in an EU Member State other than their own. The amending directive simplifies the procedure for candidacy. These citizens must simply declare that they are not deprived of the right to stand in European elections in their home Member State. The Member State of residence must notify the home Member State about this declaration.

Prior to these amendments, potential candidates had to provide an affidavit certifying their right to stand in EU elections from their home Member State. This procedure proved to be a barrier and helped keep the number of such candidates low.

A 2012 European Commission report highlights how important it is for every citizen to participate in the democratic life of the EU. This is particularly true “at local level where the decisions taken directly affect citizens”.¹³

According to this report, at the end of 2010, more than eight million EU citizens of voting age resided in an EU Member State other than their own.¹⁴ This figure has significantly increased, also thanks to EU enlargement, since the first report on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections was published in 2002.¹⁵ In **Italy**, for example, the number of non-national EU citizens of voting age increased to 1,050,000 from 56,000; in **Germany** to 2,239,641 from 1,521,000; in **Greece** to 114,377 from 16,000; in **Ireland** to 247,980

3 European Commission (2012b).

4 Decision No. 1093/2012/EU of the European Parliament and the Council, OJ 2012 L 325/1, Recital 20.

5 European Commission (2010).

6 For more on the consultation, see: http://ec.europa.eu/justice/newsroom/citizen/opinion/120509_en.htm.

7 Nemitz, P. (2012).

8 European Parliament (2009); see also: www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=580688. See also FRA (2012), p. 184.

9 The new federalist.eu (2012).

10 European Parliament (2012a).

11 Council Directive 2013/1/EU, OJ 2013 L 26/27; see also Council of the European Union (2012); and European Parliament (2012b), para. 40.

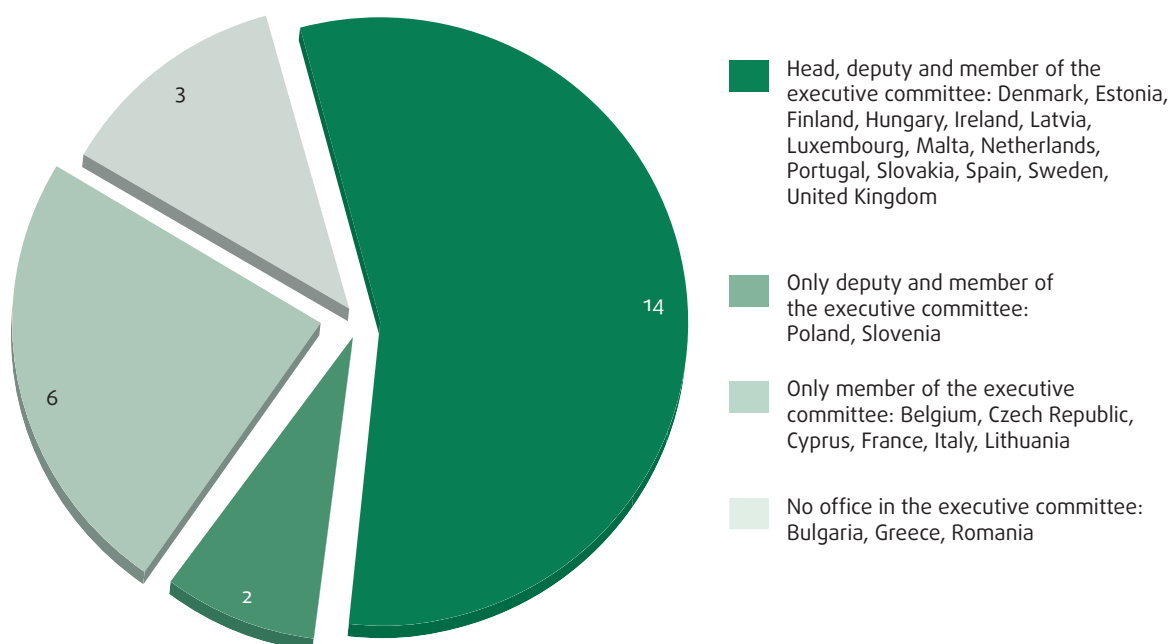
12 European Parliament (2012c).

13 European Commission (2012c), p. 3.

14 *Ibid.*, p. 6.

15 European Commission (2002).



Figure 7.1: Offices which non-national EU citizens may hold in local government units

Note: *Austria and Germany are federal republics; provisions differ by state.

Source: Data extracted from the European Commission (2012), Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals, COM(2012) 99 final, Brussels, 9 March 2012, p. 10, as updated by FRA, 2013

from 76,000; in **Denmark** to 108,806 from 32,000; and in **Portugal** to 94,157 from 26,000.¹⁶

Only around 10 %, however, take advantage of the right to vote in their country of residence.¹⁷ In **Bulgaria**, for example, of the 8,500 non-national EU citizens Eurostat said were living in Bulgaria in 2011,¹⁸ only 248 asked to be registered for the October 2011 municipal elections and only five ran as candidates.¹⁹

The 2012 European Commission report found that the transposition of Directive 94/80/EC was broadly satisfactory. Non-national EU citizens nevertheless still faced some obstacles when exercising their right to vote in municipal elections, such as a minimum period of residency requirement or tighter deadlines to submit registration applications than nationals.²⁰

EU Member States vary in how they apply Article 5 (3) of Directive 94/80/EC, which makes it possible to restrict the offices into which non-national EU citizens can be elected. Figure 7.1 illustrates the situation.

In many EU Member States, namely **Denmark, Estonia, Finland, Hungary, Ireland, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Spain, Sweden** and the **United Kingdom**, nothing prevents non-national EU citizens from running for or being nominated to the position of mayor. Other Member States reserve all or some executive positions for nationals. **Poland** and **Slovenia** reserve the post of head of local administration for nationals.

In **Belgium, Cyprus, the Czech Republic, France, Italy** and **Lithuania**, non-national EU citizens may become members of the executive committee but they may not hold the post of deputy head of the local administration.

Bulgaria, Greece and **Romania** apply all the restrictions of Article 5 (3) of Directive 94/80/EC: non-national EU citizens cannot be members of executive committees.²¹ The European Commission is of the opinion that a less restrictive approach would better support the integration of non-national EU citizens and their direct involvement in the EU Member State of residence.²²

Data collection on non-national EU citizens' participation differs by Member State. In the **Czech Republic**, for

¹⁶ European Commission (2012c), p. 6.

¹⁷ *Ibid.*, p. 7.

¹⁸ Eurostat (2012).

¹⁹ Bulgaria (2011).

²⁰ European Commission (2012c), p. 8.

²¹ *Ibid.*, p. 10.

²² *Ibid.*, p. 11.

example, ahead of the 12–13 October 2012 municipal elections, no data on the participation of non-national EU citizens were collected. In other Member States, statistical offices collect and provide aggregated data (**Belgium**²³ and **Finland**²⁴) on non-national EU citizens' participation.

In all EU Member States, the lack of data makes it difficult to assess the actual participation of non-national EU citizens. While more data would be useful, it is understandable that public authorities in EU Member States are reluctant to collect such data as it would require them to single out non-national EU citizens during an election.²⁵ During municipal elections in Innsbruck (**Austria**) on 15 April 2012, for example, 9,633 non-national EU citizens were registered to vote but no information is available on how many actually voted.²⁶ Similarly, out of the 12,000 non-national EU citizens living in Burgenland (Austria), 3,000 registered to vote for the 7 October 2012 municipal elections but no data are available on how many actually voted.

In **Belgium**, the ratio of registered non-EU national citizens was 18.5 % ahead of the municipal election of October 2012 (653,958 potential and 120,826 registered voters).²⁷ Similarly, in **Cyprus**, during the December 2011 municipal and local elections, 12,333 non-national EU citizens were registered, 61 stood for office and nine were elected, of which two were Greek nationals and seven British nationals. However, no data are available on the number of non-national EU citizens that actually voted.

In **Finland**, 61,617 non-national EU citizens had the right to vote in the 28 October 2012 municipal elections and 143 stood as candidates.²⁸ In **Malta**, some 1,300 were registered to vote in the 10 March 2012 local council elections, but again no information is available on how many actually voted.²⁹

An **Italian** Council of State decision clarified the deadline for registration on electoral lists for EU citizens.³⁰ All eligible Italian citizens automatically have their names inserted on the electoral lists of electors prepared by the Electoral Office (*Ufficio Elettorale*), while non-national EU citizens must register on a special voters' list within five days of the official election announcement. The

Council of State confirmed that this is mandatory and that the five-day deadline cannot be prolonged. Given the short time frame, the Ministry of Interior called on mayors to directly inform non-national EU citizens who are not on the electoral lists.³¹

In response to criticisms related to the residence requirement mentioned in the 2012 European Commission report, the **Lithuanian** government amended the Law on Elections to Local Government Councils by removing the five-year minimum residence requirement for non-national EU citizens.³²

The **Slovenian** government also accepted the European Commission remarks on the compatibility of its domestic legislation on local elections with EU law and amended the local election act by lifting the current five-year minimum residence requirement for non-national EU citizens.³³ The amendments increased the number of non-national EU citizens allowed to vote to more than 8,200 from around 1,200.

The European Commission report also refers to the **Czech Republic, Germany, Greece, Latvia, Lithuania, Poland, Slovakia and Spain**, which limit the right of non-national EU citizens to become members of, or found, a political party.³⁴ The amendment to the **Finnish** Act on Political Parties, which entered into force on 1 September 2012, lifted previous limitations affecting non-national EU citizens' right to found a party.³⁵

7.1.2. The right to vote: national-level trends

EU Member States draw up electoral procedures governing the various elections at local, regional, national or even EU level; EU law does not determine them. Such procedural rules, even if not specific to EU citizens, still have an impact on the conditions under which EU citizens exercise their right to participate in local and European elections.

23 Belgium, Directorate General of Institutions and Population (2012).

24 See: Statistics Finland at: www.stat.fi/til/kvaa/index_en.html.

25 European Commission (2012c), p. 7.

26 Austria, City of Innsbruck (2012).

27 Belgium, Directorate General of Institutions and Population (2012).

28 For the number of people entitled to vote (whole country), see: http://192.49.229.35/K2012/e/aaniioikeutetut/aoik_kokomaa.html.

29 Malta, Office of the Electoral Commission (2012).

30 Italy, Council of State, Decision No. 01193/2012 of 1 March 2012.

31 Italy, Ministry of Interior (2012).

32 Lithuania, Law amending Art. 2, 35, 36, 87, 89, 90 of the Law on the Elections to Local Government Councils, 2 October 2012.

33 Slovenia, Act amending the Local elections act, 25 October 2012.

34 European Commission (2012c), p. 13.

35 Finland, Amendment to the Act on political parties (372/2012), 15 June 2012.



"[The Parliamentary Assembly of the Council of Europe (PACE)] calls on Council of Europe Member States to [...] foster citizen participation in the electoral process, notably by: [...] enabling all citizens to exercise their right to vote through proxy voting, postal voting or e-voting, on the condition that the secrecy and the security of the vote are guaranteed; facilitating the participation in the electoral process of citizens living abroad, subject to restrictions in accordance with the law, such as duration of residence abroad, whilst ensuring that, if polling stations are set up abroad, their establishment is based on transparent criteria; safeguarding the right to vote of vulnerable groups (people with disabilities, the illiterate, etc.) by adapting polling stations and voting material to their needs; abolishing legal provisions providing for general, automatic and indiscriminate disenfranchisement of all serving prisoners irrespective of the nature or gravity of their offences."

PACE Resolution 1897 (2012) Ensuring greater democracy in elections

EU Member States are taking steps to make elections more accessible by, for instance, allowing for postal voting, e-voting, advance voting or even voting from abroad.

The right to vote from abroad was the central issue in the *Sitaropoulos and Others* case.³⁶ The European Court of Human Rights (ECtHR) considered that no international treaty required states to arrange for the exercise of voting rights of persons residing abroad. Although the **Greek** Constitution allows for the possibility of the legislature organising this right, political consensus to enact the provision has never been reached. The ECtHR concluded that "the very essence of the applicants' voting rights [...] was [not] impaired in the instant case."³⁷

As in 2011, the right to vote for citizens living abroad was also under continued discussion in several EU Member States. The Constitutional Convention established to reform the **Irish** Constitution, for example, will address the right to vote in presidential elections for Irish citizens living abroad.³⁸ The convention's inaugural meeting took place on 1 December 2012 and discussions are scheduled to finish one year from that date. The meetings will decide whether a referendum to change the constitution is to be held on each issue.

In the **United Kingdom**, British citizens may vote in parliamentary elections from abroad but lose this right if they are away from the United Kingdom for more than 15 years. In 2010, a British man resident in Spain, James Preston, applied for judicial review of the relevant legislation as to its compatibility with EU law. The High Court dismissed his application in December 2011.

Mr Preston's appeal was heard in July 2012 and in October 2012 the Court of Appeal dismissed it. A request to appeal to the Supreme Court is pending.³⁹

In addition to legal challenges before the ECtHR,⁴⁰ the legislature also attempted to change the 15-year rule.⁴¹ An amendment seeking to abolish the rule was added to the Electoral Registration and Administration Bill that went through Parliament in 2012, but the amendment was withdrawn before the bill gained royal assent on 31 January 2013.⁴² An all-party inquiry on the issue remains a possibility.

While several EU Member States make provision for non-national EU citizens to vote from abroad in parliamentary elections, few exercise this right. In **Slovakia**, for example, 8,018 citizens registered to vote from abroad in 2012,⁴³ with 7,051 of these exercising that right to vote via registered mail. With over 2,553,726 valid votes cast, votes from abroad accounted for just 0.28 % of the total vote in Slovakia,⁴⁴ but this still showed more than a doubling from the 3,427 citizens, or 0.14 % of the overall popular vote, who voted from abroad in 2006.

Following a 2010 redistricting of French legislative constituencies, 11 constituencies were created outside France for the election of representatives to the French National Assembly, creating direct representation for French citizens living abroad. These newly created constituencies returned 11 elected Members of Parliament to the National Assembly during the 2012 French Parliamentary elections.

The adoption of a law on electoral procedure in **Hungary**⁴⁵ was due to complete the electoral reform prompted by the new Fundamental Law together with Act CCIII on the election of the Members of the National Assembly.⁴⁶ Although the Bill was adopted on 26 November 2012, in its decision of 4 January 2013, the Constitutional Court quashed some of its key provisions, which compels Parliament to review the act.⁴⁷ The constitutionally rejected provisions included replacing the automatic voter registration system with a new mandatory registration scheme.

³⁶ ECtHR, *Sitaropoulos and Others v. Greece*, No. 42202/07, 15 March 2012.

³⁷ *Ibid.*, para. 81.

³⁸ Ireland, Lower House of Parliament (2012), Vol.771 No. 5, p. 27.

³⁹ United Kingdom, Court of Appeal (2012), *Preston, R (on the application of) v. The Lord President of the Council*, EWCA Civ 1378, 25 October 2012.

⁴⁰ ECtHR, *Shindler v. The United Kingdom*, No. 19840/09, lodged on 26 March 2009.

⁴¹ White, I. (2013).

⁴² United Kingdom, Electoral Registration and Administration Act 2013, 31 January 2013.

⁴³ SITA Slovak News Agency (2012).

⁴⁴ Slovakia, Statistical Office of the Slovak Republic (2012).

⁴⁵ Hungary, Bill T/8405 on electoral procedure, 26 November 2012.

⁴⁶ Hungary, Act CCIII of 2011 on the election of the Members of the National Assembly, 30 December 2011.

⁴⁷ Hungary, Constitutional Court, Decision I/3653/2012.

In a provision unaffected by the Constitution Court's ruling, the bill seeks to ensure the suffrage of citizens who live abroad by mandating that they may register by mail or electronically, any time during the general registration period. Once passed, the new electoral law will enable Hungarian citizens living abroad to register on electoral lists and have one vote for party lists, whereas citizens residing in Hungary may also vote for individual candidates in single-member constituencies. In essence, the reform would allow Hungarian citizens who move within the EU to retain partial suffrage at home. The right to vote by post would facilitate their participation in elections.⁴⁸

The Council of Europe's Venice Commission and the Organization for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR), issued a joint opinion on the Hungarian parliamentary elections act, endorsing the legislature's decision to limit the right to vote for Hungarians living abroad to the proportional part of the elections, given that the new Citizenship Law would grant the vote to some five million new Hungarian citizens compared to the eight million voters who live in Hungary.⁴⁹ The remaining parts of Bill T/8405/73 will enter into effect if the Hungarian Parliament chooses to reaffirm them.

Calls for the equal representation of women and men in national parliaments were also renewed in 2012. The European Parliament called for a balance of the sexes in elected and nominated positions in political decision making, as well as funding for related awareness-raising campaigns.⁵⁰ In October 2012, the Parliamentary Assembly of the Council of Europe (PACE) called on Council of Europe member states to introduce legislation that would make it possible for political parties to adopt positive action measures including in the electoral field in support of the under-represented sex. To support these measures, funding should be made available to those parties that take positive action to promote women's representation or participation and sanctions applied to those parties that fail to comply with their gender-related legal obligations.⁵¹

Figure 7.1 shows the proportion of women in the national parliaments of EU Member States and Croatia and ranks them according to the Inter-Parliamentary Union's global ranking. In the majority of EU Member States and Croatia (20), the proportion of women is

below 30 % in the lower or single house. A similar situation can be found in the 13 EU Member States that have an upper house or a senate: in nine of these the proportion of women is below 30 %.⁵²

The report attached to the PACE Resolution also presents promising practices aimed at enhancing women's representation in national parliaments, such as organising campaigns and activities to attract women's membership, ensuring maximum transparency in the selection of candidates to stand for election and the setting up of mentoring and training programmes to enhance the capacity of talented women to take up positions of political responsibility.⁵³

Some EU Member States, including **Belgium**⁵⁴ and **Poland**,⁵⁵ have planned legislative amendments to ensure equal representation of female and male candidates on electoral lists, with similar proposals to promote equal opportunities for men and women on electoral lists in both European and regional elections.

In **Ireland**, an amendment to the Electoral Act provides that state funding for political parties will not be available unless at least 30 % of political parties' candidates are women.⁵⁶ In **Italy**, the Chamber of Deputies (*Camera dei Deputati*) approved a bill on gender balance in local legislative councils and government, but it is still pending in the Senate. The law stipulates, for example, a 5 % reduction of public funds allocated to a political party if two-thirds of its list of candidates are of the same sex.⁵⁷

The **Czech** Ministry of Interior has announced plans for a general reform of the electoral code, but it has yet to decide whether this will be in the form of a new bill or an amendment to current election laws. The proposal will be submitted to the government by mid-2013. The reform should unify the existing laws that organise elections, thereby simplifying the legal framework.

48 Hungary, Bill T/8405 on electoral procedure, 26 November 2012, Art. 252.

49 Council of Europe, Venice Commission and the OSCE/ODIHR (2012), para. 43.

50 European Parliament (2012d), Resolution on women in political decision-making – quality and equality, P7_TA(2012) 0070, Brussels, 13 March 2012.

51 Council of Europe, Parliamentary Assembly (PACE), Resolution 1898 (2012) on political parties and women's political representation, 3 October 2012, para. 7.

52 See also: European Commission, DG Justice, Gender balance in decision-making positions database, National Parliaments, available at: http://ec.europa.eu/justice/gender-equality/gender-decision-making/database/politics/national-parliaments/index_en.htm.

53 Council of Europe, PACE (2012).

54 Belgium, Proposal of 5 June 2012 for a law with regard to the adaptation of the electoral law to promote the equal opportunity of men and women in elections, Doc. Parl. Chamber 2011–2012 No. 233/001; Proposal of 20 June 2012 with regard to equal representation on the electoral lists of the European elections of men and women, Doc. Parl. Chamber 2011–2012 No. 2274/001; Proposal for a special majority law of 20 June 2012 with regard to the equal representation on the electoral lists in the regional parliaments, Doc. Parl. Chamber 2011–2012 No. 2273/001.

55 Gazeta wyborcza.pl (2012).

56 Ireland, Electoral (Amendment) (Political Funding) Act 2012, Part 6, 42 (c).

57 Italy, Law No. 96 of 6 July 2012.



Figure 7.2: Proportion of female parliamentarians in EU Member States and Croatia

Note: Only 13 EU Member States have an upper house or a senate.

Source: Data extracted from the Inter-Parliamentary Union, *Women in National Parliaments as of 1 January 2013*, available at: www.ipu.org/wmn-e/classif.htm.

Czech legislation does not provide for proxy voting, under which one person casts a vote on behalf of an absent other, but Czech citizens who cannot vote at the polling station of their residence can request a 'voter ID', enabling them to vote in other polling stations in the Czech Republic.⁵⁸ The idea of postal voting was abandoned after political discussion due to concerns about possible fraud.

The introduction of e-voting was discussed in the context of the overall reform of **Czech** electoral legislation. Although e-voting comes in many forms, from punch-cards to internet voting, it is characterised by the use of electronic systems for both the voting and counting processes. Financial reasons, however, forced a postponement of the first pilot e-vote to 2015 from the original plan to use it in the October 2012 Senate and regional elections. The Czech authorities are working on technical solutions for a possible use of e-voting in the future.

In **Estonia**, where e-voting has been in place since 2002, amendments to all relevant electoral laws were adopted in October 2012.⁵⁹ Their main aim was to further regulate electronic voting and in particular to establish a specific electronic voting committee, the function of which is to prepare and organise the e-voting, to solve any issues hindering e-voting procedure and to verify e-voting results.⁶⁰

In the **United Kingdom**, a reform of the procedures for registration on the electoral roll was going through Parliament when this annual report went to print.⁶¹ Whereas the current system gives the responsibility to one person in each household to register everyone living at that address ('household registration'), the new system proposes Individual Electoral Registration with verifiable personal identifiers. When passed, this would be the biggest change in the voter registration process

59 Estonia, Act Amending the Election Law and other Acts, RT I, 1 November 2012, 1, 17 October 2012.

60 Estonia, Election Act, 2002, as amended, Section 17.

61 United Kingdom, Electoral Registration and Administration Bill (2012-2013), 31 January 2013.

58 Czech Republic, Ministry of Interior (2012).

since the introduction of the universal franchise, the extension of the right to vote to all adult citizens.

Promising practice

Introducing e-voting in national parliamentary elections

Citizens residing outside France were able, for the first time, to e-vote via internet in the June 2012 French Parliamentary elections.⁶³ Voters submitted their e-mail addresses and mobile phone numbers to consulates, which then sent them a login and instructions on how to vote. This voting method was widely used: 57 % of voters used it during the first round of the election and 54 % during the second.⁶⁴ The French authorities evaluated the voting system positively and the OSCE/ODIHR issued several recommendations to improve it.

For more information, see : OSCE/ODIHR (2012a), p. 9., available at: www.osce.org/odihr/elections/93621

The voting rights of convicted prisoners remained a contentious issue in 2012. In May, in the case *Scoppola v. Italy (No.3)* a Grand Chamber of the ECtHR found that in adapting voting bans to the individual's specific situation, the Italian system was not excessively rigid and did not contravene the European Convention on Human Rights (ECHR).⁶⁴

This case was of great relevance for the United Kingdom. The government asked the ECtHR for a six-month extension to amend its related legislation in light of the *Scoppola* judgment,⁶⁵ which was granted.

In November 2012 the British government published a draft Bill, which a Joint Committee of both Houses must first scrutinise before the legislation can be brought before Parliament.⁶⁶ The draft Bill set out three options for Parliament to consider: a ban for prisoners sentenced to four years or more; a ban on prisoners sentenced to more than six months; and a ban for all convicted prisoners.

The Council of Europe's Committee of Ministers, at its December 2012 meeting on the supervision of the execution of judgments, welcomed the proposal but noted that the third option, of retaining a blanket ban on voting by prisoners, "cannot be considered compatible

with the European Convention on Human Rights."⁶⁷ The Committee of Ministers decided to resume consideration of the case at the latest in September 2013.

7.1.3. The limitation of voting rights in the case of disability

The UN Committee on the Rights of Persons with Disabilities confirmed its broad interpretation of the meaning of participation in political and public life as guaranteed by Article 29 of the UN Convention on the Rights of Persons with Disabilities (CRPD).

In its Concluding Observations on the State report presented by Hungary, the Committee called on the State to review "all relevant legislation [...] to ensure that all persons with disabilities regardless of their impairment, legal status or place of residence have a right to vote, and that they can participate in political and public life on an equal basis with others."⁶⁸

The United Nations (UN) standards are reiterated in several other forums. For example, the OSCE reported on several occasions its concern about inaccessible polling stations (**France**,⁶⁹ **Greece**,⁷⁰ the **Netherlands**,⁷¹ and **Slovenia**⁷²). It regularly refers to the CRPD standards when doing so.

Accessibility of polling stations remains a recurrent issue for EU Member States, 24 of which (and Croatia) ► have ratified the CRPD (discussed in detail in **Chapter 5** – discrimination on the ground of disability) and thereby accepted that elections should be barrier free. Some improvements can, however, be reported with respect to the accessibility of polling stations.

"[The Parliamentary Assembly of the Council of Europe (PACE)] called on Council of Europe Member States to: [...] foster citizen participation in the electoral process, notably by: [...] guaranteeing that all possible means are used to make all polling stations accessible".

PACE Resolution 1897 (2012) Ensuring greater democracy in elections

The reality on the ground underscored the urgency of PACE's call.

Several national action plans adopted in 2012 aim at enhancing persons with disabilities' participation in public and political life (**Austria**⁷³ and **Finland**⁷⁴). During

62 France, Electoral Code, Art. L. 330-13 of the electoral code and Art. R176-3 to R176-3-10.

63 France, *Ministère des Affaires étrangères* (2012), p. 47.

64 ECtHR, *Scoppola v. Italy (No.3)*, No. 126/05, 22 May 2012; see also ECtHR, *Cucu v. Romania*, No. 22362/06, 13 November 2012, in which the Court finds Romania in breach of the ECHR because of its automatic voting ban on convicted persons.

65 ECtHR, Press release (2012).

66 White, I. (2012).

67 *Ibid.*

68 United Nations, Committee on the Rights of Persons with Disabilities (2012), para. 46.

69 OSCE/ODIHR (2012a).

70 OSCE/ODIHR (2012b).

71 OSCE/ODIHR (2012c).

72 OSCE/ODIHR (2012d).

73 Austria, Federal Ministry of Labour, Social Affairs and Consumer Protection (2012).

74 Finland, Ministry of Justice (2012).

the 2012 elections in Innsbruck, for example, 24 out of 42 polling stations (57 %) were barrier-free.

Other EU Member States adopted legislative and/or executive acts to encourage and organise the participation of persons with disabilities in elections and to set rules on the accessibility of polling stations.

This was the case in **Hungary** with the adoption of the Law on electoral procedure⁷⁵ and **Belgium** ahead of the 2012 municipal elections.⁷⁶ In Walloon, NGOs criticised that those needing to use accessible polling stations were required to declare this 2-1/2 months in advance of the elections.⁷⁷

The **Greek** Ministry of Interior sent a circular before the national election of June 2012 asking polling station election officials to assist voters if the polling station was not accessible. Such assistance could include entering the voting booth with the person to help them vote or bringing election materials outside inaccessible polling stations.⁷⁸

This solution did, however, raise OSCE concerns, failing as it did to make provision for voters with disabilities to choose their own assistance providers. In its report on the Greek elections, it said: "In light of Greece's recent ratification of the UNCRPD and in order to ensure the secrecy of the vote, amendments should be introduced to the current legislation to require that polling stations be accessible to voters with disabilities and to allow such voters to select the assistance providers of their choice."⁷⁹

The **Lithuanian** central electoral commission issued a decision calling for fully accessible polling stations to be set up.⁸⁰ The commission cooperated closely with the public agency Braille Printing (*Všį 'Brailio spauda'*) and the Lithuanian Union of the Blind and Partially Sighted (*Lietuvos aklyjų ir silpnaregių sąjunga*) to provide basic information in Braille for elections and in particular for the parliamentary elections in 2012.

The **Dutch** Ministry of Interior commissioned the Project Bureau Accessibility to develop a checklist on the accessibility of polling stations which was used for the parliamentary elections on 12 September 2012. The

checklist establishes four categories which contribute to a barrier-free polling station, namely communication, accessibility, enterability and usability.⁸¹

Visually impaired persons also experience difficulty in voting. Before the **Dutch** parliamentary elections, *Viziris*, an NGO supporting the rights of persons with visual impairments, highlighted problems of accessibility in polling stations. It called on its members to report on their voting experiences.⁸² During the last Dutch elections, the Minister of Interior tested (and continue to test) alternative voting ballots adapted for visually impaired voters and people with low literacy levels. These ballots can also be transferred to voters digitally and then printed out so that the voter has more time to vote before mailing it in.⁸³ In its report on the **French** parliamentary elections, the OSCE noted that "no special means were provided for visually impaired voters who could thus not vote in secrecy."⁸⁴

Promising practice

Supporting candidates with disabilities

On 9 July 2012, the United Kingdom government launched the *Access to elected office for disabled people* strategy, to provide new support to people with disabilities who want to run for election. The strategy provides in particular for a training scheme encouraging persons with disabilities to participate in political life by giving an introduction to the skills that might be needed when standing for office, as well as a dedicated fund – the Access to Elected Office Fund – which provides financial support for candidates who have additional expenses linked to a disability.

For more information, see: United Kingdom, Home Office (2012), details of the strategy are available at: www.homeoffice.gov.uk/equalities/equality-public-political/access-elected-office/

For more information on the Access to Elected Office Fund, see: www.access-to-elected-office-fund.org.uk/

The right to vote for persons with intellectual disabilities and persons with mental health problems is an area of law characterised by great diversity among EU Member States. The majority, however, still link the loss of legal capacity⁸⁵ – the withdrawal of legal recognition of a person's decisions, such as to register to vote⁸⁶ – to disenfranchisement. EU Member States follow three main

75 Hungary, Bill T/8405 on electoral procedure, 26 November 2012, Art. 153.

76 Belgium, Walloon Minister of Health, Social Action and Equal Opportunities (2012).

77 Socialist Association of Disabled Persons (ASPH asbl.) (2012a) and ASPH asbl. (2012b).

78 Greece, Ministry of Interior, Circular No. 33, Facilitation to citizens with disabilities for the exercise of their voting rights during the parliamentary elections of 17th June 2012, 19 May 2012.

79 OSCE/ODIHR (2012b), p. 5.

80 Lithuania, Central Electoral Commission (2012).

81 Project Bureau Accessibility (2012).

82 Viziris (2012).

83 Netherlands, Minister of the Interior and Kingdom Relations (2012).

84 OSCE/ODIHR (2012a), p. 2.

85 FRA (2012), p. 188.

86 FRA (forthcoming).

approaches: total exclusion, case-by-case consideration and full participation.⁸⁷

EU Member States that exclude individuals link the right to vote to the legal capacity of the individual. In other Member States, national legislation prescribes an individual assessment of the ability to vote before taking the right away.

EU Member States that have removed all restrictions enable persons with intellectual disabilities and persons with mental health problems to vote on an equal footing with other citizens.⁸⁸

There have been few changes since 2011. **Croatia**⁸⁹ reformed its legal framework and **Luxembourg**⁹⁰ has made plans to do so.

Table 7.1: The right to political participation of persons with mental health problems and persons with intellectual disabilities, by EU Member State and Croatia

EU Member State	Exclusion	Limited participation	Full participation
AT			x
BE	x		
BG	x		
CY		x	
CZ	x	x	
DE	x		
DK	x	x	
EE	x	x	
EL	x		
ES		x	x
FI		x	x
FR		x	x
HU		x	
IE	x		x
IT			x
LT	x		
LU	x		
LV	x		
MT	x	x	
NL			x
PL	x		
PT	x		
RO	x		
SE			x
SI		x	
SK	x		
UK			x
HR	x		

Notes: An EU Member State can be represented in more than one column, as persons with mental health problems and persons with intellectual disabilities may be treated differently according to the national law of the respective Member State.

Source: FRA, 2012

88 FRA (2012), p. 189.

89 Croatia, Voters' Register Act, Official Gazette 144/12.

90 Luxembourg (2012), p. 47.

87 FRA (2010), pp. 15 and following.



On 14 December, the Croatian parliament passed the Act on the Voters' Register, removing all limitations on the voting rights of persons divested of legal capacity.⁹¹ Article 64 of the Act ensures that "persons fully divested of legal capacity by a final decision of a competent court in the period preceding the coming into force of this Act shall be considered voters and shall be entered into the voters' register". In securing voting rights for persons divested of legal capacity, the Ministry of Public Administration has responded to criticism by the Ombudsperson for Persons with Disabilities.⁹²

Croatia remains, however, in the 'exclusion' column in Table 7.1, because it still has a law that excludes persons without legal capacity from voting, although some NGOs have reported that there are plans to amend this Act on the Elections of Representatives to the Croatian Parliament.⁹³

In **Luxembourg**, the National Action Plan for the implementation of the CRPD of March 2012⁹⁴ provides for a reform by 2015 of the legal capacity legal framework. In parallel, by June 2014, the Constitution will be amended in order to lift the total voting ban imposed on persons under guardianship, in other words persons who have a third party who is legally entitled to make decisions on their behalf.⁹⁵ The constitutional reform will put an end to the automatic ban, ensuring that individuals can only be divested of their voting rights on a case-by-case basis.

In the **Netherlands**, no legal restrictions are imposed on persons with mental health problems and persons with intellectual disabilities. The OSCE/ODHIR has, however, suggested, referring to Article 29 of the CRPD, providing support to persons with intellectual disabilities who are unable to vote without assistance.⁹⁶

Table 7.1 provides an updated summary of a table published in the last FRA Annual Report.⁹⁷

7.2. Developments in participatory democracy

Besides voting rights at municipal and European elections, EU law encourages wider participatory democracy. The Treaty on the European Union (TEU) facilitates citizens' direct involvement in EU affairs.

The 'public exchanges' prescribed by Article 11 of the TEU can also take other forms, including through consultations. The European Commission closed 112 such consultations in 2012 after 131 in 2011, seven of which were in the area of Justice and Fundamental Rights as compared to four in 2011.⁹⁸

The consultation documents should be made available in all EU official languages, according to the European Ombudsman. The Ombudsman said that the failure to do so was an example of maladministration.⁹⁹

The European citizens' initiative provides a new tool of which citizens are taking advantage.

7.2.1. The European citizens' initiative

On 1 April 2012, the regulation governing European citizens' initiatives (ECI)¹⁰⁰ took effect. Since then, citizens' committees, made up of at least seven EU citizens who are resident in at least seven EU Member States, can make requests for registration.¹⁰¹

"I am thrilled that European Citizens' Initiatives are finally a reality. This is a great boost for participatory democracy in Europe. Now the race is on to see which initiative will be the first to gather one million signatures."

Maroš Šefčovič, Vice-President of the Commission, Brussels, 8 May 2012

The first European Citizens' Initiative, 'Fraternité 2020 – Mobility. Progress. Europe', was registered on 9 May 2012. It was proposed by a committee of EU citizens living in Austria, Belgium, Hungary, Italy, Luxembourg, Romania and Spain. The main objective is to "enhance EU exchange programmes – like Erasmus or the European Voluntary Service – in order to contribute to a united Europe based on solidarity among citizens".¹⁰²

Twelve ECIs were registered in 2012, covering a variety of topics including media pluralism and press freedom,¹⁰³ animal protection ('Stop Vivisection')¹⁰⁴ and broader ecological considerations ('30 Km/h – Making the Streets Liveable!').¹⁰⁵ In the area of political participation and citizenship, the 'Let me Vote' initiative aims at

91 Croatia, Voters' Register Act, Official Gazette 144/12.

92 Croatia (2012).

93 Udruga Sjaj (2012).

94 Luxembourg (2012), p. 47.

95 FRA (forthcoming).

96 OSCE/ODIHR (2012c), p. 5.

97 FRA (2012), p. 189.

98 European Commission (2012d).

99 European Ombudsman, Case: 0640/2011/AN of 4 October 2012.

100 Regulation No. 211/2011 of the European Parliament and the Council, OJ 2011 L 65/1.

101 European Commission, European Citizens' Initiative, available at: <http://ec.europa.eu/citizens-initiative/public/welcome>; and FRA (2011), pp. 136 and following.

102 European Commission (2012e); for further information on such EU exchange programmes, see: www.fraternite2020.eu.

103 For more information on the European initiative for media pluralism, see: www.mediainitiative.eu.

104 For more information on the citizens' initiative against vivisection, 'Stop Vivisection', see: www.stopvivisection.eu.

105 For more information on the citizens' initiative '30 km/h – making the streets liveable!', see: <http://de.30kmh.eu>.

granting the right to vote to non-national EU citizens in all political elections¹⁰⁶ while the 'central public online collection platform for the European citizens' initiative' seeks to facilitate the registration and collection of signatures for future ECIs.

Seven requested ECI registrations were rejected because they did not satisfy the conditions laid down in the ECI regulation. Article 4 (2) of the regulation stipulates that the European Commission will register a proposed initiative within two months of a request provided that: the citizens' committee has been formed and the contact persons designated; the proposed initiative does not manifestly fall outside the framework of the Commission's powers; the proposed initiative is not manifestly abusive, frivolous or vexatious; and the proposed initiative is not manifestly contrary to EU values as set out in Article 2 of the TEU.

The initiative 'My voice against nuclear energy', for example, aimed at eliminating nuclear energy. The European Commission refused to register the initiative arguing that such a ban would be contrary to the Euratom Treaty. Since the TEU and TFEU provide no legal basis to propose an act contrary to the Euratom Treaty, the latter treaty would need to be modified by agreement between the contracting parties before such an ECI could be registered.¹⁰⁷

Some European Parliament resolutions suggest that the Petition Committee of the Parliament should hold the public hearings prescribed by Article 11 of the ECI regulation,¹⁰⁸ given its experience of direct contact with citizens.¹⁰⁹

The majority of EU Member States have in place the enabling legislation or rules allowing citizens to start or contribute to an ECI.

7.2.2. NGO involvement – consultations and preparations for the European Year of Citizens 2013

The Europe for Citizens programme (2007–2013) supports a wide range of activities and organisations promoting 'active European citizenship' especially the involvement of citizens and civil society organisations in the process of European integration.¹¹⁰ In addition to the permanent themes of the programme, the pro-

gramme's priorities in 2012 aimed at the promotion of European citizenship and democracy, including the development of understanding of the EU, its values and what it brings to citizens' daily lives; and to ensure that the direct and current interest of citizens are fed into the European political agenda.¹¹¹ The specific priorities of the programme in 2013 will contribute to the objectives of the European Year of Citizens.

On 14 December 2011, the European Commission adopted the Proposal for a Council Regulation establishing for the period 2014–2020 the programme Europe for Citizens.¹¹² The programme aims at enhancing civic participation to ensure that civil society contributes to policy decisions. In addition, the programme should ensure that individual citizens participate in debates and discussions on EU matters.¹¹³

A number of actions are proposed to ensure the practical implementation of these aims, including: bringing people together from local communities across Europe through the twinning of towns; supporting civil society organisations through grants designed to provide structural support; enhancing European citizenship through high visibility events, studies and the dissemination of information; and promoting and preserving European remembrance by sponsoring projects such as those commemorating the victims of mass exterminations and deportations.

The European Commission commissioned a study on Participatory Citizenship in the European Union that mapped the theory, policy, practices and levels of engagement across the EU. The study's policy recommendations are aimed at the upcoming 2013 European Year of Citizens, the new Europe for Citizens Programme (2014–2020) and the 2014 European elections.

The policy recommendations are divided into three Sections: Concepts and definition of Participatory Citizenship, Effective strategies for facilitating Participatory Citizenship and an EU strategy for Participatory Citizenship in the economic crisis and beyond. In essence, the recommendations are aimed at "effectively maintaining and enhancing democracy and social cohesion through Participatory Citizenship."¹¹⁴



¹⁰⁶ For more information on the 'Let me vote' citizens initiative see: www.letmevote.eu.

¹⁰⁷ European Commission (2012f), available at: <http://ec.europa.eu/citizens-initiative/public/documents/579>.

¹⁰⁸ Regulation No. 211/2011 of the European Parliament and the Council, OJ 2011 L 65/1, p. 1.

¹⁰⁹ European Parliament (2012b), para. 3; see also European Parliament (2012e).

¹¹⁰ The current programme, with a €215 million budget, started on 1 January 2007 and will end on 31 December 2013.

¹¹¹ See: http://eacea.ec.europa.eu/citizenship/programme/priority_themes_en.php.

¹¹² European Commission (2011).

¹¹³ *Ibid.*; both the European Economic and Social Committee (EESC) and the Committee of the Regions supported the Commission's proposal, see: EESC (2012), p. 2 and Committee of the Regions (2012).

¹¹⁴ Hoskins, B. and Kerr, D. (2012), pp. 7–8.



A debate with citizens in Dublin on 10 January 2013 officially kicked off the European Year of Citizens, coinciding with the start of the Irish Presidency of the Council of the European Union. The debate focused on the development of EU citizenship in particular and of the EU in general, with a view to the European Parliament elections of 2014. An EU-wide alliance of civil society organisations has set itself up expressly to collaborate with the European Commission on the European Year. This European Year of Citizens Alliance (EYCA)¹¹⁵ is a key strategic partner representing civil society.¹¹⁶

As part of the European Year of Citizens, the European Commission started holding a series of debates or town hall meetings with citizens to discuss topics such as: How should we fight the crisis?, What do you expect from your European citizenship?, and: What kind of Europe do you want by 2020?

Twenty such debates, which are open to everyone, are planned to be held across the EU over the course of 2013.¹¹⁷ The first debates took place in 2012 in Spain, Austria, Germany, France and Italy, respectively, and were established to ensure that the opinions expressed would feed into future European Commission proposals on strengthening citizens' rights, and maintaining a Union where those rights are fully respected. Twenty additional debates are planned to take place in 2013 across Europe.

Outlook

To celebrate the introduction of EU citizenship 20 years earlier, 2013 was designated as the European Year of Citizens. The year will focus both on what the EU has already achieved for citizens and on meeting citizens' expectations for the future. Events throughout the year will explain how people can benefit directly from their EU rights and the policies and programmes that exist to facilitate the full enjoyment of EU citizenship.

The year should stimulate an EU-wide debate with citizens on how the EU should look in future and what reforms are needed to improve their everyday lives.¹¹⁸

The Council Regulation establishing the Europe for Citizens' Programme (2014-2020), which will be adopted by mid-2013,¹¹⁹ will support active participation in EU life.

Another issue that will be debated is the broadening of EU citizens' right to vote in national elections in the country in which they are residing. This area of reform is central to the European Citizens' Initiative 'Let me Vote' and has already triggered robust discussions.¹²⁰

¹¹⁵ For more information on the EYCA, see: <http://ey2013-alliance.eu>.

¹¹⁶ European Commission (2012g).

¹¹⁷ For more on the debates on the future of Europe, see: http://ec.europa.eu/european-debate/index_en.htm.

¹¹⁸ European Commission (2012g).

¹¹⁹ European Commission (2011).

¹²⁰ Bauböck, R., Cayla, P. and Seth, C. (2012).

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Access to efficient and independent justice

Rights of crime victims

Justice Index

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UN & CoE

January

21 February – Council of Europe publishes a handbook entitled *Protecting the right to a fair trial under the European Convention on Human Rights*

28 February – Optional Protocol 3 to the Convention on the Rights of the Child on a communications procedure opens for signature

February

19 March – Venice Commission issues an opinion on the judiciary in Hungary

March

20 April – Council of Europe member states adopt the Brighton Declaration on the reform of the European Court of Human Rights aimed at matching its capacity to its case load

27 April – UN Crime Prevention and Criminal Justice Commission adopts UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems

April

May / June

July / August

20 September – European Commission for the Efficiency of Justice (CEPEJ) publishes its report on the evaluation of judicial systems

September

25 October – 2012 Council of Europe/European Commission's 'Crystal Scales of Justice' prize for innovative court practices is awarded to the Regional Court of Antwerp, marking the European Day of Civil Justice

October

5–6 November – Consultative Council of European Judges, adopts an opinion on the specialisation of judges

November

14–15 December – Venice Commission issues an opinion on the judiciary in Romania

20 December – UN General Assembly adopts the UN principles and guidelines on access to legal aid in criminal justice systems

December

EU

January

2 February – European Parliament adopts two resolutions concerning collective redress: towards a coherent European approach to collective redress and on the annual report on EU competition policy

February

March

April

22 May – Measure B of the EU Criminal Procedure Roadmap – the letter of rights – is adopted

May

June

18 July – European Commission President José Manuel Barroso issues a statement following the adoption of the Cooperation and Verification Mechanisms Reports for Romania and Bulgaria

July

August

12 September – EU Justice Commissioner Viviane Reding announces plans to launch a 'justice scoreboard' meant to rank the rule of law in EU Member States

25 September – Court of Justice of the European Union adopts new rules of procedure aimed at coping with increased workload

September

1 October – FRA (European Agency for Fundamental Rights) issues an Opinion on proposed EU data protection reform package with an emphasis on access to justice issues

October

November

4 December – FRA issues an Opinion on the confiscation of proceeds of crime

6–7 December – FRA hosts Fundamental Rights Conference, entitled Justice in austerity – challenges and opportunities for access to justice

20 December – The revised Brussels I regulation on common rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters is adopted

December

8

Access to efficient and independent justice



Concerns for the rule of law – in particular judicial independence – in some European Union (EU) Member States cast a shadow on access to justice in 2012, a fundamental right that has been adversely affected by the financial crisis. Events in some Member States called into question the basic principle of the rule of law, tainting cross-border justice developments. In part as a reaction to this, EU Member States stepped up efforts to follow more closely the rule of law, ensure trust in justice systems and monitor developments where needed. More specifically, overly lengthy proceedings remained a major stumbling block for access to justice, but EU Member States took steps to remedy this and other shortcomings. To do so, they launched a number of initiatives, including: broadening legal standing, ensuring effective access to legal aid, enhancing e-justice and establishing and extending the mandates of non-judicial mechanisms.

8.1. Key EU and international policy developments and instruments

8.1.1. Under scrutiny: judicial independence and the rule of law

Access to justice – a central fundamental right, as well as an enabling right, for claiming other rights – can be sought through a range of mechanisms, from traditional courts to non-judicial mechanisms such as national equality bodies and National Human Rights Institutions (NHRIs), and from local level through national to EU and international levels.

Despite significant developments in non-judicial mechanisms across the EU, the spotlight remained on developments in EU Member States' justice systems as overall EU scrutiny on the rule of law heightened in 2012. For as judicial cooperation and integration in Europe grows, so too does the need for trust across EU Member States in their mutual appreciation of the rule of law. Some developments in 2012 underscored apprehension in this area.

Key developments in access to efficient and independent justice

- Doubts about the rule of law in some EU Member States lead to a European Union (EU) initiative aimed at monitoring developments in all Member States through a 'justice scoreboard'.
- Financial austerity takes a toll on access to justice through reductions in numbers of courts and mergers of non-judicial mechanisms.
- A sense of crisis spurs innovation and reform in some EU Member States, which modify court procedures and make more use of e-justice tools in order to reduce costs and shorten the length of proceedings.
- The criminal procedural roadmap of the EU takes a step forward with the adoption of a second instrument, Measure B – 'the letter of rights'.
- Focus at the Member State level remains on non-judicial mechanisms, such as National Human Rights Institutions and national equality bodies – with some strengthened and others weakened – as a number receive increased monitoring responsibilities under United Nations (UN) human rights conventions.

At the adoption of the Cooperation and Verification Mechanism reports for **Bulgaria** and **Romania** in 2012, the President of the European Commission, José Manuel Barroso, acknowledged Bulgaria's progress but voiced concern as to the rule of law in Romania:

"In every Member State of the European Union we need a well-functioning, independent judicial system, and respect for democratic institutions and the rule of law. The European Union is based on the principle of respect of the rule of law and democratic values. Events in Romania have shaken our trust. Challenging judicial decisions, undermining the constitutional court, overturning established procedures and removing key checks and balances have called into question the Government's commitment to respect the rule of law."

President of the European Commission José Barroso issues a statement following the adoption of the Cooperation and Verification Mechanisms Reports for Romania and Bulgaria on 18 July 2012, Speech/12/565, available at: http://europa.eu/rapid/press-release_SPEECH-12-565_en.htm?locale=en

The European Commission for Democracy through Law (Venice Commission), which advises the Council of Europe on constitutional matters, also raised concerns in relation to Romania. Its opinion focused on governmental and parliamentary decisions affecting the Constitutional Court and the Ombudsman or the

- Advocate of the People (see also the **Focus Section** of this annual report). The Venice Commission highlighted in particular its worry about the extensive recourse to government emergency ordinances – both by previous and present political majorities – which presents a risk for democracy and the rule of law in Romania. Other issues raised related to statements made by representatives of state institutions that demonstrated a worrying lack of respect for the status of other state institutions, including the Constitutional Court as the guarantor of the supremacy of the constitution.¹

Other EU Member States also came under increased scrutiny in 2012. The Venice Commission adopted four opinions that concerned the judiciary in **Hungary**, focusing on: the status of judges and court administration; the Constitutional Court; prosecution; and subsequent amendments to legislation related to the judiciary.

The first of these opinions examined various aspects of the judiciary and concluded that the overall effect of recent changes was not in compliance with European standards.² The opinion listed 16 problematic points, with the main cause for concern being the concentration of power to appoint judges in the hands of the President of the National Judicial Office, which supervises the central administration of the courts.

The second opinion, on the Constitutional Court, added another 10 detailed points of concern, which would require improved formulations in legislative documents to improve access to justice.³ The third opinion, on the Prosecution Service, highlighted insufficient checks on the powers of the Prosecutor General.⁴ The fourth and final opinion, released in October, takes revisions made since the first opinion was released in March into consideration, commenting positively on a long list of changes made.⁵ The early retirement age of judges and the procedure by which cases may be transferred were still causes of concern, with both issues having implications for judicial independence. By the end of 2012, the Venice Commission list on Hungary had a remaining 14 points of concern, including concentration of powers and the risk of undue political influence.

FRA ACTIVITY

Confronting challenges and finding opportunities for access to justice in times of austerity

In December 2012, FRA held its annual Fundamental Rights Conference on the topic of justice in austerity, focusing on the many obstacles to accessing justice resulting from the financial crisis. The conference, which brought together some 300 policy makers, including experts and practitioners from EU institutions and bodies, the Council of Europe, national administrations, associations of legal professionals, judiciary and civil society, also explored prospects for innovation and reform, triggered by the need to cut costs. The conference was held at the European Parliament under the auspices of the President of the European Parliament and with the support of the Cyprus Presidency of the Council of the European Union.

For more information, see: fra.europa.eu/en/event/2012/fundamental-rights-conference-2012-0

On 6 November 2012, on the basis of the European Commission's infringement proceedings against Hungary, the CJEU held that lowering the mandatory retirement age to 62 from 70 years of age for judges, prosecutors and notaries within a short transitional period was not necessary to achieve the objective of standardising the retirement age for public-sector professions and, therefore, constituted a disproportionate measure amounting to discrimination on the ground of age. Accordingly, the CJEU concluded that Hungary had failed to fulfil its obligations under the Employment

¹ Council of Europe, Venice Commission (2012a).

² Council of Europe, Venice Commission (2012b).

³ Council of Europe, Venice Commission (2012c).

⁴ Council of Europe, Venice Commission (2012d).

⁵ Council of Europe, Venice Commission (2012e).

Equality Directive.⁶ The EU also took other action in relation to developments in Hungary.⁷

Such developments underscored apprehension within the EU concerning mutual trust in the rule of law, which is growing increasingly important with the continued development of judicial cooperation and integration in Europe. In order to track the rule of law in the EU, the European Commission announced, in 2012, a plan to benchmark judicial strength, efficiency and reliability in the Member States through a 'justice scoreboard' (see also the **Focus Section** of this annual report).⁸

8.1.2. Opinions and instruments

Developments in 2012 were not limited to responses to evolving problems. A number of evaluations, opinions and instruments with close relevance for access to justice were adopted. The Council of Europe's European Commission for the Efficiency of Justice (CEPEJ) launched, on 20 September 2012, its evaluation report of European judicial systems, a biennial evaluation of the judiciaries in the 47 Council of Europe Member States.⁹ This report is the fifth in a series of evaluations that cover public expenditure on courts, prosecution and legal aid; various models of legal aid; court organisation; alternative dispute resolution; judges; execution of court decisions; and court reform. In evaluating the judicial systems, the CEPEJ report offers detailed analysis of patterns and trends across Europe. In relation to access to justice, for example, the Commission concluded that: there is a need to ease financial barriers for citizens who do not have sufficient means to initiate a judicial proceeding; geographical access to courts may be partly compensated by other measures, such as information technology tools; and that access to justice should be further facilitated through the promotion of alternative dispute resolution.

In 2012, the Consultative Council of European Judges (CCJE), an advisory body of the Council of Europe, adopted an opinion on the specialisation of judges. The opinion focused specifically on the advantages and limitations of having judges specialised in particular types of cases.¹⁰

The third optional protocol to the UN Convention on the Rights of the Child (CRC) opened for signature in 2012, making available an additional individual complaints instrument that makes it possible to access justice at

an international level through individual complaints.¹¹ For an overview of the status of the nine core UN human rights conventions, the extent to which EU Member States have accepted these and how many cases were submitted during 2012, see **Chapter 10** of this annual report.

The UN Crime Prevention and Criminal Justice Commission adopted a global instrument on cost-free legal assistance – legal aid – in April 2012: *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*. The UN General Assembly subsequently adopted this instrument in November 2012, lending weight to the recommendations.¹² It is a non-binding, or 'soft-law' tool, with 14 Principles and 18 Guidelines, recognising the right to legal aid, legal aid for victims of crime, the right to be informed and a special provision for vulnerable groups.

8.2. Selected cases from European-level courts

Significant court cases also dealt with access to justice in 2012. The Court of Justice of the European Union (CJEU) handled several cases during the year that focused on an effective remedy and fair trial, rights guaranteed in Article 47 of the Charter of Fundamental Rights of the European Union. Among these were cases dealing with judicial independence and 'equality of arms' between parties – essential aspects of access to justice – through having to consider the role of the European Commission in competition proceedings. Other important cases concerned mutual trust between judicial systems and access to justice in the context of countering terrorism.

In *Europeses Gemeenschap v. Otis NV and Others*, the CJEU decided that the European Commission was able to act as an independent decision maker in a competition process related to elevator manufacturers while also acting on behalf of the EU to claim compensation before a national court.¹³ A central element at stake was whether this dual Commission role was compatible with the Charter's fair trial provisions. The CJEU ruled that despite the European Commission's potentially conflicting tasks, the fair trial guarantees were upheld.¹⁴

Such a combination of roles would be more problematic in clear-cut criminal areas, where judicial independence must be more strictly upheld. After EU accession to the European Convention on Human Rights (ECHR), a future

⁶ Council Directive 2000/78/EC, OJ 2000 L 303 and CJEU, C-286/12 *Commission v. Hungary*, 6 November 2012.

⁷ European Commission (2012a).

⁸ Reding, V. (2012).

⁹ Council of Europe, CEPEJ (2012a).

¹⁰ Council of Europe, CCJE (2012).

¹¹ United Nations, Office of the High Commissioner for Human Rights (2012).

¹² United Nations (UN), Commission on Crime Prevention and Criminal Justice (2012).

¹³ CJEU, C-199/11, *Europeses Gemeenschap v. Otis NV and Others*, 6 November 2012.

¹⁴ *Ibid.*, paras. 37–67.

European Court of Human Rights (ECtHR) ruling would be able to assess the EU system in this regard.

In another CJEU preliminary ruling case, *Trade Agency Ltd. v. Seramico Investments Ltd.*,¹⁵ judicial cooperation in civil matters was at stake. The national court's questions addressed the mutual recognition and enforcement of judgments and, more specifically, whether it was possible to refuse to enforce a foreign judgment under the Charter's fair trial provision (Article 47). The question related to a case where judgment was given without the presence of the defendant who also argued that he had not received a request to appear. The CJEU ruled that a national court can refuse enforcement only when an overall assessment shows that there is a "manifest and disproportionate breach of the defendant's right to a fair trial", not merely on the basis of a judgment having been given in the absence of the defendant.¹⁶

In his October 2012 *Melloni* Opinion,¹⁷ the Advocate General addressed judicial cooperation in criminal matters on a related issue — whether a court can refuse to execute a decision by a court in another Member State on the basis of a fundamental rights concern, specifically looking at fair trial and effective remedy issues in relation to the European Arrest Warrant (EAW). While the EAW empowers an EU Member State to issue a warrant requiring another, 'executing', Member State to arrest and transfer a person to it for the purpose of conducting a criminal prosecution or executing a custodial sentence, this can be refused under some circumstances. The Advocate General suggests in response to this request for preliminary ruling that the execution cannot be made conditional on the person being entitled to a retrial in the issuing Member State, even when the person was not present during the trial and the decision was taken in their absence. For the executing authorities to require a retrial would undermine the very purpose of the EAW, the Advocate General argued. Such a condition would in effect enable the executing state to dictate requirements for safeguards and would run counter to an EU area of justice based on mutual trust.¹⁸ Nonetheless, to safeguard the person's rights, they would have needed to be aware of the original trial and to have retained a lawyer.

¹⁵ CJEU, C-619/10, *Trade Agency Ltd. v. Seramico Investments Ltd.*, 6 September 2012.

¹⁶ *Ibid.*, para. 62.

¹⁷ CJEU, (2012); More generally on the execution of the EAW and non-discriminatory application of the ground for optional non-execution, see CJEU, C-42/11, 5 September 2012.

¹⁸ UN, Office on Drugs and Crime (UNODC) (2012), also offers guidance on transferring persons and on a range of legal and practical aspects, of relevance to sentenced persons and suspects, paras. 88–145.

Promising practice

Increasing the accessibility of fair trial information

In a visual and accessible format, Fair Trials International created an overview in 2012 of ECtHR fair trial cases as well as several other sources by state, including practitioners' views on the fairness of trials. The interface of the map provides a comparative overview of the status of justice in Europe and also contains specific justice information on individual EU Member States.



Source: For more information on the Justice in Europe campaign, see: www.fairtrials.net/justice-in-europe

Turning to access to justice more directly: in previous annual reports, FRA reported on concerns about accessing justice in the EU linked to UN Security Council resolutions freezing funds in an attempt to counter terrorism.¹⁹ In 2012, the Grand Chamber dismissed an appeal by Bank Melli Iran and upheld the decision to freeze the funds.²⁰ It concluded that the restrictions occasioned by the fund-freezing measures on a bank's freedom to carry out economic activity, and on its right to property, were not disproportionate to the important ends sought: the preservation of international peace and security.

In 2012, the CJEU also dealt with issues related to sanctions against Myanmar (Burma). In a Grand Chamber judgment, *Tay Ze v. Council*, the CJEU set aside an earlier ruling, saying that evidence relied upon to impose such sanctions must be precise. The CJEU thus annulled the regulation that imposed the sanctions.²¹

To provide timely access to justice, the CJEU also made use of its urgent procedures to deal with a case ▶ related to irregular migration (see **Chapter 1** of this annual report).²² A Vietnamese national was facing criminal prosecution in Germany for "assisting illegal immigration".²³ Some two months elapsed between the German court's request for a preliminary ruling and

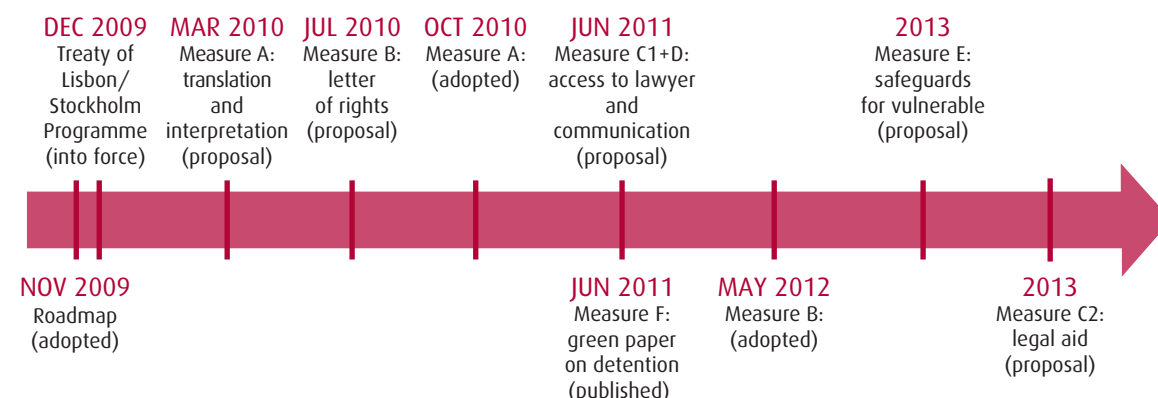
¹⁹ See FRA (2011), Section 8.2.3; and FRA (2012a) Section 8.1.

²⁰ CJEU, C-380/09 P, *Melli Bank plc v. Council of the European Union*, 13 March 2012.

²¹ CJEU, C-376/10 P, *Tay Ze v. Council*, 13 March 2012.

²² CJEU, C-83/12 PPU, *Minh Koa Vo*, 10 April 2012.

²³ *Ibid.*, para. 20.

Figure 8.1: Timeline of the Criminal Procedure Roadmap, 2009–2014

Source: FRA, 2012

a CJEU judgment, far less than the two-year average before a ruling.

The ECtHR also dealt with key issues related to access to justice during 2012. To mention one case only, in *C.A.S. and C.S. v. Romania*, the issue at stake was court proceedings in the rape case of a seven-year-old boy. The ECtHR concluded that despite the gravity of the allegations and the particular vulnerability of the victim, the criminal investigation had been neither prompt nor effective and was, as such, “devoid of meaning”.²⁴

► (See also **Chapter 4** of this annual report.)

8.3. Developments related to EU legislation

A number of EU legislative initiatives on criminal and civil law progressed during 2012 with significance for access to justice.

8.3.1. Criminal law

Prominent among criminal law initiatives is the criminal procedures roadmap and its progress (see Figure 1 below; for the ‘parallel’ roadmap on the rights of victims of crime; see Chapter 9 of this annual report).²⁵ Of the six measures envisaged (A–F) in the criminal procedure roadmap, which aims at ensuring minimum EU standards for the rights of suspects and the accused, the first (A), a directive on the right to interpretation and translation in criminal proceedings, was adopted in 2010 and is to be transposed by 27 October 2013.²⁶ Measure B, a directive providing for basic rights to information in criminal proceedings, was adopted in May 2012.²⁷ Once

these measures are transposed, suspects and accused persons in criminal proceedings will be issued “a letter of rights” to ensure that they are properly informed of their rights in the proceedings and the accusations against them in a language they understand.

As for the remaining measures of the Roadmap, in 2011 the European Commission proposed an instrument on the right of access to a lawyer and to communicate upon arrest, merging components originally intended as D and parts of measure C (C1).²⁸ The Justice and Home Affairs Council reached a general agreement in June 2012 on a draft text on this merged instrument.²⁹ The European Parliament held its orientation vote on the matter in July 2012³⁰ and negotiations between institutions began in September 2012. One remaining element of measure C on legal aid (C2) has been delayed.

Measure E, on safeguards for vulnerable persons and on legal aid (C2), and an additional instrument on the presumption of innocence, are scheduled to be proposed as a package in the second half of 2013.³¹ 2012 saw the publication of the results of a 2011 public consultation on a green paper on the application of EU criminal justice legislation in the field of detention (measure F, standards for pre-trial detention).³² EU Member States mostly opposed introducing EU rules in the area and instead favoured promoting good practices; while civil society mainly preferred minimum rules.³³

²⁴ ECtHR, *C.A.S. and C.S. v. Romania*, No. 26692/05, 20 March 2012, para. 83.

²⁵ Council of the European Union (2009) Resolution, 30 November 2009, OJ C 295/1.

²⁶ Directive 2010/64/EU, OJ 2010 L 280/1.

²⁷ Directive 2012/13/EU, OJ 2012 L 142/1.

²⁸ Proposal for a directive of the European Parliament and of the Council, COM (2011) 326 final, 8 June 2011.

²⁹ Council of the European Union, Press release 10760/12, 8 June 2012.

³⁰ European Parliament, status updates on the draft Directive on Judicial cooperation in criminal matters: the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest, available at: www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=592050.

³¹ European Commission (2012b), p. 25.

³² European Commission (2011a).

³³ European Commission (2012c).

One particularly noteworthy 2012 development relates to the EAW. The five Nordic countries (three of which are EU Member States: **Denmark, Finland and Sweden**) issued a statement on a common Nordic procedure to regulate the handing over of a suspect or accused person to the authorities in another state – a surrender procedure.³⁴ The statement followed up the entry into force on 16 October 2012 of a Convention on surrender procedures between the Nordic countries (Nordic Arrest Warrant, NAW). Since the NAW requires closer cooperation than the EAW, the Nordic EU Member States will rely on the NAW instead of the EAW.

FRA ACTIVITY

Confiscating the proceeds of crime – fundamental rights concerns

The European Commission issued a proposal for a Directive on the freezing and confiscation of the proceeds of crime in the EU on 12 March 2012. In response to a European Parliament request, the FRA issued an opinion in December 2012, highlighting, for example, aspects of presumption of innocence and the right to property in the freezing and confiscation of assets. The FRA opinion specifically points to the right to access justice, for victims of crime as well as for suspects, as important related fundamental rights considerations.

For further information, see: <http://fra.europa.eu/en/opinion/2012/fra-opinion-confiscation-proceeds-crime>

8.3.2. Civil law

The reform of the EU regulation that sets out common rules on jurisdiction, recognition and enforcement of judgments in civil and commercial matters, Brussels I, was adopted in December 2012.³⁵ The reform abolished the procedure under which Member States obliged to enforce another Member State's ruling were first required to revalidate it, known as the 'exequatur' procedure, which had caused bureaucratic delays.

In 2012, the EU and its Member States further developed the use of mediation, which is generally understood as a cost-efficient and more effective tool than court proceedings for certain types of cases, such as those related to consumers' rights. The European Parliament, the European Commission and the Council of the European Union reached provisional agreement for an EU initiative reinforcing alternative dispute resolution

for consumer disputes alongside a regulation concerning online dispute resolution.³⁶

8.4. Developments related to European and national courts

8.4.1. Length of proceedings

The right to a fair trial and to have one within a reasonable time frame are established fundamental rights forming part of access to justice. For the EU, the Charter of Fundamental Rights provides for these through Article 47 (2) on effective judicial protection within a reasonable time and through Article 41 (1) on the right to have affairs handled impartially, fairly and within a reasonable time frame.³⁷

Judicial efficiency and the need to reduce the length of court proceedings remained an overarching need for most EU Member States in 2012,³⁸ as in previous years. The number of cases related to length of proceedings, as well as to fair trial more generally, continued to decline, falling to 151 in 2012 from 202 in 2011 (see Table 8.1). Nonetheless, these violations continued to constitute a third of all violations, and the most frequent, that the ECtHR found.

As to violations among EU Member States, length of proceedings emerges as the one main pattern from the case law of the ECtHR.³⁹

In response, **Belgium**⁴⁰ for example, endeavoured to speed up trials by having single judges rather than panels deal with some criminal case appeals, unless the defendant requested otherwise. **Greece**⁴¹ reinforced that same procedure for civil courts and **Croatia**⁴² for administrative proceedings.

34 Council of the European Union, Notification by Finland according to Art. 31 (2) of the Council Framework decision of 13 June 2002, 14440/12, 2 October 2012.

35 Regulation (EU) 1215/2012, OJ 2012 L 351/1.

36 European Parliament, 2011/0373(COD), 10 December 2012, available at: <http://www.europarl.europa.eu/oel/popups/summary.do?id=1238899&t=e&l=en>.

37 See, for example, CJEU, *Imperial Chemical Industries Ltd v. European Commission*, T-214/06, 5 June 2012, paras. 284 and 285.

38 Council of Europe, CEPEJ (2012a), Chapter 9; see also Council of Europe, CEPEJ (2012b).

39 Data extracted from ECtHR Annual Report 2012, pp. 152–153. For monitoring the execution of judgments, see Council of Europe, Committee of Ministers (2012), regarding Italy, Greece or Romania.

40 Belgium, Proposal for a law amending Art. 109bis.

41 Greece, The Act on fair trial and reasonable duration, *Δίκαιη δίκη και εύλογη διάρκεια αυτής*, 12 March 2012.

42 Croatia, Official Gazette No. 143, 20 December 2012.

Table 8.1: Number of ECtHR judgments in 2012 and fair trial-related violations, by EU Member State and Croatia

	ECtHR judgments finding at least one violation*		Violations of the right to a fair trial		Violations of length of proceedings	
AT	10	(7)	0	0	3	(5)
BE	6	(7)	1	(2)	1	0
BG	58	(52)	8	(2)	17	(21)
CY	0	(1)	0	0	0	(1)
CZ	10	(19)	2	(13)	0	(2)
DE	11	(31)	1	0	0	(19)
DK	0	(1)	0	0	0	0
EE	2	(3)	1	(1)	0	0
EL	52	(69)	1	(6)	35	(50)
ES	8	(9)	3	(4)	1	(1)
FI	2	(5)	0	0	0	(2)
FR	19	(23)	3	(11)	0	(2)
HU	24	(33)	0	(4)	9	(19)
IE	2	(2)	0	0	2	(2)
IT	36	(34)	3	(7)	16	(16)
LT	7	(9)	2	(3)	1	(5)
LU	1	(1)	0	(1)	1	0
LV	10	(10)	1	0	2	(1)
MT	1	(9)	0	(3)	0	(3)
NL	5	(4)	2	(1)	0	0
PL	56	(54)	1	(14)	6	(15)
PT	22	(27)	5	(1)	17	(13)
RO	70	(58)	13	(9)	10	(10)
SE	4	0	0	0	0	0
SI	20	(11)	0	(1)	13	(6)
SK	21	(19)	1	(2)	11	(5)
UK	10	(8)	0	(3)	1	(1)
HR	19	(23)	2	(8)	5	(3)
Total	486	(529)	50	(96)	151	(202)

Notes: The number of cases in 2011 is in parenthesis.

The five highest numbers of violations in each category are highlighted in red.

*ECtHR judgments finding at least one violation by an EU Member State, or concerning two EU Member States: Italy & Bulgaria (2012), Greece & Germany (2012).

Source: Council of Europe/ECtHR, Annual Report 2012, p. 152

The **Czech Republic** also adopted an amendment introducing single judges in some decisions on appeal.⁴³ The Public Defender of Rights in the Czech Republic reported in March 2012 that lengthy procedures were threatening the right to a fair trial within a reasonable time frame and even noted that some courts had refused to hear complaints on length of proceedings.⁴⁴

In preparation for EU accession, the EU monitored **Croatia** in relation to a number of issues, including the judiciary and fundamental rights, looking in particular at increasing efficiency.⁴⁵

The difficulties some EU Member States, such as **Bulgaria**,⁴⁶ **Latvia**⁴⁷ and **Slovenia**,⁴⁸ experience with

43 Czech Republic, *Zákon č. 404/2012 Sb., kterým se mění zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, a některé další zákony*.

44 Czech Republic, Public Defender of Rights (2012).

45 Croatia (2012a) and (2012b).

46 European Commission (2011b), pp. 8–9.

47 Latvia, Cabinet of Ministers (2009).

48 Slovenia, Ministry of Justice and Public Administration (2012).

length of proceedings stem from problems in distributing cases evenly. These Member States therefore took steps to address the issue by facilitating the shifting of judges and cases among courts and by clarifying the respective roles of levels of courts, with positive effects. In the **United Kingdom**, England and Wales are seeking the same improvements through a proposed unification of local (county) courts.⁴⁹

Ireland shortened the period for some requests for judicial review from six to three months and also took steps to reduce the length of oral proceedings in superior courts.⁵⁰ Ireland will also hold a referendum on constitutional changes in late autumn 2013 that would enable the Supreme Court to speed up its procedures.⁵¹

To reduce its length of proceedings, **Italy** is limiting appeals in civil proceedings by restricting the types of legal actions that can be referred to its supreme court, the Court of Cassation.⁵² Italy also revised the Pinto act – which was originally introduced to address the systemic delays from length of proceedings issues – particularly as regards a reasonable trial duration, beyond which the right to compensation arises.⁵³ **Finland** drew up plans to introduce two new options in court proceedings to make these more efficient.⁵⁴ It plans to allow: plea bargaining, under which the prosecution negotiates with a defendant for a guilty plea to a lesser offence than the one charged; as well as an option of non-prosecution, which would reduce the number of investigations going to court.⁵⁵

Promising practice

Making length of court proceedings public

The United Kingdom makes court performance targets and statistics about case handling times in England and Wales publicly available, including the average length of cases by geographic location and subject area. This feature provides for transparent comparison that can contribute to making courts more efficient.

For more information, see: United Kingdom, Open justice: Making Sense of Justice, available at: <http://open.justice.gov.uk/courts/>

Estonia,⁵⁶ among others, introduced simplified procedures, such as hearing witnesses by telephone or through written statements, rather than requiring them to appear in court, avoiding the resulting delays if they failed to appear. Such procedures are allowed in criminal cases if the accused and the prosecutor have agreed on how the case should be concluded.⁵⁷ **Slovenia** adopted a revised act that provides for stricter time limits for court proceedings.⁵⁸

The **Netherlands** instituted a system whereby certain questions on civil law from lower courts can be put to the Supreme Court to resolve the issue – a system similar to EU Member State courts' requests for preliminary rulings from the CJEU.⁵⁹ It also introduced a new court procedure for administrative law cases that aims at finding solutions by the judge for the parties rather than legal elements for a verdict – a system that is believed to improve the efficiency of justice through less legal rigidity.⁶⁰

Many EU Member States have also introduced various e-justice measures to reduce the length of proceedings (see Section 8.5.3 on e-justice).

The pace of execution of ECtHR judgments at national level further exacerbates the overall issue of length of proceedings. Data from 2012 show that several EU Member States suffered from excessive delays in execution of key cases – non-repetitive cases that relate to a general or structural problem that only legislation can address, which are known as 'leading pending cases'. **Bulgaria, Greece, Italy, Poland** and **Romania** were the five EU Member States, as well as Croatia, that had the highest number of leading cases pending execution after five years (see Tables 8.2; and ► Table 10.7 in **Chapter 10** of this annual report).⁶¹

8.4.2. Reform of the CJEU and the ECtHR

The Charter of Fundamental Rights of the European Union ensures access to justice through the right to an effective remedy before a tribunal in Article 47 (1).

► As for court proceedings, see also **Chapter 4.3.** of this annual report on child-friendly justice.

49 United Kingdom, Crime and Courts Bill, HL Bill 4.

50 Ireland, Rules of the Superior Courts (Judicial Review), Statutory Instrument No. 691 of 2011.

51 Denham, S. (2012).

52 Italy, Law 134/2012 amending Art. 360 of the Code of Civil Procedure.

53 Italy, Law No. 89 of 24 March 2001, Official Gazette General series No. 78, 3 April 2001 revised by Decree 83/12 (converted into Law 134/12).

54 Finland, Ministry of Justice (2012).

55 *Ibid.*

56 Estonia (2012), Code of Administrative Court Procedure, RT I, 56.

57 Estonia, Criminal procedure Law, RT I, Art. 239–250.

58 Slovenia, Act amending protection of right to trial without undue delay act, 15 May 2012.

59 Netherlands, Law Gazette of the Kingdom of the Netherlands, Volume 2012, No. 166.

60 Netherlands, Council for the Judiciary (2012).

61 Council of Europe (2013).

Table 8.2: Number of leading cases pending execution in 2011 and 2012, five EU Member States with the most cases pending execution for more than five years

EU Member States	Average execution time Leading cases pending > 5 years	
	2011	2012
BG	27	32
EL	15	20
IT	31	33
PL	15	27
RO	20	28

Note: The table includes data only on the top five EU Member States where implementation is delayed by more than five years. For a full EU Member State and Croatia list, see Table 10.7 in [Chapter 10](#).

Source: The data are extracted from the Council of Europe's Draft of the Annual Report 2012, Supervision of the execution of judgments and decisions of the ECtHR, April 2013

The CJEU's statute was revised in 2012 to make the court more efficient and adapt it to the enlarged EU.⁶² Seventeen judges now constitute a full court in contrast to 15, with similar adjustments made in the smaller constellations. The Grand Chamber was enlarged from 13 to 15 judges, but the former requirement of having all five Chamber Presidents present for a Grand Chamber decision has been relaxed to stipulate a minimum of three of the five. The revision also reduced some written documentation in favour of oral procedures.

The CJEU also adopted new rules of procedure in September 2012 to streamline its work and handle a heavier workload.⁶³ The increase in cases and the types of cases stem from the transition into a more integrated Union, resulting in a consistent rise in requests for preliminary rulings over recent years. The changes to the rules of procedure also made it possible for the CJEU to deal with a file case without an oral hearing. The new rules extended defence submission deadlines to two months from one, clarified rules on legal aid and introduced the possibility of keeping the parties for preliminary rulings anonymous.⁶⁴ The new rules of procedure have themselves been made more user-friendly through clearer clustering and headings.⁶⁵

Further reforms were initiated during 2012 concerning the ECtHR in Strasbourg. One of the principal aims of the Brighton Declaration of April 2012 was to match the capacity of the ECtHR with the number of incoming cases (see Section 8.6 related to NHRIs).⁶⁶ The member states of the Council of Europe, through its Steering Committee for Human Rights (CDDH), have been preparing two new draft protocols, Nos. 15 and 16, to the ECHR in part to diminish the number of applications and make the court more efficient.⁶⁷

Draft Protocol No. 15 would introduce a number of changes to the ECHR, by:⁶⁸

- Stressing in the preamble the subsidiary relationship between the ECtHR and the States Parties and the role of the margin of appreciation in applying certain ECHR rights. This measure aims at clarifying the respective roles of national authorities and the ECtHR.
- Requiring judges at the ECtHR to be under 65 when taking office. This measure aims at replacing an upper-age limit and ensuring that highly qualified judges may serve the full term of office.
- Removing the right of parties to a case to object to a Chamber's proposal to relinquish a case to the Grand Chamber. This measure aims at accelerating proceedings in important cases and thereby helping to maintain consistency in case law.

⁶² Protocol No. 3 of the European Parliament and of the Council, as amended by Regulation (EC) No. 741/2012, OJ 2012 L 228/1, Art. 16, 17 and 20.

⁶³ CJEU (2012a). New rules of procedure adopted on 25 September 2012, came into force on 1 November, replacing a set originating from 1991.

⁶⁴ See also CJEU (2012b), reflecting innovations introduced by those rules which may affect both the principle of a reference for a preliminary ruling to the CJEU and the procedure for making such a reference.

⁶⁵ CJEU (2012a); See also CJEU (2012b).

⁶⁶ United Kingdom, Ministry of Justice (2012a).

⁶⁷ Council of Europe, Steering Committee for Human Rights (CDDH) (2012a) and (2012b).

⁶⁸ Council of Europe, CDDH (2012c).

- Reducing the time limit for submitting an application from six to four months after the final decision at domestic level.
- Allowing applications in which an applicant had not suffered 'significant disadvantage' to be deemed inadmissible even if not previously considered by a domestic tribunal. These last two measures aim at rationalising and updating certain admissibility criteria.

Promising practice

Checking admissibility for the ECtHR – a model for national courts

In an effort to reduce the large number of inadmissible cases it receives, the ECtHR produced a video in 2012 setting out the criteria it uses to assess the admissibility of cases, which include the exhaustion of a domestic remedy and the lapsing of the six-month time for lodging an application.



It also made available a supplementary Practical Guide on Admissibility Criteria in a range of languages to clarify what types of applications are admissible. Such an admissibility checklist could be useful in many national settings as well, for courts as well as for non-judicial mechanisms (see the FRA project entitled CLARITY in this regard).

For more information, see: ECtHR, Press release, 27 January 2012, <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-3822504-4385502>

For details on the EU accession to the ECHR, see Chapter 10 of this annual report.

Draft Protocol No. 16, though optional, would expand the competence of the ECtHR to give advisory opinions.⁶⁹ The highest courts and tribunals (as specified by each ratifying state) would be empowered to ask the ECtHR to deliver an advisory opinion on questions of principle as to interpretation or application of the rights and freedoms contained in the ECHR and its protocols, arising in the context of a case pending before that court.

Such an advisory opinion by the ECtHR would not be binding. The proposal would allow, similar to the rules in contentious proceedings, for friends-of-the-court (*amicus curiae*) submissions by the Council of Europe Commissioner for Human Rights. The protocol would seek to underscore the importance of national courts as the first port of call for human rights cases and to promote effective resolution of complaints at the national level.

8.4.3. Reforms in EU Member States' national court systems

EU Member States also engaged in major restructurings of their judiciaries in 2012, mainly reducing the number of local courts. While this measure may increase effectiveness by pooling resources in fewer locations, it may also run the risk of reducing physical access to justice because courts are located further away from one another. **Italy**, for instance, decided to close 220 local courts and merged the offices of courts and public prosecutors offices in 2012.⁷⁰

8.5. Facilitating access to justice

Access to justice not only refers to the availability of courts and procedures, a number of factors provide obstacles or create incentives for actual access to justice: court fees may discourage the use of courts; legal aid will have the opposite effect. Information and communication technologies can enhance court efficiency and other complaint mechanisms. Effective non-judicial redress systems likewise facilitate access to justice. The EU witnessed a number of developments in these respects in 2012 in the EU (for developments in non-judicial mechanisms, see Section 8.6).

8.5.1. Court fees and legal aid

The 2012 CEPEJ report notes that an increasing number of states rely on court fees to finance their court systems while allocating a larger amount of legal aid to fewer cases, resulting in an overall budget increase.⁷¹ Legal aid developments occurred in many EU Member States during 2012. Bulgaria took noteworthy steps towards broadening the scope of persons who can qualify for legal aid as well as towards introducing a related needs-based assessment.⁷² The Constitutional Court in **Hungary** found discriminatory a provision that excluded legal aid in cases of constitutional complaints

⁷⁰ Italy, Legislative Decree No. 155/2012, 7 September 2012.

⁷¹ Council of Europe, CEPEJ (2012a), pp. 82–83.

⁷² A draft amendment was published in 2012 and the law published as Bulgaria, Law amending the Legal Aid Act, Official Gazette No. 1514, March 2013, see in particular para. 22.

⁶⁹ Council of Europe, CDDH (2012d).

and annulled it.⁷³ **Spain** adopted an act in November 2012 that aims at doubling funds drawn from court fees to discourage the unjustified use of the court system and, at the same time, at financing an expansion of legal aid.⁷⁴ Other EU Member States, such as **Lithuania**,⁷⁵ have sought to improve access to legal aid by simplifying application procedures.

Several EU Member States either proposed or implemented reductions in legal aid. **Germany** proposed major savings on federal legal aid spending,⁷⁶ but, at the same time, opened the door to legal aid for third parties in ECtHR proceedings.⁷⁷ In the **United Kingdom**, new legislation is coming into effect for England and Wales, which will reduce the availability of legal aid in civil cases.⁷⁸ Scotland also introduced new legislation with similar effect.⁷⁹

In the second half of 2011, **Ireland** introduced cost-cutting measures to its criminal legal aid scheme, including a 10 % reduction in fees and rates payable for such aid, which were expected to result in savings in 2012.⁸⁰ Expenditure on criminal legal aid fell to €50.5 million in 2012 from €56.1 million in 2011, while expenditure on civil legal aid services through the Legal Aid Board⁸¹ fell marginally in both 2011 and 2012.⁸² Overall demand for civil legal aid services increased by 93 % between 2006 and 2011, according to the Legal Aid Board's 2011 Annual Report, which was published in December 2012. The Legal Aid Board links this increase directly to the economic crisis – both in terms of individuals requiring greater financial assistance and certain areas – such as family law, debt and unemployment – seeing increased need.⁸³

8.5.2. Legal standing

The rules that regulate who is allowed to bring a claim before courts and non-judicial redress mechanisms are known as 'legal standing'. A claim relating to several person or entities may be referred to as collective redress or a collective interest action. Where legal standing provisions are broader, a claim for actions

for general or public interests can be referred to as public interest actions.⁸⁴

Building on its public consultation, Towards a coherent European approach to collective redress, the European Commission included an initiative for an EU approach to collective redress in its 2012 Work Programme. The proposal, possibly legislative, would be a cross-cutting measure covering several policy areas with the aim to improve the enforcement of EU law and access to justice for citizens and companies.⁸⁵

The European Parliament passed a resolution at the first reading of the European Commission initiative on 2 February 2012, supporting the introduction of an EU-wide collective redress mechanism and providing guidance as to the shape of such a mechanism, including specific safeguards in order to prevent its misuse.⁸⁶ The European Parliament also published two related studies on legal standing (*locus standi*) in June and August 2012: a study on *Collective Redress in Antitrust*; and a study on *Standing Up for Your Rights(s) in Europe: A Comparative Study on Legal Standing* before the EU and Member States' courts.

The first study analyses the EU's systems of collective redress for breach of competition law, discussing the legal basis for a legislative initiative at EU level. The publication also assesses the advantages of, and limits to, different policy options regarding procedural rules applying generally to collective actions and specifically to collective redress in antitrust.⁸⁷ The second study provides an in-depth comparative analysis of legal provisions, doctrine and case law on legal standing before the civil, criminal and administrative courts of selected national legal systems, including nine EU Member States – **Belgium, France, Germany, Hungary, Italy, the Netherlands, Poland, Sweden** and the **United Kingdom** (England and Wales) – and before the EU courts.⁸⁸

At national level, there were several new legislative and other developments or proposals related to collective redress in 2012. **Belgium**⁸⁹ and **Malta**

73 Hungary, Constitutional Court (2012), Decision 42/2012. (XII. 20.) in relation to Act LXXX of 2003, Art. 3 (3) (c).

74 Spain, Law 10/2012 of 20 November 2012.

75 Lithuania, *Seimas* No. XIP-4364, 27 April 2012.

76 Germany, Federal Ministry of Justice, Draft law amending the law on legal aid, 2 May 2012.

77 Germany, Federal Council, BR-Drs. 462/12, 21 September 2012.

78 United Kingdom, Legal Aid, Sentencing and Punishment of Offenders Act 2012.

79 United Kingdom, Scottish Government, (2011), pp. 1–18;

United Kingdom, Scottish Government (2012), pp. 1–18.

80 Ireland (2011).

81 See: www.legalaidboard.ie/.

82 See: House of the Oireachtas, Written Answer No. 444.

83 Ireland, Legal Aid Board (2012).

84 FRA (2012b) emphasised access to justice and effective redress mechanisms in cases of data protection breaches by such measures as broadening the rules on legal standing. It specifically advocated the possibility of lodging public interest actions before data protection authorities and courts subject to specific conditions. See Chapter 3 for details.

85 See: www.ec.europa.eu/atwork/pdf/forward_programming_2012.pdf.

86 European Parliament (2012), *Resolution Towards a Coherent European Approach to Collective Redress*, 2 February 2012. On the same day, the Parliament also adopted a resolution on collective redress in the area of competition, 2 February 2012.

87 European Parliament, Directorate-General for Internal Policies (2012a).

88 *Ibid.*

89 Belgium, Doc. parl. Chamber, 2011–12, No. 2035/001/.

introduced or strengthened such mechanisms.⁹⁰ In **Hungary**, NGOs were given a wider legal standing in consumer interest cases.⁹¹

As a further example of such public interest actions, in the **United Kingdom**, the High Court granted legal standing to an individual so that she could ask a court to review a local authority's decisions on public library provision. Although she neither lived nor worked within the local authority's area, she had a genuine interest in education, particularly for minority and disadvantaged groups.⁹² In another case, the United Kingdom Supreme Court permitted the parents of a voluntary psychiatric patient who had killed herself whilst on home leave to assert legal standing as victims of the hospital's negligence in releasing their daughter.⁹³

8.5.3. E-justice

Information and communication technologies can enhance access to justice by providing justice-related services, such as: online information on jurisprudence; online case and file management; electronic forms and e-handling of individual complaints by complaint mechanism bodies; and video technology to make procedures accessible at long distance.

"[Information and communication technologies] can be used to [...] reinforce the safeguards laid down in Article 6 ECHR: access to justice, impartiality, independence of the judge, fairness and reasonable duration of proceedings," CEPEJ said in its 2012 report. Such tools often provide quicker and cheaper solutions than traditional paper-based systems, a shift that is of particular relevance in times of austerity. The ECtHR revamped in 2012 its search engine for cases – HUDOC – to make it easier to find a case.⁹⁴

At the same time, e-justice may alienate those lacking access or adverse to such technology so it is important to see e-justice as supplementing rather than replacing traditional systems.

Promising practice

Enhancing the European e-justice portal

The European e-justice portal had further features added in 2012. These included revised European Payment Order (EPO) online forms pursuant to Commission Regulation (EU) No. 936/2012 of 4 October 2012 as well as various new content topics, such as information on the property effects of marriage, and translated factsheets on victim and defendant rights.

The portal also introduced information on the European Case Law Identifier (ECLI). Through a minimum set of uniform metadata for case law, the ECLI aims to facilitate easy access to national and European case law. The system is open to any state. The state can also tailor its scope, applying it to, for example, just the Supreme Court level or to all courts. It will also apply retroactively to historical records.

For more information, see: <https://e-justice.europa.eu>

FRA ACTIVITY

Charter 4 Mobile – an EU application replicable at national level

FRA's new Charter 4 Mobile, a fundamental rights hub for mobile devices, makes it possible for anyone interested in EU fundamental rights to access the text of the Charter of Fundamental Rights of the European Union in all 23 official EU languages.

Launched at FRA's Fundamental Rights Conference on 6–7 December 2012, Charter 4 Mobile provides additional practical and regularly updated information. This includes explanations of the legal provisions, academic commentary, related international and EU law, EU case law and related FRA publications provided on an article-by-article basis.

For more information, see: <http://fra.europa.eu/charter4mobile/>

At EU Member State level, a general trend of launching new e-justice technologies continued throughout 2012. Several Member States introduced computerised databases with court records, which replaced paper-based systems or provided the possibility of e-filing individual complaints in certain areas.

In **Hungary**, as of 1 January 2013, parties will be able to submit documents online both in criminal and civil law cases as well as to follow developments in their cases online. It is expected that such systems will speed up court procedures and internal case management.⁹⁵

90 Malta, Chapter 520 of the Laws of Malta, Act VI of 2012.

91 Hungary, Act LV of 2012 on the Amendment of Act CLV of 1997, Art. 24.

92 United Kingdom, High Court (2012), *R (on the application of Williams) v. Surrey County Council* [2012] EWHC 516 (Admin).

93 United Kingdom, Supreme Court (2012), *Rabone v. Pennine Care NHS Foundation Trust* [2012] UKSC 2.

94 ECtHR (2012), pp. 64–66.

95 Echo Television (Hungary) (2012).

Similarly, in **Lithuania**, where the amended Civil Procedural Code entered into force in January 2013,⁹⁶ parties to judicial proceedings will be able to submit procedural documents to the court electronically.

Strides were also made in making technology available in the courtroom. Video conferencing, for example, aims at assisting parties in presenting their case to the court, while others, such as digital audio recording, seek to directly assist judges and court clerks, thereby making the existing system more efficient and less costly. **Slovenia** tested a new system in 2012 that would allow courts to abandon written transcriptions of hearings in favour of sound recordings, which would be accessible with a digital certificate through a dedicated website.⁹⁷

Latvia⁹⁸ introduced video conferencing to allow courts to hold remote hearings with persons residing abroad, witnesses, court experts, children, patients in hospitals or elderly homes, prisoners and other participants. The use of such equipment in courts is designed to: reduce costs by saving on transport of detained persons to court or parties' personal travel costs; ensure timely contributions by parties to case hearings; and enhance court accessibility, such as for persons with disabilities who could opt not to physically attend hearings. Such a system could also enable hearings for crime victims who do not wish to confront the perpetrator (for more ► on victims of crime, see **Chapter 9** of this annual report).

In 2012, in the **United Kingdom**, the English and Welsh courts initiative, which allows defendants in criminal proceedings to appear in early hearings by video link, expanded, adding a virtual court.⁹⁹ A new website also allows the public to track crime data and police response by geographical area in England and Wales – a tool that supports access to justice through increasing transparency of basic data but also poses some risks in terms of privacy and data protection.¹⁰⁰

Starting in 2012,¹⁰¹ the **Dutch** Council for the Judiciary prepared to launch cantonal e-courts¹⁰² (*e-kantongerechten*) to make it easier for citizens to submit complaints and to shorten the overall length of procedures. In a digital procedure, courts have six-to-eight weeks to reach a decision on complaints. If this project is successful, the Council for the Judiciary will use it as a model to simplify civil procedures for the whole judiciary.

96 Lithuania, *Seimas* (2012), No. IX-743, 26 June 2012.

97 For more information, see: <http://obravnavne.mp.gov.si>.

98 Latvia, Court Administration (*Tiesu administrācija*) (2012).

99 United Kingdom, Ministry of Justice (2012b) and (2012c).

100 See: www.police.uk/.

101 Netherlands, Council for the Judiciary (2012a).

102 This initiative is not to be confused with the private initiative e-court reported on in the FRA 2011 Annual report.

Several EU Member States, including **Austria**,¹⁰³ **Belgium**,¹⁰⁴ **Bulgaria**,¹⁰⁵ **Denmark**,¹⁰⁶ **Italy**,¹⁰⁷ **Poland**¹⁰⁸ and **Slovakia**¹⁰⁹ created web portals and other web tools in 2012 to raise legal awareness and educate the public, providing easily accessible and barrier-free information on the functioning of court proceedings, downloadable forms and relevant case law. In the **United Kingdom**, the Crime and Courts Bill 2012¹¹⁰ further developed proposals to permit broadcasting certain aspects of court proceedings in England and Wales, with a view to increasing public understanding of court proceedings.¹¹¹

Promising practice

Reporting discrimination by mobile application

In October 2012, the **Dutch** Minister of Immigration, Integration and Asylum launched a mobile phone application, Discrimination Report (*Discriminatie melden*), that aims at facilitating reporting discrimination at work.

With the help of this free application, an individual can use a smartphone to report discrimination instantly. Through a simple interface, the tool makes it possible to: select the ground of discrimination; describe the situation and add a photo of the incident; fill in one's name, email and postcode, the latter to determine which regional Anti-Discrimination Bureau can provide the most relevant support; and file the incident.

For more information, see: www.discriminatie.nl/

8.6. Non-judicial mechanisms

Access to justice is not limited to traditional courts but encompasses non-judicial mechanisms. At the national level, equality bodies and NHRIs facilitate access to justice either directly by addressing individual

103 Austria, Web portal for court information, available in German at: www.justiz.gv.at/justizinfo.

104 Belgium, Web portal for court information, available in Dutch at: www.hervormingjustitie.be and in French at: www.reformejustice.be.

105 Bulgaria, BILI, Web portal for TJA court information, available at: <http://judicialprofiles.bg/en/pages/methodology/>.

106 Denmark, Web portal for court information, available in Danish at: www.domstol.dk/om/Nyheder/oevrigenyheder/Pages/Klogpaadomstolene.aspx.

107 Italy, Web portal for court information, available at: www.pst.giustizia.it/PST/it/homepage.wpp.

108 Poland, Ministry of Justice (*Ministerstwo Sprawiedliwości*) (2012), 'Ruszyły internetowe portale orzeczeń', Press release, 1 August 2012, available at: <http://ms.gov.pl/pl/informacje/news,4173,ruszyly-Internetowe-portale-orzeczen.html>.

109 Slovakia, Law No. 33/2011, including Law No. 38/1993, 1 May 2011.

110 United Kingdom, Crime and Courts Bill 4.

111 United Kingdom, Ministry of Justice (2012d), pp. 1–26.

complaints or indirectly through their advisory and awareness-raising functions.

NHRIs are bodies established by national law to protect and promote human rights in a state. They provide access to justice in a variety of ways, depending on their mandates, by, for example, hearing individual complaints; undertaking research; raising awareness of human rights standards to prevent the need to access justice from arising; or, by monitoring a state's compliance with its international human rights treaty obligations and engaging in the work of international mechanisms (for more on the role of NHRIs as monitoring bodies under international treaties, see [Chapter 10](#) of this annual report).

The main 2012 NHRI-related developments in **Finland** and **Lithuania** concern the process of establishing such institutions; in addition, five Member States — **Belgium**, **Denmark**, **Hungary**, **Ireland**, the **Netherlands** — and **Croatia** made changes to institutional settings and powers of existing NHRIs.

Austerity measures taken in EU Member States also resulted in budget and staff cuts in some NHRIs in 2012. The Equality and Human Rights Commission in the **United Kingdom**, for example, faced major budget cuts which may undercut its financial stability and hence its effectiveness in adhering to its mandate.¹¹²

The year 2012 also witnessed developments regarding the status of NHRIs as a result of the accreditation process by the International Coordinating Committee of National Human Rights Institutions (ICC). These developments are ► further discussed in [Chapter 10](#) of this annual report.

Finland established a Human Rights Centre in early 2012 with responsibilities for the promotion, implementation and monitoring of fundamental and human rights. The NHRI encompasses the Human Rights Centre and two additional components: a newly established Human Rights Delegation and the existing Parliamentary Ombudsperson Institution.¹¹³

In 2012, **Lithuania** initiated the establishment of an NHRI. It decided, however, given its existing institutional system and the financial situation, not to create a new human rights institution but rather to improve the current legal basis and increase the competence of the Parliamentary Ombudsmen's Office (*Seimo kontrolierijų įstaiga*), ensuring

compliance with the Paris Principles in an effort to obtain accreditation from the ICC.¹¹⁴

Some states made changes to institutional aspects of existing NHRIs. **Croatia** adopted a new Ombudsman Act in July 2012,¹¹⁵ strengthening the status of the ombudsman. The new legislation granted the ombudsman limited authority to intervene before courts (they may request an explanation from a president of a competent court in cases where it is apparent that the proceedings are being unnecessarily delayed or that powers are manifestly abused) as well as access to classified data without a security vetting certificate.¹¹⁶ A merger between the Office of the Ombudsman and the Human Rights Centre (*Centar za ljudska prava*) also enhanced the Ombudsman's capacity to promote fundamental rights. On 29 May 2012, the **Danish** Parliament adopted a new act governing the country's NHRI, the Danish Institute for Human Rights (DIHR, *Institut for Menneskerettigheder*). This act, which takes effect on 1 January 2013, clarifies the role of the DIHR as Denmark's NHRI in accordance with the Paris Principles.¹¹⁷

Other institutional reforms related to NHRIs that also serve as national equality bodies under EU law. Many national equality bodies, whose role it is to promote equal treatment, were established as part of pre-existing NHRIs or have since been or are expected to be merged with NHRIs.

Structural changes introduced by the **Netherlands** and **Hungary** in 2011 became effective in 2012. The **Dutch** NHRI, which was established in 2011 and integrated the B-status Equality Treatment Commission, opened officially on 2 October 2012.¹¹⁸ The **Hungarian** law on the Commissioner for Fundamental Rights (CXI/2011) came into force on 1 January 2012.¹¹⁹

Negotiations on creating a **Belgian** NHRI, begun in 2006, continued, leading to the creation of an inter-federal task force to prepare for an NHRI's creation by 30 June 2013. The new NHRI would integrate three institutions: the reformed Equality Body (the future Interfederal Centre for Equal Opportunities and Opposition to Racism); the existing Centre for the Equality of Men and Women; and a newly created Federal Centre for the Analysis of Migratory Flows, the Protection of the Fundamental Rights of Non-citizens and the Fight against Human Trafficking.¹²⁰

114 Lithuania, *Seimas* (2012), No. XIP-4638(2), 24 September 2012; and, for the Paris Principles, see UN, General Assembly (1993), Resolution A/RES/48/134, 20 December 1993.

115 Croatia, Ombudsman's Act, Official Gazette No. 76, 9 July 2012.

116 Croatia, Official Gazette No. 86, 27 July 2012.

117 Denmark, Act No. 553 of 18 June 2012.

118 Netherlands, Netherlands Institute for Human Rights (2012).

119 Hungary, Fundamental Law of Hungary, Art. 30 (1)–(2); Act No. CXI. on the Commissioner for Fundamental Rights (2011. évi CXI. törvény az alapvető jogok biztosáról), 26 July 2011.

120 Bribosia, E., European network of legal experts in the non-discrimination field (2012).

112 United Kingdom, Equality and Human Rights Commission (2012), p. 22.

113 For more information on the Parliamentary Ombudsperson, see: www.oikeusasiamies.fi.



The **Irish** Minister for Justice announced the government's intention to merge the Equality Authority and the Irish Human Rights Commission into a single body in 2012.¹²¹ The Bill is scheduled for publication in mid-2013, according to the government's legislative programme.¹²²

Some EU Member States carried out reforms of their national equality bodies, including those that are not also NHRIs, reflecting the need to reduce costs amid

austerity measures. The Office for Equal Opportunities in **Slovenia**, the main public institution for promoting equal opportunities and gender equality, was closed down in April 2012. Its staff, including the Advocate of the Principle of Equality, the Slovenian equality body, transferred to the Equal Opportunities and European coordination service, a newly created organisational unit under the authority of the Ministry of Labour, Family and Social Affairs.¹²³

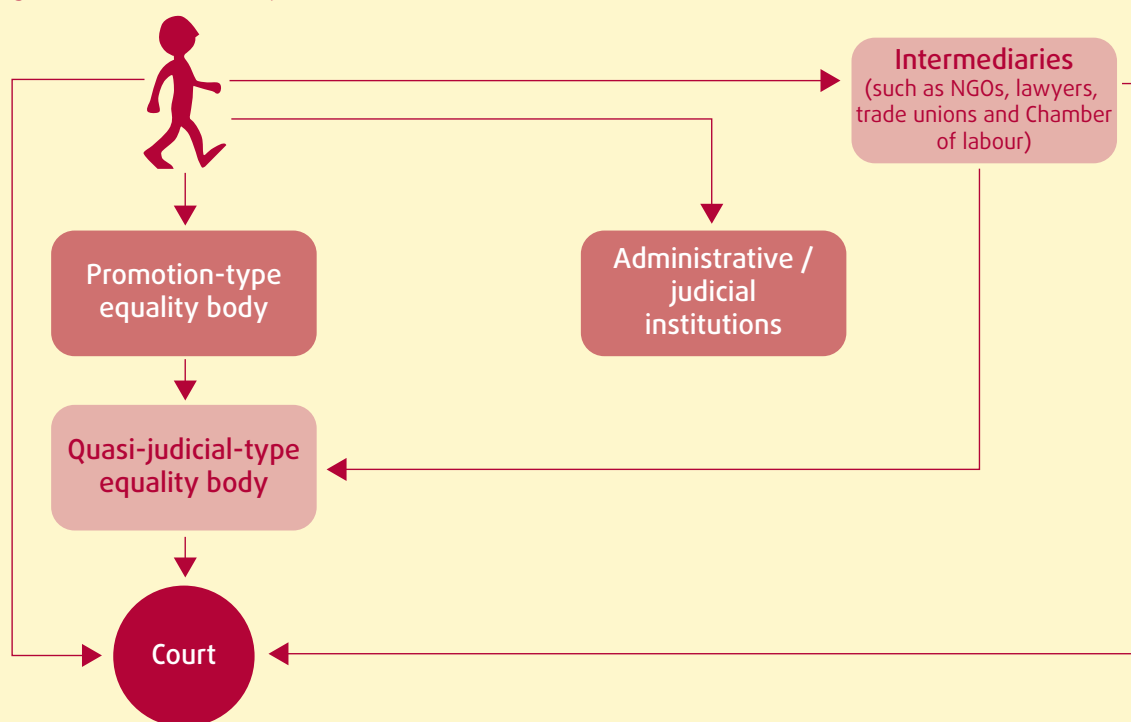
FRA ACTIVITY

Enhancing access to justice

FRA launched a report looking into some of the practical barriers that people who have been discriminated against face when accessing justice via equality bodies at its Fundamental Rights Conference, held at the European Parliament in Brussels in December 2012.

The analysis is based on interviews conducted with persons who brought a complaint of discrimination and with persons who had decided not to pursue a complaint further, as well as with lawyers and representatives of NGOs that provide advice and support to complainants and representatives of equality bodies in eight EU Member States: **Austria, Belgium, Bulgaria, the Czech Republic, Finland, France, Italy** and the **United Kingdom**. The study looked into the various options of accessing justice, as per Figure 8.2, and how interviewees perceived them.

Figure 8.2. How to access justice



The report concluded that three changes in particular would enhance access to justice via equality bodies: reducing complexity and increasing accessibility; strengthening the power of mechanisms; and boosting support to accommodate diversity and ensure a fundamental rights-based context.

This report supplements a 2011 FRA legal report, which analysed access to justice through judicial avenues.

For more information, see: <http://fra.europa.eu/en/publication/2012/access-justice-cases-discrimination-eu-steps-further-equality>

¹²¹ Ireland, Irish Human Rights and Equality Commission Bill 2012.

¹²² Ireland, Department of the Taoiseach (2012).

¹²³ Slovenia, Act amending public administration act, 19 March 2012.

The **Italian** government cut resources allocated to the National Office against Racial Discrimination (UNAR), prompting the Commissioner for Human Rights of the Council of Europe to express fears that the cuts could jeopardise UNAR's capacity to fulfil its role in the fight against discrimination.¹²⁴

In **Poland**, parliament was presented with a draft act envisaging the establishment of a new independent Defender for Protection against Discrimination mandated to tackle discrimination on the grounds of gender, race, ethnic origin, religion or belief, disability, age and sexual orientation.¹²⁵ The Parliamentary Legislative Committee,¹²⁶ however, declared the draft act unconstitutional.

Rhineland-Palatinate, one of **Germany's** 16 federal states (*Länder*), established a new governmental equality body incorporating the department of Anti-discrimination and Diversity into the State Ministry of Family Affairs;¹²⁷ in addition, the three ruling parties of the State of Schleswig-Holstein announced a coalition agreement on the foundation of a new State Anti-Discrimination Agency.¹²⁸

Some EU Member States extended the remit of national Equality Bodies. **Malta** expanded the mandate of the National Commission for the Promotion of Equality, following amendments to the Equality for Men and Women Act, to cover the promotion of equality on the basis of sexual orientation, age, religion or belief, racial or ethnic origin, and gender identity in employment, financial institutions and education.¹²⁹

Italy expanded UNAR's competence to cover not only discrimination based on race and ethnic origin but discrimination based on all the grounds covered in Council Directive 2000/78.¹³⁰

Outlook

The adverse effect of the economic crisis on access to justice, as with many other areas, continued in 2012, including by restricting legal aid to a more limited number of cases or decreasing the number of local courts. However, as was explored during the FRA's 2012 Fundamental Rights Conference, Justice in austerity – challenges and opportunities for access to justice, there are also numerous initiatives, some well under way and some burgeoning, that give reason for optimism in 2013 and beyond. 2012 also generated a reinvigorated debate on the need to underpin the rule of law across the EU and this will see developments during 2013.

While the main concern over the excessive length of proceedings persists, several EU Member States took action that not only reduced the time it takes to access justice but also helped to modernise justice systems in a way that should increase the quality, independence, efficiency, transparency and ultimately trust in these institutions. Various types of non-judicial bodies with a human rights remit, such as NHRIs and equality bodies, are increasingly viewed as cost-efficient and accessible bodies. Legal standing is receiving increased attention, boosted by EU action in the area of collective redress.

As for EU cross-border justice, 2013 will witness the proposal of two outstanding measures of the criminal procedure roadmap, namely on legal aid and safeguards for vulnerable persons (measures C2 and E) in a package that includes an initiative on the presumption of innocence. Court decisions in civil matters will be expedited by the late 2012 developments on the Brussels I regulation that simplifies the cross-border enforcement of judgments, and the promotion and application of mediation as an alternative to justice will be furthered.

124 Council of Europe, Commissioner for Human Rights (2012).

125 Poland, Draft act on the Defender for Protection against Discrimination.

126 Poland, Parliamentary Legislative Committee (2012).

127 Germany, Ministry for Integration, Family, Children, Youth and Women of Rhineland-Palatine (2012).

128 Germany, Act IX of 2012.

129 Malta, National Commission for the Promotion of Equality (2012).

130 Council Directive 2000/78/EC, OJ 2000 L 303; and Italy, Decree 31 May 2012.



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UN & CoE

January

February

14 March – Turkey becomes the first Council of Europe member state to ratify the Convention on Preventing and Combating Violence against Women and Domestic Violence (*Istanbul Convention*)

March

April

May

June

July

August

September

4 October – Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) publishes Second General Report on its activities

October

November

December

EU

10 January – European Protection Order for crime victims (EPO), endorsed by the European Parliament on 13 December 2011, enters into force

January

February

March

April

May

19 June – European Commission adopts the *EU strategy towards the eradication of trafficking in human beings 2012–2016*

June

July

August

September

25 October – European Parliament and the Council of the European Union adopt a directive on establishing minimum standards on the rights, support and protection of victims of crime in the EU (*EU Victims' Directive*, 2012/29/EU)

October

November

6 December – Council of the European Union adopts Conclusions on combating violence against women, and the provision of support services for victims of domestic violence

14 December – Portugal becomes the first EU Member State to pass in parliament the bill of ratification of the Convention on Preventing and Combating Violence Against Women and Domestic Violence (*Istanbul Convention*)

December

9

Rights of crime victims



With the adoption of the European Union (EU) directive establishing minimum standards on the rights, support and protection of victims of crime, which replaced a 2001 Framework Decision, the year 2012 witnessed a decisive step in the development of enforceable rights of victims of crime: for the first time, the European Commission was empowered to ensure the fulfilment of rights of crime victims by monitoring the transposition of the directive into EU Member States' national legislation and, if necessary, by bringing infringement proceedings to the Court of Justice of the European Union. The year also saw important progress in the field of victims' rights, particularly policies addressing labour exploitation and violence against women, while Member States continued in their efforts to ratify the Council of Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence.

9.1. EU and Member State developments

9.1.1. EU level: victims' package

On 25 October 2012, the European Parliament and the Council of the European Union adopted a directive establishing minimum standards on the rights, support and protection of victims of crime (*EU Victims' Directive*).¹ The directive entered into force on 15 November, replacing the Council Framework Decision on the standing of victims in criminal proceedings.

With the adoption of the new directive, which constituted Measure A of the Council of the European Union's *Roadmap for strengthening the rights and protection of victims*,² Measure B providing the EU Member States with guidance when implementing the directive is the roadmap's next step. It will recommend practical measures by taking stock of the existing best practices among Member States in the field of assistance and protection

Key developments in the area of the rights of crime victims

- The European Parliament and the Council of the European Union adopt a Directive establishing minimum standards on the rights, support and protection of victims of crime, replacing the 2001 Framework Decision on the standing of victims in criminal proceedings.
- The European Commission adopts the *EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016*, which identifies key priorities the EU should focus on to combat trafficking in human beings.
- EU Member States take steps to strengthen the protection of victims of violence against women as part of their preparations to ratify the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (*Istanbul Convention*).

to victims of crime and building on them within the framework of the applicable legislative instruments.³

¹ Directive 2012/29/EU, OJ 2012 L 315.

² Council of the European Union (2011); for more information, see: FRA (2012a), Section 9.1.1.

³ Council of the European Union (2011), p. 6.

EU Member States have three years, until 16 November 2015, to adopt the necessary national provisions and measures. The United Kingdom and Ireland opted in to this directive. Denmark is not taking part and will neither be bound by nor subject to its application.

“The criminal justice systems of the EU Member States have sometimes been too focused on the criminal and not enough on the victim. With this new European law, we will strengthen the rights of victims. Nobody wants to fall victim to a crime, but if it happens, people should be safe in the knowledge they will have the same basic rights everywhere in the European Union. Every year, an estimated 15 % of Europeans or 75 million people in the European Union fall victim to a crime.”

European Commission, Vice-President and Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding, Press release, Luxembourg, 4 October 2012, available at: http://europa.eu/rapid/press-release_IP-12-1066_en.htm

9.1.2. National developments

Several EU Member States took concrete measures to strengthen victims' rights over the course of 2012. This included enacting new legislation expanding the definition of victims and the rights of victims, both during the investigation of a crime and throughout criminal proceedings. Several countries also strengthened the rights of 'indirect' victims such as family members.

In early 2012, the **Czech** government thus strengthened the situation of victims by adopting⁴ an Act on the Victims of Crime.⁵ The lower house of the Czech Parliament passed the act in December 2012, which is expected to proceed through the upper house in 2013.⁶ The act organises and extends the rights of victims in criminal proceedings, increases state financial aid provisions and introduces a duty to provide information to victims on where they can access support.

A **Dutch** act extending the categories of persons entitled to speak in court during criminal procedures took effect on 1 September 2012.⁷ The Act on the extension of the right to speak in court for victims and next of kin during criminal procedures grants the right to speak to any family member with close family ties to the deceased victim. Parents or guardians of children under the age of majority who are not able or are too young to speak for themselves also now have the right to speak in court.⁸

4 Czech Republic, Government ruling No. 82, August 15, 2012.

5 The Chamber of Deputies refers to the act as print No. 617.

6 Czech Republic, The Chamber of Deputies, *Sněmovní tisk 617/O, část č. 1/5 N.z. o obětech trestných činů – EU*.

7 Netherlands, Act extending the categories of persons entitled to speak in court during criminal procedures, 12 July 2012.

8 Netherlands, Ministry of Security and Justice (2012).

Promising practice

Improving the quality of victim support services

The Capacity Building for EU Crime Support Project (CABVIS) is an EU-wide project supporting victims of crime. It aims at promoting the implementation of EU measures for supporting victims of crime and improving the quality of victim support services.

Partner organisations from several EU Member States are participating in the project, which is funded by the European Commission's Criminal Justice Programme. It tackles difficulties arising from the lack of harmonised victim support services among EU Member States and from the legal implementation of EU measures. In this way, the project addresses the gap between the availability of and the need for victim support in the EU.

CABVIS focuses on a range of activities including:

- improving the networking and knowledge exchange of victim support organisations, with a special focus on cross-border victimisation issues;
- informing about EU Member States' legal systems and access to justice within them;
- enhancing the training capacity of victim support organisations; and
- organising informative seminars for police officers, judicial practitioners and other stakeholders.

Victim Support Europe, the umbrella network for national victim support organisations in Europe, developed the project with financial support from the European Commission Directorate-General Justice. Germany, Hungary, the Netherlands, Portugal, and the United Kingdom are participating in the project, which is managed by the Portuguese Association for Victim Support (*Associação de Apoio à Vítima, APAV*).

Products under development include a leaflet on cross-border victimisation, which is being translated into around 30 languages, and a handbook on the European 116006 helpline. All publications will be made available on Victim Support Europe's website.

For more information, see: <http://victimsupporteurope.eu/about/projects/cabvis>

A group of **Polish** Members of Parliament brought a legislative initiative⁹ to the lower house of the parliament (*Sejm*) in May that makes it possible for everyone whose rights have been violated to

9 For more information, see: <http://orka.sejm.gov.pl/Druk17ka.nsf/o/D568BEE75E885C22C1257A45003F738D/%24File/604.pdf>.

challenge a prosecutor's decision not to initiate or to discontinue preparatory proceedings. Under the current state of affairs, thousands of people harmed by an offence against the public interest depend upon the prosecutor to take action. Under the initiative, persons who are directly or indirectly harmed by the offender's conduct would be entitled to appeal against the prosecutor's decisions.

Croatia's new Criminal Code (*Kazneni zakon*), which entered into force in January 2013,¹⁰ expands the definition of victims. It adds that a victim of a criminal offence is not only a person who has suffered property damage or physical, mental or emotional pain because of an unlawful act but is also a person against whom a serious violation of human rights and fundamental freedoms has been committed.¹¹

9.1.3. Victim support

Article 8 of the EU Victims' Directive underlines the necessity of having strong victim support structures, whether they are provided by public or non-governmental organisations or organised on a professional or voluntary basis. The directive requires EU Member States to ensure that victims "have access to confidential victim support services, free of charge, acting in the interests of the victims before, during and for an appropriate time after criminal proceedings."¹² This includes taking measures to establish specialist support services in addition to, or as an integrated part of, general victim support services, or to enable victim support organisations to call on existing specialised entities providing such specialist support.¹³ Family members of victims should also have access to support services.

To meet the costs of developing a victim support services structure, some EU Member States have looked into alternatives to the state budget as funding sources. Several EU Member States, for example, raise money for generic victim support services through a victims' crime fund or the like, whereby persons convicted of an offence pay a fine to help fund crime victim services.

Article 9 of the EU Victims' Directive emphasises the special role that victim support services play in providing victims with information, advice and support related to: how to access compensation, their role in criminal proceedings and referral to specialist support services.

"Victim support services should (as a minimum) provide:

(a) information, advice and support relevant to the rights of victims including on accessing national compensation schemes for criminal injuries, and on their role in criminal proceedings including preparation for attendance at the trial;

(b) information about or direct referral to any relevant specialist support services in place;

(c) emotional and, where available, psychological support;

(d) advice relating to financial and practical issues arising from the crime;

(e) unless otherwise provided by other public or private services, advice relating to the risk and prevention of secondary and repeat victimisation, of intimidation and of retaliation."

Source: Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L 315, Art. 9 (1) a

A number of EU Member States reorganised victim support structures in 2012 to facilitate access to high-quality services.

In **Belgium**, the Flemish Minister of Welfare, Public Health and Family circulated a letter¹⁴ to general centres for social welfare in February announcing a restructuring between July 2012 and January 2014 to provide and facilitate access to affordable, high-quality social and care services.

In **France**, the Prime Minister signed a decree in May 2012 amending the Code of penal procedure and establishing a nation-wide structure of victim support offices (*Bureaux d'aide aux victimes*). These offices are located within the courthouse of each regional court (*Tribunal de grande instance*), managed by private associations and tasked with informing and advising victims throughout criminal proceedings and with regard to applying for compensation.¹⁵ The Ministry of Justice also published an online version of the guide of victims' rights, aimed at informing and helping victims to enforce their rights at all stages of criminal proceedings, including how to apply for legal aid or compensation. The guide also contains useful information for associations of victims and legal professionals.¹⁶

With the Police Reform and Social Responsibility Act 2011,¹⁷ the **United Kingdom** established the new posts of Police and Crime Commissioners (PCC) whose

¹⁰ Croatia, Criminal Code, 21 December 2012.

¹¹ *Ibid.*, Art. 87 (23) CC.

¹² Directive 2012/29/EU, OJ 2012 L 315, Art. 8 (1).

¹³ *Ibid.*, Art. 8 (3).

¹⁴ Belgium, Flemish Minister of Welfare, Public Health and Family (2012).

¹⁵ France, Ministry of Justice, Decree No. 2012-681 relating to the Offices for assistance to victims, 7 May 2012.

¹⁶ The eBook guide of victims' rights is available at: www.justice.gouv.fr/publications-10047/guides-professionnels-10048/parution-du-guide-les-droits-des-victimes-14413.html.

¹⁷ United Kingdom, Police Reform and Social Responsibility Act 2011, 15 September 2011.

responsibilities include assessing police response to victims. Elections for PCCs took place in November 2012 and the new commissioners took office on 22 November. They are also responsible for deciding and allocating the budget for most victim support, except where the government considers a national service is warranted, for example, to respond to terrorist attacks, homicide support and trafficking.¹⁸ The PCCs will now decide locally on both the provision of victim support and the funding for each area, replacing the previous system under which funding decisions were taken nationally and funds apportioned to local victim support schemes from within the same 'family'.

Under the reform, several different agencies could potentially deliver services. While not explicitly mentioned, it seems that the changes advocated in the consultation paper¹⁹ and the government response²⁰ will open the way for a further reduction in state funding. In contrast to the change in structure and funding of victim support, the government has made it clear that the Ministry of Justice²¹ will continue to fund witness support centrally. Figures suggest a slight decline in the numbers of witnesses receiving support: 240,000 in 2011–2012²² from 268,000 in 2010–2011.

In addition, the consultation paper and the government response advocate for Victim Support, the non-governmental organisation (NGO) currently responsible for generic victim support services in England and Wales, shifted emphasis towards victims most in need.

The EU Victims' Directive enshrines the importance of the availability of emotional and psychological support for victims in Article 9 (1) c. Across the EU the psychological needs of victims of crime are increasingly acknowledged, as evidenced by 2012 policy developments in several EU Member States, such as the development of psycho-social programmes and funds for financial and psychological aid, psycho-social court assistance and guidance on criminal procedures such as trials.

The **Slovenian** Ministry of Interior (*Ministrstvo za notranje zadeve*), for example, adopted a resolution to establish a national plan on the Prevention and Combating of Crime 2012–2016.²³ One of the goals of the resolution was to strengthen the protection and support to victims through mechanisms such as funds for financial and psychological aid. One of the strategies outlined in the resolution was the development

of psycho-social programmes and emergency accommodation for persons in distress.

In June, the Conference of the Ministers of Justice (*Konferenz der Justizministerinnen und Justizminister*) in **Germany** adopted a resolution on psycho-social court assistance. The ministers stressed the importance of this type of support for victims of violent crime and emphasised the need for targeted training for support staff. Ministers also agreed on the need for comparable and standardised national quality standards for psycho-social court assistance and support for witnesses and victims in criminal proceedings, and commissioned a working group to develop such standards.²⁴

In parallel with these developments, civil society organisations as well as some federal states (*Länder*) are designing guidelines on such assistance. The National Association of Women's Counselling and Rape Crisis Programmes (*Bundesverband der Frauenberatungsstellen und Frauennotrufe*), for example, published guidelines on psycho-social assistance for girls and women in criminal proceedings.²⁵

The Ministry of Justice of Lower Saxony (*Niedersächsisches Justizministerium*) developed – together with professionals from the justice system, police, victim support organisations and public health-care – minimum standards for psycho-social court assistance in Lower Saxony and started a training scheme in psycho-social court assistance for support staff of the support organisation '*Niedersächsische Opferhilfe e.V.*' in Lower Saxony, to guarantee psycho-social court assistance all over Lower Saxony.²⁶

The umbrella organisation, Working Group of Victim Support in Germany (*Arbeitskreis der Opferhilfen in Deutschland e.V.*), published minimum standards for psycho-social assistance for victim and witnesses in criminal proceedings.²⁷

In **Austria**, the number of victims receiving psycho-social and legal guidance is trending higher, rising to 4,499 in 2012 from 2,829 in 2008. Victims have the right to the psycho-social and the legal guidance (*Prozessbegleitung*) necessary to guarantee their procedural rights, according to Section 66 (2) Criminal Procedure Act (*Strafprozessordnung*, StPO). Psycho-social guidance includes preparation for trial and accompaniment to interrogations. Legal guidance includes legal advice and representation by an attorney.

¹⁸ United Kingdom, Ministry of Justice (2012a).

¹⁹ *Ibid.*

²⁰ Response to the consultation process was published in July; see: United Kingdom, Ministry of Justice (2012b).

²¹ *Ibid.*

²² United Kingdom, Victim Support (2012), p. 31.

²³ Slovenia, Resolution on the national plan on the prevention of and combating crime 2012–2016, 12 July 2011.

²⁴ Germany, 83rd Conference of the Ministers of Justice (2012).

²⁵ Bürner, S. (2012).

²⁶ Germany, Ministry of Justice of Lower Saxony (2012).

²⁷ Germany, Working Group of Victim Support in Germany (2012).



Croatian support offices were established between 2008 and 2011 as part of an overall institutional structure to provide victim/witness support. This included the setting up of ministerial departments that supply information to victims, a National Committee for the Support of Victims/Witnesses and seven county court offices for victims and witnesses of crime.²⁸ This model was praised and recommended as a promising practice to be emulated across southeast Europe.²⁹

FRA ACTIVITY

Assessing victim's rights in practice

FRA carried out research in 2012 on the support services available in all 27 EU Member States and Croatia. A key objective of the project, *Victim Support Services in the EU: An overview and assessment of victims' rights in practice*, is to present promising practices in victim support services.

The project focuses on measures, projects and other initiatives in victim support services that have proven particularly effective and/or innovative and can serve as models for implementation across the EU in line with the requirements of the Victims' Roadmap, especially Measure B, concerning recommendations on practical measures and best practices in relation to the Victim's Directive.

The project provides the first independent overview of targeted victim support services in the EU's 27 Member States and Croatia, including a review of current practices and gaps in provision at the national and regional level. The project will look at the services that both states and NGOs provide with a view to developing an overview of the various models and features of victim support in existence across the EU.

FRA will finalise an initial report on generic victim support provisions in the EU-27 and Croatia in 2013.

For more information, see the project page and the project factsheet, available at: <http://fra.europa.eu/en/project/2012/victim-support-services-eu-overview-and-assessment-victims-rights-practice>

9.1.4. Compensation

While EU Member State data show that the number of victims applying for compensation across the EU continues to be low, caution should be exercised when interpreting why this is so. In addition to a lack of information and the complexity of procedures and paths to claim compensation, it is possible that many victims

either do not consider compensation a main concern or they have insurance. In addition, in many Member States, victims of crime must first exhaust the possibility of receiving compensation from the offender before being able to apply for state compensation.³⁰

In 2011 in **Germany**, a mere 10.4 % of all victims of crimes involving violent acts applied for compensation under the Crime Victim's Compensation Act (*Gesetz über die Entschädigung von Opfern von Gewalttaten*, OEG) and less than 40 % of the applications were granted, according to data collected by the victim's association the white ring (*Weißer Ring*). Compared to the total number of victims of reported crime, these figures show that less than 4 % of victims receive compensation under the OEG.³¹

The amount of money paid in compensation in **Poland** has increased from €14,500 in 2006 to €57,250 in 2008 and €102,938 in 2011 (seven times the amount in 2006), however it still remains very low. Incomplete absorption of financial assets is linked to the low number of applications lodged, due mostly to victims' lack of awareness of their rights. The Ministry of Justice has taken a number of measures to disseminate information and raise awareness of victims' rights.

The number of victims of crime in **Romania** applying for and receiving financial compensation remained consistently low from 2010 to 2012. Eight victims out of 13 who applied obtained financial compensation in 2012, against seven out of 12 in 2011 and eight out of 21 in 2010, according to information from the Romanian Ministry of Justice. The total amount of compensation paid was roughly €10,120 (RON 45,538). The data also show regional differences, with fewer than half the courts – 15 of 40 – receiving applications for compensation from 2010 to 2012.

Several EU Member States amended the regulation and conditions of compensation claims and increased efforts to raise awareness among victims about how to claim compensation.

The National Council for Support and Compensation of Victims of Crimes of **Bulgaria** (NCSCVC) produced an updated brochure providing information to victims of crime about the procedure to apply for compensation.³² The brochure is available on the council's website in Bulgarian and English.³³ Following complaints about law enforcement officers' failure to provide timely information to victims of crime on their rights to compensation, an obligation under the Support and Financial

²⁸ For more information, see: FRA (2012a), p. 220.

²⁹ Council of Europe, Parliamentary Assembly (PACE) (2011), para. 15.

³⁰ Directive 2012/29/EU, OJ 2012 L 315, Art. 16.

³¹ Germany, *Weißer Ring* (2012).

³² Bulgaria, NCSCVC (2012a), point 3.1.

³³ Bulgaria, NCSCVC (2012b).

Compensation of Victims of Crime Act (Article 6), the NCSCVC is taking measures to ensure that they fulfil this obligation. In an effort to make the compensation mechanism clearer and more accessible, the NCSCVC approved a model application for financial compensation and a list of required documents for its consideration.³⁴

Measures are also under way in **Estonia** to simplify the procedure for victims seeking compensation for damages,³⁵ and the Ministry of Justice (*Justiitsministeerium*) has said it intends to amend the Criminal Procedure Act (*Kriminaalmenetluse seadustik*).³⁶ The draft law attempts to address the concerns revealed by a University of Tartu study on victims and witnesses in criminal procedures conducted in 2011.³⁷

The system is causing so-called 'secondary' victimisation – a recognised problem in research on victims – under which inappropriate treatment during criminal proceedings, for example, subjects victims to additional or "re-victimisation at the hands of the criminal justice system itself", the study showed.³⁸ It attributed this phenomenon to victims having insufficient information about their rights during the criminal procedure or of the possibility to demand compensation from the perpetrator. Victims also lack information concerning available support from the state, including state legal aid and compensation mechanisms.

9.2. Rights of victims of domestic violence and violence against women

Domestic violence against women in Europe remains widespread and under-reported and victims of violence are not effectively supported by public services, according to research conducted by the European Institute for Gender Equality (EIGE) in 2011 and 2012.³⁹

Insufficient specialised services for women victims of violence and the absence of mandatory gender-sensitive training for professional helpers of victims and perpetrators are only a few of the reasons put forward in EIGE's 2012 report, *Review of the Implementation of the Beijing Platform for Action in the EU Member States: Violence against Women – Victim Support*. It also highlights shortcomings in state funding of specialised services for women victims of violence. The report points out that while all 27 EU Member States

have counselling centres/services for victims of violence, EIGE's research shows that only eight Member States (**Cyprus, Germany, Ireland, Luxembourg, Malta, Slovenia, Sweden** and the **United Kingdom**), as well as **Croatia** fulfil the Council of Europe's recommended ratio of one counselling centre/service per 50,000 women.⁴⁰

FRA ACTIVITY

Surveying violence against women

FRA conducted the first EU-wide survey on gender-based violence against women in 2012, interviewing a random, representative sample of more than 40,000 women in the 27 EU Member States and Croatia. The research will for the first time provide comparable data on the extent, nature and consequences of gender-based violence against women in the EU – including physical, sexual and psychological violence, sexual harassment and stalking, involving acts committed by both intimate partners and other persons.

The findings of the survey will be released in 2014.

For more information, see: <http://fra.europa.eu/en/project/2012/fra-survey-womens-well-being-and-safety-europe>

The EU Victims' Directive reinforces the rights of women who are victims of gender-based violence. The directive also holds that such victims and their children often require special support and protection because of the high risk of secondary and repeat victimisation, of intimidation and of retaliation connected with such violence and also because they are disproportionately affected by violence in close relationships.⁴¹ The directive calls for specialist support services (referred to in Article 8 (3)) to develop and provide "targeted and integrated support for victims with specific needs, such as victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling."⁴²

The directive requires that EU Member States implement a number of other special measures determined on the basis of individual needs assessments. Such protective measures would ensure, for example, that those conducting interviews with victims of sexual violence, gender-based violence or violence in close relationships be of the same sex as the victim, if the victim so wishes. Other measures include avoiding unnecessary questioning, holding private hearings or using communication technology so that the victim need not be physically present during a trial.⁴³

³⁴ Bulgaria, NCSCVC (2012a) and (2012c), point 3.

³⁵ Estonia, Ministry of Justice (2012).

³⁶ Estonia, Criminal Procedure Act, 9 July 2012.

³⁷ Estonia, University of Tartu, Centre for Applied Social Sciences (2012).

³⁸ Hucklesby, A. and Wahidin, A. (2009), p. 363.

³⁹ EIGE (2012a), p. 2.

⁴⁰ EIGE (2012b).

⁴¹ Directive 2012/29/EU, OJ 2012 L 315, Recitals 17 and 18.

⁴² *Ibid.*, Art. 9 (3) b.

⁴³ *Ibid.*, Art. 22 and 23.

In addition, the directive asks Member States to “take appropriate action, including through the internet, aimed at raising awareness of the rights set out in this Directive, reducing the risk of victimisation, and minimising the negative impact of crime and the risks of secondary and repeat victimisation, of intimidation and of retaliation, in particular by targeting groups at risk such as children, victims of gender-based violence and violence in close relationships. Such action may include information and awareness-raising campaigns and research and education programmes, where appropriate in cooperation with relevant civil society organisations and other stakeholders.”⁴⁴

In December, under the Cyprus Presidency of the Council of the European Union, the Council of Ministers of Justice and Internal Affairs adopted conclusions on *Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence*.⁴⁵ The Council conclusions call on EU Member States and the European Commission to strengthen action plans and programmes to prevent and combat violence against women. The document proposes several areas for further development, such as: developing a European Strategy for preventing and combating all forms of violence against women; improving the handling of complaints at Member State level; providing or strengthening appropriate training; and considering establishing a European helpline. They also call on the European Parliament, the European Commission and Member States to consider signing, ratifying and implementing the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

Following the adoption of the Council of Europe’s Convention on Preventing and Combating Violence against Women and Domestic Violence (*Istanbul Convention*) on 11 May 2011, EU Member States continued to make efforts to ratify the convention in 2012. Seventeen Member States had signed the convention by December 2012 (for the situation on signatures and ► ratifications as of 31 December 2012, see [Chapter 10](#)).⁴⁶

A number of Member States implemented national policies and other measures in 2012 as they prepared to ratify the Istanbul Convention. As part of its preparations, the **Slovakian** Ministry of Labour, Social Affairs and Family, for example, drafted amendments throughout the year to laws on the labour code, social

services, equal treatment, socio-legal protection of children and social guardianship.⁴⁷

Slovakia also worked on improving the regional availability of assistance and services provided to women and children who are victims of domestic violence. The project’s ambition is to develop a nationwide network of facilities that specialise in helping victims of domestic violence. An emergency hotline available 24/7 to provide free counselling to victims of domestic violence will be an integral part of the network. The project, which received financial support from the European Social Fund, also plans to establish the Coordination and Methodological Centre for Violence against Women and Domestic Violence (*Koordináčné a Metodické centrum prevencie a eliminácie násilia na ženách a domáceho násilia*)⁴⁸ to help eliminate such violence altogether. The government began elaborating a legal analysis and is to propose necessary legislative changes in 2013 with a view to implementing and ratifying the Istanbul Convention.

Romania amended Law No. 217/2003 on the prevention and combating of domestic violence⁴⁹ in March 2012. The law establishes multi-agency teams to help prevent and combat domestic violence at a local level.⁵⁰ The team is composed of representatives of police, local health authorities, social welfare and child protection authorities, probation services, NGOs, forensic services as well as any other institution with a relevant mandate. The role of the team is to ensure cooperation between the institutions involved in preventing and combating domestic violence and to suggest measures to improve interventions in cases of domestic violence. The ministries and other bodies of the central public administration will elaborate a national strategy in order to prevent and fight domestic violence. The strategy will be accompanied by an internal mechanism to coordinate and monitor the measures taken for its implementation.⁵¹

Croatia took into account relevant convention provisions when drafting its new Criminal Code, with a view to the signature and ratification of the Istanbul Convention. The amended code marks a change in Croatia’s approach to domestic violence, as it no longer criminalises a specific criminal offence,⁵² but instead explicitly treats several

44 *Ibid.*, Art. 26 (2).

45 Council of the European Union (2012)

46 EU Member States that had signed the convention by 31 December 2012: Austria, Belgium, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and the United Kingdom. Croatia signed the convention on 22 January 2013.

47 Information provided upon request by the Ministry of Labour, Social Affairs and Family.

48 This section is based on information provided upon request by the Ministry of Labour, Social Affairs and Family on 23 August 2012.

49 Romania, Law No. 217/2003 on the prevention and combating of domestic violence, 22 May 2003.

50 *Ibid.*, Art. 13, para. 4.

51 Romania, Law No. 25/2012 amending Law No. 217/2003 on the prevention and combating of domestic violence, 9 March 2012, Art. 5.

52 Croatia, Criminal Code, 21 December 2012.

factors as aggravating circumstances warranting more severe punishment. These include: an offence against a family member (for example, bodily injury); or a family member whom the perpetrator had already abused (aggravated murder); or a person who is especially vulnerable due to certain particular circumstances, such as age or pregnancy.

In line with the Istanbul Convention's requirements, the new Criminal Code also introduces several offences that explicitly aim at protecting women against violence and discrimination, including female genital mutilation, stalking, sexual harassment and forced marriage. The new code amends some existing gender-neutral offences that disproportionately affect women in order to further strengthen their protection. The Croatian government adopted a decision to initiate the procedure for signing the convention in December 2012.

In **Italy**, the Sicily and Lombardy regions approved regional laws against gender-based violence in 2012.⁵³ The two texts provide operative measures to help women and formally set up regional and local anti-violence networks. Following a country visit to Italy in January 2012, however, the UN Special Rapporteur on violence against women – despite acknowledging the evolution of the Italian legal framework and judicial protection measures to combat violence against women in recent years – characterised the actual structure as being fragmented and not allowing for effective redress for women victims of violence, thus contributing to “the silencing and invisibility surrounding violence against women, its causes and consequences.” She also identified a lack of a coordinating government policy, and stressed the necessity of effectively investing in victim support. As part of her recommendations, she cited the need for the government to improve support services and the provision of legal aid, and specifically, “enhance coordination and exchange of information among the judiciary, police and psychosocial and health operators who deal with violence against women.”⁵⁴

In **Germany**, the draft of the Federal Government for an Act of Strengthening the Rights of Victims of Sexual Abuse is still pending before the German Parliament (*Deutscher Bundestag*). The proposal suggests changes to the criminal procedure code, reducing multiple interviewing of victims in court proceedings and improving access to specialised lawyers for adult victims. It supplements provisions excluding the public from hearings with victims who are minors and extends the rights of

victims to receive information.⁵⁵ The law of 1 December establishing an emergency telephone number for women victims of violence (*Hilfetelefongesetz*) entered into force on 14 March.⁵⁶

In some EU Member States, debates emerged over domestic violence and the question of how to effectively protect women against violence, also in relation to measures outlined in the convention, sparking heated debate in some cases.

In **Lithuania**, for example, several organisations including the National Association of Families and Parents (*Nacionalinė šeimų ir tėvų asociacija*), the Lithuanian Family Centre (*Lietuvos šeimos centras*) and the Centre of Marriage and Family Studies of Vytautas Magnus University (*VDU Santuokos ir šeimos studijų centras*) issued an address to the government and the head of parliament stating that Lithuania should not adhere to the Istanbul Convention because it “promotes gender ideology”.⁵⁷

The Istanbul Convention also sparked controversy in **Poland**, leading to an ideological division within the government. The Government Plenipotentiary for Equal Treatment supported the convention, but the Minister of Justice opposed it. The Minister of Justice declared that ratification would threaten the Polish family model because it obliges state parties to eliminate traditional gender roles.⁵⁸ The Minister claimed that the convention “generates diverse interpretations, while its final interpretation will not depend on the Polish government or Parliament, so in result it is limiting the national sovereignty”.⁵⁹

Banning the perpetrator from the home is a cornerstone of any effective policy on supporting and protecting the rights of victims of domestic violence. The European Protection Order (EPO), which was adopted by the European Parliament on 13 December 2011, reflects the importance of this measure. The EPO, which relates to criminal matters, will be complemented by an instrument with regard to protection orders decided by civil courts.

EIGE's report, *Violence against Women – Victim Support*, also highlights EU Member States' increasing acknowledgment that imposing physical distance between the perpetrator and the victim is key to protecting victims of domestic violence from further violence. EIGE's research

53 Italy, Sicily Region (Regional Law No. 3, Rules for the contrast and the prevention of gender-based violence, 3 January 2012; Italy, Lombardy Region, Regional Law No. 47, Measures of prevention, enforcement and support of women victims of violence, 26 June 2012.

54 United Nations, General Assembly (2012).

55 Germany, Federal Parliament, Draft of the Federal Government for an Act of Strengthening the Rights of Victims of Sexual Abuse, 22 June 2011.

56 For more information about the details about the helpline, see: FRA (2012a), p. 225.

57 Bernardinai.lt (2012).

58 Gazeta Wyborcza (2012).

59 Polish Press Agency (2012).



shows that the police in 10 Member States can expel perpetrators from the residence and forbid them from approaching or contacting the victim for a set period of time: **Austria**, the **Czech Republic**, **Denmark**, **Finland**, **Germany**, **Hungary**, **Luxembourg**, the **Netherlands**, **Slovakia** and **Slovenia**.⁶⁰

Promising practice

Assisting migrants who are experiencing domestic violence

The Irish Naturalisation and Immigration Service published guidelines in August 2012 that set out how it deals with victims of domestic violence who are foreign nationals and whose current immigration status hinges on their relationship to the perpetrator of the violence. It explains how victims of domestic violence whose relationships have broken down can apply for independent immigration permission in their own right, thus ensuring that migrants who are victims of domestic violence are not compelled to remain in abusive relationships for fear of losing their immigration status.

Source: Ireland, Irish Naturalisation and Immigration Service (2012), Victims of Domestic Violence – Immigration Guidelines, August 2012, available at: www.inis.gov.ie/en/INIS/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf/Files/Victims%20Of%20Domestic%20Violence%20-%20Note%20for%20Web.pdf

In **Spain**, the police power to arrest has been extended to protect victims until a court order can be issued. In the **United Kingdom**, powers to ban the perpetrator from the home for up to 28 days have been piloted in three police areas in England. Courts in **Finland**, **France**, **Greece**, **Ireland**, **Italy**, **Lithuania**, **Malta** and **Sweden** can issue rapid injunctions to expel perpetrators and ensure non-contact, or prosecutors can issue interim protection orders.

Belgium enacted a law on the temporary banning of a violent partner from the home in case of domestic violence. The public prosecutor can oblige the violent partner to immediately leave the residence for a maximum of 10 days.⁶¹

Romania amended Law No. 217/2003 on the prevention and combating of domestic violence⁶² in March 2012. Among other things, victims of domestic violence may now petition the court for a restraining order, compelling perpetrators to leave the common domicile, to maintain

a minimum distance from victims or their families and workplace, and cease any contact with the victim.⁶³ The application will be tried via a fast track procedure and a lawyer must assist the applicant.⁶⁴

In **Denmark**, Act No. 112 of 2012⁶⁵ is expected to strengthen the protection of persons against persecution, harassment and violation of privacy, including stalking. Until 3 February 2012, several different statutes had provisions regulating stalking. This new act, however, combines these provisions into a single act and strengthens the possible measures that can be taken against stalkers. Under the act, any contact is now considered a violation of a restraining order – not just contact that is considered a violation of the victim's peace. Breaches of restraining orders, exclusion orders and expulsion are punishable by fines and up to two years of imprisonment, and any violation that amounts to stalking will be considered an aggravating circumstance.⁶⁶

The **Lithuanian** Ministry of Social Security and Labour (*Socialinės apsaugos ir darbo ministerija*), in cooperation with NGOs, began to regulate the activities of specialised domestic violence assistance centres (*specializuotu pagalbos centru veiklos aprašas*).⁶⁷ Such centres are created in accordance with the Law on Protection against Domestic Violence.⁶⁸ Centres must employ “consultants with social science education. Priority is given to psychologists, social workers or jurists.”⁶⁹ A body to coordinate the assistance centres is to be established.⁷⁰

In addition, a new amendment to the Lithuanian law on protection against domestic violence was submitted in November 2012, which provides more thorough regulation on financing and implementation of preventive measures. One suggested change is that the municipalities must provide “preventative measures aimed at victims of domestic violence” in their strategic planning documents.⁷¹

In the **Czech Republic**, the new Civil Code adopted on 3 February 2012, which will become effective on

⁶³ *Ibid.*, Art. 1 PCT. 27.

⁶⁴ *Ibid.*

⁶⁵ Denmark, Act No. 112 of 3 February 2012 on restraining orders, exclusion orders and expulsion, 30 June 2009.

⁶⁶ *Ibid.*, Section 21.

⁶⁷ Lithuania, Ministry of Social Security and Labour (2012), Order of the Minister of Social Security and Labour on approval of the description of specialised assistance centres' activities, 10 May 2012.

⁶⁸ Lithuania, Law on protection against domestic violence, 26 May 2011, Art. 8, part 3 provides that the centres are established “with priority given to non-governmental organisations”.

⁶⁹ Lithuania, Ministry of Social Security and Labour (2012).

⁷⁰ *Ibid.*

⁷¹ Lithuania, Ministry of Interior, Draft law on amendment of Article 4 of the Law on protection against domestic violence, 2011.

⁶⁰ EIGE (2012a), p. 24.

⁶¹ Belgium, Act on the temporary ban in case of domestic violence of 15 May 2012. The law entered into force on 1 January 2013.

⁶² Romania, Law 217/2003 on the prevention and combating of domestic violence, 22 May 2003.

1 January 2014 (Law No. 89/2012 Coll.),⁷² introduces in Section 751 a special provision on protection against domestic violence.

9.3. Rights of victims of trafficking and severe forms of labour exploitation

The European Commission adopted the *EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016* on 19 June 2012.⁷³ The strategy identifies five priorities that the EU should focus on in order to address the issue of trafficking in human beings:

- identifying, protecting and assisting victims of trafficking;
- stepping up the prevention of trafficking in human beings;
- increasing prosecutions of traffickers;
- enhancing coordination and cooperation among key actors and policy coherence;
- increasing knowledge of and an effective response to emerging concerns related to all forms of trafficking in human beings.

Besides its five core priorities, the strategy also outlines a number of actions the European Commission proposes to implement between 2012 and 2016 together with other actors, including EU Member States, the European External Action Service, EU institutions, EU agencies, international organisations, third countries, civil society and the private sector.

The strategy also makes reference to the role of EU agencies in coordinating and carrying out its priorities and action points. Under priority A, for example, 'Identifying, protecting and assisting victims of trafficking', Action 3 on 'Protection of Child Victims of Trafficking', the strategy states that: "[i]n 2014, together with the European Union Agency for Fundamental Rights, the Commission intends to develop a best practice model on the role of guardians and/or representatives of child victims of trafficking."⁷⁴

The Irish High Court, in *Hussein v. the Labour Court*, held on 31 August 2012, that national employment

legislation does not cover undocumented migrant (non-EU/non-EEA) workers because of their illegal status.⁷⁵ The case concerned an undocumented worker whose employer paid him as little as 55 cents an hour while he worked 77 hours a week over a prolonged period of time. The judge expressed deep concern that this exclusion of undocumented migrant workers could cause serious injustice, and he had a copy of his decision transmitted to the parliament so that it could consider the policy implications for the Employment Permits Act of 2003 as manifested in his judgment.

Promising practice

Training labour inspectors to identify potential trafficking victims

Portuguese authorities coordinated two awareness-raising programmes on human trafficking, aiming to improve labour inspectors' ability to identify potential trafficking situations. The Observatory on Trafficking in Human Beings (*Observatório do Tráfico de Seres Humanos*, OTSH), the Commission for Citizenship and Gender Equality (*Comissão para a Cidadania e Igualdade de Género*) and the Authority for Working Conditions (*Autoridade para as Condições de Trabalho*) in Portugal jointly coordinated the programmes for labour inspectors, delivering sessions in Lisbon and Porto to some 100 labour inspectors.

In April 2012, in partnership with the United Nations Office on Drugs and Crime in Vienna, the OTSH organised a Trainers' Training Programme for national experts. The main goal was to provide these professionals with training skills, with which they could then provide training in their own organisations in Portugal, as well as in their organisational counterparts in all Portuguese-speaking countries.

The OTSH also organised a training week for criminal justice practitioners in Portuguese-speaking countries from 17 to 21 September.

For more information, see: Portugal, *Observatório do Tráfico de Seres Humanos (OTSH)* (2012), available at: www.otsh.mai.gov.pt/?area=203&mid=000&sid=1&sid=000&cid=CNt4b605e9175313

On reaching his conclusions, the judge said: "While this conclusion seems [...] to be inescapable on the application of established legal principles, it is not a result which yields much satisfaction. If [the complainant's] account is correct – and let it be recalled that both the Commissioner and the Labour Court found that it was – then he has been the victim of the most appalling exploitation in respect of which he has no effective recourse."

⁷² Czech Republic, Civil Code, Law No. 89/2012, 3 February 2012.

⁷³ European Commission (2012).

⁷⁴ For FRA reports on human trafficking, see: <http://fra.europa.eu/en/publications-and-resources>.

⁷⁵ Ireland, High Court, *Hussein v. the Labour Court*, 31 August 2012, paras. 22–24.



The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) recognised that there is insufficient outreach work and a lack of proactive approach in the identification of trafficking victims, in particular as regards labour exploitation cases and children.⁷⁶ GRETA's findings also show that despite the fact that trafficking for the purpose of labour exploitation is on the rise, inadequate training and intelligence gathering hinders the relevant professionals (in particular labour inspectors) from identifying victims.

One recommendation by GRETA to several EU Member States and Croatia is the adoption of a proactive approach to the identification of victims of trafficking for the purpose of labour exploitation, for example by organising regular visits by labour inspectors to work sites commonly using migrant workers.⁷⁷

Cooperation between government actors or public services and NGOs and outreach to victims is rather limited in the area of labour exploitation. Nevertheless, a number of EU Member States such as **Denmark**, **Germany** and **Slovenia** moved beyond focusing solely on victims of trafficking for the purposes of sexual exploitation in 2012 to implement measures for labour exploitation victims.

In **Germany**, specialised support services working with victims of sexual exploitation are thus in part expanding services to victims of labour exploitation. Trade unions are also becoming increasingly active in work to prevent the labour exploitation of central and eastern European workers.

At the end of 2011, the German Federation of Trade Unions (*Deutscher Gewerkschaftsbund*) launched a three-year 'fair mobility' project (*Faire Mobilität*) to support migrant workers from central and eastern European countries to achieve fair wages and working conditions. The Federal Ministry of Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*, BMAS) organised a conference in March 2012 on labour exploitation, with representatives from all relevant ministries of the states, social welfare organisations, national and international NGOs working in the field and other relevant actors taking part. The conference aimed at exchanging experiences and working towards the development of support structures for victims of labour exploitation.⁷⁸

As part of a national action plan against trafficking in human beings, **Austria** set up a working group on labour exploitation composed of experts from relevant ministries, the Chamber of Labour, the Trade Union Federation, universities and NGOs.

In April 2012, **Slovenia** adopted an Action plan of the Interdepartmental Working Group for the Fight against Trafficking in Human Beings 2012–2013.⁷⁹ The action plan says that labour exploitation is increasing, especially in the construction, hospitality, agriculture and entertainment industries, exacerbated by the economic crisis.

The Slovenian 2011 Aliens Act was harmonised with the Directive of the European Parliament and Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.⁸⁰ Provisions include protection measures for victims of illegal employment who can now receive a temporary residence permit.⁸¹

"An estimated 10,000 people in Ireland work in the domestic work sector performing essential caring and cleaning services. The isolation and invisibility of domestic workers, many of whom live in their employers' homes, creates a fertile ground for exploitation. This is a sector that has high incidences of exploitation and forced labour. Common complaints reported to (the Migrant Rights Centre of Ireland) include long hours of work, pay below national minimum wage, no days off, no sick pay, no holiday pay, harassment, bullying, retention of identity documents and physical and mental abuse."

Ireland, Migrant Rights Centre Ireland (MRCI) (2012), available at: www.mrci.ie/press-centre/domestic-workers-launch-week-of-action-to-call-on-the-government-to-end-their-exploitation

The number of persons officially identified as victims of trafficking for labour exploitation in **Denmark** has risen over the last few years. National action plans and the Danish Centre against Human Trafficking (CMM) have helped to sharpen the focus on this problem. Establishing contact with victims of trafficking for labour exploitation in places such as building sites, restaurants and in the agricultural sector is difficult. To increase access to potential victims of trafficking, CMM has established partnerships with Danish authorities, such as the authorities responsible for the working environment, the tax authorities and police, and trade unions in the labour market. The Centre has also held seminars for authorities and for trade unions and has established various working groups. The purpose is to share knowledge on human trafficking, maintain a focus on the problem and 'train the trainers' so that relevant organisations can train and implement procedures in their own organisations.

⁷⁶ Council of Europe, GRETA (2012), p. 14.

⁷⁷ Such recommendations have been made in the GRETA reports on Austria, Cyprus, Denmark, Slovakia and Croatia, see: *Ibid.*, p. 15.

⁷⁸ For more information on the conference, see: <http://www.bmas.de/DE/Themen/Soziales-Europa-und-Internationales/Meldungen/arbeitsstagung-studie-menschenhandel.html>.

⁷⁹ Slovenia, Action plan of the Interdepartmental Working Group for the fight against trafficking in persons 2012–2013, 12 April 2012.

⁸⁰ Directive 2009/52/EC, OJ L168/24.

⁸¹ Slovenia, Aliens act, 15 June 2011, Art. 50.

FRA ACTIVITY

Addressing severe forms of labour exploitation

FRA hosted an expert meeting in November 2012, to exchange ideas and discuss research planned on severe forms of labour exploitation, particularly of migrants.

The expert meeting, *Allowing victims of severe forms of labour exploitation to have access to justice in EU Member States*, brought together about 15 experts from national government agencies and specialised bodies, international and non-governmental organisations and universities to prepare the project's launch.

A key focus of the project will be on what factors allow victims of criminal forms of labour exploitation to access civil and criminal justice and what factors impede such access. The project will also look at victim support, assessing existing networks and their potential for reaching out to victims.

The project will be linked to other FRA research, in particular the reports on migrants in an irregular situation employed in domestic work and child victims of trafficking, as well as the victim support services project. Research will be carried out throughout 2013.

For more information, see: FRA (2009) and FRA (2011)

9.4. Rights of victims of hate crime

Several EU Member States took steps to protect against bias-motivated violence and support victims of such violence (see also Chapter 6). Member States are increasingly developing hate crime definitions to cover a wide range of protected characteristics.

Croatia's new Criminal Code specifies that a hate crime means a criminal offence committed on account of a person's race, colour, religion, national or ethnic origin, disability, sex, sexual orientation or gender identity (Article 87 (20) CC). In line with Article 4 of the Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, the same provision provides that unless a more severe penalty is explicitly prescribed – as is the case with a number of offences including aggravating murder, female genital mutilation and serious/bodily injury – such conduct should be taken as an aggravating circumstance.

FRA ACTIVITY

Acknowledging victims of (hate) crime

FRA launched a report in November 2012 that makes the case for increasing the visibility of hate crime, emphasising the responsibility of criminal justice systems to identify and highlight cases of hate crime. *Making hate crime visible in the European Union: acknowledging victims' rights* also argues for collecting and publishing related data, whether on police investigations, prosecutions, convictions or sentencings.

On the same day, FRA launched a report on minorities as victims of crime, including their experiences of racially motivated crime. The European Union Minorities and Discrimination Survey (EU-MIDIS) report, *EU-MIDIS Data in Focus Report 6: Minorities as Victims of Crime*, presents data, which are based on interviews with 23,500 people, on respondents' experiences of victimisation across five crime types.

The average rate of criminal victimisation for all groups surveyed in EU-MIDIS was 24 %, in other words every fourth person from a minority group said that they had been a victim of crime at least once in the 12 months preceding the survey. Across the five crime types in the 12 months preceding the survey, Sub-Saharan Africans, closely followed by Roma, experienced, on average, the highest overall victimisation levels, at 33 % and 32 %, respectively, the report showed.

The report also reveals that 60 % of Sub-Saharan Africans, 54 % of Roma and 43 % of North Africans indicated that 'racist' or religiously offensive language was used during incidents of assault and threat or serious harassment, in comparison with 23 % of Central and East Europeans and 27 % of Russians.

For more information, see: FRA (2012b) and FRA (2012c)

In **Malta**, the Criminal Code was amended to include further victims of bias-motivated crime, such as crimes for which the pretext is sex, gender identity, sexual orientation, race, colour, language, ethnic origin, religion or belief or political or other opinion.⁸²

On the basis of three proposals to amend the Criminal Code, the **German** Parliament discussed ways to implement Article 4 of the Framework Decision on Racism and Xenophobia, which concerns Member States taking

⁸² Malta, Act VIII of 2012 to amend the Criminal Code, 26 June 2012.

Table 9.1: Classification of official data collection mechanisms pertaining to hate crime, by EU Member State

Limited data	Good data	Comprehensive data
<i>Few incidents and a narrow range of bias motivations are recorded Data are usually not published</i>	<i>A range of bias motivations are recorded Data are generally published</i>	<i>A range of bias motivations, types of crimes and characteristics of incidents are recorded Data are always published</i>
Bulgaria Cyprus Estonia Greece Hungary Ireland Italy Latvia Luxembourg Malta Portugal Romania Slovenia	Austria Belgium Czech Republic Denmark France Germany Lithuania Poland Slovakia Spain	Finland Netherlands Sweden United Kingdom

Notes: Information as of January 2013.

'Official data' is understood here as those data collected by law enforcement agencies, criminal justice systems and relevant state ministries.

There is a broad range of bias motivations covered by the 27 EU Member States and Croatia. These include: racism, xenophobia, religious intolerance, antisemitism, Islamophobia/anti-Muslimism, anti-Roma, sexual orientation, gender identity, disability and extremism, as well as any other bias motivations covered by national legislation.

Source: FRA, 2012b

necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance.⁸³

The debate also touched on the question of whether it would be sufficient to introduce a crime committed due to a bias motivation as an aggravating circumstance or whether police might overlook a mere aggravating circumstance in investigations.⁸⁴ The latter argument is in line with FRA's opinion that merely including bias motivation in a list of aggravating circumstances is neither the most effective way to acknowledge victims nor to ensure public visibility of hate crime.⁸⁵

In March 2012, the **British** government launched its 2012–2014 plan to tackle hate crime,⁸⁶ which seeks to encourage the reporting of hate crimes by victims and sets out an agenda for dealing with hate crime at a local level, thereby enabling "hate crime strategies that reflect local needs".⁸⁷ In October 2012, the Equality and Human Rights Commission of Great Britain published *Out in the open: a manifesto for change*. The report examines various agencies' plans to identify and eliminate disability-related harassment over the coming

years, and sets out recommendations.⁸⁸ *Out in the Open* is a follow-up to the 2011 report *Hidden in plain sight* which highlighted systemic failures in organisations' work to prevent disability-related harassment.⁸⁹

The same report highlighted the importance of acknowledging victims of hate crime and emphasised the need for comprehensive and reliable data. To date, official data collection mechanisms pertaining to hate crime in the 27 EU Member States can be classified into three categories, based on their scope and transparency:

- 1 *Limited data*: data collection is limited to a few incidents and to a limited range of bias motivations. The data are not usually published.
- 2 *Good data*: data are recorded on a range of bias motivations and are generally published.
- 3 *Comprehensive data*: a broad range of bias motivations, types of crimes (such as assault, threat, etc.) and characteristics of incidents are recorded. The data are always published.

83 Council Framework Decision 2008/913/JHA, OJ 2008 L 328.

84 Germany, Federal Parliament (2012), p. 5.

85 FRA (2012b), pp. 11 and 27.

86 United Kingdom, Home Office (2012).

87 *Ibid.*, p. 8.

88 United Kingdom, EHRC (2012).

89 United Kingdom, EHRC (2011).

EU Member States are struggling to find the right balance between protecting against hate speech and freedom of expression. In **Poland**, coinciding with the foiled bomb attack on the constitutional organs of the state on 9 November 2012, the Minister of Administration and Digitalisation⁹⁰ intensified efforts against hate speech.⁹¹ The Minister announced the reactivation of the Council for Prevention against Hate Speech (*Rada ds. Przeciwdziałania Mowie Nienawiści*) within the ministry. The Council currently operates under the name Council for the Prevention of Racial Discrimination, Xenophobia and related Intolerance (*Rada dospraw Przeciwdziałania Dyskryminacji Rasowej, Ksenofobii i związanej z nimi Nietolerancji*) within the Chancellery of the Prime Minister. The Council includes representatives from several ministries and its tasks will include activities to stop hate speech.⁹²

The Human Rights Defender in Poland addressed a general statement to the Minister of Justice in July concerning the implementation of its guidelines on the prevention of racially motivated violence.⁹³ The guidelines suggest creating a database with a registry of all discriminatory offences accompanied by acts of violence and the conducting of surveys and research, which would make it possible to estimate the scale of racially motivated violence. They also call for training for public officials, in particular the police, and awareness-raising activities. The Human Rights Defender emphasised the state's obligation to provide protection against violence to all individuals, regardless of their race, ethnic origin or nationality. The Minister of Justice confirmed that this area is of special interest.⁹⁴

On 8 June, the Supreme Court of **Finland** delivered a judgment in a landmark case on the limits of freedom of expression. The court ruled that a member of the Finnish Parliament was guilty of inciting hatred against an ethnic group, because, in his blog posts, he had compared Islam to paedophilia and insinuated that immigrants from Somalia were predisposed to stealing and living off welfare. The court emphasised that hate speech does not fall under the protection afforded to freedom of speech. It ordered the parliamentarian, who chaired the Parliament's Administration Committee which deals with immigration issues, to pay a fine and to remove the blog posts.⁹⁵ The judgment led to a fierce debate on whether a parliamentarian convicted of a hate crime was a suitable choice to chair

the committee. The parliamentarian finally resigned from his position as chair.

Outlook

2012 saw the adoption of the EU Victims' Directive (Measure A of the Roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings). The upcoming year will see the adoption of recommendations on practical measures and best practices for the implementation of the directive in practice. These recommendations are expected to provide guidance to the Member States and take stock of the existing practices in the field of assistance and protection to victims (Measure B).

The Council of the EU is expected to adopt a regulation on mutual recognition of protection measures taken in civil matters upon request of the person at risk in the first half of 2013. This measure will complement the European Protection Order relating to criminal matters. The regulation is due to enter into force later in 2013 and shall apply from 11 January 2015.⁹⁶

Under Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, EU Member States must take the necessary measures to comply with the provisions of the Framework Decision by 28 November 2013. By this date, the Council will have reviewed the Framework Decision and assessed the extent to which Member States have complied with it.

⁹⁰ Poland, Minister of Administration and Digitalisation (2012).

⁹¹ *Gazeta Prawna* (2012).

⁹² Poland, Minister of Administration and Digitalisation, *Protokół z 35. posiedzenia Komisji Wspólnej Rządu i Mniejszości Narodowych*, 26 November 2012.

⁹³ Poland, Human Rights Defender (2012), p. 81.

⁹⁴ Poland, Ministry of Justice (2012).

⁹⁵ Finland, Supreme Court, KK0:2012:58 (R2010/1101), 8 June 2012.

⁹⁶ For more information, see: www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/jha/135890.pdf.



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EU Member States and
international obligations

Human rights instruments instruments instruments

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10

EU Member States and international obligations

The European Union (EU) and its Member States work within an ever more intricate framework of international human rights standards and monitoring mechanisms. The year 2012 witnessed important steps with regard to the related obligations, with EU Member States and Croatia becoming parties to close to 30 international treaties, including protocols, that are of direct relevance for the protection of fundamental rights. European or international monitoring bodies adopted almost 40 reports on the fundamental rights performance of EU Member States and Croatia, recognising achievements and highlighting challenges. Monitoring bodies received a large number of individual complaints, especially the European Court of Human Rights, which identified violations by EU Member States and Croatia of the European Convention of Human Rights in 486 judgments, singling out length of proceedings and fair trial as continuing issues of concern in several Member States. Monitoring by the United Nations and European organisations must be supported by strong and effective monitoring at national level. An essential supporting role in this respect rests with National Human Rights Institutions that are compliant with the Paris Principles.

10.1. The fundamental rights landscape

The EU's fundamental rights landscape consists of norms, institutions and procedures from local to international levels.¹ The UN, the Organization for Security and Co-operation in Europe (OSCE), the Council of Europe and the EU have put in place a range of legal instruments and corresponding monitoring mechanisms that complement and interact with one another to support fundamental rights across the EU.

¹ See *Bringing rights to life: The fundamental rights landscape of the European Union*, available at: <http://fra.europa.eu/en/publication/2012/bringing-rights-life-fundamental-rights-landscape-european-union>.

Key developments

- A new United Nations (UN) instrument in relation to the rights of the child becomes available, paving the way for a form of access to justice at supra-national level.
- Penultimate European Union (EU) Member State and Croatia accede to the European Convention on Human Rights Additional Protocol 13 which abolishes the death penalty in all circumstances, leaving one remaining EU Member State that has signed but not yet ratified the protocol.
- Five of the 13 applications brought to the European Committee of Social Rights (ECSR) in 2012 concern Greek pensioners' organisations complaining about pension cuts they see as violating social rights under the European Social Charter (ESC).
- Length of proceedings continues to be a major problem around Europe, as identified by case law from the European Court of Human Rights (ECtHR), along with, for instance, the right to an effective remedy. Overall, however, the number of judgments finding violations in EU Member States and Croatia is trending lower.
- The role of National Human Rights Institutions (NHRIs) as monitoring bodies at national level under UN treaties is increasing.

Table 10.1: Acceptance of selected Council of Europe conventions, by EU Member State and Croatia

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU
<i>Total accepted</i>	19	15	17	23	17	17	18	16	13	19	24	20	18
ECHR (as amended by P14)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ECHR P1 (property, education, etc)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ECHR P4 (no prison for debt, etc)	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓
ECHR P6 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ECHR P7 (criminal appeal)	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓
ECHR P12 (discrimination)	s	s	✗	✓	s	s	✗	s	s	✓	✓	✗	s
ECHR P13 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ESC original (1961)	✓	✓	✗	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓
ESC (1996)	✓	✓	✓	✓	s	s	s	✓	s	s	✓	✓	✓
ESC CCPP**	s	✓	✓	✓	✓	✗	s	✗	✓	✗	✓	✓	s
CIPPPD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CIPPPD Additional Protocol	✓	s	✓	✓	✓	✓	s	✓	s	✓	✓	✓	✓
ECCVVC	✓	✓	✗	✓	✓	✓	✓	✓	s	✓	✓	✓	s
ECLSG	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ECLSG AP	✗	s	s	✓	✗	✗	✗	✓	✗	✗	✓	s	✓
ECPT	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ECRML	✓	✗	✗	✓	✓	✓	✓	✗	✗	✓	✓	s	✓
FCNM	✓	s	✓	✓	✓	✓	✓	✓	s	✓	✓	✗	✓
ECECR	✓	✗	✗	✓	✓	✓	✗	✗	✓	s	✓	✓	s
"Oviedo Convention"	✗	✗	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓
CoC	✓	✓	✓	✓	s	✓	✓	✓	s	✓	✓	✓	✓
CoC Additional Protocol	s	s	✗	✓	✗	✓	✓	s	s	✗	✓	✓	✗
CATHB	✓	✓	✓	✓	✗	✓	✓	s	s	✓	✓	✓	s
CSEC	✓	s	✓	s	✗	s	✓	s	✓	✓	✓	✓	s
CAOD	✗	s	✗	✗	✗	✗	✗	s	✗	✗	s	✗	✓
CVW***	s	s	✗	✗	✗	s	✗	✗	s	s	s	s	✗

Notes: * All European Member States are state parties to the original ESC

** ESC Article D indicates that

*** CVW was adopted in 2011

Acronyms stand for the following:

ECHR (as amended by P14) Convention for the Protection of Human Rights and Fundamental Freedoms

ESC (rev)** European Social Charter

ESC CCPP ESC Collective Complaints Procedure Protocol

CIPPPD (1981) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The European Union will be able to accede to this convention pending additional declarations of Council of Europe member states.

CIPPPD Additional Protocol Additional Protocol to the CIPPPD, on supervisory authorities and transborder data flows

ECCVVC European Convention on the Compensation of Victims of Violent Crimes

ECPT European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECRML European Charter for Regional or Minority Languages

ECECR European Convention on the Exercise of Children's Rights

ECLSG European Charter of Local Self-Government

IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR	Total number of accepted out of 27 Member States and Croatia
15	16	18	16	17	15	21	14	20	20	19	19	18	13	22	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	s	✓	26
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	x	✓	25
s	s	x	✓	s	x	✓	x	s	✓	x	✓	s	x	✓	8
✓	✓	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	27
✓	✓	x	✓	✓	✓	✓	✓	✓	s	✓	s	✓	✓	✓	23
✓	✓	✓	s	s	✓	✓	s	✓	✓	✓	✓	✓	s	s	18
✓	✓	x	x	x	x	✓	x	✓	x	✓	s	s	x	✓	13
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	s	✓	✓	✓	x	✓	✓	✓	✓	✓	x	✓	s	✓	21
x	x	s	✓	x	x	✓	x	✓	✓	✓	x	✓	✓	✓	18
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
x	x	✓	x	x	x	✓	x	x	x	✓	✓	x	s	x	8
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
x	s	x	✓	x	s	✓	✓	x	✓	✓	✓	✓	✓	✓	17
✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	24
s	✓	x	s	✓	s	x	✓	s	x	s	✓	s	x	✓	12
x	s	✓	s	✓	x	s	s	✓	✓	s	✓	✓	x	✓	17
s	✓	✓	s	✓	✓	✓	s	✓	✓	s	✓	✓	✓	✓	22
x	s	✓	s	✓	s	✓	s	✓	✓	s	✓	x	x	✓	12
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	24
s	s	s	✓	x	✓	✓	s	✓	✓	s	s	s	s	✓	13
x	x	✓	x	x	x	x	x	x	x	✓	s	x	x	x	3
x	s	x	s	x	s	s	s	s	x	s	s	s	s	x	0

FCNM

Framework Convention for the Protection of National Minorities

'Oviedo Convention'

Convention on Human Rights and Biomedicine

CoC

Convention on Cybercrime

CoC Additional Protocol

Additional Protocol to CoC, on criminalisation of acts of a racist and xenophobic nature committed through computer systems

CATHB

Convention Action against Trafficking in

Human Beings

CSEC

Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

CAOD

Convention on Access to Official Documents

CVW

Convention on Preventing and Combating Violence against Women and Domestic Violence

ECLSG AP

Additional Protocol for the European Charter of Local Self-Government

✓ = State party/applicable

s = signed

x = not signed

■ High acceptance (20 and above)

■ Medium acceptance (16-19)

■ Low acceptance (15 and below)

Source: FRA, 2012; data extracted from: Council of Europe website 'Treaty office', available at: <http://conventions.coe.int>

Promising practice

Visualising human rights commitments – new human rights application

An application launched in 2012 provides a global mapping of basic country indicators, human rights in practice and legal commitments in an accessible easy-to-view format. The Institute for Democracy & Conflict Resolution at the University of Essex in the United Kingdom developed the concept and collected the data, with additional financing provided by the Economic and Social Research Council and the Mackman Group. The application offers country data worldwide on issues such as migration and indicators, including on institutionalised democracy; in addition to formal human rights commitments such as conventions; as well as data from human rights indices, for example on women's political rights.



For more information, see: www.humanrightsatlas.org/

10.2. Acceptance of Council of Europe conventions and protocols

Several significant developments occurred with respect to Council of Europe conventions and protocols in 2012. One of the main developments was **Latvia's** ratification of the European Convention on Human Rights' (ECHR) Additional Protocol 13 on the abolition of the death penalty in all circumstances.² Among EU Member States and Croatia only **Poland** has yet to ratify the protocol.

A number of EU Member States accepted a selection of key Council of Europe instruments in 2012 (see Table 10.1, which also contains a three-stage colour code

with the darker shade indicating a higher number of accepted conventions; see also Figure 10.4):

- **Belgium, Italy, Malta, the Netherlands, Poland** and the **United Kingdom** signed the Convention on Preventing and Combating Violence against Women and Domestic Violence (*Istanbul Convention*);
- **Lithuania** ratified the Convention on Access to Official Documents;
- **Portugal** ratified the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;
- **Cyprus, Finland, Germany** and **Lithuania** ratified the Convention on Action against Trafficking in Human Beings;
- **Austria, Belgium** and **France** ratified the Convention on Cybercrime;
- **Cyprus, Estonia, Finland, Hungary** and **Lithuania** ratified the Additional Protocol to the European Charter of Local Self-Government, and **Bulgaria** signed it;
- **Finland** ratified the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data regarding supervisory authorities and transborder data flows;
- **Belgium** ratified the ECHR Additional Protocol 7 on criminal appeal;
- **Estonia** declared that it considers itself bound by a range of additional articles of the European Social Charter (ESC);
- the **Czech Republic** ratified the ESC's additional protocol on collective complaints.

Furthermore, the Council of Europe released a number of monitoring reports on EU Member States in 2012 (see Table 10.2) with a wealth of information on issues ranging from racism, rights of minorities, to problems with detention, prisons and other places of involuntary confinement.

² Art. 3 of that Protocol holds that no reservations may be made to the provisions therein.

Table 10.2: Overview of monitoring reports released under Council of Europe monitoring procedures in 2012, by EU Member State and Croatia

	ECPT	ECRML	FCNM	ECRI
AT				
BE	✓			
BG	✓		✓	
CY				
CZ		✓		
DE	✓			
DK				✓
EE				
EL				
ES			✓	
FI				
FR	✓			
HU				
IE			✓	
IT				✓
LT				
LU				✓
LV				✓
MT			✓	
NL	✓	✓		
PL				
PT				
RO			✓	
SE			✓	✓
SI				
SK				
UK				
HR				✓
Total	5	2	6	6

✓ = Monitoring reports issued in 2012

Note: The table provides an overview of monitoring reports released under Council of Europe monitoring procedures in 2012 and does not take as reference the dates of country visits; reports included are those available on the Council of Europe website.

Acronyms stand for:

ECPT European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

ECRI European Commission against Racism and Intolerance

ECRML European Charter for Regional or Minority Languages

FCNM Framework Convention for the Protection of National Minorities

Source: FRA, 2012; data extracted from: Council of Europe bodies – www.cpt.coe.int/en/states.htm, www.coe.int/t/dg4/education/minlang/Report/default_en.asp, www.coe.int/t/dghl/monitoring/minorities/3_FCNDocs/Table_en.asp, www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry_en.asp

Table 10.3: Acceptance of ESC provisions, by EU Member State and Croatia

	European Social Charter (revised)									
	Article	AT	BE	BG	CY	EE	FI	FR	HU	IE
<i>Total accepted</i>		15	24	17	15	23	26	31	18	28
Right to work	1	✓	✓	✓	✓	✓	✓	✓	✓	✓
Just conditions of work	2	p/a	✓	p/a	p/a	p/a	✓	✓	✓	✓
Safe and healthy work conditions	3	✓	✓	✓	p/a	p/a	p/a	✓	✓	✓
Fair remuneration	4	p/a	✓	p/a	p/a	p/a	p/a	✓	x	✓
Right to organise	5	✓	✓	✓	✓	✓	✓	✓	✓	✓
Right to bargain collectively	6	p/a	✓	✓	✓	✓	✓	✓	✓	✓
Protection of children and young persons	7	p/a	✓	✓	p/a	p/a	p/a	✓	✓	✓
Protection of maternity of employed women	8	p/a	✓	✓	p/a	✓	p/a	✓	✓	p/a
Vocational guidance	9	✓	✓	x	✓	✓	✓	✓	✓	✓
Vocational training	10	✓	✓	x	✓	p/a	✓	✓	✓	✓
Protection of health	11	✓	✓	✓	✓	✓	✓	✓	✓	✓
Social security	12	✓	✓	p/a	✓	✓	✓	✓	p/a	✓
Social and medical assistance	13	✓	✓	p/a	p/a	✓	✓	✓	✓	✓
Benefit from social welfare services	14	✓	✓	✓	✓	✓	✓	✓	✓	✓
Persons with disabilities	15	✓	✓	x	✓	✓	✓	✓	✓	✓
Protection of the family	16	✓	✓	✓	x	✓	✓	✓	✓	✓
Protection of children and young persons	17	✓	✓	p/a	x	✓	✓	✓	✓	✓
Work in the territory of other Parties	18	p/a	✓	p/a	p/a	p/a	✓	✓	x	✓
Protection and assistance of migrant workers	19	p/a	p/a	x	✓	✓	p/a	✓	x	✓
Non-discrimination on the grounds of sex	20	✓	✓	✓	✓	✓	✓	✓	✓	✓
Information and consultation	21	x	✓	✓	x	✓	✓	✓	✓	x
Participation in improvement of working conditions	22	x	✓	✓	p/a	✓	✓	✓	✓	✓
Social protection of elderly persons	23	x	x	x	x	x	✓	✓	x	✓
Protection in cases of termination of employment	24	x	x	✓	✓	✓	✓	✓	x	✓
Protection in case of employer's insolvency	25	✓	✓	✓	✓	✓	✓	✓	x	✓
Dignity at work	26	p/a	p/a	✓	x	✓	✓	✓	x	✓
Workers with family responsibilities	27	p/a	x	p/a	p/a	✓	✓	✓	x	✓
Protection of workers' representatives	28	✓	x	✓	✓	✓	✓	✓	x	✓
Consultation in collective redundancy procedures	29	x	✓	✓	✓	✓	✓	✓	x	✓
Protection against poverty and social exclusion	30	x	✓	x	x	✓	✓	✓	x	✓
Housing	31	x	x	x	x	x	✓	✓	x	x

Notes: Acceptance includes both being a State Party as well as accepting additional monitoring provisions. Partly accepted indicates that not all paragraphs of the article were accepted.

Source: FRA, 2012; data extracted from Council of Europe website 'European Social Charter – Table of accepted provisions', available at: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionsIndex_en.asp

Table 10.3: (continued)

IT	LT	MT	NL	PT	RO	SK	SI	SE	CZ	DK	DE	EL	LV	LU	PL	ES	UK	HR
30	24	21	30	31	17	25	29	23	11	18	15	21	10	16	11	23	14	15
✓	✓	✓	✓	✓	✓	✓	✓	✓	p/a	✓	✓	✓	✓	✓	✓	✓	✓	✓
✓	✓	p/a	✓	✓	p/a	✓	✓	p/a	✓	p/a	✓	✓	x	✓	p/a	✓	p/a	✓
✓	✓	✓	✓	✓	p/a	✓	✓	p/a	✓	✓	✓	✓	x	✓	✓	✓	✓	x
✓	✓	✓	✓	✓	✓	✓	✓	p/a	p/a	p/a	p/a	✓	x	p/a	p/a	✓	p/a	x
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	p/a	p/a	✓	✓	✓
✓	✓	✓	✓	✓	✓	✓	✓	p/a	✓	x	p/a	✓	x	✓	p/a	✓	p/a	✓
✓	✓	p/a	✓	✓	✓	✓	✓	p/a	p/a	p/a	p/a	✓	✓	p/a	✓	✓	p/a	✓
✓	✓	✓	✓	✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓
✓	✓	✓	✓	✓	x	✓	✓	✓	x	✓	p/a	✓	x	✓	p/a	✓	✓	x
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
✓	p/a	p/a	✓	✓	✓	✓	✓	p/a	✓	✓	✓	✓	x	✓	✓	✓	p/a	x
✓	p/a	✓	✓	✓	p/a	p/a	p/a	✓	✓	✓	✓	✓	✓	✓	p/a	✓	✓	✓
✓	✓	✓	✓	✓	x	✓	✓	✓	✓	✓	✓	✓	✓	✓	p/a	✓	✓	✓
✓	✓	✓	✓	✓	p/a	p/a	✓	✓	p/a	✓	✓	✓	x	✓	✓	✓	✓	x
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
✓	p/a	p/a	✓	✓	p/a	p/a	p/a	✓	p/a	✓	✓	✓	x	✓	p/a	✓	✓	x
✓	p/a	x	p/a	✓	p/a	p/a	✓	✓	p/a	x	✓	✓	x	✓	✓	✓	✓	x
✓	✓	✓	✓	✓	✓	✓	✓	✓	p/a	✓	x	✓	x	x	x	✓	x	✓
✓	✓	x	✓	✓	✓	✓	✓	✓	p/a	✓	x	✓	x	x	x	✓	x	✓
✓	x	✓	✓	✓	x	✓	✓	✓	p/a	✓	x	✓	x	x	x	✓	x	x
✓	✓	✓	✓	✓	✓	✓	✓	x										
x	✓	✓	✓	✓	✓	✓	✓	✓										
✓	✓	✓	✓	✓	x	✓	✓	✓										
✓	✓	p/a	✓	✓	p/a	p/a	✓	✓										
✓	✓	✓	✓	✓	✓	✓	✓	x										
✓	✓	✓	✓	✓	✓	✓	✓	✓										
✓	x	x	✓	✓	x	✓	✓	✓										
✓	p/a	x	✓	✓	x	x	✓	✓										

✓ = accepted
 p/a = partly accepted
 x = not accepted

Table 10.4: Conformity of national law and practice with ESC provisions, by EU Member State and Croatia

	Total number of Charter provisions examined *	Total number of conclusions of conformity	Total number of conclusions of non-conformity	1 - Conformity	1 - Non-conformity	9 - Conformity	9 - Non-conformity	10 - Conformity	10 - Non-conformity	15 - Conformity	15 - Non-conformity	18 - Conformity	18 - Non-conformity	20 - Conformity	20 - Non-conformity	24 - Conformity	24 - Non-conformity	25 - Conformity	25 - Non-conformity	1 Additional Protocol - Conformity	1 Additional Protocol - Non-conformity	Percentage (non-conformity of total number of Charter provisions examined)
AT	14	7	3	2	1			2	2			3										21
BE	19	9	9	2	2	1		2	3		2	3	1	1					1			47
BG	8	2	5	1	3							1			1		1					63
CY	16	5	6	1	1	1		2	1		2	1			1		1					38
CZ	6	2	2	1	1							1									1	33
DE	14	11	1	3	1	1		3		2		2										7
DK	16	12	2	4		1		3	1	1	1	3										13
EE	14	8	3	1	1		1	3		2	1			1				1				21
EL	16	6	6	1	2	1		3	1		1	1	2									38
ES	16	10	3	1	2	1		2	1	2		3								1		19
FI	20	16	2	3		1		3	1	3		4		1			1	1				10
FR	20	9	4	3		1		2	1		1	2	1		1			1				20
HU**																						
IE	20	6	8		2		1	2	3	2		1	1	1			1					40
IT	19	13	4	2	2	1		5		2		2	1	1			1					21
LT	18	16	1	3		1		5		3		2		1		1			1			6
LU	15	8	4	1	2	1		3			2	3										27
LV	5	3	2	2	2	1																40
MT	17	7	1	1				3		2		1					1					6
NL***	20	17	2	4		1		5		2	1	3		1			1	1				10
PL	10	8	1	2	1	1		2		2		1										10
PT	20	12	5	1	2	1		3	1	3		3	1		1	1						25
RO	12	3	2			1				1		1	1						1			17
SE	19	18	1	4		1		4	1	3		4		1				1				5
SI	19	9	4	3	1	1		1		1	2	2	1		1			1				21
SK	18	2	14		4		1		3		2	1	2		1		1	1				78
UK	15	10	3	3		1		3	1	2		1	2									20
HR	6	2	4	1	3		1													1		67

Total examined: 412

Notes: * The discrepancy between the total number of ESC provisions examined and the number of provisions Member States are in conformity and non-conformity with is due to the ECSR being unable to reach a conclusion for some situations, pending receipt of additional information from the Member State government concerned. A 'situation' refers to a specific provision of an article (e.g. paragraph 2 of Article 18). The ECSR monitors compliance with the ESC (with its 1988 Additional protocol) and ESC Rev. according to a four-year cycle and on the basis of yearly state reports on a thematic group of provisions (the provisions of the Charter have been divided into four thematic groups together making up the four-year cycle). Conclusions in 2012 focused on employment, training and equal opportunities: Articles 1, 9, 10, 15, 18, 20, 24, 25 and Article 1 of the Additional Protocol. During 2011 the ECSR examined the application of the 1961 Charter by 11 EU Member States and Croatia: Austria, Czech Republic, Denmark, Germany, Greece, Latvia, Luxembourg, Poland, Slovakia, Spain and the United Kingdom. During the same time period the ECSR also examined the application of the Revised Charter by 15 EU Member States: Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Ireland, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia and Sweden. Hungary did not submit a report in time.

** Hungary failed to submit a report and consequently the ECSR was unable to adopt conclusions.

*** Only Netherlands is considered, the European part of the Kingdom of the Netherlands (formed by the Netherlands, the Netherlands Antilles and Aruba).

Source: Council of Europe, Conclusions of the European Committee of Social Rights 2012

■ lower than 15%
■ between 15%-25%
■ greater than 25%

10.2.1. Economic and social rights: standards and compliance

The ESC – which guarantees social and economic rights – witnessed developments in 2012. All EU Member States and **Croatia** are among the 43 parties to the original 1961 ESC (ESC original (1961)); and 18 EU Member States have ratified the ESC (1996) (see Table 10.1).

Thirteen EU Member States and Croatia are bound by the 1995 Additional Protocol to the ESC Providing for a System of Collective Complaints (Collective Complaints Procedure Protocol, CCPP) and an additional five have signed the instrument (see Table 10.1). **Finland** remains the sole EU Member State which, in addition to the CCPP itself, accepted on 4 April 2012 the submission of collective complaints (Article 2 of the CCPP) not only from international NGOs and national trade unions (mandated under Article 1 of the CCPP) but also from national non-governmental organisations – a possibility available under Article 2 of the CCPP.³ Thirteen EU Member States and Croatia are bound by the CCPP and an additional five have signed the instrument (see Table 10.1).

The applications under the CCPP to the ECSR are noteworthy in order to understand current issues in the area of economic and social rights. Of the 12 cases filed in 2012, five concern Greek pensioners' organisations complaining about pension cuts that they argue amount to a violation of social rights under the ESC. In all five cases, the ECSR declared the complaints admissible as far as they concerned Article 12 of the ESC on the right to social security. The outcome of these applications was still pending as this annual report went to print.⁴ See also the **Focus** section of this report.

To ensure compliance with the provisions of the 1961 and the 1996 ESC, as well as those of a 1988 Additional Protocol that extended the rights of the 1961 ESC to include, for instance, rights of the elderly to social protection, the ECSR monitors State Parties' implementation of the treaty on a four-year cycle. To cover all provisions during this cycle, the provisions are divided into four thematic groups so that states report on one of the four every year.

In 2012, the review focused on employment, training and equal opportunities, relating to Articles 1, 9, 10, 15, 18, 20, 24 and 25 of the ESC and Article 1 of the 1988 Additional Protocol (see Table 10.3 for the content of these provisions). During 2012, the ECSR examined the application of the 1961 ESC by **Croatia** and 11 EU Member States: **Austria, Czech Republic, Denmark, Germany,**

Greece, Latvia, Luxembourg, Poland, Slovakia, Spain and the **United Kingdom**. During the same time period, the ECSR also examined the application of the 1996 ESC by 15 EU Member States: **Belgium, Bulgaria, Cyprus, Estonia, Finland, France, Ireland, Italy, Lithuania, Malta, the Netherlands, Portugal, Romania, Slovenia** and **Sweden**. **Hungary**, for the second year in a row, did not submit a report on time, informing the ECSR that it would do so only in the first half of 2013.

Of the provisions examined in relation to each State Party (the number of these provisions differing depending on the number of provisions accepted), the average of the ECSR 'non-conformity' conclusions across the 26 EU Member States (without Hungary) and **Croatia**, was 25 %, similar to 27 % in the previous year. Table 10.4 outlines the number of provisions examined as well as the number and rate of conformity of national law and practice with ESC provisions by EU Member State and **Croatia**. The table also contains a three-stage colour code with the lighter shade indicating a higher percentage of 'non-conformity' conclusions.

Table 10.5 provides a specific thematic example, presenting the ECSR's conclusions on the conformity of EU Member States' legislation with ESC provisions on education and vocational training for persons with disabilities (Article 15 (1)), employment of persons with disabilities (Article 15 (2)) and social integration and participation of persons with disabilities in the life of the community (Article 15 (3)), with respect to the period 2007 to 2011 (made available in 2012). Further information and statistics relative to persons with disabilities are presented later in this chapter, including data provided at UN level on the Convention on the Rights of Persons with Disabilities (CRPD).

10.2.2. Civil and political rights: cases and compliance

The current annual ECtHR statistics indicate that the Court handed down 648 judgments in 2012 – 486 of which proved to be violations – in relation to cases brought against the 27 EU Member States and **Croatia**. As shown in Table 10.6, the most frequent subjects of proceedings before the ECtHR related to length of proceedings (151 judgments), the right to liberty and security (80), the right to an effective remedy (74) and inhuman or degrading treatment (71). A trend to fewer judgments finding a violation against EU Member States and Croatia continued in 2012 with 486, a fall from 509 (+23 **Croatia**) in 2011. The ECtHR handed down considerably fewer judgments in EU Member States and Croatia in 2012 on the length of proceedings, right to a fair trial and non-enforcement.

For the first time in the ECtHR's history the stock of pending cases was reduced by some 16 %, or to 128,100 cases against 151,600 at the beginning of (continued p. 288)

³ For more information on the ESC, see: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp.

⁴ A list of all complaints and the corresponding documentation is available at: www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp.

Table 10.5: ECSR conclusions on the conformity of national legislation with Article 15 paragraphs 1, 2 and 3 of the ESC, by EU Member State and Croatia

	Education and vocational training for persons with disabilities	Employment of persons with disabilities	Integration and participation of persons with disabilities in the life of the community
AT	Deferral	Deferral	Not applicable
BE	Non-conformity: it has not been established that people with disabilities are guaranteed an effective right to mainstream education and training.	Non-conformity: it has not been established that persons with disabilities are guaranteed effective equal access in employment.	Deferral
BG	Not applicable	Not applicable	Not applicable
CY	Deferral	Non-conformity: it has not been established that persons with disabilities are guaranteed effective protection against discrimination in employment.	Non-conformity: it has not been established that persons with disabilities are effectively protected against discrimination in the fields of housing, transport and cultural and leisure activities.
CZ	Not applicable	Deferral	Not applicable
DE	Conformity	Conformity	Not applicable
DK	Non-conformity: there is no legislation explicitly protecting people with disabilities from discrimination in education.	Conformity	Not applicable
EE	Conformity	Conformity	Non-conformity: there is no anti-discrimination legislation to protect persons with disabilities which explicitly covers the fields of housing, transport, telecommunications and cultural and leisure activities.
EL	Deferral	Non-conformity: it has not been established that persons with disabilities are guaranteed effective equal access to employment.	Not applicable
ES	Conformity	Conformity	Not applicable
FI	Conformity	Conformity	Conformity
FR	Non-conformity: it has not been established that people with autism are guaranteed effective equal access to (mainstream and special) education.	Deferral	Deferral
HU	No report received	No report received	Not applicable
IE	Conformity	Conformity	Deferral
IT	Conformity	Deferral	Conformity
LT	Conformity	Conformity	Conformity
LU	Non-conformity: it has not been established that persons with disabilities are guaranteed an effective right to mainstream training.	Non-conformity: it has not been established that persons with disabilities are guaranteed effective equal access to employment.	Not applicable
LV	Not applicable	Not applicable	Not applicable
MT	Conformity	Deferral	Conformity
NL	Conformity	Non-conformity: it has not been established that persons with disabilities are guaranteed effective equal access to employment.	Conformity
PL	Conformity	Conformity	Not applicable
PT	Conformity	Conformity	Conformity
RO	Deferral	Conformity	Not applicable
SE	Conformity	Conformity	Conformity
SI	Non-conformity: it has not been established that persons with disabilities, in particular with intellectual disabilities, are guaranteed an effective right to mainstream education and training.	Non-conformity: it has not been established that persons with disabilities are guaranteed effective equal access to employment.	Conformity
SK	Non-conformity: it has not been established that persons with disabilities are guaranteed an effective right to mainstream education and training.	Non-conformity: it has not been established that there is effective anti-discrimination legislation; it has not been established that persons with disabilities are guaranteed effective equal access to employment.	Not applicable
UK	Conformity	Conformity	Not applicable
HR	Not applicable	Not applicable	Not applicable

Notes: 'Not applicable' refers to provisions which are not accepted by the state in question.

'Deferral' refers to cases where conclusions are postponed to a later date.

Source: www.coe.int/t/dghl/monitoring/socialcharter/Conclusions/ConclusionsIndex_en.asp



Table 10.6: Number of ECtHR judgments finding a violation in 2012, by ECHR article, and number of 'leading' cases pending execution at the end of 2012, by EU Member State and Croatia

Article		AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR	Sub-tota		
Violations	Right to life - deprivation of life	2		4		2							1	1											1				9			
	Lack of effective investigation	2		7		2											2								3			1	15			
	Prohibition of torture	3		1					1																				2			
	Inhuman or degrading treatment	3		5		1			1	11	1		3	3		2	1		4			7		24	1	2	2	1	2	71		
	Lack of effective investigation	3		6		1			1	2			2			2			4					12	1	2		1	34			
	Prohibition of slavery / forced labour	4											1														1		2			
	Right to liberty and security	5	4	12		3	3			12	1	1	7	4			2				1	13		10			2	1	4	80		
	Right to a fair trial	6	1	8		2	1		1	1	3		3				3	2		1		2	1	5	13		1	2	50			
	Length of proceedings	6	3	1	17					35	1			9	2	16	1	1	2			6	17	10		13	11	1	5	151		
	Non enforcement	6		1																						1	1		3			
	No punishment without law	7					2				1														1				4			
	Right to respect for private and family life	8	2	1	14		1	1			1	1	1	1		7	1		1	1	2	8	3	5	1	2	2	2	4	62		
	Freedom of thought, conscience and religion	9																												0		
	Freedom of expression	10	1		1		1						1	3	2		1					2	4	1	3					20		
	Freedom of assembly and association	11													3										1			1		5		
	Right to marry	12																											1	1		
	Right to an effective remedy	13		1	20						21			2		4	1					1		5			12	3	1	3	74	
	Prohibition of discrimination	14	2		1		1			1	2														3		1	1		12		
	Protection of property	P1-1			8		1	1		2							13			1			23	1	7		1		1	59		
	Right to education	P1-2																												0		
	Right to free elections	P1-3			1												1								1					3		
	Right not to be tried or punished twice	P7-4																												0		
	Other Articles of the Convention		3	1	13		4	1		1	6			3	2		7			1	1		9	1	4	1	4	6	1	3	72	
Total																																
Judgments finding at least one violation		10	6	58		10	11		2	52	8	2	19	24	2	36	7	1	10	1	5	56	22	70	4	20	21	10	19	486		
Friendly settlements / Striking out judgments						1	1									2								1	2							
Judgments finding no violation		13		3		3	8	1	2	3	2	3	8	1		2	5	1	4	1	2	16		6	8	2	2	13	4	113		
Other judgments**				3		1	3		1	1		2	1			23			1		2	1	2	1	2	1		1	42			
Number of judgments*		23	6	64		15	23	1	4	56	10	5	29	26	2	63	12	2	14	3	7	74	23	79	15	22	23	24	23	648		
'Leading' cases pending execution***		19	17	108	8	20	17		6	59	15	11	42	24	3	62	13	3	24	14	9	76	15	88	8	16	14	17	46	754		

Notes: Judgments may concern more than one provision.

* Some judgments concern two EU Member States, possibly including third states, one case for each of the following pairs: Bosnia and Herzegovina, Croatia, Serbia, Slovenia and 'the former Yugoslav Republic of Macedonia'; Greece and Germany; Italy and Bulgaria; Montenegro and Serbia; Moldova and Russia; and San Marino and Italy.

** Other judgments: just satisfaction, revision judgments, preliminary objections and lack of jurisdiction.

*** 'Leading' cases relate to the supervision of leading case execution and are those that the Council of Europe identified as not being repetitive cases but showing a structural or general problem in the state concerned, for which measures must be taken to address the problem.

Source: Data extracted from ECtHR Annual report 2012, pp. 152-153; for 'Leading' cases pending execution', data are extracted from Supervision of the execution of judgments and decisions of the ECtHR, Draft of the Annual Report 2012, Council of Europe, April 2013

the year. The total number of applications dealt with increased by 68 %, mainly due to new working methods introduced by Protocol No. 14 to the ECHR which optimised the filtering and processing of applications.

Table 10.6 provides an overview of the number of judgments in which the ECtHR found a violation in 2012, broken down by ECHR articles and by Member State and **Croatia**. It also shows the number of pending 'leading' cases for execution. The Council of Europe determines those cases as 'leading' that relate to a structural or general problem in the state concerned that needs to be addressed by legislative measures.

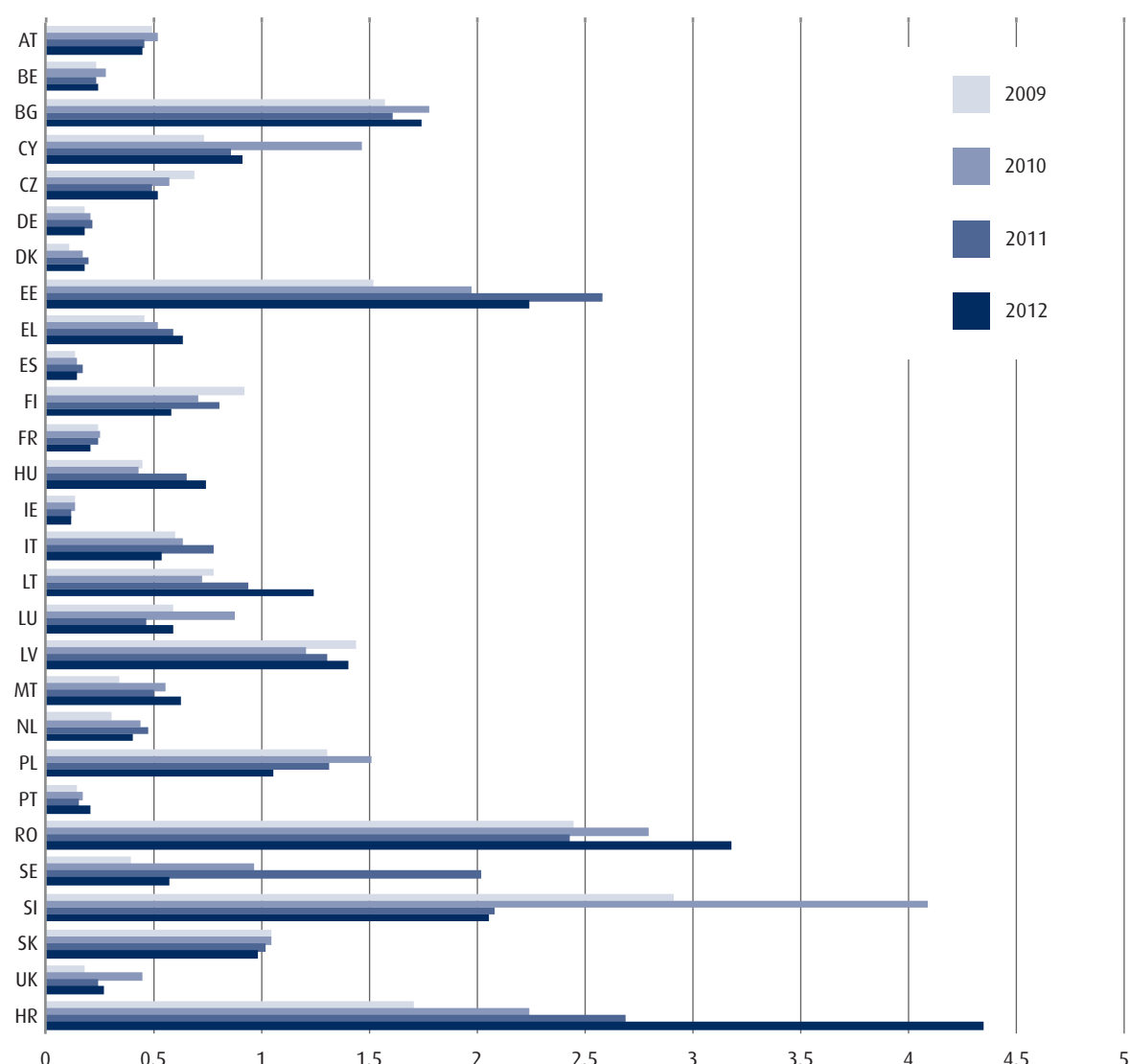
The ECtHR also offers details on the number of complaints it allocates to its internal judicial formations

by population. Applications that are allocated to a judicial formation are those for which the ECtHR has received a correctly completed form, accompanied by copies of relevant documents. Figure 10.1 shows the per capita allocation by state from 2009 to 2012. In general terms the number of applications by state stabilised. The figure does not include applications at the pre-judicial stage with an incomplete case file.

Figure 10.2 presents the most violated provisions of the ECHR, and the EU Member States and Croatia with the four highest number of violations by respective right.

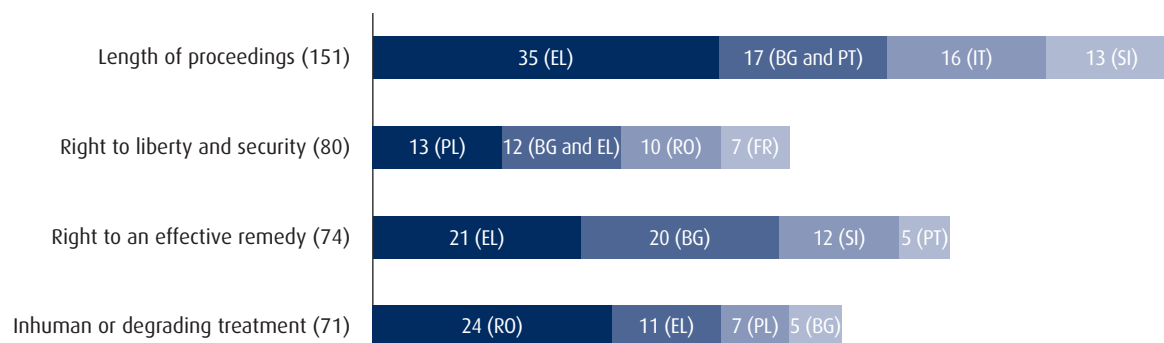
Figure 10.3 shows the number of pending applications before the ECtHR. Of the 128,100 total at the end of

Figure 10.1: Applications allocated to a judicial formation per 10,000 inhabitants, by EU Member State and Croatia



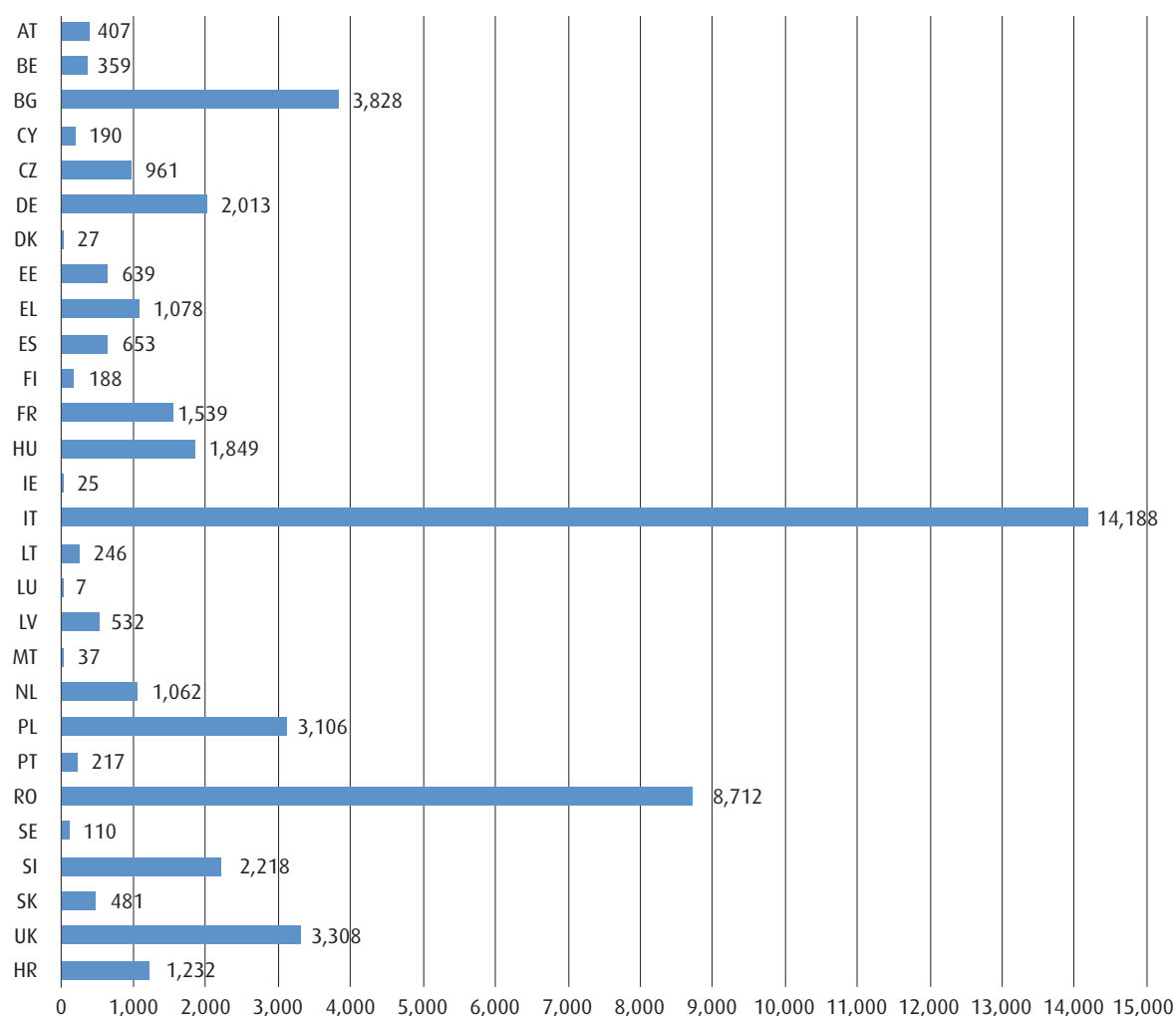
Notes: The Council of Europe member states had a combined population of approximately 822 million inhabitants on 1 January 2012. The average number of applications allocated per 10,000 inhabitants was 0.79 in 2012. 'Applications' refers to complaints lodged to the ECtHR, which the court has not yet decided are admissible or not.

Source: 2011 and 2012: Internet sites of the Eurostat service ('Population and social conditions') or from the United Nations Statistics Division

Figure 10.2: Most violated human rights provisions

Notes: The darkest shade of blue is used for the highest number of ECHR violations, medium blue for a medium number of violations and light blue for a low number of violations. In the case of 'Right to liberty and security', which is the second most violated human right, the bar is shorter as the number of violations per individual state is lower (e.g. 13 for PL). In cases where two states are mentioned in brackets, each of the states committed the same number of violations (e.g. 17 BG and 17 PT).

Source: ECtHR, Annual report 2012

Figure 10.3: Number of cases pending before judicial formations of the ECtHR as of December 2012, by respondent EU Member State and Croatia

Note: This table presents only the 27 EU Member States and Croatia. For all 47 Council of Europe member states' statistics, see ECtHR, Annual report 2012. 'Cases' refers to applications which have been deemed admissible by the ECtHR and thus will be considered on the merits.

Source: ECtHR, Annual report 2012

2012, EU Member States and **Croatia** together account for 49,212, or some 38 %. **Italy, Romania** and **Bulgaria** have the largest number of pending cases.

Table 10.7 presents the number of cases with an average execution time greater than five years of leading pending cases and the total amount of just satisfaction awarded for all cases in both 2011 and 2012 by EU Member State and **Croatia**. In the table, the five highest numbers of cases are highlighted, as well as the five highest

amounts of just satisfaction awarded. In 2012 the highest number of leading pending cases with execution times longer than five years was in **Italy**, which also had the highest amount of just satisfaction awarded, at almost €120,000,000, up from €8,000,000 in 2011.

Not only the EU Member States but the EU itself will, with its accession, be bound by the ECHR and subject to the jurisdiction of the ECtHR. The negotiations on the accession, initiated in 2010, continued in 2012 without

Table 10.7: Number of leading pending cases with average execution time of more than five years and total just satisfaction awarded, by EU Member State and Croatia

	Average execution time		Just satisfaction	
	Leading cases Pending > 5 years		Total awarded (euros)	
	2011	2012	2011	2012
AT	2	4	79,493	119,689
BE	6	5	46,269	156,150
BG	27	32	731,302	1,404,532
CY	2	2	3,200	0
CZ	3	5	276,396	193,530
DE	1	1	348,922	502,026
DK			21,000	223,178
EE			8,000	28,118
EL	15	20	7,061,189	1,659,800
ES	2	1	331,000	156,840
FI	3	5	105,114	70,150
FR	4	4	2,183,236	7,667,647
HU	1	1	1,143,510	674,000
IE	1	1	38,800	168,035
IT	31	33	8,414,745	119,558,467
LT	1	2	42,995	60,738
LU	1	3	0	37,885
LV	4	7	101,364	57,000
MT	4	4	170,500	90,800
NL	2	2	8,340	62,283
PL	15	27	803,223	570,040
PT	4	4	3,618,619	1,029,170
RO	20	28	1,765,401	1,349,518
SE	1		5,500	20,240
SI	3	6	36,830	263,362
SK	1	1	425,363	349,817
UK	5	5	454,457	418,220
HR	6	10	190,543	325,950
Total:			28,415,312	137,217,185

Notes: 'Leading' cases relate to the supervision of leading case execution and are those that the Council of Europe identified as non-repetitive and illustrating a structural or general problem in the state concerned, for which legislative or other measures must be taken, according to the ECtHR.

The table highlights the four highest numbers of cases and the amount of just satisfaction awarded in 2012.

Source: Data are extracted from 'Supervision of the execution of judgments and decisions of the European Court of Human Rights', Draft of the Annual Report 2012, Council of Europe, April 2013

reaching a conclusion.⁵ The meeting records from the September 2012 round of talks between the Council of Europe's Steering Committee for Human Rights (CDDH) – composed of representatives of the Council of Europe Member States – and the European Commission reveal some of the outstanding issues.⁶

Among the 'contentious' topics are: attribution of a case to the EU or to one or more of its Member States when implementing EU law; some procedural aspects of the new 'co-respondent' mechanism bringing together the EU and one or more of its Member States before the ECtHR; and the participation of the EU in the Committee of Ministers, including the EU's voting rights. Negotiations were continued at the 7–9 November 2012 meeting where delegations exchanged views with representatives of civil society who stressed the importance of transparent negotiations. Representatives of non-governmental organisations expressed concern about the effects of the changes envisaged for applicants and EU's obligations under the ECHR, which they felt should encompass not only legislative acts but any action attributable to the EU.⁷

10.3. Acceptance of UN conventions and protocols

Global standards established under the auspices of the UN and its associated organisations, like the International Labour Organization (ILO), provide a universal framework of instruments and monitoring mechanisms. The map in Figure 10.4 highlights the acceptance of international instruments – both those of the UN and the Council of Europe – by EU Member State and Croatia. By aggregating the number of conventions and protocols accepted and their accompanying monitoring mechanisms, one can develop a crude measurement of a state's commitment to human rights obligations. In Figure 10.4, a convention for example, 'counts' as much as a protocol. Although crude, these numbers offer objective information that enable comparisons which speak volumes about the willingness of a state to be held accountable. Similarly rough is the cut-off line for the applied colour code in Figure 10.4, made by dividing the range into three categories of the same size.

The UN Convention on the Rights of Persons with Disabilities (CRPD) embodies the closest formal inter-connection between the EU and the UN human rights system, with the EU itself becoming party to the CRPD in 2010. The CRPD is the first of the core international human rights treaties that explicitly allows for regional organisations to accede.

In 2012, five EU Member States, namely **Bulgaria, Estonia, Greece, Malta** and **Poland**, ratified the CRPD, bringing the total number to 24 plus **Croatia** (see Table 10.6). All EU Member States have signed the CRPD. In 2012, **Estonia, Greece** and **Malta** also ratified the Optional Protocol to the CRPD, which allows for individual complaints of violation of rights in the CRPD. The total number of EU Member States that are party to the CRPD Optional Protocol is 18, plus **Croatia**, with four others having signed the protocol (on CRPD, see ► further **Chapter 5** in this Annual report, and on the role of NHRIs in monitoring the implementation of CRPD, see Section 10.5.2 of this chapter).

As for other changes related to UN human rights instruments during 2012, **Slovakia** ratified the Optional Protocol on individual complaints to the International Covenant on Economic, Social, and Cultural Rights (ICESCR), which will enter into force on 5 May 2013, while **France** and **Ireland** signed it. **Luxembourg** ratified Optional Protocol 1 to the Convention on Transnational Organized Crime (UNTOC) on smuggling migrants.⁸

Although all EU Member States and Croatia are party to the Convention on the Rights of the Child (CRC), not all have ratified the treaty's three protocols. **Estonia**, alone among EU Member States and Croatia, has not yet ratified Optional Protocol 1 on the Involvement of Children in Armed Conflict.⁹

Twenty five EU Member States and **Croatia** are party to Optional Protocol 2 on child prostitution, with **Finland** becoming a party in 2012. The **Czech Republic** and **Ireland** have only signed this protocol.

Austria, Belgium, Cyprus, Finland, Germany, Italy, Luxembourg, Malta, Portugal, Romania, Slovakia, Slovenia and **Spain** signed Optional Protocol 3 to the CRC on complaint procedures (communication procedure), which opened for signature in February 2012 (see Table 10.8).

In 2012, **Austria** ratified the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) and its optional protocol on

5 For a list of meeting documents, see: www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp.

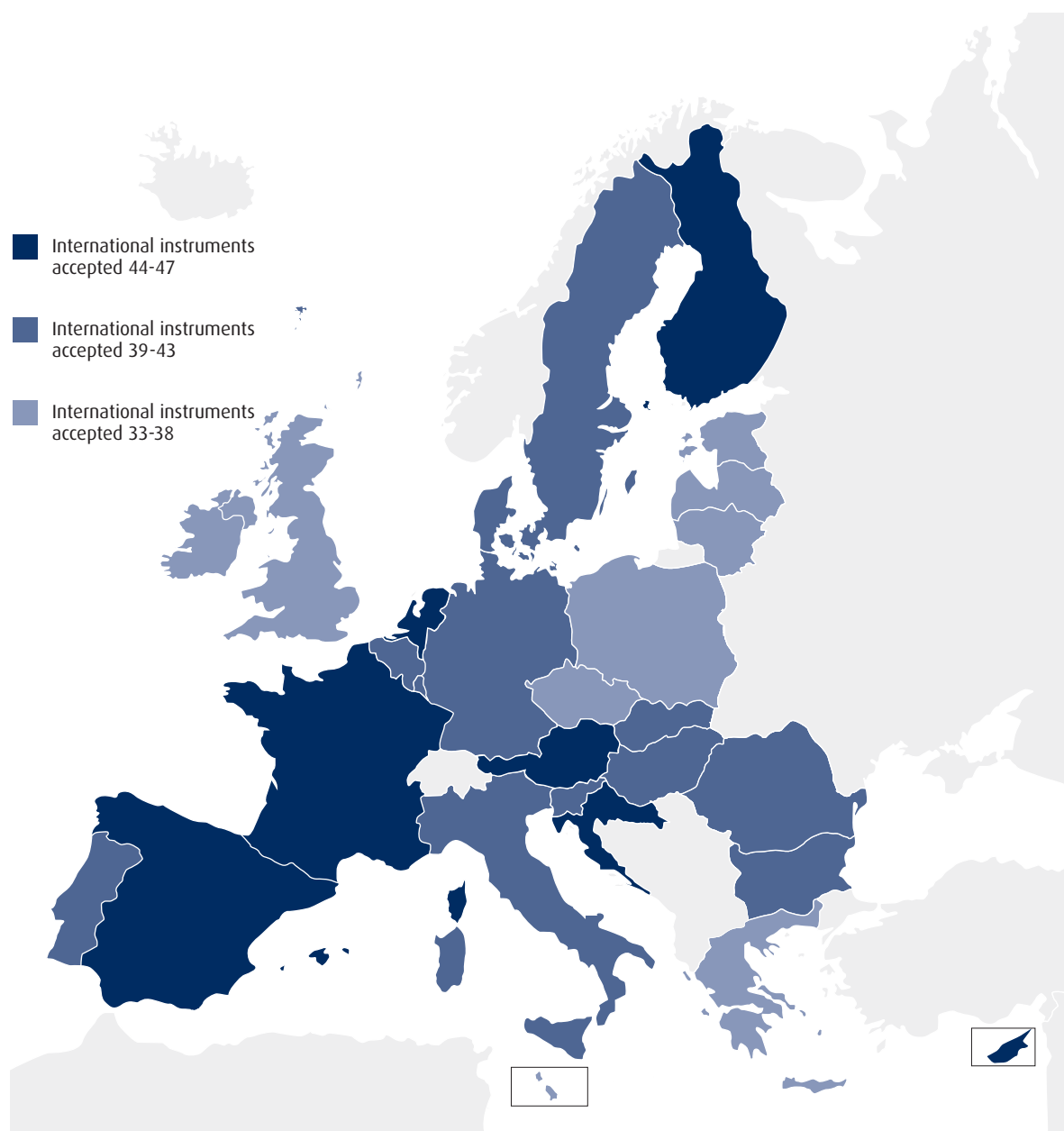
6 Council of Europe (2012), 47+1(2012)R02, 19 September 2012, available at: [www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1\(2012\)R02final_EN.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2012)R02final_EN.pdf).

7 Council of Europe, 47+1(2012)R03, 7–9 November 2012, available at: www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1%282012%29R03_EN_final.pdf.

8 The EU is also party to UNTOC as well as its Protocols, having ratified the Convention in 2004, and Protocols 1 and 2 in 2006.

9 The ratification process is, however, ongoing and is expected to be completed in 2013.

Figure 10.4: Acceptance of UN and Council of Europe human rights instruments, by EU Member State and Croatia



Notes: The figure includes the full list of the UN instruments (conventions and corresponding protocols but also accepted additional monitoring provisions.) provided in Table 10.8. The figure also includes all Council of Europe instruments (conventions and protocols) that are listed in Table 10.1. The total number considered is 57 (31 for the UN and 26 for the Council of Europe).

Source: FRA, 2012; data extracted from: United Nations website 'Treaty Collection', available at: <http://treaties.un.org>

individual complaints, raising the total number of ratifications of the convention as well as its protocol to six among the EU Member States and Croatia.

Similarly, in the context of the Convention against Torture, already ratified by all EU Member States, **Austria** and **Hungary** ratified the Optional Protocol (OP-CAT), requiring a state to designate or establish a National Preventive Mechanism (NPM). With these additions in 2012, 19 EU Member States, as well as **Croatia**, are

parties and another six are signatories (see further on the role of NHRIs as NPMs in Section 10.5.2 below).¹⁰

The International Convention on the Rights of Migrant Workers (ICRMW) remains the only one of the nine

¹⁰ The Portuguese Parliament approved the submission of an instrument of ratification for OP-CAT by means of Resolution 143/2012 of 13 December 2012. The actual ratification date was, however, 15 January 2013 and it is therefore not included in the text or the tables of this annual report.

► ‘core’ UN human rights treaties that no EU Member State has ratified or signed (see also **Chapter 1**). However, an International Labour Organisation convention on domestic workers (ILO C189), adopted in 2011, received in 2012 the sufficient number (two: the Philippines and Uruguay) of ratifications for it to enter into force in 2013.

Table 10.8 shows the acceptance of selected UN conventions and protocols, while also marking EU Member States and Croatia by number of accepted instruments, coded with a three-stage colour scheme in which the darkest shade indicates the highest percentage of ‘non-conformity’ conclusions.

10.4. Monitoring obligations: international

Most of the UN conventions referred to in Table 10.8 provide for the establishment of international monitoring bodies (UN treaty bodies) that supervise State Parties’ implementation of their obligations, through, among other means, a periodic reporting procedure. The UN Human Rights Council provides a further monitoring role through the Universal Periodic Review (UPR) process initiated in 2006.¹¹ Such monitoring mechanisms mandated at UN level are further supported by the universal system of accredited NHRIs with a more general human rights mandate, discussed in Section 10.5.

10.4.1. Universal Periodic Review (UPR)

The UPR is facilitated by a group of three States, known as a ‘troika’, assembled for each review session. With the assistance of the UPR secretariat (a part of the UN Office of the High Commissioner for Human Rights, OHCHR), the troika prepares an outcome document on the review, which includes a summary of the review proceedings, recommendations presented by states, conclusions and voluntary commitments presented by the state under review.

After the monitoring of all UN member states in a complete first four-year UPR cycle, five EU Member States underwent the UPR procedure for a second time in 2012: the **Czech Republic**, **Finland**, the **Netherlands**, **Poland**, and the **United Kingdom**.¹² A UPR working group issues recommendations based on the reviews, suggesting how the state can more effectively meet its human rights obligations. States must express their positions in relation to the recommendations at three stages: a) during the Working Group, b) during the three-month period between the Working Group and the Human Rights Council Plenary Session through a written document called an ‘addendum’, or c) at the very latest, in their statement during the Human Rights Council plenary, when the final outcome of the UPR is adopted.

States may accept, partly accept or reject the implementation of these recommendations. The **United Kingdom**, for example, received 132 recommendations, accepting 72, accepting 19 in part and rejecting 41. The **Netherlands** received 119 recommendations, accepting 65, accepting seven in part and rejecting 47. The reasons for rejection of recommendations vary from country to country, but could stem from the fact that the state is already addressing the issue raised. **Slovenia** submitted a mid-term report during 2012 with the implementation measures for a total of 97 recommendations.¹³ Table 10.9 provides an overview of the UPR recommendations for the EU Member States reviewed in 2012.

¹¹ For the UN Human Rights Council, three new EU Member States were elected in late 2012 to begin serving on the 47-member body on 1 January 2013, adding to an existing six and replacing Belgium and Hungary. The present members (and the year each one’s term expires) are: Austria (2014), Czech Republic (2014), Estonia (2015), Germany (2015), Ireland (2015), Italy (2014), Poland (2013), Romania (2014), and Spain (2013). UN General Assembly, GA/11310, 12 November 2012, available at: www.un.org/News/Press/docs/2012/ga11310.doc.htm.

¹² For more information about the UPR system, see: www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx and about the UPR sessions, see: www.upr-info.org/-Session-13-May-2012-.html.

¹³ See: http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/SI/Slovenia_mid-term_report.pdf.

Table 10.8: Acceptance of selected UN conventions, by EU Member State and Croatia

	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES	FI
<i>Total accepted</i>	26	25	23	23	19	26	23	18	21	27	21
ICERD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICERD - Individual complaints (Art. 14 (1))	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓
ICCPR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICCPR - State complaints (Art. 41)	✓	✓	✓	✗	✓	✓	✓	✗	✗	✓	✓
ICCPR - OP1 (individual complaints)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICCPR - OP2 (death penalty)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICESCR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ICESCR - OP (Individual complaints) [not yet in force]	✗	s	✗	✗	✗	✗	✗	✗	✗	✓	s
CEDAW	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CEDAW - OP (Individual complaints)	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓
CEDAW - OP (Inquiry procedure, Art. 10, 'opt-out')	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓
CAT	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CAT - OP (OP-CAT)	✓	s	✓	✓	✓	✓	✓	✓	s	✓	s
CAT - State complaints (Art. 21 (1))	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓
CAT - Individual complaints (Art. 22 (1))	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓
CAT - Inquiry procedure (Art. 20 (2), 'opt-out' in Art. 28 (1))	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CRC	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
CRC - OP1 (armed conflict)	✓	✓	✓	✓	✓	✓	✓	s	✓	✓	✓
CRC - OP2 (prostitution)	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓
CRC - OP3 (communication procedure)	s	s	✗	s	✗	s	✗	✗	✗	s	s
ICRMW	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗
CPED	✓	✓	s	s	✗	✓	s	✗	s	✓	s
CPED - Individual complaints (Art. 31)	✓	✓	✗	✗	✗	✓	✗	✗	✗	✓	✗
CRPD	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	s
CRPD - OP (individual complaints)	✓	✓	s	✓	s	✓	✗	✓	✓	✓	s
UNTOC	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓
UNTOC - OP1 (smuggling of migrants)	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓
UNTOC - OP2 (trafficking)	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓
CRSR	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ILO C169	✗	✗	✗	✗	✗	✗	✓	✗	✗	✓	✗
ILO C189*	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗

Notes: Acceptance includes both being a State Party as well as accepting additional monitoring provisions.

ICERD International Convention on the Elimination of All Forms of Racial Discrimination

ICCPR International Covenant on Civil and Political Rights

ICCPR OP1 Optional Protocol to the ICCPR

ICCPR OP2 Second Optional Protocol to the ICCPR, aiming at the abolition of the death penalty

ICESCR International Covenant on Economic, Social and Cultural Rights

ICESCR OP Optional Protocol to the ICESCR

CEDAW Convention on the Elimination of All Forms of Discrimination against Women

CEDAW OP Optional Protocol to the CEDAW

CAT Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CAT OP Optional Protocol to the CAT

CRC Convention on the Rights of the Child

CRC OP2 Optional Protocol to the CRC on the involvement of children in armed conflict

CRC OP3 Complaint procedure

Table 10.8: (continued)

FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR	Total accepted out of 27 Member States and Croatia
25	24	19	23	19	24	16	22	24	21	22	20	24	24	24	21	23	
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✗	✓	✗	✓	✓	✓	✓	✓	✓	✓	✓	✗	✗	23
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✗	✓	✓	✓	✗	✓	✗	✓	✓	✓	✗	✗	✓	✓	✓	✓	✓	20
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	27
✓	✓	✓	✓	✓	✓	✗	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	26
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
s	✗	s	s	✗	s	✗	✗	s	✗	s	✗	✗	s	✓	✗	✗	2
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	25
✓	✓	✓	✓	✓	✓	✗	✗	✓	✓	✓	✓	✓	✓	✓	✓	✓	25
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	s	s	✗	✓	✗	✓	✓	✓	s	✓	✓	✓	✗	✓	✓	19
✓	✓	✓	✓	✗	✓	✗	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	24
✓	✓	✓	✓	✗	✓	✗	✓	✓	✓	✓	✗	✓	✓	✓	✗	✓	23
✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	✓	✓	✓	✓	✓	✓	✓	27
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	26
✗	✗	✗	s	✗	s	✗	s	✗	✗	s	s	✗	s	s	✗	✗	0
✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	0
✓	✗	s	s	s	s	✗	s	✓	✗	s	s	s	s	s	✗	s	6
✓	✗	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	6
✓	✓	s	✓	✓	✓	✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	25
✓	✓	✗	✓	✓	✓	✓	✓	✗	✗	✓	s	✓	✓	✓	✓	✓	20
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
✓	✓	s	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	26
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	27
✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	28
✗	✗	✗	✗	✗	✗	✗	✗	✓	✗	✗	✗	✗	✗	✗	✗	✗	3
✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	✗	0

ICRMW

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

CPED

International Convention for the Protection of All Persons from Enforced Disappearance

CRPD

Convention on the Rights of Persons with Disabilities

CRPD OP

Optional Protocol to the CRPD

ILO C169

Indigenous Tribal People Convention

ILO C189

Domestic Workers Convention

UNTOC

Convention on Transnational Organized Crime

UNTOC Op 1

Optional Protocol 1 to the CTOC on smuggling migrants

UNTOC Op 2

Optional Protocol 2 to the CTOC on trafficking

CRSR

Convention relating to the Status of Refugees

* ILO C189 was adopted in 2011, but is not yet in force

✓ = State party/applicable

s = signed

✗ = not signed

■ High acceptance (25 and above)

■ Medium acceptance (21-24)

■ Low acceptance (20 and below)

Source: Data extracted from United Nations website 'Treaty Collection', available at: <http://treaties.un.org>

Table 10.9: Universal Periodic Review recommendations in 2012, by EU Member State and Croatia

	Total	Accepted*	Partially accepted	Rejected*
CZ	The Czech Republic's position on all recommendations is still pending.			
FI	78	71	4	3
NL	119	65	7	47
PL	124	105	0	19
UK	132	72	19	41

Notes: * Numbers are subject to change as postponed or rejected recommendations may later be accepted. Please note that these figures may differ depending on the source used for compiling the data.

Source: FRA, 2012; the table draws on information available at: www.upr-info.org/+Detailed-statistics-available+.html and www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx

10.4.2. Treaty bodies

In contrast to the UPR system, which considers the wider human rights record of a state, UN treaty bodies monitor the implementation of rights guaranteed under their respective treaties. In 2012, the UN General Assembly issued a resolution on strengthening and enhancing the effective functioning of the human rights treaty body system.¹⁴ A treaty body generally conducts a review on the basis of regular reports submitted by the state in question. Review cycles of treaty bodies typically range from between four and five years, with the exception of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which has in principle a two-year cycle.

In 2012, these bodies reviewed several EU Member States. As Table 10.10 shows, of all the treaty bodies, the monitoring body for ICERD, the Committee on the Elimination of Racial Discrimination (CERD), reviewed the largest number of EU Member States in 2012: **Austria, Finland, Italy, and Portugal**. Table 10.10 shows that EU Member States and Croatia are subject to a range of nine monitoring activities at the UN level under which the respective EU Member States and Croatia submitted reports in 2012.

In addition to reporting, individual complaints mechanisms are also made available under the treaties (see Table 10.11). As mentioned, an additional instrument became available in relation to the rights of the child. At an official ceremony on 28 February 2012 in Geneva, the third Optional Protocol to the Convention on the Rights of the Child (CRC) was ► opened for signature (see also **Chapter 4**).¹⁵

Of the nine core UN human rights conventions, three do not yet allow for individual complaints to the respective treaty body. Article 77 of the ICRMW of 1990 has not yet received the sufficient number of declarations (two of the required 10) for the complaint mechanism to become operational – and none of the EU Member States has signed the convention itself (of non-EU states, 35 have signed and 46 are parties).

The 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights has similarly not yet entered into force (eight of the required 10 state parties, and an additional 32 signatures). Eight EU Member States have signed the protocol and, of these, Slovakia ratified in 2012 following Spain.¹⁶

The same is true for the third Optional Protocol to the CRC (two of the required 10 state parties, and an additional 34 signatures) – with 13 EU Member States having signed the protocol. Both optional protocols are also concerned with inter-state complaints and inquiry procedures.

Table 10.11 offers an overview of the nine core UN human rights instruments with their respective provision or optional protocol providing for individual complaints. In addition to the year of adoption, the year of entry into force and the number of state parties, the overview provides details on the respective individual complaints mechanism, the extent of its acceptance and the number of communications/cases in 2012 alongside the number of concluded violations. The table provides

¹⁴ UN General Assembly, A/RES/66/254 of 15 May 2012, initiated by the resolution of 16 March 2012, A/66/L.37.

¹⁵ See: www2.ohchr.org/english/bodies/crc/OPIC_Ceremony.htm.

¹⁶ In early 2013 the protocol reached the required number of ratifications and enters into force on 5 May 2013. Portugal became party in January 2013, bringing the total number of EU Member States having ratified the protocol to three. Since these ratifications took place in 2013, this Annual report does not include them in its text or tables.

a global tally as well as an overview for EU Member States and Croatia.¹⁷

10.4.3. UN special procedures

The system of Special Procedures is a central element of the UN human rights machinery and covers all human rights: civil, cultural, economic, political and social. At the end of 2012 there were 36 thematic and 12 country mandates.

With the support of the UN OHCHR, special procedures undertake country visits; act on individual cases and concerns of a broader, structural nature by sending communications to states and others in which they bring alleged violations or abuses to their attention; conduct thematic studies and convene expert consultations, contribute to the development of international human rights standards, engage in advocacy, raise public awareness and provide advice for technical cooperation.

On various occasions, EU Member States have expressed their support for the system of special procedures and called on states to fully cooperate with them. All EU Member States and Croatia have extended a standing invitation to all thematic special procedures of the Human Rights Council, thereby announcing that they will always accept 'requests to visit' from all special procedures.

In this context, several special procedures mandate holders visited one or more EU Member States and/or Croatia in 2012:

- The Special Rapporteur on violence against women, its causes and consequences visited **Croatia** and **Italy**.
- The Special Rapporteur on the human rights of migrants visited **Greece** and **Italy**.
- **Germany** and **Sweden** received visits from the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran.
- The Special Rapporteur on freedom of religion or belief visited **Cyprus**.
- The Special Rapporteur on the situation of human rights defenders visited **Ireland**.

- The Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes visited **Hungary**.

- The Independent Expert on the effect of foreign debt and other related international financial obligations of States on the full enjoyment of human rights, particularly economic, social and cultural rights visited **Latvia**.

- The **United Kingdom** received a visit from the Working Group of experts on people of African descent.

The results of these visits are presented in written reports submitted to the Human Rights Council and can be found on the webpage of each special procedures mandate holder.¹⁸

In 2012, special procedures mandate holders sent 28 communications to several EU Member States: **Cyprus, Finland, France, Greece, Hungary, Italy, the Netherlands, Poland, Portugal, Romania, Spain** and the **United Kingdom**. Communications sent by special procedures and the responses sent by states, if any, can be found in the 'communications report of special procedures' presented at each session of the Human Rights Council.

Special Procedures have undertaken studies on issues of particular relevance for the EU. For example, the Special Rapporteur on the human rights of migrants launched a year-long study to examine the rights of migrants in the Euro-Mediterranean region, focusing in particular on the management of the external borders of the EU. In May 2012, he held consultations with the key EU institutions responsible for protecting and promoting the rights of migrants,¹⁹ including the Directorate-General Home Affairs and the Directorate-General for Justice of the European Commission, and other relevant regional entities, including the European Parliament, the European Council, FRA, Frontex and relevant civil society actors. Subsequently, he carried out four key countries visits, covering both sides of the EU southern Mediterranean border: Tunisia, Turkey, **Italy** and **Greece**. The findings and recommendations emerging from these visits will be presented to the 23rd session of the Human Rights Council in June 2013 in the form of one thematic global mission report, with country-specific attachments.

¹⁷ The total number of applications as well as concluded violations since the inception of each mechanism was published in *Bringing rights to life: The fundamental rights landscape of the European Union*, available at: <http://fra.europa.eu/en/publication/2012/bringing-rights-life-fundamental-rights-landscape-european-union>.

¹⁸ See: www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.

¹⁹ For more information, see: www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/ConceptNote.aspx.

Table 10.10: UN monitoring reports issued in 2012, by EU Member State and Croatia

	HRC	CERD	CESCR	CEDAW	CAT	CRC	CRC-OP-SC	CRPD	UPR	Total
AT		✓				✓				2
BE										0
BG			✓	✓						2
CY						✓				1
CZ					✓				✓	2
DE	✓									1
DK										0
EE										0
EL					✓	✓	✓			3
ES			✓							1
FI		✓							✓	2
FR										0
HU								✓		1
IE										0
IT		✓								1
LT	✓									1
LU										0
LV										0
MT										0
NL									✓	1
PL									✓	1
PT		✓								1
RO										0
SE							✓			1
SI										0
SK			✓							1
UK						✓			✓	2
HR										0
Total	2	4	3	1	2	4	2	1	5	24

✓ = Monitoring reports issued in 2012

Notes: Acronyms stand for:

CERD Committee on the Elimination of All Forms of Racial Discrimination
 HRC Human Rights Committee (Monitoring body of the International Covenant on Civil and Political Rights, ICCPR)
 CESCR Committee on Economic, Social and Cultural Rights
 CEDAW Committee on the Elimination of Discrimination against Women
 CAT Committee against Torture
 CRC Committee on the Rights of the Child
 CRC-OP-SC Committee on the Rights of the Child (Monitoring the Optional Protocol on the Sale of Children)
 CRPD Convention on the Rights of Persons with Disabilities
 UPR Universal Periodic Review

Source: FRA, 2012; data extracted from: UN bodies – <http://tb.ohchr.org/default.aspx>
 (For sources – Concluding Observations were used for all UN reports)

Table 10.11: UN conventions with individual complaint mechanisms and number of cases

	ICERD	ICESCR	ICCPR	CEDAW	CAT	CRC	ICRMW	CRPD	CPED
Year of adoption (into force)	1965 (1969)	1966 (1976)	1966 (1976)	1979 (1981)	1984 (1987)	1989 (1990)	1990 (2003)	2006 (2008)	2006 (2010)
Number of state parties (out of which EU Member States and Croatia)	175 (28)	160 (28)	167 (28)	187 (28)	153 (28)	193 (28)	46 (0)	127 (25)	37 (6)
Individual complaints provision/ instrument [year of adoption (OP)] (into force) – yellow: not yet in force	Article 14 (1969)	OP [2008]	OP [1966] (1976)	OP [1999] (2000)	Article 22 (1987)	OP [2011]	Article 77	OP [2006] (2008)	Article 31 (2010)
Number of states accepting individual complaints (of which EU Member States and Croatia)	54 (23)	8 (2)	114 (27)	104 (25)	66 (23)	2 (0)	2 (0)	76 (20)	16 (6)
Total number of cases registered (including those newly registered in 2012)	52 (3)	n/a	2,231 (98)	47 (8)	534 (50)	n/a	n/a	9 (9)	0 (0)
Total number of cases where a violation was found (including those adopted in 2012)	13 (1)	n/a	799 (54)	12 (3)	75 (8)	n/a	n/a	1 (1)	0 (0)
Number of cases where a violation was found related to EU Member States and Croatia (including those adopted in 2012)	10 (1)	n/a	107 (3)	7 (2)	33 (3)	n/a	n/a	1 (1)	0 (0)

Notes: Information sorted by: year of adoption, year of entry into force, number of state parties, extent of acceptance of individual complaints, number of cases (communications).

n/a = not applicable

Source: Data provided by the UN OHCHR and extracted from: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>

10.5. Monitoring obligations at national level: National Human Rights Institutions

NHRIs have a crucial role to play in monitoring international obligations and their national implementation, often as an officially appointed national implementation mechanism under treaties (see 10.5.2.). In the course of 2012, the Human Rights Council and the UN General Assembly underscored the valuable contribution of NHRIs in this area.²⁰

The 2012 Brighton Declaration on the future of the ECtHR called for more effective implementation of the ECHR at the national level through, among other things, the establishment of independent NHRIs, with the rationale

that human rights can most effectively be addressed at the national level. In addition, the Declaration calls on states to work “in a spirit of co-operation with” NHRIs.²¹

The Council of Europe Commissioner for Human Rights highlighted in 2012 the essential role of NHRIs and similar bodies during the current economic crisis in Europe, referring to their ability to mitigate the effects of austerity measures on fundamental rights by providing “expert advice on the groups that need the most protection, on the impact of various policy measures and on the more general human rights consequences of the crisis”.²²

Echoing the Council of Europe, the European Commission and the European Parliament also called for the setting-up of NHRIs in all EU Member States and for measures facilitating the networking of these bodies with other

20 See UN Human Rights Council resolution 20/14 of 5 July 2012. The UN General Assembly adopted resolution 66/169 on 19 December 2011, and resolution 67/163 on 20 December 2012, affirming the important role of NHRIs in promoting and protecting human rights at both the national and international levels.

21 See: <http://hub.coe.int/20120419-brighton-declaration>.

22 Council of Europe, Commissioner for Human Rights (2012), Comment of the Council of Europe Commissioner for Human Rights that National Human Rights Structures can help mitigate the effects of austerity measures, CommDH 027(2012), 31 May 2012, available at: www.coe.int/t/commissioner/news/2012/120531hrc_EN.asp.

mechanisms across the EU to help individuals exercise their fundamental rights and address violations most effectively.²³

10.5.1. Accreditation and international cooperation

At the international level, NHRIs cooperate through the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC). The ICC promotes and supports participation of NHRIs in the international human rights system and facilitates cooperation among NHRIs at the global level. The ICC, through its Sub-Committee on Accreditation, also undertakes accreditation of NHRIs for compliance with the Paris Principles – which require that NHRIs are independent, created by law, protected against governmental interference and have adequate funding.

NHRIs that are accredited as fully compliant with the Paris Principles, that is, having A-status, are recognised by the UN system and as such are entitled to fully participate in the work of the UN structures, including various kinds of speaking rights in monitoring procedures independent of their national state.²⁴ To enable EU Member States to establish and seek Paris Principles compliant NHRIs, FRA published a handbook, outlining the accreditation procedures and providing a number of national examples. The European Parliament also invited the FRA to support the EU networking of NHRIs: In its annual report, the European Parliament calls for “the setting-up of appropriate National Human Rights Institutions in all Member States and for measures facilitating the networking of these bodies across the EU with the support of the FRA; invites the EU institutions and the Member States to develop the capacity of Equality Bodies and Data Protection Bodies, of NHRIs and of FRA as human rights litigants”.²⁵

At the European level, NHRIs from across the EU coordinate their activities through the European Group of NHRIs that also facilitates engagement with the ICC as well as with European and UN bodies and monitoring mechanisms. In relation to NHRIs in EU Member States and Croatia, in 2012, four A-status NHRIs – in **Denmark**,

Poland, Portugal and Spain – successfully underwent required regular re-accreditation by the Sub-Committee on Accreditation, maintaining their A-status.²⁶ In March 2012, the B-status of the **Slovakian** NHRI lapsed and it consequently lost its accreditation due to non-submission of required documents.²⁷ By the end of 2012, therefore, the number of the accredited NHRIs in EU Member States and Croatia was: 13 A-status NHRIs (12 in 10 EU Member States and one in **Croatia**), seven B-status NHRIs and one C-status NHRI. The number of EU Member States without accredited NHRIs increased by one to nine (see Table 10.12).

FRA ACTIVITY

Aiding the establishment and accreditation of National Human Rights Institutions in the EU

FRA published a *Handbook on the establishment and accreditation of NHRIs in the European Union* in October 2012, outlining the accreditation procedure step-by-step. The handbook provides examples of concrete practices related to such issues as powers, independence and mandate. The handbook also shows accreditation trends and lists the applicable international standards. It was published alongside a collection of case studies outlining the experiences of NHRIs in selected Member States.

For further information, see:
<http://fra.europa.eu/en/publication/2012/handbook-establishment-and-accreditation-national-human-rights-institutions>

10.5.2. Designation as national implementation mechanisms

The OP-CAT and CRPD require State Parties to establish or appoint an effective mechanism at the national level to monitor implementation of state obligations. Both the CRPD and OP-CAT also instruct states to give due regard to the Paris Principles when establishing this national mechanism. Hence, NHRIs fully compliant with the Paris Principles, in other words holding A-status, are the bodies that are most likely to meet these criteria. (For an overview of monitoring bodies under CRPD see ► **Chapter 5**, Section 5.2.4 in this Annual report).

²³ European Commission (2012), *2011 Report on the Application of the EU Charter of Fundamental Rights*, COM(2012) 169 final, 16 April 2012. European Parliament (2012), *Situation of fundamental rights in the European Union (2010–2011)*.

²⁴ See, for example, UN, Human Rights Committee (2012), *Paper on the relationship of the Human Rights Committee with national human rights institutions*, CCPR/C/106/3, 13 November 2012. See, in general, FRA (2012), *Handbook on the establishing and accrediting National Human Rights Institutions in the EU*, available at: <http://fra.europa.eu/en/publication/2012/handbook-establishment-and-accreditation-national-human-rights-institutions>.

²⁵ For more information, see: European Parliament (2012), *Situation of fundamental rights in the European Union (2010–2011)*.

²⁶ ICC, Sub-Committee on Accreditation (2012), *Report and Recommendations of the Sub-Committee on Accreditation*, Geneva, November 2012, available at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20Report%20November%202012%20%28English%29.pdf>.

²⁷ ICC, Sub-Committee on Accreditation (2012), *Report and Recommendations of the Sub-Committee on Accreditation*, Geneva, 26–30 March 2012, available at: <http://nhri.ohchr.org/EN/AboutUs/ICCAccreditation/Documents/SCA%20MARCH%202012%20FINAL%20REPORT%20ENG%20WITH%20ANNEXURES.pdf>.

An overview of accredited NHRIs in the EU serving as independent mechanisms for independent monitoring of the CRPD, as per Article 33 (2) is available in

- **Chapter 5.** During 2012, the B-status NHRI in **Austria** was entrusted with a mandate to act as a National Preventive Mechanisms (NPM) under the OP-CAT.²⁸ One of two B-status NHRIs in **Bulgaria** (the Ombudsman) was also given a mandate as NPM under the OP-CAT.²⁹

Outlook

The year 2012 saw an increase in formal commitments by EU Member States and Croatia to Council of Europe and UN standards and monitoring mechanisms. While the rate of signatures of the Optional Protocol to the CRC on an individual complaints procedure is relatively quick, this is not the case for the optional protocol under the International Covenant on Economic, Social and Cultural Rights. There is seemingly no action among EU Members States or Croatia to accept the rights of migrant workers through the ICRMW. Given the number of signatures to date, acceptance through ratification will likely continue to grow for the Istanbul Convention against violence against women, ECHR Protocol 12 on discrimination, ESC 1996 on social and economic rights as well as its collective complaints mechanism, to mention some.

For the coming period, it is expected that the negotiations on the EU's accession to the ECHR will be concluded. In addition the EU might in future accede to other human rights conventions – beyond the CRPD – and become subject to monitoring in other forums, such as a voluntary screening of the EU by the UPR-process in the Human Rights Council.

Table 10.12: NHRIs by accreditation status, by EU Member State and Croatia

	A-status	B-status	C-status	No accreditation/ institutions
AT		✓		
BE*		✓		
BG*		✓		
CY*				✓
CZ				✓
DE	✓			
DK*	✓			
EE				✓
EL	✓			
ES	✓			
FI				✓
FR	✓			
HU		✓		
IE	✓			
IT				✓
LT				✓
LU	✓			
LV				✓
MT				✓
NL*		✓		
PL	✓			
PT	✓			
RO			✓	
SK*				✓
SE*		✓		
SI		✓		
UK	GB*	✓		
	NI	✓		
	SC	✓		
HR	✓			

Notes: * Relevant NHRIs also serve as a National Equality Body under EU law.

Orange indicates that relevant NHRIs underwent re-accreditation in 2012 and maintained their previous accreditation status. Red indicates that NHRI accreditation status changed in 2012.

Bulgaria has two NHRIs, both with B-status: the Ombudsman of the Republic of Bulgaria and the Commission for protection against Discrimination of the Republic of Bulgaria.

The United Kingdom has three NHRIs, all with A-status: in Great Britain, the Equality and Human Rights Commission covering human rights issues in England and Wales, and certain human rights issues in Scotland (those not devolved to the Scottish Parliament); in Northern Ireland, the Northern Ireland Human Rights Commission; and in Scotland, the Scottish Human Rights Commission.

GB stands for Great Britain; NI for Northern Ireland; and SC for Scotland.

Source: ICC, see: <http://nhri.ohchr.org>

²⁸ Austria (2012), 1. Bundesgesetz, mit dem das Bundes-Verfassungsgesetz, das Volksanwaltschaftsgesetz 1982, das Sicherheitspolizeigesetz, das Strafvollzugsgesetz und das Bundesgesetzblattgesetz geändert werden (Bundesgesetz zur Durchführung des Fakultativprotokolls vom 18. Dezember 2002 zum Übereinkommen der Vereinten Nationen gegen Folter und andere grausame, unmenschliche oder erniedrigende Behandlung oder Strafe – OPCAT-Durchführungsgesetz), BGBl. I Nr. 1/2012, 10 January 2012, available at: <http://vlex.at/vid/volsanwaltschaftsgesetz-bundesgesetzblattgesetz-opcat-344167454>. See also: <http://volksanwaltschaft.gv.at/en/the-austrian-ombudsman-board/responsibilities>.

²⁹ Bulgaria, Ombudsman Act, new chapter 4a 'National Preventive Mechanism', entered into force on 11 May 2012.

The ECSR and the increased number of collective complaints related to social rights, a number which is likely to continue to grow, further underscores the impact of the financial crisis and the need for effective monitoring. Negotiations on EU's accession to the ECHR will continue in 2013. The number and the nature of cases before the ECtHR as well as recommendations from different UN human rights mechanisms clearly signal the need for effective implementation and monitoring of international obligations at national level. Paris Principles compliant NHRIs are well positioned, and indeed in part designed, to serve as links between the international and national levels – as evidenced by their increasing obligations under CRPD and OP-CAT.

International obligations are effectively monitored by different forms of scrutiny at various levels: reporting requirements, expert monitoring and clear follow-up on recommendations made at UN, Council of Europe, EU and Member State level. This web of fundamental rights institutions and mechanisms is growing increasingly intricate and interlinked – with EU accession to the ECHR, EU acceptance of the CRPD and ever stronger interactions between national monitoring bodies such as national equality bodies and NHRIs with structures at EU, Council of Europe and UN levels.

EU Member States and Croatia, as all states, could make better use of the various forms of expert and peer recommendations and decisions on the way fundamental rights are and ought to be safeguarded. The year ahead should see further related developments, with better use made of the vast pool of information on the fundamental rights situation in the EU (see the **Focus** section ► and **Chapter 8** of this Annual report, in relation to the proposed Justice Scoreboard).



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Country codes

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EL	Greece
ES	Spain
FI	Finland
FR	France
HU	Hungary
HR	Croatia
IE	Ireland
IT	Italy
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom



The full report and the annual report summary – Highlights 2012 – are available in English, French and German. These documents are available for download at: fra.europa.eu.



HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

For its role in advancing peace, reconciliation, democracy and human rights in Europe, the European Union (EU) was awarded the Nobel Peace Prize in 2012, a vote of confidence in the project of European integration and an eloquent acknowledgement of what a hard-won achievement it represents. It was awarded, fittingly, at a time of testing, when the values that knit the EU together felt the strain of socio-economic, political and constitutional crises.

Against a backdrop of rising unemployment and increased deprivation, this FRA Annual report closely examines the situation of those, such as children, who are vulnerable to budget cuts, impacting important fields such as education, healthcare and social services. It looks at the discrimination that Roma continue to face and the mainstreaming of elements of extremist ideology in political and public discourse. It considers the impact the crises have had on the basic principle of the rule of law, as well as stepped up EU Member State efforts to ensure trust in justice systems.

The annual report also covers key EU initiatives that affect fundamental rights. The European Commission launched a drive in 2012 to modernise the EU's data protection framework, the most far-reaching reform of EU data protection legislation in 20 years. The EU also pushed ahead with the increased use of databases and information technology tools for border management and visa processing. It took steps to enable non-national Union citizens to participate in European Parliament elections, enhanced victims' rights, successfully negotiated asylum instruments which were under review and focused on the challenges and obstacles facing older persons, including those with disabilities, in its 2012 Year of Active Ageing.

The annual report looks at fundamental rights-related developments in asylum, immigration and integration; border control and visa policy; information society and data protection; the rights of the child and protection of children; equality and non-discrimination; racism and ethnic discrimination; participation of EU citizens in the Union's democratic functioning; access to efficient and independent justice; and rights of crime victims.

FOCUS

This year's annual report Focus section examines times of crisis from the perspective of fundamental rights. It acknowledges that the crises have prompted discussions about the nature, scope and future of the EU, while reaffirming the principles at the EU's heart, including adherence to fundamental rights.



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