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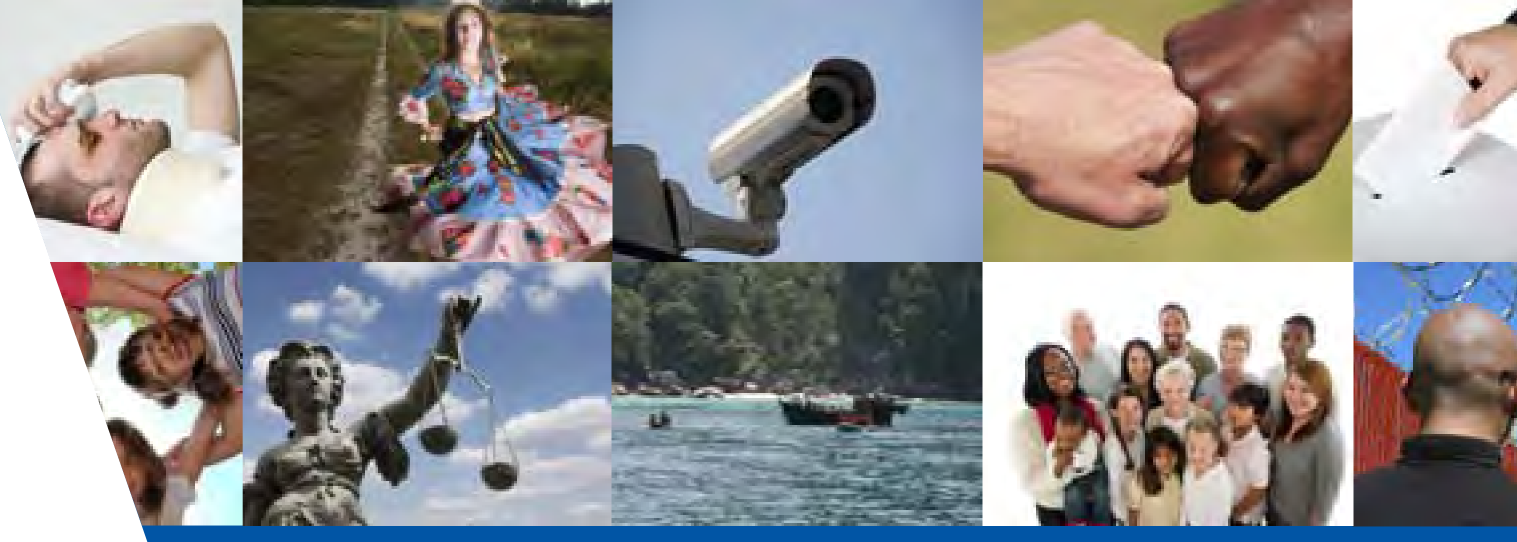

Fundamental rights: challenges and achievements in 2010

EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

Fundamental rights: challenges and achievements in 2010

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)
ECRI	European Commission against Racism and Intolerance (Council of Europe)
ECtHR	European Court of Human Rights
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
LIBE	Civil Liberties, Justice and Home Affairs Committee of the European Parliament
MAF	Multi-annual Framework (FRA)
NFP	National Focal Point (FRA)
NGO	Non-governmental organisation
RAXEN	Racism and Xenophobia Network (FRA)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU

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

The full report is available in English, French and German. The annual report's summary is available in English, French, German, Hungarian and Polish. These documents are available for download at: fra.europa.eu.

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Fundamental rights: challenges and achievements in 2010

Foreword

2010 was in various ways a watershed year in fundamental rights in the European Union (EU). For instance, the commonly agreed EU rules on free movement and non-discrimination were intensively discussed, notably in the context of the rights of persons belonging to minorities such as the Roma. This set a clear political signal as regards the legally binding character of the Charter of Fundamental Rights of the European Union when implementing EU law.

This annual report of the European Union Agency for Fundamental Rights (FRA) covers the main events and developments in the area of fundamental rights in the EU during 2010. It is different from previous annual reports both in content and form. As its new title *Fundamental rights: challenges and achievements* signals, this annual report provides a review of the main fundamental rights developments and events in the EU in 2010. Each successive annual report will increasingly allow for the identification of trends in an area built on the common values that form the basis of the process of European integration and the Member States' constitutional traditions.

The annual report encompasses the full range of fundamental rights issues covered by the scope of the FRA mandate. It looks at developments at both European as well as national level, also taking into account international standards. Various institutions and mechanisms, such as those established by the Council of Europe, continue to provide valuable information for this report.

We would like to thank the members of the FRA Management Board for diligently overseeing the process of completing the Annual Report and the FRA Scientific Committee for the valuable advice they provide to guarantee the soundness of this important FRA report. Special thanks go to the National Liaison Officers who commented on a draft of this report, thereby improving its quality and ensuring correct factual information at EU Member State level.

We also take this opportunity to thank the staff of the FRA for their commitment and hard work on this and all the other FRA reports during the year.

Ilze Brands Kehris
Chairperson of the FRA

Morten Kjaerum
Director of the FRA

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
- Protection of victims

Contents

FOREWORD ... 3

INTRODUCTION ... 7

FOCUS: ROMA IN THE EU – A QUESTION OF FUNDAMENTAL RIGHTS IMPLEMENTATION ... 11

1. ASYLUM, IMMIGRATION AND INTEGRATION ... 29

1.1. Asylum ... 29
1.2. Rights of irregular migrants ... 34
1.3. Immigration and integration ... 38
Outlook ... 40
References ... 41

2. BORDER CONTROL AND VISA POLICY ... 47

2.1. Border control ... 47
2.2. Visa policy ... 51
Outlook ... 52
References ... 53

3. INFORMATION SOCIETY AND DATA PROTECTION ... 57

3.1. Review of the current EU data protection framework ... 57
3.2. Compliance of the Data Retention Directive with fundamental rights principles ... 58
3.3. Data protection authorities: independence, powers and resources ... 59
3.4. Data protection and transparency in the information society ... 60
3.5. New challenges ... 61
Outlook ... 63
References ... 64

4. THE RIGHTS OF THE CHILD AND PROTECTION OF CHILDREN ... 69

4.1. Violence against children ... 70
4.2. Child-friendly justice ... 73
4.3. Child trafficking ... 74
4.4. Separated children in a migration or asylum context ... 75
4.5. Data collection ... 76
Outlook ... 77
References ... 78

5. EQUALITY AND NON-DISCRIMINATION ... 81

5.1. Horizontal issues ... 81
5.2. Sex discrimination ... 89
5.3. Religion or belief ... 91
5.4. Disability ... 92
5.5. Sexual orientation and gender identity ... 95
5.6. Age ... 98
5.7. Multiple discrimination ... 99
Outlook ... 101
References ... 102

6. RACISM AND ETHNIC DISCRIMINATION 109
6.1. Data collection 109
6.2. Employment 110
6.3. Healthcare 113
6.4. Housing 116
6.5. Education sector 118
6.6. Racist crime 120
Outlook 125
References 126

7. PARTICIPATION OF EU CITIZENS IN THE UNION'S DEMOCRATIC FUNCTIONING 133
7.1. Participation in elections by non-national EU citizens 133
7.2. The limitation of voting rights in the case of disability 135
7.3. The European Citizens' Initiative 136
Outlook 137
References 138

8. ACCESS TO EFFICIENT AND INDEPENDENT JUSTICE 141
8.1. The concept of access to justice 141
8.2. Developments at EU level 142
8.3. Access to justice at Member State level 145
Outlook 149
References 150

9. PROTECTION OF VICTIMS 155
9.1. Developments at EU and international levels 155
9.2. Issues in focus 156
9.3. Data collection and evidence-based policymaking 159
Outlook 161
References 162

10. INTERNATIONAL OBLIGATIONS 165

Introduction

The Treaty of Lisbon's 'first year' shapes the political landscape

The new treaty base provided by the Treaty of Lisbon set the scene for the work of the European Union (EU) in 2010. Various components of this treaty promise a more fundamental rights-orientated and more accessible EU. Indeed, during 2010 the major EU institutions highlighted the importance of fundamental rights in the context of legislation undertaken at EU level. The FRA Annual Report identifies challenges and achievements as they emerged in 2010. Its chapters cover the nine areas identified by the Agency's Multi-annual Framework 2007-2012. Chapter 10 is new and provides an overview of international obligations relevant to the areas of EU law covered in this report. The report's appearance – including 'Promising practices' and 'FRA Activity' boxes – also reflects a new development, following a multi-modular approach where single chapters can stand alone.

Last year's annual report analysed in its introduction the positive potential the Treaty of Lisbon has for the protection of fundamental rights at the European level. Now, we can look back at the first year the EU was operating on the basis of a legally binding bill of rights of its own – the Charter of Fundamental Rights of the European Union. 2010 also saw – after many years of discussion in this context – concrete negotiations on the upcoming formal accession of the EU to the European Convention on Human Rights (ECHR). In addition to providing this new double-entrenchment in fundamental rights standards, the Lisbon Treaty moves the EU closer to citizens. For instance, it offers increased access to justice. Measures adopted in areas formerly covered by the third pillar, including criminal law, are now included in the jurisdiction of the Court of Justice of the European Union (CJEU). Moreover, the treaty establishes a new instrument of direct democracy – the European Citizens' Initiative. The latter innovation will allow EU citizens to articulate their ideas and wishes for EU engagement in a specific policy field. Another innovation of the new treaty is a renewed commitment to diversity and against discrimination. On the basis of this new legal environment, the European Commission concluded in its Communication on a *Strategy for the effective implementation of the Charter of Fundamental Rights of the European Union* in the autumn of 2010 that "[a]ll the components of an ambitious fundamental rights policy are therefore present". This also holds true from an institutional perspective. Increasingly, the EU is equipped with a 'fundamental rights architecture' that goes beyond the establishment of a Fundamental Rights Agency at EU level.

For the first time, with European Commission Vice-President Viviane Reding, a member of the Commission is specifically responsible for the protection of fundamental rights. As EU Commissioner for Justice, Fundamental Rights and Citizenship, she announced a "zero-tolerance policy" vis-à-vis violations of the Charter in a Commission Communication on EU policy in the area of fundamental rights, as well as a regular annual report on the implementation of the Charter of Fundamental Rights. In its Communication on a strategy for the effective implementation of the Charter of Fundamental Rights, the European Commission stated that it will "make the fundamental rights provided for in the Charter as effective as possible". Part of this strategy is a detailed assessment of the impact of proposed legislation on fundamental rights. In this context, the European Commission also declared that it would "strongly defend" its position when it comes to the standards of fundamental rights protection contained in its legislative proposals, and it would notify the Council and the Parliament of its opposition if they seek to lower those standards. In its first *Report on the application of the EU Charter of Fundamental Rights*, which was published at the end of March 2011, the

European Commission highlights various fundamental rights challenges, including the need to address the correct bodies when lodging complaints in relation to rights enshrined in the EU Charter of Fundamental Rights. In those areas where the EU Charter does not apply, citizens' fundamental rights are guaranteed by national authorities according to their constitutional systems.[1] The European Commission report is accompanied by a Staff working paper providing clear examples when the Charter applies and when it does not. These examples are all taken from letters from the general public as well as from questions and petitions sent to the European Commission in the course of 2010.[2]

"People's interest in and expectations about the enforcement of the Charter are high. However, the Charter does not apply to all situations in which fundamental rights are at issue in the European Union. In 2010, the Commission received more than 4,000 letters from the general public regarding fundamental rights. Approximately three quarters of these concerned cases outside the remit of EU law. This reflects a frequent misunderstanding about the purpose of the Charter and the situations where the Charter applies or does not apply. … The Charter applies to actions by all EU institutions and bodies. It concerns in particular the legislative work of the European Parliament, the Council and the Commission. … The Charter applies to Member States only when they are implementing EU law."

European Commission, 2010 Report on the application of the EU Charter of Fundamental Rights*, p. 3*

The other major institutional players, the European Parliament and the Council of the European Union, have equally underlined their commitment to fundamental rights. At the end of 2009, when the Treaty of Lisbon entered into force, the European Parliament amended its rules of procedure. The new rules provide for a mechanism that a Committee, a political group or at least 40 Members of Parliament can refer a proposal for a legislative act to the Civil Liberties, Justice and Home Affairs (LIBE) Committee if they consider that the proposal or parts of it "do not comply with rights enshrined in the Charter". The opinion of the LIBE Committee shall be included in an annex to the report of the committee responsible for the subject matter, according to rule No. 36 of the rules of procedure. One year later, the European Parliament again underlined its commitment to an efficient fundamental rights protection system at EU level. In its 2010 resolution on fundamental rights and the Treaty of Lisbon, the Parliament calls "on the EU decision-making institutions to use the data and facts provided by the FRA during the preparatory stage of legislative activity, in decision-making and/or monitoring processes and to be in constant and close cooperation with the FRA".[3]

Similarly, the Council of the European Union set up a new permanent Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) in December 2009, replacing a working party that had dealt with human rights but whose focus had been on external relations. The working group is "tasked with all matters relating to fundamental rights and citizens' rights including free movement of persons, negotiations on accession of the Union to the ECHR [and] the follow-up of reports from the EU Agency for Fundamental Rights".[4] This change is symptomatic of the increasing emphasis on the situation of fundamental rights *within* the EU. The establishment of the fundamental rights and citizens' rights working group signals an increasing awareness of the fact that the EU has to confront new responsibilities in the area of fundamental rights. More recently, in February 2011, the Council adopted conclusions "on the role of the Council of the European Union in ensuring the effective implementation of the Charter".[5] The conclusions state that the Council disposes of a number of tools to assess and ensure the compatibility with fundamental rights "of any amendment it proposes as well as of the Member States' initiatives" in the context of EU legislation. According to the Council, these compatibility checks will ensure that the Council only delivers acts with a 'fundamental rights label'. The Council also invited the FREMP Working Party to elaborate methodological guidelines dealing with the main aspects of fundamental rights scrutiny by 30 June 2011. These guidelines should serve as guidance for the work of the preparatory instances of the Council where relevant. Furthermore, the Council reaffirmed its commitment to take into account the reports and opinions of the FRA on specific thematic topics, while encouraging FREMP to maintain and reinforce the cooperation with the Agency, including the follow-up of FRA reports relevant to its work.

The EU Charter of Fundamental Rights "is addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law", according to its Article 51, paragraph 1. Moreover, the Charter emphasises that it "does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties" (Article 51, paragraph 2).[6] Nonetheless, as the European Commission's first annual report on the Charter's application shows, it is frequently misunderstood. The general public is often unclear about the scope of application of the EU Fundamental Rights Charter, judging from the letters sent to the Commission. This has been underlined by survey findings of the European Ombudsman in March 2011, according to which 72% of European citizens do not feel well informed about the EU Charter of Fundamental Rights.[7]

1 European Commission, COM(2011) 160 final, 30 March 2011.
2 European Commission, SEC(2011) 396 final, 30 March, 2011.
3 European Parliament Resolution of 15 December 2010 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), point 33.
4 Council of the European Union, Document 17653/09 as of 16 December 2009, p. 5.
5 Council of the European Union, 3071st Justice and Home Affairs Council meeting, 24-25 February 2011.
6 Charter of Fundamental Rights of the European Union, OJ 2010 C 83/389, Article 51, paragraphs 1 and 2.
7 European Ombudsman, press release No. 6/2011, 18 March 2011.

While the European Commission Annual Report focuses on the implementation and application of the EU Charter of Fundamental Rights, the FRA Annual Report covers more general fundamental rights issues within the competencies of the European Union. On the other hand, the FRA Annual Report is also more limited in scope than the European Commission report as it only covers the areas of the Agency's current Multi-annual Framework (MAF) 2007-2012, which defines the thematic areas the Agency has to focus its work on. The Council of the European Union decides on the MAF, which runs for five years. The current one covers nine thematic areas: 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 protection of victims.[8]

An issue falls within the EU competencies, if the EU has, for instance, a shared or supportive competence to deal with a matter, regardless of whether it has made use of the respective competence. This report is therefore not necessarily limited to existing secondary EU law. It deals with fundamental rights in the sense of Article 6 of the Treaty on the European Union (TEU), following thereby three different normative sources: the EU Charter of Fundamental Rights, fundamental rights as guaranteed by the ECHR, as well as rights as they result from the constitutional traditions common to the EU Member States. The latter two sources constitute general principles of the Union's law. Since the Court of Justice of the European Union (CJEU), when identifying general principles of law, occasionally "draws inspiration from [...] the guidelines supplied by international treaties for protection of human rights on which the Member States have collaborated or to which they are signatories",[9] the FRA Annual Report also looks in Chapter 10 at selected international obligations of the EU Member States.

A new face for FRA's Annual Report

According to the FRA Founding Regulation,[10] the Agency 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".[11] This is FRA's third Annual Report, the concept of which was developed in line with feedback from various Agency stakeholders. The feedback also includes that of participants in the Fundamental Rights Platform (FRP) who gave their views on the previous year's annual report.[12] This reform, which is an ongoing rather than a one-off exercise, aims to increase the report's accessibility and its relevance.

The report also has a new layout, including 'quotes' and boxes highlighting 'FRA Activities' and 'Promising practices' in the field of fundamental rights – these elements are designed to facilitate its use. The promising practice boxes are intended to encourage stakeholders to consider and emulate initiatives, where appropriate, and to allow for an exchange of experiences. Please note that they are deliberately called "promising" instead of "good" practice, since these practices have not been directly scrutinised or evaluated by the FRA. To avoid any confusion between the FRA Annual Report and its annual Activity Report, which provides detailed information on what the Agency has done over the respective year, the title of the Annual Report was changed to *Fundamental rights: challenges and achievements in 2010*. The FRA activity boxes, nonetheless, allow the reader to gain an overview of the type of work that the Agency carries out, by providing short examples of FRA activities over the year.

With the new modular approach, single chapters of the Annual Report can stand alone. This approach allows readers and FRA stakeholders to quickly access the thematic area in which they are interested. Each chapter begins with a brief summary of the main developments in the respective fundamental rights area over the past year, thereby identifying major developments in the fields at stake. Each chapter also has its own outlook which outlines the major fundamental rights challenges to be expected in the coming year 2011. This introduces a forward-looking element which contains information about prospective developments. Each chapter also includes a bibliography, which does away with the need for an overall bibliography. This FRA Annual Report is organised using a colour code based on the different titles of the Charter of Fundamental Rights of the European Union – Freedoms (Title II), Equality (Title III), Citizens' Rights (Title V) and Justice (Title VI). A 16-page stand-alone summary highlights selected legal and policy developments to provide readers with an overview of key findings in 2010.

Furthermore, the multi-modular approach allows a more in-depth treatment of the various policy fields where fundamental rights apply. The structure of the report continues to be based on the Agency's MAF. In contrast to earlier reports, the 2011 Annual Report dedicates a chapter to each MAF area. It also substantially expands the chapters that are not related to equality and racism to provide information about mainstream areas such as citizens' rights, data protection and access to justice. This more balanced coverage of thematic areas helps to underline that the Agency does not only address issues in the fundamental rights field that are of special relevance to specific population groups, such as

8 Council Decision (2008/203/EC) implementing Regulation (EC) No. 168/2007 as regards the adoption of a Multi-annual Framework (MAF) for the FRA for 2007-2012.
9 Opinion of the Court of Justice of the European Union (1996).
10 Council Regulation (EC) No. 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ 2008 L 53.
11 *Ibid.*, Article 4, paragraph 1 (e).

12 The contributions delivered in the framework of the FRP consultations are available at: fra.europa.eu/fraWebsite/networks/frp/frp-contributions/frp-contributions_en.htm.

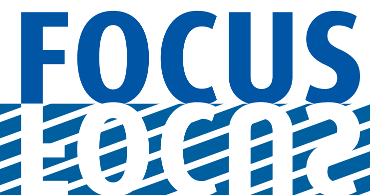
immigrants, ethnic minorities or Lesbian Gay Bisexual and Transgender (LGBT) people.

The section on international human rights instruments and obligations, which was introduced for the first time in an annex to the previous year's Annual Report, has been expanded into a full chapter, following positive feedback from the European Parliament.[13] The chapter is part of an effort to underline the multilevel-relevance of fundamental rights: an efficient protection of fundamental rights is only possible if local, national, European and international norms and administrations interact. To raise awareness of the international dimension of fundamental rights, this chapter will be updated in each subsequent report. This year's chapter already includes Croatia, the fundamental rights situation of which will also be covered in other chapters of future FRA annual reports. This results from the EU-Croatia Stabilisation and Association Council decision of 25 May 2010 on the participation of Croatia in the FRA's work.[14]

The FRA Annual Report covers developments and events in the area of fundamental rights that took place between 1 January 2010 and 31 December 2010. However, where relevant, events that took place between October and December 2009 or in early 2011 have also been taken into consideration. Similar to last year, the report draws on data and information collected by the Agency's RAXEN National Focal Points (NFPs) and its FRALEX group of senior legal experts in each of the 27 EU Member States, as well as on the findings of primary research projects carried out by the Agency itself. The Agency's various research projects are referred to throughout the report at points where the findings are directly relevant to the thematic areas being discussed. These findings, rooted in research and expert analysis, enable comparisons to be made between the 27 EU Member States and also provide evidence upon which future policies can be based. The data and information provided is checked for accuracy by 27 liaison officers from the governments of each Member State, and the report has undergone internal quality review processes. Feedback on this report is always welcome and can be sent to: annualreport@fra.europa.eu.

13 European Parliament Resolution of 15 December 2010, paragraph 32.
14 Decision No. 1/2010 of the EU-Croatia Stabilisation and Association Council of 25 May 2010 on the participation of Croatia as an observer in the European Union Agency for Fundamental Rights' work and the respective modalities thereof, OJ 2010 L 279.

Roma in the EU – a question of fundamental rights implementation



Roma in the EU – a question of fundamental rights implementation

France's controversial 'repatriation' of Bulgarian and Romanian Roma during the summer of 2010 put the situation of Roma communities in Europe high on the political agenda. The fact that the right to free movement and residence of European Union (EU) citizens of Roma origin was called into question generated widespread public and political debate over the situation of one of Europe's largest ethnic minorities, the Roma minority, and the fulfilment of their fundamental rights. In its determination to weave fundamental rights into the fabric of EU law, the European Commission sent strong political signs in 2010 in relation to Roma, not least in setting up a Roma Task Force in September 2010.

The issue of Roma inclusion is a question of fundamental rights implementation, as Roma are disproportionally affected by social exclusion, discrimination, unemployment, poverty, bad housing, low levels of education and poor health standards. Although the Lisbon Treaty stipulates that the EU should aim to combat social exclusion and discrimination based on ethnic origin when defining and implementing its policies, and despite the application of legal instruments such as the Racial Equality Directive, the Roma continue to live in a vulnerable situation within the EU and to be discriminated against due to their ethnic origin.

The discrimination of Roma in Europe entered the collective conscience in the context of free movement of Roma people and their 'repatriation'. In France, where large numbers of Roma were sent back to their EU countries of origin over the summer of 2010, the respective policies at national level raised concerns of compatability with EU law and have sparked a wide and heated debate. At the end of July, the French government ordered a clampdown against Roma immigrants from Romania and Bulgaria, expelling a large number of Roma and demolishing their camps. The argument for targeted discrimination rested on a French interior ministry paper ordering priority action specifically against the Roma. The paper was in circulation for five weeks before it was leaked to the French media and subsequently withdrawn.

The development and the analysis of the situation of Roma in **France** resulted in the establishment of the European Commission's Roma Task Force, based on a joint effort by European Commission Vice-President Viviane Reding, the European

Roma and key developments:

Between 10 and 12 million Roma live in the EU, candidate countries and potential candidate countries in the western Balkans. This encompasses a broad variety of population groups such as Sinti, Gypsies, Jenisch, Kalé, Camminanti, Ashkali and Travellers, and their subgroups. Using 'Roma' as an umbrella term rules out any prejudice regarding the manner in which any of these groups present themselves.

Key developments, mainly in those EU Member States where Roma account for a significant part of the population, included the following:

- Roma increasingly faced difficulties in freely moving and residing within the EU. Certain Member States reinforced policies of 'repatriations';
- the housing conditions of Roma populations remained a particularly problematic area. The EU might provide further stimuli to improve the situation through a revision of the European Regional Development Fund (ERDF) with regards to the eligibility of housing interventions in favour of marginalised communities;
- the employment rate among Roma continued to be lower than that in the majority population;
- the level of education among the Roma population remained very low. Despite the reform of national educational systems, segregating tendencies have been reported in a number of Member States;
- Roma continued to suffer from poor health conditions, including lower life expectancy, and tended to have limited access to healthcare services.

Commissioner for Employment, Social Affairs and Inclusion László Andor, and the Commissioner for Home Affairs Cecilia Malmström. Its mandate was to assess Member States' use of EU funds for Roma integration, and their effectiveness. The scope of the topic of Roma and their living situation goes far beyond the issue of cross-border movement or the use of EU funds. This section of the FRA Annual Report, focusing on the Roma and their fundamental rights situation in the EU, will first sketch out the initiatives and measures taken at EU level in 2010, before looking in greater detail at the issue of freedom of movement and 'repatriations' of the Roma in the EU. It will then examine the social and economic situation of the Roma, notably their access to housing, employment, education and healthcare. Here, the focus will rest on those EU Member States where the Roma account for a significant proportion of the population.

European initiatives paving the way for Roma inclusion

2010 witnessed the continuation of a process that has put the social and economic situation of the Roma high on the EU policy agenda, culminating in the establishment of the Roma Task Force in September 2010.

On the occasion of International Roma Day on 8 April 2010, the Second European Summit on Roma inclusion[1] took place in Córdoba in Spain. These summits bring together high level representatives from EU institutions, national governments and civil society organisations from all over Europe. The Córdoba summit focused on the 10 Common Basic Principles for Roma Inclusion, which were annexed to the June 2009 conclusions of the Employment, Social Policy, Health and Consumer Affairs Council (EPSCO) meeting.[2] These principles aim to guide the EU institutions and Member States when they design and implement new policies or projects for Roma inclusion. In order to underline the political will at EU level to advance the social and economic integration of the Roma in Europe, the then Council Trio Presidency – **Spain**, **Belgium** and **Hungary** – issued a joint statement at the Córdoba summit. The declaration was based on the commitment to mainstream Roma issues into all relevant policies, a roadmap for the actions of the European Platform for Roma Inclusion[3] – an annual platform for the exchange of good practices and experiences – and the effective use of EU Structural Funds.[4]

The European Council's commitment to improve the situation of the Roma was translated into more operational terms by the European Commission. In its Communication on *The social and economic integration of Roma in Europe* of 7 April 2010, the European Commission identified some core challenges that the EU and its Member States need to address, including: the promotion of the integrated use of EU funds to tackle the multidimensional challenges of Roma exclusion, a focus on the most disadvantaged micro-regions, and the mainstreaming of Roma inclusion into other policies, such as education, employment, public health, infrastructure, urban planning, economic and territorial development.[5]

On 7 June 2010, in its *Conclusions on advancing Roma inclusion* the Council invited the European Commission and the EU Member States, in close cooperation and in accordance with their respective responsibilities, to mainstream Roma issues "in the fields of fundamental rights, gender equality, personal security and protection against discrimination, poverty and social exclusion, regional cohesion and economic development, as well as in other fields that are key to the active inclusion of Roma, such as ensuring access to education, housing, health, employment, social services, justice, sports and culture, and also in the EU's relations with third countries".[6]

> *"The issue of Roma inclusion is a question of human rights implementation. We have the political commitment at EU level [...]. We are all committed to the common basic principles of inclusion and equality. But improving the situation of the Roma population is about more than just principles of social inclusion. It is about **all** actors contributing to turning these principles of inclusion and equality into **real** rights."*
> *Morten Kjaerum, FRA Director, Second European Roma Summit, 8 April 2010*

In reaction to the concerns about Roma rights and their socio-economic situation in Europe that emerged in summer 2010, the European Commission established a Roma Task Force on 7 September 2010. The task force included senior officials from all relevant Commission departments and representatives of the European Union Agency for Fundamental Rights (FRA). It aimed to streamline, assess and benchmark the effectiveness of EU and national funding by all Member States in favour of the integration of Roma for the period 2008-2013.[7] Although the responsibility for the integration of Roma rests primarily with the EU Member States, the EU has made substantial funding available to support Member State actions in this area. In other words, the European Commission's Roma Task Force has been seeking to analyse how EU Member States were following up on the Commission's Communication of 7 April 2010.

To further strengthen a pan-European response to the integration and well-being of Roma, the Parliamentary Assembly of the Council of Europe adopted in the course of 2010 two reports on the situation of Roma in Europe and on the case of Roma within the recent rise in national security discourse in Europe,[8] in which it stressed that many initiatives remained isolated and limited – therefore offering only partial responses. The

1 For more information, see http://ec.europa.eu/social/main.jsp?catId=518&langId=en&eventsId=234&furtherEvents=yes.
2 Council of the European Union, EPSCO (2009).
3 For more information, see: http://ec.europa.eu/social/main.jsp?catId=761&langId=en.
4 Council of the European Union (2010).
5 European Commission (2010b); for more information, see also: European Commission (2010c).
6 Council of the European Union, EPSCO, *Council conclusions on advancing Roma inclusion*, Luxembourg, 7 June 2010.
7 European Commission (2010).
8 Council of Europe, Parliamentary Assembly (PACE), (2010a) and (2010b).

reports also highlighted that concrete results of a wide range of measures could not be properly evaluated because many governments refused to collect statistics based on ethnicity. On 20 October, the Council of Europe held a High Level Meeting on Roma and Travellers in Strasbourg, gathering representatives of the 47 Council of Europe countries, the EU and the Roma community. In issuing the 'The Strasbourg Declaration on Roma',[9] the Council of Europe Member States agreed to work together to combat discrimination against the Roma, thereby ensuring their social inclusion, empowerment and better access to justice. At this meeting, Commission Vice-President Viviane Reding announced that, based on the findings of the Roma Task Force, the European Commission would present an EU framework for national Roma integration strategies in April 2011.[10]

Promising practice

Council of Europe to train Roma mediators

As a follow-up to the High Level Meeting on Roma and the adoption of the Strasbourg Declaration in Strasbourg in October 2010, the Council of Europe launched a European training programme for Roma mediators, who will give legal and administrative advice to communities. The programme envisages the training of school, health and employment mediators working with Roma people who face difficulties in exercising their social rights, namely accessing housing, education, employment and healthcare services. Roma mediators will also work to improve the link between the Roma communities and civil society.

For more information, see: www.coe.int/t/dg3/romatravellers/source/documents/Call_trainers_final_EN.pdf

Freedom of movement within the EU

In the summer of 2010, the issue of free movement and 'repatriations' of Roma became prominent, notably in relation to **France**,[11] where the respective policies at national level raised concerns of compatibility with EU law, as well as with international human rights law. In light of these 'repatriations' or so-called 'voluntary returns', EU institutions as well as the Council of Europe's European Commission against Racism and Intolerance (ECRI) voiced their concerns.

On 24 August 2010, ECRI noted that "while France may impose immigration controls in accordance with its international obligations, ECRI wishes to recall that EU citizens have the right to be on French territory for certain periods of time and to return there. In these circumstances, France should look for sustainable solutions in cooperation with partner States and institutions".[12] The United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD) also noted in its concluding observations for **France** in September 2010 that "there have been reports that groups of Roma have been returned to their country of origin without the free, full and informed consent of all the individuals concerned".[13]

> *"No one should be expelled on the basis of their ethnic origins. It is not acceptable to stigmatise people because of their ethnicity. Roma people are Europeans and therefore their rights have to be respected like those of any other EU citizen."*
> *Jerzy Buzek, European Parliament President, 17 September 2010*

The European Parliament in its Resolution of 9 September 2010 on the situation of Roma and on freedom of movement in the EU emphasised the right of all EU citizens and their families to free movement and residence throughout the EU. The Parliament expressed "deep concern at the measures taken by the French authorities and by other Member States' authorities targeting Roma and Travellers and providing for their expulsion". It emphasised that mass expulsions are prohibited by the EU Charter of Fundamental Rights and the European Convention on Human Rights (ECHR). In accordance with the Free Movement Directive, the Parliament also recalled that people's lack of economic means cannot justify the automatic expulsion of EU citizens under any circumstances. Moreover, it stressed that restrictions on freedom of movement and residence on grounds of public policy, public security and public health can be imposed solely on the basis of personal conduct, and are not justified by general considerations of crime prevention or on the basis of ethnic or national origin.[14]

In order to quickly establish the facts and to assess whether the measures taken by the French authorities were in compliance with the Free Movement Directive and the EU Charter of Fundamental Rights, the European Commission and French authorities had a detailed exchange on the transposition of EU law. The European Commission took note of the assurances given by France on 22 September 2010. Nonetheless, a French government administrative instruction[15] from 5 August 2010 was not in conformity with this orientation: it was thus repealed and replaced by a different instruction on 13 September 2010.[16]

In order to verify the application of the political assurances given by the French authorities on 22 September 2010 and of the Free Movement Directive in practice, the European Commission asked the French authorities to provide detailed documentation to this end. Since France had not transposed the Free Movement Directive on the right of free movement into national law in a manner that rendered those rights completely effective, the Commission

9 Council of Europe (2010).
10 Reding, V. (2010).
11 Carrera, A. and Faure Atger, A., CEPS (2010).
12 Council of Europe, ECRI (2010a).
13 UN, CERD (2010a).
14 European Parliament (2010c).
15 France, Ministry of Interior, Overseas and Territorial Communities (2010a).
16 France, Ministry of Interior, Overseas and Territorial Communities (2010b).

further asked the French government to include those safeguards in French legislation and to adopt legislation swiftly. On this basis, the European Commission decided on 29 September 2010 to issue a letter of formal notice to France[17] unless France replied to its requests by 15 October 2010. On that day, France provided detailed documentation including draft legislative measures and a precise calendar for putting the safeguards required under the Free Movement Directive into French legislation. France also provided samples of decisions taken by the national authorities in the relevant period of time, such as the annulment of the administrative instruction of 5 August 2010, as well as clarifying material related to their proceedings over the summer.

On 19 October 2010, the European Commission therefore announced that infringement proceedings were suspended.[18] On 26 November 2010, the Commission informed France that until the legislation was adopted, it would be desirable to take appropriate administrative measures to ensure that the provisions of the Free Movement Directive are followed systematically in practice by the relevant authorities. In their reply of 7 December 2010, the French authorities reaffirmed their commitment to transpose the Free Movement Directive. They took note of other points raised by the European Commission and confirmed their intention to ensure compliance with the principles laid down in the directive.

Expulsions and repatriations of Roma EU citizens are not a new issue, and were reported in 2009 by civil society sources. For instance, according to the *Roma Rights Record* of the European Roma Rights Centre (ERRC), about 10,000 Roma were expelled from **France** in 2009, while **Germany** paid an 'aid to return' to more than 100 Roma to voluntarily return to Romania in June 2009.[19] In the same year, removals and expulsions of Roma EU citizens were also reported in **Italy**.[20]

of whom 828 were said to be 'voluntary' returns in nature and 151 forced returns.[21] In **Italy** voluntary repatriations and evictions were reported, with the local government in Pisa issuing contracts for the "repatriation of Romanian Roma" and providing funds for approximately 100 Roma to return to Romania.[22] The European Roma Rights Centre (ERRC) reported that in 2010 **Denmark**[23] and **Sweden**[24] expelled 23 and 50 Romanian nationals, respectively, back to **Romania** in 2010. It is worthwhile noting that the Danish government did not confirm that the expelled persons were of Roma ethnic origin since neither the Danish Immigration Service nor the Ministry of Refugee, Immigration and Integration Affairs register persons according to their ethnic origin. In France, the ERRC said that French authorities had expelled approximately 8,000 Roma by September 2010.[25]

Promising practice

Establishing a contact office for European migrant workers and Roma

The Berlin Senate set up a contact office for European migrant workers and Roma. Six social workers offer support to newly arrived Roma in Berlin regarding access to regular work, healthcare and decent housing. The contact office is also engaged in raising public awareness of the situation of Roma and in mediating when anti-Roma incidents occur. In August 2010, the Berlin Senate updated its information leaflet for public administration employees on the legal rights and duties of Roma and European migrant workers to cover the areas of employment, schooling and social benefits.

For more information, see: www.berlin.de/imperia/md/content/lb-integration-migration/publikationen/recht/handreichung_roma_u_europ_wanderarbeitnehmer_innen_bf.pdf?start&ts=1281002053&file=handreichung_roma_u_europ_wanderarbeitnehmer_innen_bf.pdf

FRA ACTIVITY

Promising Roma integration initiatives, few concrete steps

In its report on *Selective Positive Initiatives – The Situation of Roma EU citizens moving to and settling in other EU Member States*, the FRA identified promising initiatives of Roma integration at regional as well as local level in **France**, **Italy** and **Spain**.

However, the research found little evidence that public authorities in receiving countries had developed any concrete strategies or measures at grass roots level to integrate Roma EU citizens from other Member States. This reflects a general lack of policies and measures to raise awareness and promote free movement and residence.

In 2010, some EU Member States continued to remove and repatriate Roma EU citizens to their country of origin paying an 'aid to return'. According to French authorities, a total of 979 Romanian and Bulgarian nationals in an irregular situation were returned to their countries of origin between 28 July and 27 August 2010,

17 European Commission (2010d).
18 European Commission (2010e).
19 ERRC (2010b) and ERRC (2010a).
20 ERRC (2009).

21 Eric Besson (2010).
22 Open Society Foundations, Open Society Justice Initiative (2010).
23 ERRC has filed appeals against deportation orders issued to 10 Romanian Roma by the Danish Immigration Service with the Danish Ministry of Refugees, Immigration and Integration Affairs. The appeals, filed on 3 September 2010, follow the arrest of the Roma concerned during police actions targeting 23 EU Roma in Copenhagen on 6 July 2010 and their collective deportation from Denmark to Romania the very next day. More information available at: http://www.errc.org/cikk.php?cikk=3675.
24 ERRC (2010b).
25 ERRC (2010b) and (2010a).

Assessing the social and economic situation of Roma

As highlighted in the FRA's last two Annual Reports, the various problems Roma face in the areas of housing, employment, education and access to healthcare have raised considerable concerns in recent years, including at European Union level. Yet, despite increasing awareness, and new policies and measures by EU Member States, the situation of the Roma population living within the EU has not substantially improved, according to data and information collected by the Agency's Racism and Xenophobia Information Network (RAXEN) in 2010.[26]

As EU Member States continue to lack regular and effective mechanisms to collect usable and meaningful data on the socio-economic situation of the Roma population, broken down by ethnicity, age, sex and disability, the assessment of their situation has shortcomings and is incomplete.

FRA ACTIVITY

Filling the data gap – the FRA Roma survey in 11 EU Member States

To fill the gap in the availability of reliable and comparable data on the situation of Roma in the EU, at the end of 2010 the FRA decided to carry out a survey in 11 EU Member States on Roma's experiences in relation to discrimination and their situation with respect to employment, housing, education and health, among other areas. The survey will also interview members of the majority population living in neighbourhoods alongside Roma in order to create benchmarks for comparison between these two population groups. The survey's findings will support the European Commission's Roma Task Force in assessing Member States' use of EU funds for Roma integration, thereby providing information for those developing policies and other initiatives directed at Roma in key substantive areas related to fundamental rights.

More specifically, the survey will provide new information on the experiences and opinions of the Roma with respect to the seven EU Member States surveyed in the FRA European Union Minorities and Discrimination Survey (EU-MIDIS) – Bulgaria, the Czech Republic, Greece, Hungary, Poland, Romania and Slovakia – and in relation to four additional EU Member States that were not covered in EU-MIDIS (France, Spain, Italy and Portugal).

Employment

Despite the fact that several Member States have undertaken vocational training measures and programmes to maximise the employability of the Roma, these measures typically have only limited impact on employment rates among Roma.[27] In order to assess the employment status of Roma populations, the results of the FRA European Union Minorities and Discrimination Survey (EU-MIDIS)[28] were compared with those of the European Social Survey (ESS)[29] for the first time in response to a request from the European Commission Roma Task Force. This allows for a comparison of the employment status of Roma with that of the respective majority populations in the seven EU Member States covered by the FRA EU-MIDIS survey, namely Bulgaria, the Czech Republic, Greece, Hungary, Poland, Romania and Slovakia. In total, 3,510 Roma people were interviewed from these seven EU Member States. The ESS was selected as the benchmark, given that the survey used some of the same questions as EU-MIDIS, allowing for comparisons to be made on these items. Furthermore, the interviews in round four of the ESS were carried out at a similar time to EU-MIDIS, in 2008. Whereas the results of the ESS are representative of the general population in the country and can be considered to reflect the national average for a given variable, the results of the EU-MIDIS are representative of the areas where the survey was carried out – that is, areas in the EU Member States where the Roma population was sufficiently concentrated for random route sampling, given the absence of address lists which could have been used as a sampling frame.

> *Member states of the Council of Europe want "to ensure equal access of Roma to employment and vocational training in accordance with international and domestic law, including, when appropriate, by using mediators in employment offices. Provide Roma, as appropriate, with possibilities to validate their skills and competences acquired in informal settings".*
>
> *'The Strasbourg Declaration on Roma'*
> *Council of Europe High Level Meeting on Roma, Strasbourg, 20 October 2010, available at: http://www.coe.int/t/dc/files/source/2010_cm_roma_final_en.doc*

In both the EU-MIDIS and ESS surveys the respondents, aged 16 years and older, were asked to indicate whether at the time of the interview they were employed, unemployed, taking care of the home, studying, retired, or fell into some other category. In all seven EU Member States, the Roma respondents indicated a level of employment below that of the general population in the respective country (Figure 1). Respondents' self-reported situation is what is meant here by 'employment status'. The most notable difference can be observed in **Poland**, where 17%

26 For more information, see also: European Parliament (2010).

27 FRA (2009a).
28 FRA (2009c); further information available at: fra.europa.eu/fraWebsite/eu-midis/index_en.htm.
29 ESS (2008); further information available at: ess.nsd.uib.no/ess/round4/.

of the Roma respondents said they were working, compared with 47% of the general population – a difference of 30 percentage points. In **Romania**, the employment rate of the Roma was 28 percentage points lower than that of the general population, with 17% of the Roma indicating they were working, compared with 45% of the majority population. In **Hungary**, where the difference between the Roma in the EU-MIDIS survey and the majority population in the ESS survey is smallest, there is a 10 percentage point difference in employment rates of 31% and 41%, respectively. It should be noted that, when interpreting these figures due regard should be given to the different sampling of both surveys. Therefore, the results are only indicative of differences.

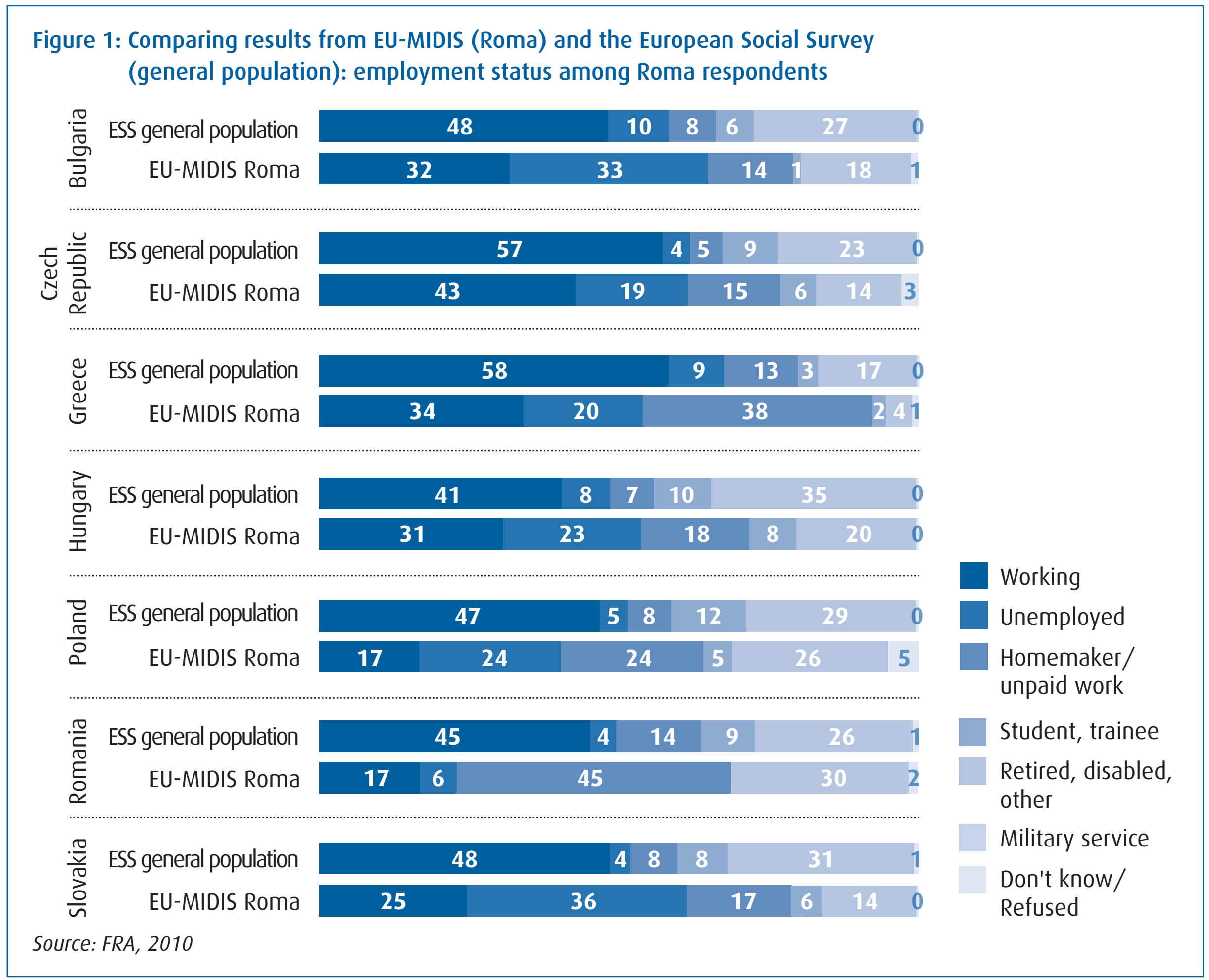


Figure 1: Comparing results from EU-MIDIS (Roma) and the European Social Survey (general population): employment status among Roma respondents

Source: FRA, 2010

According to a policy note entitled *Roma Inclusion: An economic opportunity for* ***Bulgaria, Czech Republic, Romania*** *and* ***Serbia*** published by the World Bank at the end of September 2010, Roma with jobs earn much less than non-Roma. The average wage gap is almost 50% and is related to the lower educational attainment of Roma. The World Bank note is based on quantitative data from seven household surveys in the abovementioned countries and information from interviews with 222 stakeholders, including government and non-government officials, and Roma and non-Roma. According to the note, the employment rate differential amounts to about 26 percentage points. Furthermore, the note finds that closing the productivity gap for Roma in central and eastern Europe could potentially add as much as EUR 9.9 billion annually to the economies of these four countries in increased output, and EUR 3.5 billion annually in fiscal benefits. Furthermore, bridging the gap in labour market opportunities and education would add up to EUR 6 billion to economic production and some EUR 2 billion to government revenues in these countries every year.[30]

A combination of low education levels and discrimination was identified as the reason for this situation. In late 2009 and in 2010, various international monitoring mechanisms addressed these issues with regard to a variety of EU Member States. Following a visit to **Bulgaria** in November 2009, the Council of Europe Commissioner for Human Rights published a report in February 2010 pointing out that, despite governmental measures undertaken to improve the access of Roma to the labour market, "discrimination is still an important factor preventing certain minorities, in particu-

30 World Bank (2010a).

lar Roma, from accessing employment".[31] Together with discrimination, Roma's relatively poor educational background – which in itself reflects discrimination – reduces their employability (see also the following section on the Roma's level of education and segregation).

The 2009 ECRI report on **Greece** noted that "most Roma who live in settlements continue to earn their income from scrap and garbage collection and few are employed in the mainstream labour market due to discrimination and prejudice, although their lack of qualifications, as a result of a low education level, also play a role".[32] With regard to **Hungary**, the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM) came to a similar conclusion. In its third opinion on Hungary, adopted in March 2010, it expressed concern that "despite the measures taken to encourage the employment of the most vulnerable groups, persons belonging to the Roma are more often discriminated against in the labour market than others".[33] The same Committee, in its second Opinion on **Portugal**, pointed out that Roma frequently face discrimination in access to employment which limits their participation in socio-economic life. The Committee also mentioned that "even though programmes of vocational training and retraining of Roma have been carried out, they often have only a limited impact on the employment rates of Roma. Moreover, Roma representatives regret that there is limited support for self-employment and the setting up of small businesses, which could constitute alternatives to itinerant trade and working on fairs and markets".[34]

As regards attitudes at the workplace, a survey on the perception of the general population of the Roma minority in **Romania** included questions on the acceptance level of the general population to having a Roma co-worker. The survey, carried out by the Romanian Institute for Evaluation and Strategy (*Institutul Român pentru Evaluare si Strategie, IRES*) in 2010, interviewed 1,321 respondents based on a Computer Assisted Telephone Interviewing (CATI) method with a 2.8% error. The survey findings showed that only 54% of the respondents agreed with the idea of having a Roma as co-worker, compared with 69% and 84% of respondents accepting a Hungarian or German co-worker, respectively; 68% of the respondents considered that Roma are disadvantaged in access to employment.[35]

Level of education and segregation

The educational situation of Roma pupils remains unsatisfactory despite efforts undertaken by EU Member States and a recommendation of the Council of Europe Parliamentary Assembly (PACE). In June 2010, PACE issued a recommendation to its Member States to dismantle segregated schooling by ensuring the effective and non-segregated access of Roma to mainstream education while expecting Roma to accept that they should fulfil their obligations with regard to education.[36] In the absence of official data providing statistics broken down by ethnicity, there is evidence from surveys that a high proportion of Roma in several EU Member States continue to attain a lower level of education in comparison with the majority population. As highlighted in the previous section, low levels of education and literacy significantly reduce Roma's employability.

To allow for a comparison of the educational attainment of Roma populations with that of the respective majority populations, the results of the FRA EU-MIDIS survey were again compared with those of the European Social Survey. Both surveys asked the respondents how many years of school they had attended. Responses do not tell the exact qualification achieved but serve as an indicator for the level of education that respondents obtained. The seven EU Member States covered correspond to those included in the EU-MIDIS survey in which Roma populations were interviewed – that is, Bulgaria, the Czech Republic, Greece, Hungary, Poland, Romania and Slovakia. As already highlighted, when interpreting the results of the surveys, due regard should be given to the different sampling frames of both surveys, and the fact that the Roma and majority populations were surveyed in different areas, at different times and with slightly different questions. The results are therefore only indicative of differences.

> *"The first point is the need to tackle the root causes of exclusion. First and foremost, this means promoting education for young Roma. This needs to start as early as possible in order to give young Roma children a fair start in life. Increasing Roma's employability depends on improving their education. Desegregating schools and kindergartens is crucial if Roma children are to have the chance to later participate fully in society."*
>
> *László Andor, European Commissioner for Employment, Social Affairs and Inclusion, Brussels, 1 December 2010*

In all seven Member States surveyed, the results show a higher proportion of Roma with low levels of education – five years of school or less. While between 19% and 32% of respondents in the general population across the sampled countries had completed 14 years of education or more, the highest figure for Roma was 10% in Bulgaria (Figure 2). Large differences exist in Greece, where 97% of the general population state that they have been in school for five years or more, compared with 26% of the Roma respondents. This means that the majority of Roma respondents in Greece have completed five years or less of schooling.

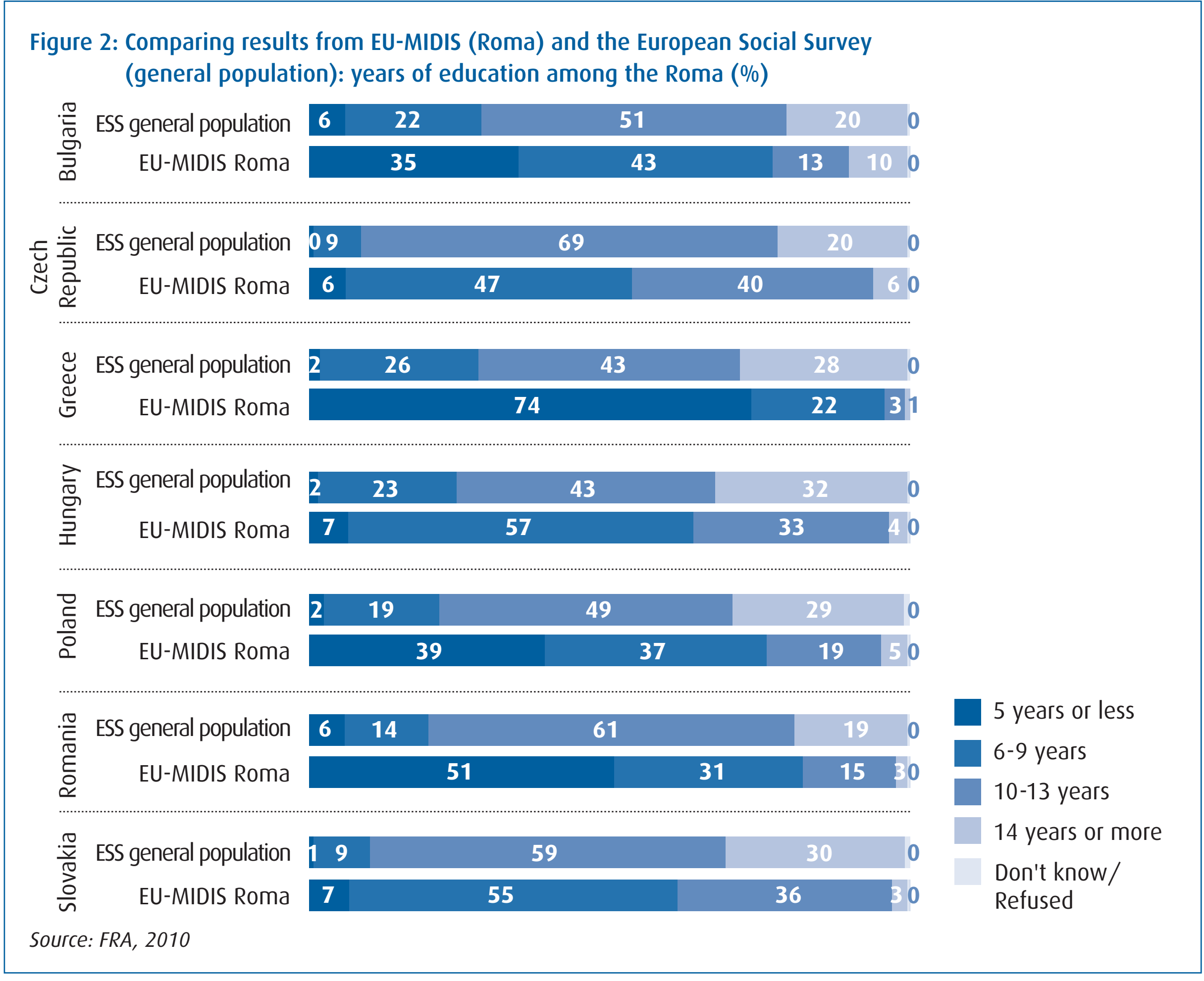
A similar picture emerges in **Bulgaria**, **Poland** and **Romania**, where between 35% and 51% of Roma indicate that their education amounts to five years or less, compared with 2% to 6% of the general population as measured by the ESS. In the **Czech Republic**, **Hungary** and **Slovakia**, there are only small differences between the Roma and the general population when it

31 Council of Europe, Commissioner for Human Rights (2010).
32 Council of Europe, ECRI (2009), pp. 8 and 20.
33 Council of Europe, Advisory Committee on the FCNM (2010a).
34 Council of Europe, Advisory Committee on the FCNM (2010b), pp. 7 and 21-22.
35 IRES (2010).

36 Council of Europe, PACE (2010a).

comes to schooling of five years or less, with almost all respondents from both groups achieving this level. However, there are major differences between the general population and the Roma in these countries in terms of the number of years of school which the respondents have completed, with the Roma respondents showing consistently lower levels of education.

Figure 2: Comparing results from EU-MIDIS (Roma) and the European Social Survey (general population): years of education among the Roma (%)



Source: FRA, 2010

Although systematic segregation no longer exists as an educational policy in any EU Member State, segregation continues to be practised by schools and educational authorities in different, mostly indirect, ways in a number of Member States. This is sometimes the unintended effect of policies and practices, and sometimes the result of residential segregation. In this vein, the EU synthesis report on *Ethnic Minority and Roma women in Europe – A case for gender equality?* noted that “Roma children are more likely than other children to be segregated in special schools or classes, due to their greater learning difficulties, the reluctance of schools to enrol them, the pressure of ethnic majority parents not to have Roma children in class with their children, and the isolation of Roma settlements”.[37]

A similar concern was expressed by the Council of Europe Commissioner for Human Rights in his report on **Bulgaria**. The Commissioner noted that although the number of Roma children in auxiliary and boarding schools is progressively decreasing, their presence in such schools is still disproportionately high.[38] In September 2010, the World Bank report, *A review of the Bulgaria school autonomy reforms*, revealed that problems integrating with other pupils and distance are the two main factors discouraging Roma pupils' attendance at regular schools.[39]

The issue of segregation was also raised in the **Czech Republic**. In March 2010, the Czech School Inspectorate (*Ceská školní inspekce*, CSI) published a report based on inspections carried out at 171 former ‘special schools'.[40] The report highlighted continued segregation and discrimination of Roma pupils three years after the 2007 judgment by the European Court of Human Rights in *D.H. and Others v. Czech Republic*. In its report, *Injustice renamed: Discrimination in education of Roma persists in the Czech Republic*, Amnesty International claimed that the Czech Republic has simply renamed ‘special schools' to ‘practical elementary schools' but the system which places children in these schools and teaches a limited curriculum essentially remains the same.[41]

37 European Commission (2010f), p. 11.

38 Council of Europe, Commissioner for Human Rights (2010).
39 World Bank (2010b).
40 CSI (2010).
41 Amnesty International (2010a).

In its report on **Greece**, ECRI was concerned about "the fact that there are cases of Roma children being separated from other children within the same school or in the vicinity thereof".[42] With regard to **Germany**, the Council of Europe Advisory Committee on the FCNM noted that "Roma and Sinti children continue to face difficulties in education, due to the persistence of prejudice and stereotyping and that they are persistently over-represented in 'special' schools".[43] The results of an empirical investigation of the Edumigrom research project in **Hungary**, in which 18 schools and 35 classes in two urban areas were surveyed, reveal that the performance of Roma pupils was systematically poorer in segregated environments: 69% of Roma pupils performed poorly in segregated classes, compared with 40% of Roma pupils in mixed classes.[44]

Amnesty International raised concerns regarding the situation in the **Slovak Republic**. In its report, *Unlock their future: Steps to end segregation in education*, it points to serious gaps in the enforcement and monitoring of the ban on discrimination and segregation in the Slovak educational system. The report notes that segregation of Romani children takes various forms: special schools or special classes within mainstream schools designed for pupils with 'mild mental disabilities', as well as mainstream Roma-only schools and classes. While Roma are estimated to comprise less than 10% of **Slovakia**'s total population, they make up 60% of the pupils in special schools, according to a 2009 survey.[45] Several cases of segregation were also reported in relation to housing, where local governments physically separated Roma and the majority population to avoid confrontations between them (see the section on housing).

Housing conditions

Housing is the most visible sign of social exclusion experienced by the Roma community. Poor housing conditions and residential segregation have a negative impact on education, employment and health. Therefore poor housing prolongs the cycle of deprivation and social exclusion experienced by the Roma in the European Union.

Enjoyment of affordable, habitable, accessible and culturally adequate housing is a fundamental right. It is guaranteed under the International Covenant on Economic Social and Cultural Rights (ICESCR), which binds all EU Member States, as well as under the European Social Charter. The right to housing assistance is also enshrined in Article 34 of the Charter of Fundamental Rights of the European Union.

> *"Authorities must guarantee the rights of Roma to live with dignity in adequate housing, including the provision of all public utilities. Roma settlements lacking recognised tenure should be formalised, and forced evictions carried out in violation of human rights standards and procedural safeguards must be stopped."*
>
> *Thomas Hammarberg, Council of Europe Commissioner for Human Rights, 30 September 2010.*

As underlined in last year's FRA Annual Report, Roma and in particular Travellers continue to be among the most vulnerable groups in private and social housing throughout the EU. This includes discrimination in access to housing, poor housing conditions, segregation and forced evictions. In a report on *The situation of Roma EU citizens moving to and settling in other Member States*, which was published at the end of 2009, the FRA found that Roma live in substandard, insecure and often segregated housing conditions. Such housing conditions often lead to major problems for Roma in other areas of life, such as education, employment and healthcare.[46]

Promising practice

Campaigning for a school without discrimination

In Romania, the National Council for Combating Discrimination, together with the Ministry of Education, Research, Youth and Sport, organised the campaign 'School without discrimination' for the third consecutive year in 2010. The campaign ran over the month of October and November, with its main goal to promote diversity education in the Romanian school system. In 2010, the initiative targeted teachers with a long training experience and inspectors for Roma in particular. The programme ran in different cities in Romania. It was, however, impossible to identify information concerning the success or failure of this initiative.

For more information, see: www.cncd.org.ro/noutati/Proiecte/Scoala-fara-discriminare-84/

42 Council of Europe, ECRI (2009), p. 22.
43 Council of Europe, Advisory Committee on the FCNM (2010c).
44 See V. Messing, M. Nemenyi, J. Szalai, with contributions from A. Szasz, (2010).
45 Amnesty International (2010b) and (2010c).

46 FRA (2009b).

In late 2009 and in 2010, various international monitoring mechanisms addressed shortcomings in this area vis-à-vis a variety of EU Member States. With regard to **France**, the 2010 ECRI report,[47] as well as the CERD concluding observations,[48] noted that the French authorities had not provided Travellers with the necessary number of encampment areas, as foreseen in the Act of 5 July 2000, which is known as the 'Besson Act'. According to the ECRI 2010 report on the **United Kingdom** (UK), persons representing Gypsies and Travellers emphasised that "adequate site provision remains an especially pressing issue for their communities pointing out the reluctance of many councils to provide additional pitches frequently related to high levels of resistance amongst local communities and parish councils to such developments".[49] In **Austria**, the ECRI 2010 report acknowledged that although the situation of Roma has improved in recent years, they still encounter difficulties in obtaining housing, and in rural areas they often live apart from the rest of the population.[50]

"We were always afraid of the winter; that under the thick snow the roof would collapse. Indeed there were small parts that fell down. Now it is fixed and we can sleep."

Interview with a Roma respondent, Hungary, in FRA (2009c)

Moreover, the CERD's concluding observations on **Romania** raised concerns that Roma continue to be victims of racial stereotyping and racial discrimination in access to housing.[51] In its concluding observations on the **Slovak Republic**[52] and **Slovenia**,[53] respectively, the CERD noted that the Roma minority population encountered segregation, as well as other forms of discrimination in relation to housing. In **Poland**, the 2010 ECRI report,[54] as well as the opinion of the Advisory Committee established under the FCNM,[55] highlighted the issue of poor Roma housing conditions as an unsolved problem, despite the efforts made.

Furthermore, in **Italy**, an Amnesty International report deemed the points system currently used for the allocation of low-rent public housing in the city of Rome to be indirectly discriminatory against Roma. For instance, one criterion for the allocation of social housing is prior eviction from private accommodation (*sfratto*) and as a result Roma who have only lived in camps are effectively excluded from accessing social housing.[56] In June 2010, the European Committee of Social Rights (ECSR) reviewed evictions, as well as the living conditions which Roma and Sinti had endured in camps or similar settlements in Italy, and concluded that Italy violated the right to housing in conjunction with Article E on non-discrimination of the European Social Charter.[57]

In January 2010, the ECSR found **Greece** had violated the right of the family to social, legal and economic protection, on the grounds that a significant number of Roma families continue to live in conditions that fail to meet minimum standards of adequate housing and that Roma families continue to be forcibly evicted in breach of the European Social Charter and the legal remedies generally available are not made sufficiently accessible to them.[58]

In **Slovakia**, several cases were reported where local governments tried to solve confrontational relations between Roma and non-Roma populations by building walls or fences that physically separated Roma residents from non-Roma. The authorities in question tried to justify the construction of physical barriers by the need to protect non-Romani inhabitants from criminality and the different lifestyle of local Roma. Such barriers were erected in several Slovak towns and municipalities, including Ostrovany, Michalovce, Trebišov, Lomnička, Sečovce and Prešov. The Slovak National Centre for Human Rights (*Slovenské národné stredisko pre ľudské práva*, SNSĽP) also looked into the situation. In its expert opinion, the centre observed that, while these issues do not fall under any of the concrete areas protected by the country's anti-discrimination legislation, the application of the general principle of non-discrimination as stipulated by national law cannot be limited to these areas only. The areas covered by the Slovakian anti-discrimination legislation correspond to those covered by EU law, namely: employment, social protection, including social security and healthcare, education, and access to and supply of goods and services, including housing.

"[T]he walls that have been built in Ostrovany as well as in other cities in Slovakia are becoming an actual symbol of people's segregation."

Slovak National Centre for Human Rights (2010)

At EU level, the discussion focused on the question of how to best use EU structural funds with regards to housing. On 19 May 2010, the European Parliament and the Council adopted Regulation (EU) No. 437/2010 amending Regulation (EC) No. 1080/2006 on the European Regional Development Fund (ERDF) regarding the eligibility of housing interventions in favour of marginalised communities.[59] The new regulation extends housing interventions eligible for ERDF support to the renovation of houses in rural areas, and to the replacement of houses in both urban and rural areas. This amendment is a remarkable step, which helps

47 Council of Europe, ECRI (2010b), pp. 31-32.
48 UN, CERD (2010), Point 16, p. 4.
49 Council of Europe, ECRI (2010c), p. 43.
50 Council of Europe, ECRI (2010d), p. 31.
51 UN, CERD (2010b).
52 UN, CERD (2010c).
53 UN, CERD (2010d).
54 Council of Europe, ECRI (2010e), pp. 21-22.
55 Council of Europe, Advisory Committee on the FCNM (2009), paragraph 203-206.
56 Amnesty International (2010d), p. 5.
57 Council of Europe, European Committee of Social Rights (ECSR) (2010a).
58 Council of Europe, ECSR (2010b). See also the case concerning the family Georgopoulos, UN International Covenant on Civil and Political Rights (2010).
59 OJ 2010 L 132, pp. 1-2.

to address the specific situation of Roma communities who often live in rural areas and in 'houses' that hardly qualify as a property undergoing 'renovation'. Both the Council and the European Commission declared that the provision of ERDF-led housing interventions to marginalised communities throughout the EU should be of an "exceptional nature" and should only occur when they are "part of an integrated approach".[60] For this reason, the new European Commission Regulation 832/2010 of 17 September 2010 sets out rules for the application of European funds. The regulation clearly states that expenditure for housing in favour of marginalised communities shall only be committed if "such housing investment is part of an integrated approach and support for housing interventions for marginalised communities takes place together with other types of interventions including interventions in the areas of education, health, social inclusion and employment". Furthermore "the physical location of such housing ensures spatial integration of these communities into mainstream society and does not contribute to segregation, isolation and exclusion".[61]

FRA ACTIVITY

Roundtable on the use of structural funds

On 27 and 28 May 2010, the FRA, in cooperation with the Roma Civic Alliance, organised a Roundtable in Budapest on 'Roma inclusion and human rights implementation at the local level'. Representatives of the EU, international institutions, national and local authorities explored how EU structural funds could best be used and how local authorities can draw from these funds while implementing human rights at the local level. Such initiatives should address the needs of Roma communities, with the aim of reducing social inequalities, increasing gender equality and combating discrimination. The roundtable discussions covered a number of examples provided by representatives of Romani grass roots organisations and local authorities, which enabled participants to better assess the needs of local authorities and to learn from each other's experiences.

For more information, see: http://fra.europa.eu/fraWebsite/news_and_events/infocus10_2605_en.htm

Healthcare conditions

Inadequate access to housing, education and employment contribute to poorer health, on average, among Roma than among the general population. Data published in late 2009 and 2010 underlines that Roma populations suffer from poor health conditions and tend to have limited access to healthcare. In light of this, the fourth meeting of the EU Platform for Roma Inclusion in December 2010 determined the fostering of effective and quality care for Roma children and their families as one of the priority areas within its roadmap for actions.[62]

> *"Regarding the health status of the Roma, available data suggest that there is a higher incidence of chronic diseases in this group, which requires closer and more effective use of health services."*
>
> *Trinidad Jiménez García-Herrera, Spanish Minister for Health and Social Policy, Córdoba, 8-9 April 2010*

Within the framework of the EU Public Health Programme, the Spanish non-profit intercultural social organisation *Fundación Secretariado Gitano* (FSG) initiated the project 'Health and the Roma community – Analysis of the situation in Europe' in seven EU Member States, namely **Bulgaria**, **Czech Republic**, **Greece**, **Portugal**, **Romania**, **Slovakia** and **Spain**. The findings, based on responses from 7,604 Roma of all ages and covering 5,647 households, show that in **Bulgaria**, **Greece** and **Portugal** 46% to 62% of the Roma households surveyed live in areas with poor health conditions, and 43% to 53% in neighbourhoods distant from urban centres and therefore far from hospitals or healthcare centres. In the **Czech Republic** and **Slovakia**, almost one fifth of the surveyed Roma households lack health or social services in the vicinity of their homes.[63] Furthermore, according to the findings of the project on Health and Roma Community[64] a high percentage of Roma children fail to follow adequately the child vaccination programme. The largest proportion of minors that does not properly follow the child vaccination programme was found in Romania (46%), followed by Greece (35%) and Bulgaria (29%).

In its 2010 report, *Ethnic minority and Roma women in Europe – A case for gender equality?*, the European Commission also looks at the health conditions of Roma women and children, as well as their access to healthcare. The report states that "Roma women and men have an average life expectancy at birth considerably lower than the rest of the population. This is a consequence of their bad housing and living conditions, as well as their patchy access to screening and healthcare. [...] Roma women use healthcare services less than the rest of the population, because medical treatment may conflict with the Roma rules of hygiene and modesty, and because they often feel excluded by the negative attitudes/racism/discrimination of some healthcare workers and hospitals."[65]

As regards low life expectancy, the report concludes for **Romania** that "[e]arly and frequent pregnancies place Roma women at particular health risks, aggravated by poor access to health services and poverty, with a negative influence on

60 Interinstitutional doc. 7964/10 ADD 1 as of 7 April 2010.
61 Commission Regulation No. 832/2010, OJ 2010 L 248, Article 1 paragraph 4, pp. 1-35.
62 For more information, see: http://ec.europa.eu/social/main.jsp?catId=761&langId=en.
63 FSG (2009), p. 101.
64 *Ibid.*, p. 101.
65 European Commission (2010f), p. 11.

the life expectancy of Roma women. In addition to health risks, early and numerous births contribute to the exclusion of Roma women from education and labour market participation. The infant mortality rate for the Roma in **Romania** is four times higher than the national average".[66] The lack of prenatal care contributes to a high infant mortality rate among the Roma community and adversely affects the health of newborns by depriving them of timely access to healthcare.

Discrimination plays also a role in this context. In August 2010 CERD issued its concluding observations on **Romania**, which underlined the persistence of racist stereotypes and race discrimination against Roma in access to healthcare services, and recommended to the state party to guarantee access by Roma to healthcare and social services and to continue to support Roma health mediators.[67]

FRA ACTIVITY

Roma roundtable on the eve of the Second European Roma Summit

On 6 and 7 April 2010, on the eve of the Second European Roma Summit hosted by the Spanish EU Presidency, the FRA brought together Romani and Traveller women, as well as representatives from the European Commission, in Córdoba, **Spain**, for a roundtable examining the way forward: 'On a road to equality'. Romani women, together with the Agency, identified possible actions that EU Presidencies, the European Commission, but also the Member States could take up for discussion at the Platform of Roma Inclusion. Suggestions included support for ethnic data collection, recognition of multiple discrimination and the promotion of an open coordination mechanism for mainstreaming and realising the full equality of Roma women. To summarise and reinforce all of the statements made, the Romani and Traveller women endorsed a position paper.

The position paper is available at: http://fra.europa.eu/fraWebsite/attachments/RT_roma_summit_key_messages.pdf

Data collected at the national level highlight serious problems when it comes to healthcare access by Roma communities. For instance, in September 2010, the results of the *All Ireland Traveller health study* were launched. The study, which included Travellers living both in the **Republic of Ireland** and **Northern Ireland**, was conducted among 10,500 Traveller families. The research findings revealed that the male Traveller life expectancy at birth is 61 years, 15 years lower than that of the male majority population. Romani women's life expectancy is 70 years, 11 years fewer than that of the female majority population. In relation to racism and discrimination, the report found that almost one in two Travellers felt discriminated against in all areas of life. Some 40% of respondents indicated they had experienced some degree of discrimination in accessing health services.[68]

Outlook

The EU and its Member States have a particular responsibility towards the Roma who form the largest ethnic minority in the Union. The Council of Europe called on its Member States to treat the Roma issue not only from the perspective of a socially disadvantaged group, but from the perspective of a national minority entitled to enjoy the rights enshrined in the Framework Convention for the Protection of National Minorities (FCNM).

The EU Charter of Fundamental Rights sets out the values on which the EU is based. To make these values become reality for – and thereby improve the situation of – Roma communities, they need to be translated into practice. To this end, a number of elements are key to overcoming the challenges hindering the successful inclusion of Roma communities in today's EU societies. These include:

- the full use and application of existing EU legal instruments in compliance with the EU Charter of Fundamental Rights, such as the Racial Equality Directive and the Free Movement Directive;
- the promotion of 'joined-up governance' approaches for Roma inclusion by strengthening multilevel governance based on effective partnerships with all relevant stakeholders. These include national level coordination bodies for Roma, local and regional authorities, regional Roma coordinators, private companies, other specialised equality bodies and NGOs active in the field of Roma;
- improved cooperation between national, European and international players and representatives of the Roma communities, which can increase the effectiveness of available financial instruments to achieve Roma inclusion;
- the promotion of a more integrated and effective use of EU Funds to tackle the multidimensional challenges of Roma exclusion, including the development of national desegregation policies supported by the structural funds;
- systematic mainstreaming of Roma inclusion issues into the broad policy areas of education, employment, public health, infrastructure, urban planning, economic and territorial development;
- regular and systematic collection of official, usable and meaningful ethnically disaggregated data accompanied by all the necessary safeguards laid down, among other regulations, by the EU Data Protection Directive. Effective inclusion policies are informed policies.

66 *Ibid.*, p. 114.
67 UN, CERD (2010e), paragraph 14.
68 University College Dublin (2010).

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Asylum, immigration and integration

Border control and visa policy

Information society and data protection

UN & CoE

28 January – CoE Parliamentary Assembly adopts a resolution and a recommendation on the detention of asylum seekers and irregular migrants

January

February

March

April

May

June

July – UN High Commissioner for Refugees comments on the European Commission's proposal for a Directive on minimum standards for the qualification and status of third-country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted

July

August – UN High Commissioner for Refugees comments on the European Commission's proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing international protection

August

September

October

November

December

21 January 2011 – ECtHR Grand Chamber delivers lead judgment on the application of the Dublin II regulation (*M.S.S. v. Belgium and Greece* case)

January

EU

January

February

2 March – CJEU interprets the Qualification Directive in the *Abdulla and others* case

4 March – CJEU interprets the Family Reunification Directive in the *Chakroun* case

March

April

19 May – EU adopts a regulation establishing a European Asylum Support Office

May

15 June – CJEU interprets the Qualification Directive in the *Bolbol* case

22 June – CJEU rules on aspects of the Schengen Borders Code in the *Melkei and Abdeli* case

June

July

18 August – CJEU interprets application of Asylum Procedures Directive in the *NS v. Secretary of State for the Home Department* case

August

September

11 October – CJEU interprets application of Asylum Procedures Directive in the *M.E. and others v. refugee Applications Commissioner, Minister for Justice and Law Reform* case

October

9 November – CJEU interprets the Qualification Directive in the *B and D* case

November

December

1 Asylum, immigration and integration

The latest Eurostat figures reveal that in the 12-month period up to September 2010 around 250,000 people applied for asylum in the 27 European Union (EU) Member States. The EU asylum system allows those facing the risk of serious harm in their home country to apply for international protection. However, progress in legislative reforms leading to the creation of a Common European Asylum System by 2012 has been slow. Concurrently, Greece was confronted with unprecedented pressures on its asylum system, challenging its ability to implement human rights guarantees. Furthermore, a recent ruling by the European Court of Human Rights (ECtHR) raised questions about the operability of the Dublin II Regulation. Regarding the integration of migrants, a trend emerged of tying the granting of permanent residence for legally-residing non-EU nationals to integration requirements.

This chapter covers developments in EU and Member State policies and practices in the areas of asylum, immigration and the integration of migrants for the year 2010. It relates primarily to the fundamental rights situation of asylum-seekers and legally resident migrants in the EU. In order to gain a comprehensive overview of this area, this chapter should be read together with Chapter 2 on border control and visa policy, which focuses on the situation of fundamental rights of asylum seekers and irregular migrants at EU borders.

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

- provisions of the Qualification Directive,[2] relating to eligibility for, and the granting and withdrawal of refugee status, were clarified by judgments of the Court of Justice of the European Union (CJEU);
- Member States at the EU's external borders faced difficulties in guaranteeing fundamental rights where they experienced increased inflows of migrants, in particular regarding detention conditions of irregular migrants;
- transfers of asylum seekers to Greece under the Dublin II Regulation were suspended in order not to pose risks to the fundamental rights of those transferred;[3]
- detention conditions for irregular migrants, including for those whose asylum claims have failed, posed issues for the protection of human rights;
- protection practices under readmission agreements raised concerns as regards the principle of *non-refoulement*;
- more Member States introduced integration requirements as a condition of granting permanent residence permits;
- a few Member States discussed granting migrants greater political rights.

1.1. Asylum

Three principal challenges can be identified in relation to the area of asylum. Firstly, while the Stockholm Programme[1] commits the EU Member States to the creation of a Common European Asylum System (CEAS) by 2012, progress in revising the legislative framework has been modest. Secondly, Member States have continued to face practical challenges in the application of the existing *acquis* relating to the conditions of reception for asylum seekers. More particularly, the extraordinary pressure experienced by the **Greek** asylum system has highlighted the potential challenges to fundamental rights. Such challenges may arise in states where the present EU asylum framework is combined with a national asylum system that still requires further development and shows insufficient administrative capacity to cope with the inflow of asylum seekers. Thirdly, there is evidence to

1 European Council (2010).

2 Council Directive 2004/83/EC, OJ 2004 L 304.

3 Council Regulation (EC) No. 343/2003 OJ 2003 L50, p. 1.

suggest that public intolerance towards migrants and asylum seekers may be increasing.[4]

This section will consider developments in the EU legislative and institutional framework, including the interpretation of the law provided by the CJEU. It will then discuss the challenges to fundamental rights resulting from the practical implementation of the existing framework, including a focus on the problems faced by **Greece** and their implications for the European asylum system as a whole.

1.1.1. EU legislative and institutional developments

Among the six legal instruments under revision – that is, the Long-term Residents Directive,[5] the Reception Conditions Directive,[6] the Qualification Directive, the Asylum Procedures Directive,[7] the Dublin II Regulation[8] and the Eurodac Regulation[9] – in the development of a CEAS, the Council of the European Union and the Parliament had only agreed on amendments to the Long-term Residents Directive by the end of 2010.[10] This directive, as amended, will permit persons granted international protection to move freely within the EU on the same basis as other long-term residents from third countries. However, gaps in the asylum framework remain given the absence of revised legislation in relation to the regulation of asylum procedures, the reception of asylum seekers and the determination of refugee status.

Albeit with limited progress, discussions continued on proposed amendments to the four main EU asylum instruments – the Reception Conditions Directive (Recast),[11] the Asylum Procedures Directive (Recast),[12] the Qualification Directive (Recast)[13] and the Dublin II Regulation (Recast)[14] – which are intended to introduce higher common standards of protection through further harmonisation of Member States' legislation. The Office of the United Nations High Commissioner for Refugees (UNHCR) has broadly welcomed the European Commission's proposals since they address some of the existing gaps.[15] However, the Council of the European Union did not show support for some of the provisions including proposals to strengthen the right to an effective remedy, the provision of legal assistance and the regulation of detention. To reinvigorate the negotiation process, the Belgian EU Presidency organised a Ministerial Conference on Asylum in September 2010, where the FRA presented the results of its research on access to justice for asylum seekers.[16]

Despite the Belgian EU Presidency's efforts to make progress on the CEAS, there was reluctance at Council level further to develop EU standards in this area. This may be due, in part, to practical challenges in implementing the existing *acquis*. The European Commission has announced that it will submit amended proposals for the Asylum Procedures and Reception Conditions Directives before the beginning of the Polish EU Presidency in July 2011.[17] Negotiations on revisions to the Dublin II Regulation and the Eurodac Regulation, which is the tool through which fingerprints are collected and compared, also continued.[18] The European Commission withdrew provisions from its proposal, which afforded access to Eurodac to law enforcement agencies and Europol for law enforcement purposes; these provisions had raised fundamental rights concerns according to an opinion issued by the European Data Protection Supervisor (EDPS) in April 2010. However, in November 2010, 10 EU Member States, namely **Austria**, **Czech Republic**, **France**, **Germany**, **Hungary**, **Lithuania**, the **Netherlands**, **Portugal**, **Slovenia** and **Spain**, specifically requested the reinsertion into the regulation of a provision allowing access for law enforcement services to Eurodac.[19]

Meanwhile, progress was made with regard to the institutional framework of the EU asylum system. In February 2010, the European Parliament and the Council adopted the Regulation establishing a European Asylum Support Office (EASO).[20] The EASO, based in Malta, will work to improve the implementation of the CEAS by strengthening practical cooperation in the area of asylum among EU Member States. More particularly, it has the task of providing technical advice and assistance to Member States experiencing pressure on their asylum and reception systems. Such operational support includes the provision of training, gathering and disseminating information on countries of origin, and coordinating action to assist the asylum and reception systems of Member States. The EASO shall become operational by 19 June 2011.[21]

1.1.2. The role of the Court of Justice

The CJEU provided clarification of existing legislative provisions in a series of judgments in 2010. This section will focus on three cases relating to the Qualification Directive.

In the *Abdulla* case, the CJEU ruled on the interpretation of Article 11 (1) (e) of the directive relating to the withdrawal of refugee status.[22] It found that a refugee may lose his/

4 Chapter 6, 'Racism and ethnic discrimination'.
5 Council Directive 2003/109/EC, OJ 2004 L 16.
6 Council Directive 2003/9/EC, OJ 2003 L 031.
7 Council Directive 2005/85/EC, OJ 2005 L 326.
8 Council Regulation (EC) No. 343/2003, OJ 2003 L50.
9 Council Regulation (EC) No. 2725/2000, OJ 2000 L 316.
10 European Parliament (2010a).
11 European Commission (2008a).
12 European Commission (2009a); see also European Commission (2010a).
13 European Commission (2009b).
14 European Commission (2008b).
15 UNHCR (2010a), UNHCR (2010b) and UNHCR (2009a). See also European Council on Refugees and Exiles (ECRE) (2010a), ECRE (2010b), ECRE (2009a).
16 FRA (2010a), (2010b) and (2010c).
17 Council of the European Union (2010a), p. 9.
18 European Commission (2009c); see also European Commission (2008b).
19 Council of the European Union (2010a), p. 9.
20 Regulation (EU) No. 439/2010, OJ 2010 L 132, p. 11.
21 *Ibid.,* Article 54.
22 CJEU, Joined cases C-175-179/08, *Abdulla and others*, 2 March 2010. The *Elgafaji* case (C-465/07) was the first preliminary CJEU ruling on the upper case Qualification Directive in February 2009.

her status when the circumstances which had justified the person's fear of persecution no longer exist and he/she has no other reason to fear being persecuted within the meaning of Article 2 (c) of the directive. However, such a change of circumstances must be of a "significant and non-temporary nature" and the factors which formed the basis of persecution must have been "permanently eradicated".[23]

In the *Bolbol* case, the CJEU ruled on the interpretation of Article 12 (1) of the Qualification Directive.[24] According to this provision, refugee status may not be granted to those who fall under the protection of a United Nations (UN) body, as provided for under Article 1D of the UN Convention relating to the status of refugees. However, the CJEU held that a displaced Palestinian could not be excluded from being considered a refugee just because he/she was eligible, in principle, for protection or assistance from the United Nations Agency for Palestine Refugees (UNRWA). Rather, the CJEU found that such exclusion can only occur where a person actually avails themselves of this protection or assistance, which was not the case here.

In the *B and D* case, the CJEU ruled on the interpretation of Article 12 (2) (b) and (c) of the directive.[25] According to this provision, refugee status may not be granted where there are serious reasons for considering that an individual has committed "a serious non-political crime" or is "guilty of acts contrary to the purposes and principles of the United Nations". The CJEU found that the fact that a person has been a member of a terrorist organisation[26] and "has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations'". Rather, the CJEU stated that such a finding "is conditional on an assessment on a case-by-case basis of the specific facts".[27]

At the end of 2010, a number of other cases relating to the Asylum Procedures Directive and the Dublin II Regulation were pending before the CJEU.[28] One of the cases was referred by the Court of Appeal of the **United Kingdom** (UK). It seeks to clarify whether transfers of asylum seekers to EU Member States, where their fundamental rights as provided for under the EU Charter are considered to be at risk or where minimum standards of the Asylum Procedures Directive are not enforced, might be in breach of EU law and other international obligations. Similarly, the High Court of **Ireland** referred a case to the CJEU regarding the legality of transferring asylum seekers to other EU Member States that have different standards of refugee protection.

1.1.3. Practical operation of the asylum *acquis*

Two main challenges to the protection of fundamental rights can be identified in the practical operation of the existing asylum *acquis*. Firstly, the implementation by Member States of the EU legal framework in relation to asylum may render the rights of asylum seekers difficult to realise in practice. Secondly, EU Member States may experience difficulties in coping with increased inflows of migrants. In response to these challenges, some measures towards increasing solidarity among Member States can be identified.

A 2010 UNHCR study on the implementation of the Asylum Procedures Directive found significant divergences in interpretation between EU Member States, suggesting that the legislation was not being applied correctly in practice.[29]

FRA ACTIVITY

Information material on asylum procedures: great differences between EU Member States

In 2010, the FRA collected the experiences of almost 900 asylum seekers in the 27 EU Member States (EU27). Their experiences confirm the existence of considerable disparities in the provision of written information on the asylum procedure and in the opportunities available to challenge a negative decision by the asylum authorities. The FRA found that a lack of adequate or timely information in a language understood by the asylum applicant could undermine the practical application of their rights under the legal framework.

To illustrate the different approaches, Figure 1.1 outlines the number of languages in which general information leaflets about the asylum procedures were translated. In five EU Member States – **Austria**, the **Czech Republic**, **Denmark**, **Germany** and **Ireland** – information leaflets are translated into more than 20 languages. In comparison, in **France**, **Greece**, **Lithuania** and **Portugal**, asylum information leaflets are translated into five languages, although, for example, among those applying for asylum in 2009, **France** had more than 100 different nationalities, and **Greece** had more than 60 nationalities (Figure 1.2). While for certain asylum seekers it might be expected that applicants are able to understand the host state language (as in the case of French or Portuguese-speaking former colonies), it cannot be assumed that this would address the language needs of the whole range of diverse nationalities in these Member States.

23 *Ibid.*, paragraphs 72 ff.
24 CJEU, C-31/09, *Bolbol*, 15 June 2010.
25 CJEU, Joined cases C-57/09 and C-101/09, *B and D*, 9 November 2010.
26 According to the list forming the Annex to the Council Common Position on the application of specific measures to combat terrorism, OJ 2001 L 344/93, pp. 95-96.
27 CJEU, Joined cases C-57/09 and C-101/09, *B and D*, 9 November 2010, paragraph 99.
28 CJEU, C-69/10 *Samba Diouf*, 5 February 2010, on the interpretation of Article 39 of the Asylum Procedures Directive in the context of access to justice. CJEU, C-411/10, *NS v. Secretary of State for the Home Department*, 18 August 2010; and C-493/10, *M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 11 October 2010. Both cases were joined by order of the President of the CJEU on 9 November 2010. Previously, in the *Petrosian and others* case (C 19/08), the CJEU ruling of 29 January 2009 clarified a rather technical question concerning the start of the period for transfer of the asylum seeker in the meaning of Articles 20 (1) (d) and 2 of Council Regulation (EC) No. 343/2003 of 18 February 2003.
29 UNHCR (2010c).

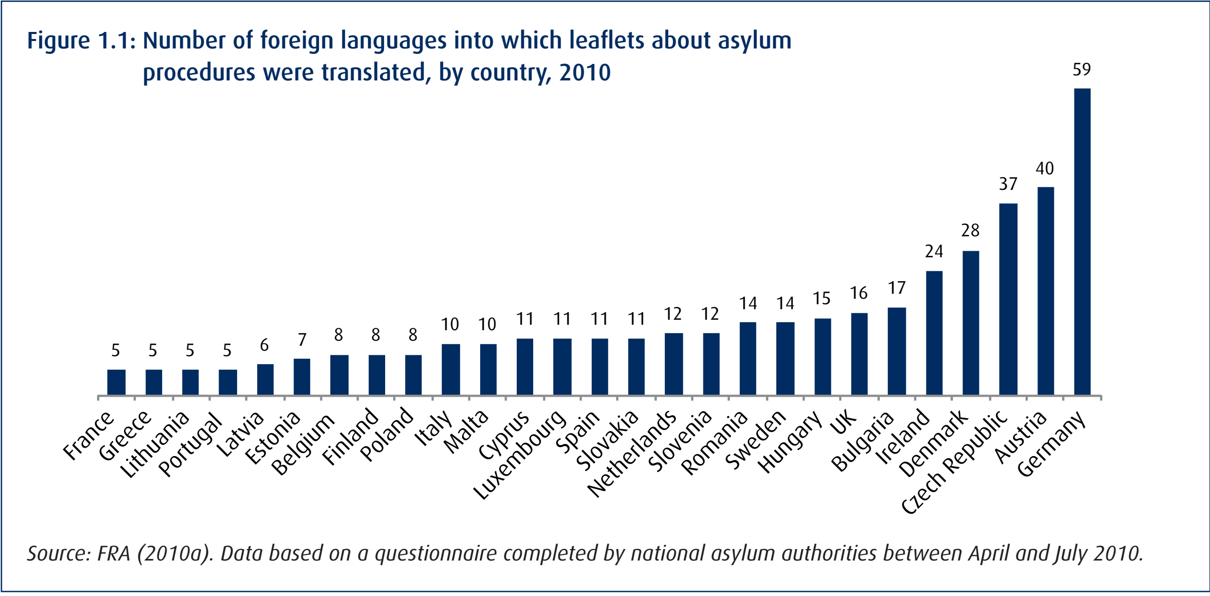


Figure 1.1: Number of foreign languages into which leaflets about asylum procedures were translated, by country, 2010

Source: FRA (2010a). Data based on a questionnaire completed by national asylum authorities between April and July 2010.

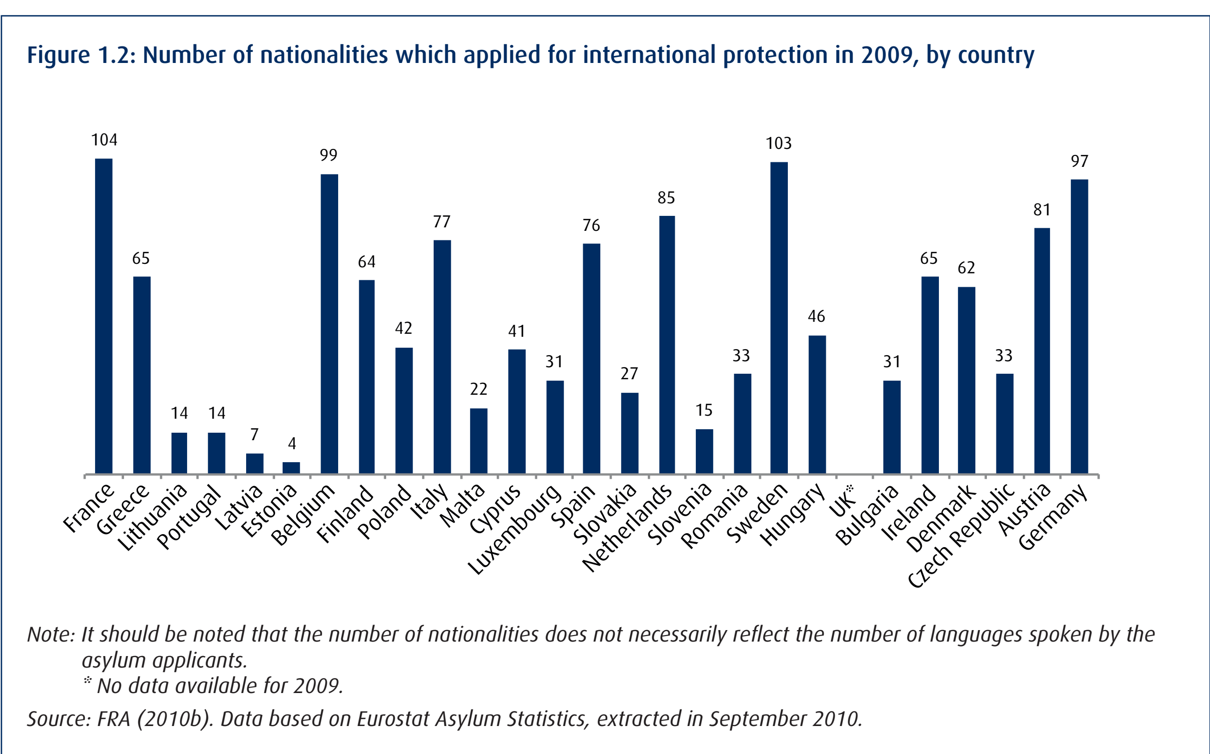


Figure 1.2: Number of nationalities which applied for international protection in 2009, by country

Note: It should be noted that the number of nationalities does not necessarily reflect the number of languages spoken by the asylum applicants.
** No data available for 2009.*

Source: FRA (2010b). Data based on Eurostat Asylum Statistics, extracted in September 2010.

1.1.4. Coping with increased numbers of arrivals

In 2010, **Greece** was subject to significant immigration pressure. Some 90% of all 2010 irregular crossings of the land, sea or air border of the EU took place in Greece. At the same time, the asylum system of Greece is in the early stages of development, with limited reception capacities.[30]

In cases where an EU Member State receives an increased number of persons crossing the border in an irregular manner, challenges to fundamental rights protection may occur at two levels: its asylum system may not have the capacity to deal with higher numbers, and applicants transferred back to overburdened states may risk being exposed to breaches of their rights.

Firstly, where an asylum system of an EU Member State does not have the capacity to deal with high numbers of asylum seekers, difficulties in providing adequate reception conditions may occur. Such difficulties were reported in **Belgium**, **Greece** and **Italy** in 2010.[31] As a consequence, states often take measures to limit the overall number of asylum

30 FRA (2011).

31 For more information, see for Belgium, P. Courard (2010); for Greece, Council of Europe (2010) and for Italy, UNHCR (2009c).

seekers, which can have a negative impact on standards of protection.[32] Furthermore, living conditions may become difficult and homelessness could follow as a direct result, as seen in Greece. In addition, asylum seekers may be held in inadequate detention facilities together with irregular migrants, which could include, for instance, individuals who have served sentences for criminal offences and are awaiting deportation.

Secondly, the extraordinary pressure on the Greek asylum system revealed the weaknesses of EU law when applied in this type of 'stress situation'. By the end of 2010, some 1,000 cases concerning the application of the Dublin II Regulation to asylum seekers were pending before the ECtHR.[33] They mostly concerned claims against **Belgium**, the **Netherlands**, **Finland** and **France** contesting transferral back to **Greece** and **Italy**.

In a large number of cases, the ECtHR granted interim measures under Rule 39 of its Rules of Court, instructing states not to carry out transfers of the asylum applicants to **Greece** while it examined their cases. As part of the procedure before the Court, interim measures may be taken when justified by emergency circumstances. If the Court grants the applicant such an interim measure, the applicant's expulsion is suspended. Nonetheless, it will still have to deliberate on the admissibility and merits of the cases concerned. The ECtHR later issued a letter informing those states continuing to transfer applicants to **Greece** that it would systematically grant interim relief in relation to any attempt to transfer asylum seekers to Greece pending its judgment in the case of *M.S.S. v. Belgium and Greece*.[34] This put further pressure on EU Member States such as **Austria**, **Belgium**, **Denmark**, **Finland**, the **Netherlands** and the **UK** to suspend all transfers. However, not all EU Member States had officially announced that they would halt all transfers to Greece by December 2010.[35]

In January 2011, the ECtHR Grand Chamber delivered its judgment in the case of *M.S.S. v. Belgium and Greece*. The case concerned the return by **Belgium** of an Afghan asylum seeker to **Greece** in application of the Dublin II Regulation. Subsequently, the asylum seeker was detained in **Greece** and filed an application for asylum while he had to live on the street with no means of subsistence. The ECtHR found both **Greece** and **Belgium** in violation of Articles 3 (prohibition of degrading or inhuman treatment) and 13 (right to an effective remedy) of the European Convention on Human Rights (ECHR).

In addition to the case of *M.S.S. v. Belgium and Greece*, two pending cases, which were referred to the CJEU by courts in **Ireland** and the **UK**,[36] may have also contributed to the decision of certain EU Member States to temporarily suspend transfers of asylum seekers to **Greece**.[37]

Some observers see the ECtHR ruling in the *M.S.S.* case as a blow to the EU asylum system in the sense that the assumption no longer stands that all EU Member States respect fundamental rights and that it is therefore safe to automatically transfer asylum seekers between EU countries.[38] At the same time, the European Commissioner for Home Affairs, Cecilia Malmström, underlined the need for all EU Member States to meet their responsibilities under the asylum system in order to ensure that all those in need can avail themselves of international protection.[39] In this sense, one explicit objective of the further development of the CEAS is to increase solidarity and responsibility among EU Member States, as well as between the EU and third countries.

It is worthwhile noting that **Greece** committed to reform its asylum system based on a national action plan including immediate and long-term measures. In particular, Greece adopted a new Presidential Decree in November 2010 to cover the transitional period until the new asylum service is established and the new law regulating this service is adopted, and until the screening centres providing initial reception for persons crossing the borders are established.[40] Moreover, during the February 2011 Management Board meeting of the EASO, Greece announced that it would ask for the deployment of the first 'asylum support teams' who will provide assistance to address current demands in its asylum system.

1.1.5. Measures based on solidarity

The European Commission and the EU Member States, together with UNHCR, EASO and Frontex, are engaged in substantial efforts to assist Greece. This support concerns both the asylum system, but also migration management more generally. It combines significant financial and practical assistance for the reform of the national asylum system, border and return management, a more efficient use of the relevant EU funds on migration management and better cooperation with neighbouring countries, in particular Turkey.

Another example of solidarity-based measures can be found in burden sharing among some Member States. In 2010, **Germany** and **France**, alongside other EU Member States, continued to alleviate the pressure on the overburdened asylum system of **Malta**, through refugee relocation

32 Chapter 2, 'Border control and visa policy'.
33 ECtHR (2010).
34 ECtHR, GC, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011.
35 For more on the situation in Greece, see FRA (2011).
36 CJEU, C-411/10, *NS v. Secretary of State for the Home Department*, 18 August 2010; and C-493/10, *M.E. and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 11 October 2010.
37 For more information, see, for example, the Netherlands, Decision 5671201 of the Ministry of Justice to halt transfers, 13 October 2010.
38 For more information, see, for example, ECRE (2011).
39 European Commission (2011).
40 Greece/PD 114/2010 of 22 November 2010. See also law no. 3907/2011 published on 26 January 2011.

projects. A study commissioned by the European Parliament, which was completed in January 2010, calculated that asylum spending in relation to gross domestic product (GDP) was 1,000 times higher in Malta than in Portugal in 2007. The study further confirmed that Malta experienced pressures on its asylum system disproportionate to its capacity. **Bulgaria**, **Cyprus** and **Poland** experience similar pressure due to limited capacity.[41] According to information issued by the French Ministry of Immigration, Integration, Asylum and Consolidated Development (*Ministère de l'immigration, l'intégration, l'asile et le développement solidaire*), **France** accepted 92 recognised refugees from **Malta** in 2009 and 93 in 2010. **Germany** relocated 102 refugees from **Malta** in 2010. These arrivals are part of the intra EU Relocation from Malta (EUREMA) pilot project, which includes 10 participating EU Member States: **France**, **Germany**, **Hungary**, **Luxembourg**, **Poland**, **Portugal**, **Romania**, **Slovakia**, **Slovenia** and the **UK**. Apart from **France** and **Germany**, most Member States have pledged to take five to 10 refugees each. According to the European Parliament report, the pilot project is an ad hoc example of responsibility sharing, although its impact is primarily symbolic.[42] In comparison, a total of more than 600 refugees have departed for the USA from **Malta** since 2007 and a further 250 refugees were in the process of being relocated at the end of 2010.[43]

1.2. Rights of irregular migrants

Although irregular migrants form only a small proportion of the migrant population they are more likely to be exposed to human rights violations than other groups of migrants.[44] The term irregular migrant refers to an individual whose stay on the territory of a Member State is not authorised, including individuals who have received a negative decision on their asylum claim. Their irregular status normally prevents them from seeking redress where their rights are violated, as this would expose them to the risk of being removed. Therefore, existing safeguards, such as the obligation on Member States to provide mechanisms through which third-country nationals in illegal employment may lodge complaints either directly or through third parties under the Employer Sanctions Directive, should be fully taken into account in national implementing measures.[45]

The majority of international human rights norms are generally applicable to every person, irrespective of their migration status. Only certain rights, most notably some socio-economic and political rights are limited to nationals or to non-nationals staying or residing lawfully. Hence, although none of the EU Member States have ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), they are nevertheless bound by other core international human rights instruments they adhere to, for instance, the ECHR, the UN Convention on the Rights of the Child or International Labour Organisation (ILO) instruments. In addition, with an increasing number of ratifications of the ICRMW,[46] the pressure on European states to ratify this human rights instrument which specifically protects migrant workers is likely to increase.

FRA ACTIVITY

Examining key aspects of the social situation of irregular migrants

In 2010, the FRA published its report on *Detention of third-country nationals in return procedures*, thereby providing a legal analysis of a number of issues covered in the Return Directive. The second project looks at the social situation of irregular migrants in the EU. For this project, in 2010, the FRA collected information through field work, including interviews with irregular migrants, analyses of secondary data, and questionnaires from national authorities, municipalities and various actors working with irregular migrants. Building on this, the FRA plans to examine in greater detail key aspects of the social situations of irregular immigrants in the EU in order to assess the extent to which their fundamental rights are respected and protected. Areas covered by the research include health, housing, education, social care, fair working conditions and access to justice.

For more information, see: http://fra.europa.eu/fraWebsite/research/projects/proj_irregularimmigrants_en.htm

1.2.1. Immigration detention

Where individuals have been unsuccessful in their claims for asylum or where they are otherwise unlawfully present in an EU Member State, they may be removed, and may also face detention pending removal. These issues are in part regulated by the Return Directive.[47]

In 2010, the ECtHR found that three Member States were in breach of the ECHR due to unlawful detention and inhuman treatment of detained foreigners.[48] This indicates that detention of asylum seekers and migrants for immigration purposes remains an area where respect for fundamental rights is at risk.

41 European Parliament (2010a).
42 *Ibid.*, p. 46.
43 Figures received from UNHCR Malta on 15 December 2010.
44 Looking at the EU in particular, figures from the European research project Clandestino (2007-2009), estimated the size of the irregular population in the EU 27 at 1,900,000-3,800,000 in 2008. Whereas, according to Eurostat (2009) some 19.5 millions third-country nationals officially lived in the EU on 1 January 2008.
45 Directive 2009/52, OJ 2009 L 168, p. 24.
46 As of 13 December 2010, there were 44 States parties to the ICRMW.
47 Directive 2008/115/EC, OJ 2008 L 348, p. 98.
48 See for example, ECtHR, *Al-Agha v. Romania*, No. 40933/02, 12 January 2010; ECtHR, *A.A. v. Greece*, No. 12186/08, 22 July 2010; ECtHR, *Massoud v. Malta*, No. 24340/08, 27 July 2010.

The Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) published its report in November 2010, following its fifth periodic visit to **Greece** in September 2009. The CPT delegation found: allegations of ill treatment by detained irregular migrants; lack of access to doctors; no access to free legal aid for irregular migrants and lack of information on their detention in a language they can understand; grim conditions of detention due to overcrowding and poor material and hygienic conditions; and the detention in police or border guard stations for weeks and even months of both irregular migrants and persons facing criminal charges. In October 2010, the UN Special Rapporteur on Torture presented his preliminary findings on irregular immigration and asylum in **Greece**, including evidence of: inhuman detention conditions for immigrants due to overcrowding in prisons and detention facilities; poor health conditions; lack of an independent investigation mechanism for victims of physical abuse; and dysfunctions in the asylum system and protracted detention of irregular migrants. While acknowledging the overwhelming situation faced by **Greece**, the UN Special Rapporteur recommended that **Greece** be provided with substantial support to handle the immense inflow of irregular migrants, as well as advocating the revision of the Dublin II Regulation towards a fairer system of burden sharing for refugee protection in the EU. Similar findings were reported by the UNHCR.

The situation at the detention facilities at the Greek-Turkish border has also been described by a report by the FRA issued in early March 2011. The FRA noted that in spite of €9.8 million emergency funding granted by the EU under the European Refugee Fund to Greece to cover immediate and urgent needs and the strengthening of the asylum system, the situation in the detention facilities remains essentially unchanged. At the beginning of March, the only visible change was the deployment of medical staff to these facilities.[49]

EU Member States transferring asylum seekers under the Dublin II Regulation back to overburdened states for the processing of their applications may risk exposing the applicants to breaches of their fundamental rights. Such a situation may occur either due to reception conditions in the overburdened state (as illustrated in relation to Greece) or due to the risk that the overburdened state might return applicants to their state – where they face the threat of persecution, a real risk of torture, and arbitrary deprivation of the right to life or irreparable harm – or a state of transit where they face a risk of persecution or serious harm (the principle of *non-refoulement*). This includes the prohibition to return a person to a transit country where the person is not protected from return to persecution or serious harm (chain *refoulement*).

In 2010, the FRA issued a report on the detention of third-country nationals in return procedures.[50]

In January 2010, the Parliamentary Assembly of the Council of Europe adopted a Resolution and a Recommendation on the detention of asylum seekers and irregular migrants in Europe.[51] The Assembly encouraged Member States of the Council of Europe to follow 10 guiding principles governing

Promising practice

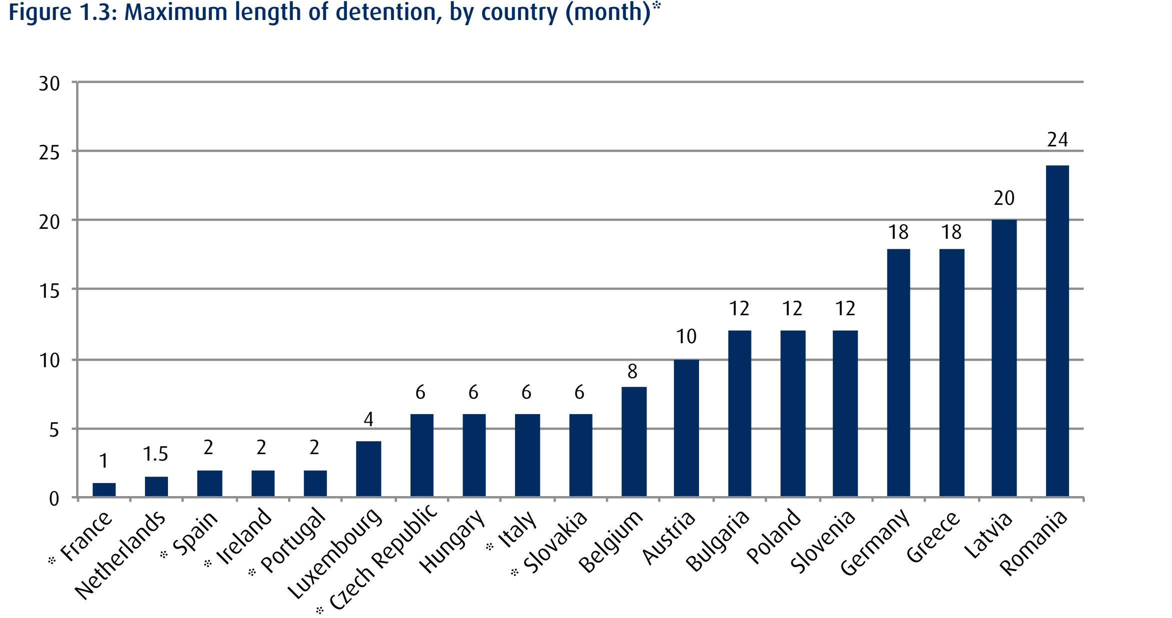
Alternatives to detention of irregular families with children

One issue examined in the 2010 FRA report relates to alternatives to detention. Although many EU Member States provide for the possibility of imposing alternatives to detention, this is often done only exceptionally and primarily for particularly vulnerable groups, such as families with children. In Belgium families may be placed in open houses. This programme is accompanied by individual counselling on the immigration options available to the migrant. So far this alternative appears quite successful, as it reduces the need for deprivation of liberty without substantially increasing absconding rates, thanks to the intense individual counselling.

Another aspect concerns the length of pre-removal detention. The Return Directive provides for a maximum length of detention of six months, which can be prolonged under certain conditions up to 18 months in total. The directive required transposition to be completed by December 2010. As of November 2010, eight EU Member States had not laid down by law a maximum time limit for pre-removal detention or for certain types of pre-removal detention: **Cyprus**, **Denmark**, **Estonia**, **Finland**, **Lithuania**, **Malta**, **Sweden** and the **UK**.[52] In addition, in the Netherlands no upper limit is foreseen in law for deprivation of liberty resulting from Article 59.1(a) of the Aliens Act 2000, which is by far the most common ground for the detention of foreigners. Without a maximum period of detention stipulated by law, the rights of irregular migrant detainees are protected only to the extent that they can exercise rights of judicial review. As shown in Figure 1.3, in late 2010 upper time limits in other EU Member States for the deprivation of liberty of foreigners who have been issued an expulsion order ranged from 32 days in France to 20 months in **Latvia** or two years in **Romania**.

49 FRA (2011).
50 *Ibid.*, p. 43.
51 Council of Europe, Parliamentary Assembly (PACE) (2010a); PACE (2010b).

Figure 1.3: Maximum length of detention, by country (month)*



*Note: * Lengths of detention expressed in days or weeks in national legislation are provided in months in the graph. In countries where more than one time limit exists, the longest possible period of detention has been selected. States that have an upper time limit only for certain situations of pre-removal detention have been included in the list; this is the case in the Netherlands and Romania.*

Source: FRA (2010c), Detention of third-country nationals in return procedures*, Vienna, FRA*

the circumstances in which the detention of asylum seekers and irregular migrants may be legally permissible.

The Assembly also recommended that the Committee of Ministers of the Council of Europe adopt rules on minimum standards of conditions of detention of irregular migrants and asylum seekers, and establish a consultation body. Such a body, it stated, should be comprised of government experts, members of civil society, and relevant representatives of international organisations, the European Commission and the Council of Europe. This body would have the task of examining in detail the 10 guiding principles on the circumstances in which the detention of asylum seekers and irregular migrants is legally permissible. This is the first time that an international body has called for the development of specific standards for immigration detention. However, in reply,[53] the Committee of Ministers expressed the opinion that the pre-existing 2003 Recommendation on measures of detention of asylum seekers and the 2005 'Twenty guidelines on forced return' largely corresponded to the substance of the documents put forward by the Assembly.[54] It went on to state its intention to initiate a study on the implementation of the latter two documents by the Member States.

1.2.2. Returns

The Return Directive sets out the conditions under which third-country nationals without a right to stay may be removed from the territory of a Member State. Application of this legislation has given rise to three challenges in terms of human rights protection: firstly, the treatment of individuals during the removal process itself; secondly, the impact of a decision to remove individuals on their right to a family life; and thirdly, the operation of readmission agreements between the EU and its Member States on the one hand and third states on the other.

In relation to the treatment of individuals, Article 8 (6) of the Return Directive creates a duty to establish "an effective return monitoring system" with the aim of reducing the risk of ill-treatment or death during return procedures, instances of which continued to occur in 2010.[55] While the directive does not set criteria for determining 'effectiveness', in order to guarantee fairness in the process it can be assumed that such monitoring would benefit from the establishment of bodies with independent and adequately trained personnel, able to report their observations to the relevant authority. From the evidence collected by the FRA, it seems that only three EU Member States, namely **Austria**, **Germany** and **Luxembourg**, involve external actors (NGOs or national human rights institutions) in this work.

52 *Ibid.*, p. 43.
53 Council of Europe (2010).
54 See the reply adopted by the Committee of Ministers on 13 October 2010 at the 1095th meeting of the Ministers' Deputies, CM/AS(2010) Rec1900, final 15 October 2010.
55 For example, an Angolan irregular migrant died during a removal by air from the UK after having been restrained by private security guards in October 2010; for more information, see P. Lewis, M. Taylor and C. de Comarmond (2010).

FRA ACTIVITY

Monitoring returns

To gather the opinions of NGOs on the opportunities and risks for return monitoring, in December 2009 the FRA co-organised a workshop on the monitoring of forced returns with ECRE and the Churches' Commission on Migrants in Europe. Benefits of effective national return monitoring systems were highlighted and ways to mitigate the risks for civil society actors engaging in such activity identified. Three pre-conditions for effective monitoring were drawn up: a clear definition of the rules of engagement of the monitor; adequately qualified monitoring staff; and an effective reporting mechanism.

At national level, individual cases of returns continued to attract media attention and clearly raised fundamental rights issues, such as the right to family life, as illustrated in the following two examples. In **Finland** in March 2010, the Supreme Administrative Court ruled against the granting of residence permits to two elderly women staying irregularly in Finland but whose children and grandchildren lived in the country. Publicity surrounding the case sparked a political debate, with some criticising the rigidity of Finnish legislation.[56] Similarly, in **Lithuania** an elderly woman staying irregularly, who was living with her son, was refused a residence permit, which she applied for on the grounds of family reunification. The Supreme Administrative Court reversed the decision, stressing the obligation of national institutions to respect the right to private and family life guaranteed by Article 8 ECHR. The court also made reference to the Family Reunification Directive[57] and the Return Directive, stating that they obliged Member States to respect the right to family life when deciding on the expulsion of aliens.[58]

A recent report by UNICEF[59] investigated the situation of Roma, Ashkali and Egyptian children who were deported from **Germany** to Kosovo with their families. Since they had lived in Germany for many years under toleration status, most of the 116 children interviewed felt distraught and disoriented in Kosovo. While they had attended school in Germany, three quarters of children interviewed had not yet attended school in Kosovo because they did not know the language, lacked school certificates from Germany or because their families were too poor. UNICEF argued that forcibly returning families with children to Kosovo could in some cases be in breach of the principle of the best interests of the child enshrined in the UN Convention on the Rights of the Child (CRC).

1.2.3. Readmission agreements

Readmission agreements involve a reciprocal agreement between a Member State and a third state to cooperate over the return of irregular migrants, including individuals whose asylum applications have been unsuccessful. These agreements may be used in the context of returning an individual under the Return Directive, and have been used in particular to return individuals to a transit state where they have been apprehended following an attempt to cross the external borders of the EU in an irregular manner. Each Member State has a web of bilateral readmission agreements or cooperation agreements that include provisions on readmission.[60]

In addition, Member States have mandated the European Commission to conclude readmission agreements for the EU as a whole. Approximately a dozen EU readmission agreements have thus far been concluded and a mandate has been given to the Commission to negotiate others, including with Morocco and Turkey.[61] In 2010, the Council adopted two readmission agreements: one with Pakistan[62] and one with Georgia.[63]

A recent study on Readmission Policy in the European Union commissioned by the European Parliament shows that readmission policies can have serious consequences for human rights guarantees.[64] In particular, it highlights the frequency of 'premature returns' where states are considered to be safe destinations for return upon the mere cessation of hostilities, even though serious risks to human rights protection may remain. The bilateral agreements between Libya and Italy illustrate the risks that a strict application of enhanced cooperation agreements can pose to human rights, such as the *non-refoulement* principle, given the serious concerns for human rights protection of irregular migrants present in Libya. In this sense, the authors of the study criticise the fact that readmission agreements are seen by Member States and the European Commission as an effective way to address irregular flows of migrants to the EU "regardless of whether the country where migrants are to be readmitted (i.e., Libya) already possesses the capacity to fully respect the fundamental human rights and the dignity of the removed persons".[65]

56 Finland, Ministry of Interior (2010) and Helsingin Sanomat (2010).
57 Council Directive 2003/86/EC, OJ 2003 L 251, 22, p. 12.
58 Lithuania/Lietuvos vyriausiasis administracinis teismas/ A-822-1226-09, 22 October 2009.
59 UNICEF (2010).
60 European University Institute (2010). It shows the increasing density of the bilateral patterns of cooperation on readmission involving European countries.
61 For more information, see Statewatch: www.statewatch.org/ news/2010/jan/eu-readmission-agreements.pdf.
62 OJ 2010 L 287, p. 52-67. The agreement entered into force on 1 December 2010.
63 European Commission (2010e).
64 European Parliament (2010d).
65 *Ibid.* p. 40.

The Parliamentary Assembly of the Council of Europe recently issued a resolution relating to readmission agreements. The resolution calls on Council of Europe Member States to consider the human rights situation and the availability of a well-functioning asylum system in a state prior to entering into negotiations on such agreements with that state.

> *"There is [...] a risk that readmission agreements pose a threat, directly or indirectly, to the human rights of irregular migrants or asylum seekers. This concerns, in particular, the risk that the sending or the readmitting country fails to honour their obligations under the Geneva Convention [...] and then uses a readmission agreement to enforce a flawed decision."*
>
> *Council of Europe, Parliamentary Assembly, Resolution 1741 on readmission agreements: a mechanism for returning irregular migrants, points 3 and 7.1, 22 June 2010*

1.3. Immigration and integration

This section focuses on the fundamental rights situation of legally resident migrant workers, and measures to promote integration. The Stockholm Programme encourages the creation of flexible admission systems that are responsive to the needs of Member States and enable migrants to take full advantage of their skills and competences. It also calls for integration policies aimed at granting them rights and obligations comparable to those of EU citizens.

1.3.1. Legally resident third-country nationals

As noted in section 1.1. on asylum, in December 2010 the Council and the European Parliament reached an agreement on the amended text of the Long-term Residents Directive, concerning the status of third-country nationals who are long-term residents. However, progress on other pending instruments regulating legal migration has been slow. In particular, the European Commission's proposal for a directive to establish a single procedure and a common set of rights for all migrant workers has not progressed significantly.[66]

The amended Long-term Residents Directive allows beneficiaries of international protection to be granted long-term resident status and enjoy a number of rights, including facilitating movement within the EU, and equal treatment with EU citizens in education, access to the labour market and social security benefits. Persons granted international protection become eligible for long-term resident status after a period of five years has elapsed. The point from which this period begins does not necessarily coincide with the date on which the application for international protection was lodged. Article 4 (2) stipulates that where the application process exceeds 18 months in length, this entire period shall count towards the five-year requirement. Where the application process takes less time, EU Member States are required to put at least half of the waiting period towards the requirement.

Legislation to regulate the admission and stay of third-country national intra-corporate transferees (non-EU nationals who are personnel of multinational enterprises working outside the EU, and then transferred to posts in a Member State) and seasonal workers was proposed by the European Commission in July 2010, in the form of two draft directives.[67] Each proposed directive sets out rules governing the admission of this category of workers, and the rights that they will enjoy as regards equal treatment, procedural rights and (in relation to intra-corporate transferees) movement between Member States.

Both proposals are undeniable steps forward in ensuring common social and procedural rights for third-country nationals employed in seasonal work or posted by their employer to the EU. However, some concerns have been expressed, including by the European Trade Union Confederation.[68]

1.3.2. Integration

Article 79 (4) of the Treaty on the Functioning of the European Union (TFEU) allows the EU to establish measures to provide incentives and support for Member States in promoting the integration of legally resident third-country nationals. This new legal basis was introduced by the Treaty of Lisbon. The Stockholm Programme reaffirms that granting comparable rights, responsibilities and opportunities for all is at the core of European cooperation in integration, while "taking into account the necessity of balancing migrants' rights and duties".

This has paved the way for a number of new developments in the area of integration, namely the exploration of the feasibility of European Integration Indicators and European Integration Modules, and the call for a renewed European agenda on integration. The European Integration Modules are intended as a source of inspiration for Member States when developing or implementing integration programmes or actions. At the same time, integration indicators are used to monitor the results of integration policies. The Commission also published its third edition of a Handbook on integration in April 2010, prepared with the help of the National Contact Points on Integration.[69]

At the Zaragoza ministerial conference on integration in 2010, the Ministers in charge of migration policies agreed to stress the need to develop a new agenda on integra-

66 European Commission (2007). The European Parliament failed to agree an amended proposal at first reading in December 2010. See European Parliament (2010b).

67 European Commission (2010b).
68 European Trade Union Confederation (ETUC) (2010).
69 European Commission (2010c).

tion.[70] The Europe 2020 strategy for smart, sustainable and inclusive growth also highlighted the need to design a new agenda for migrants' integration "to enable them to take full advantage of their potential".[71] This renewed EU agenda on integration is likely to reinforce existing instruments and give rise to new instruments to improve knowledge and exchange between Member States, and to facilitate mainstreaming of integration priorities in all relevant policy areas.

Efforts in the framework of the Europe 2020 strategy should be complemented by *"an ambitious integration agenda [...]. This agenda should include a coordination mechanism as proposed in the Stockholm Programme in order to improve structures and tools for European knowledge exchange and facilitate mainstreaming of integration priorities in all relevant areas."*

Council of the European Union, Council Conclusions on the follow-up of the European Pact on Immigration and Asylum, 3018th Justice and Home Affairs Council meeting, Luxembourg, 3 June 2010.

Despite the increasing EU momentum of integration issues, Member States' views and approaches continue to differ as regards goals and means of integration policies. Nevertheless, certain trends can be detected, for instance, some Member States seem to be moving towards linking the issuing of residence permits to integration requirements for certain categories of migrants. This is illustrated by the following examples from six Member States.

In **Denmark**, legislation on an immigration test was amended and entered into force in 2010.[72] As of November 2010, third-country nationals must pass the test in order to be granted a residence permit on the grounds of family reunification with a spouse/partner in Denmark or, in the case of preachers, to be granted an extension of the residence permit. The immigration test has to be passed within a set period of time after entering the state or after receiving an official invitation.

Denmark also strengthened its integration requirements for permanent residence. The Danish Supreme Court ruled on the legality of the 'attachment requirement' that couples have to meet in order to benefit from family reunification. The spouse and the sponsor's combined attachment to Denmark must be greater than their combined attachment to any other state. This requirement is lifted if the sponsor has held Danish citizenship for at least 28 years, or if the sponsor was either born and raised in Denmark or has lived in Denmark since early childhood and has resided there legally for more than 28 years.[73] In a judgment of January 2010, the Danish Supreme Court held that the 'attachment requirement' did not violate the right to family life of Danish citizens (as guaranteed by Article 8 ECHR), either taken alone or in conjunction with the prohibition on discrimination (Article 14 ECHR).[74] The case is now pending before the ECtHR.

In **France**, a government bill seeks to make the renewal of residence permits conditional on the efforts towards integration made by individuals.[75] In the **Netherlands**, as of January 2010, the granting of permanent residence status is made conditional on passing the civic integration test.[76] In **Malta**, the legislation transposing the Long-term Residents Directive was amended to include an integration requirement. A third-country national applying for the status of long-term resident in **Malta** is now required to produce evidence that he/she attended an integration course in the 12 months prior to the application, passed the subsequent exam with a minimum score of 75%, and passed a Maltese or English exam with a minimum score of 75%.[77]

In **Italy**, the Council of Ministers approved a plan to introduce a credits-based system to issue residence permits where relevant criteria may include knowledge of the language, Italian law and public services.[78] Other Member States remain committed to the principle of voluntary participation of migrants in integration programmes.[79] This includes **Sweden**, where a new law on 'introduction', providing for a 60-hour course on Swedish society for new arrivals, was submitted to the Integration Minister.

In the Stockholm Programme, the European Council invited the European Commission to support Member States' efforts in identifying "joint practices and European modules to support the integration process, including essential elements such as introductory courses and language classes, a strong commitment by the host community and the active participation of immigrants in all aspects of collective life".[80] The declaration by the European Ministerial Conference on Integration in Zaragoza puts forward 15 principles the ministers agreed upon, also reiterating the call to "strengthen local initiatives and civic participation investing in districts with a high immigrant concentration in order to create a sense of belonging as it is vital that immigrants participate in all aspects of social, economic, and cultural life".[81]

70 European Ministerial Conference on Integration (2010).
71 European Commission (2010d), p. 18.
72 Denmark, Bill No. 87 amending the Aliens Act, Act on Active Social Policy L 87 and Act No. 400 of 21 April 2010, adopted by Parliament on 15 April 2010.
73 For more information, see the Danish Immigration Service and Ministry of Refugee, Immigration and Integration Affairs website: www.nyidanmark.dk/en-us/coming_to_dk/familyreunification/spouses/attachment_requirement.htm.
74 Danish Supreme Court, judgment of 13 January 2010 concerning spousal family reunification (judgment published in the Danish legal journal U2010.1035).
75 France, Ministry of Immigration, Integration, Asylum and inclusive Development (2010).
76 The Netherlands, Aliens Act 2000. For more information, see also the Netherlands Immigration and Naturalisation Department website: www.ind.nl/.
77 Malta (2010).
78 Italy (2010).
79 Sweden, Lag (2010:197) om etableringsinsatser för vissa nyanlända invandrare.
80 European Council (2010), p. 30.
81 European Ministerial Conference on Integration (2010), p. 11.

As regards active citizenship, the 2010 Zaragoza declaration refers in its Annex to the 2009 Swedish Presidency conference conclusions on indicators and the important role that monitoring of the outcome of integration policies can play in this regard. The Swedish Presidency conference conclusions, however, also highlighted that no unified view existed among Member States regarding indicators in the area of active citizenship. At the same time, the conference conclusions underlined that the participation of immigrants in the democratic process as active citizens supports their integration and enhances their sense of belonging.[82]

As regards the political participation of third-country nationals,[83] it is worthwhile noting that only five EU Member States – **Denmark**, **Finland**, **Italy**, the **Netherlands** and **Sweden** – have ratified the Council of Europe 1992 Convention on the Participation of Foreigners in Public Life at Local Level. However, a great number of EU Member States grant, to some extent, third-country nationals the right to political participation at local level – in fact, more than half of the EU Member States do so. **Belgium**, **Denmark**, **Greece**,[84] **Ireland**, the **Netherlands** and **Sweden** provide all third-country nationals with the right to vote and the right to stand as a candidate. **Luxembourg** and **Estonia** provide third-country nationals with the right to vote but not to stand as a candidate. Some EU Member States, such as **Finland**, **Lithuania**[85] or **Slovakia** grant the right to vote and to stand as a candidate to all third-country nationals who have a permanent residence or who hold a long-term residence status. In **Lithuania** in 2007, for example, 25 non-Lithuanian citizens stood as candidates in local elections out of a total of 13,422 candidates; none of the non-Lithuanian candidates, however, were elected.[86] **Slovenia** and **Hungary** provide third-country nationals with permanent residence or with long-term residence status with the right to vote but not to stand as a candidate. Finally, several Member States provide only citizens of certain third countries with political rights: in **Portugal** and the **UK**, certain citizens of certain third countries have the right to vote and to stand as a candidate, while in **Spain**[87] citizens from certain third countries have the right to vote, but not to stand as a candidate.

There was no clear move towards extending the right to vote to third-country nationals across EU Member States during 2010. In **Germany**, proposals in this direction were discussed,[88] while in **France** the legislature rejected proposals in this vein. In **Denmark**, the number of years of legal residence required in order to be granted the right to vote was raised from three to four. It should be noted that even where political participation is legally guaranteed, awareness is often low among third-country nationals that they may enjoy a right to vote in local elections. As a result, the participation rate of third-country nationals is rather low in such elections. For instance, in Ireland, in the local elections of June 2009, the number of combined EU and non-EU citizens on the electoral register represented about 12% of the migrant population living in Ireland.[89]

Outlook

With regard to asylum, two issues will stay at the forefront of the EU agenda in the coming years. Firstly, if the CEAS is to be completed by 2012 significant progress will be required in 2011. Secondly, following the *M.S.S* case Member States that have not already done so are likely to suspend transfers of asylum seekers to Greece, in application of the Dublin II Regulation, for an indefinite period of time. Whether further initiatives based on solidarity and collective responsibility will emerge remains unclear.

The fundamental rights challenges in the context of returns can be expected to crystallise as Member States continue with the transposition and implementation of the Return Directive.

In the case of legally resident third-country nationals, the European Commission is likely to table new proposals on labour migration in the years to come, in addition to the 2010 proposals on seasonal workers and third-country intra-corporate transferees. The pace of economic recovery in the EU may well have an impact on the readiness of Member States to open up new legally recognised migration routes for labour migrants.

Finally, regarding the integration of third-country nationals, it remains to be seen whether the introduction of a legal basis for cooperation on integration in Article 79 (4) TFEU will deepen the EU's impact in that area. The answer may become clearer once a renewed agenda for integration is proposed by the European Commission.

82 *Ibid.*, p. 12-13.
83 For political participation of EU citizens outside their home state, see Chapter 7 'Participation of EU citizens in the Union's democratic functioning'.
84 Greece, Law 3838/2010 on 'Modern provisions regarding Greek citizenship and political participation of aliens of ethnic origin and aliens who reside lawfully in Greece', adopted in March 2010.
85 Lithuania, Law No. IX-959, 28 June 2002.
86 For more information, see the communication from the RAXEN national focal point in Lithuania, the Centre of Ethnic Studies at the Institute for Social Research, with the Central Electoral Commission of the Republic of Lithuania, 2 October 2007.
87 The third-country nationals who will be able to vote in the May 2011 local elections are nationals from Bolivia, Cap Verde, Chile, Colombia, Ecuador, Iceland, Paraguay, Peru, New Zealand and Norway.
88 Bundestag-Drucksachen 17/1047, 17/1150 and 17/1146.
89 New Communities Partnership (NCP) (2010).

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April

May

22 June – CoE Parliamentary Assembly issues resolution on readmission agreements

June

July

August

September

October

November

December

EU

January

February

25 March – EU adopts a regulation amending the convention implementing the Schengen agreement and the regulation regarding movement of persons with a long-stay visa

March

26 April – Council supplements the Schengen Borders Code on the surveillance of external sea borders for Frontex-coordinated operational cooperation

April

May

22 June – CJEU rules on aspects of the Schengen Borders Code in the *Melki and Abdeli* case

25 and 26 June – Council issues conclusions on 29 measures to reinforce the protection of external borders and combat illegal immigration

June

July

August

September

October

November

15 December – EU adopts a regulation amending the regulation listing the third countries whose nationals require visas when crossing borders and those whose nationals are exempt

December

2

Border control and visa policy

With the notable exception of Greece, the European Union (EU) has seen an overall downward trend in irregular migration in 2010. However, the specific situation in Greece has raised concerns that those in need of asylum will be prevented from making their claims and that mistreatment awaits those who are returned. At a more general level, steps have been taken to enhance respect for fundamental rights during joint operations undertaken under the coordination of Frontex, including proposed amendments to Frontex's founding regulation to make explicit references to human rights. While the extension of visa-free travel has allowed easier entry and free movement within the EU for citizens of some non-EU countries, the establishment of databases containing personal information raises questions about the right to data protection.

This chapter covers developments in EU and Member State policies and practices in the area of border control and visa policies for the year 2010. The chapter first considers the rights of irregular migrants and those seeking asylum when they are intercepted at the EU's borders. It then looks at visa policies allowing entry into, and travel within, the EU. In order to gain a comprehensive overview of this area, it should be read together with Chapter 1 on asylum, immigration and integration, which focuses on the situation of fundamental rights of those within the asylum-seeking process, as well as legally resident migrants.

This chapter will make frequent reference to the Schengen area and the Schengen Borders Code.[1] It is therefore important to recall that not all EU Member States are part of the Schengen area, which includes non-EU states, as shown in Figure 2.1.

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

- cooperation agreements between EU Member States and third states, which allow for interception and return of migrants at maritime borders, risked preventing those in need of international protection from claiming asylum;
- steps were taken to ensure respect for fundamental rights in the context of operations under the coordination of Frontex at the EU's external borders;
- for the first time, Frontex deployed Rapid Border Intervention Teams (Rabits) at the land border with Turkey, at the request of Greece;
- visa-free travel was granted to holders of biometric passports from Albania, Bosnia and Herzegovina and holders of Taiwanese passports.

2.1. Border control

This section will examine developments relevant to fundamental rights protection for irregular migrants at two levels. It will first explore the rights of irregular migrants and those seeking access to the asylum-seeking process at the external borders of the EU in the context of interception and return to their country of origin or country of transit. It will then analyse the rights of irregular migrants once they are within the EU.

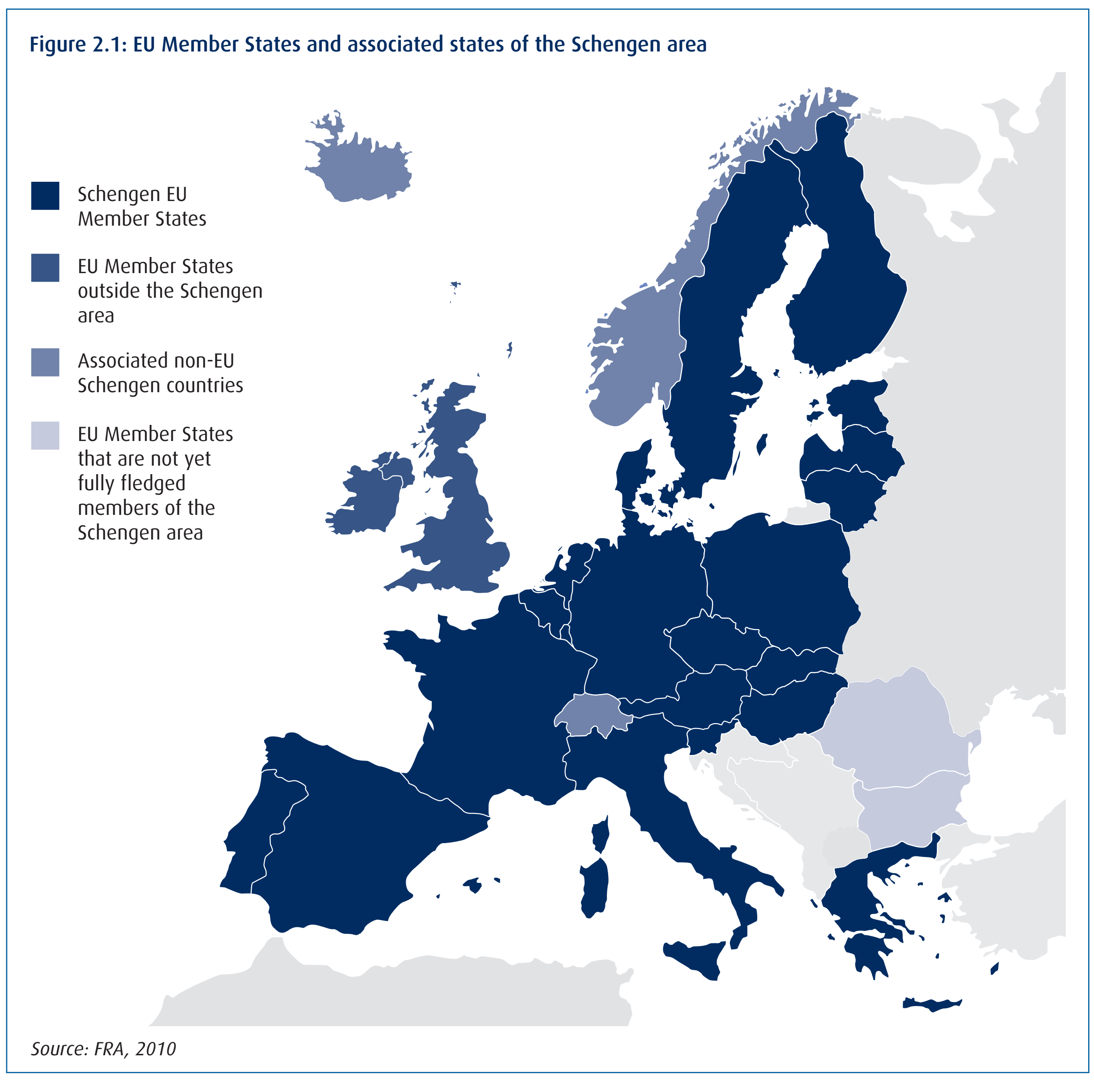
2.1.1. Curtailment of migration into the EU

In its World Migration Report 2010,[2] the International Organisation for Migration (IOM) considered that by 2050 the number of international migrants worldwide could be as high as 405 million. It also notes that the growing pressure to migrate, whether for economic reasons or to avoid or escape the effects of environmental change, far outstrips the availability of legal opportunities to do so. Therefore,

1 Regulation (EC) No. 562/2006, p. 1.

2 IOM (2010), p. 3.

Figure 2.1: EU Member States and associated states of the Schengen area



Source: FRA, 2010

it will continue to test the ability of states to manage their borders and address the complexities of irregular migration.[3]

Nevertheless, figures from Frontex on detected illegal border crossings into the EU show that illegal migration flows decreased in the period from January to September 2010, except at the Greek land borders.[4] The decrease in illegal migration flows is mainly due to two factors: a fall in employment opportunities in the EU, and more effective migration and asylum policies in the Member States, including better cooperation with third countries or between Member States.[5] For instance, the UK Border Agency attributes the 80% fall between September 2009 and 2010 in the number of irregular migrants attempting to enter the **UK** from Calais over a 12-month period to the closing of a makeshift camp for irregular migrants in **France** in 2009, as well as to the intensity of British and French checks in Calais.[6]

Increased cooperation has taken place at two levels: among EU Member States themselves, and between Member States and third states with regard to maritime borders. Member States, such as **France** and **Italy**, have announced increased cooperation in patrolling maritime borders in the western and central Mediterranean,[7] where irregular entries remained low before the political uprising in north African countries. EU Member States and third states have also increased their cooperation with regard to maritime borders. In **Spain**, detections of illegal border crossings dropped from 39,000 detections in 2006 to only about 4,450 detections in the first three quarters of 2010, partly

3 *Ibid.*, p. 4.
4 Frontex (2010a).
5 Frontex (2010b).
6 UK Border Agency (2010).
7 For example, Italy and France announced that they would intensify cooperation with regard to joint maritime patrols in the Mediterranean and joint training of coast guards. For more information, see France, Ministry of Immigration (2010).

due to increased cooperation in border management with west African states.[8] Italy experienced a similarly dramatic decrease in irregular migrants landing on Italian coasts, supposedly mainly due to the agreement with Libya signed on 30 August 2008 and adopted on 3 February 2009.[9] The agreement provides for Italian coastguards to turn intercepted boats carrying illegal immigrants in the Mediterranean sea back to the Libyan coast.[10]

FRA ACTIVITY

Visit to Greek-Turkish border in January 2011

In 2010, the FRA decided to carry out an in-depth investigation at the Greek-Turkish border in order to understand the obstacles and difficulties in responding immediately to a humanitarian emergency. FRA's fieldwork research also aimed at providing evidence-based advice to the relevant authorities to fully respect fundamental rights. The report, entitled *Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner*, was presented to EU institutions and the Greek government. It provides evidence for the development of effective policies at EU and national level for similar situations that may occur in future, both in Greece and in other Member States.

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

It has been highlighted that cooperation with third states, such as Libya, may run the risk of preventing those in need of international protection from actually reaching EU borders in order to lodge their applications.[11] Various organisations, including the Council of Europe and UNHCR, have criticised Italy for not observing the *non-refoulement* principle as the treatment of irregular immigrants in Libyan camps raises serious human rights concerns.[12] A case was filed with the European Court of Human Rights (ECtHR) in May 2009 by 11 Somalis and 13 Eritreans who were among the first group of about 200 migrants intercepted by Italian coastguards and summarily returned to Libya.[13] Following public statements criticising the returns, in June 2010 Libya, which is not a party to the 1951 UN Convention relating to the status of refugees and has no asylum system, asked the UNHCR to close its office in Tripoli and stop its activities, which included registration of asylum seekers, refugee status determination and visiting detainees.[14] An agreement concluded between the European Commission and Libya is discussed in the following subsection.

2.1.2. Responses at EU level

In parallel to steps to curtail migration, three measures occurred at EU level that may have an impact on fundamental rights guarantees: firstly, an agreement between the European Commission and Libya on migration; secondly, the strengthening of human rights protection as part of the mandate of Frontex; and thirdly, the deployment of Rapid Border Intervention Teams (Rabits) at the Greek-Turkish land border.

The situation of asylum seekers in Libya, including potential problems resulting from cooperation between Libya and EU Member States, has given rise to concern. In October 2010 the European Commission and Libya signed a *joint communiqué* on a migration cooperation agenda which contains a list of agreed initiatives for possible further dialogue and cooperation.[15] These initiatives include support and assistance to Libya in screening people in need of international protection in mixed migration flows, and enhancing Libya's reception capacities.

"The situation at the Greek land border with Turkey is increasingly worrying. The flows of people crossing the border irregularly have reached remarkable proportions and Greece is manifestly not able to face this situation alone. I am very concerned about the humanitarian situation. I trust that proper assistance will be given to all person[s] crossing the border and that the request for international protection will be considered, in full compliance with EU and international standards."

Statement by Cecilia Malmström, European Commissioner in charge of Home Affairs, upon the request of the Greek government to get assistance via Rapid Border Intervention Teams at the land border between Greece and Turkey. MEMO/10/516, 24 October 2010.

The European Commission's joint *Communiqué* with Libya was subject to criticism from the European Council on Refugees and Exiles (ECRE), which questioned whether the task of distinguishing irregular migrants from those seeking international protection could be left to Libya without posing a barrier to genuine asylum seekers.[16] However, the cooperation agenda could entail future EU assistance to reinforce Libya's capacity to prevent irregular migrants from entering Libya through its southern border, as well as the development of Libyan patrol, search and rescue capacities in its territorial waters and on the high seas.

A second development relates to the mandate of Frontex. Following the entry into force of the Treaty of Lisbon, a number of steps were taken to enhance respect for fundamental rights during joint operations of several EU Member

8 Frontex (2010a, 2010b and 2010c)
9 Italy (2009).
10 Italy, Ministry of Interior (2010). The impact of the sudden flow of large numbers of people leaving Libya as a result of the ongoing armed conflict that erupted in February 2011 will be considered in the Annual Report of 2011. See UNHCR (2011).
11 European Parliament (2011), para. (1) (f).
12 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2009); UNHCR (2009); Amnesty International (2010); Jesuit Refugee Service (2010).
13 ECtHR, *Hirsi and others v. Italy*, No. 27765/09, pending before the Grand Chamber.
14 UNHCR (2010).
15 European Commission (2010a).
16 ECRE (2010).

States undertaken at the EU's external borders under the coordination of Frontex. In February 2010, the European Commission proposed amendments to the founding regulation of Frontex.[17] These amendments include explicit references to human rights, particularly as regards training of border guards and the conduct of joint operations. For example, in the area of forced removals it requires the establishment of a code of conduct to guide the implementation of joint return flights.

A third development relates to the deployment of Rapid Border Intervention Teams (Rabits). In early November 2010, at the request of Greece, Frontex deployed Rabits to patrol the Greek-Turkish land borders. In 2010, the largest inflow of irregular migrants (both in terms of absolute numbers and of percentage increase) was registered at external land borders in Greece. According to Frontex figures, Greece was the point of entry for about 90% of all illegal border crossings into the EU in the second quarter of 2010. Greece has stated that it cannot deal with the situation alone, as it does not have the material or human capacity to process, accommodate and address the basic needs of all undocumented migrants and asylum seekers entering Greece. As discussed in Chapter 1 on asylum, immigration and integration, the situation raises serious fundamental rights concerns.

"[F]or the return of illegally present third country nationals by air ... common standardised procedures ... should simplify the organisation of joint return flights and assure return in a humane manner and in full respect for fundamental rights, in particular the principles of human dignity, prohibition of torture and of inhuman or degrading treatment or punishment, right to liberty and security, the rights to the protection of personal data and non discrimination."

Article 9.2 of the proposal to amend the Frontex Regulation, COM(2010) 61 final.

Following a request from the Council of the European Union, the European Commission proposal was amended to allow Frontex to process the personal data of individuals returned in joint operations. The European Data Protection Supervisor (EDPS) indicated that this would require articulation of a clear legal basis in the regulation as well as data protection safeguards.[18] The proposal remained under discussion at the end of 2010 in the European Parliament and the Council.

In April 2010, the Council adopted a decision that supplemented the Schengen Borders Code and provided for rules and guidelines for maritime surveillance operations coordinated by Frontex.[19] This measure is being challenged by the European Parliament in the Court of Justice of the EU (CJEU), on the grounds that it exceeds the powers granted to implement the Schengen Border Code.[20]

This Council Decision contains a set of legally binding 'Rules for sea border operations coordinated by the Agency' (i.e. Frontex) and non-binding 'Guidelines for search and rescue situations and for disembarkation in the context of sea border operations coordinated by the Agency'. The rules address such general issues as compliance with fundamental rights, *non-refoulement* of persons intercepted at sea, and assistance to persons with special needs, along with specific rules on the measures to be taken when intercepting vessels suspected of carrying irregular migrants. The guidelines concern issues relating to search and rescue operations and disembarkation of any persons rescued or intercepted, with priority to be given to disembarkation in the state from which those persons departed. Where it would be impossible to disembark rescued or intercepted persons in the state of departure, disembarkation should occur in the state hosting the operation. This new set of rules led **Malta** to announce that it would not host joint Frontex operations.

Some 200 border-control specialists have been made available by the other 26 Member States and Schengen-Associated Countries participating in the first ever Rabit deployment.[21] All Rabit officers receive mandatory human rights awareness training as part of their pre-deployment training by Frontex. Shortly prior to the Rabit deployment, NGOs expressed concerns regarding the identification of persons in need of special protection, including children.[22] Others have observed the inadequacy of providing a security-driven response to what should be seen as a humanitarian crisis which needs to be dealt with according to EU fundamental rights standards.[23]

FRA ACTIVITY

Cooperation agreement with Frontex

FRA has been cooperating with Frontex at an informal level in a variety of contexts. On 26 May 2010, the European Day of Border Guards, the FRA and Frontex signed a cooperation arrangement.[24] The arrangement includes collaboration in a number of areas, including research and training, as well as support in the development of standards and good practices to guide Frontex-led joint operations.

17 European Commission (2010b).

18 EDPS (2010).
19 Council of the European Union (2010a).
20 CJEU, C-355/10, *European Parliament v. Council*, pending.
21 Frontex (2010c).
22 Pro Asyl (2010).
23 Carrera, S. and Guild, E. (2010).
24 European Union Agency for Fundamental Rights (FRA) (2010).

2.2. Visa policy

From April 2010, EU Member States began the direct implementation of the EU Visa Code.[25] Alongside the further implementation of the Schengen borders code, the Visa Information System (VIS) and the Schengen Information System (SIS II), this led to a series of legislative changes and draft proposals in a number of Member States in 2010, including **Austria**, **Czech Republic**, **Estonia**, **Germany**, **Hungary**, **Finland**, **Italy**, **Lithuania**, **Poland**, **Slovakia**, and **Sweden**. While the relationship between visa policies and fundamental rights is not always self-evident, visa policy has an impact on the right of everyone to leave his or her country (guaranteed by Article 2 of Protocol No. 4 to the ECHR and Article 12 of the International Covenant on Civil and Political Rights). Visa policies and procedures can work to facilitate or obstruct admission into the EU. In addition to free movement rights, the establishment of databases with personal information raises questions regarding the right to data protection, as protected by Article 8 of the EU Charter of Fundamental Rights.[26]

The two main databases in the area of visa policies and border control are the SIS II and the VIS. Although not all EU Member States are part of the Schengen system, they do all have access to these information systems. The SIS[27] is an information system used by border guards, police, customs, judicial and vehicle registration authorities and authorities issuing visas in the Schengen states for the purposes of law enforcement and border control. It contains alerts on persons subject to arrest warrants or police monitoring, persons who are to be refused entry to the Schengen area, and information on lost or stolen objects such as identity documents, firearms, motor vehicles and banknotes.

The VIS[28] will contain data on admissible applications for short-stay visas,[29] including the applicant's personal and travel details, photograph and fingerprints, as well as the authorities' decisions relating to the application, such as issuance, refusal, extension or annulment. The VIS will be used by relevant visa, border control and immigration authorities. In both information systems, the original information is supplied, adapted and retrieved by the relevant authorities in Schengen states.

Although national authorities have a duty to ensure that the data they enter into European common databases is correct, up to date and in line with EU data protection and privacy rules, there remains a risk of unfair treatment of individuals.

25 Regulation (EC) No. 810/2009, OJ 2009 L 243, p. 1.
26 Chapter 3, 'Information society and data protection'.
27 Regulation (EC) No. 1986/2006, OJ 2006 L 381, p. 4; Council Decision 2007/533/JHA, OJ 2007 L 205, p. 63. The second generation SIS system (SIS II) is going to be launched in 2013.
28 Regulation (EC) No. 767/2008, OJ 2008 L 218, p. 60. The VIS is going to be launched in June 2011.
29 A short-stay visa is a visa for a stay of less than 90 days.

2.2.1. General developments at EU level

In March 2010, the Council and the European Parliament amended the Schengen Borders Code as regards the movement of persons with long-stay visas.[30] This amendment extends the freedom to travel within the Schengen area for three months in a six-month period to holders of long-stay visas that are issued by a Schengen state in accordance with its national legislation for stays of more than 90 days. The state is obliged to make a prior check in the SIS II before issuing such visas. It also harmonises the format of such visas, and provides for a maximum one-year period of validity for a long-term visa before its replacement with a residence permit.

In late 2009 and 2010, the Court of Justice of the EU (CJEU) ruled on two important cases concerning the implementation of the Schengen Borders Code which indirectly have a bearing on fundamental rights. The 2010 ruling clarified that identity checks at or near internal Schengen borders cannot have an effect equivalent to border checks.[31] The 2009 judgment related to the question of whether a Member State is obliged to take a removal decision under common Schengen rules against a person that does not fulfil, or no longer fulfils, the conditions of duration of stay, or whether it can apply its national legislation allowing, for example, for a fine. According to the CJEU, the relevant European legislation must be interpreted as meaning the Member State is not obliged to adopt a decision to expel that person.[32]

2.2.2. Visa-free travel

In line with the Thessaloniki European Council conclusions, western Balkan states were granted visa waivers in 2009 and 2010, based on the fulfilment of requirements set out in their respective 'roadmaps' for visa liberalisation established by the EU. In November 2009, the Council adopted a Council Regulation waiving visa requirements for nationals of Serbia, the Former Yugoslav Republic of Macedonia (FYROM) and Montenegro.[33] Following the visa liberalisation in December 2009, **Belgium**, **Germany**, and **Sweden** experienced increased numbers of asylum seekers from these Balkan states. After the assessment of individual asylum applications, it seems that the majority of the persons concerned are not likely to qualify for international protection.[34] Many applicants were nationals of Serbia and FYROM, mostly of Roma or Albanian ethnicity, motivated by economic factors to seek asylum in western European countries. Many had been told by travel agents or smug-

30 Regulation (EU) No. 265/2010, OJ 2010 L 85, p. 1.
31 CJEU, Joined cases C-188/10 and 189/10, *Melki and Abdeli*, 22 June 2010.
32 CJEU, Joined cases C-261/08 and C-348/08, *María Julia Zurita García, Aurelio Choque Cabrera v. Delegación del Gobierno en Murcia*, 22 October 2009.
33 Council Regulation (EC) No. 1244/2009, OJ 2009 L 336, p. 1.
34 For more information, see the Eurostat database at: www.epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database.

gling networks that lodging an application for asylum would entitle them to accommodation, pocket money or access to the job market.[35] After measures by Member States to curb these migration flows failed,[36] Commissioner Malmström called on the Serbian and FYROM authorities to take measures to prevent their citizens from asking for asylum in the EU.[37]

These developments did not jeopardise the Commission's proposal to waive visa requirements for nationals of Albania and Bosnia and Herzegovina,[38] on the grounds that those western Balkan countries have satisfied the conditions in their respective roadmaps for visa liberalisation. Following a parliamentary debate in September 2010, the European Parliament voted in favour of lifting visa obligations for holders of Bosnian and Albanian biometric passports.[39] This decision was backed by the Council in November 2010, bringing the total number of non-European Economic Area (EEA) states or administrative regions holding a visa waiver for stays of up to 90 days in the Schengen area to 42 by December 2010.[40]

Other developments include waiving visa requirements for holders of Taiwanese passports,[41] and the conclusion of a visa waiver agreement with Brazil[42] and a visa facilitation agreement with Georgia.[43] The latter agreement was concluded in parallel with a readmission agreement with Georgia, which was formally adopted by the Council in January 2011.[44] On 29 October 2010, the Commission adopted draft negotiating directives for the renegotiation of the existing visa facilitation agreements with Moldova, the Russian Federation and Ukraine.

Several Member States also signed bilateral agreements for visa waivers in order to facilitate border traffic in border areas in accordance with the Regulation on Border Traffic.[45] This regulation allows for derogation from the general rules governing border crossing at the external borders of the EU. It aims to facilitate border crossing for third-country residents living within 50 kilometres of the border by providing for special local border traffic permits. As the external borders of the EU are reinforced, local communities situated near those borders want to ensure that borders with their third-country neighbours are not a barrier to trade, social and cultural life or regional cooperation. **Latvia** and Belarus approved such an agreement in August 2010, which will come into force when ratified by the parliaments of both states.[46] Similarly, an agreement has been signed between **Latvia** and Russia,[47] and a border traffic agreement entailing visa-free travel for border area residents of **Romania** and Moldova entered into force in February 2010.[48] Finally, **Poland** and Russia called for the introduction of visa-free circulation in the Kaliningrad region, although the region extends further than the 50 kilometres allowed under the Regulation on Border Traffic.[49]

Outlook

With regard to border control, evaluation of the first deployment of Rabits in **Greece** will provide useful lessons for future operations of this nature. Close cooperation between Frontex, the FRA and the European Asylum Support Office, as well as the greater prominence of fundamental rights in Frontex's mandate, creates an opportunity for fundamental rights to become an integral element of border management.

Concerning visa policies, it remains to be seen whether visa liberalisation in the western Balkans will continue at the same pace as in 2009 and 2010. Concerns about large numbers of migrants or asylum applicants trying to settle in the EU could slow the process. A second question for the immediate future relates to the harmonised application of the common EU Visa Code. As of April 2010, the Visa Code was applied in all states participating in the common EU visa policy. It is unclear whether the procedural rights of visa applicants, such as fixed processing times and deadlines and the right to appeal negative decisions, will be applied in a similar way by all participating states.

35 Wathelet, M. (2010). For more information on Roma, see 'Roma in the EU – a question of fundamental rights implementation'.
36 Frontex (2010d), p. 20.
37 EurActiv (2010).
38 European Commission (2010c).
39 European Parliament (2010).
40 Regulation (EU) No. 1091/2010, OJ 2010 L 329, p. 1.
41 Regulation (EU) No. 1211/2010, OJ 2010 L 339, p. 6.
42 Council of the European Union (2010b), OJ 2010 L 275, p. 3. See also Council of the European Union (2010c), OJ 2010 L 273, p. 2.
43 Council of the European Union (2010d), OJ 2010 L 308, p. 1.
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46 Latvia, www.mk.gov.lv/doc/2005/AMSl_160610_pierobeza_BR.2054.doc.
47 See www.likumi.lv/doc.php?id=70556. available at www.mfa.gov.lv/en/policy/bilateral-relations/bilateral/?mode=out&state=BLR&title=&branch=0&day1=dd%2Fmm%2Fyyyy&day2=dd%2Fmm%2Fyyyy&status=0&day3=dd%2Fmm%2Fyyyy&signer=.
48 See Romania, Office for Immigration (2010).
49 See Poland, www.fakty.interia.pl/swiat/news/inicjatywa-polski-i-rosji-ws-ruchu-bezwizowego-z,1461146.

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Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, OJ 2009 L 243 (*Visa Code*).

Regulation (EU) No. 265/2010 of the European Parliament and of the Council of 25 March 2010 amending the Convention Implementing the Schengen Agreement and Regulation (EC) No 562/2006 as regards movement of persons with a long-stay visa, OJ 2010 L 85.

Regulation (EU) No. 1091/2010 of the European Parliament and of the Council of 24 November 2010 amending Council Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, OJ 2010 L 329.

Regulation (EU) No. 1211/2010 of the European Parliament and of the Council amending Council Regulation (EC) No. 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, Brussels, 15 December 2010, OJ 2010 L 339.

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UN & CoE

28 December 2009 – UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism publishes a report on the protection of the right to privacy in the fight against terrorism

December

January

February

March

April

May

June

July

August

29 September – CoE Committee of Ministers issues declarations on the Digital Agenda for Europe, on network neutrality and on the management of the Internet protocol address resources in the public interest

September

October

23 November – CoE Committee of Ministers issues a recommendation on the protection of individuals with regard to automatic processing of personal data in the context of profiling

November

December

EU

January

February

9 March – CJEU interprets the Data Protection Directive in the *Commission v. Germany* case

March

April

May

15 June – European Commission issues a communication on the use of security scanners at EU airports.

29 June – CJEU considers the scope of the protection of data in the context of access to EU documents in the *Commission v. Bavarian Lager* case

June

20 July – European Commission issues a communication on information management in the area of freedom, security and justice

July

August

21 September – European Commission issues a communication on the global approach to transfers of Passenger Name Record (PNR) data to third countries

September

October

4 November – European Commission issues a communication on a comprehensive approach to personal data protection in the EU

9 November – CJEU rules in the *Volker und Markus Schecke GbR, Hartmud Eifert, Land Hessen v. Bundesanstalt für Landwirtschaft und Ernährung* case that various provisions of EU secondary law are invalid due to a violation of the EU's data protection rules

November

December

3 Information society and data protection

Google Street View, Facebook and other social media have become part of the fabric of everyday life in the information society in recent years. In 2010, data protection concerns were raised in a number of EU Member States in relation to these developments. Moreover, national security threats continued to have an impact on airport security in 2010, which led to a heated debate at European Union (EU) level as well as in some Member States, particularly in relation to the introduction of body scanners. The protection of personal data was at the forefront of many fundamental rights debates in the EU in 2010 including in relation to new technologies and proposals concerning the reform of the EU data protection framework, taking into account the Lisbon Treaty and the Stockholm Programme.

This chapter covers developments in EU and Member State policies and practices in the area of information society and data protection in the year 2010. It sets out concerns raised by national courts with regard to the EU framework for data protection, noting in particular the question of whether the Data Retention Directive is in compliance with fundamental rights and, more generally, examining calls for reform of the framework. The chapter then deals with concerns relating to the independence, powers and resources of data protection authorities in EU Member States. Reflecting on the need for transparency in an information society, the chapter also considers the delicate balance which must be struck between data protection and the right to information. The chapter ends by reflecting on how data protection challenges were met in 2010 and how they may be met in the future in the areas of police and security cooperation, technological advances and airport security.

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

- new technologies raised new fundamental rights concerns and led to calls for a modernisation of EU data protection legislation;
- consensus grew that data protection forms a key concern in international agreements, especially in the case of those dealing with Personal Name Records (PNR) and Swift;
- concerns were raised at political and legal levels in relation to the rise in compulsory retention of communication data (telephone and Internet) by private companies;
- the independence of data protection authorities became an issue that was dealt with before the Court of Justice of the European Union (CJEU);
- political debate continued on the implications of the use of body scanners as security devices at airports;
- the balance between data protection concerns and the right to information emerged as a topic and was addressed before the CJEU.

3.1. Review of the current EU data protection framework

Data protection is explicitly enshrined in Article 8 of the Charter of Fundamental Rights of the European Union as a distinct fundamental right, the first international human rights instrument to have done so. The processing of personal data and the free movement of such data are also regulated by the Data Protection Directive.[1] Moreover, following the adoption of the Lisbon Treaty in December 2009, European Commission Vice-President Viviane Reding identified the protection of personal data of European citizens as a priority policy area in 2010.

1 Directive 95/46/EC, OJ 1995 L 281, pp. 31-50.

"I would like to single out (...) priority areas where I believe we need to show strongly that Europe's policy is changing with the Lisbon Treaty. First of all, we need to strengthen substantially the EU's stance in protecting the privacy of our citizens in the context of all EU policies."

Viviane Reding, European Commission Vice-President, 11 January 2010.

Rapid technological evolution and the increased exchange of data in today's information society has led to a rich debate on the review of current EU legislation governing data protection and privacy, which dates from 1995. The current data protection framework in the EU is therefore still based on the pre-Lisbon system and thus heterogeneous in its provisions and application. The European Commission took the first step in this debate by launching in 2009 a public consultation on the future legal framework for the protection of personal data in the EU.[2] In November 2010, the European Commission published in a communication its views on the protection of personal data in the EU, which highlights new challenges in this area and identifies the need to revise the data protection rules in the areas of police and judicial cooperation in criminal matters.[3] Prior to this, the European Commission issued a communication providing an overview of information management in the area of freedom, security and justice.[4] The Council of Europe also initiated in 2010 a modernisation of its data protection framework, Convention 108 on the protection of individuals with regard to automatic processing of personal data.[5] The Council of Europe is seeking to identify whether the protection framework set out by Convention 108 needs to be modified and complemented in order to better satisfy the legitimate expectation of individuals and concerned professionals with respect to data protection. To this end, the Council of Europe launched – on the occasion of the 30th anniversary of Convention 108 – a public consultation with a view to allowing all stakeholders and interested persons to make their views known. The modernisation of Convention 108 should also lead to an enhanced monitoring of the implementation of the convention.

3.2. Compliance of the Data Retention Directive with fundamental rights principles

In 2010, the European Commission announced that the 2006 Data Retention Directive, which compels telephone and Internet companies to collect data about all of their customers' communications,[6] is under review.[7] Concerns have been raised in EU Member States that the directive does not comply with fundamental rights standards. In a joint letter, dated 22 June 2010, more than 100 non-governmental organisations (NGOs) from 23 EU Member States asked the European Commissioners Cecilia Malmström, Viviane Reding and Neelie Kroes to "propose the repeal of the EU requirements regarding data retention in favour of a system of expedited preservation and targeted collection of traffic data". According to the letter, such generalised data retention puts confidential activity as well as contacts with journalists, crisis lines and business partners, for example, at risk of disclosure by way of data leaks and abuse.[8] National campaigns against the implementation of the directive took place in **Austria**, **Belgium**, **Bulgaria** and **Germany**, and gained broad media coverage. Such concerns about the gradual erosion of privacy protection were also recognised at the end of 2009 by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism.[9]

The debate surrounding the fundamental rights compliance of the Data Retention Directive was further fuelled by a number of rulings in EU Member States' constitutional courts. In its Decision No. 1258 of 8 October 2009, the **Romanian** Constitutional Court (*Curtea Constituțională*) declared the implementation of the directive unconstitutional.[10] In March 2010, Germany's federal Constitutional Court (*Bundesverfassungsgericht*) annulled German legislation implementing the Data Retention Directive. The Court also held that the legislation posed a serious threat to personal privacy rights.[11] Following this judgment, the German federal Commissioner on Data Protection and Freedom of Information (*Bundesbeauftragter für den Datenschutz und die Informationsfreiheit*, BfDI) asked German companies to delete all data collected under the unconstitutional statute. According to the BfDI, all companies complied with this request. In a joint resolution, the BfDI and the Data Protection Commissioners of the German states (*Länder*) called on the German federal government to support the repeal of the Data Retention Directive.[12]

"For warding off danger, it follows from the principle of proportionality that a retrieval of the telecommunications traffic data stored by way of precaution may only be permitted if there is a sufficiently evidenced concrete danger to the life, limb or freedom of a person, to the existence or the security of the Federal Government or of a Land (state) or to ward off a common danger."

German Constitutional Court, Press release, 2 March 2010

Another legal challenge was brought before the Irish High Court (*An Ard-Chúirt*) in 2006 by the non-governmental organisation, Digital Rights **Ireland** (DRI). The case challenged both the directive itself as well as its transposition into national law. In July 2008, the Irish Human Rights

2 For a summary of the replies to this consultation, see European Commission (2010a).
3 European Commission (2010b).
4 European Commission (2010c).
5 Council of Europe (2010).
6 Directive 2006/24/EC, OJ 2006 L 105, p. 54.
7 European Commission (2010d).

8 See joint letter of more than 100 NGOs of 22 June 2010, available at: www.vorratsdatenspeicherung.de/images/DRletter_Reding.pdf.
9 Scheinin, M. (2009).
10 Romania, Constitutional Court (2009).
11 Germany, Constitutional Court (2010).
12 Germany, BfDI (2010a).

Commission (*An Coimisiún ul Chearta an Duine,* IHRC) was given the permission of the court to appear as a friend of the court *(amicus curiae)* in this action. According to a press release issued by the IHRC, "[t]his case raises important issues about the extent to which laws and measures governing the monitoring of one's private life by the State in pursuit of tackling crime possess sufficient human rights safeguards".[13] In May 2010, the High Court held that DRI had standing *(locus standi)* to bring this challenge and agreed to refer the question concerning the validity of the directive to the Court of Justice of the European Union (CJEU).[14]

Promising practice

Public consultation on draft bill transposing Data Retention Directive

Between 15 November 2009 and 15 January 2010, the Austrian government carried out a public consultation on a draft bill transposing the Data Retention Directive. Public bodies, private entities and persons submitted 189 comments in total – the greatest number ever reached in a public review of draft legislation in Austria. Most of the comments criticised the duty set out in the directive to retain traffic data, location and subscriber data processed in publicly available electronic communications services or networks.

For a list of all comments received in the consultation on the draft bill, see the Austrian Parliament's website at: http://www.parlinkom.gv.at/PAKT/VHG/XXIV/ME/ME_00117/index.shtml.

Meanwhile, doubts about the fundamental rights compliance of the Data Retention Directive were also delaying its transposition in certain Member States. Although the CJEU held in July 2010 that **Austria** had violated the EU Treaty by not transposing the directive by the 15 March 2009 deadline,[15] the Austrian transposition of the directive was further delayed.[16] In the proceedings before the CJEU, Austria expressed concerns about the compliance of the directive with fundamental rights, especially Article 8 of the EU Charter of Fundamental Rights.[17] In **Sweden**, the implementation of the Data Retention Directive was also delayed due to fundamental rights concerns.

13 European Digital Rights (2008).
14 Ireland, *Digital Rights Ireland Ltd. v. Minister for Communication, Marine and Natural Resources and others*, High Court, McKechnie J., unreported, 5 May 2010.
15 CJEU, C-189/09, *Commission v. Austria*, 29 July 2010.
16 Austria, Federal Ministry of Justice (2010).
17 CJEU, C-189/09, *Commission v. Austria*, 29 July 2010.

3.3. Data protection authorities: independence, powers and resources

According to Article 28 of the Data Protection Directive, supervisory authorities must be set up in each EU Member State in order to monitor the application of the directive. The independence, powers and resources of data protection authorities in EU Member States emerged as a key concern in 2010. The FRA addressed this issue in greater detail in its report on *Data protection in the European Union: the role of National Data Protection Authorities*, which was published in May 2010.

3.3.1. Independence

In the case of *Commission v. Germany*, the CJEU dealt with the question of the independence of data protection supervisory authorities for the first time. By applying strict criteria, the CJEU held that the German data protection institutions at federal state (*Länder*) level responsible for monitoring the processing of personal data by non-public bodies were not sufficiently independent because they were subject to oversight by the state.[18] The case revolved around the interpretation of Article 28 (1) of the Data Protection Directive which requires data protection authorities to "act with complete independence in exercising the functions entrusted to them".

> *"Directive 95/46 is to be interpreted as meaning that the supervisory authorities responsible for supervising the processing of personal data outside the public sector must enjoy an independence allowing them to perform their duties free from external influence. That independence precludes not only any influence exercised by the supervised bodies, but also any directions or any other external influence, whether direct or indirect, which could call into question the performance by those authorities of their task consisting of establishing a fair balance between the protection of the right to private life and the free movement of personal data."*
>
> *CJEU, C-518/07* Commission v. Federal Republic of Germany, *9 March 2010, paragraph 30.*

In his Opinion, the Advocate General qualified the term 'independence' as relative in nature, since it is necessary that the legislator specifies the level of such independence and this remains undefined. Following this logic, the Advocate General concluded that the German data protection institutions in question were sufficiently independent even though they were subject to state oversight.[19] In contrast, the Court rejected this line of argument and stressed that the directive should be interpreted in accordance with the usual meaning of the words, thereby opting for a strict construction of 'independence'. The CJEU also pointed out that the word 'independence' is complemented by the adjective 'complete'

18 CJEU, C-518/07, *Commission v. Germany*, 9 March 2010.
19 *Ibid.*

in the directive and should therefore be understood in a broad sense.

In December 2010, the European Commission referred **Austria** to the CJEU for lack of independence of its data protection authority. Austrian data protection legislation requires the relevant authority to exercise its functions independently and not to take any instruction when performing its duties. According to the Commission, 'complete independence' is not guaranteed because the authority is integrated into the federal Chancellery, where the Chancellor has the right to be informed on all subjects concerning the daily management of the authority at all times.[20]

3.3.2. Powers

On 24 June 2010, the European Commission requested the **United Kingdom (UK)** to comply with EU law by strengthening the powers of its national data protection authority, the Information Commissioner's Office (ICO).[21] The European Commission called for the ICO to be given power to: conduct random checks for compliance with data protection law; to issue penalties; and to assess the recipient country's data protection regime before international transfers of information are made from the UK.[22] The European Commission is currently analysing the UK response to the allegations that it has raised.

FRA ACTIVITY

Comparison of Data Protection Authorities

In May 2010, the FRA published its report *Data Protection in the EU: the role of National Data Protection Authorities*. The report provides a comparative overview of the powers and independence of data protection authorities in the EU and highlights the lack of independence, powers and resources of data protection authorities in certain EU Member States.

FRA (2010), Data Protection in the EU: the role of National Data Protection Authorities – Strengthening the fundamental rights architecture in the EU II*, available at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.*

3.3.3. Resources

The resources of data protection authorities are crucial for their functioning as fundamental rights guardians. Nevertheless, in 2010, budgets were curtailed in many EU Member States as a result of the financial crisis. The information provided below is not directly comparable but still indicative of certain trends.

The following countries reported a significant decrease in human and/or financial resources during the reporting period: **Estonia** (12.5% decrease of financial resources for the period from 2008 to 2010), **Ireland** (in 2008, EUR 2.04 million; in 2009, EUR 1.81 million; in 2010, EUR 1.21 million), **Latvia** (in 2008, 25 staff; in 2009, 16 staff; in 2010, 19 staff; in 2008, EUR 730,984; in 2009, EUR 476,984; in 2010, EUR 381,295), **Lithuania** (reductions of staff unspecified, but wages fund reduced by 69% from LTL 2,929,000 (EUR 848,690 as of 31 December 2010) to LTL 1,886,000 (EUR 546,477), cuts of 64.6%), **Slovakia** (no change of human resources; in 2008, EUR 960,850; in 2010 EUR 728,696).

However, from 2007 to 2010, **France** and **Germany** reported a significant increase in human and financial resources.[23] A similar trend was also observed in Spain where the Spanish data protection authority (*Agencia Española de Protección de Datos*) saw the number of employees rise from 99 employees in 2007 to 155 in 2009. Its budget also increased from EUR 13.44 million for 2008 to EUR 15.32 million for 2009.[24]

Lastly, either no changes or only slight changes with regard to human and financial resources were reported during 2010 in the following countries: **Austria**, **Bulgaria**, **Cyprus**, **Finland**, **Greece**, **Hungary**, **Italy**, **Malta**, **Poland**, **Romania**, **Slovenia** and the **UK**.

3.4. Data protection and transparency in the information society

It is often the case in fundamental rights discourse that a delicate balance must be found between competing interests. In the case of data protection, this balancing act takes place when the right to the protection of personal data is pitted against the right to information. The CJEU dealt with this issue in 2010 in the context of ensuring transparency.

In June 2010, in the case of the *Commission v. Bavarian Lager*, the CJEU considered the scope of the protection of personal data in the context of access to documents of the EU institutions.[25] In that case, the European Commission had provided access to minutes of a meeting but had blanked out five names. The applicant had applied for full access to the document yet could not justify the necessity for such personal data. As a result, the CJEU upheld the European Commission's decision to refuse full access to the document.

It is also worth mentioning the Joined cases C-92/09 and C-93/09, which came before the CJEU Grand Chamber in November 2010, as here EU legislation was challenged on the basis of its compliance with fundamental rights.[26] This

20 European Commission (2010e).
21 European Commission (2010f).
22 United Kingdom, Information Commissioner's Office (2010).

23 If not otherwise stated, these data were provided by the FRA network of senior legal experts, FRALEX.
24 Spain, Agency for the Protection of Data (2008), p. 84, and (2009), p. 92.
25 CJEU, C-28/08 P, *Commission v. Bavarian Lager*, 29 June 2010.
26 CJEU, Joined cases C-92/09 and C-93/09, *Eifert, Schecke v. Land Hessen*, 9 November 2010.

case related to EU legislation on agricultural policy which requires EU Member States to ensure the annual *ex-post* publication of beneficiaries' names and the respective amounts paid under the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD).[27] The applicants had asked the administrative court of Wiesbaden to require the German federal state (*Land*) of Hessen not to publish the data relating to them. As a result, the court in Wiesbaden referred the case to the CJEU. The CJEU stated that it is legitimate in a democratic society that taxpayers have a right to be kept informed of the use of public funds. The CJEU also held that the publication of data on a website which named the beneficiaries of EAGF and EAFRD aid and set out the precise amounts they received constitutes an interference with the right to respect for private life in general, and to the protection of their personal data, in particular. The CJEU concluded that the publication of the personal data of each and every EAGF and EAFRD aid beneficiary was not sufficiently proportionate as it was not strictly necessary to achieve the pursued aim of transparency. As a result, the CJEU declared certain provisions of Regulation No. 1290/2005 and Regulation No. 259/2008 invalid, thereby striking down EU legislation on the basis of fundamental rights concerns.

3.5. New challenges

3.5.1. Data protection, and police and security cooperation

The Lisbon Treaty abolished the previous division of the EU in three distinct pillars and extended the ordinary legislative procedure to the area of police and judicial cooperation in criminal matters. Moreover, the powers of the European Parliament have been considerably strengthened in the context of the conclusion of international agreements, which has important implications for data protection. In February 2010, the European Parliament used these new powers to withhold its consent to an interim agreement between the EU and the United States of America (US) concerning the processing and transfer of financial messaging data from the EU to the US (so-called Swift I Agreement), signed on 30 November 2009. The Parliament claimed this agreement did not offer enough protection for EU citizens' personal data.[28] On the 8 July 2010 – after the European Data Protection Supervisor (EDPS) delivered an opinion,[29] the European Parliament gave its consent to the revised agreement,[30] which was formally concluded on 13 July 2010.[31]

Fundamental rights concerns have also arisen in relation to international agreements on the exchange of PNR data. On 1 March 2010, a Belgian human rights NGO (*Ligue des Droits de L´Homme*) brought a case before the constitutional court of **Belgium** claiming that the domestic legislation of 30 November 2009, which implemented the 2007 EU-US PNR Agreement, violated data protection standards.[32] On 5 May 2010, the European Parliament adopted a resolution[33] stating that both a Privacy Impact Assessment and a proportionality test must be carried out before the finalisation of any new European legislation on the transfer of PNR data.

In September 2010, the European Commission adopted a package of proposals on the exchange of PNR data with third countries,[34] consisting of an EU external PNR strategy and recommendations for negotiating directives for new PNR agreements with Australia, Canada and the US.[35] The strategy aims to ensure a high level of data protection in the exchange of PNR data with third countries.[36]

3.5.2. Technological challenges

Fundamental rights concerns posed by new technological challenges featured prominently on the agenda of the Council of Europe during the reporting period. In 2010, the Committee of Ministers of the Council of Europe adopted a package of declarations and recommendations in this context: a declaration on the digital agenda for Europe;[37] a declaration on network neutrality;[38] a declaration on the management of the Internet protocol address resources in the public interest;[39] a declaration on enhanced participation of Member States in Internet governance matters – the Governmental Advisory Committee (GAC) of the Internet Corporation for Assigned Names and Numbers (ICANN).[40] Furthermore, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1906 (2010) on rethinking creative rights for the Internet age.[41]

New technological challenges also led to fundamental rights debates in EU Member States. Google Street View is a service provided by the information technology (IT) company Google, which offers panoramic views from various positions along streets in many cities worldwide. For this purpose, Google sends specially adapted cars through cities in the EU and beyond in order to collect pictures. However, during this task the IT company had – according to Google´s statement – inadvertently gathered fragments of personal data sent over unsecured Wi-Fi systems.

As a result, on 21 May 2010 the **Austrian** Data Protection Commission (*Österreichische Datenschutzkommission*, DSK) imposed a temporary ban on the collection of data through 'Google Street View' cars and initiated an investigation. By

27 Council Regulation (EC) No. 1290/2005, OJ 2007 L 322, p. 1 and Commission Regulation (EC) No. 259/2008, OJ 2008 L 76, p. 28.
28 European Parliament (2010a).
29 European Data Protection Supervisor (EDPS) (2010).
30 European Parliament (2010b).
31 Council Decision 2010/412/EU, OJ 2010 L 195, p. 3.
32 Belgium, La Ligue des droits de l'Homme (LDH).
33 European Parliament (2010c).
34 European Commission (2010g).
35 European Commission (2010h).
36 See European Union Agency for Fundamental Rights (FRA) (2008).
37 Council of Europe, Committee of Ministers (2010a).
38 Council of Europe, Committee of Ministers (2010b).
39 Council of Europe, Committee of Ministers (2010c).
40 Council of Europe, Committee of Ministers (2010e).
41 Council of Europe, Parliamentary Assembly (2010).

the end of November 2010, the temporary ban was lifted, but the investigation into the procedures of Google Street View continues.[42] Similar proceedings took place in many countries, including **Spain**,[43] **Slovenia**[44] and **Italy.**[45]

In **Germany**, the debate focused on the right to object to pictures taken by Google Street View. In August 2010, the German branch of Google agreed to accommodate individual objections, which since the end of 2010 can be lodged online,[46] against the publication of pictures of private houses and of persons in its Street View service. The Data Protection Commissioner of Hamburg (*Der Hamburgische Beauftragte für Datenschutz und Informationsfreiheit*, HmbBfDI) published an information leaflet[47] and a form[48] for submitting such objections. Moreover, the federal Commissioner on Data Protection and Freedom of Information demanded a central register for objections regarding the publication of personal data on the Internet, including services such as Google Street View.[49] The second chamber of the German federal parliament (*Bundesrat*) adopted a draft bill amending the federal Law on Data Protection (*Bundesdatenschutzgesetz*, BDSG) to ensure improved protection of personal data with regard to geographical information services on the Internet such as Google Street View.[50] In a press release on 18 August 2010, it appeared that the German federal government (*Bundesregierung*) seemed to favour wholesale reform of the online data protection law and would make a proposal in that regard.[51]

"Most of the 75% of Europe's youngsters who go online are enthusiastic users of social networking sites. ...However publishing personal information or pictures may lead to embarrassing or even traumatic situations. Young people do not always realize the risk that online images and videos may circulate beyond their control and knowledge."

Viviane Reding, European Commission Vice-President, 9 February 2010.

On 7 July 2010, the Data Protection Commissioner of Hamburg initiated an investigation against Facebook concerning the collection of e-mail and mobile phone contact data and the creation of contact profiles for marketing purposes of non-users of Facebook via address books of registered users.[52] This procedure may result in a fine and it is the first time that such a procedure has been initiated against Facebook in Europe.

The role of Facebook in election campaigns also came to the fore as a topic of discussion in **Bulgaria** in 2010. On 22 June 2010, several members of the ruling party in Bulgaria proposed provisions introducing restrictions relating to election campaigns on the Internet. The main purpose was to compare the information provided via electronic media, bloggers and social networks like Facebook and Twitter with the information provided by more traditional text, radio and television media. Ordinarily, the same rules regarding reporting of election campaigns should apply to both forms of media. In response to this proposal, opposition parties expressed their concern and declared it would constitute a violation of freedom of expression and amounted to control of the Internet.[53]

3.5.3. Body scanners

Airport security measures, in particular the use of body scanners, seemed to dominate debates about data protection in the EU in 2010. Indeed, in the aftermath of the attempt to blow up a plane with hidden explosives on a flight between Amsterdam and Detroit on 25 December 2009, the debate about various types of body scanners at airports took a more prominent position on the political agenda. This issue attracted considerable media attention and it was claimed that displaying images in which a person going through the scanner is shown naked interfered with the right to respect for private life. On 15 June 2010, the European Commission published its communication on the use of security scanners at EU airports, which argued that only a solution found at EU level would guarantee uniform application of security rules and standards. This is considered essential "to ensure both the highest level of aviation security as well as the best possible protection of EU citizens' fundamental rights and health". [54] In this context, the European Commission underlined the importance of various provisons of the EU Charter of Fundamental Rights, including human dignity (Article 1), respect for private and family life (Article 7), protection of personal data (Article 8), freedom of thought, conscience and religion (Article 10), non-discrimination (Article 21), the rights of the child (Article 24) and a high level of human health protection in the definition and implementation of all Union's policies and activities (Article 35).

A European Privacy and Data Protection Commissioners' Conference, which took place in Prague in April 2010, also addressed this issue. The Commissioners adopted a resolution stating that data protection principles and safeguards as well as privacy by design should be taken into account when considering the use of body scanners.[55]

42 Austria, Austrian Data Protection Commission.
43 Spain, Spanish Agency for Data Protection (*Agencia Española de Protección de Datos*).
44 Slovenia, Information Commissioner (*Informacijski Pooblascenec*).
45 Italy, Italian Data Protection Authority (*Garante Per la Protezione Dei Dati Personali*).
46 Germany, Commissioner on Data Protection and Freedom of Information for Hamburg (HmbBfDI) (2010a).
47 Germany, HmbBfDI (2010b).
48 See Germany, The independent federal state centre for data protection for Schleswig-Holstein (*Das Unabhängige Landeszentrum für Datenschutz Schleswig-Holstein*, ULD).
49 Germany, BFDI (2010b).
50 Germany, Federal Parliament (*Bundestag*) (2010).
51 *Ibid.*, p. 15.
52 Hamburg.de (2010).
53 Bulgarian Helsinki Committee (2010).
54 European Commission (2010i).
55 European Privacy and Data Protection Commissioners (2010).

The European Court of Human Rights (ECtHR) referred to security measures at airports in *Gillan and Quinton v. United Kingdom*.[56] The case concerned the practice of police stops and searches in the UK. In this case, the UK government argued that police stops and searches do not amount to an infringement of the right to privacy because they equate to searches passengers regularly submit to at airports.[57] Rejecting this argument, the ECtHR pointed out that passengers submit to customary searches at airports voluntarily because they choose to fly knowing such searches take place, whereas such choice does not exist with regard to police stops and searches which can take place anywhere and at any time.[58] It is unclear whether this reasoning applies also to body scanners because they go beyond customary searches.

The debate surrounding body scanners and data protection concerns also arose in other EU Member States, such as **France**,[59] **Spain**[60] and **Germany**, during 2010.[61]

FRA ACTIVITY

Body scanners and fundamental rights

In July 2010, the FRA issued a discussion paper on *The use of body scanners: 10 questions and answers*. The paper identifies fundamental rights potentially affected by the use of body scanners. It further reflects on the requirements and specific considerations that should be taken into account when discussing the introduction of such technical devices at European airports. The paper also examines the conditions that should apply in order to address the concerns related to fundamental rights.The Agency presented the paper's conclusions at a hearing at the European Economic and Social Committee in January 2011.

FRA (2010), The use of body scanners: 10 questions and answers, *available at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.*

Outlook

New technical developments continue to shape our lives, bringing fundamental rights concerns to the fore. Facebook, Google Street View and body scanners are likely to remain on the agenda and will probably contribute to the ongoing overarching debate about the modernisation of the EU data protection framework. Against the background of the Lisbon Treaty, two issues will be central in the near future: compliance with fundamental rights standards (for example, in the context of data retention), and the possible extension of the scope of the general data protection framework to include areas of police and justice cooperation in criminal matters. This is likely to affect the way in which data protection is dealt with both inside and outside the EU. Indeed, the debate on data protection will probably continue to move towards the centre of the fundamental rights discourse in the EU in coming years.

56 European Court of Human Rights (ECtHR), *Gillan and Quinton v. United Kingdom*, No. 4158/05, 12 January 2010.
57 *Ibid.*, at paragraph 60.
58 *Ibid.*, at paragraph 60.
59 See France, National Commission on information technology and liberties (*Commission nationale de l'informatique et des libertés, CNIL*) (2010).
60 For an experts debate on the use of body scanners at airports, see the Data Protection Agency of Madrid website, available at: www.dataprotectionreview.eu/.
61 Germany, BfDI (2010a); Germany / BfDI (2010b).

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The rights of the child and protection of children

Equality and non-discrimination

Racism and ethnic discrimination

UN & CoE

January

3 February – CoE Committee of Ministers issues recommendation on de-institutionalisation and community living of children with disabilities

February

March

April

May

18 June – UN Committee on the Rights of the child publishes Concluding Observations on Belgium

June

1 July – Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse enters into force

July

August

29 September – UN Committee on the Rights of the child publishes Concluding Observations on Spain

September

5 October – CoE Parliamentarty Assembly adopts recommendation on child abuse in institutions

October

17 November – CoE Committee of Ministers adopts guidelines on child-friendly justice

November

December

EU

January

February

29 March – European Commission adopts a proposal for a directive on combating sexual abuse, sexual exploitation of children and child pornography

March

April

6 May – European Commission publishes an Action Plan on unaccompanied minors (2010-2014)

May

June

July

August

September

October

November

December

January

Beginning of 2011 – European Commission adopts EU Agenda for the rights of the child (15 February 2011)

February

4

The rights of the child and protection of children

Children's rights form part of the fundamental rights that the European Union (EU) is committed to protect while respecting the jurisdiction of its Member States. According to the Lisbon Treaty, the EU shall promote the rights of the child. In 2010, EU action focused on implementing the Stockholm Programme, the EU's new justice strategy, primarily in regard to child protection. In early 2011, the European Commission released its Communication on an 'EU Agenda for the rights of the child', setting out a programme of action for the coming years. A key action item is to render justice systems more child friendly, turning the rights of the child into reality through EU legislation. However, many challenges remain, as there is evidence that the rights of children, in particular of those in a vulnerable situation, are not adequately protected.

This chapter first looks at developments regarding violence against children, including sexual abuse and exploitation. It then examines issues and developments in relation to child-friendly justice, child trafficking and the situation of separated children in a migration or asylum context. The chapter concludes by looking at data availability issues.

In February 2010, the European Commission's Directorate General for Justice commissioned a qualitative Eurobarometer survey on children's rights in all 27 EU Member States. The survey aimed to identify how children view their rights and which of these rights they consider most important, as well as the various obstacles they face in exercising these rights. The study follows up on Flash Eurobarometer surveys carried out in 2008 and 2009 (Flash EB series 235 and 273). Children, from 15-to-17-years old, from different social and ethnic backgrounds – including Roma and Traveller children, and children with special needs – participated in the study. Many children referred to the 'right to participate' and repeatedly underscored its importance in relation to areas of their lives where they are expected to attain certain achievement levels, such as in school, further education or jobs. However, they also referred to the 'right to participate' in the context of families undergoing separation and divorce. Key rights identified include freedom of speech, access to healthcare, the right to family life and freedom from violence and bullying. The final Eurobarometer report, published in October 2010, underlined the importance of consulting children.[1]

Key developments in the area of children's rights:

- the European Commission adopted in early 2011 an EU Agenda for the rights of the child, including 11 action points;
- agreement was reached at EU level on the final text of a directive on preventing and combating trafficking in human beings and protecting victims, which devotes particular attention to child protection;
- the Council of Europe adopted Guidelines on child-friendly justice and a recommendation on de-institutionalisation and community living of children with disabilities;
- the European hotline for missing children, 116 000, was in operation in only 13 EU Member States;
- worrying results emerged from inquiries in different EU Member States into child abuse committed in institutions or by their staff members;
- FRA findings underlined that separated children in a migration or asylum context are often not appropriately housed, medical screening upon arrival is not always accessible, asylum determination procedures are often not child friendly, and the quality of guardianship varies significantly among EU Member States;
- there remained a lack of comprehensive disaggregated data regarding child trafficking for sexual or labour exploitation; where they are recorded, the number of victims of trafficking identified remained very low.

1 European Commission (2010a).

"It is very disappointing when I talk to someone older and the answer is, 'you are too young to know'" (Greek girl).

Beyond education, the right felt to be most important for children is the 'right to be a child', to have the opportunity to play, grow and develop.

"Parents, society and teachers: they expect very much from us [...]" (Estonian girl).

European Commission (2010a), The rights of the child, *Eurobarometer, Qualitative Study, available at*: http://ec.europa.eu/public_opinion/archives/quali/ql_right_child_sum_en.pdf

4.1. Violence against children

The well-being of children also depends on ensuring that societies are free of violence, abuse and exploitation. In March 2010, the European Commission adopted two proposals for directives aiming at reinforcing the framework for protection of some of the most vulnerable children, namely those who are victims of sexual abuse and exploitation and of trafficking. The protection of children against all forms of violence is a priority for the EU. Since 1997, the EU has, for example through the Daphne Programme[2], supported Member States' efforts to prevent and combat violence against children, young people and women and to protect victims and groups at risk. During 2010, the Daphne III Programme[3] contributed to the protection of children, young people and women against all forms of violence through a variety of projects implemented throughout the EU.

In November 2010, the European Commission began a campaign, 'Dial 116 000: The European hotline for missing children'[4], calling again on Member States to implement the missing children hotline 116 000 as a matter of priority to ensure a high-quality service. Three years after the adoption of the relevant Commission Decision (2007/116/EC), the hotline is operational only in 13 Member States.

4.1.1. Violence in domestic and institutional settings

According to the European Association for Injury Prevention and Safety Promotion (EuroSafe), most acts of violence against children occur in the domestic environment, making it difficult to identify them or to intervene preemptively.[5] However, EuroSafe highlighted that "epidemiological data show that in Europe about 19.4% of children are physically maltreated within the family and 32.6% of children are victims of bullying".[6] Since 2008, the Council of Europe has been campaigning for the total abolition of corporal punishment. In about three quarters of the EU Member States, corporal punishment is prohibited.[7] The 2009 EuroSafe report on *Injuries in the European Union – Statistics summary 2005-2007* says, "100 fatalities occur per year due to abuse and neglect of children younger than one year in the EU. A significant number of child deaths resulting from abuse or neglect, however, may still not be recorded as such in the official death certificates".[8]

In 2010, **Poland** set a good example in this regard, by amending the Act on the prohibition of domestic violence on 6 May 2010,[9] thereby banning the use of physical punishment, psychological violence and any form of vexatious behaviour. The law, which entered into force on 1 August 2010, will enable social workers to intervene in cases of alcoholic parents or if children are not cared for properly, placing them under the supervision of another family member, if necessary. The law contains measures to separate offenders from victims (for example, through eviction from a common dwelling) and local authorities are required to register domestic violence victims and offenders.

Promising practice

Advocacy and Advice helpline

In the **United Kingdom**, an advocacy and advice helpline for children and young people, which was launched in May 2010, gives children and young people the opportunity to get help on issues that are important to them, especially if they feel their views are not being heard or are not being taken into account. The 'Meic' advice helpline works with and complements other advice services and helplines, which have a prominent safeguarding role. Meic is the first helpline of its kind in the UK to be rolled out on a national basis in Wales and is supported by the Welsh Assembly Government. Anyone under 25 can get in touch with the helpline for free, via telephone, text or instant message, seven days a week, initially for eight hours a day from 12.00-20.00 before it becomes a 24-hour service. Advisers provide callers with information, let them know where they can get further help or transfer them to an independent professional advocate trained to help children and young people.

For more information, see: http://wales.gov.uk/newsroom/childrenandyoungpeople/2010/100514helpline/?lang=en

Violence against children in institutions is a particularly heinous form of child abuse, as these children are particularly vulnerable. Although the United Nations Convention on the Rights of the Child explicitly recognises in Article 3 that institutions, services and facilities responsible for the care or protection of children shall conform to the standards

2 For more information, see: www.ec.europa.eu/justice/funding/daphne3/funding_daphne3_en.htm.
3 European Parliament and the Council of the European Union (2007).
4 European Commission (2010b).
5 For more information, see the EU Injury Database – a systematic injury surveillance system that collects accident and injury data from selected emergency departments of Member State hospitals at: www.webgate.ec.europa.eu/idb/index.cfm?fuseaction=home&CFID=8131853&CFTOKEN=671378aefbc160a-7B9FE270-F6AA-B156-D00A714E3C5D9236&jsessionid=3608ebfe79d57c22f726TR.
6 EuroSafe, 'Child violence', Factsheets, p. 3.
7 *Ibid.*, p 5.
8 EuroSafe (2009), p. 20.
9 Poland, *Ustawa o przeciwdziałaniu przemocy domowej*, Journal of Law 2010 No. 125, 10 June 2010.

established by competent authorities, a number of problems persist in EU Member States. This concerns in particular the standards established in the areas of safety and health, as well as the number and suitability of the staff working in such institutions or facilities.

For example, in **Poland** a study conducted by Warsaw University on behalf of the Nobody's Children Foundation in the context of the DAPHNE III project on 'Sexual abuse against children at residential institutions'[10], surveyed a sample of 62 children aged 15-18 years (42 girls and 20 boys) living in Warsaw residential care institutions. The study found that 53% of the respondents reported that they had experienced emotional abuse (name calling, humiliation) by adults in the preceding year: 32% of the respondents were hit – at least once – by a grown-up; 32% had one of their things purposely damaged; 52% were victims of theft; 24% had sexual proposals or vulgar comments about their appearance; 10% had their private body parts touched against their will; 11% were forced to have some form of sexual intercourse and 13% were witnesses to rape; 13% made an online acquaintance of a person who later attempted to abuse them sexually and 7% reported they had had sex for money or other payment. Girls were significantly more likely than boys to experience sexual abuse. However, a majority of the adolescent respondents were optimistic about the availability of help in cases of victimisation and other difficult life situations.

Against a backdrop of investigations into institutional child abuse cases in European countries, the Committee of Ministers of the Council of Europe[11] adopted on 3 February 2010 a recommendation on de-institutionalisation and community living of children with disabilities. This recommendation requires that children with disabilities should be able to exercise the same rights as other children and to access social rights on the same basis. Similarly, on 26 November 2010, policymakers from the 53 member countries of the World Health Organization (WHO) Regional Office for Europe signed the *European declaration on the health of children and young people with intellectual disabilities and their families*.[12] The European declaration identifies 10 priority areas, the first of which is that "all children and young people with intellectual disability, wherever they live, must be guaranteed lives free from bullying, harm or abuse and should not live in fear or neglect". For more information, see the relevant section in Chapter 5 on equality and non-discrimination.

However, there is still concern about the conditions under which children live in institutional care. In 2010, in its concluding observations on **Spain**, the United Nations Committee on the Rights of the Child expressed concern about the situation of children with conduct disorders placed in special centres financed by the public administration, but privately managed.[13] The committee found a large variety of intervention programmes ranging from highly restrictive to more open. It was also concerned that the criteria and procedures for referring children to these centres may be insufficient and that these centres may constitute a form of deprivation of liberty.

Promising practice

Protocol for action in protection centres

In **Spain**, the Commission of Directorate Generals of Childhood of the Autonomous Communities adopted a protocol that aims to make the assessment of professional interventions simpler and more systematic in order to guarantee the protection of the rights of the child. The 'Basic protocol for action in protection centres and/or residences for children diagnosed with behavioural disorders' (*Protocolo básico de actuación en centros y/o residencias con menores diagnosticados de trastornos de conducta*) in May 2010.

For more information, see: www.dipgra.es/documentos/documentos_interes/4_centros_menores_trastornos_conducta_1295267411.pdf

In **Ireland** in March 2010, the publication of a report by the Health Service Executive (HSE) on the death of a child in state care caused considerable controversy. The HSE stressed that the death of a child in care is a very serious matter and requires careful and detailed consideration to ensure that improvements are implemented. The report[14] raised concerns regarding child protection, the responsibility of the State to protect those in care and the issues surrounding the investigation and reporting. According to the HSE, 20 children died in care over the past decade. The media also reported concerns over complaints of physical and sexual abuse of children in foster care and the lack of prosecution arising from such complaints.[15] Figures released by the HSE and published on 28 May revealed that at least 18 children who were in contact with social services or in care died over the past decade of unnatural causes, such as suicide, drug overdoses, unlawful killings, road traffic incidents and other accidents.[16] The figures caused considerable public disquiet and controversy. An Independent Review Group on Child Deaths was established to investigate this matter. The Health (Amendment) Bill, due to be published on 18 June 2010[17], will provide the legislative basis for the provision of information from the HSE to the Minister of State for Children and the Independent Review Group on Child Deaths. In March 2010, the Health Information and Equality Authority

10 Nobody's Children Foundation (2010), p. 31.
11 Council of Europe Committee of Ministers (2010a).
12 WHO, Regional Office for Europe (2010).
13 United Nations Committee on the Rights of the Child (UNCRC) (2010), paragraphs 41-43.
14 Ireland, Health Service Executive (HSE) (2010a).
15 Ireland, Raidió Teilifís Éireann (RTÉ) (2010) and Downes, J. (2010).
16 Ireland, HSE (2010b).
17 Ireland, Office of the Minister for Children and Youth Affairs (2010).

(HIQA) published new standard reporting guidelines according to which in addition to providing information on children in care who died of unnatural causes, information should be provided relating to children who die of natural causes due to illness or disease. This is the standard now applied for all cases to be notified from 2010 onwards.

In March 2010, the Chief Prosecutor of **Bulgaria** ordered jointly with the Bulgarian Helsinki Committee (Български хелзинкски комитет) a new inquiry into the deaths and bodily injuries of children with disabilities in childcare institutions. The inquiry was ordered after the Bulgarian Helsinki Committee filed a lawsuit against the Prosecutor's Office for discrimination of children with disabilities in February 2010. On 20 September 2010, the Chief Prosecutor and the Bulgarian Helsinki Committee announced the results of their joint inspections, including evidence of 238 cases of deaths occurring between 2000 and 2010. At least two thirds of these deaths were considered avoidable: 31 cases of death were caused by systematic malnourishment; 84 cases by physical deterioration due to neglect; 13 cases by infections resulting from insufficient hygiene; six cases by accidents, such as freezing to death, drowning or suffocation; 36 by pneumonia resulting from exposure to the cold or long-term immobility; two cases by violence; and 15 cases remaining unexplained. As a result, the Chief Prosecutor announced the opening of 166 criminal proceedings.[18] All appellate prosecution offices have been instructed to exercise *ex officio* instance review of the previously terminated pre-trial proceedings. In accordance with comprehensive action plans for 2011, the district prosecution offices have been requested to monitor regularly the operation of care homes.

4.1.2. Sexual abuse and exploitation

On 29 March 2010, the European Commission adopted a *Proposal for a Directive on combating sexual abuse, sexual exploitation of children and child pornography*.[19] The proposal repealing the previous relevant Framework Decision 2004/68 builds on the 2007 Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse[20] and covers several fields: criminal law including the criminalisation of serious forms of child sexual abuse and exploitation currently not covered by EU legislation; criminal investigation and initiation of proceedings; and developments in the information technologies environment, including the criminalisation of new forms of sexual abuse and exploitation facilitated by Internet use. In addition, the proposal envisages national mechanisms to block access to websites with child pornography, together with action to delete content at source under the supervision of judicial services or the police. On 24 January 2011, the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE) published its draft report[21] on the European Commission proposal.

On 1 July 2010, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse entered into force. **Denmark**, **Greece**, the **Netherlands** and **France** were the first EU Member States to ratify the convention, which is the first international instrument to tackle all forms of sexual violence against children. The convention also covers sex tourism and the solicitation of children for sexual purposes through information and communication technologies (also known as 'child grooming'). On 29 November 2010, the Council of Europe launched an awareness-raising campaign in Rome on sexual violence against children to break the silence surrounding sexual abuse and educate children and professionals.

Promising practice

Red button for a safer Internet

The Czech National Centre for a Safer Internet and the governmental Committee for the Rights of the Child prepared special software. When installed on a computer, a 'Red Button' (*Červené tlačítko*) appears on the screen, which, when pressed, submits anonymously the content of the webpage on display to a hotline, where experts analyse the content and contact the police, if necessary.

For more information, see: www.horka-linka.saferinternet.cz/internet-hotline

At national level, the public debate about sexual abuse and exploitation by members of religious institutions, in particular the Roman Catholic Church, continued in 2010 leading to different initiatives.

In **Ireland**, the 'Saving Childhood Ryan'[22] campaign was launched by a number of NGOs on the anniversary of the 'Ryan Report'[23] seeking to improve child protection mechanisms and the full implementation of the Ryan Report recommendations. The campaign promoted the strengthening of children's rights in the Constitution and requested that provisions of the 'Implementation Plan' of the Ryan Report recommendations be given a statutory basis, as well as ensuring that all children in care have a dedicated social

18 Bulgaria, Bulgarian Helsinki Committee (2010).
19 European Commission (2010c).
20 CETS No. 201.
21 European Parliament (2010).
22 For more information, see: www.savingchildhoodryan.ie.
23 Ireland, The Compensation Advisory Committee (2002).

worker and care plan.[24] Work on a constitutional amendment to protect children's rights began.[25]

In **Austria**, the Federal Minister of Justice and the State Secretary for Family and Youth Affairs convened an expert Roundtable on prevention of child abuse on 13 April 2010, where experts criticised the lack of resources for child protection services.[26] During the same month, the Catholic church initiated the Independent Ombudsperson. This institution is a civil-society-based body that acts on the basis of recommendations issued by an independent Commission for Victims of Abuse and Violence (*Unabhängige Opferschutzanwaltschaft – Initiative gegen Missbrauch und Gewalt*).[27] Since its establishment, more than 500 victims have contacted the institution, which collects information from victims, cooperates with police and prosecutors, and recommends support measures for victims abused by representatives of the church, including financial compensation. On 21 September 2010, the Commission announced the first 10 decisions regarding financial compensation. In the **Netherlands** in March 2010, through the initiative 'Help and Law', the Roman Catholic Church set up its own investigations into more than 2,000 allegations of sexual and physical abuse of children by representatives of the church dating back to the 1950s.[28]

High-profile court cases in the EU Member States have increased public awareness of sexual abuse and exploitation of children. In **Portugal** on 2 September 2010, following a trial that lasted six years, the 7th and 8th Criminal Courts rendered judgment in the case of the Casa Pia institution, in which paedophile crimes were allegedly committed against the young boys and girls with financial problems who were in its care. The case, which involved 32 victims and 920 witnesses, resulted in six prison sentences ranging from five years and nine months to 18 years imprisonment, with one acquittal. Most of the accused have lodged appeals.

In **Belgium** in April 2010, the Brussels Court of Appeal upheld a judgment which ordered the sentencing of a former parish priest to five years in prison for the sexual abuse of a six-year-old boy from 1994 until 2001. In June 2010, the media reported[29] that the Belgian police raided the headquarters of the Belgian Catholic Church and the premises of an independent church commission, which was investigating hundreds of child abuse claims, and seized computers and files reportedly evidencing systematic sexual abuse practices. Subsequently, a Belgian court declared the raid illegal and ordered the material returned.

In **Denmark** in April 2010, police launched an investigation into more than 17 claims of abuse dating back to the 1970s and 1980s. The investigation was terminated as the time elapsed since the alleged abuses exceeded the statute of limitations.[30]

A number of national legislative initiatives combating child abuse were taken. For example, in **Spain**, amendments to the Criminal Code implementing the Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, include a new section criminalising sexual aggression against children 13 years old and under and the practice of 'grooming'.[31] The amendments, which entered into force on 23 December 2010, also introduce the penalty of deprivation of paternal authority.

The increasing importance of combating grooming is reflected in EU legislative proposals and in national initiatives.

4.2. Child-friendly justice

Significant work on child-friendly justice was produced by the project 'Children in the Union - Rights and Empowerment' (CURE).[32] CURE is a cooperation of partners in nine Member States, and is co-funded by the Prevention of and Fight against Crime programme (ISEC) of the European Commission, DG Justice. It is run by the Crime Victim Compensation and Support Authority of **Sweden**, which examined children as crime victims in the criminal justice systems of the EU. The 2010 CURE report argued that justice systems, and in particular criminal justice systems, are not adapted to children. The report noted, "Children are more exposed to crime than other groups of individuals. Children subjected to crime are also particularly vulnerable when entering the criminal justice system. The reasons are connected to the fact that this system is not adapted to children. This means that child victims and witnesses do not have the same access to justice as adults. It also might lead to secondary victimisation. Not responding to the needs of child victims might be detrimental to the well-being and development of these children. Another effect is lack of confidence in the judicial system."[33]

"[C]hild victims and witnesses do not have the same access to justice as adults".

2010 CURE report. For more information, see: www.brottsoffermyndigheten.se/default.asp?id=3251.

The European Commission's proposal in August 2010 for a directive[34] on the right to information in criminal proceed-

24 Ireland, Saving Childhood Ryan (2010).
25 Ireland, Joint Committee on the Constitutional Amendment on Children (2010).
26 Austria, Ministry of Justice (*Bundesministerium für Justiz*) (2010) and for more information on Ombuds offices against violence and sexual abuse with respect to to the catholic church, see: www.katholisch.at.
27 For more information, see www.opfer-schutz.at.
28 BBC (2010).
29 Mevel, J. (2010) and Le Soir (2010).
30 The Copenhagen Post (2010).
31 Spain, Ley Orgánica 5/2010 of 22 June 2010, Boletín Oficial del Estado, 23 June 2010.
32 For more information see: www.brottsoffermyndigheten.se/default.asp?id=3251.
33 CURE (2010), p. 13.
34 European Commission (2010d).

ings contains special provisions for children. According to these, the information normally provided in a standard written document (Letter of Rights) must be presented orally to children, taking into account a child's age, level of maturity, as well as to the child's intellectual and emotional capacities. For more information, see Chapter 8 on child-friendly access to justice.

More broadly, the European Commission's Communication on an EU Agenda for the Rights of the Child[35], published in February 2011, highlights that making justice systems more child-friendly is a key action item for the EU, as it concerns an area of high practical relevance where the EU has, under the Treaties, the competence to turn the rights of the child into reality through EU legislation. In the context of civil and criminal justice policies the Commission's Agenda contains proposals for concrete measures to make justice systems more child-friendly, which for instance include for 2011 the adoption of a proposal for a Directive raising the level of protection of vulnerable victims, including children.

"When my parents got themselves divorced, there were loads of people who took the decision 'in my interest'. No-one asked my advice."

Luxembourg, boy, Eurobarometer (2010), The rights of the child, *p. 11.*

The Council of Europe Committee of Ministers adopted the Guidelines on child-friendly justice on 17 November 2010.[36] Their aim is to ensure that all rights of children, among which the right to information, representation, participation and protection, are fully respected with due consideration to the child's level of maturity and understanding as well as to the circumstances of the case in all judicial and administrative procedures. These guidelines are intended to serve as a practical guide to implementing internationally agreed standards built on the existing international, European and national standards.

There were also some important initiatives in Member States. For example, in **Latvia** on 4 March 2010, the Parliament adopted amendments to the Law on the Protection of the Rights of Children, regarding the sphere of authority of police and other institutions in cases of violence against children. Accordingly, the police, childcare, educational, medical and social rehabilitation institutions can ban parents and close relatives from meeting a child, if this can harm his/her health, development and security. These new rules also envisage specific action against institutions in cases of reasonable suspicion of violations of children's rights.

The need to strike a balance between state intervention for child protection and the protection of family life, and, in particular, the need to limit the power of authorities to separate a child from his/her family was highlighted in **Poland** by the Commissioner of Children's Rights.[37] The Commissioner argued that the procedures for compulsory removal into state care should be standardised, that the obligations of the court-appointed custodian should be clarified and that the family should be informed about foster care procedures.

35 European Commission (2011).

36 Council of Europe Committee of Ministers (2010b).

4.3. Child trafficking

On 29 March 2010, the European Commission adopted a *Proposal for a Directive on preventing and combating trafficking in human beings and protecting victims*,[38] which builds on the Palermo Protocol[39] and the 2005 Council of Europe Convention on Action against Trafficking in Human Beings. Several articles deal with child protection acknowledging that children are more vulnerable and stipulating that in the application of the directive the primary consideration must be the child's best interests. On 14 December 2010, political agreement was reached on the final act and on the same day, the European Commission appointed Myria Vassiliadou as its first Anti-Trafficking Coordinator.

However, in 2010 little progress was made regarding the paucity of comparable and disaggregated data on child trafficking for sexual or labour exploitation at EU and at national level, which had already been highlighted in 2009 by the FRA report on *Child Trafficking in the European Union – Challenges, perspectives and good practices*[40]. Differences in legal definitions of offences and non-conformity to the Palermo Protocol for criminalising trafficking remain key obstacles to systematic data collection.

Nevertheless, some EU Member States systematically collect disaggregated data on children. For example, in the **UK**, such data are broken down according to the type of exploitation, the age range and gender of victims by the National Referral Mechanism (NRM)[41] of the UK Human Trafficking Centre (UKHTC). The NRM enables the UKHTC to identify the number of victims and to build a clearer picture about the scale of the problem of human trafficking in the UK. During the first 18 months of the NRM (1 April 2009 to 30 September 2010) 276 referrals of children were made, and in 77 of these cases the information received was considered to be sufficient for concluding that the person was indeed believed to be a victim of human trafficking. In **Romania**, the National Agency against Trafficking in Persons collects data on all victims of trafficking, including children disaggregated by gender, age, residence and background of the victim, recruitment and transportation, destination of trafficking and type of exploitation. The report for the first half

37 For more information, see www.brpd.gov.pl/wystapienia/wyst_2010_02_12.pdf

38 European Commission (2010e).

39 United Nations, Protocol to the Convention against Transnational Organised Crime to Prevent Suppress and Punish Trafficking in Persons, especially Women and Children, Geneva, 2000.

40 European Union Agency for Fundamental Rights (FRA) (2009), p. 13.

41 UK, Serious Organised Crime Agency website: www.soca.gov.uk/about-soca/library/doc_download/237-nrm-statistical-data-010409-to-300910

of 2010 identified 27 boys and 99 girls as victims of trafficking, compared with 63 children in the corresponding period for 2009 and 109 for the same period in 2008.[42]

Some positive steps were taken by EU Member States in incorporating the uniform definition contained in the Council of Europe Convention on Action against Trafficking of Human Beings. For example, in **Poland** an amendment to the Penal Code, which entered into force on 8 September 2010, implemented the convention's definition of trafficking and provided a definition of illegal adoption. The amendment also defined slavery and introduced a minimum conviction of three years imprisonment for the crime of human trafficking.

There is some evidence to suggest that certain groups of children, including those who beg, are vulnerable to being trafficked. During 2010 stronger sanctions have been put in place for persons who exploit children for begging in **Italy**. The Italian Court of Cassation clarified that the new article 600-*octies* of the Italian criminal code, introduced by *Legge n. 94* of 2009, punishes whoever exploits a child under 14 years of age to beg, or otherwise allows or encourages a child under his/her legal custody or authority to do so.[43] The new law changes the qualification of the offence from misdemeanour to crime, broadens the scope of guilt, and increases the level of sanctions: children exploitation for begging is now punishable with a maximum sanction of three years of imprisonment.

4.4. Separated children in a migration or asylum context

Many children arrive in the EU every year separated from their parents, often seeking asylum. Some of these children have fled their country of origin displaced by war, armed conflicts, for fear of persecution and some to escape from poverty. Some may even have been trafficked for sexual or labour exploitation. The situation of these children is particularly precarious and their protection is therefore of critical importance. The European Council noted the problem in the Stockholm Programme giving "priority to the needs of international protection and reception of unaccompanied minors".

In this context, the FRA published in 2010 a report on separated asylum-seeking children based on fieldwork interview research and complementing parallel legal and policy research carried out by the European Migration Network (EMN) on *Policies on reception, return and integration, arrangements for, and numbers of, unaccompanied minors – an EU comparative study*.[44]

FRA ACTIVITY

Study on separated, asylum-seeking children

On 7 December 2010, the FRA published its report on *Separated, asylum-seeking children in EU Member States*, which found that children are sometimes placed in unsuitable accommodation, such as in closed structures, including hotels or hostels together with unrelated adults. The report, which was based on interviews with 336 separated asylum-seeking children and 302 adults responsible in their care in 12 Member States, also found problems with medical screening and health assessment, and guardianship systems. The report, which was published at the Agency's Fundamental Rights Conference, 'Ensuring justice and protection for all children', also said that legal representatives are not always trained or qualified.

For more information, see: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/pub_sep_asylum_en.htm

The European Commission adopted on 6 May 2010 an *Action Plan on Unaccompanied Minors for the years 2010–2014* focusing on three main strands for action: the prevention of unsafe migration and trafficking; reception and procedural guarantees in the EU – encompassing age assessment and family tracing issues; and the identification of durable solutions – including family reunification. The Action Plan supports the adoption of common standards for guardianship and legal representation and recommends that a decision on the future of each unaccompanied minor be taken by the competent authorities as soon as possible, preferably within six months. The return of the children is identified as only one option "because the issue is much more complex and multidimensional and there are clear boundaries to the Member States' freedom of action when dealing with unaccompanied minors".[45]

On 3 June 2010, the Justice and Home Affairs Council, in its conclusions on unaccompanied minors, invited the European Commission to assess whether EU legislation offers them sufficient protection. The Council also asked Member States to monitor the quality of care provided in order to ensure that "the best interest of the child is being represented throughout the decision-making process". It also encourages them to cooperate with EU agencies and networks, mainly Frontex, Europol, the European Asylum Support Office, the FRA and and European Migration Network in order to improve the analysis and exchange of data.

42 Romania, Ministerul Administrației și Internelor, Inspectoratul General al Poliției Române, Agenția Națională împotriva Traficului de Persoane, (2010).
43 Italy, Corte di Cassazione, I sez. pen., 22 June 2010, No. 23869, in materia di accattonaggio.
44 European Migration Network (EMN) (2010).

45 European Commission (2010f), p. 2.

Promising practice

Little alien – a documentary on young asylum seekers

On 1 October 2010, the documentary 'Little Alien' by Nina Kusturica received the 'Outstanding Artist Award - Intercultural Dialogue 2010' sponsored by the Austrian Federal Ministry for Education, Arts and Culture (Bundesministerium für Unterricht, Kunst und Kultur). The film portrays the struggles of young asylum seekers from Somalia and Afghanistan, who are trying to find a new home in Austria. Educational material was produced by the filmmakers and as part of their 'school tour' the film crew and protagonists participated in workshops and public screenings.

For more information, see: www.littlealien.at

4.5. Data collection

The lack of robust comparable data on child rights issues described in the 2006 Commission Communication 'Towards an EU Strategy on the Rights of the Child' remains a persistent problem in the EU. Although some countries have data collection systems in place, their quality varies and data are not comparable, as they are based on different indicators.

An example of a Member State collecting data in the context of violence against children is, for instance, **Bulgaria**. Since it was established in 2001, The State Agency for Child Protection collates the statistics provided by all Child Protection Departments of the state. They record the cases of violence against children on a special information card which includes: the number of cases of violence against children, type of violence, location of the violent acts, age and family status of the children victims of violence, profile of the person who submitted the claim, the profile of the perpetrator, and measures for protection that have been applied.[46]

An example of a Member State collecting data in the context of sexual abuse is **Sweden**. According to the National Council for Crime Prevention (*Brottsförebyggande rådet*, Brå), it is not unusual for teenagers aged between 14 and 15 years to report that they have been contacted through the Internet

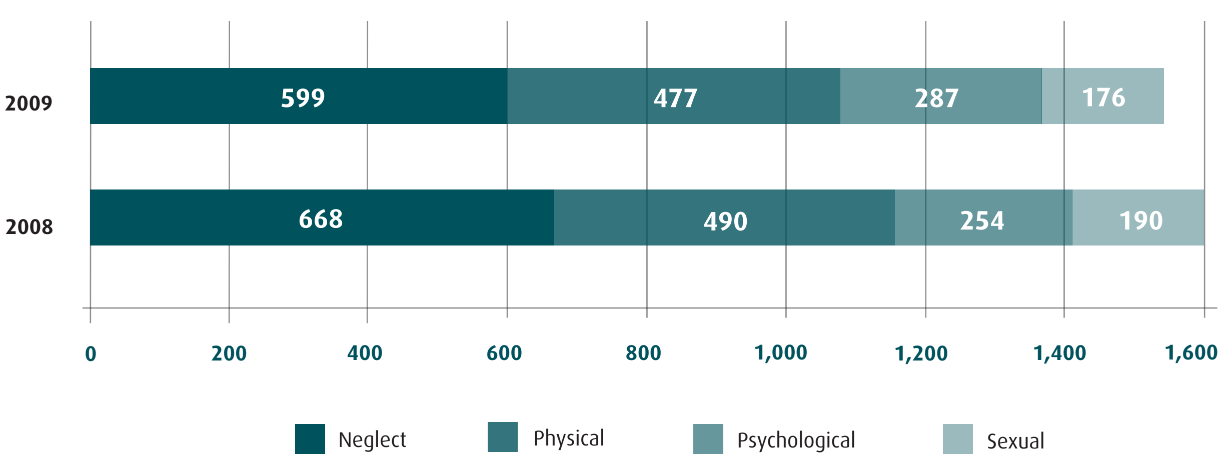
FRA ACTIVITY

Presentation of child rights indicators

In November 2010, the FRA published its final report on child rights indicators. Their purpose is to enable EU institutions, Member States, and organisations and individuals concerned with developing the appropriate legal and policy responses to enhance the protection and promotion of children's rights by the EU. The FRA's child rights indicators are an initial toolkit to evaluate the impact of EU law and policy on children's status and experience across the fields of: family environment and alternative care; protection from exploitation and violence; adequate standard of living; and education, citizenship and participation in activities related to school and sport. The indicators highlight limitations and gaps in current legal and policy responses, providing a springboard for future legal and policy development. They respect EU competence and the role of national and local authorities in addressing different aspects of the protection, promotion and fulfilment of the rights of the child.

FRA (2010b) Developing Indicators for the Protection, Respect and Promotion of the Rights of the Child in the European Union, *available at: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/pub-rightsofchild-summary_en.htm*

Figure 4.1: Number of child victims of violence in Bulgaria, 2008 and 2009



Source: FRA 2010, based on statistics from the State Agency for Child Protection, Bulgaria

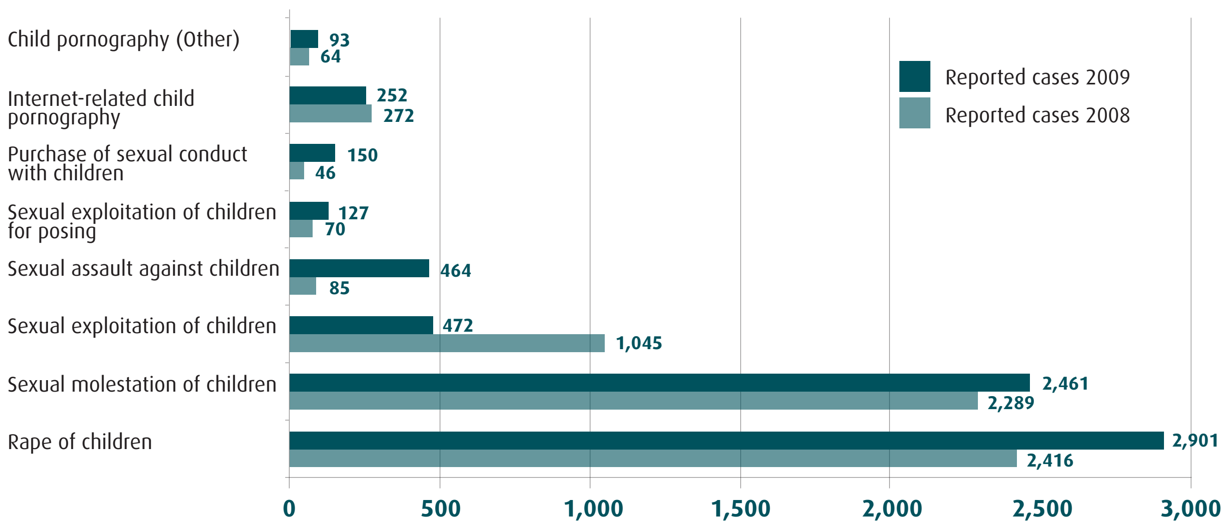
46 For more information, see: www.stopech.sacp.government.bg/.

and offered money or other forms of payment (such as topping up their mobile phone cards) in exchange for sexual services. Although a report of the Swedish National Youth Board suggests that the Internet has not led to more young people selling sex, a third of the youth covered by the report had received sexual invitations on the Internet.[47] However, according to Swedish sources, the majority of reported cases of sexual exploitation of children are committed by someone with a close relationship to the victim. As figure 4.2 illustrates, most of the reported cases of child abuse and exploitation in Sweden concerned rape. The majority of reported cases of child rape victimise girls aged between birth and 14 years, followed by girls aged between 15 and 17 (40%). Child rape against boys aged between birth and 14 years amounts to 6% and of boys aged between 15 and 17 to 1%.[48]

implementation by providing evidence-based assistance and expertise, collecting data from secondary sources and fieldwork research, and by continuing to report progress made.

Following the strong focus of the EU Agenda on child-friendly justice and the adoption of the relevant Council of Europe guidelines, progress in this area will be of primary importance. Legal and policy developments in this field should reflect international standards such as the UN Convention on the Rights of the Child, as well as the European Convention on Human Rights and international standards and relevant case law concerning children. A particularly important goal is to achieve recognition of the special status, needs and rights of children and, as a result, the need to respect, protect and fulfil their right to access justice, as well as to be consulted and heard in proceedings involving or affecting them.

Figure 4.2: Reported cases of child abuse and exploitation in Sweden, 2008-2009



Source: FRA 2010, based on the criminal statistics report 2008-2009 of the National Council for Crime Prevention (Brottsförebygganderådet, Brå), Sweden.

Given the need for objective, reliable and comparable data on children's rights, the European Commission asked the FRA to develop indicators for measuring the protection, respect and promotion of the rights of the child in the EU in order to assess the impact of Union law and policies identifying their achievements and revealing gaps.

Outlook

The European Commission's Communication on an Agenda for the Rights of the Child contains an ambitious work plan for improving child protection in the EU. It proposes concrete action in key areas, such as child-friendly justice, protecting children in vulnerable situations and fighting violence against children inside the EU and externally. The FRA will support its

Children in situations of particular vulnerability are another key focus area for EU work. These include children that go missing from home, children with disabilities, Roma and Traveller children, separated children in a migration or asylum context and child victims of trafficking for sexual and labour exploitation. The EU measures to enhance the protection of these children must have as a primary consideration the children's best interests, with respect to their psychological and physical well-being, as well as their legal, social and economic interests. Furthermore, the children's views and opinions should be taken into account.

Finally, children using modern communication technologies benefit from digital learning. Nonetheless, they are also vulnerable when confronted with potentially harmful content and harmful conduct through cyber-bullying or grooming, for instance. In this regard, the EU, national authorities and service providers have a reponsibility to develop concrete measures that protect children effectively.

47 Sweden, National Council for Crime Prevention (Brottsförebygganderådet, Brå) (2010), p. 68.
48 *Ibid.*, p. 26.

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UN & CoE

January

5 February – UN Committee on the Elimination of discrimination against women issues Concluding Observations on the Netherlands

February

2 March – European Court of Human Rights (ECtHR), decides the *Kozak v. Poland* case with implications for the status of same-sex couples

31 March – CoE Committee of Ministers adopts a recommendation on measures to combat discrimination on grounds of sexual orientation or gender identity

March

29 April – CoE Parliamentary Assembly adopts a resolution and a recommendation on discrimination on the basis of sexual orientation and gender identity

April

May

24 June – ECtHR decides the *Schalk and Kopf v. Austria* case with implications for the status of same-sex couples

June

22 July – ECtHR decides the *P.B. & J.S. v. Austria* case with implications for the status of same-sex couples.

July

August

September

7 October – CoE Parliamentary Assembly adopts a resolution and a recommendation on guaranteeing the right to education for children with illnesses or disabilities

22 October – UN Committee on the Elimination of discrimination against women issues Concluding Observations on the Czech Republic

October

November

December

EU

12 January – CJEU decides in the *Domnica Peterson v. Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* case on the legality of age limits for practicing dentists

19 January – CJEU clarifies in the *Seda Kücükdeveci v. Sedex GmbH & Co. KG* case whether it is possible to disregard periods of employment that predate a certain age

January

February

8 March – EU adopts a directive implementing the revised framework agreement on parental leave

March

April

May

15 June – EU adopts a directive on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity

June

July

August

21 September – European Commission adopts a Strategy for equality between women and men (2010-2015)

September

October

15 November – European Commission adopts a European Disability Strategy (2010-2020)

November

23 December – EU ratifies the UN Convention on the Rights of Persons with Disabilities

December

5

Equality and non-discrimination

Ten years on from the European Union's (EU) adoption in 2000 of a detailed legislative framework on discrimination, evidence available to the FRA shows that the elimination of discrimination continues to constitute a significant challenge in the Member States. Not to be discriminated against – be it on the basis of sex, religion, disability, sexual orientation or age – is a fundamental right that is of relevance to countless situations in daily life. Over the reporting period, the EU adopted directives on parental leave and on equality between self-employed men and women, while the European Commission established a new five-year strategy working toward equality between men and women. Member States introduced legislation to implement a number of EU equality directives. But despite this progress, challenges remain. Multiple discrimination, for example, remains a reality that is largely not mirrored by the legal framework of the EU. The Lisbon Treaty puts the EU under a new horizontal obligation to combat discrimination in all its policies and activities – a task that can contribute to more equal societies.

This chapter covers developments in EU and Member State policies and practices in the area of non-discrimination for the year 2010. In order to gain a comprehensive overview of this area, it should be read together with Chapter 6 on racism and ethnic discrimination, which focuses more specifically on discrimination on the basis of racial and ethnic origin, including racist crime. This chapter will first examine horizontal issues that relate to non-discrimination across all grounds, including those of racial and ethnic origin. It will then move on to examine developments in relation to specific grounds of discrimination: sex, religion or belief, disability, sexual orientation and age. Finally, the chapter will address the issue of multiple discrimination.

5.1. Horizontal issues

This section will address issues relating to the area of non-discrimination as a whole, including discrimination on the basis of racial and ethnic origin, discussed in greater detail in Chapter 6 on racism and ethnic discrimination. It will address the development and application of the equality directives, the issue of rights awareness, and the role of the equality bodies, including numbers of complaints.

Key developments in the area of non-discrimination:

- negotiations on the 'horizontal' directive remained ongoing in the Council of the European Union;
- EU Member States continued to introduce new legislation, as well as amending existing ones, to transpose the equality directives, namely the Racial Equality Directive, Employment Equality Directive, Gender Goods and Services Directive and Gender Equality Directive (recast);
- levels of complaints received by equality bodies remained varied across the EU. Despite an increase in complaints reported in 12 EU Member States, overall numbers appeared low. The mandates of some equality bodies were broadened to include more grounds of discrimination;
- directives on parental leave and on equality between self-employed men and women were adopted, as well as a five-year strategy promoting equality between men and women covering the period 2010-2015. Negotiations on the Pregnant Workers Directive remained ongoing;
- the European Institute for Gender Equality (EIGE) was formally opened;
- the EU ratified the United Nations Convention on the Rights of Persons with Disabilities (CRPD), as did a further four Member States in 2010, bringing the total to 16 Member States having ratified the convention. The European Commission launched its

European Disability Strategy,[1] and some Member States moved towards the implementation of independent living and inclusive education for persons with disabilities;[2]

- the Council of Europe Committee of Ministers adopted a far-reaching recommendation on sexual orientation and gender identity discrimination,[3] while the Parliamentary Assembly adopted a recommendation and a resolution on the topic. European Court of Human Rights (ECtHR) case law and measures among some Member States prompted developments in the rights of same-sex couples, transgender rights and the carrying out of Pride marches;
- discrimination on the basis of religion received consideration in judicial decisions relating to the display of religious symbols at work and religious classes in schools;
- promotion of the participation of both older persons and young persons in the labour market received attention in initiatives of the European Commission;[4]
- progress towards dealing with discrimination on multiple grounds was seen among some Member States' courts and equality bodies.

5.1.1. The equality directives

The 10th anniversary of the EU equality directives stood at the centre of the 2010 Equality Summit that took place in Brussels on 15 and 16 November 2010 and was co-organised by the Belgian Presidency of the EU and the European Commission. As it stands, EU non-discrimination law prohibits discrimination on the grounds of racial origin, ethnicity and sex across the areas of employment, access to goods and services and access to welfare services. However, discrimination on the grounds of religion or belief, disability, sexual orientation and age is prohibited only in the area of employment. Adoption of the proposed 'horizontal' directive, submitted by the Commission in July 2008, would eliminate this current 'hierarchy of grounds' by prohibiting discrimination on these grounds in roughly the same areas covered by the Racial Equality Directive[5] and Gender Equality Directives, namely the Gender Goods and Services Directive[6] and Gender Equality Directive (recast).[7]

At EU level, negotiations on the 'horizontal' directive remained ongoing. The conclusions of the June 2010 meeting of the Council of the EU on Employment, Social Policy, Health and Consumer Affairs (EPSCO) noted that "despite some progress, further discussions are needed on numerous issues. These include the division of competences between the Member States and the EU, the specific provisions on disabilities (e.g. the scope of the directive, its financial and practical implications and the interrelationship between the directive and more detailed sectoral specifications), the implementation calendar and the issues of legal certainty".[8] The Council Progress report of 19 November 2010 concludes that, although "significant progress has been made under the Belgian Presidency in the attempt to clarify the provisions concerning financial services and housing, there is a clear need for extensive further work on the proposal".[9]

> *"Since diversity enriches the Union, the EU and its Member States must provide a safe environment where differences are respected and the most vulnerable protected. Measures to tackle discrimination, racism, anti-Semitism, xenophobia and homophobia must be vigorously pursued."*
>
> *The Stockholm Programme – An open and secure Europe serving and protecting citizens (OJ C 115, 4 May 2010, p. 1), paragraph 2(3), p. 14.*

FRA ACTIVITY

Many EU Member States extend protection against discrimination

In 2010, the FRA published an update of a comparative legal report on discrimination on the grounds of sexual orientation and gender identity. It found that many EU Member States had introduced legislation prohibiting discrimination on the grounds of sexual orientation in those areas covered by the Racial Equality Directive, even though the equality directives did not require them to do so. "As of 2010, only nine Member States have maintained the 'hierarchy' that affords racial and ethnic origin better protection than other grounds (**Cyprus**, **Denmark**, **Estonia**, **France**, **Greece**, **Italy**, **Malta**, **Poland**, **Portugal**)."

FRA (2010), Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, 2010 update: Comparative legal analysis

At national level, 10 years after the adoption of the Employment Equality Directive[10] and the Racial Equality Directive in 2000, legislative activity remained ongoing in some Member States. This is both the result of infringement proceedings launched by the European Commission, and efforts to simplify, strengthen and consolidate existing national legal frameworks. For instance, in 2010 **Latvia** continued the transposition of the Racial Equality Directive and of the Employment Equality Directive by amending the Education Law, the Law on the Support for the Unemployed and Jobseekers and the Labour Law. Some of these measures were introduced in response to the reasoned opinion of the European Commission sent to Latvia on 25 June 2009 concerning the failure to properly transpose the definition of indirect discrimination.[11] Furthermore, in September 2010

1 European Commission (2010b).
2 Council of Europe, Committee of Ministers (2010a).
3 Council of Europe, Committee of Ministers (2010b).
4 European Commission (2010c) and (2010d).
5 Council Directive 2000/43/EC, OJ 2000 L 180, p. 22.
6 Council Directive 2004/113/EC, OJ 2004 L 373, p. 37.
7 Directive 2006/54/EC, OJ 2006 L 204, p. 23.
8 Council of the European Union (2010a).
9 Council of the European Union (2010d).
10 Council Directive, 2000/78/EC, OJ 2000 L 303, p. 16.
11 European Commission (2009a).

the Latvian Parliament (*Saeima*) approved amendments to the Consumer Rights Protection Law at the second reading, which in addition to gender, race and ethnicity adds disability as a prohibited ground for discrimination in the provision of access to goods and services.[12]

By the end of 2010, the **Polish** Parliament (*Sejm*) had adopted the Act on implementation of certain EU provisions concerning equal treatment, which was designed to transpose the equality provisions of various EU directives.[13] The act took effect on 1 January 2011. In the **Czech Republic**, the final provisions of the Anti-discrimination Act[14] took effect in December 2009, after most of its provisions entered into force in September 2009. The **United Kingdom** (UK) saw the adoption of the Equality Act 2010, which extends and consolidates non-discrimination law concerning all grounds covered by the equality directives.[15] Most of the legislation took effect on 1 October 2010, applying mainly to England, Wales and Scotland. With a few exceptions, it does not apply to Northern Ireland, since equal opportunities and discrimination are 'transferred matters' under the Northern Ireland Act 1998.

In **Finland**, as the various amendments made to the Equality of Treatment Act in the period following its initial adoption have caused the legislation to grow quite fragmented,[16] the Ministry of Justice (*Oikeusministeriö*) set up a committee to investigate the possibility of reforming the current legislation.[17] The proposed new Equality of Treatment Act aims to reform the bodies currently monitoring equality and discrimination. If and when implemented, the law will provide more extensive and systematic legal protection for equality, prohibiting discrimination in both the public and private sectors.

In the **Netherlands**, a legislative proposal to amend the Constitution was brought before the House of Representatives on 14 June 2010 in order to add disability and sexual orientation to the grounds protected under Article 1 of the Constitution.[18] In addition, the Municipal Antidiscrimination Facilities Act entered into force on 28 January 2010. It requires municipalities to arrange an easily accessible way for citizens to submit a claim to a Municipal Antidiscrimination Facility.[19] Finally, a bill was submitted to the legislature on the establishment of a human rights body. The institute will be combined with the Equal Treatment Commission and form a new organisation to be called the Human Rights and Equal Treatment Commission (on National Human Rights Institutions, see Chapter 8 on Access to justice).

5.1.2. Rights awareness

The equality directives require the EU Member States to raise awareness about equality-related rights by bringing the relevant provisions "to the attention of the persons concerned by all appropriate means".[20] Despite the fact that discrimination continues to be a persistent feature in Europe, it appears that awareness of rights and how to exercise them remains low. It is noteworthy that, according to the Special Eurobarometer survey of November 2009,[21] about 16% of people in Europe claim to have personally experienced discrimination on the basis of race, religion, age, disability or sexual orientation in 2009. Age is the most common reason for self-reported discrimination at 6% of those surveyed. As regards the perception of age discrimination, this appears to be closely correlated with the impact of the financial and economic crisis: the survey shows that 64% of Europeans are concerned that the recession will contribute to more age discrimination in the job market.

Most importantly, the survey illustrates the importance of the work still to be done to raise awareness and inform people about their rights. Consistent with previous findings,[22] only one in three Europeans are aware of their rights should they become a victim of discrimination or harassment. This shows that there are challenges in developing greater rights awareness. However, this figure masks considerable differences at national level: awareness increased since the last survey in 2008 in the **United Kingdom** (UK) (by eight percentage points), **France** (by seven percentage points), **Ireland** and **Sweden** (each by six percentage points), but fell in **Poland** (by 12 percentage points) and **Portugal** (by 11 percentage points).

FRA ACTIVITY

FRA survey shows low awareness of rights and equality bodies

In 2010, the FRA published its third *Data in Focus Report* based on the results of the EU Minorities and Discrimination Survey (EU-MIDIS), which was based on face-to-face interviews in the EU27 with 23,500 respondents with a self-identified ethnic minority/immigrant background. The report focused on levels of rights awareness in the field of non-discrimination and knowledge about equality bodies. The findings revealed that, on average across the different minority groups surveyed, only 25% knew about existing non-discrimination legislation in the three areas of employment, goods and services as well as housing. In addition, 80% of all survey respondents could not think of a single organisation that could offer support to victims of discrimination – be this government-based or an NGO – and, when given the name of an Equality Body or the equivalent organisation in their Member State, 60% of respondents indicated that they had never heard of them.

FRA (2010), Data in Focus 3: Rights awareness and equality bodies

12 Latvia (2010a).
13 Poland (2010a).
14 Czech Republic (2009).
15 United Kingdom (2010a), Chapter 15.
16 Finland (2009a).
17 Finland (2009b).
18 Netherlands (2010a).
19 Netherlands (2010b).
20 Article 12 Employment Equality Directive, Article 10 Racial Equality Directive.
21 European Commission (2009b).
22 European Commission (2008b).

5.1.3. Equality bodies

The Racial Equality Directive and Gender Equality Directives require Member States to establish or designate "a body or bodies" – referred to as 'equality bodies' – with a range of tasks to promote equality, including providing independent assistance to victims of discrimination. Equality bodies now exist in all EU Member States. Since the last FRA Annual Report in 2010, **Spain** has designated equality bodies and **Poland** has adopted a legislative framework for an equality body. Although equality bodies are not required by the Employment Equality Directive, several Member States have designated equality bodies to cover the grounds of religion or belief, sexual orientation, disability and age, in addition to sex and racial and ethnic origin.

This section provides an overview of the level of complaints or requests for assistance made to the respective equality bodies, showing trends in the number of cases, the main areas of discrimination reported and developments in their operation and work.

2010 saw some important developments. Firstly, 10 out of 24 Member States where data for 2010 was available experienced an increase in the number of complaints or requests to equality bodies for assistance. Secondly, institutional reform of existing mechanisms, including a widened mandate to include other grounds of discrimination, took place in **Denmark** and **France**. Thirdly, equality bodies have come under increasing scrutiny from United Nations (UN) Treaty Bodies, notably the Committee on the Elimination of Racial Discrimination (CERD), during the process of periodic review.

Two issues of concern[23] remain:

- the low number of cases brought before many equality bodies;
- the relatively poor quality of data being collected in some Member States, which lacks disaggregation by grounds of discrimination, such as sex and age, or by thematic area, such as employment or education.

The three directives – that is, the Racial Equality and Gender Equality Directives – requiring equality bodies to be established specify that their mandate must include the provision of "independent assistance to victims of discrimination in pursuing their complaints about discrimination."[24] This may, depending on the Member State, be an actual redress mechanism, allowing the equality body:

- to issue a decision on the complaint itself ('complaint'); or
- to provide assistance to victims of discrimination in other procedures, such as referring the complaint to a public prosecutor or mediator, taking the case to court; or
- to provide assistance assistance to the complainant in one of these processes ('reference').

Unless there is a specific need to distinguish between them, 'complaints' in the following section will be taken to include 'references'.

As noted in previous annual reports, the fact that a greater or lesser number of complaints are registered by comparison to previous years cannot in itself be taken as an indication of the trend in actual occurrences of discrimination. Numbers of registered complaints are likely to be dependent on levels of awareness of existing mechanisms, confidence that making a complaint will be useful, levels of possible compensation available, and the user-friendliness of mechanisms. In addition, the history of each Member State's approach to discrimination needs to be kept in mind to understand reporting and recording practices.

FRA ACTIVITY

The role of equality bodies in delivering access to justice

In late 2010, the FRA convened the inception meeting for its research project on access to justice through equality bodies. The project, running throughout 2011, will analyse how equality bodies contribute to facilitating access to justice, as experienced not only by representatives of these bodies, but also intermediaries – such as lawyers and victim support organisations – and complainants themselves. The research will look at the EU as a whole, while focusing on eight selected Member States.

For more information, see: http://fra.europa.eu/fraWebsite/research/projects/proj_accessingjustice_en.htm

FRA ACTIVITY

Promoting a stronger fundamental rights architecture

In May 2010, the Agency organised a symposium entitled 'Strengthening the fundamental rights architecture in the EU' and released four reports relating to issues that contribute to the overarching architecture of fundamental rights in the EU: equality bodies, data protection authorities, and national human rights institutions, as well as the views of social partners as important stakeholders in the sphere of discrimination in employment. The symposium addressed issues like independence, mandates and resources as themes relevant for the efficient protection and promotion of fundamental rights at the national level.

For more information, see http://fra.europa.eu/fraWebsite/media/mr-070510_en.htm

23 These issues are indeed also reflected in several reports published by the Council of Europe European Commission against Racism and Tolerance (ECRI) on EU Member States in 2010 on: Austria (2010a), p. 43; Estonia (2010b), pp. 21 and 45; France (2010d), p. 44; and Poland (2010e), p. 37.

24 Article 13 (2) Racial Equality Directive; Article 12 (2) (a) Gender Goods and Services Directive; Article 20 (2) (a) Gender Equality Directive (recast).

Table 5.1: Equality bodies established in 2010

	New equality bodies
Spain	Council for the Promotion of Equal Treatment and Non-discrimination on the Grounds of Racial or Ethnic origin 'Race and Ethnic Equality Council' (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*) The Council commenced operations in late 2009.[25]
Poland	Commissioner for Civil Rights Protection, 'Ombuds Office' (*Rzecznik Praw Obywatelskich*, RPO) supported by the Government Plenipotentiary for Equal Treatment (within the Prime Minister's Office). The Polish government adopted the Act on implementation of certain EU provisions concerning equal treatment in September 2010, which came into effect on 1 January 2011.

Nevertheless, statistics on numbers of complaints can be taken to provide an indication of how aware victims are of complaints mechanisms. Although a high number of registered complaints could suggest that an equality body may have a high impact in terms of changing discriminatory practices, a low number should not necessarily be correlated with a low impact. This is because a single case could have a high impact if it deals with important issues, sets a precedent, results in a change in law or practice and/or receives a high level of attention from the media and the public.

Table 5.2: Number of complaints or requests to equality bodies on all discrimination grounds and ethnic discrimination, by EU Member State, 2009 and 2010

	2009				2010									
	Discrimination on all grounds		Ethnic discrimination (including race)			Discrimination on all grounds				Ethnic discrimination (including race)				
	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of months reported on	Number of complaints during reporting period	Number of complaints adapted to 12 months (total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	Number of complaints during reporting period	Number of complaints adapted to 12 months (total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	
Austria			482	57	7					347	595	71	+113	National: The three Ombuds for Equal Treatment combined
			257	31	8					165	248	29	-10	Regional: Seven regional discrimination offices
			739	88	8					512	768	91	+29	Total: National and regional above combined
Belgium	1,564	145	827	77	12	1,343	1,343	123	-221	627	627	58	-200	Centre for Equal Opportunities and Opposition to Racism (CEOOR). Note that gender discrimination is not included. Data relates to opened files (*dossiers compétents*) only, not to all received enquiries (*signalements*).
Bulgaria	1,039	137	20	3	9					10	13	2	-7	Commission for Protection against Discrimination (CPD). Data on ethnic discrimination related to decisions only, not all complaints.
Cyprus	168	210	116	145	9	145	193	242	+25					Anti-Discrimination Authority and Equality Authority combined

25 For more information, see: www.igualdadynodiscriminacion.org.

	2009				2010									
	Discrimination on all grounds		Ethnic discrimination (including race)			Discrimination on all grounds				Ethnic discrimination (including race)				
	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of months reported on	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	
Czech Republic			3	0	9					24	32	3	+29	Public Defender of Rights. Broadened mandate in September 2009
Denmark			200	36	11	210	229	42						Board of Equal Treatment
Estonia	50	38	2	2	12	47	47	36	-3	2	2	2	0	Gender Equality and Equal Treatment Commissioner
Finland	411	78	318	60	12	364	364	69	-47					Ombudsman for Equality and Office of the Ombudsman for Minorities combined – note that the data for all grounds only covers gender discrimination; data include complaints as well as requests for advice; decrease could be partly due to new Q&A online
France	10,545	163	3,009	47	8	8,239	12,359	191	+1,814	2,269	3,404	53	+395	High Commission against Discrimination and for Equality (Halde)
Germany	10,777	132	639	8										Federal anti-discrimination agency. Data combined from August 2006 through July 2010. Data relate to contacts, not complaints or requests
Greece	54	5	14	1										The Greek Ombudsman
Hungary			60	5	9					112	149	15	+104	Equal Treatment Authority (ETA)
Ireland			79	18	9					29	39	9	-40	Irish Equality Authority. Data include race and Traveller grounds.
Italy			382	6	7					413	708	12	+326	National Office Against Racial Discrimination (UNAR)
Latvia	101	46	14	6	12	78	78	55	-23	9	9	4	-5	Ombudsman's Office
Lithuania			12	3	9					15	20	6	+11	The Office of the Equal Opportunities Ombudsperson (OEOO)
Luxem-bourg					12	90	90	180		12	12	24	+12	Centre for Equal Treatment. Data for August 2009 – August 2010.
Malta	35	88	5	13	12	17	17	43	-18	3	3	8	-2	Maltese National Commission for the Promotion of Equality
Nether-lands			66	4										Equal Treatment Commission
Poland			24	1	7					13	22	1	-2	Human Rights Defender
Portugal			77	7	11.5					73	76	7	-1	Commission for Equality and Against Racial Discrimination
Romania					18					58	39	2	+39	National Council for Combating Discrimination. Data for 18 months, 2009 and through June 2010. Data affected by de facto paralysis of activities during several months in 2009 and 2010.
Slovakia			0	0	8	12					18	3	+13	Slovak National Centre for Human Rights
Slovenia			10	5	10					3	4	2	-6	Advocate of the Principle of Equality

	2009				2010									
	Discrimination on all grounds		Ethnic discrimination (including race)			Discrimination on all grounds				Ethnic discrimination (including race)				
	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of complaints	Number of complaints per 1,000,000 inhabitants	Number of months reported on	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	Number of complaints during reporting period	Number of complaints adapted to 12 months (Total reported/months reported on x 12)	Number of complaints per 1,000,000 inhabitants	Change in number of complaints 2009 to 2010	
Spain										235	235	5		Council for the Promotion of Equal Treatment and Non-Discrimination on the Grounds of Racial or Ethnic Origin. Commenced activities in 2010.
Sweden	2,537	270	766	81	12	2,614	2,614	278	77	761	761	81	-5	Equality Ombudsman (DO). Commenced activities in 2009.
United Kingdom			23	0	8					14	21	0	-2	Equality and Human Rights Commission (Great Britain)
			4,983	83										Employment Tribunal. Data for 2008/09.

Source: FRA, FRALEX and RAXEN networks, 2010

It should be noted that data is not available for all EU Member States and complaints numbers are not always broken down by the grounds of discrimination. Disaggregated data were available mostly in respect of discrimination on the basis of racial and ethnic origin, and this has been presented where possible, in addition to aggregated numbers of complaints across all grounds. The disparate nature of the data used in Table 5.2 illustrates the difficulties of data comparability among Member States.

As Table 5.2 shows, 10 Member States recorded an increase in complaints of ethnic discrimination to the equality bodies. In **Austria**, **France** and **Italy**, the increase is very large. Most of the Member States reported no significant change, while six Member States – **Belgium**, **Bulgaria**, **Ireland**, **Latvia**, **Slovenia** and **Sweden** – have experienced reductions in complaints received by equality bodies.

The change in the number of complaints reported from the previous year may, as stated, indicate various changes in the operation or perception of an equality body. In some cases, the change may be related to reforms of the institutions in question regarding mandate or powers, as outlined in the section on institutional reforms and challenges below. The total number of complaints may reflect the extent to which an equality body has shifted emphasis towards receiving and acting on complaints as opposed to, for example, awareness raising or more general monitoring.

The French equality body, the Equal Opportunities and Anti-Discrimination Commission HALDE (*Haute Autorité de Lutte contre les Discriminations et pour l'Égalité*), is noteworthy as it continues to receive more than 10,000 complaints across all grounds of discrimination, as well as the greatest number of complaints related to ethnic discrimination. However, when viewing the numbers, it is important to recall that some systems allow for and indeed process complaints through other channels, such as the **United Kingdom** (UK), where employment tribunals register several thousand complaints relating to discrimination annually.

5.1.4. International monitoring

As equality bodies have come into operation, they have been increasingly subject to scrutiny by the monitoring bodies of the United Nations (UN) human rights treaties to which EU Member States are party.[26] Chapter 10 on international obligations provides an overview of human rights treaties to which EU Member States are party.

Since FRA's 2010 Annual Report, the UN Committee on the Elimination of Racial Discrimination (CERD) has reviewed several EU Member States under its periodic reporting

26 The institutional set-up and work of the equality authorities are also regularly discussed in ECRI's country-by-country reports; for more information see ECRI 2010 reports on: Austria (2010a), pp. 18-21; Estonia (2010b), pp. 20-21; France (2010d), pp. 12-14; Poland (2010e), pp. 16-17; and the United Kingdom (2010c), pp. 25-26.

procedure. The Committee is responsible for monitoring implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which was adopted in 1965. In **Denmark**'s case, the CERD noted that "the State party should strengthen the Board's complaint-lodging-procedure to enable complainants to provide oral testimony which will also assist the panel of the Board to assess and appreciate the demeanour of the parties to the complaint".[27] As regards **France**, the CERD called for better coordination between various mechanisms and – in light of proposals to merge the existing Equality Body with a new, larger structure – stressed the need to have a separate, independent institution dealing with discrimination.[28] In scrutinising **Slovenia**, the CERD did not specifically mention the equality body but called for efforts to raise awareness among the public of available remedies.[29]

"There is a clear need to adopt a more comprehensive approach to human rights at the national level, with efforts and resources focused on key institutions – such as a visible and effective overarching NHRI that can act as a hub to ensure that gaps are covered and that all human rights are given due attention."

FRA (2010), National Human Rights Institutions in the EU Member States, *p. 9*

Regarding **Greece**, the CERD noted that since "the Office of the Ombudsman is the only independent body, [... Greece should] consider giving it overall powers to receive complaints of racial discrimination, while cooperating with the other bodies (the Committee for Equal Treatment and the Labour Inspectorate) when examining them."[30] In relation to **Estonia**, the CERD pointed out that neither the Chancellor of Justice nor the Commissioner is fully compliant with the Paris Principles, which constitute accepted international standards for independent national monitoring bodies. For more information, see Chapter 8 on access to justice.[31] Similarly, for **Romania**, the CERD recommended that the National Council for Combating Discrimination (NCCD) be reformed in order to comply with the Paris Principles, as well as to ensure better cooperation between existing bodies with various mandates.[32] Also in relation to the situation in Romania, the CERD recommended ensuring that data collection would enable adequate and efficient public policies which respond to the needs of specific vulnerable groups.[33]

27 UN CERD (2010a), paragraph 18.
28 UN CERD (2010b), paragraph 19; see also France, National Assembly (2010a).
29 UN CERD (2010c), Concluding observations (Slovenia), CERD/C/SVN/CO/6-7, 20 September 2010, paragraph 14.
30 UN CERD (2010d), paragraph 18. See also ECRI's first interim follow-up recommendation, 2009 report on Greece, p. 51.
31 UN CERD (2010e), Concluding observations (Estonia), CERD/C/EST/CO/8-9, 27 August 2010, paragraph 10. See also ECRI's 2010 report (2010b), pp. 20-21.
32 UN CERD (2010f), Concluding observations (Romania), CERD/C/ROU/CO/16-19. paragraph 11.
33 UN CERD (2010f), paragraph 8.

5.1.5. Institutional reform and challenges

As discussed, while some equality bodies have only recently come into operation, some of those already in existence have been subject to reform. Some equality bodies are witnessing an expansion of their mandates while others are experiencing changes that risk undermining their effectiveness.

In the **Czech Republic**, as of December 2009 the jurisdiction and mandate of the equality body, Public Defender of Rights (*Veřejný ochránce práv*), beyond public administrative bodies to include private entities.[34] In late 2010, the Senate of **Romania** approved and transmitted a legislative proposal to amend Article 24 of Government Ordinance No. 137/2000 on preventing and sanctioning all forms of discrimination to parliament for further discussion. Changes discussed include the appointment process of the steering board as well as the mandate of the equality body.[35]

Promising practice

Complaints: how to improve data collection

In **Germany**, in late 2009 the Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes,* ADS) took measures to address the prevailing lack of equality data by commissioning a feasibility study on how to improve the quantitative equality data situation, especially in the area of complaints data. The study recommends the enhancement of specialised anti-discrimination support offices and the setting up of a nationwide network of organisations that support victims of discrimination and register discrimination complaints in a coherent and standardised way. In late September 2010, the ADS held an expert workshop with key actors in the field of anti-discrimination support work to jointly discuss a roadmap for establishing such a support and complaint data collection network.[36]

In its last Annual Report, the Human Rights Ombudsman in **Slovenia** (*Varuh človekovih pravic Republike Slovenije*) noted a lack of comprehensive institutional mechanisms for the prevention of and protection against discrimination. The report further highlighted that there was an obvious lack of relevant data on the situation of specific vulnerable groups, which could only be obtained through field research. According to the Ombudsman, they "have also been reminded of this by the international monitoring bodies in the fields of human rights protection and prevention of discrimination, and, in the recent period, by the FRA". The Ombudsman also noted the lack of independence of the equality body in performing tasks.[37] The Slovenian equality body, Advocate of the Principle of Equality (*Zagovornik načela enakosti*), is placed within the govern-

34 Czech Republic (2009).
35 Romania (2010).
36 Germany, ADS (2010).
37 Slovenia, Human Rights Ombudsman (2010), pp. 42-44.

mental Office for Equal Opportunities (*Urad Vlade Republike Slovenije za enake možnosti*). Following the Ombudsman's comments, the government established an ad hoc working group to look into the institutional status of the Advocate.[38]

In **Spain**, the equality body, the Council for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (*Consejo para la promoción de la igualdad de trato y no discriminación de las personas por el origen racial o étnico*), became operational in late 2009. According to information on its website, a complaints mechanism has been introduced by drawing on the capacity of eight existing NGOs.[39] A network of centres to assist victims of discrimination was launched in June 2010 with more than a hundred offices across Spain.

Promising practice

A regional network for improving labour market access

Romania has established a regional network of advisory services on non-discrimination complementing the Romanian Equality Body, which has the aim of promoting the social inclusion of victims of discrimination. The project, carried out under the European Social Fund (ESF), is designed to promote equal access to the labour market for women and persons belonging to vulnerable groups by raising awareness of the principle of equal opportunities and its application to staff working in the local public administration, the social partners, non-governmental organisations (NGOs), experts and media representatives in selected parts of the country.

For more information, see: www.crj.ro/EN/Multi-regional-network-of-advisory-services-on-antidiscrimination-issues-aiming-the-social-inclusion-of-the-discriminated-persons-/.

5.2. Sex discrimination

Important developments in relation to equality between the sexes include the adoption of directives on parental leave and benefits, and the continued negotiation of a directive on pregnant workers.[40] Alongside the official opening of the European Institute for Gender Equality (EIGE), the European Commission also adopted a five-year strategy to promote equality. Case law from the CJEU and at the national level continues to provide clarification of legislative provisions, as well as illustrating the ongoing challenges faced in the context of employment and access to goods and services.

5.2.1. General developments

Important international organisations focusing on equality between men and women were established in 2010. Through its Resolution on system-wide coherence adopted on 21 July, the UN General Assembly created the UN Entity for Gender Equality and the Empowerment of Women, to be known as 'UN Women'. At the European level, June 2010 saw the official opening of EIGE. The role of EIGE is to support the EU and its Member States in their efforts to promote gender equality and fight sex discrimination. In November 2010 the EIGE and FRA concluded a cooperation agreement. Also at EU level, the European Commission adopted a five year *Strategy for equality between women and men 2010-2015* in September 2010.[41] The strategy is a work programme for the Commission and aims to improve gender equality within five priority areas:

- equal economic independence;
- equal pay for equal work and work of equal value;
- equality in decision-making;
- dignity, integrity and an end to gender-based violence;
- gender equality outside the Union.

Key actions include monitoring the correct implementation of EU equal treatment laws, with a particular focus on the Gender Goods and Services Directive and the Gender Equality Directive (recast), and on the extent to which gender has been taken into account in applying the non-discrimination directives.

5.2.2. Employment

The principal developments in the area of employment relate to increased protection of maternity and paternity rights as well as the rights of pregnant workers at both the EU and Member State level. Firstly, in 2010 the Council adopted the Parental Leave Directive[42] entitling male and female workers to at least four months of parental leave of which one month is not transferable between partners. The Parental Leave Directive implements the revised framework agreement on parental leave concluded by the EU-level social partners, namely BusinessEurope, the European Association of Craft, Small and Medium-sized Enterprises (UEAPME), the European Centre of Employers and Enterprises providing Public Services (CEEP) and the European Trade Union Confederation (ETUC). The gender pay gap gives an economic incentive for men, who tend to earn more than women, to take shorter leave or not to take any leave at all. The directive's restrictions on parental leave transferability seek to encourage more equality in the uptake of parental leave between men and women.

38 Information provided by the Advocate of the Principle of Equality.
39 For more information, see: www.igualdadynodiscriminacion.org
40 European Commission (2008a); see also Council Directive 92/85/EEC OJ 1992 L 348, p.1.
41 European Commission (2010a).
42 Council Directive 2010/18/EU, OJ 2010 L 68, p. 13.

FRA ACTIVITY

Stakeholder engagement for the first EU-wide survey on violence against women

The FRA started in 2010 to implement its violence against women survey stakeholder engagement strategy. The academic experts, representatives of civil society organisations, practitioners and governmental experts who attended the consultations discussed the issues the survey should cover and the ways the survey can have an impact on the development of policies at various levels. The results of the consultations shaped the development of a draft questionnaire, which will undergo pre-testing in six EU Member States during first half of 2011. The outcome of the consultations also influenced the aims and objectives of the full-scale survey to be conducted in the EU27 in 2011-2012.

For more information, see: http://fra.europa.eu/fraWebsite/research/projects/proj_eu_survey_vaw_en.htm

Secondly, the Council adopted the Gender Equality for Self-Employed Workers Directive,[43] which strengthens the application of the principle of equal treatment between men and women who want to establish or extend a self-employed activity, including the entitlement of self-employed women to maternity benefits of at least 14 weeks. In October 2010, in a legislative resolution the European Parliament proposed significant amendments to the Commission's proposal for the revised Pregnant Workers Directive.[44] Despite the Parliament's proposal of 20 weeks of continuous maternity leave on full pay, the Council of Ministers voted to take the European Commission's initial proposal of 18 weeks of maternity leave in principle on full pay, but as a minimum on sick pay, as the basis for negotiations.[45]

The issue of paternity leave was also addressed at national level. In **Latvia**, the Labour Law's definition of direct discrimination has been expanded to cover paternal leave. Under the amended Labour Law "less favourable treatment due to pregnancy or maternity leave, or failure to grant parental leave to a father shall be deemed direct discrimination on gender grounds".[46] In **Greece**, the Ombudsman took the initiative in two cases where fathers were refused parental leave. In its role as a mediator, it successfully intervened for the respect and extension of parental leave for male academics employed by universities[47] and in the Armed Forces.[48]

National reports reveal that pregnant women still face significant challenges in the workplace and after returning to work, in addition to other forms of discrimination. For example, a study by the **Belgian** Institute for the Equality of Women and Men (*Institut pour l'égalité des femmes et des hommes,* IEFH / *Instituut voor de Gelijkheid van Vrouwen en Mannen,* IGVM) revealed that up to about 20% of employees encounter at least one form of discrimination when they become pregnant. About 5% claimed to have been dismissed, or to have resigned because of the way they were treated during their pregnancy.[49]

Pregnancy features frequently in cases relating to sex discrimination. In **France**, the Appeal Court of Paris (*Court d'appel de Paris*) ordered the banking group BNP Paribas to pay more than EUR 350,000 in compensation to a former employee for discrimination based on sex, pregnancy and marital status. Returning from parental leave, the employee was neither assigned to her previous position nor to a job similar to the one held before the leave, and was also given lower pay. As a result, the employee appealed to the French equality body HALDE.[50]

In a **Swedish** case, when a woman working temporarily in a shop in Örebro told her employer that she was pregnant she was suspended from her employment. The Equality Ombudsman and the employer reached a settlement of SEK 105,000 (EUR 10,500) for the woman.[51] The Swedish Equality Ombudsman also took Sweden's National Social Insurance Agency (NSIA) to court because it denied sickness benefits to pregnant women. The NSIA argued that the complications experienced by the women concerned were normal consequences of pregnancy and thus did not constitute an illness. The Equality Ombudsman on the other hand emphasised the need to recognise the health issues of pregnant women and argued that the NSIA's approach enhanced discriminatory structures that specifically disadvantage women. The Stockholm District Court ruled in favour of the pregnant women and ordered the NSIA to pay SEK 50,000 (EUR 5,000) to each of the women involved.[52]

5.2.3. Access to goods and services

Developments can be noted in the case law of the Court of Justice of the European Union (CJEU) and national courts in this area. In *Association Belge des Consommateurs Test-Achats ASBL and Others* the Court was, for the first time, asked to interpret the Gender Goods and Services Directive in a context of sex discrimination in insurance premiums. Article 5(2) of the directive allows Member States to permit differences related to sex in respect of insurance premiums and benefits, if sex is a determining risk factor which can be substantiated by relevant and accurate actuarial and statistical data. The Belgian Constitutional Court asked the CJEU whether this provision of the directive is compatible with the prohibition of discrimination on grounds of sex. In her Opinion of 30 September 2010, Advocate General Kokott

43 Directive 2010/41/EU, OJ 2010 L 180, p. 1.
44 European Parliament (2010a).
45 Council of the European Union, EPSCO (2010b).
46 Latvia (2010b).
47 Greece, Ombudsman (2010a).
48 Greece, Ombudsman (2010a).
49 Belgium, IEFH/IGWM (2010).
50 France, HALDE (2009); France / Appeal Court of Paris (2010b).
51 Sweden, Swedish Equality Ombudsman (2010c).
52 Sweden, Swedish Equality Ombudsman (2009a).

urged the CJEU to rule that Article 5(2) of the directive is invalid, insofar as it permits sex discrimination contrary to the fundamental right to be free from sex discrimination. The CJEU handed down its judgment in March 2011.[53]

In **Ireland**, the Supreme Court ruled on whether restricting membership of clubs constituted discriminatory treatment against women. National legislation states that a club shall not be considered to be discriminating due to exclusionary membership rules "if its principal purpose is to cater only for the needs of" a particular group that is defined by a protected ground (such as religion, age or sex).[54] In 2004 the District Court, in proceedings brought by the Equality Authority, ruled that Portmarnock Golf Club was a 'discriminatory' club not exempt under the legislation because its principal purpose was the playing of golf rather than catering for the needs of male golfers. In 2005 the High Court reversed this judgment, finding that the club did in fact fall within the exemption provided by the legislation. This was upheld by the Supreme Court, by a majority of three to two, in November 2009.

5.3. Religion or belief

Principle developments in this area came mainly in the form of court decisions, although some developments in national legislation can be noted. Case law related largely to two aspects of religion or belief – the right to express one's beliefs, but also the right to choose not to do so.[55] Various cases concerning the wearing of the headscarf by Muslim women, which relate to the protected grounds of religion, ethnicity and sex, will be discussed later in this chapter in the section concerning multiple discrimination.

On a more general note, it should be highlighted that the protected ground of religion or belief has the potential to overlap with the protected ground of racial or ethnic origin considered in Chapter 6 on Racism and ethnic discrimination. In this sense, the European Court of Human Rights (ECtHR) stated, for instance in 2005, that "ethnicity has its origin in the idea of societal groups marked by common nationality, tribal affiliation, religious faith, shared language, or cultural and traditional origins and backgrounds.[56] This approach has also been applied at national level. A case in which an individual of Sikh religion was refused entry into a public building because he would not remove his ceremonial sword, was dealt with as one of discrimination on the basis of ethnicity by the Austrian Equal Treatment Commision, Senate III (*Österreichische Gleichbehandlungskommission, Senat III*) in 2005.[57]

5.3.1. Employment, goods and services

Case law has continued to develop in the Member States, in particular around the issue of displaying religious and cultural symbols on clothing in the workplace. At first sight, the approach among the Member States on the issue of clothing may seem contradictory. However, it appears that national courts are more likely to accept restrictions as justified if it can be shown that they are applied as part of a company policy ensuring neutral uniforms.

In **Austria**, in connection with the case of a Muslim supermarket cashier faced with dismissal, the federal Ombud for Equal Treatment ruled that a ban on wearing headscarves was discriminatory.[58] In **Germany**, the labour court in Gießen (Hesse) ruled that the rejection of a job applicant, a 26-year old Muslim woman, on the grounds of wearing a headscarf constituted religious discrimination.[59] In the **Netherlands**, where a Muslim woman was not invited for a job interview because she wore a headscarf, the Equal Treatment Commission considered the relevant employment agency to have violated the law as it neglected to handle the woman's complaint conscientiously.[60]

In contrast, in **Belgium** a labour court in Antwerp judged that the discharge of a receptionist on grounds of wearing the headscarf did not amount to discrimination, since the requirement of the employer for staff to dress 'neutrally' was a legitimate one.[61] Similarly, in the **Netherlands**, in the case of a tram driver who had been suspended for refusing to wear his golden crucifix under his uniform, where it could not be seen, an appeal court ruled that the company clothing policy was legitimate, and that, unlike headscarves, which were part of the company uniform, the visible golden crucifix was considered to interfere with the uniform and professional appearance of employees.[62]

A difference in approach among Member States can be noted in two cases where an individual's religious beliefs reduced the range of employment opportunities they were willing to accept, and therefore resulted in their unemployment benefits being cut. The two cases concerned Muslim men who refused to shake hands with women and were thus unable to take jobs offered to them. In the **Netherlands**, the court ruled that the municipality's action in cutting the man's allowance was legitimate.[63] In **Sweden**,

53 CJEU, Case C-236/09, *Charles Basselier v. Conseil des ministres.*
54 Equal Status Act, Section 9. – (1) For the purposes of *section 8*, a club shall not be considered to be a discriminating club by reason only that – (*a*) if its principal purpose is to cater only for the needs of – (i) persons of a particular gender, marital status, family status, sexual orientation, religious belief, age, disability, nationality or ethnic or national origin,(ii) persons who are members of the Traveller community, or (iii) persons who have no religious belief.
55 For cases concerning places of worship, see ECRI's 2010 report on France (2010d), p. 30.
56 ECtHR, *Timishev v. Russia,* Nos. 55762/00 and 55974/00, 13 December 2005, paragraph 55.
57 Original language text and English summary available through the FRA InfoPortal, Case 5-1, at: http://infoportal.fra.europa.eu/InfoPortal/caselawFrontEndAccess.do?id=5.
58 Austria, Gleichbehandlungsanwaltschaft (2010a).
59 Germany, Labour Court Gießen (Arbeitsgericht Gießen), Az.5 Ca 226/09, 22 December 2009.
60 Netherlands, Equal Treatment Commission (2010).
61 Belgium, Labour Court Antwerp (*Tribunal du Travail d'Anvers*), R.G. 06/397639/A 27 April 2010; see also Belgium, Centre for Equal Opportunities and Opposition to Racism (CEEOR) (2010a).
62 Netherlands, Amsterdam Court (2009a) and (2010).
63 BK7175, Amsterdam Court , AWB 09/3208 WWB, 17 december 2009.

in a similar case, the court ruled that the man had suffered discrimination on grounds of religion.[64] In the latter case the Equality Ombudsman stated that "Sweden is a multicultural country and we must ensure that there are several different ways to show each other respect [other] than to shake hands".[65]

In the context of goods and services, some smaller developments could be observed. For instance, in the *Jakóbski* case in December 2010 the ECtHR held that prison authorities in Poland, by refusing to provide the applicant with a meat-free diet in accordance with his religious precepts, had infringed upon his right to show his religion through observance of the rules of the Buddhist religion, as protected by Article 9 of the European Convention on Human Rights (ECHR).[66] In **Romania** on 6 May 2010, the Parliament adopted legislation on discharge from hospitals or morgues of deceased Muslims, which accommodated Islamic religious rituals when handling the deceased and allowing burial in due time.[67]

5.4. Disability

In December 2010, the EU became party for the first time to a UN human rights treaty alongside its Member States: the UN Convention on the Rights of Persons with Disabilities (CRPD).[68] Insofar as it has competence, the EU has undertaken a range of obligations to guarantee the rights of persons with disabilities parallel to the Member States. In November 2010, the *European Commission launched its European Disability Strategy 2010-2020: A renewed commitment to a barrier-free Europe*,[69] which is embedded in the CRPD philosophy.

The overall objective of the strategy is to empower women and men with disabilities so that they can enjoy their full rights and benefit fully from their participation in society. Achieving this, and ensuring consistent and effective implementation of the UN Convention across the EU calls for a degree of consistency in action. The Strategy therefore identifies EU-level action to supplement that taken at national level. It also identifies the support to be provided in terms of funding, research, awareness-raising, statistics and data-collection. The new Strategy identifies eight priority areas for EU action: accessibility, participation, equality, employment, education and training, social protection, health and external action.

Against this background this section will consider developments beyond the sphere of employment and access to goods and services, and also cover developments on two other issues that are covered by the CRPD, namely independent living and inclusive education.

5.4.1. The EU and the CRPD

The CRPD is the first international human rights treaty which the EU was involved in negotiating and signing, alongside its Member States. It is the first such treaty to which the EU has become party, by signing it on 30 March 2007.[70] On 26 November 2009, the Council of the EU adopted a decision allowing the EU to ratify the CRPD, although with a reservation to exclude the employment of persons with disabilities within the armed forces, as permitted in Article 4 Paragraph 4 of the Employment Equality Directive.[71] Following the finalisation of a Code of Conduct setting out arrangements for the implementation by, and representation of, the EU in relation to the CRPD,[72] the EU formally deposited the instruments of ratification on 23 December 2010. The CRPD entered into force for the EU on 22 January 2011.

> *"I want to conclude the UN Convention under the Belgian presidency as quickly as possible. If it is concluded without waiting for all the Member States [to ratify], then the EU will send a strong signal."*
>
> *Jean-Marc Delizée, Belgian Secretary of State for Social Affairs, at the European Day of People with Disabilities on December 3 2010*

In 2010, a further four Member States ratified the Convention, namely **France**, **Latvia**, **Lithuania** and **Slovakia**, bringing the number of ratifications to 16 out of 27 Member States. When ratifying, several Member States have entered reservations and interpretive declarations.[73]

In addition to the CRPD, there is also an Optional Protocol, which establishes a system of individual complaints, allowing individuals alleging violations by States Parties to this instrument to make a claim to the Committee on the Rights of Persons with Disabilities. All four Member States that ratified the Convention in 2010 also ratified the Optional Protocol. At the end of 2010, 14 Member States had become party to the Protocol. For more on the status of ratifications, see Chapter 10 on international obligations.

5.4.2. Employment

Activities to promote the employment of persons with disabilities can be noted in several Member States. These include quota systems, which can be an effective tool to facilitate access of persons with disabilities to the labour market. In **Cyprus**, a new law came into force towards the end of 2009 introducing quotas for the employment of

64 Sweden, Swedish Equality Ombudsman (2010b).
65 *Ibid.*
66 ECtHR, *Jakóbski v. Poland*, No. 18429/06, 7 December 2010.
67 Romania, Law No. 75/2010.
68 The CRPD was adopted by UN General Assembly resolution 61/106 of 13 December 2006, and it came into force on 3 May 2008.
69 European Commission (2010a).
70 Butler, I. and De Schutter, O. (2008), pp. 277-320. On 29 August 2008, the European Commission adopted and transmitted to the European Parliament and the Council two proposals concerning the conclusion, by the European Community, of the Optional protocol of the CRPD (European Commission (2008c)).
71 Council of the European Union (2010c), p. 55.
72 Council (2010).
73 For more information, see: http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.

persons with disabilities in the public sector of 10% of the number of the vacancies to be filled at any given time, provided that this does not exceed 7% of the aggregate of employees per department.

In the **UK**, the Department of Work and Pensions published the findings of a study[74] exploring how employers are responding to the provisions of the Disability Discrimination Act (DDA) 1995[75] and 2005.[76] Among other things, the findings include: 30% of surveyed employers were currently employing a disabled person, and 42% had employed a disabled person in the preceding 10 years; 61% of employers surveyed had made an employment-related adjustment for a disabled employee in the past, or planned to do so. This marked a statistically significant fall since the last survey in 2006, where the figure was 70%. Flexible working times or working arrangements were the most commonly reported employment-related adjustments (53% and 50% of respondents, respectively). Almost half of respondents had adapted the working environment, or had provided accessible parking. Reasons cited by employers for making employment-related adjustments were that it was the 'right thing to do' and that adjustments enabled them to retain valued existing employees. The proportion of employers making these sorts of adjustments in response to a request from an employee has increased over time: in 2009 30% of employers making employment-related adjustments had done so following such a request, compared to 22% in 2006.

Promising practice

A Global Employment Strategy for Persons with Disabilities

The **Spanish** State Observatory on Disability (*Observatorio Estatal de la Discapacidad*) reported that between 1 January and 1 June 2010, employment among the disabled rose by 18.37%. In total 23,876 persons with disabilities found work, 3,706 more than in the same period of the previous year. The rise in employment numbers is largely attributed to the 2009-2010 Global Employment Strategy for the Disabled (*Estrategia Global de Empleo para Personas con Discapacidad 2009-2010*), which was implemented in March 2009 with funding of EUR 3.7 billion. This strategy, which is the result of collaboration between the government and business leaders, trade unions, third sector entities and organisations of people with disabilities, aims to raise activity and employment indices among persons with disabilities and improve their working conditions.

Ministry of Health and Social Policy, Media Release, available at: www.msps.es/gabinetePrensa/notaPrensa/desarrolloNotaPrensa.jsp?id=1844

At the same time, obstacles to the participation of persons with disabilities in the labour market can be observed, as evidenced by several courts. In **Cyprus** in December 2007, a former public hospital employee with a speech impairment lodged a complaint with the equality body against her employer. She had been dismissed from the position of assistant clerk. The Cypriot Ombudsman found[77] that the complainant's speech impairment was considered a disability according to national legislation and in line with the CJEU ruling in the case of *Chacón Navas*.[78] Therefore the complainant was wrongfully dismissed based on her disability, particularly as the duty to provide reasonable accommodation was not met.

In **Belgium**, a man with a physical impairment was refused a job due to his disability. As a result of mediation by the Centre for Equal Opportunities and Opposition to Racism (CEOOR), the parties reconciled and the firm agreed to pay financial compensation to the victim. The compensation will be used to fund a new organisation in support of persons with disabilities, led by the victim.[79]

5.4.3. Access to goods and services

Developments in legislation and policy initiatives promoting access to goods and services, and accessibility for and participation by persons with disabilities can be noted in a number of Member States. A new Law of the Autonomous Community of Navarra, **Spain**, on universal accessibility and universal design for all persons aims to guarantee equal opportunities for persons with disabilities. The law seeks to ensure universal accessibility and universal design of products, environments, programmes and services to be usable by all people in line with the accessibility principles outlined by the CRPD.[80]

In Northern Ireland the Disability Discrimination (Transport Vehicles) Regulations came into force on 25 January 2010 covering trains, buses, coaches, taxis, vehicle rental and breakdown services. The Regulations make it unlawful to treat a person with disabilities less favourably than someone without a disability, for example by offering them a lower standard of service. Transport providers will be under a legal duty to make alterations to their existing practices to ensure that their services are accessible to disabled people.[81]

Many of the discrimination cases reported in 2010 across Member States concern general accessibility of goods and services. Accessibility is one of the overarching principles guiding the CRPD. In **Austria**, a first instance court found the lack of subtitles on DVDs to be illegal, although the

74 UK, Department of Work and Pensions (2009).
75 UK, Disability Discrimination Act (DDA) 1995–1995, Chapter 50.
76 *Ibid.*, Chapter 13.

77 Cyprus, Ombudsman (2010) File Numbers A/℗ 2898/2007, A.K.I. 10/2010, dated 23.02.2010
78 CJEU, Case C-13/05, *Chacón Navas*, 11 July 2006, ECR 2006 p. I-6467.
79 Belgium, Centre for Equal Opportunities and Opposition to Racism (2010b).
80 Spain, Navarra, Ley 5/2010 of 6 April.
81 United Kingdom, The Disability Discrimination (Transport Vehicles) Regulations (Northern Ireland) 2009 – 2009 No. 428; see also Northern Ireland, Equality Commission (2010).

judgment is not final. A deaf customer bought DVDs produced by the Austrian Broadcasting Agency (*Österreichische Rundfunk*) which he could not follow because of the lack of subtitles. The competent commercial court stated that the absence of subtitles constituted discrimination on grounds of disability, referring to the Disability Equality Act, as well as to the fact that subtitling would have been affordable and therefore would not have imposed an unreasonable burden on the ABA.[82]

In **Belgium**, a travel agency in Ghent refused to allow a man with a hearing impairment to register for a group trip, claiming that it would not be able to guarantee the man's safety when he would have to communicate with the local population. The only way the man could join, the travel agency argued, was if he brought someone to accompany him, at his own expense. After failed mediation attempts, the CEOOR took the case to the courts. The CEOOR claimed that simple adjustments, like the use of paper and text messaging to convey messages, could be sufficient to let the man participate in the group trip. It argued that the insistence of the travel agency that the man had to arrange for someone to accompany him was not justifiable. The court followed the CEOOR's reasoning. On the basis of the General Anti-Discrimination Act, the travel agency was ordered to pay fixed damages of EUR 650, and a coercive fine of EUR 1,000 per new violation or per day that the violation at hand continued. The travel agency also had to advertise the judgment in their office in Ghent, and have it published at its own expense in various media, in its newsletter and on its website.[83]

5.4.4. Independent living and de-institutionalisation

Article 19 of the CRPD guarantees the right to independent living, recognising that persons with disabilities should have the right to choose their living arrangements. Independent living is also part of the Council of Europe Disability Action Plan 2006-2015, aimed at promoting the rights and full participation of people with disabilities in society. In December 2009, to mark the European Days of Persons with Disabilities, the European Commission organised discussions on the subject of creating conditions for independent living. A policy paper on *Transition from institutional to community-based care*,[84] prepared in 2009 with the support of European Commissioner for Employment, Social Affairs and Inclusion, Vladimír Špidla, was endorsed by his successor László Andor in May 2010. The paper was prepared jointly by representatives of various disabled persons organisations, in collaboration with organisations representing the interests of children and the elderly, who also often reside in group homes.

NGOs also pointed out that using European Structural Funds to fund large-scale infrastructure projects – such as the building or renovation of institutional care homes – results in exclusion, rather than the promotion of social inclusion intended.[85] Some say this is a missed opportunity, as the money could be diverted to fund infrastructure needed for independent living, instead of promoting institutionalisation.[86] The obligation to prevent discrimination on the grounds of disability is included in Article 16 of the Structural Funds regulation.

In his Human Rights Comment of October 2010,[87] the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, condemned the inhuman treatment of persons in institutions and called for de-institutionalisation and the implementation of the right to independent living. This reflects the position adopted in February 2010 in the Recommendation of the Committee of Ministers of the Council of Europe on de-institutionalisation and community living of children with disabilities.[88] A report on the situation of independent living of persons with disabilities in Europe was published by the Academic Network of European Disability experts.[89] This issue is discussed in more detail in Chapter 4 on the Rights of the child and protection of children.

FRA ACTIVITY

Research on persons with disabilities or mental health problems

Independent living is one of the four areas covered by the FRA social study on the fundamental rights of persons with intellectual disabilities and persons with mental health problems launched in 2010. Other areas of focus include legal capacity, fundamental rights in institutions and access to justice. The study collects evidence of the lived experience of persons with disabilities. It is conducted in an emancipatory way in close collaboration with persons with a lived experience of mental health treatment (i.e. user/survivor researchers), persons with intellectual disabilities speaking out for themselves (i.e. self-advocates) and disabled persons' organisations.

For more information, see: http://fra.europa.eu/fraWebsite/attachments/Factsheet-disability-nov2010.pdf

5.4.5. Inclusive education

The right to inclusive education, as guaranteed by Article 24 of the CRPD, is a necessary precondition for creating employment opportunities for persons with disabilities and making the right to work for persons with disabilities, as guaranteed by Article 27 of the CRPD, a reality. The Parliamentary Assembly of the Council of Europe adopted a Recommenda-

82 Austria, Klagsverband zur Durchsetzung der Rechte von Diskriminierungsopfern (2010b).
83 CEOOR (2010c).
84 European Commission (2009c).
85 European Coalition for Community Living (2010).
86 *Ibid.*
87 Council of Europe (2010).
88 Council of Europe Committee of Ministers (2010a).
89 R. Townsley *et al* (2010).

tion and a Resolution on guaranteeing the right to education for children with illnesses or disabilities.[90] Developments in this regard can be noted in three Member States.

The equality body of **Bulgaria** (PADC) issued a recommendation to the Ministry of Education requesting that children with disabilities be given a choice of educational opportunities on an equal footing with other children.[91] The guiding principles ought to be those of adequacy, accessibility and availability of schooling. This issue was also taken up by the Institute for Human Rights in **Germany**, which published a statement calling on the federal states (*Länder*) to comply with their obligation under the CRPD to provide inclusive education for pupils with disabilities. The statement criticises a decision of the Higher Administrative Court of Hessen (*Hessischer Verwaltungsgerichtshof*) which held that the CRPD does not establish rights for individuals and that the German federal states (*Länder*) are not bound by the treaty.[92]

A 2010 report on discrimination at schools in **France** found that in almost 10 years the number of children with disabilities entering the mainstream education system had doubled, rising from 90,000 to 175,000 children. However, a 'fear' among non-disabled students of 'different' pupils was still found to exist.[93] Although it is not possible to say with certainty whether this increase in numbers is due to students with disabilities passing from a 'special' system of education into the mainstream system – it may be that other factors, such as a decrease in home schooling, are at play. This increase could be interpreted to suggest a more inclusive education system.

5.5. Sexual orientation and gender identity

Several important developments in relation to discrimination on the grounds of sexual orientation can be noted both at the level of the Council of Europe and among the Member States in terms of legislation, policy and case law. In particular, these relate to the position of same-sex partners, legal recognition of gender reassignment and Pride events.

2010 saw the adoption of a Recommendation of the Committee of Ministers of the Council of Europe on measures to combat discrimination on grounds of sexual orientation or gender identity, which provides the most far-reaching political commitment at the intergovernmental level for the protection of LGBT rights.[94] In turn, some police initiatives to counter abuse and violence can be noted at national level.

> *"Discrimination on the basis of gender and sexual orientation has ceased to constitute a political cleavage, and is enshrined in the EU's founding act and statement of values. It is something that distinguishes Europe from many other parts of the world. We are inspired by the sense for human dignity and the uniqueness of each person. Everyone deserves equal chances in life."*
>
> *Statement by Herman Van Rompuy, President of the European Council, on the International Day Against Homophobia, 17 May 2010*

In 2010, the FRA published a comparative legal analysis identifying six developments across the EU Member States:

- a large number of developments in the field of equal treatment in free movement and family reunification law. The definition of 'family member' in legislation transposing EU law on free movement or on family reunification has been or is expected to be expanded in seven EU Member States – **Austria**, **France**, **Hungary**, **Ireland**, **Luxembourg**, **Portugal**, and **Spain**. However, a trend in the opposite direction has emerged in three EU Member States – **Bulgaria**, **Estonia** and **Romania** – where same-sex marriages and partnerships contracted abroad are considered invalid, which makes it more difficult for same-sex spouses and partners to reunite;
- a substantial number of initiatives in asylum law: with the addition of six EU Member States – **Finland**, **Latvia**, **Malta**, **Poland**, **Portugal** and **Spain** – the total number of EU Member States that explicitly afford protection to LGB victims of persecution amounts to 23 countries;
- a mixture of developments in the area of freedom of assembly. While progress has been noted in **Bulgaria**, **Poland** and **Romania**, the right to organise pride events continues to be challenged in **Latvia** and **Lithuania**;
- moderate expansion of legal protection against sexual orientation and gender identity discrimination. There has been an extension of non-discrimination legislation covering sexual orientation beyond employment in the **Czech Republic** and the **UK**. In relation to the recognition of gender identity as autonomous ground or as 'sex' discrimination, changes have been observed in the **Czech Republic**, **Sweden** and the **UK**. The equality body in **Denmark** has extended its mandate to cover sexual orientation discrimination;
- minimal increase in protection against abuse and violence, including hate speech and hate crime. Positive initiatives have emerged in **Greece**, **Lithuania**, **Slovenia** and the **UK**;

90 Council of Europe (2010a) and (2010b).
91 On 13 May 2010, the PADC decision was upheld by the Supreme Administrative Court.
92 Germany, Deutsches Institut für Menschenrechte (2010); the statement includes a comment on the verdict in the Hessen litigation process (7 B 2763/09) of 12 November 2009.
93 Anne Rebeyrol (ed.) (2010).
94 Council of Europe, Committee of Ministers (2010b). The Parliamentary Assembly also adopted a Recommendation (see Council of Europe (2010c)) and a Resolution (see Council of Europe (2010d)).

- setbacks with respect to freedom of expression: **Lithuania** appears isolated in its prohibition of dissemination of material that could be seen as 'promoting' homosexuality.

FRA ACTIVITY

Updated report identifies uneven progress on LGBT rights

In November 2010, the Agency published an update of its comparative legal report on discrimination on the basis of sexual orientation and gender identity of 2008. The report identified discriminatory practices that attracted considerable media interest, in particular legislation in Lithuania which bans the 'promotion' of homosexuality and same-sex relations to minors or in public, and the use of 'phallometric testing' in the Czech Republic as a practice to assess applications by gay asylum seekers.

FRA (2010), Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, 2010 update: Comparative legal analysis

5.5.1. International and national developments on 'family life'

With respect to case law in the field of discrimination on grounds of sexual orientation, the ECtHR examined three applications referring, albeit in different terms, to the situation of same-sex couples. In the case *Kozak v. Poland*, the ECtHR emphasised that there is a need to strike a balance between the protection of the traditional family and the Convention rights of sexual minorities. At the same time it underlined that "a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense".[95] Such an exclusion is in breach of Article 14 ECHR, taken in conjunction with Article 8 ECHR on the right to respect for private and family life.

> *States should 'necessarily take into account developments in society and changes in the perception of social, civil status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life'.*
>
> *ECtHR,* Kozak v. Poland*, paragraph 98*

Subsequently, in *P.B. & J.S. v. Austria*, the ECtHR applied the same principle to a case concerning the extension of a worker's health and accident insurance to his same-sex partner. The ECtHR reiterated that a cohabiting same-sex couple living in a stable de facto partnership falls within the notion of 'family life', and confirmed that the burden falls on the State to prove that there was a 'necessity' to exclude certain categories of people from the scope of application of the law in question.[96] The ECtHR concluded that a difference in treatment between same-sex and different-sex partners was not justified.

The scope of the Member States' obligation to establish a legal scheme equivalent to marriage, or to open up marriage to same-sex couples, was considered in the case of *Schalk and Kopf v. Austria*. The ECtHR concluded that there was no violation of the right to marry as enshrined in Article 12 ECHR because "the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State".[97] With respect to the claim that the lack of an alternative to marriage would violate Articles 8 and 14 ECHR, the ECtHR noted the "rapid evolution of social attitudes towards same-sex couples". The ECtHR concluded, however, that there was no violation of Articles 8 and 14 because "there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes".[98]

At national level, notable decisions in this area were delivered by courts in two Member States, in **Germany** in the context of inheritance and donations[99] and **Estonia** related to financial support to same-sex families with children.[100]

> *"[T]he relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would […]. Same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship".*
>
> *ECtHR,* Schalk and Kopf v. Austria*, paragraphs 94 and 99*

5.5.2. Transgender rights

Some movement occurred in some Member States towards recognising that issues of gender identity involve a strong element of self-determination, and away from its association with psychiatric disorder. Throughout the EU, however, the conditions that an individual must satisfy in order to obtain gender reassignment treatment and to ensure legal recognition of gender reassignment are often vague and not set out in legislation. The procedure in most Member States foresees lengthy processes of psychological, psychi-

95 ECtHR, *Kozak v. Poland*, No. 13102/02, 2 March 2010, paragraph 99.

96 ECtHR, *P.B. & J.S. v. Austria*, No. 18984/02, 22 July 2010, paragraphs 30 and 42.

97 ECtHR, *Schalk and Kopf v. Austria*, No. 30141/04, 24 June 2010, paragraph 61.

98 *Ibid.*, paragraph 105.

99 Germany, Bundesverfassungsgericht, BVerfG, 1 BvR 611/07; 1 BvR 2464/07.

100 Estonia, Tallinn Ringkonnakohus/3-09-1489.

atric and physical tests[101] and can include disproportionate medical requirements, such as the diagnosis of a mental disorder or compulsory sterilisation. This situation impacts the ability to travel with valid documents or to participate in education and employment, where personal identification documents or certificates must be presented. The *Strategy for equality between women and men 2010-2015*, already mentioned in section 5.2.1, foresees studying the specific issues pertaining to gender identity in the context of sex discrimination.

The scope for improving access to treatment as well as legal recognition of the preferred gender remains generally limited. However, legislative and policy developments can be noted among several Member States. In **France**,[102] transsexuality has been removed from the list of 'long term psychiatric conditions'. Nevertheless, the process of gender reassignment remains attached to the assumption of transsexuality as a severe pathology; gender identity issues are now placed in the category of 'long term afflictions', relating to 'severe' or 'invalidating pathologies' (code ALD 31), as proposed by the French National Authority for Health (*Haute Autorité de santé,* HAS). In November 2010, a new law was adopted in **Portugal** on legal recognition of gender reassignment. Under the new rules, the recognition of the preferred gender can be obtained through a simple administrative procedure and within eight days. As a precondition for legal recognition, the application of the interested person must be accompanied by a certificate from a multi-disciplinary medical team. After the Portuguese President's veto, the law was readopted on 15 March 2011 and entered into force on 20 March 2011.[103]

"Neither cultural, traditional nor religious values, nor the rules of a 'dominant culture' can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity."

Recommendation CM/Rec(2010) 5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity (Adopted by the Committee of Ministers on 31 March 2010)

In **Latvia**, the establishment of a specialised medical institution for approving applications for gender reassignment is pending.[104] Latvian legislation also explicitly permits a change of name following gender reassignment. **Ireland** is expected to put legislation in place allowing for legal recognition of gender reassignment, following the withdrawal of its appeal to the Supreme Court in the case of a transgender woman who was claiming her right to legal recognition of gender reassignment.[105] In **Germany**, following a judgment by the Constitutional Court, the requirement to divorce as a precondition to alteration of the recorded sex on official documents was abolished.[106] In January 2011, the Constitutional Court ruled that transgender people wishing to enter into a registered partnership no longer need to undergo gender reassignment operations nor do they need to be permanently infertile. In the **Netherlands**, there are proposals to abolish the requirement of compulsory sterilisation for changing the recorded sex on the birth certificate.[107]

Two court decisions at Member State level can also be noted. In **Austria**, the courts have found that surgery cannot be imposed as a precondition for alteration of an individual's name and sex in the relevant documents.[108] In **Malta**, a judgment of the Constitutional Court delivered in November 2010 found that the impossibility for a transgender woman to marry her male partner violated Article 12 of the ECHR on the right to marry.[109]

In December 2010, the federal equality body in **Germany** published a study on Discrimination against Trans people in Germany, especially in the job market.[110] Beyond the area of gender reassignment, **Spain** modified its legislation to provide better protection in the area of criminal law from abuse and violence motivated by transphobia. In June 2010, among other grounds, discrimination on the grounds of 'sexual identity' was added to the aggravating circumstances laid down in Article 22 (4) of the criminal code. The article now considers as aggravating circumstances 'committing an offence out of racist, anti-semitic or other kinds of discriminatory motives related to the victim's [...] gender, sexual orientation or identity [...]'. In Scotland, the June 2009 Offences (Aggravation by Prejudice) (Scotland) Act entered into force on 24 March 2010, also indicating a (homo- and) transphobic motive as an aggravating circumstance.[111]

FRA ACTIVITY

Upcoming large-scale survey on discrimination and victimisation of LGBT people

In 2010, the Agency held consultation meetings with experts and stakeholders in the LGBT field in preparation for a survey on the experiences of discrimination and victimisation of LGBT people. The survey will be carried out in 2011 and 2012 across the EU. The data collected will provide policymakers with the evidence needed to elaborate future measures, especially in light of the Council of Europe Recommendation of 31 March 2010 to promote equality and combat discrimination and hate crime.

101 Hammarberg, T. (2009), p. 16.
102 France, Government order No. 2010-215.
103 Portugal (2011) Lei n.º 7/2011 de 15 de Março Cria o procedimento de mudança de sexo e de nome próprio no registo civil e procede à décima sétima alteração ao Código do Registo Civil, 15 March 2011.
104 Latvia (2009), Section 28 paragraph 1. At the end of 2010 the law has not yet been approved by the cabinet of Ministers.
105 Ireland, High Court/2007/IEHC 470 (19 October 2007).
106 Germany, BGBl I, Nr. 43, p. 1978 (22 July 2009), Article 5.
107 Netherlands, Parliamentary Documents Lower House (2008-2009) 27017, nr. 53 (1 October 2009).
108 Austria, Verfassungsgerichtshof/B1973/08; Austria, Verwaltungsgerichtshof/2008/17/0054; /2008/06/0032; /2009/17/0263.
109 Malta Today (2010).
110 Germany, Antidiskriminierungsstelle des Bundes (2010).
111 Spain, Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal; Spain, State Official Journal of 23/06/2010.

Promising practice

Homophobic crimes: major emphasis on swift reaction

In **Spain**, the National Police Corps in the central district of Madrid has reached an agreement with the Madrid LGBT association (COGAM) to guarantee that an 'immediate response' will be given to homophobic aggressions. At the level of the autonomous communities, it is worth mentioning that in Catalonia a 'Protocol for police action against homophobia' was adopted, which enables the Catalan police to report immediately to the prosecution office any offences that appear motivated by the victims' sexual orientation, in order to record statistical information on this issue. The Public Prosecutor's Office in the province of Barcelona has created a Special Service on Hate and Discrimination Offences. This example of good practice has been followed by the creation of a similar service in Madrid.

5.6. Age

General initiatives relating to age discrimination which promote the participation of both older and younger people can be observed at the EU level. Better legislative protection has been introduced in some Member States extending protection against age discrimination to areas beyond the sphere of employment. Specific developments in relation to employment and retirement are considered separately.

In 2010, the European Commission proposed to designate 2012 as the European Year for Active Ageing. In reaction to the process of significant population ageing in the EU, the initiative aims to help create better employment opportunities and working conditions for older people, and to promote their active social participation and good health.[112]

The European Commission's 2020 Strategy also addresses age-related concerns and calls on Member States to reform age-related public expenditure and raise "effective retirement ages, in order to ensure the financial viability, accessibility and social adequacy of age-related public expenditure".[113]

The EU 2020 Strategy also includes measures for young people. One of the seven flagship initiatives is 'Youth on the move', which aims to enhance the performance of education systems and facilitate entry into the labour market for young people. This will serve to sustain the progress achieved with the adoption in April 2009 of the 'EU Strategy for Youth' for the period 2010-2018.[114]

Increased awareness of age as grounds for discrimination, as discussed in relation to rights awareness in section 5.1.2, is reflected in legislative developments among the Member States that extend protection against discrimination beyond the sphere of employment. In **Sweden**, the government proposed extending the prohibition of discrimination on the basis of age, going beyond employment and education, to new areas such as access to goods and services, housing, public events, health and medical care, social services, social insurance and unemployment insurance.[115] In **Austria**, where protection against age discrimination is still limited to the labour market, amendments to the equal treatment legislation entered into force in March 2011, introducing a provision prohibiting discrimination against the relatives of aged persons.[116]

Principal developments in this area relate to decisions handed down by the CJEU and national courts. In the *Petersen* case[117] a German court requested the CJEU to examine **German** legislation which provides that authorisation to practice as a dentist under the 'panel' system – where dentists providing care under insurance agreements are registered – will expire when the dentist reaches 68 years of age. In January 2010, the CJEU found that this age limit could not be justified by the need to protect public health since dentists are allowed to treat patients beyond the age of 68 outside the 'panel' system. However, the CJEU did accept that the measure could be justified as a means of opening access to employment for younger dentists. The CJEU concluded that Article 6 (1) of the Employment Equality Directive does not preclude a measure aimed at "shar[ing] out employment opportunities among the generations in the profession of panel dentist, if, taking into account the situation in the labour market concerned, the measure is appropriate and necessary for achieving that aim".

In the case of *Kücükdeveci* [118] a German court requested clarification of whether national legislation, under which periods of employment completed by the employee before reaching the age of 25 are not taken into account in calculating the notice period for dismissal, constituted age discrimination. The CJEU noted that such a rule could disadvantage younger workers compared to older workers, since younger workers with greater experience or seniority could be treated less favourably than older workers who had worked for a shorter period. The CJEU concluded that the exclusion of experience accrued under the age of 25 for calculating the period for dismissal amounted to age discrimination.

In two Member States national bodies found legislation to be incompatible with the Employment Equality Directive. Firstly, in **Cyprus**, the equality body found that the Employ-

112 European Commission (2010c).
113 European Commission (2010d).
114 European Commission (2009d). For further information on the Rights of the child see chapter 4.

115 Sweden (2010).
116 Austria, Gleichbehandlungsgesetz, Section 19 para 4, Section 21 para 4, Section 44 para 4, Section 47 para 4.
117 CJEU Case C-341/08. *Dr Domnica Petersen v. Berufungsausschuss für Zahnärtze für den Bezirk Westfalen-Lippe* 12 January 2010.
118 CJEU, Case C-555/07 *Seda Kücükdeveci v. Swedex GmbH & Co. KG*, 19 January 2010, not yet reported.

ment Law[119] entitling employers to dismiss employees over 65 years of age without compensation amounted to age discrimination. The law, which is still in force, was thereby found in violation of the Equal Treatment in Employment and Occupation Law N.58(I)/2004, transposing the directive.[120]

Since 2008 the maximum age for compulsory retirement in **France** is 70 years, but several special systems still exist providing compulsory retirement at an earlier age for specific employment sectors, such as civil aviation.[121] However, on 9 November 2010 a new retirement law came into force. This law prescribes that by 2018 the retirement age will start at 62 and not 60 as was previously the case. In two rulings delivered in 2010,[122] the Court of Cassation (*Cour de Cassation*) decided that differing treatment with regard to retirement age is not justified and that exemptions must correspond to a predetermined professional requirement, pursue a legitimate objective and be proportionate to achieving this objective.[123]

Other cases can be noted in the area of access to goods and services. In **Belgium**, the Belgian branch of ING bank announced that it would limit the amount of funds that people above 60 years of age could withdraw at cash machines to protect them against fraud or theft. Following accusations of discrimination based on age, the bank quickly abandoned the idea and entered into dialogue with the CEOOR.[124] The Belgian railway company NMBS/SNCB's practice of imposing additional charges on international rail tickets that are not purchased online raised similar concerns. The CEOOR found that this practice was discriminatory since those unable to take advantage of this reduced price would mainly be people with limited access to the Internet, which would disproportionately include older people.[125] Another question arose in **Cyprus** where the equality body received complaints arguing that age limits on government subsidies for artificial insemination might constitute discrimination.[126]

5.7. Multiple discrimination

The following section covers developments in relation to 'multiple discrimination'. In order to gain a comprehensive overview it should be read in conjunction with Chapter 6 on Racism and ethnic discrimination. The term 'multiple discrimination' refers to discrimination on more than one grounds.[127] The concept recognises the fact that an individual can be discriminated against on more than one grounds in any given situation or time. For instance, an individual may often possess characteristics relevant to more than one protected grounds, such as disability and age, or sex and ethnic origin, that might either increase their chances of being subject to discrimination, or converge to place them in a particular situation that makes him/her vulnerable to discrimination.

In this sense, multiple discrimination may be characterised as 'additive', where an individual may be subject to discrimination on more than one grounds and the role of the different grounds can still be distinguished. For instance, an older person with a disability may experience discrimination on the basis of his/her age in one situation and because of her disability in another. Multiple discrimination may also be characterised as 'intersectional' where two or more protected grounds converge to create a situation where that individual suffers discrimination on several grounds that cannot be separated.[128] For instance, a Muslim woman may experience discrimination in a particular situation that would not affect a non-Muslim woman or a Muslim man.[129] Such a situation might arise where a Muslim woman requires a medical examination but cultural or religious considerations require this to be performed by a female doctor.

Two difficulties may arise where multiple discrimination is not taken into account in legislation, or the practice of courts or equality bodies. Firstly, in order to succeed, claims may be brought on only one of the relevant grounds. This may limit the potential of cases to bring about broader changes to policy or legislation, as well as affecting the level of compensation payable to the victim. Secondly, in the case of intersectional discrimination, it may become difficult to prove one's case because discrimination cannot be shown where the grounds are taken separately.

FRA ACTIVITY

Ethnic minorities more likely to experience multiple discrimination

In 2010, the FRA prepared a *Data in Focus Report* based on the results of the EU-MIDIS survey, looking at multiple discrimination as experienced by members of ethnic minority and immigrant groups. The report found that on average, those belonging to ethnic minorities are almost five times more likely to experience multiple discrimination than members of the majority population (14% against 3%).

FRA (2011), Data in Focus report: Multiple Discrimination, Luxembourg, Publications Office.

In June 2010, the results of the European project GendeRace were presented. The research explored the experiences of people who have lodged complaints on the grounds of gender and race discrimination in six EU Member States.

119 Cyprus, The Combating of Racial and Some Other Forms of Discrimination (Commissioner) Law N. 42(1)/ 2004, articles 39(1) and 39(3) respectively.
120 Article 4 of the Termination of Employment Law.
121 France, La loi n° 2008-1330.
122 France, Court of Cassation/Social chamber/ 05-11-2010/n°08-43.68; and 05-11-2010/n°08-45.307.
123 Hautefort, M., pp. 9-10.
124 Belgium, CEOOR (2010d); Belgium/CEOOR (2010e).
125 Belgium, CEOOR (2010f).
126 A.K.R. 126/2009, dated 27 April 2010.
127 Compare to FRA (2011).
128 European Commission (2007).
129 For cases related to the wearing of the headscarf, see ECRI's 2010 report on France (2010d), p. 30.

The results show that most cases of multiple discrimination occur in the employment sector. Both women and men face intersectional discrimination, and both exhibit difficulties in identifying their experiences of discrimination as occurring on multiple grounds. For instance, ethnic minority women tend to identify the discrimination they experienced as due to race discrimination more often than gender discrimination.[130]

5.7.1. Legislation, case law and equality body practice

EU law does not yet use the term 'multiple discrimination' in legally binding provisions and few Member States refer to 'multiple discrimination' in their legislation.[131] Legislative developments occurred in the **UK**, where in April 2010 the UK Equality Act introduced a provision referring to 'dual' discrimination which will enable people to bring claims complaining of direct discrimination based on a combination of two protected characteristics.[132] At the end of 2010, it was not known when the multiple discrimination provision would come into effect.

FRA ACTIVITY

Inequalities and multiple discrimination in access to healthcare

At the beginning of 2010, the FRA held a first expert meeting on 'Inequalities and multiple discrimination in access to healthcare'. The research, which is fieldwork-based, explores the particular vulnerabilities resulting from the intersection of ethnic origin, age and gender in access to healthcare and quality of care. Based on the findings of the research, the FRA will formulate advice to the EU institutions and to EU Member States about how to tackle multiple discrimination in access to healthcare in the EU.

Judicial decisions concerning claims that could potentially have been dealt with as cases of multiple discrimination occurred in various Member States. In this context reference should be made to discussion of cases under the section on religion (above), which may relate to the intersection of grounds of sex, religion and/or ethnic origin. In practice these cases were dealt with generally on the grounds of religious discrimination only. The situation of discrimination against Muslim women wearing the headscarf provides an obvious example of the potential for cases to be dealt with under multiple discrimination. However, in the absence of multiple discrimination provisions in national legislation, such cases tend to be dealt with on one grounds only, that of religion.

130 Carles, I and Jubany-Baucells, O. (2010).
131 European Commission (2009e).
132 United Kingdom, Equality Act 2010.

For example, in **Sweden,** a Muslim woman was refused entry to an aerobics class because she wore a headscarf. The District Court ruled that this was a case of discrimination on the grounds of religious belief. The sports club was obliged to pay SEK 5,000 (EUR 500) in compensation to the woman. The District Court argued that people who, due to their religious beliefs, are prohibited from removing their headscarves, were disadvantaged by the sports club's rules and that this was a case of indirect discrimination. Following discussions with the Equality Ombudsman, the sports club changed its rules and headscarves are now permitted during exercise at the club's facilities.[133]

The intersection between the grounds of sex and religion was also apparent in the context of a campaign in **Bulgaria** in 2010 to renew personal documents. Muslim women were forced to partly remove their hijabs when pictures of their faces were taken. In June, several muftis wrote letters of protest to the authorities stating that this violates the Muslim canon.[134] However, the government underlines that during the mentioned campaign it has strictly respected the relevant national law. The latter allows the taking of a picture of a person with a hat or a hijab, so long as the two ears of the photographed person may be seen together with 1 cm of their hair.[135]

5.7.2. Equality bodies and multiple discrimination

There is a trend among the Member States towards the creation of single equality bodies able to deal with several protected grounds, or the merging of existing equality bodies. For instance, since 2009 the **UK** and **Sweden** have had one single equality body. At the same time, to date most equality bodies address discrimination on single grounds only. Those equality bodies that do collect data on claims involving multiple grounds report an increasing number of such cases. This could be taken to show an increase in levels of awareness of this issue among legal advisors and victims of discrimination.

In **Bulgaria**, where the national legal framework includes reference to multiple discrimination, among the proceedings instituted by the Commission for Protection against Discrimination (CPD), complaints on multiple grounds have steadily increased from 43 in 2006 to 95 in 2009. According to the CPD, this shows that complaints are becoming more complex and that there is increased public awareness and knowledge of the legal framework.[136] Still, it is likely that the majority cases of multiple discrimination remain unreported or are not addressed as such. In **Austria**, according to data for 2009 released by the Ombud for Equal Treatment, who is responsible for equal treatment between men and

133 Sweden, Swedish Equality Ombudsman (2010a).
134 Bulgaria, Bulgaria Helsinki Committee (2010).
135 Addendum No. 5 to Article 9 paragraph 1 of the Ordinance for Issuing Bulgarian Personal Documents.
136 Bulgaria, Комисия за защита от дискриминация (2010); for the exact figures, see Table 1 of Annex 1.

women in employment, nine out of 56 complaints concerned multiple discrimination. In **Germany**, according to data collected between August 2006 and July 2010 by the Federal Equality Body, 308 complaints concerned multiple discrimination, representing 7.7% of the total number of complaints.

Reported cases of multiple discrimination appear to concern two or three intersecting grounds, one of which is usually gender. In **Denmark** in March 2010, Berlingske Media advertised for a staff member with responsibility for organising conferences. The Documentary and Advisory Centre on Racial Discrimination, Denmark (DACoRD) complained to the Board of Equal Treatment that the advertisement constituted discrimination on multiple grounds – age, ethnicity and disability – as the employee should be 'healthy', between the age of 25 and 45 and be 'fluent in Danish'.[137] On 1 December 2010, the case was rejected by the Board of Equal Treatment due to the lack of a specific complainant.

In **Sweden**, a woman complained of discrimination when she was insulted during a job interview for a post in a motel because of her marriage to a Muslim and was later refused the position. The interviewer posed questions about her husband's culture and attitudes towards women in general, saying that she had had bad experiences of "Swedish girls who are together with the immigrants" and that the man's family would not be allowed to sit in the restaurant while she was working. The Equality Ombudsman took the case to the Labour Court alleging discrimination and harassment based on gender, ethnicity and religion, and claimed 200,000 SEK (EUR 20,000) in compensation.[138]

Another case in Sweden concerned a 48-year-old female mathematics teacher of Polish origin who applied for a job at a secondary school in Hallsberg. Although she was qualified and had many years of professional experience, she was not called for an interview. The Equality Ombudsman reached a settlement with the employer who was required to pay SEK 40,000 (EUR 4,000). The Equality Ombudsman considered that she had been treated less favourably due to her gender, age and ethnicity.[139] In the **UK**, a black-African woman working for a global construction company received a settlement in a case alleging unfair dismissal due to race and sex discrimination, after being selected as one of five staff being considered for redundancy, four of whom were women and all five of whom were from ethnic minorities.[140]

Outlook

The coming year provides the Member States with a fresh opportunity to strengthen protection against discrimination on the grounds of religion or belief, sexual orientation, disability and age beyond the sphere of employment. This could be done through various instruments and initiatives including, at EU level, the adoption of the 'horizontal' directive.

While at national level the relatively low numbers of complaints received by many equality bodies is a cause for concern, the fact that there have been increases in many Member States is encouraging. However, in order to maximise their effectiveness, equality bodies will require sufficient resources over the year ahead.

The EU five-year strategy on promoting equality between men and women will provide an opportunity to overcome the challenges facing women in the workplace and in access to goods and services. The strategy also refers to issues of gender identity.

Ratification of the CRPD by the EU offers a remarkable opportunity to develop the promotion of equality for persons with disabilities across the range of EU competences. By the end of 2011, the Commission will suggest solutions to set up a monitoring framework bringing the EU in line with Article 33 (2) CRPD.

The adoption of the Council of Europe's Recommendation on measures to combat discrimination on the grounds of sexual orientation or gender identity provides Member States with a clear set of standards and guidance. Putting this into practice in the coming years is likely to prove a significant challenge. The findings of the FRA's future survey on discrimination and victimisation of LGBT persons may help to shed light on progress as well as provide impetus for improvements.

It is likely that the current economic climate will present major challenges for EU Member States in the field of age discrimination in terms of meeting the objectives of the European Union 2020 Strategy, which includes providing better employment opportunities and working conditions for older people.

Multiple discrimination remains a reality that is largely not mirrored by the legal framework of the EU or the Member States, or the approach of courts and equality bodies. Increasing understanding and awareness of multiple discrimination and accommodating it in the legal process is a necessary, if difficult, task for the coming years.

137 Denmark, Documentary and Advisory Centre on Racial Discrimination (DACoRD) Case no: 2426, 2010.
138 Case: ANM 2009/1300, see Sweden, Swedish Equality Ombudsman (2010d).
139 Sweden, Swedish Equality Ombudsman (2009b).
140 Hinton, J. (2010).

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Austria, Verfassungsgerichtshof/B1973/08, 3 December 2009.

Austria, Verwaltungsgerichtshof/2008/17/0054, 27 February 2009.

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Austria, Verwaltungsgerichtshof/2009/17/0263, 17 February 2010.

Austria, Gleichbehandlungsanwaltschaft bei der Bundesministerin für Frauen und Öffentlichen Dienst (2010a), 'Wer darf mit Kopftuch an die Kassa?', Vienna.

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UN & CoE

January

February

2 March – European Commission against Racism and Intolerance (ECRI, established in 1993 by the CoE Member States) delivers its fourth report on Austria, Estonia and the United Kingdom

25 March – United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD), established under the International Convention on the Elimination of All Forms of Racial Discrimination, issues Concluding Observations on the Netherlands and Slovakia

March

28 April – ECRI delivers its fourth report on Poland

April

May

15 June – ECRI delivers its fourth report on France

June

July

August

13 September – CERD issues Concluding Observations on Romania

20 September – CERD issues Concluding Observations on Denmark and Slovenia

23 September – CERD issues Concluding Observations on Estonia and France

September

October

November

December

EU

January

February

March

April

May

June

July

August

September

October

28 November – Deadline for transposing the EU Council Framework Decision in all EU Member States

November

December

6 Racism and ethnic discrimination

The prohibition of discrimination on the basis of race and ethnicity is well established in international and European law. At the same time, court cases and studies published in the European Union (EU) show that racism remains a significant problem in the areas of employment, healthcare, housing and education. Racially motivated crimes are committed every day on European soil. In order to fully understand the phenomenon of racism and ethnic discrimination, comprehensive and comparable data collection mechanisms would be helpful. However, overall progress in introducing such mechanisms remained slow, whereas at the same time efforts to promote equality with respect to racism and ethnic discrimination took place.

This chapter covers developments in EU and Member State policies and practices in the area of discrimination on the grounds of race and ethnicity, including racially motivated crime. The chapter will address developments in the areas of employment, healthcare, housing and education. It will then examine the issue of data collection, before focusing on the specific issue of data surrounding racially motivated crime. For a comprehensive overview of the issue of discrimination and equality in general, this chapter should be read alongside Chapter 5 on equality and non-discrimination, which focuses on the other grounds protected by EU law such as sex, religion or belief, disability or sexual orientation. In particular, reference should also be made to Chapter 5 on equality and non-discrimination for information relating to cross-cutting issues in the area of discrimination and equality in general, namely: rights awareness; equality bodies, including statistics with regard to racial or ethnic discrimination complaints; and multiple discrimination.

Key developments in the area of racism and ethnic discrimination:

- discrimination in the area of employment remained prevalent, with cases relating to discrimination in job advertisements, recruitment processes, working conditions and dismissals;
- access to healthcare remained dependent on efforts to overcome language barriers and accommodate cultural diversity. In the case of irregular migrants, access hinged upon whether healthcare personnel were required to report undocumented persons to the authorities;
- although formal legal and administrative barriers to accessing social housing were present in only a few Member States, available evidence suggested that minorities continue to live in lower-quality housing resulting from both direct and indirect discrimination;
- segregation in education appeared to remain a problem affecting mainly Roma children in some Member States. Barriers to access to education remained for children of undocumented migrants in some Member States where school authorities are obliged to collect information and report on the legal status of students and their parents;
- a number of Member States were beginning to move towards the collection of data broken down by race or ethnicity, which is an important development in an effort to record and identify potentially discriminatory practices;
- most Member States that collect data on racially motivated crime showed an increase in recorded numbers.

6.1. Data collection

As noted in successive publications, including former annual reports of the FRA, the collection of reliable and comparable data is vital in order to formulate policies targeted at combating inequality, as well as for measuring the success of new measures. At the same time, the collection of racially or ethnically disaggregated data is particularly problematic in some Member States. The need for data relates not only to measuring levels of complaints of discrimination of discrimination, as discussed in Chapter 5 on equality and

non-discrimination, or crimes that are racially motivated, as per section 6.6, but more generally to areas such as employment, housing, education and healthcare.

Various developments in the area of data collection can be reported. For instance, in **Finland**, a specific monitoring group was formed in 2008 to support national data collection on discrimination. In 2010, the Group adopted a four-year action plan for 2010–2013. In 2010, the Group focused on developing data collection with regard to working life, especially in relation to Occupational Safety and Health Inspectorates.

France does not collect data on ethnicity. The census does not include any ethnic data, in spite of reiterated recommendations by the United Nations Committee on the Elimination of Racial Discrimination (CERD). In its Concluding Observations on France, issued as part of a state reporting procedure in August 2010, it requested the inclusion of a question related to ethnicity in the census, on "purely voluntary and anonymous" basis and according to self-identification.[1] In June 2010, the Council of Europe European Commission against Racism and Intolerance (ECRI) report on France, requested the French authorities to "envisage collecting data broken down according to categories such as ethnic or national origin, religion, language or nationality, so as to identify manifestations of discriminations [...]".[2]

"Of the 23,500 respondents interviewed in the FRA EU-MIDIS survey, who had an ethnic minority/immigrant background – when asked about their willingness to provide data on their ethnicity and religion as part of a census on an anonymous basis if this could help combat discrimination – about three out of four respondents in Ireland (74%) and Sweden (72%) had no objection to providing information on their ethnicity for a census, and about three out of five in France (61%), Portugal (62%) and the Netherlands (62%) said the same."

EU-MIDIS Main Results Report *pp. 85-86*

In 2009, the French Commissioner for Diversity and Equal Opportunities (*Commissaire à la diversité et à l'égalité des chances*) established a Committee for Measuring and Evaluating Diversity and Discrimination (Comedd) to "give France the means to understand the current state of discrimination". The committee published its findings in February 2010 making several recommendations, notably the inclusion in the annual census of a question on the birth country of the respondent's parents. It also insisted on the necessity of fostering research and experimental surveys using alternative means to measure discrimination, such as relying on family names, on-site observations and possibly questions on self-identified ethnicity, as long as this information remained under the supervision of the competent institutions (such as the National Council for Statistical Information (*Conseil national de l'information statistique*, CNIS) and the National Commission for Data Protection (*Commission nationale de l'informatique et des libertés*, CNIL)).[3]

In **Hungary**, the Parliamentary Commissioner for the Rights of National and Ethnic Minorities (Minority Ombudsman) (*Nemzeti és Etnikai Jogok Országgyűlési Biztosa*) and the Hungarian Parliamentary Commissioner for Data Protection and Freedom of Information (*Adatvédelmi Biztos*) published a joint report and a set of recommendations concerning data collection. The report discusses perceptions of ethnicity in discrimination and equality policies, options for establishing objective criteria for membership in minority groups for the purposes of political representation and minority rights, monitoring of racial profiling and racially motivated hate crimes, and guidelines for the media.[4]

Promising practice

Monitoring racial discrimination through the media

The Italian Office against Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali,* UNAR) has launched an initiative to monitor the activity of newspapers and websites, in order to find cases of racial discrimination reported by mass media that have not been reported to the police or judicial authorities.

UNAR (2010), Relazione al Presidente del Consiglio dei Ministri sull'attività svolta nel 2009*, Rome, UNAR, p. 3.*

In September 2010, the **Lithuanian** Parliament issued a decision[5] recommending that the government approve the Action Plan on National Statistics of Equality.[6] In **Poland**, calls for a system for gathering and analysing social and demographic data to monitor racism, racial discrimination and xenophobia has returned to the political agenda.[7]

6.2. Employment

As in previous years, complaints of ethnic discrimination were common in the area of employment. For **Belgium**, **France**, **Germany** and the **Netherlands** it was explicitly noted as the area where discrimination is reported most often.[8] In contrast, in several other Member States there remains an almost total absence of complaints, which typi-

1 United Nations, Committee on the Elimination of Racial Discrimination (CERD) (2010), p. 3.
2 Council of Europe, European Commission against Racism and Intolerance (ECRI) (2010a), p. 45.
3 Comedd (2010).
4 Hungary, Parliamentary Commissioner's Office (*Országgyűlési Biztosok Hivatala*) (2009),
5 Lithuania, Decision No. XI-1028 of the Lithuanian Parliament, 21 September 2010.
6 Lithuania, The Office of Equal Opportunities Ombudsperson (*Lygiu Galimybiu Kontrolieriaus Tarnyba*) (2009).
7 Klaus, W. and Frelak, J. (eds.) (2010). For the previous initative, see Poland, Pełnomocnik Rządu ds. Równego Traktowania (2010).
8 This fact was reported by the Antwerp reporting office for discrimination in Belgium, the HALDE in France, anti-discrimination agencies in the Netherlands and various civil society organisations or anti-discrimination offices in Cologne, Munich, Berlin and Hamburg, as noted in RAXEN reports to the FRA.

cally reflects challenges with respect to recording practices and public willingness to report. Evidence of discrimination continued to emerge regarding advertisements, recruitment processes and other practices. In some cases, this type of discrimination relates to particular characteristics that are associated with ethnicity, for example language. Furthermore, in Chapter 5 on equality and non-discrimination, religion is identified as a characteristic which is closely associated with ethnicity (cases dealing with the display of religious or cultural symbols at work are dealt with in that chapter).

6.2.1. Prevalence of employment discrimination

In several Member States surveys of minorities were conducted in order to measure their experiences of perceived discrimination, particularly in relation to the frequency of such experiences. In **Germany,** the annual survey of 1,000 adults of Turkish origin in North Rhine-Westphalia[9] noted that the highest rates of perceived discrimination occur at the workplace or at school/university (50.6%) and when looking for a job (40.2%). In **Lithuania,**[10] 11% of Russians; 11% of Poles; and 14% of Belarusians indicated in a 2010 survey that they had felt discriminated against or harassed on the grounds of ethnic origin in the last 12 months, with the area of employment being mentioned most often. In a survey in the **Netherlands,** 71% of people from ethnic minorities reported rejections in relation to job opportunities, with just over a quarter of these believing that this was due to discrimination.[11] It should be noted that results from these surveys are not directly comparable as they use different methodologies. A survey of the majority population was carried out in **Romania** (*Institutul Român pentru Evaluare si Strategie IRES, Sondaj de opinie, Perceptia publică a minorităţii rome*), where only 54% of the respondents felt comfortable with the idea of having a Roma as a co-worker, compared to 69% and 84% regarding a Hungarian or German co-worker, respectively.

Statistical surveys from a range of Member States revealing higher unemployment rates or lower wages for migrants and minorities when compared with the majority population, even when their qualifications and experience are similar, have been reported in previous annual reports. In 2010, this body of evidence was added to by surveys from **Austria**,[12] **Belgium**[13] and **Italy**.[14]

6.2.2. Cases of employment discrimination

Evidence from these surveys can be read together with complaints and court cases relating to discrimination in the workplace. Cases of employment discrimination could be found relating to job advertisements, recruitment, experiences at the workplace and dismissal.

In relation to discriminatory job advertisements, the previous FRA Annual Report, which covered the main developments in the area of fundamental rights in the EU during 2009, noted such discriminatory advertisements in four Member States. In 2010, examples of such discrimination were to be found in France and Denmark. In **France**, an advertisement by a wine producer, which explicitly excluded Travellers and persons of North African origin, was ruled discriminatory by the country's equality body, the High Commission against Discrimination and for Equality (*Haute autorité de lutte contre les discriminations et pour l'égalité*, HALDE).[15] In **Denmark**, the Documentary and Advisory Centre on Racial Discrimination (DACoRD) (*Dokumentations- og Rådgivningsceneret om Racediskrimination*, DRC) reported that despite registering many cases of discriminatory job advertisements, neither the Ministry of Labour nor the police seem to be taking any action against them.[16]

Promising practice

Diversity guidelines in the area of recruitment

In Finland in November 2009, the City of Helsinki released guidelines for managers to use when recruiting employees from other cultural backgrounds, containing information on equal treatment, language skills and cultural differences. The guidelines recommend that job applicants from an immigrant background should be recruited in those cases where they have the same level of qualification as other applicants. The City aims to improve the proportion of immigrants amongst city staff until it approaches 10%, the proportion of immigrants in the overall population in Helsinki.

Finland, Positive Action in Recruitment (Maahanmuuttajien positiivinen erityiskohtelu työhönotossa). For more information, see www.hel.fi.

In relation to discriminatory recruitment practices, discrimination testing has proved particularly successful in exposing these. The results of the first systematic discrimination testing study in **Germany** since the mid-1990s were published in February 2010,[17] showing that applicants with a Turkish-sounding name face discriminatory barriers in access to the labour market. The researchers tested 528 publicly advertised student internships and discovered that the chances of applicants with a Turkish name receiving a call back by the employer were 14% lower than the chances of the 'German' testers, with the discrimination rate sig-

9 Sauer, M. (2010).
10 Lithuania, *Lietuvos socialinių tyrimų centro Etninių tyrimų institutas* (2010).
11 Coenders, M., Boog, I. & Dinsbach, W. (2010).
12 Austria, Bundeskanzleramt Österreich, Bundesministerin für Frauen und Öffentlichen Dienst (2010).
13 Corluy, V., and Verbist, G. (2010).
14 Italy, IT Ismu, Censis, Iprs (2010).
15 France, HALDE (2010), p. 39.
16 Denmark, DACoRD (2010), pp. 17-18.
17 Kaas, L. and Manger, C. (2010).

nificantly higher in small companies. In the **Netherlands**, a man of non-Dutch origin applied for the post of probation officer, but, although he had the desired qualifications and work experience, he was not invited for an interview. When he applied again with a different place of birth and a Dutch name, however, he was invited for an interview. The Equal Treatment Commission (ETC) ruled this to be a case of racial discrimination.[18] In **France**, a testing research exploring discrimination against young people living in the Paris area analysed three grounds of discrimination: gender, area of residence (privileged or under-privileged), and origin (French or Moroccan).[19] The researchers sent 3,864 CVs to 307 advertised jobs. As well as showing that Moroccans were less likely to receive a positive response, the research showed that exclusion by residential area affected women more than men, with Moroccan women from an underprivileged area experiencing the most discrimination. For information on the phenomenon of multiple discrimination, see Chapter 5 on equality and non-discrimination. For further examples of the use of discrimination testing, see section 6.4 on housing.

In relation to experiences at work, in October 2010, four Polish migrants working on an industrial site in **Ireland** were awarded compensation by the Equality Tribunal after suffering "deliberate, blatant and unfettered" racist abuse at work. The men had been told not to speak Polish to each other on their lunch breaks, were subjected to direct verbal abuse, and were told that the odour of Polish food and Polish people was unpleasant.[20]

Promising practice

Municipalities engage in discrimination testing

In Belgium, the Government of the Brussels-Capital Region launched a pilot project to improve employment opportunities, particularly for people of migrant origin. Between August and December 2010, four municipalities of Brussels used anonymous CVs to test access to certain public vacancies. In January 2011, other Brussels municipalities will join the pilot project.

Communication from the Office of the Minister Benoît Cerexe, 6 September 2010.

In the context of termination of working contracts, cases of discrimination were reported in several Member States. In **Finland**, a trainee of Roma origin was awarded compensation after his two-week work placement was terminated after the first day because the company claimed it had received negative feedback from customers.[21] In **France**, the Versailles Court of Appeal sentenced a bailiff to pay compensation to a former employee who had been dismissed in a discriminatory fashion, after regularly being the target of racist remarks linking his North African origin to Islamic terrorism.[22] In **Germany**, an employer agreed to pay compensation to a trainee of Asian background who had been informed that his contract had not been extended because the company preferred 'German employees'.[23] In **Ireland**, a complaint was upheld by the Equality Tribunal in relation to a Lithuanian claimant who had been subject to frequent verbal abuse, which later resulted in unfair dismissal.[24]

6.2.3. Language and accent

As with religion or belief, discussed in Chapter 5 on equality and non-discrimination, in certain circumstances it may not be possible to dissociate language and accent from ethnicity. In 2010, there were several cases reported where language or accent was used as grounds for discrimination. Even if these cases do not show a clear pattern, they illustrate how language can play a role in the context of discrimination and racism. In Hamburg, **Germany**, a man born in Ivory Coast was awarded compensation by the labour court for unlawful indirect discrimination on the grounds of ethnic origin after being rejected three times for a job as a postman, whilst the position remained vacant. He had been told that his command of German was not good enough even though he had successfully undertaken an apprenticeship in Germany and had worked in German offices.[25] Also in Germany, the state labour court in Bremen confirmed that the dismissal of an employee because of her Russian accent was a case of unlawful direct discrimination on the grounds of ethnic origin. The claimant had been dismissed by the new managing director of a small logistics company on the grounds that customers would react negatively to her Russian accent.[26] In contrast, in February 2010 the Supreme Court in **Denmark** decided that it was not a violation of the Law on Equal Treatment when a company selected four out of six employees for redundancy on the basis of their level of fluency in Danish.[27]

18 The Netherlands, Equal Treatment Commission (2010), *Opinion 2010-68*.
19 Duguet, E., L'Horty, Y., du Parquet, L., Petit, P., Sari, F. (2010).
20 Holland, K. (2010).
21 Finland, Vähemmistövaltuutettu (2010).
22 France, HALDE (2009).
23 Germany, *Antidiskriminierungsstelle des Bundes* (2010).
24 Ireland, Equality Tribunal (2010).
25 Germany, Labour Court (*Arbeitsgericht*) Hamburg/25 Ca 282/09, 26 January 2010; see also Germany, *Antidiskriminierungsstelle des Bundes* (2010), Newsletter ADS-aktuell No. 1/2010, 02 September 2010.
26 Germany, State Labour Court (*Landesarbeitsgericht*) Bremen, 1 Sa 29/10, 29 June 2010; Labour Court (*Arbeitsgericht*) Bremen-Bremerhaven Bremen/8 Ca 8322/09, 25 November 2009.
27 Sø-& Handelsretten, SHR af. 12/04-07 *Funktionærforhold – Usaglig opsigelse – Ligestilling og ligebehandling*, Sag F-43-06.

FRA ACTIVITY

Shedding light on racism in sport

According to a FRA report on racism in sport which was published in 2010, persons belonging to minority groups are often discriminated against in terms of their employment conditions. In several Member States, foreign professional football players, mainly from African countries, can face precarious employment conditions and are treated differently by their clubs in comparison with domestic players. The report identifies both problematic instances as well as promising practices.

FRA (2010), Racism, ethnic discrimination and exclusion of ethnic minorities in sport: a comparative view of the situation in the European Union, *available at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.*

6.3. Healthcare

This section addresses discrimination in healthcare on the grounds of race or ethnicity. It will begin by discussing patterns of health inequality as noted in recent studies, and then move on to developments relating to the position of undocumented migrants and provision for diversity in healthcare, including mental health provision.

6.3.1. Health inequalities

Evidence suggests that socioeconomic factors, such as education, income, gender, but also ethnicity and race, have an impact on individuals health status and health outcomes. Therefore, the World Health Organization (WHO) Regional Office for Europe commissioned a review of the health divide and inequalities in health from July 2010 to 2012 in order to inform the development of a new health policy for the region. The first phase of the review assesses levels of inequalities in health across Europe and identifies the barriers to and opportunities for reducing these. It is argued in the draft report that unequal distribution of power as well as unequal access to resources, capabilities and rights, lead to health inequalities. In its interim report, the WHO Regional Office emphasises that political empowerment and the full realisation of human rights are also critical in improving health and reducing inequality.[28]

Following the European Commission Communication on *Solidarity in health, reducing health inequalities*, which was published in October 2009,[29] a strong political commitment to address socioeconomic determinants of health has developed. Both the Spanish and Belgian Presidencies of the Council of the European Union had made health inequalities a priority theme.[30] In its opinion on the above mentioned health inequalities communication in May 2010, the Social Protection Committee (SPC, in charge of coordination of the Open method of coordination for social protection and social inclusion) advised taking extra measures to improve health among vulnerable groups, including people from some migrant or ethnic minority backgrounds.[31]

Also at national level, policy developments can be noted in relation to three Member States in this area. The results of the Tackling health inequality in **Belgium** (TAHIB) research project show that ethnic minorities have a significantly higher risk of reporting worse states of health, explained by their statistically lower socioeconomic status and poorer living environment. Better monitoring was proposed as a means of addressing this.[32] Similarly, the All **Ireland** Traveller Health Study (2010),[33] covering both Ireland and Northern Ireland, points to great health disparities between the Traveller and the settled population, with a difference in life expectancy of 11 years. Substantial health inequalities exist between Roma and non-Roma populations – a fact that is stressed by this report in the focus section on the Roma. Finally, in its monitoring report adopted in December 2009, ECRI has strongly encouraged the **United Kingdom (UK)** to pursue efforts to eliminate inequalities in health status and access to health services experienced by members of black and minority ethnic groups.[34] This message was also echoed in *Fair Society*, *Healthy lives*, published in February 2010,[35] as a result of a two-year long investigation by an independent commission, which looked into the Strategic Review of Health Inequalities in England.

> *"The more a group is marginalised, the more vulnerable it is. Nevertheless, being a migrant, from a certain ethnic group or a person with a disability does not make a person inherently more vulnerable or at increased risk. Rather, it is the interaction between several factors that creates increased vulnerability. These factors include poverty, inequality, discrimination, exposure to various threats (such as sexual abuse), the prevailing incidence or prevalence of disease (such as HIV) and the possibilities of epidemics (such as influenza)."*
>
> *WHO Regional Office for Europe (2010) Interim first report on social determinants of health and the health divide in the WHO European Region*

6.3.2. Irregular migrants

The EU Member States have undertaken to guarantee the right to health of every person within their jurisdiction in a number of international treaties, including the International Covenant on Economic Social and Cultural Rights (ICESCR) which guarantees in its Article 12 (1) the right "to the enjoyment of the highest attainable standard of physical and mental health". For more on international obligations, see Chapter 10. In 2010, the Recommendation of the Committee of Ministers of the Council of Europe on Good governance

28 WHO (2010).
29 European Commission (2009a).
30 Council of the European Union (2010a). For a summary of the Belgian Presidency Conference on health inequalities, see: www.eutrio.be/pressrelease/integrated-approach-required-deal-health-inequalities.
31 Council of the European Union (2010b).
32 More information about the project is accessible at: www.belspo.be/belspo/fedra/proj.asp?l=fr&COD=TA/00/15.
33 Ireland, Pavee point (2010).
34 Council of Europe, ECRI (2010b), p. 33.
35 Marmot, M. (2010), *Fair Society, Health Lives*, available at: www.marmotreview.org.

in healthcare emphasised that healthcare systems should be based on the principles of universality, solidarity and access.[36] However, as shown in a forthcoming report of the FRA on irregular migrants, practices in offering treatment to undocumented migrants vary widely among Member States and are often in contradiction with international standards.[37]

In some Member States, reporting duties were introduced, obliging health professionals to report undocumented migrants they treat. In **Germany**, the Ministry of Interior (*Bundesministerium des Innern*, BMI) recently clarified that the duty of professional secrecy outweighs the duty to report.[38] As a result, health staff and hospital accountancy units are exempt from reporting the undocumented migrants they treat to the immigration authorities. Irregular migrants, thus, may access all care provisions, with respect to immediate medical attention.[39] However, a reporting duty continues to exist for social welfare offices.[40] Even when no such strict duties are in place, service providers may be asked to cooperate with immigration authorities or the police, either in general or with regard to individual cases. This may lead to fear of approaching healthcare providers, as developments in **Italy** have illustrated: a proposal to introduce a reporting obligation for health staff was hotly debated in 2009, but was not introduced in the end.[41] However, the adopted amendments criminalised illegal entry and residence of third-country nationals.[42] The public debate around this issue created fears among the irregular migrant community and discouraged many of them to access healthcare services.[43]

In contrast to the stance adopted by the law in **Italy**, a survey carried out by Censis, suggests that over 80% of Italians think that irregular immigrants should have access to public health services.[44] About 65% of respondents believe that health is an 'inviolable right' and 'healthcare is an essential act of solidarity'. Less than 20% of interviewees are against granting access to the National Health Service to irregular immigrants. Further analysis of the situation of irregular migrants can be found in Chapter 2 on border control and visa policy.

36 Council of Europe (2010).
37 FRA (2011) (forthcoming). For a more in-depth discussion on access to healthcare for undocumented migrants, see also the forthcoming FRA report on access to healthcare – a case study of 10 EU Member States.
38 Germany, Ministry of Interior, Administrative Decree on the Residence Act, 26 October 2009.
39 FRA (2011) (forthcoming).
40 Katholisches Forum, 'Leben in der Illegalität' (2010).
41 See the national campaign "Divieto di segnalazione" (Forbidden to denounce) in Italy, available at: www.immigrazioneoggi.it/documentazione/divieto_di_segnalazione-analisi.pdf.
42 Italy, Law No. 94/09 on provisions in matters of public safety, 15 July 2009.
43 For more information on the law and its effect on irregular migrants and accessing healthcare in Italy, see Platform for International Cooperation on Undocumented Migrants (PICUM) (2010), p. 9, and LeVoy, M. and Geddie, E. (2009).
44 La Repubblica, 'Sì alle cure per gli immigrati irregolari Censis, favorevoli otto italiani su dieci', 5 February 2010.

FRA ACTIVITY

Irregular migrants and healthcare: interviews in 10 EU Member States

For an upcoming report on access to healthcare for irregular migrants, in 2010 the Agency conducted interviews in **Belgium**, **France**, **Germany**, **Greece**, **Hungary**, **Ireland**, **Italy**, **Poland**, **Spain** and **Sweden**. These countries were selected to cover a broad variety of different situations across the EU so that the results could also be relevant for countries and cities not covered by the research. Altogether, the fieldwork involved 221 qualitative interviews in 23 big cities: 36 with public authorities, 43 with civil society representatives, 67 interviews with health staff and 75 with irregular migrants.

6.3.3. Diversity in health service provision

Similar to the situation in 2009, obstacles remain in 2010 in some EU Member States in relation to accessing culturally adequate healthcare services. In some Member States, it has been reported that people who do not speak the respective majority languages face problems in accessing healthcare. For instance, a study on third-country nationals, undertaken in Poznań, one of **Poland**'s larger cities, pointed to the fact that no information on the Polish health system was available in foreign languages. In this study, the researchers also identified factors hindering integration, including discrimination and prejudice based on a persons' origin or appearance (namely, race and skin colour). Discrimination on the basis of appearance was especially significant in the context of education and healthcare.[45]

As highlighted in the previous FRA Annual Report, in **Denmark** the provision of cultural mediators and interpreters will be reduced following legislation that will enter into force in 2011. This legislation will require those who have lived in Denmark for over seven years to cover the costs of translation themselves.

6.3.4. Mental health

Diversity in the provision of services is of particular importance in the context of crucial delivery of mental healthcare. The ways in which patients describe their symptoms vary between cultures; in some cases, somatic symptoms, that is those related to physical health, can constitute a manifestation of psychological ill health.

45 Bloch N. *et al* (2010).

Promising practice

Transcultural psychiatry: raising awareness on transcultural sensitivities

In Rekem, **Belgium**, the Public Psychiatric Care Centre (*Openbaar Psychiatrisch Zorgcentrum*, OPZC) introduced a working group on 'transcultural psychiatry'. In collaboration with the provincial integration centre (*Provininciaal Integratiecentrum*, PRIC) in Limburg and the intercultural mediation service of the hospital ZOL in Genk, the working group has the task of developing, in cooperation with the province, a policy concept for ensuring continued awareness-raising of transcultural sensitivities in mental healthcare delivery among staff involved in social work and care services.

For more information, see: www.opzrekem.be.

The 2010 ECRI report on the **UK** noted that, as regards mental health, some black and minority ethnic groups were significantly more likely to experience forms of mental health problems than others.[46] This situation does not appear to have improved in recent years, although research is being conducted into the causes of this and understanding has improved. This resonates with the findings of the Care Quality Commission's 'Count Me In' 2009 census, published in January 2010, which monitors the ethnicity of people detained and treated in mental health hospitals against their will under the Mental Health Act 1983, which was last modified on 15 October 2009. The report shows that people from black and white/black mixed groups are three times more likely to be detained under the legislation than the average person, which can reflect wider disadvantage but may also indicate racism in the mental health system. In addition, the findings of an AESOP (Aetiology and ethnicity in schizophrenia and other psychoses) study found high rates of psychosis among the African-Caribbean population in the **UK**.[47] The study prompted a discussion in the pages of *The Guardian* newspaper between the study's authors and mental health activists.[48] The activists oppose the view presented in the AESOP study, which states that schizophrenia had reached "epidemic" proportions among the African-Caribbean community in the UK. In the words of the Director of Black Mental Health UK (BMHUK): "We know from a number of reports that rather than being a reflection of the true incidence of mental illness, it is the result of medicalising cultural differences, social problems and institutional racism."[49]

Levels of poor mental health could result from discrimination or social exclusion. In the **Netherlands**, a research study examined the association between perceived discrimination and depressive symptoms among Turkish-Dutch and Moroccan-Dutch adolescents and young adults.[50] Results show that respondents who perceived discrimination on a personal level were more likely to suffer from depression than those who did not perceive that they had been discriminated against. This association was greater for the Moroccan-Dutch population than the Turkish-Dutch population. Moreover, the Dutch Healthcare Inspectorate (*Inspectie voor de Gezondheidszorg*, IGZ) stated that many ethnic minorities in the Netherlands may have a different way of dealing with emotions such as shame, because they are raised in a so-called 'collectivist society', representing a different set of values to those of more individualised Western societies.[51] They may find it difficult to talk with a professional about mental problems. According to findings of the Institute of Mental Health and Addiction (*Trimbos Institute*), the staff of the mental healthcare services are not fully aware or trained to take this into account.[52]

Investment in the promotion of immigrant mental health is also part of the upcoming National Health Plan (2011-2016)[53] in **Portugal**, under the theme of promoting immigrants access to the National Health Service.

The mental health of asylum seekers in particular also attracted attention in 2010. Insufficient access to psychological help for asylum seekers was noted in **Poland**, where a monitoring exercise covered five out of 20 asylum seekers centres operating in Poland and contained interviews of personnel and medical staff working at the centres as well as aliens living there.[54] In **Finland**, adult asylum seekers are given access to mental healthcare, while there is a lack of services for children.[55] A study from the **UK** points to the fact that indefinite detention has a negative impact on the health status of detained asylum seekers, who are said to experience high levels of mental health problems and suicide attempts.[56] For developments in the area of asylum, see Chapter 1 on asylum, immigration and integration.

46 Council of Europe, ECRI (2010b), p. 32.
47 Aetiology and Ethnicity in Schizophrenia and other Psychoses Study Group (AESOP) (2006).
48 The Guardian, 'Poor research or an attack on black people?', 3 March 2010.
49 Mattilda MacAttram, BMHUK Director, quoted in 'Fightback over claims on mental illness and its prevalence among black people', The Guardian, 3 February 2010.
50 Van Dijk, T.K, Agyemang, C., de Wit, M. and Hospern K. (2010).
51 Hilderink, I. van't Land, H. and Smits, C. (2009).
52 The Netherlands, Gemeenschappelijke Gezondheidsdient (2010).
53 See Portugal, Ministerio de Saude (2002), No. 14/DSPCS.
54 Fundacja Międzynarodowa Inicjatywa Humanitarna (International Humanitarian Initiative Foundation) (2009).
55 Parsons, A. (2010).
56 London Detainee Support Group (2010).

6.4. Housing

This section will consider evidence from statistical patterns of inequality, as well as specific research projects, including discrimination testing, that points towards the existence of both direct and indirect discrimination in the area of housing. Roma and Travellers are the groups which are the most consistently disadvantaged in private and social housing. Findings emerging from the monitoring activities of ECRI and the United Nations Committee on the Elimination of Racial Discrimination (CERD) in 2010 drew attention to the continuing segregation and discrimination faced by these two groups in the area of housing; for more information on international monitoring, see Chapter 10 on international obligations. Migrants, refugees and asylum seekers are subject to legal and administrative restrictions in access to social housing in only a few Member States.

Housing is a crucial factor in determining the quality of life of all persons, and having an impact not only on day-to-day living conditions but also on employment and access to services, including education and healthcare. As such, housing is one of the most important aspects effecting the integration of people with an ethnic and migrant background. Promotion of the right to housing, recognised by the ICESCR to which all EU Member States are party, can be seen as an effective instrument of the integration process, as well as an important indicator of integration status. However, discrimination on the basis of race and ethnicity can have a serious impact on access to adequate housing.

"Cases have also been reported of undocumented migrants sharing flats with many others, with the same beds being used according to the work schedule of individuals, with 5 or 10 beds allocated to one room."

UN Special Rapporteur report on adequate housing, addressing the situation of undocumented migrants in Europe, 9 August 2010, paragraph 52

In his 2010 report, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living concluded that "discrimination and xenophobia affect the living conditions of migrants and their coexistence with the local community. They have thus been identified as key factors in the exclusion of migrants from adequate housing. States need to combat xenophobia and discrimination as a matter of urgency and ensure that no legislative or administrative acts reinforce discrimination against migrants with regard to their access to social or private housing. Moreover, States should take effective measures to ensure that housing agencies and private landlords refrain from engaging in discriminatory practices."[57]

Three trends can be identified in 2010. First, surveys and discrimination testing in a variety of EU Member States provide evidence that discrimination is still a frequent feature of the housing sector. In addition, the housing situation of Roma and Travellers continues to be perceived as a special case which deserves particular attention; for more information, see the focus section on Roma in the EU. Finally, access to social housing continues to be subject to various legal and administrative restrictions effecting persons belonging to vulnerable groups.

6.4.1. Surveys and discrimination testing

According to the EU project on Promoting Comparative Quantitative Research in the field of Migration and Integration in Europe (PROMINSTAT) "evidence suggests that, in general terms, migrant and minority groups, given their more vulnerable position, continue to experience difficulties in accessing all tenures of housing. Various obstacles hindering access to housing have been documented. Both housing supply and affordability are undoubtedly central to this debate, yet other aspects such as direct or indirect discrimination on the part of landlords, agents, housing professionals, local authorities, banks etc. [...] are also fundamental aspects".[58] In **Germany**, the Criminological Research Institute of Lower Saxony (*Kriminologische Forschungsinstitute Niedersachsen*, KFN) published the results of a large scale questionnaire-based survey, carried out in 2006 among almost 45,000 secondary school students in the ninth grade. In a sub-sample, 20,604 German (non-migrant) ninth-grade students were asked about their attitudes towards certain minority members as neighbours. The results of the survey show that German youngsters prefer other native Germans in their neighbourhood over migrants and minorities. By far the most undesirable neighbours are Turks followed by ethnic German repatriates (*Spätaussiedler*). People with dark skin and Jewish people are considered more positively by the respondents, but still less desirable than Swedish and Italian neighbours.[59]

Another survey carried out by the Centre for Studies on Turkey (*Zentrum für Türkeistudien,* ZfT) among 1,000 migrants of Turkish origin, revealed that housing continues to be an area where people of Turkish origin in North Rhine-Westphalia experience discrimination: 39.1% of respondents reported experiences of discrimination when looking for a flat and 28.4% have encountered discrimination in the neighbourhood.[60] In **Italy**, a survey carried out among 1,000 non-EU citizens in 2009 by the union of tenants, Sunia, revealed that landlords often refuse to rent to foreigners or do so only on unfavourable terms, such as high prices and low-quality housing. The survey showed that rents are on average 30% to 50% higher than those applied to Italians and landlords often asked for additional guarantees at the time of signing the lease, such as an Italian guarantor or a bank deposit.[61]

57 UN, General Assembly (2010), paragraph 89.

58 Fonseca, M. L., McGarrigle, J. and Esteves, A. (2010), p. 3.

59 Baier, D., Pfieffer, C., Simonson, J., Rabold, S. (2009), p. 114.

60 Sauer M. (2010).

61 SUNIA (2009).

In a few Member States, discrimination tests were carried out in order to determine the prevalence of discrimination against migrants and ethnic minority groups in access to the housing market. In **Spain**, a report of SOS Vizkaya Racism (SOS Racismo Bizkaia) found discrimination as one of the main reasons explaining the difficulties encountered by migrants in accessing decent housing in the city of Bilbao.[62] The report also includes the findings of a discrimination testing exercise based on 60 visits to private houses and 6 visits to estate agents that revealed that 64% of housing owners rented flats to native individuals but not to migrants and 50% of estate agents did not provide migrants with housing offers despite having flats in stock.

In **Italy**, the Centre for Public Policy of the University of Modena and Reggio Emilia conducted a field experiment using the Internet to measure discrimination in the Italian rental housing market. The research was based on 3,676 e-mails enquiring about the rental of vacant apartments in 41 Italian cities. The experiment revealed that in extensive areas of the Italian rental housing market there is a significant degree of discrimination against people from Arab and eastern European countries. The research also found that the most discriminated groups are those with names of Arab origin and, within the same group, men were found to be more discriminated against than women (the names used represented three different ethnic groups: Italian, Arab-Muslim and Eastern European).[63]

In **Sweden** in August 2010, the Equality Ombudsman (*Diskriminerings Ombudsmannen*) published a study on discrimination in the housing market based on discrimination testing. The property rental market was examined through almost 400 phone calls to 150 tenants in 90 different locations. The property purchasing estate market was examined by a total of 44 visits in Stockholm, Helsingborg and Lund. The study revealed that discrimination on the ground of ethnicity occurred to a greater extent than on other grounds, targeting mainly people of foreign background in the property rental market and Finnish Roma and Muslims in the property purchasing estate market, respectively.[64]

6.4.2. Legal and administrative restrictions for access to social housing

Social housing serves different client groups in different states – in some states its use is confined to the very poor, while in others it houses low-waged working families or even those belonging to the middle class.[65] Access to social housing for migrants, refugees and asylum seekers is still subject to legal and administrative restrictions in a few EU Member States.

In her report, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living noted that "insufficient information and inadequate advice, discrimination in the allocation of dwellings or financial assistance, laws restricting the access of non-citizens to public housing, cumbersome bureaucracy and lack of access to grievance mechanisms restrict the access of migrants to public housing. In many countries migrants are not entitled to housing assistance or to public housing, which are reserved for long-term residents".[66]

In August 2010, the UN High Commissioner for Refugees (UNHCR) Regional Representation for Central Europe published its regular report on the situation of asylum seekers and refugees in central Europe, including **Slovenia**. With regard to the situation of refugees, the report noted that access to affordable housing tends to be a systematic problem for refugees in **Slovenia**, as they are not entitled to state non-profit housing and have to provide for their accommodation at market prices. In this respect, the report recommended "that stakeholders (Ministry of Interior, NGOs and UNHCR) approach the Ministry of Environment to review the issue of access to social housing with a view of ensuring that refugees and holders of permanent residence permits are eligible for non-profit apartments".[67]

The 2010 ECRI report on **France** noted that "direct and indirect racial discrimination towards immigrants, persons of immigrant origin and other visible minority groups remains a problem in both the private and the public housing sectors. With regard to social housing, a key problem is the lack of transparency of the system for allocating dwellings, which in the opinion of certain specialists can help create an environment conductive to potential discriminatory practices".[68]

In the **Netherlands**, in April 2010, the Minister of Housing, Communities and Integration gave permission[69] to extend the application of the Special Measures Urban Issues Act in the municipality of Rotterdam by four years.[70] According to this legislation, at the request of a city council, the Minister can identify areas in which additional requirements apply for persons seeking housing. The Act allows cities to regulate the housing market in these specific areas and to temporarily limit the influx of disadvantaged households, with no income or employment. The Dutch equality body, the Equal Treatment Commission (ETC) (*Commissie Gelijke Benhandeling*, CGB), has argued that the legislation results in indirect discrimination on the grounds of race, nationality and gender, affecting migrant groups disproportionately.[71] The government reasons, however, that the legislation aims to improve the living standards and strengthen the settlement and investment climate for businesses, within

62 SOS Racismo Bizkaia (2010).
63 Baldini, M., Federici M., (2010). On multiple discrimination, see Chapter 5 on equality and non-discrimination.
64 Sweden, Equality Ombudsman(2010).
65 Whitehead, C. and Scanlon, K. (2007).

66 UN, General Assembly (2010), paragraph 89.
67 UNHCR Regional Representation for Central Europe (2010), p. 71.
68 Council of Europe, ECRI (2010a), p. 24.
69 The Netherlands, Decision of the Dutch Government (2010).
70 The Netherlands, Wet bijzondere maatregelen grootstedelijke problematiek (Stb. 2005, 726), 22 December 2005.
71 The Netherlands, ETC (2005).

Promising practice

Guidelines for rentals and sales of housing space

As a member of the international city network 'Cities for Human Rights', the city of Nuremberg has made fighting discrimination and racism against people with a migration background in the local housing market a political priority. To this end, the city of Nuremberg and stakeholders of the Nuremberg housing market have drafted guidelines specifically aimed at assisting the city, property companies, estate agents and landlords to consider migrants who want to rent or buy a flat without prejudice and free of discrimination.

Nuremberg places emphasis on human rights and submits guidelines for housing, Media release of the Nuremberg City Hall, No. 994, 2 October 2009.

specific poor areas. It submits that the selection is based on income, not on grounds of race, nationality or gender, and that it only applies to people who do not live in the Region of Rotterdam.

6.5. Education sector

The ability to access education can have a significant impact on the range of employment opportunities available to individuals, which in turn can affect income, housing and quality of life in general. Although the right to education is guaranteed in the European Convention on Human Rights (ECHR) and the ICESCR, among other international instruments, a number of challenges remain in ensuring equality and non-discrimination in the sphere of education.

"Education-related inequalities have an impact over the life-span, not just in childhood. Differences in participation in education persist throughout life."[72]

UK Equality and Human Rights Commission (2010)

This section focuses on equality in access to education and persisting forms of segregation in education. In more general terms, information received in the reporting period confirms, however, that racist incidents and discriminatory practices continue in the area of education. At the same time, regular and institutionalised reporting mechanisms are still lacking and 2010 did not witness overall improvement as regards the monitoring of racist incidents in schools. It appears, nevertheless, to be the case that systems for monitoring racist incidents in educational establishments, such as schools, are widespread in **France**, **Germany** and the **Netherlands**. In **Germany**, some federal states (*Bundesländer*) monitor right-wing extremism in schools. In the **UK**, schools have an obligation to collect and keep annual records of racist incidents in their establishments. In **France**, data on racist incidents is provided through the Vigilance and Information System on School Safety (*Système d'Information et de Vigilance sur la Sécurité scolaire*, SIVIS) and in the Netherlands, local and regional Anti-Discrimination Agencies register complaints in the area of education. It is unclear, whether other Member States currently have systematic monitoring of racist incidents in educational institutions in place.

6.5.1. Equal access to education

While at a formal level EU Member States provide open access to education, in practice, vulnerable groups face many difficulties in accessing good quality education. In some Member States, the children of asylum seekers are not subject to compulsory schooling. This is, for instance, the case in Sweden, although asylum seekers' children do have a right to attend school. Discussion arose as to whether children who reside in **Sweden** without a residence permit should be granted the right to education and participation in pre-school. The Cabinet Office (*Regeringskansliet*) presented a proposal regarding access to school for all children in February 2010.[73] In **Latvia**, in January 2010 the Ministry of Education and Science (*Izglītības un zinātnes ministrija*, IZM) received a complaint from a legal guardian of an asylum seeker about the failure to provide education opportunities envisaged by legislation.[74]

Promising practice

National register on discrimination in schools

According to a decision of the Dutch Ministry Council *(Ministerraad)* of June 2010, primary, secondary and vocational schools in the **Netherlands** will become obliged to register racist incidents in a single national registration system. Every second year, the figures will be made available in a national monitor. Discrimination on grounds of race, sex and sexual orientation is one of the categories of incidents that have to be registered. In the school year 2009-2010, a series of pilots took place in which clear definitions of different types of incidents were formulated. It is expected that the register will come into force on 1 August 2011.

For more information, see Central government (Rijksoverheid) *media release on a national incident recording mechanism for a safer school climate, 25 June 2010.*

72 UK, Equality and Human Rights Commission (2010).

73 Sweden, Cabinet Office (2010).

74 Latvia, Ministry of Education and Science (2010), Letter No. 1-12/517.

Access problems are to be expected where school authorities are obliged to collect information and report on the legal status of students and their parents. According to data received in 2010 through a questionnaire sent to national authorities in the context of a FRA project on 'Fundamental rights of irregular migrants', in some Member States, including **Austria**, **Belgium**, **Finland**, **Greece**, **Italy** and the **Netherlands**, school authorities are prohibited from reporting irregular migrants to immigration authorities. It should also be noted that no provision relating to reporting irregular migrant children to the authorities exists in a number of other Member States, including **Bulgaria**, **Estonia**, **Luxembourg**, **Latvia**, **Finland**, **Portugal**, **Romania**, **Slovenia**, **Spain** and **Sweden**.

Exceptions are **Cyprus**, or – to some degree – **Slovakia**. In Cyprus a circular of the Migration Department requires state schools to inform authorities about the enrolment of undocumented children.[75] In **Slovakia**, school administrations are obliged to report undocumented children attending or leaving a school on the basis of the Act on Stay of Aliens (Article 53 (3)).[76] In **Germany**, the situation is more complicated: at federal level, a general 'duty to report' exists according to Article 87 of the Residence Act.[77] However, several federal states have enacted legislation or issued administrative instructions that exempt school authorities from this general duty, such as North Rhine-Westphalia.[78] In Hamburg and Berlin, registration systems for school children were set up in the form of databases. Parents associations campaigned against this move and activists supporting data protection tried to boycott the database.[79]

Available data indicates that Roma are among the most disadvantaged as regards access to education. For example, in **France**, according to the annual report of the French Ombudsperson for Children (*Défenseur des enfants*), and in many international reports, Travellers as well as Roma migrants continue to encounter many difficulties and even refusals, when they seek to enrol their children in school.[80] For more information on the situation of Roma in the field of education, see this report's focus section on Roma in the EU.

Further barriers in accessing education include: geographical isolation and long distances to schools; unavailability of pre-school facilities; unequal treatment in enrolment procedures and access testing.

75 November 2004, (not publically available).
76 Slovakia, Zákon č. 48/2002 Z. z. o pobyte cudzincov a o zmene a doplnení niektorých zákonov (Act on Stay of Aliens).
77 Germany, Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (AufenthG) (2004), Article 87.
78 Deutsches Rotes Kreuz and Caritas, *Aufenthaltsrechtliche Illegalität: Beratungshandbuch* 2010, p. 18.
79 For more information, see, for example, the Berlin Refugee Council website (*Flüchtlingsrat Berlin*) available at: www.fluechtlingsrat-berlin.de/print_pe.php?sid=424.
80 Défenseur des enfants (2009), p. 95-96. See also sections on Roma migrants and Travellers in CERD (2010).

However, initiatives for widened and fairer access to education can also be noted. For instance, in **Germany**, in the federal state Hesse a new provision came into force at the end of 2009, which removed practical barriers for undocumented migrants to enrol their children at school. According to a new regulation, which was introduced with an amendment to section 3 of the Hesse State Act on schooling for pupils with non-German mother tongue, an official document, proving residence status or that the family is registered in the municipality, or a 'toleration' certificate (*Duldungs-Bescheinigung*), is no longer required for the enrolment procedure.[81]

6.5.2. Segregation in education

In past years, a number of research studies have pointed to the fact that segregation produces and reproduces inequality. In its report, *Segregation of Roma children in education*, the European Commission classified segregation as "structural discrimination" that is not justifiable under the Racial Equality Directive.[82] The practice of sending students with a Roma or migrant background to special needs schools remains a problem. For further information, see this report's focus Chapter on Roma in the EU. In **Bulgaria**, the enrolment of pupils with normal intellectual capacity in establishments for children with disabilities is explicitly forbidden by Regulation No. 6 (2002) of the Minister of Education, Youth and Science. Its implementation is monitored by the Commission for Protection against Discrimination, together with relevant NGOs. The final list of the children with special educational needs is approved by the Minister. Due to these additional procedural guarantees, the number of children judged to have special educational needs dropped in 2010 by 760 out of 2,571 children assessed by the Special Expert Commission established by the Ministry of Education, Youth and Science. Consequently, as of September 2010, the total number of children with disabilities who attend special schools amounted to 1,811 children.

In its 2010 report on the **Netherlands**, CERD expressed its concerns about forms of segregation in Dutch primary and secondary schools. Measures that have been taken in previous years, including the establishment of the Mixed Schools Knowledge Centre (*Kenniscentrum Gemengde Scholen*, KGS) and the role assigned to the Education Inspectorate in promoting integration, have proved inadequate. CERD urged the Dutch authorities to increase their efforts to prevent and abolish segregation in education, for example, through the review of admissions policies that may have the effect of creating or exacerbating segregation.[83]

In **Hungary**, the Supreme Court reversed the decision of the second instance court, holding that the segregation of Roma children amounted to discrimination. This case had been appealed by the Chance for Children Founda-

81 Vogel, D. and Aßner, M. (2010).
82 European Commission (2007).
83 UN CERD (2010b).

tion. The case concerned the segregation of Roma pupils, where different buildings within the same schools were predominantly used for either Roma or children from the majority. The Supreme Court established that segregation did not require active behaviour. By not taking measures to redress the factual situation, the local council and schools had effectively segregated Roma pupils. The court pointed out that neither the lack of space in the central buildings, nor long-standing traditions, nor special forms of education, justified segregation of the Roma pupils.

In 2009, the **Bulgarian** Helsinki Committee reported that Roma pupils who go to school with Bulgarian children are often verbally harassed because of their ethnic background which eventually results in them leaving education.[84] In this sense, the reversal of segregation should be accompanied by measures to combat harassment and discrimination of Roma pupils in mainstream schools. For more information, please see this report's focus Chapter on Roma in the EU.

6.6. Racist crime

This section focuses on the situation in the EU with respect to manifestations of racially motivated and related crime (hereafter 'racist crime') – which is one of the most extreme expressions of racism and xenophobia against specific groups in society. Further developments relating to the rights of victims of crime can be found in Chapter 9 on protection of victims.

It is important to note that the information presented here is based only on an analysis of publicly available official data on racist crime (government as opposed to NGO generated), and is therefore necessarily limited to those Member States that collect sufficient data for analysis. The information can be usefully compared with results from the FRA EU Minorities and Discrimination Survey (EU-MIDIS),[85] which includes data on the prevalence of respondent-perceived racially or religiously motivated crime based on information supplied in interviews with 23,500 ethnic minority and immigrant people across the EU. EU-MIDIS results indicated that between 57% and 74% of incidents of assault or threats, depending on the different respondent groups surveyed, were not reported to the police. In this regard, and in the general absence of alternative sources of data collection on racist crime such as victimisation surveys in the style of EU-MIDIS, it should be kept in mind that, in all likelihood, official data will represent only a minority of incidents that actually take place. Nationally recorded statistics can only be understood as representing those few incidents that come to the attention of the police and are processed through Member States' criminal justice systems.

6.6.1. Developments and trends in officially recorded racist crime

Across the EU, the collection and public availability of official criminal justice data on racist crime continues to vary significantly between Member States, with some publishing no data (such as **Bulgaria** and **Greece**) and only a few collecting and publishing comprehensive data on a regular basis (such as **Finland**, **Sweden** and the **UK**). Uncritical readings of existing data on racist crime can make it appear that those few Member States that comprehensively record and publish data have a greater problem with some of the most abhorrent forms of racism – such as racially motivated violent crime – than those that publish no or limited data. A more insightful reading of official data is that the collection and publication of extensive figures indicates that a Member State is effectively responding to racist crime by acknowledging its existence, and the State's response to it, in a transparent way.

Table 6.1 shows the status of official criminal justice data collection mechanisms on racist crime in the EU27 for 2009. The reality is that for the past six years for which the FRA, and its predecessor the European Union Monitoring Centre on Racism and Xenophobia (EUMC), has categorised the status of data collection on racist crime there has been no overall improvement in data collection across the EU. Notably, **Sweden** has progressed from 'Good' to 'Comprehensive' data collection, particularly as a reflection of changes in 2008 that saw the extension of racist and other hate crime categorisation. However, the continuing status quo illustrates the extent to which many Member States are not responding to racist crime as a fundamental rights abuse that warrants improved data collection in order to formulate policies and courses of action to address it.

Table 6.2 indicates trends in criminal justice data on racist crime, encompassing a range of incidents and crimes, which variously cover racism, xenophobia, anti-Semitism and related crimes such as incitement to racial hatred and violence, which are based on the most recent publicly available government data. In some of the Member States which are in the 'lowest' category according to the status of their data collection mechanisms, details on racist crime incidents are collected by the police, but these are available only upon specific request and the data are not systematically published on a regular basis – this is the situation for example in **Cyprus**. On the other hand, in **Spain** detailed data on racist crimes is available for Catalonia and bigger cities, but a data collection system is yet to be implemented nationwide.

When looking at official criminal justice data on racist crime, direct comparisons should not be made between data gathered in different EU Member States. This is because information is reported and recorded differently in each Member State. However, looking at fluctuations in recorded crime *within* a Member State can serve to highlight patterns in both manifestations of racist crime and changes

84 Bulgaria, Български хелзинкски комитет (2009).
85 FRA (2009).

Table 6.1: Status of official criminal justice data collection mechanisms on racist crime in the EU27

Official data not systematically available	**Limited**	**Good**	**Comprehensive**
Official national data tend either not to be collected or made publically available	Limited reporting on a handful of investigations and court cases, and/or focus on general discrimination that can include racist crime	A good system exists to register crimes, and/or system focuses on right-wing extremism and/or anti-Semitism	Extensive data collection, with detail typically provided about victim characteristics, place of victimisation etc.
Bulgaria Cyprus Greece Portugal Spain	Estonia Hungary Italy Latvia Lithuania Luxembourg Malta Netherlands Romania Slovenia	Austria Belgium Czech Republic Denmark France Germany Ireland Poland Slovakia	Finland Sweden UK

Source: FRA, 2010

Table 6.2: Trends in officially recorded racist crime, 2000-2009

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	% change 2008-2009	% change 2000-2009
Belgium	757 crimes	751	727	848	1,021	1,272	1,375	1,304	1,188	1,053	-11.4%	+8.5%
Czech Republic	364 crimes	452	473	335	364	253	248	196	217	265	+22.1%	-6.0%
Denmark	28 incidents	116	68	53	37	87	227	35	175*	306	+74.9%	+89.1%
Germany	-	14,725 crimes	12,933	11,576	12,553	15,914	18,142	17,607	20,422	19,468	-4.7%	+8.2% 2001-2009
France	903 reports	424	1,317	833	1,574	979	923	723	864	1,841	+113.1%	+6.1%
Ireland	72 reports	42	100	62	84	94	173	214	172	128	-25.6%	+27.9%
Austria	450 complaints	528	465	436	322	406	419	752	835	791	-5.3%	+11.3%
Poland	215 crimes	103	94	111	113	172	150	154	122	109	-10.7%	-1.5%
Slovakia	35 crimes	40	109	119	79	121	188	155	213	132	-38.0%	+31.6%
Finland	495 crimes	448	364	522	558	669	748	698	1,163*	1,385	+19.1%	+33.1%
Sweden	2,703 crimes	2,785	2,391	2,436	2,414	2,383	2,575	2,813	4,826**	4,707	-2.5%	+10.3%
England & Wales	47,701 incidents	53,121	54,858	49,344	54,157	57,863	60,926	62,071	58,445	55,862	-4.4%	+2.2%
Scotland			1,699 offences	2,673	3,097	3,856	4,294	4,474	4,543	4,564	+0.5%	+18.1% 2002-2009
Northern Ireland							1,006 incidents	1,183	1,044	1,036	-0.8%	-0.5% 2002-2009

*Notes: * Not comparable with previous years due to changes in the incident counting rules. ** Not comparable with previous years due to changes in the definition of hate crime.*

Source: FRA, 2010

in recording practices. However, Member States with low absolute figures, such as **Denmark**, tend to show the most significant percentage changes from year to year. Therefore, fluctuations in recorded crime in these countries have to be interpreted cautiously. In addition, in 2008 **Denmark**, **Finland** and **Sweden** changed their system of recording racist crime, which resulted in notable increases in recorded crime between 2007 and 2008, and continuing high levels of recorded racist crime in 2009 in contrast with earlier periods. As a result, long-term trend analysis of data for these countries has to be treated with caution and contextualised with respect to changes in data collection practices. With this in mind, Table 6.2 shows the following:

- during the period 2000-2009, 10 of the 12 Member States, which publish sufficient criminal justice data on racist crime to be able to undertake an analysis of trends, experienced an upward trend in recorded racist crime. The **Czech Republic** and **Poland** experienced a downward trend;
- looking only at the most recent two years for which data is available for comparison – 2008 to 2009 – four of the 12 Member States which collect sufficient criminal justice data on racist crime experienced an upward trend in recorded racist crime.[86]

In sum, looking at overall long-term trends in recorded racist crime from 2000 to 2009, a picture emerges of a general increase in the majority of Member States where sufficient data is available for analysis. In comparison, when looking at trends between the latest two years for which data is available, only one third of Member States indicate an increase. In **France**, the 113% rise in recorded racist crime in the period 2008-2009 largely reflects a significant increase in recorded anti-Semitism during 2009 (see Table 6.3), which occurred around the time of Israeli interventions in Gaza. To this end, it can be deduced that events elsewhere in the world can have an impact on manifestations of racism at the Member State level. Herein, comparison of data between two years can highlight the influence of particular events on fluctuations in racist crime, while the analysis of data over several years allows for an assessment of general trends that are not subject to sporadic influences.

6.6.2. Trends in anti-Semitism

Given Europe's history in the twentieth century, the need to collect data specifically on anti-Semitism remains important. However, only six Member States collect sufficiently robust criminal justice data on anti-Semitic crime for a trend analysis.

Looking at Table 6.3, the picture of anti-Semitic crime that emerges is as follows:

- between 2001 and 2009 four out of six Member States, for which a trend analysis was undertaken, experienced an overall upward trend, while two remained stable;
- in comparison, between 2008 and 2009 five out of six Member States showed an upward trend and one a downward one. In the case of **Austria**, the recorded figures are consistently lower each year, and therefore the notable 47.8% decrease between 2008 and 2009

Table 6.3: Trends in recorded anti-Semitic crime, 2001-2009

	2001	2002	2003	2004	2005	2006	2007	2008	2009	% change 2008-2009	% change 2001-2009
Austria	3	20	9	17	8	8	15	23	12	-47.8%	+9.1%
France	219	936	601	974	508	571	402	459	815	+77.6%	+0.4%
Germany	1,629	1,594	1,226	1,346	1,682	1,662	1,561	1,496	1,520	+1.6%	+0.3%
Netherlands*	41	60	50	58	65	108	50	49	67	+36.7%	+4.0%
Sweden	115	131	128	151	111	134	118	159	250	+57.2%	+10.3%
UK**	310	350	375	532	459	598	561	546	926	+69.6%	+25.7%

*Notes: * Statistics of the Dutch Public Prosecution Service: number of discriminatory incidents where anti-Semitism was identified, but which might not relate specifically to anti-Semitic crime.*

*** The UK data is from the 'Community Security Trust', an independent Jewish organisation, which is used as source material by official government publications in the UK.*

In addition to the Member States listed here, the Centre for Equal Opportunities and Racism (CEOOR) in Belgium also releases official statistics on complaints of anti-Semitism, but these statistics go beyond addressing just racist crime. For more information, see FRA (2010).

Source: FRA, 2010

86 For the UK, the overall trend in recorded crime is based on data for England and Wales. This reflects the relative population of England and Wales in comparison with Scotland and Northern Ireland. In Scotland, recorded racist incidents showed a year-on-year downward trend over the period of 2006-2007 to 2008-2009. See www.scotland.gov.uk/Publications/2010/04/26153852/8

has to be put into perspective as based on only eleven crimes. Also the 36.7% increase in incidents in the Netherlands is based on 18 recorded cases more in 2009, compared with 2008. In comparison, in **France**, and also potentially in the **UK** and **Sweden**, the notable increases in recorded anti-Semitic crime can be cautiously attributed to the influence of events concerning Israel and Palestine in 2009 – as noted in the previous sub-section.

FRA ACTIVITY

Anti-Semitism in the EU

In April 2010, the FRA published a *Summary overview of the situation of anti-Semitism in the European Union in the period 2001-2009*. This is the sixth update of the 2004 report on manifestations of anti-Semitism in the EU; it contains governmental and non-governmental statistical data covering 2001 to 2009 for those EU Member States that have official or unofficial data and statistics on anti-Semitic incidents.

For more information, see: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/pub_cr_antisemtism_update_2010_en.htm

6.6.3. Trends in right-wing extremism

In line with the focus on data collection on anti-Semitism in Europe, another traditional area for data collection in some Member States concerns the activities of right-wing extremist groups with regard to racist and related hate crimes. To date, only four Member States collect criminal justice data that is sufficiently robust to allow for a comparison of trends in crime with an extremist right-wing motive.

Looking at Table 6.4, the most notable long-term increase in recorded crime with an extremist right-wing motive can be noted in **Germany**, whereas in **Austria** and **Sweden** very slight increases are recorded. For **France**, no discernible long-term trend can be noted. However, the one-year trend analysis between 2008 and 2009 shows a very different pattern, as **France** has a 40% increase in recorded crime with an extremist right-wing motive, while **Sweden** shows a major decrease in extremist right-wing crime in this 12-month period and **Germany** shows a slight decrease. These 12-month fluctuations could reflect either an actual increase or decrease in the activities of right-wing extremists, particularly with regard to Internet-based crime. It can also indicate potential improvements or downturns in the detection and prosecution of these activities by criminal justice agencies in these four Member States, which might be explained by factors such as shifting police priorities and resource allocation. At the same time, the (historical) focus in some Member States on data collection concerning crimes with an extremist right-wing motive needs to be contextualised against manifestations of 'racist' and related 'hate' crimes where the perpetrators have no political 'extremist right-wing' motivation. Evidence from the Agency's EU-MIDIS survey, as reported in last year's Annual Report, indicates that the involvement of persons with such a background is, according to respondents who indicated they were victims of racially motivated crime, very limited with respect to incidents that could be considered as 'racist'.

Evidence from the FRA's RAXEN research teams indicates increased Internet use, including the use of social networks, by different individuals and groups in the promotion and perpetration of hate crime against particular groups in society.[87] In this regard, it is notable that 18 Member States still have to ratify the additional protocol to the Council of Europe's Convention on Cybercrime concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems. Twelve EU Member States have already signed the Council of Europe convention.

Table 6.4: Trends in recorded crime with an extremist right-wing motive, 2000-2009

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	% change 2008-2009	% change 2000-2009
Austria	291	301	261	264	189	188	204	280	333	356	+6.9%	+1.8%
Germany	-	10,054	10,902	10,792	12,051	15,361	17,597	17,176	19,894	18,750	-5.8%	+16.6% 2001-2009
France	207	198	179	148	461	419	301	247	129	181	+40.3%	+0.1%
Sweden	566	392	324	448	306	292	272	387	667*	538	-19.3%	+2.3%

* *Not comparable with previous years due to changes in the definition of crimes with an extremist right-wing motive.*

87 Data collected in the EU27 as part of the FRA research study on 'Racist and related hate crimes in the EU', which was submitted to the Agency in September 2010 and will be published after analysis.

FRA ACTIVITY

Ethnic profiling and low levels of trust in police

In 2010, the FRA launched a Guide to assist law enforcement officers in understanding the differences between legitimate uses of profiling as an investigatory tool and profiling that breaches rules on non-discrimination. It also featured examples of good practice from various EU Member States. The Guide is accompanied by a *Data in Focus Report* on police stops and minorities, which presents data from the FRA EU-MIDIS survey comparing the experiences and perceptions of police stops among minority respondents and majority respondents living in the same areas in 10 Member States. The results from EU-MIDIS, together with the findings of the Guide, indicate that levels of trust in the police decline if minorities perceive they experience discriminatory treatment from the police – the implications of which are that minorities who are victims of racially motivated crime are likely not to report their victimisation to the police because of lack of trust.

FRA (2010), Understanding and preventing discriminatory ethnic profiling: A guide; *FRA (2010),* EU-MIDIS Data in focus 4: Police stops and minorities, *both available at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm*

6.6.4. The Council Decision on Racism and Xenophobia

By 28 November 2010, the Council Framework Decision on Racism and Xenophobia should have been transposed in Member States' national laws.[88]

According to information collected by the Agency, at the beginning of September 2010 five EU Member States had taken measures to transpose the framework decision. In other eight Member States, existing legislation was considered as already meeting or surpassing provisions in the framework decision. In some of these Member States existing legislation extends to 'hate crime' motivated by other grounds. The remaining Member States were still in the process of transposing the framework decision and notifying their implementing measures to the European Commission – which is responsible for monitoring the situation. As soon as this process is complete and translations are available, the European Commission will start its analysis of the transposition of the Framework Decision.

FRA ACTIVITY

Three forthcoming surveys and a report on hate crime

In 2011, the FRA is preparing a report on racist and related hate crime. This report is to be complemented by three large-scale surveys that the Agency will carry out in 2011 and 2012. The surveys were developed in the course of 2010 and will variously record manifestations of 'hate crime', namely: an EU-wide survey on violence against women; an EU-wide survey on discrimination and victimisation against members of the LGBT community, as well as a survey in selected Member States of manifestations of anti-Semitism. The latter will systematically explore the experiences of Europe's Jewish populations with respect to both reported and unreported experiences of hate crime. For more on related women's and LGBT issues, see Chapter 5 on equality and non-discrimination.

6.6.5. Developments at national level

Against this background, some promising practices can be noted from 2009 and 2010 that reflect various attempts to address racist crime in line with legislative developments, data collection and concrete initiatives. Amongst the latter is the continued commitment of the police force in **Ireland** to a diversity strategy for the years 2009-2012, which will encompass the policing of victims of racism. Other promising initiatives have emerged from the NGO community, and include examples such as the establishment of a legal aid package for victims by the NGO 'People against Racism' in **Slovakia**.

In parallel to improvements in responses to racist and religiously motivated hate crime, some of the most notable developments that are taking place in Member States relate to broader responses to hate crime that encompass a range of grounds (far beyond provisions in the Framework Decision on Racism and Xenophobia). These promising practices are being driven both by governmental and non-governmental initiatives for change. For example, in the **Czech Republic,** a counselling centre In Iustitia, which was established in 2009 by an NGO, focuses on victims of different forms of hate-motivated violence.

National initiatives during 2009 and 2010 include the setting up of a government working group in **Finland** that looks into extending the scope of the current Framework Decision on Racism and Xenophobia to include hate crime across a range of grounds. The working group submitted a report to Parliament on 12 February 2010. In **Lithuania**, in June 2009, hate-motivated crimes across different grounds were added to the list of aggravating circumstances in the country's criminal code, including the grounds of sexual orientation and disability. In Scotland (**UK**), a key piece of legislation was enacted in 2009 which protects victims of crime who

88 Council Framework Decision 2008/913/JHA, OJ 2008 L 328, p. 55.

are targeted as a result of hatred of their actual or presumed sexual orientation, transgender identity or disability.[89]

It is also notable that in **Finland**, **Sweden** and the **UK** (data collection systems differ between England and Wales, and Northern Ireland) official data collection already provides figures on a range of hate-motivated crimes; including sexual orientation and disability. In **Sweden**, categorisation of hate crime by the Swedish National Council for Crime Prevention (*Brottsförebyggande rådet*, Brå) extends to anti-Roma and Islamophobic hate crime. Authorities in **Germany** also make available some data on politically motivated hate crimes committed because of the victim's sexual orientation or disability, although the label of 'politically motivated' would seem to narrow the scope for including 'everyday' crimes that are committed by those without any political motivation.

When looking to compare practices across the EU and between Member States, it should be emphasised that there is often great variation at regional level within a Member State. For example, with respect to **Spain**, Catalonia currently has the most comprehensive data collection on and responses to hate crime in the state across a range of different grounds.

It appears that the most progressive developments in response to a broad range of hate crimes are typically emerging in those EU Member States that have been at the forefront of addressing racist crime. The implementation of the Framework Decision on Racism and Xenophobia – both in terms of its legal transposition and implementation on the ground – will be evaluated by the European Commission in due course.

Outlook

The successful use of discrimination testing as a means of monitoring the prevalence of discrimination and proving discriminatory practices in the employment and housing sectors by some Member States evidences the value of this technique. As a result of such success, it is anticipated that such testing could become more common across the EU.

Greater understanding of mental health issues facing minorities will need to be developed in order to ensure equality in the enjoyment of good health. Existing initiatives at EU level by the European Commission and the Social Protection Committee could help to encourage the spread of those positive practices discussed above to other Member States.

Combating segregation in education in the coming years will need to be accompanied by measures to prevent harassment and discrimination within the mainstream education system in order to ensure that minorities are able to participate effectively.

The collection of data that is disaggregated according to racial or ethnic origin, in line with the recommendations of ECRI and CERD, remains an open challenge for many Member States. Developments in Member States such as **France**, where the collection of this data has traditionally not occurred, may encourage other Member States to follow suit.

Given that racist crime continues to be a problem throughout much of the EU, it is clear that many Member States still need to commit to addressing racist crime through a combination of the following: changes in the law (in line with the Framework Decision and the Council of Europe's Convention on Cybercrime); improvements in criminal justice data collection and reporting in the public domain; and action on the ground to prevent and respond to racist crime.

89 UK, Offences (Aggravation by Prejudice) (Scotland) Act 2009 (asp 8).

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Participation of EU citizens in the Union's democratic functioning

Citizens' rights

Citizens' rights

UN & CoE

January

February

March

April

11 May – CoE Committee of Ministers issues a recommendation on the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education

20 May – European Court of Human Rights rules in the *Kiss v. Hungary* case on the right to vote of persons who are under guardianship due to a mental health problem

May

4 June – European Commission for Democracy through Law (the 'Venice Commission' is a CoE advisory body established in 1990) issues comments on the recommendations concerning 'Equal access to local and regional elections'

June

July

August

September

21 October – Venice Commission issues an interpretative declaration to the code of good practice in electoral matters on the participation of people with disabilities in elections

October

November

December

EU

January

February

31 March – European Commission proposes a regulation on the citizens' initiative to be adopted in early 2011 by the Council

March

April

May

June

July

August

September

27 October – European Commission adopts EU Citizenship Report 2010 that is accompanied by a report on the progress towards effective EU Citizenship 2007-2010 and a report on the 2009 European Parliament elections

October

November

December

January

Beginning of 2011 - EU adopts a regulation on the citizens' initiative (14 February 2011)

February

7

Participation of EU citizens in the Union's democratic functioning

The entry into force of the Lisbon Treaty and the now binding nature of the Charter of Fundamental Rights of the European Union have given new impetus to questions related to the participation of European Union (EU) citizens in the Union's democratic functioning. With the landmark judgment of the European Court of Human Rights (ECtHR) in relation to the right to vote, this area of law will play a vital role in ensuring the participation of EU citizens. 2010 also witnessed more intensive discussions on the European Citizens' Initiative, which is a new and potentially powerful participatory tool at EU level. Though it is too early to evaluate the full impact of this new mechanism, the Citizens' Initiative should help bring EU citizens closer to the important issues of European integration.

This chapter covers developments in EU and Member State policies and practices in the area of participation of EU citizens in the EU's democratic functioning. As this marks the first time the FRA has reported on developments in this area the following sections will serve as a starting point of a trend-oriented analysis that will be conducted in the years to come. The chapter begins with an overview of the current situation of non-national EU citizens' involvement in elections.[1] It then examines the circumstances in which the right to vote has been limited with respect to disability. The chapter concludes by considering various forms of participatory democracy, noting in particular the European Citizens' Initiative.

Key developments in the area of participation:

- as a result of the low participation rates of non-national EU citizens in municipal and European Parliament elections, discussions on electoral reform in this area began;
- the ECtHR extended its case law on the right to free elections (Article 3 of Protocol No. 1 to the European Convention on Human Rights (ECHR));
- following political consensus on the Citizens' Initiative Regulation at the end of 2010, the regulation was formally adopted in February 2011 and can be applied as of 1 April 2012.

7.1. Participation in elections by non-national EU citizens

7.1.1. The right to vote in elections

Article 22 of the Treaty on the Functioning of the European Union (TFEU) provides that EU nationals residing in a Member State other than their Member State of origin have the right to vote (otherwise known as active voting rights) and the right to be elected (also known as passive voting rights) in municipal and European Parliament elections. These rights are also enshrined in Articles 39 and 40 of the of the Charter of Fundamental Rights of the European Union. More specifically, the right to vote in European Parliament and municipal elections is regulated by secondary law.[2]

1 Articles 39 and 40, Charter of Fundamental Rights of the European Union.

2 Council Directive 94/80/EC, OJ 1994 L 368, p. 34, and Council Directive 93/109/EC, OJ 1993 L 329, p. 38.

7.1.2. Participation in European Parliament elections: problems and reforms

According to the European Commission, there has been a steady decrease in voter participation in European Parliament elections since the first direct European Parliament election in 1979 – only 43% turnout in the 2009 elections.[3] It seems that this decrease is not due to the migration of EU citizens between Member States as figures indicate that citizens who have changed their country of residence usually register to vote in European Parliament elections in the Member State of residence. The proportion of non-national citizens registered to vote in a Member State reached 11.6% in 2009, compared with 5.9% in 1994. However, due to lack of data, the European Commission could not survey the situation in all 27 Member States. The information gathered by the FRA confirms this lack of available data: many EU Member States do not keep records of the number of registered non-national EU citizens while only a small number of Member States have collected disaggregated data on how many non-national EU citizens have actually taken part in the European Parliament elections. For example, in **Cyprus** during the last 2009 European Parliament elections, 3,392 non-national EU citizens voted out of 6,458 registered non-national EU citizens,[4] and in **Finland**, 2,231 non-national EU citizens voted out of 6,211 registered.[5]

In the EU Citizenship Report 2010,[6] the European Commission identified problems encountered by EU citizens living in a Member State other than their own when both voting and standing for European Parliament elections. For example, the early publication of election results can be problematic as it may influence an ongoing poll in another Member State (this happened in the **Netherlands**). Another significant problem is the lack of information on topics such as voting rights, registration procedures for the electoral roll and conditions attached to the right to stand for election. The European Commission is currently assessing the situation in countries where these problems have arisen and has called on EU Member States to address some of these issues. The Commission is also proposing reforms to improve EU citizens' participation.

On 20 April 2010, the European Commission published its Action Plan for the implementation of the Stockholm Programme.[7] For 2011 and 2012, the Commission announced, a legislative proposal amending Directive 93/109/EC on European Parliament elections. The Action Plan also envisages the publication of a report on national practices on elections for the European Parliament by 2012.

Furthermore, in 2010 the Committee on Constitutional Affairs of the European Parliament prepared a draft report on electoral reform at the EU level, aiming to modify the Act of 1976 on the election of the Members of the European Parliament (MEPs).[8] Among its proposals, it raised the possibility of increasing the number of MEPs by 25 MEPs who would be elected by a single constituency formed of the whole territory of the EU. Also, the creation of transnational electoral lists composed of candidates from at least one third of the Member States was proposed. Each elector would be able to cast their vote for the national or regional list as well as the newly established EU constituency. The report further proposes establishing an electoral authority at EU level in charge of regulating the proper conduct of the election. The debate in the Committee is planned for the spring of 2011.

7.1.3. Participation in municipal elections

According to the Stockholm Programme Action Plan, a second implementation report of Council Directive 94/80/EC will be published by 2011. This directive sets out the conditions for the exercise of active and passive voting rights in municipal elections by EU citizens residing in a Member State of which they are not nationals. Without harmonising the electoral rules, the directive aims to facilitate the participation in municipal elections of EU citizens who have decided to reside in another Member State. The main achievement of the directive is the eradication of the nationality requirement which used to be necessary in many EU Member States in order to exercise voting rights. In 2002, the European Commission published its first report on the Directive's implementation, which concluded that the transposition process had been successfully completed with only a few instances of non-compliance.[9] However, in practice, the proportion of non-national EU citizens who actually voted in municipal elections was rather low.

The FRA enquired whether some Member States allowed non-national EU citizens to participate in regional or national elections or in national citizens' initiatives. It was reported that no Member State gives voting rights to non-national EU citizens in any other elections than municipal and European Parliament elections. **Slovenia** is the only exception to this as EU citizens from other Member States may vote in elections for the National Council (the second chamber of parliament) where bodies representative of social, economic, professional and local interests are seated. If an EU citizen from another Member State residing in Slovenia belongs to one of these groups he or she will be able to vote and to be elected. In **Ireland**, United Kingdom (UK) citizens residing in the country may vote in Irish general elections; however, only Irish citizens are entitled to vote in the presidential elections.

3 European Commission (2010a), pp. 3 ff.
4 Information supplied by the Cyprus, Elections Service of the Ministry of Interior.
5 Statistic Finland: www.stat.fi/til/evaa/kas.html.
6 European Commission (2010b), pp. 17 ff.
7 European Commission (2010c).
8 European Parliament (2010a).
9 European Commission (2002).

It should be noted that almost no data is available concerning the actual participation of non-national EU citizens in municipal elections, which is similar to the situation in relation to European elections, as noted above. Data concerning the number of non-national EU citizens who are registered voters are available and were published by the Commission in its abovementioned report on municipal elections and in its 2010 report on European elections.[10] However, only a limited number of Member States collect data on the number of non-national EU citizens who actually vote at municipal elections. For example, in the **UK** the figures that are collated by the Office for National Statistics show that there were 953,339 EU citizens registered to vote in the UK on 1 December 2008, and 955,844 on the same date in 2009. Statistics for 2010 are currently unavailable. Figures produced by the same body show that the number of EU citizens resident in the UK was 2,183,000 in 2009 and 2,115,000 in 2008. The proportion of EU residents in the UK who voted in local elections amounted to 44% in 2008 and to 45% in 2009, respectively.[11]

During the reporting period, the ECtHR further developed its case law on the right to free elections (Article 3 of Protocol No. 1 to the ECHR) by handing down 10 judgments on that issue. Five of those cases concerned EU Member States – **Austria**, **Greece**, **Hungary**, **Romania** and the **UK**. The cases dealt with the right to vote – the active voting right – and the right to stand for elections – the passive voting right. They are particularly significant since they are likely to influence the interpretation of the instruments that currently regulate the right of EU citizens to vote in municipal and European Parliament elections since they are dealing with limitations to voting rights. The next section will look at one particular type of limitation linked to disabilities.

7.2. The limitation of voting rights in the case of disability

The case of *Alajos Kiss v. Hungary*[12] concerned a citizen's active right to vote. The ECtHR found that the automatic disenfranchisement of a person under guardianship due to a mental health problem constitutes a violation of Article 3 of Protocol No. 1 to the ECHR. According to the Constitution of **Hungary**, a person placed under guardianship does not have the right to vote. The applicant was diagnosed with a psychiatric condition and was placed under partial guardianship. He later realised that his name was not on the electoral register and that he could not vote in the legislative elections of 2006. The ECtHR rejected the validity of an absolute ban on voting being imposed on any person under partial guardianship irrespective of his or her actual faculties. The ECtHR stated that "a single class of those with intellectual or mental disabilities is a questionable classification, and the curtailment of their rights must be subject to strict scrutiny".[13] The ECtHR held that only an individualised judicial evaluation could have legitimised the restriction on the applicant's voting rights.

Last year's FRA Annual Report reported on issues related to the accessibility of voting stations during the European Parliament elections for persons with disabilities.[14] Additional work was carried out during this reporting period: One survey on the accessibility of polling stations in Poland revealed that protecting the right to vote is still subject to challenges. According to the Law on the Election of the President of the Republic of Poland (amended on 19 November

FRA ACTIVITY

Political participation rights of persons with mental health problems and persons with intellectual disabilities in EU Member States

In the context of its disability project, in 2010 the FRA published a report on the *Right to political participation of persons with mental health problems and persons with intellectual disabilities.* The report presents the international and European standards in this field and provides a legal comparative analysis of the situation in EU Member States. Its findings show that in a majority of EU Member States, persons with disabilities, who have lost their legal capacity, are deprived of their voting rights. These findings raise an issue of compatibility with the United Nations (UN) standards as guaranteed in Article 29 of the UN Convention on the Rights of Persons with Disabilities (CRPD).

FRA (2010), The right to Political Participation of Persons with Mental Health Problems and Persons with Intellectual Disabilities, *available at: http://fra.europa.eu/fraWebsite/research/publications/publications_en.htm.*

10 European Commission (2010a).
11 United Kingdom, The Office for National Statistics (ONS). Figures are estimates and are determined through the Annual Population Service which is the Labour Force Survey plus various sample boosts. The figures are for the period of January to December of each year.
12 ECtHR, *Alajos Kiss v. Hungary*, No. 38832/06, 20 May 2010. The judgment is analysed in-depth by the European Union Agency for Fundamental Rights (FRA) (2010a). For a description of the overall FRA disability project, see: http://fra.europa.eu/fraWebsite/research/projects/proj_disability_en.htm
13 ECtHR, *Alajos Kiss v. Hungary*, *Ibid.*, paragraph 44.
14 FRA (2010b), 'Chapter 8', *Annual Report 2010*.

2009), persons with disabilities are allowed to give power of attorney to another person, provided that he/she lives in the same municipality and is named in the register of electors. An inquiry by the Polish Ombudsman highlighted some challenges concerning the access to elections of persons with disabilities. The Polish Ombudsman inspected almost 100 polling stations that were supposedly fully accessible. The results of this monitoring showed that almost one-third of them were not adapted to wheelchair users.

In the context of its work in the area of disability, the FRA closely collaborated with the European Co-ordination Forum for the Council of Europe Disability Action Plan 2006-2015 (CAHPAH) on the reinforcement of civic rights of persons with disabilities. The European Commission for Democracy through Law ('Venice Commission') adopted an interpretative declaration of the Code of Good Practice in Electoral Matters on the Participation of People with Disabilities in Elections.[15]

7.3. The European Citizens' Initiative

"[...] in the current debates that take place all over Europe concerning a democratic deficit of the institutions and the growing interests of democratic society and citizens in being more involved in the democratic process, the legislative initiative of citizens is increasingly regarded as a worthy corrector of the inevitable imperfections of indirect democracy."

Venice Commission (2008a), paragraph 80.

The Lisbon Treaty[16] introduced elements of participatory democracy at the EU level for the first time in the EU's integration process, notably the European Citizens' Initiative. This type of initiative is rooted in the experience of a small number of EU Member States. It was first promoted by Austria and Italy during negotiations surrounding the Treaty of Amsterdam; it was then integrated into the proposed European Constitution. Now it is enshrined in the Treaty on European Union (TEU).

Article 11 TEU explicitly recognises the added value of participatory democracy. Citizens' participation takes two different forms. First, through "public exchanges", "dialogue with representative associations and civil society" and "consultations" – these mechanisms are now foreseen in Article 11 (1)-(3) TEU. Consultations have increased in number: in 2009, the European Commission organised 68 consultations[17] of which two dealt with fundamental rights and justice matters;[18] and in 2010, the European Commission launched 95 consultations, seven of these on fundamental rights and justice-related issues. The second form of citizens' participation is prescribed in Article 11 (4) TEU on the European Citizens' Initiative, an institution of semi-direct democracy, whereby popular participation in public affairs is integrated as an element of representative democracy, which will now be discussed in greater detail.[19]

With the European Citizens' Initiative, the Lisbon Treaty introduced a new form of public participation in the European Union. Article 11 (4) TEU provides that "not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties". In accordance with Article 24 of the Treaty on the Functioning of the European Union (TFEU), the European Parliament and the Council had to determine the conditions and procedures for such an initiative to be filed: a regulation adopted in accordance with the procedure is to determine, in particular, the minimum number of Member States from which such citizens must come.

In line with the Action Plan implementing the Stockholm Programme, the required regulation was to be adopted by the end of 2010.[20] In November 2009, the European Commission published a Green Paper on a European Citizens' Initiative[21] which served as a background document for the public consultation carried out from 11 November 2009 to 31 January 2010. A public hearing took place on 22 February 2010.[22] On 31 March 2010, the European Commission submitted a proposal for a Regulation on the Citizens' Initiative to the European Parliament and to the Council of the European Union.[23] On 14 June 2010, the Council reached agreement on the draft regulation. On 15 December 2010 and on 14 February 2011, the European Parliament and the Council, respectively, adopted the regulation on the citizens' initiative.[24]

"Today we are a step closer in putting flesh to the spirit of the Lisbon Treaty: to create a participatory, inclusive and transparent EU for citizens."

Jerzy Buzek, President of the European Parliament

15 European Commission for Democracy through Law ('Venice Commission') (2010a).
16 For more information, see its only recital, whereby it aimed at " ... enhancing the ... democratic legitimacy of the Union".
17 www.ec.europa.eu/yourvoice/consultations/2009/index_en.htm.
18 www.ec.europa.eu/justice/news/consulting_public/news_consulting_public_en.htm.
19 European Economic and Social Committee (2010).
20 European Commission (2010c), p. 17.
21 European Commission (2009a). All relevant documents can be found on the European Commission website at: www.ec.europa.eu/dgs/secretariat_general/citizens_initiative/index_en.htm.
22 European Commission (2010d).
23 European Commission (2010e). See also the European Economic and Social Committee (2010) and Committee of the Regions (2010) and the European Data Protection Supervisor (EDPS) (2010).
24 Regulation (EU) No. 211/2011 of the European Parliament and of the Council on the citizens' initiative, OJ 2011 L65/1.

The regulation requires one million signatures to come from at least one quarter of all EU Member States. Only EU citizens are eligible to sign such a Citizens' Initiative. The initiative organisers should form a citizens' committee of at least seven persons residing in seven EU Member States. A minimum number of signatories is foreseen per Member State.[25] Within two months of its receipt, the European Commission shall register the Citizens' Initiative, after having checked four admissibility criteria (Article 4 (2) of the Regulation). After registration, statements of support may be collected during a 12-month period (Article 5 (5) of the Regulation), either on paper or online. As to the latter, the Commission must provide adequate software free of charge to the organisers (Article 6 (2) of the Regulation). The organisers are fully responsible for complying with the collection provisions (Article 5 (1) of the Regulation), but EU Member States are required to use "appropriate checks" in order to verify the collected signatures (Article 8 (2) of the Regulation). Once the required signatures have been collected, the Commission has three months to prepare a communication with an initial assessment of the Initiative. A joint Commission-European Parliament public hearing will then be organised and a legislative proposal should be tabled within one year or in the next Work Programme. The Commission will submit to the European Parliament and the Council a first implementation report three years after the entry into force of the regulation.

Without waiting for the adoption of the regulation, on 6 October 2010 non-governmental organisations Greenpeace and Avaaz stated that they had already collected one million signatures calling for a Europe free of GMOs. The campaign was launched in March 2010, after the European Commission announced that it intended to authorise the cultivation of a GM potato variety introduced by BASF, breaking with a *de facto* moratorium that the EU had observed since 1998.[26] However, as the regulation was not in place at that time, the campaign could not be counted as the first European Citizens' Initiative.

Outlook

Participation of non-national EU citizens in local and European elections is an integral part of the development a full understanding of European citizenship. The European Commission has highlighted shortcomings in European Parliament participation; these should be addressed in the coming years, before the next European Parliament elections, together with a more ambitious reform of the electoral law of the European Parliament. At local level, the low rate of participation in elections of non-national EU citizens remains an issue that needs to be addressed in order to realise the rights enshrined in the 1994 directive and in Article 40 of the Charter.

The possibility of participation of EU citizens in the Union's democratic functioning was significantly enhanced by the adoption of the European Citizens' Initiative during the reporting period. The importance of this new tool of semi-direct democracy should not be underestimated. Now that the enabling regulation is in place, EU Member States will need to organise structures at national level to facilitate the gathering of one million signatures needed to launch the Citizens' Initiative. At present, it is too early to evaluate the impact of this new mechanism. However, there is no doubt that the Citizens' Initiative should help bring EU citizens closer to the important issues of European integration.

25 Annex I of the Regulation. The required minimum numbers amount to the number of Members of the European Parliament elected in each Member State multiplied by 750.
26 Agence France-Presse (2010).

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UN & CoE

20 January – CoE Committee of Ministers issues recommendation on probation rules

January

24 February – CoE Committee of Ministers issues recommendation on effective remedies for excessive length of proceedings

February

March

April

May

June

July

August

September

October

17 November – CoE Committee of Ministers issues recommendation on judges: independence, efficiency and responsibilities

30 November – in the *Ahmadou Sadou Diallo* case the International Court of Justice recognises the weight that is to be given to the findings of the human rights treaty bodies

November

December

EU

January

February

March

April

May

June

20 July – European Commission proposes a directive on the right to information in criminal proceedings (‘letter of rights’)

July

August

September

20 October – EU adopts a directive on the right to interpretation and translation in criminal proceedings

October

November

December

8 Access to efficient and independent justice

The 27 European Union (EU) Member States were found in violation of the European Convention on Human Rights (ECHR) 270 times in 2010 because court cases at national level were taking too long to be adjudicated. The right to have a case decided within a reasonable time frame is just one aspect of the right of access to justice. Access to justice is pivotal to ensuring that human rights standards are actually enforced in practice. It is also essential to ensuring the rights of the accused and suspects subject to investigation and prosecution. Since the entry into force of the Treaty of Lisbon in December 2009 and the momentum created by the new justice strategy, the Stockholm Programme, there have been important developments in this area.

This chapter covers developments in EU and Member State policies and practices for the year 2010 in the area of access to justice including criminal law and civil law, insofar as these fall within EU competence. In order to gain a comprehensive overview of this area, it should be read together with Chapter 9 on Protection of victims, which focuses on the rights of victims of crimes, Chapter 5 on equality and non-discrimination, and Chapter 6 on racism and ethnic discrimination, dealing with the questions of rights awareness and equality bodies which are also relevant to access to justice.

To provide a wider context to the issues covered in this chapter, it is also worth noting three developments concerning European and international complaints bodies. First, the Treaty of Lisbon confers legally binding status on the Charter of Fundamental Rights of the European Union and dissolves the pillar structure of the EU, hence broadening the jurisdiction of the Court of Justice of the EU (CJEU). The Council of Europe has also developed new standards on judicial independence, length of proceedings and child-friendly justice.[1] Finally, ratification by Member States of the optional protocols to the Convention on Rights of Persons with Disabilities (CRPD) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) allows individuals to take individual complaints to the relevant UN monitoring bodies.[2]

Key developments in the area of access to justice:

- an EU Directive on Translation and Interpretation[3] was adopted as a first step in the implementation of the EU Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings (the 'Roadmap');[4]
- several EU Member States began reform of their courts, including measures to reduce the length of legal proceedings and increase independence;
- several Member States took steps to strengthen or create National Human Rights Institutions (NHRIs).

8.1. The concept of access to justice

The right of access to justice encompasses the right to a fair trial and the right to an effective remedy as guaranteed by Article 47 of the EU Charter of Fundamental Rights,[5] Articles 6 and 13 of the ECHR, and Articles 2 (3) and 14 of the International Covenant on Civil and Political Rights.[6] Access to justice includes not only the rights of the accused in the criminal process and respondents in the civil process, but

1 Council of Europe, Committee of Ministers, (2010a), (2010b) and (2010c).

2 For more information, see Chapter 10 on 'International obligations'.

3 Council Directive 2010/64/EU, OJ 2010 L 280/1. Ireland announced its wish to participate in the directive by using its opt-in option provided for in Protocol 21 of the Lisbon Treaty. The UK, which has the same option, has not yet decided to do so.

4 Council Resolution, OJ 2009 C 295/1.

5 CJEU, Joined cases C-154/04 and C-155/04, paragraph 126.

6 FRA (2010a).

also the rights of victims and claimants. It is not only a right in itself, but an enabling right in that it allows individuals to enforce their substantive rights and obtain a remedy when these rights are violated.

In an EU context, the right of access to justice is recognised by Article 47 of the EU Charter of Fundamental Rights, as well as in the case law of the CJEU and EU directives in the area of discrimination.[7] According to the CJEU, individuals should have remedies available in national law for breaches of rights derived from EU law which should be both effective and equivalent to procedures for similar rights under national law.[8]

"[T]he principle of equal treatment for men and women as regards access to employment [...] must be interpreted as precluding legislation of a Member State, such as [... where] an action is available to any other employee who has been dismissed, where such a limitation on remedies constitutes less favourable treatment of a woman related to pregnancy."

CJEU, C-63/08, Virginie Pontin v. T-Comalux S.A.*, judgment of 29 October 2009.*

While the focus of this chapter is on the EU and Member States, it should be noted that a substantial body of European and international supervisory mechanisms also exists, allowing individuals to make claims relating to human rights violations where such cases have not been successful at the national level. Further discussion of applicable international instruments in this area is available in Chapter 10 on International obligations and in a report by the FRA on access to justice.[9]

8.2. Developments at EU level

The following section will consider policy developments at the EU level relating to both criminal law and civil law. It will then move on to examine developments within the case law of the CJEU.

8.2.1. Legislation in the area of criminal law

Without minimum common standards to ensure fair proceedings, national judicial authorities may be reluctant to agree to the transfer of persons in their care to face trial in another Member State. This may obstruct the full implementation of measures based on mutual recognition such as the European Arrest Warrant,[10] and ultimately hinder the development of an EU area of justice as set out in the Stockholm Programme.[11]

In October 2009, the Justice and Home Affairs Council adopted a *Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*,[12] later appended to the Stockholm Programme. The Roadmap requested the European Commission to introduce proposals based on a broad outline of five measures to enhance mutual trust between Member States that would facilitate mutual recognition in the area of criminal justice ('Measures A-E'). It also called for a Green Paper on pre-trial detention ('Measure F').

In October 2010, the Directive on Interpretation and Translation (Measure A) was adopted. The directive guarantees suspects and the accused the right to written translations of relevant parts of all essential documents, and interpretation of all hearings and questioning, as well as interpretation during meetings with lawyers. Their rights cannot be waived without first receiving legal advice or full information about the consequences of such an action. It is up to the judge in the individual case to determine if the quality and extent of interpretation and translation has been sufficient.

In July 2010, the European Commission adopted a proposal on a 'letter of rights' for criminal suspects ('Measure B'),

FRA ACTIVITY

Report on access to justice

In this report, the FRA highlights challenges and opportunities in the area of access to justice. It provides a comparative analysis of procedures available at the European and international levels and their relationship with national redress mechanisms. Its main focus is on national redress mechanisms, and the procedures and practices through which access to justice is delivered. On the one hand, the report identifies concrete obstacles such as strict time limits for lodging complaints, restrictive rules on legal standing, the complexity of legal procedures and excessive legal costs coupled with strict rules relating to legal aid. On the other, it highlights promising practices which may be used to overcome these obstacles to ensure access to justice for all.

For more information, see the FRA report on 'Access to justice in Europe: an overview of challenges and opportunities', *available at: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/pub_access-to-justice_en.htm*

7 Council Directive 2000/43/EC, OJ 2000 L 180, Article 7, p. 22.
8 CJEU, C-78/98, *Preston v. Wolverhampton Healthcare*, [2000] ECR I-3201, 16 May 2000.
9 FRA (2010a).
10 Council Framework Decision 2002/584/JHA, OJ 2002 L 190, Article 1(1), p. 4.
11 European Council (2010), p. 1.
12 Council of the European Union (2009), OJ 2009 C 295, pp. 1-3.

to introduce common minimum standards on the right to information in criminal proceedings.[13] The further stages of the legislative programme are:[14]

- access to a lawyer ('Measure C', planned for 2011);
- communication with relatives, employers and consular authorities ('Measure D', planned for 2012);
- special safeguards for suspected or accused persons who are vulnerable ('Measure E', planned for 2013);
- a green paper on pre-trial detention ('Measure F' scheduled for 2014); and
- legal aid (scheduled for 2013).

In addition to the Roadmap, a Commission document is expected on definitions of crimes as well as sanctions aimed at ensuring proportionality between different types of crimes. A plan of action on mutual learning and exchange for judges, court staff and lawyers is also in the making.[15] In 2014, a green paper will open up discussion on a possible continuation of the Roadmap in areas other than those covered by previous legislative proposals.

Other instruments that have been proposed by groups of Member States include a European Investigation Order (EIO)[16] and a European Protection Order (EPO, see Chapter 9 on Protection of victims).[17] Both of these proposals are of interest from a fundamental rights perspective and also, to some extent, of concern to the area of access to justice. The EIO is particularly relevant since it aims to enhance access to justice by facilitating investigation measures across borders. While the EIO has the potential to strengthen the administration of justice, it also poses challenges. As with other EU instruments in the area of criminal justice, the EIO envisages the interaction of two Member States' legal systems in the criminal process. This creates the risk of lowering the level of human rights protection where cooperating States have different levels of safeguards.

FRA ACTIVITY

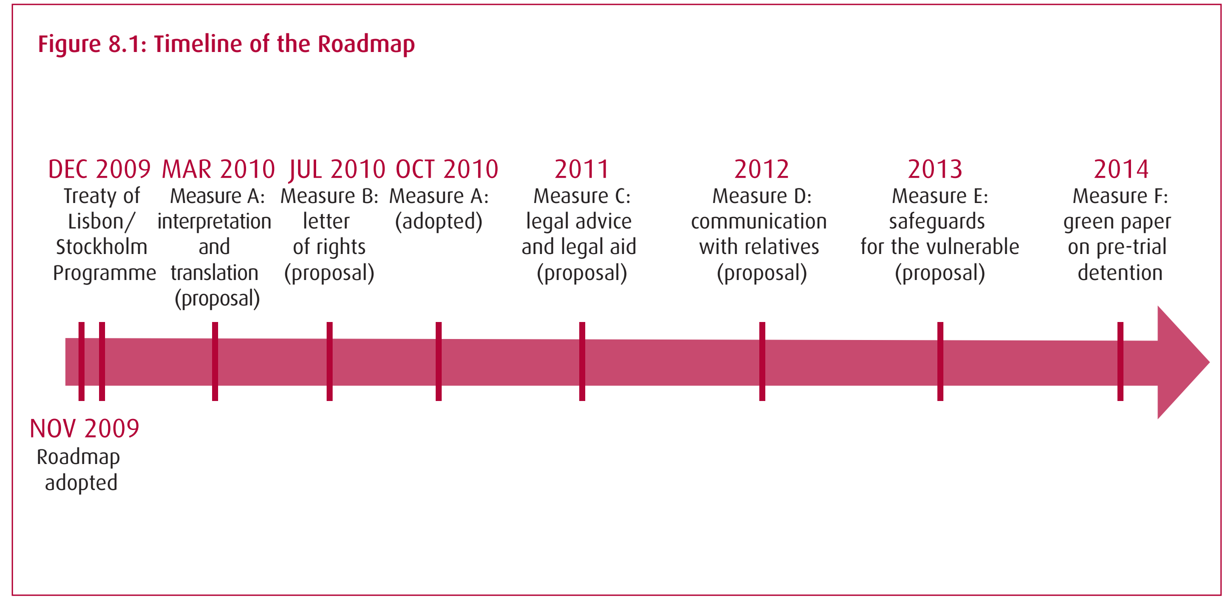
Opinion on the European Investigation Order

The European Parliament asked the FRA to provide an opinion on the draft directive establishing a European Investigation Order (EIO) in January 2011. The FRA opinion was transmitted in February 2011 and highlights potential challenges to fundamental rights protection arising from the draft text.

For more information, see 'FRA Opinion on the draft Directive regarding the European Investigation Order', *available at: http://fra.europa.eu/fraWebsite/research/opinions/op-eio_en.htm*

The following timeline sets out the key stages of the Roadmap's projected development:

Figure 8.1: Timeline of the Roadmap



13 European Commission (2010a).
14 European Commission (2010b), pp. 33-34 and 67; and speech by Vice-President Viviane Reding.
15 *Ibid.*
16 Initiative regarding the European Investigation Order in criminal matters, OJ 2010 C 165/22.
17 Initiative with a view to the adoption of a Directive of the European Parliament and of the Council on the European Protection Order, OJ 2010 C 69/5.

8.2.2. Legislation in the area of civil law

The Stockholm Programme also calls for a number of initiatives in the area of civil law, some with relevance to access to justice. Noteworthy developments in the last year include the European Commission proposal to recast the 'Brussels I' Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters into 'Brussels II'.[18] The overall objective of this revision is to remove obstacles to the free movement of judicial decisions. More specifically, the proposal seeks to improve access to justice in a specific context that includes the creation of a forum for claims of rights *in rem* (property) at the place where moveable assets are located. The proposal also includes the possibility for employees to bring actions against multiple defendants in the employment area, as well as the possibility to conclude a choice-of-court agreement for disputes concerning the tenancy of premises for professional use. Moreover, the proposal intends to extend the regulation's jurisdiction rules to defendants in third States.[19]

Similarly, with the introduction of a Regulation on Divorce and Separation, individuals exercising the right to free movement will now enjoy more efficient access to justice.[20] It has been acknowledged that this regulation will protect vulnerable or weak partners during divorce and separation proceedings as well as "improve legal certainty, predictability and flexibility for citizens".[21]

8.2.3. Developments in CJEU case law

In 2010, the CJEU issued several judgments concerning restrictive measures adopted in the context of the fight against terrorism. Such measures may lead to violations of the fundamental rights recognised among the general principles of EU law. In particular this may affect the right of access to justice when persons who are targeted by restrictive measures have no possibility to challenge such measures before a court.

> *"[T]he Community judicature must [...] ensure the review [...] of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which [...] are designed to give effect to the resolutions adopted by the Security Council."*
>
> *CJEU, Case T-253/02,* Hassan *and* Ayadi*, judgment of 3 December 2009, paragraph 71.*

The cases of *Hassan* and *Ayadi*, which the CJEU considered jointly in a judgment of 3 December 2009, are noteworthy in this context.[22] The Court of Justice expressed its disagreement with the position adopted by the Court of First Instance (now General Court) in relation to which regulations could not be scrutinised by the CJEU for their compatibility with EU fundamental rights standards. The regulations in question had been designed to give effect to a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations.

In a judgment of 30 September 2010 in the case of *Kadi v. European Commission*, the General Court noted that there is a "risk that the system of sanctions put in place by the United Nations in the context of the fight against international terrorism would be disrupted if judicial review of the kind advocated by the applicant in the light of the judgment of the Court of Justice in Kadi were instituted at national or regional level".[23] The General Court adds that "certain doubts may have been voiced in legal circles as to whether the judgment of the Court of Justice in Kadi is wholly consistent with, on the one hand, international law [...] and, on the other hand, [the EU treaties], as well as declaration No. 13 of the Conference of the Representatives of the Governments of the Member States concerning the common foreign and security policy annexed to the Treaty of Lisbon, which stresses that 'the [EU] and its Member States will remain bound by the provisions of the Charter of the United Nations and, in particular, by the primary responsibility of the Security Council and of its members for the maintenance of international peace and security'".[24]

The main concern of the General Court is that, by reviewing a measure adopted by the EU that simply implements a sanction decided by the UN Security Council, the courts of the EU would in fact be reviewing the legality of resolutions adopted by the Security Council itself. However, the implication of the rulings in the joined cases *Hassan* and *Ayadi* is that, 'as long as' the re-examination procedure operated by the Sanctions Committee established by the UN Security Council clearly fails to offer guarantees of effective judicial protection, the EU courts should review whether the implementing measures adopted by the EU complies with fundamental rights. This remains a contentious issue and due to a lack of clarity in the General Court, it would be difficult to predict future developments in this case law.

18 Council Regulation (EC) No. 44/2001, OJ 2001 L012; European Commission (2010c).
19 *Ibid.*, p. 3.
20 Council Regulation (EU) No. 1259/2010, OJ 2010 L 343.
21 Council of the European Union (2010).
22 CJEU, Joined cases C-399/06 P, *Faraj Hassan v. Council of the EU and European Commission* and C-403/06 P, *Chafiq Ayadi v. Council of the EU*, 3 December 2009. The case essentially reiterated the position adopted in CJEU, Joined cases C-402/05 P and C 415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission*, 3 September 2008.
23 CJEU (GC), Case T-85/09, *Yassin Abdullah Kadi v. European Commission*, 30 September 2010, paragraph 113.
24 *Ibid.*, paragraph 115.

8.3. Access to justice at Member State level

The following section will consider developments at Member State level in the area of access to justice. It will examine issues relating to the length of proceedings, court reform and NHRIs.

A series of trends related to access to justice can be identified in EU Member States. Positive developments include attempts to address the length of proceedings, reform of the judiciary in order to strengthen independence and the strengthening or creation of NHRIs. However, there are also court reforms that risk undermining the independence and credibility of the judiciary. Overall a number of challenges remain with regard to ensuring efficient and effective access to justice. Statistics from the ECtHR show that in 2010 alone the Court found violations in 636 cases against 26 EU Member States, 115 of which involved violations of the right to a fair trial.[25]

FRA ACTIVITY

Persons with disabilities – accessing justice

One component of the FRA disability project 'Fundamental Rights of persons with intellectual disabilities and persons with mental health problems' focuses on access to justice. In particular, it looks at legal standing and how persons with disabilities can be accommodated in court proceedings.

For more information, see: http://fra.europa.eu/fraWebsite/research/projects/proj_disability_en.htm.

8.3.1. Length of proceedings

Perhaps the greatest problem affecting access to justice in the Member States is the excessive length of legal proceedings. Recognising the scale of the challenge, the Committee of Ministers of the Council of Europe adopted a Recommendation on effective remedies for excessive length of proceedings.[26] A Guide to Good Practice accompanies the recommendation.[27]

"[Member States should ...] take all necessary steps to ensure that all stages of domestic proceedings [...] are determined within a reasonable time; [...] ensure that mechanisms exist to identify proceedings that risk becoming excessively lengthy as well as the underlying causes; [provide ...] specific forms of non-monetary redress, such as reduction of sanctions or discontinuance of proceedings."

Recommendation CM/Rec(2010) 3 of the Committee of Ministers to the Council of Europe Member States on effective remedies for excessive length of proceedings.

Table 8.1 shows that some Member States have a particularly acute problem with the length of proceedings, resulting in a high number of findings of violations as well as constituting a high proportion of judgments issued against them.

Some Member States have taken concrete measures to try to address this problem. In **Bulgaria**, a system of 'reserve advocates' has been introduced for serious crimes. These advocates will act on behalf of a defendant, even without consent, if a lawyer fails to appear during pre-trial or trial activities without good reason.[28] This appears to have the potential to speed up trials – where delay is due to absence of a lawyer – but could also pose risks to the right to a fair trial if the reserve advocate is not sufficiently familiar with specific cases.

In **Finland**, the Ministry of Justice (*Oikeusministeriö*) submitted a report to the Constitutional Law Committee of Parliament regarding delays in the judicial procedure. This

Table 8.1: Number of ECtHR judgments finding at least one violation, violations of the right to a fair trial and violations of length of proceedings, by EU Member State and Croatia

	Judgments finding at least one violation	Right to a fair trial	Length of proceedings
Austria	16 (+3)	6 (+5)	9 (+3)
Belgium	4 (-4)	3 (-1)	0 (-2)
Bulgaria	69 (+8)	6 (-5)	31 (-10)
Cyprus	3 (no change)	0 (no change)	0 (-3)
Czech Republic	9 (+6)	3 (+2)	1 (+1)
Denmark	0 (-3)	0 (no change)	0 (-3)
Estonia	1 (-3)	0 (no change)	0 (-1)
Finland	16 (-12)	2 (-7)	9 (-10)

25 Council of Europe (2011a), pp. 130-131.

26 Council of Europe, Committee of Ministers (2010c).
27 *Ibid.*, Guide to Good Practice, CM (2010)4 add1.
28 Amendment with effect from 28 May 2010, Bulgaria, Наказателно-процесуален кодекс (Criminal Procedure Code), Chapter 10, Article 94 (4) to (6).

	Judgments finding at least one violation	Right to a fair trial	Length of proceedings
France	28 (+8)	10 (+5)	1 (-1)
Germany	29 (+11)	2 (-2)	29 (+15)
Greece	53 (-16)	8 (-8)	33 (-8)
Hungary	21 (-7)	1 (-2)	14 (-6)
Ireland	2 (+2)	0 (no change)	1 (+1)
Italy	61 (no change)	9 (-2)	44 (+32)
Latvia	3 (-3)	1 (+2)	0 (no change)
Lithuania	7 (-1)	3 (+3)	3 (-4)
Luxembourg	5 (+3)	2 (no change)	3 (-3)
Malta	3 (-1)	0 (-1)	0 (no change)
Netherlands	2 (+2)	0 (no change)	0 (no change)
Poland	87 (-36)	20 (-1)	37 (-13)
Portugal	15 (-2)	2 (no change)	6 (+3)
Romania	135 (-18)	30 (-26)	16 (no change)
Slovakia	40 (+2)	2 (-2)	29 (no change)
Slovenia	3 (-3)	0 (-1)	2 (-2)
Spain	6 (-5)	4 (-1)	0 (-3)
Sweden	4 (+3)	1 (no change)	1 (+1)
United Kingdom	14 (no change)	0 (-1)	1 (-1)
Croatia	21 (+5)	6 (-1)	8 (+2)
Total	**657 (-62)**	**121 (-43)**	**278 (-14)**

Note: The figures in brackets represent the change in statistics based on figures from 2009.
Source: Council of Europe/ECtHR, Annual Report 2010, January 2011 (provisional version), pp. 130–131.

report deals with the ways in which the duration of judicial procedures could be shortened.[29] Moreover, the parliament required the government to draw up an overall plan to improve the efficiency of preliminary investigations and consideration of charges, and speed up judicial proceedings. The Ministry of Justice and the Ministry of Interior will set up a working group to look for efficient ways to shorten the duration of the judicial proceedings.[30] A further proposed measure is the introduction of plea-bargaining, a procedure in which confession of a crime at an early stage of the proceedings could, while observing the transparency of procedures, lead to a reduced punishment in comparison to that which would be handed down were the trial to run its course and the defendant be found guilty.[31]

In **Latvia**, amendments to the criminal law in October 2010 now give courts the power to issue lower sentences – including going below the normal minimum prescribed sanctions – where proceedings have not been completed within a reasonable time.[32] Similar amendments allowing mitigation of sentences in cases of undue delay have also been introduced in **Spain**.[33]

FRA ACTIVITY

Stakeholder meetings on access to justice

In 2009, the FRA launched a project focusing on a Member State-level assessment of access to justice. This 'legal' research is based on a set of indicators with a view to assessing country-specific situations and it will be followed by 'social' research initiated in 2010. The latter will be a qualitative survey on access to justice through equality bodies in eight selected EU Member States. Meetings were held in November 2009 and October 2010 with a variety of stakeholders, including European bar associations, judges' associations, Ombuds institutions and legal aid services. Outcomes included raised awareness of forthcoming projects and existing FRA findings as well as input into the framing of future research.

For more information, see: http://fra.europa.eu/fraWebsite/access_to_justice/access_to_justice_en.htm.

29 Finland, Ministry of Justice (2009a).
30 Finland, Ministry of Justice (2010a).
31 Finland, Ministry of Justice (2010b).
32 Latvia, Likumprojekts Grozījumi Krimināllikumā (Amendments to the Criminal Law), No. 1704/Lp9, 21 October 2010, Section 49.1 1)1-3.
33 Spain, Ley Orgánica 5/2010, Article 21, No. 6 of the Criminal Code.

In Italy, the slow pace of justice remains a significant problem. Legislation introduced in late 2009 aims to improve the procedure for obtaining compensation as a consequence of excessively lengthy trials and stipulates a maximum limit of two years for the legal process.[34] Italy has also introduced a mandatory alternative dispute resolution procedure in selected areas of private law.[35] The ECtHR stressed that broader reforms are required.[36] In Cyprus, new legislation has been introduced, namely a Law Providing for Effective Remedies for Exceeding the Reasonable Time Requirement for the Determination of Civil Rights and Obligations.[37] The law applies to complaints regarding length of procedure at all levels in civil and administrative cases, and allows for complaints to any district court, at any stage of the proceeding.

In August 2010, the German federal government adopted a draft bill to introduce better remedies in the case of unreasonable delays in court proceedings and preliminary investigations in criminal cases.[38] The bill provides for a specific compensation claim in the case of an unreasonable delay of proceedings. The regular amount of non-material damages shall be EUR 1,200 for each year of delay. Compensation for material damages is also provided for and may be higher than 'regular damages'. However, compensation can only be granted if an objection was raised against the undue delay at an earlier stage of the proceedings and would thereby have a preventive effect, giving the courts the opportunity to proceed with more speed.[39] With the draft bill the federal government intends to comply with the case law and guidelines of the ECtHR and the federal Constitutional Court (*Bundesverfassungsgericht*).

8.3.2. Court reform

Court reform is underway in almost half of all Member States. There is a discernible trend towards increasing judicial independence, which is an essential criteria for genuine access to justice. In **Greece**, a new law involves the parliament in the appointment of the highest judicial posts through hearings with the candidates.[40] In **Sweden**, the independence of the courts has been strengthened by constitutional amendments. This has included moving provisions relating to the judiciary to a separate chapter to underscore its independence from the government. Rules on the independence of judges were also introduced, along with further measures aimed at improving independence.[41]

In Latvia, a judicial council was established in 2010 after a decade of debate.[42] These changes include the greater budgetary independence of the judiciary.[43] Slovakia has taken measures to increase the independence and transparency of its judicial council by, for instance, opening sessions to the public.[44] The UK has established a Judicial Appointments Commission to improve independence and transparency.[45] There are also proposals to unify the existing framework of courts and tribunals under a single organisation.[46]

In contrast, in Hungary a law was adopted in December 2010 that, among other things, transfers powers to appoint court presidents from the National Council of Justice (*Országos Igazságszolgáltatás Tanács*, OIT) to the President of the OIT.[47] There is a risk that moving this power from a collective body to a single person may reduce judicial independence.

At EU level, it should also be noted that appointment procedures for judges and advocates general of the CJEU have been modified so that a conference of representatives of governments of the Member States becomes the appointing authority. The conference, however, takes its decision after consulting a panel consisting of seven persons – one of which is appointed by the European Parliament – including judges and advocates general, members of national supreme courts and senior lawyers.[48]

Promising practice

Public awareness to facilitate access to justice

In **Ireland**, the Irish Council for Civil Liberties (ICCL) launched a public information programme entitled *Know Your Rights*. The project is designed to inform people about their rights in plain language by publishing a series of information booklets and creating a specific website for the project. The first in the series of booklets *Know Your Rights: Criminal Justice and Garda Power* was published in January 2010, together with *Know Your Rights: Privacy* and *Know Your Rights: European Convention on Human Rights*. The booklets are also available on the ICCL website.

For more information on the ICCL Know Your Rights campaign, see: www.knowyourrights.ie.

34 Italy, Disegno di Legge (Bill) (2009).
35 Italy, Decreto legislativo (Legislative Decree) No. 28.
36 ECtHR, *Gaglione and others v. Italy*, No. 45867/07, 21 December 2010 (not final).
37 Cyprus, Law providing for effective remedies for exceeding the reasonable time requirement for the determination of civil rights and obligations, Law 2(I)/2010, 5 February 2010.
38 Germany, Gesetz über den Rechtsschutz bei überlangen Gerichtsverfahren und strafrechtlichen Ermittlungsverfahren, 12 August 2010.
39 *Ibid.*, Article 1, p. 5, see also p. 31.
40 Greece, Law 3841/2010.
41 The changes came into force 1 January 2011. Law (2010:1408) amending the Instrument of Government, chapter 11.
42 Latvia, Latvijas Republikas Augstākā (Supreme Court of Latvia), Press release, 1 October 2010.
43 Latvia, Likums par tiesu varu (Law on Judicial Power).
44 Slovakia, Zákon 185/2002.
45 UK, Judicial Appointments Commission.
46 See www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101005-wms0001.htm and www.justice.gov.uk/latest-updates/announcement160910b.htm.
47 Hungary, Law 2010 CLXXXIII.
48 CJEU (2009).

Other Member States have established or granted increased powers to independent judicial councils responsible for the administration of the judiciary. In **Estonia**, legislative reforms are pending before the parliament that would introduce a major overhaul with a new independent court administration.[49] The Higher Council of the Judiciary (CSM) in **France** was reformed in June 2010 with a view to strengthening judicial independence. For example, from 2011 onwards, the President of the Republic will no longer be the Council chair, with the position held instead by the chair of the Court of Cassation.[50]

FRA ACTIVITY

Access to justice for asylum seekers

Two separate expert meetings were organised by the FRA in early 2010 to prepare for field research with asylum seekers on: the quality of information on the asylum procedure; and the accessibility of remedies against negative first-instance decisions. Following the field work, which included interviews with 877 individuals in the asylum-seeking process, the FRA published two reports in 2010, *Access to effective remedies: The asylum seeker perspective and The duty to inform applicants about the asylum procedure: the asylum-seeker perspective*.

For more information, see Chapter 1 on asylum, immigration and integration.

8.3.3. National Human Rights Institutions

National Human Rights Institutions (NHRI), together with national equality bodies (discussed in Chapter 5 on equality and non-discrimination), can significantly facilitate or provide direct access to justice. They can do this in several different ways by providing information on substantive and procedural rights; providing, overseeing or referring individuals to mediation services; engaging in settlement of disputes themselves as well as assisting and supporting victims in taking cases to court.

There is a discernible movement among EU Member States towards establishing NHRIs in compliance with the Paris Principles. The Paris Principles, adopted by the United Nations (UN) General Assembly in 1993, provide authoritative guidance on the required powers and characteristics of independent and effective institutions with the role of protecting and promoting human rights at the national level.[51] In this sense, UN treaty monitoring bodies systematically encourage Member States, which are party to human rights treaties, to establish institutions in compliance with these standards.[52]

With the NHRI in Scotland receiving A-status in 2010, the total number of A-status institutions within the EU reached 12, in 10 different Member States (the **UK** having three). In at least two of those Member States with B-status NHRIs, specifically **Belgium**[53] and the **Netherlands**[54], reform is underway with the aim to achieve A-status. For **Belgium**, recent developments appear few and far between while in the **Netherlands** the NHRI is on track to be established in the coming year. **Italy** also recently committed to establishing a NHRI in line with the Paris Principles.[55]

In four of the Member States without accredited institutions (**Cyprus**, **Finland**, **Italy** and **Sweden**), decisive steps have been taken to establish NHRIs that have the potential to receive A-status. In **Finland**, the government proposed in October 2010 to set up a NHRI that would be administratively associated with the existing Parliamentary Ombudsman.[56] In **Sweden**, an inquiry committee, namely the Human Rights Delegation, which was appointed by the government to support human rights efforts, proposed in late 2010 reforms, including the establishment of an NHRI

FRA ACTIVITY

Strengthening human rights institutions

In May 2010, the FRA launched a report entitled *National Human Rights Institutions* in the EU Member States. It formed part of a series of four reports aimed at strengthening the fundamental rights architecture in the EU. The reports looked at institutions with a fundamental rights remit at national level. The NHRI report concluded, among other things, that institutions are not sufficiently independent and effective. It also found that stronger cooperation and coordination among the multiple EU bodies would help address gaps and overlaps in activities.

For more information, see: http://fra.europa.eu/fraWebsite/research/publications/publications_per_year/2010/pub_national_hr_inst_en.htm

49 On stages of proceeding available at: www.riigikogu.ee/?page=en_vaade&op=ems&eid=866881&u=20100422101349.

50 France, Act No.2001-539 on the status of magistrate and the CSM.

51 'Principles relating to the status of national institutions: Competences and Responsibilities', defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris 7-9 October 1991, adopted by the Commission on Human Rights, Resolution 1992/54, in 1992 and by the General Assembly Resolution 48/134, in 1993; for further information, see FRA (2010b).

52 On applicable UN standards binding the EU Member States, see Chapter 10 on International obligations.

53 Centre for equal opportunities and opposition to racism (2011). See also, for example, the proposal Commission Justice et Paix, *La Commission Belge des Droits Fondamentaux: présentation et projet d'accord.*

54 On 20 August 2010, the Dutch cabinet decided to propose legislation to parliament for the creation of an institute for Human Rights. The existing Equal Treatment Commission (*Commissie Gelijke Behandeling*) will be integrated into the new institute. See The Netherlands, Rijkoverheid, Wetsvoorstel College voor de rechten van de mens (BZK).

55 UN General Assembly (2010), paragraph 7. A draft law was approved in April 2007 by the Chamber of Deputies but remains to be endorsed by the Senate. A draft was introduced in the Senate in late 2009 and discussed in February 2010.

56 Finland, Ministry of Justice (2010c).

Table 8.2: NHRIs in EU Member States and Croatia, by accreditation status

Status	Country
A	Denmark, France, Germany, Greece, Ireland, Luxembourg, Poland, Portugal, Spain, United Kingdom*, Croatia
B	Austria, **Belgium**, **Netherlands**, Slovakia, Slovenia
C	Romania
Not accredited	Bulgaria, **Cyprus**, Czech Republic, Estonia, **Finland**, Hungary, **Italy**, Latvia, Lithuania, Malta and **Sweden**

*Notes: * The Equality and Human Rights Commission shares the UK seat at the International Coordinating Committee of NHRIs with the Northern Ireland Human Rights Commission and the Scottish Human Rights Commission.*
Countries shown in bold indicate a planned change in the NHRI's accreditation status in the near future.

Source: International Coordinating Committee of NHRIs, Chart of the Status of National Institutions, 1 January 2010, www.nhri.net/2009/Chart_of_the_Status_of_NIs__January_2010.pdf), updated as of December 2010.

in compliance with the Paris Principles.[57] In **Cyprus**, efforts are underway to strengthen the functions of the Commissioner for Administration (Ombudsman) and transform the office into a 'Commissioner of Human Rights'.[58]

Outlook

Continuing reforms of judicial systems in the Member States, particularly regarding the excessive length of proceedings, remain necessary. This should be seen in the context of reforms taking place at the ECtHR to deal with an excessive backlog of cases.[59] These reforms include the introduction of the 'pilot' procedure for recurrent findings of violations, which allows the ECtHR to select one or more of them for priority treatment where it receives a significant number of applications deriving from the same root cause.[60] It is only by ensuring that national judicial systems are adequate that it will be possible to place less stress on the ECtHR. At the same time, strengthening other national mechanisms, in particular Equality Bodies and NHRIs, can help to address systematic problems at the national level. Whether Member States will continue to move towards strengthening NHRIs in light of prevailing austerity measures remains to be seen.

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57 Sweden, Slutbetänkande av Delegationen för mänskliga rättigheter i Sverige (2010), *Ny struktur för skydd av mänskliga rättigheter*.

58 Bill prepared by the Attorney-General and approved by the Council of Ministers on 22 October 2010, presently pending before the legislature.

59 For more information, see: 'Interlaken Declaration' of the High level conference on the future of the European Court of Human Rights, 19 February 2010.

60 For more information, see: ECtHR, *The Pilot-Judgment Procedure*. For 'pilot case' relating to excessive length of proceedings see also, ECtHR, *Vassilios Athanasiou and others v. Greece*, No. 50973/08, 21 December 2010 (not final). The pilot judgment procedure was applied for the first time in the case of ECtHR, *Broniowski v. Poland*, No. 31443/96, 22 June 2004.

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Access to efficient and independent justice

Protection of victims

UN & CoE

January

February

March

19 April – UN Special Rapporteur on Violence Against Women addresses the issue of compensation in her first Report to the UN Human Rights Council, underlining State obligations under international law to provide the right to remedy and access to effective remedies for the harm that victims of such violence have suffered

April

May

June

July

August

September

October

17 November – CoE Committee of Ministers adopts guidelines on child friendly justice

November

17 December – CoE Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence adopts a draft Convention on preventing and combating violence against women and domestic violence

December

EU

January

February

8 March – Council of the European Union adopts conclusions on the eradication of violence against women

18 March – 12 Member States initiate a proposal for a directive on the European Protection Order

23 March – European Commission proposes a directive on preventing and combating trafficking in human beings, and protecting victims

March

26 April – Council of the European Union adopts conclusions on improving prevention to tackle violence against women and care to its victims within the scope of law enforcement

April

May

June

July

August

September

21 October – CJEU offers a clarification of the term ‘victim’ in the *Eredics and Vassné Sápi* case

October

November

December

9 Protection of victims

Alongside guaranteeing the rights of suspects and accused persons, improved protection for the rights of victims of crime, in particular women and children, featured highly on political agendas across the European Union (EU). Efforts to improve access to information and access to compensation, which are essential to ensure that the rights of victims of crime are made effective in practice, can be noted among many EU Member States. Both the EU and several Member States also introduced improvements to data collection on victims of crime to support the development of effective policies.

This chapter covers developments in EU and Member State policies and practices in the area of the rights of victims of crime for the year 2010. In order to gain a comprehensive overview of this area it should be read together with Chapter 8 on Access to justice, which focuses on developments relating to access to justice in criminal and civil law. The chapter will first outline general developments in legal standards at the EU and Council of Europe levels. It will then move on to discuss particular areas where notable developments occurred in 2010, namely: protection of victims, including compensation and access to information; violence against women; and data collection and evidence-based policymaking.

Key developments in the area of victims' protection:

- initiatives were taken at EU level to improve legislative protection of victims, such as the Human Trafficking Directive, the proposed European Protection Order, and discussions on a new Victims Directive;
- stronger standards were set for the protection of victims, such as the adoption by the Council of Europe of Guidelines on child-friendly justice, and several Member States' ratification of the Convention on Action against Trafficking in Human Beings;
- developments took place at national level to improve the position of victims, including access to compensation and information on their rights in the context of legal proceedings;
- efforts were made to address violence against women by both the Council of the European Union and the European Commission;
- measures were taken to improve data collection on victims at EU as well as national level.

9.1. Developments at EU and international levels

The following section deals with developments in legal standards at the level of the EU – including case law of the Court of Justice of the EU (CJEU) – and the Council of Europe that are relevant to the protection of victims of crime. These developments signal a growing trend towards increasing protection for victims in the context of legal proceedings.

At EU level three developments can be noted. First, the European Parliament approved the European Commission's proposal for a Human Trafficking Directive[1] in December 2010 and the Council's approval is expected to follow.[2] This directive adopts the three 'P' – prevention, protection and prosecution – response to trafficking, and seeks to increase elements of assistance and support to victims, especially with regard to the inclusion of three specific articles related to child victims.

Second, the draft European Protection Order,[3] which is currently under negotiation, focuses on inter-personal violence and aims to provide victims with protection in EU trans-

1 European Commission (2010a).
2 European Parliament (2010a); Council of the European Union (2010a).
3 European Commission (2010b), p. 5.

border cases. The draft passed the first reading in the European Parliament in December 2010.[4]

Third, discussions were underway in 2010 to identify how existing EU legislation could be amended or replaced to better meet the needs of victims.[5] Victims' needs are currently covered by the Framework Decision on the standing of victims in criminal proceedings and the Directive on compensation to crime victims.[6]

The Framework Decision on the standing of victims in criminal proceedings defines a 'victim' as "a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State".

Article 1(a), Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings, OJ 2001 L 82, p. 1.

In the case of *Eredics*, the CJEU offered clarification of the definition of 'victim' as it appears in the Framework Decision on the standing of victims in criminal proceedings. It stated that for the purposes of this legislation, 'victim' referred only to 'natural persons' (a human being) and could not include 'legal persons' (such as an organisation that is defined as such in law).[7] This decision confirmed the CJEU's finding on this question in *Dell'Orto* of 2007,[8] and serves to further inform developments in the field of victims' rights in the EU.

In relation to Council of Europe standards, in 2010 a number of EU Member States ratified the Council of Europe Convention on Action against Trafficking in Human Beings of 2005, specifically **Ireland**, **Italy**, the **Netherlands** and **Sweden**. The Committee of Ministers of the Council of Europe also adopted Guidelines on child-friendly justice,[9] which serve to protect the rights of the child in the context of legal proceedings. A tabulated overview of relevant international human rights instruments binding the EU Member States is given in Chapter 10 on international obligations.

9.2. Issues in focus

A 2009 report on victims in Europe, issued by the Portuguese Association for Victim Support (*Associação Portuguesa de Apoio à Vítima*, APAV) and funded by the European Commission, suggests that many EU Member States could benefit from reforming their current systems in terms of providing better protection for victims, including their standing in criminal proceedings.[10] While many challenges remain in ensuring that victims' rights are upheld in practice, it is also the case that a number of innovative approaches to rights protection have emerged. The following section will consider general developments at the national level, and will then focus on compensation of victims and the provision of information to victims about their rights.

9.2.1. General measures

At a general level, it is possible to highlight the development of legislative measures and practices among the EU Member States that enhance protection for victims. In **Romania**, a new criminal procedural code was adopted in June 2010, which will come into force in 2012.[11] The law details the rights of the victim during the criminal justice process – including the right to information, the right to legal aid, and the right to protection and compensation – as well as the use of mediation services.[12] In **Lithuania**, a new draft law on the protection of victims of violence in the private sphere, which would introduce special protection for victims of violence and their families, is being considered by the parliament.[13]

At a more practical level, many EU Member States have reconstructed or refurbished physical structures like courts in order to accommodate the needs of victims. In January 2010, **Ireland** officially opened a new Criminal Courts Complex, which includes a suite for victims and victim support organisations, and a room specifically designed for children. It also has a separate and private entrance/exit for victims and witnesses.[14]

Promising practice

Avoiding gaps by close cooperation: the 'Alliance against Violence'

To enhance cooperation and avoid gaps in service provision to victims, various agencies work together in some EU Member States. In **Austria** in September 2010, the inter-ministerial 'Alliance against Violence' was launched, comprising the Federal Ministries of the Interior, Justice, Economy, Family and Youth, and Women and Civil Service. The Ministry of Interior established a coordination body within the criminal intelligence service, while the Federal Security Academy will support the Alliance with its research. Its main tasks will be to coordinate all measures against violence, to develop strategies for improving the prevention of violence, and to build a link between the police and all other actors dealing with violence. Additionally, the development of specific models to address various types of violence is planned.

For more information, see: www.bmi.gv.at

4 European Parliament (2010b); Council of the European Union (2010b).
5 European Council (2010) and European Commission (2010c).
6 Council Directive 2004/80/EC, OJ 2004 L 261, p. 15.
7 CJEU, C-205/09, *Eredics and Sapi*, 21 October 2010.
8 CJEU, C-467/05 *Dell'Orto*, 28 June 2007.
9 Council of Europe, Committee of Ministers (2010).
10 Portugal, Portuguese Association for Victim Support (2009).
11 Romania, Legea 135/2010, 15 July 2010.
12 *Ibid.*, Articles 81, 93, and 486.
13 Lithuania, Lietuvos Respublikos apsaugos nuo smurto privačioje erdvėje įstatymo projektas, No. XIP-2325, 23 July 2010.
14 Irish Times (2010).

In **Poland**, within the framework of the 'Nationwide Victim Assistance Network', a help centre has been established in every Polish region (*voivodeship*) called *Sieć pomocy ofiarom przestępstw*. The European Commission funds these centres as part of the programme '2007 Prevention of and Fight against Crime'. There are currently 16 such centres in total, which aim to provide legal assistance, and psychological and social care to crime victims, and rely mainly on volunteers.[15]

9.2.2. Compensation

Alongside punishment of the offender, compensation can play an important role in restoring the victim's situation when their rights as a victim have been violated. Several EU Member States introduced or reformed legislation in the area of criminal compensation during the reporting period.

In **the Netherlands**, amendments with effect from January 2011 were introduced to strengthen the position of the victim in the criminal procedure by, for instance, making it easier for the victim to claim compensation.[16] Consideration is also being given to a proposal, submitted in April 2010, to amend legislation on criminal injuries compensation. The bill, currently pending in the House of Representatives, would expand the categories of persons who can submit a claim to the Criminal Injuries Compensation Fund and the cases in which a benefit can be claimed, as well as simplifying and modernising existing legislation.[17] Further changes to expand the categories of persons that can submit claims have been proposed by the government.[18] However, on 23 March 2010, the Senate rejected a bill on Emotional Loss which would have made it possible to allow compensation for emotional damage for relatives of deceased victims and relatives of victims who sustained serious injuries.

In **Poland**, the position of victims of crime has been strengthened through the amendment of the penal code, which includes the power for courts to oblige an offender to pay compensation beyond immediate material damages. In **Germany**, discussions have taken place on the issue of reforming legislation on the compensation of victims in order to make the process easier and more transparent.[19]

Some Member States oblige offenders to contribute to a crime victim fund. **Finland** is developing such a fund, which is based on an established Swedish model from the mid-1990s.[20] In **Sweden**, all offenders convicted of an offence punishable by a prison sentence are liable to pay a lump sum of approximately EUR 50 to the Fund for Victims of Crime, which generates approximately EUR 3.5 million a year. The fund, through the Swedish Crime Victim Compensation and Support Authority (*Brottsoffermyndigheten*), has been a major sponsor of many different projects concerning crime victims – mainly by supporting civil society organisations and research – and it has continued to increase over the years.[21]

In **Sweden**, the authorities have also investigated the possibility of making services more accessible to crime victims by providing the opportunity to apply for compensation online. In December 2010, it was, however, only possible to access applications online, not to submit them.

In **Germany**, an organisation was established in February 2009 to deal with the abuse of minors in children's homes during the 1950s and 1960s.[22] Its interim report, published in January 2010, elaborates on the possibilities of compensation for the victims. However, it comes to the conclusion that most compensation claims are statute-barred according to the relevant legal provisions. It is therefore evaluating the possibility of amending the Victims Compensation Act and the feasibility of a compensation fund for the victims.[23] Similarly, since its creation in April 2010, the Roundtable on Sexual Abuse of Children has initiated a research network for the detection and prevention of sexual child abuse.[24] It is also examining the possibility of extending the statute of limitations for civil compensation claims in this area.[25]

9.2.3. Information for victims

If victims are not aware of their rights, they may have difficulty in exercising them. A number of measures can be noted in EU Member States, some of which are innovative. In **Germany**, legislation has been introduced to provide better information to victims on their rights, as early as possible and in a language they understand.[26]

In 2010, an English version of the **Swedish** introduction to courts for victims of crime was launched (see Figure 9.1).[27] In **Poland**, within the framework of the National Programme for Crime Victims, authorities have set up an eponymous website *(Krajowy Program na Rzecz Ofiar Przestępstw)* with complete texts of legal acts, contact details of help centres and summaries of victims' rights.

Some EU Member States have developed victims' charters, which explain victims' rights in an accessible format.

15 For more information, see: www.pokrzywdzeni.gov.pl.
16 Netherlands, Decision of 13 July 2010.
17 Netherlands, Parliamentary paper No. 32 363, No. 8 (Government amendment).
18 *Ibid.*
19 Germany, Federal Ministry for Labour and Social Affairs (*Bundesministerium für Arbeit und Soziales*), Letter of 14 September 2010.
20 Finland, Ministry of Justice (*Oikeusministeriö, Justitieministeriet*) (2010).
21 See www.brottsoffermyndigheten.se/default.asp?id=1292, Brottsoffermyndighetens årsredovisning 2010, p. 9.
22 For more information on children's rights, see Chapter 4, 'The rights of the child and protection of children'.
23 Runder Tisch Heimerziehung (2010).
24 See 'Sitzung' section of Runder Tisch website: www.rundertisch-kindesmissbrauch.de/sitzungen.htm. Germany, Ministry for Education and Research (*Bundesministerium für Bildung und Forschung*) (2010).
25 Germany, Ministry of Justice (*Bundesministerium für Justiz*) (2010).
26 Germany, Gesetz zur Stärkung der Rechte von Verletzten und Zeugen im Strafverfahren (2. Opferrechtsreformgesetz), BGBl. 2009 I, p. 2280, 29 July 2009.
27 The Swedish Authority also has a quick guide on compensation, available at: www.brottsoffermyndigheten.se/default.asp?id=2237.

Figure 9.1: Court Introduction (*Rättegångsskolan*)

Welcome to Court Introduction

If you have been victim of crime you are likely facing a rare situation that can make you anxious and uncertain. If the crime was reported, the police opened a chain of events where you as the victim and several agencies and organizations may be involved. Maybe the offense will be dealt with in court. It can be difficult to know where you are going to turn to for support and to answer your questions. Read more >>

Source: Sweden, Swedish Crime Victim and Support Authority, available at: www.courtintroduction.se

Ireland's Victims Charter and a Guide to the Criminal Justice System were publicly launched by the Minister of Justice and Law Reform in July 2010. The charter has received the Plain English Mark from the National Adult Literacy Agency for its accessibility to the non-technical reader.[28]

Other efforts to popularise knowledge about the rights of victims are more innovative. A radio message was aired every day in December 2009 in **Bulgaria** on 'Darik' national radio to inform victims about their rights.[29] **Hungary** used the largest music festival in the country to make the public aware of the rights of victims. In **Poland**, the Ministry of Justice launched a campaign called 'Come out of the shadow. Let yourself be helped' (*Wyjdź z cienia! Pozwól sobie pomóc!*) which addresses victims of crime and encourages them to make use of the assistance on offer. The initiative includes about 2,000 billboards throughout the country as well as YouTube clips.

In **Romania** in 2009, a hotline was set up to assist victims of crime in obtaining information on their rights and compensation possibilities.[30] In **Finland**, Victim Support Finland initiated a helpline service to support crime victims with a foreign background. This new service is part of a five-year Victim Support Development Project (2007–2011) which aims to develop new tools to improve victim support services and make them accessible to all, regardless of their background.[31]

28 Ireland, Victims of Crime Office, Victims Charter, available at www.victimsofcrime.ie.
29 See Bulgaria, National Council for assistance and compensation to victims of crime, available at: www.compensation.bg/Default.aspx.
30 Romania, Ministry of Justice (*Ministerul Justiției*), information available at: www.just.ro.
31 Finland, *Rikosuhripäivystys/Brottsofferjouren* (RIKU) (Victim Support), available at: www.riku.fi/fi/victim+support/services.

9.2.4. Violence against women

Violence against women remains a widespread problem[32] and continues to occupy a prominent position on the political agenda, a fact underlined by the 2010 Spanish presidency of the Council's focus on the issue.[33] Children are also often vulnerable to violence and abuse, and girls are particularly vulnerable to sexual abuse, which is addressed in Chapter 4 on rights of the child and protection of children.

In 2010, the European Commission published the findings of a major project assessing the *Feasibility of harmonisation of national legislation on gender violence and violence against children (FSL study)*. The goal of the study was to examine whether it was both feasible and necessary to harmonise national legislation on violence against women, violence against children and sexual identity violence at the EU level. The study identified a number of challenges with respect to looking at the origins and causes of violence against women and the other groups studied, data collection in these areas, and possibilities for legislative harmonisation.

> *"Reparations for women cannot be just about returning them to the situation in which they were found before the individual instance of violence, but instead should strive to have a transformative potential."*
>
> *UN Special Rapporteur on Violence against Women, Rashida Manjoo, 19 April 2010, paragraph 85*

The draft European Protection Order, discussed above in the context of developments at EU level, would ensure that a person continues to benefit from protection measures even if they move or travel abroad. This is of particular benefit to women who are victims of inter-personal violence. At the policy level, the Council adopted two sets of conclusions. In March 2010, the Council adopted 'Conclusions on the eradication of violence against women', which urges Member States to enhance their efforts to end violence against women and requests the European Commission to develop an overall strategy.[34] In April 2010, the Council also adopted 'Conclusions on improving prevention to tackle violence against women and care to its victims within the scope of law enforcement', with targeted measures for police on victims of gender-based violence.

In December 2010, the Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence approved the first Draft Council of Europe Convention on preventing and combating violence against women and domestic violence.[35] The Convention would create legally binding standards explicitly requiring States to prevent violence against women and domestic violence, protect its victims and punish the perpetrators. It fills a significant gap in human rights protection for women and encourages Member States to extend its protection to all victims of domestic violence.

At national level, developments can be noted among three EU Member States. In **Greece**, in 2009 a National Multi-Annual Programme on Preventing and Combating Violence Against Women (2009-2013) was launched by the Ministry of Justice, Transparency and Human Rights. The Programme incorporates both preventive and supporting actions for victims of gender-based violence. This includes the operation of a 24-hour SOS telephone line, an awareness-raising campaign and the establishment of 13 new Consultation Centres. This is the first time that a complete action programme has been elaborated in **Greece** for combating gender-based violence. In **Portugal**, according to the official government website (www.cig.gov.pt), there has been an increase in reported cases of gender-based violence. In **Cyprus**, a national non-governmental organisation (NGO) has received funding in order to carry out activities related to domestic violence, including awareness raising, mapping, website building, and the offer of training to the judiciary, public prosecutors and other criminal justice actors.[36]

During 2010, two EU Member States, the **Netherlands** and the **Czech Republic**, were monitored by the UN Committee on the Elimination of Racial Discrimination (CEDAW) under the periodic State reporting procedure. Among other observations, CEDAW welcomed measures in both the **Netherlands** and the **Czech Republic** to combat domestic violence. At the same time, the **Netherlands** was urged to ensure free legal aid for all victims of domestic violence. In relation to the **Czech Republic**, CEDAW raised several concerns relating to low rates of reporting, prosecution and conviction for domestic violence and rape, as well as the definition of rape and the availability of legal aid.[37]

9.3. Data collection and evidence-based policymaking

The development of effective and targeted legislation and policies addressing both the needs and substantive rights of victims depends on the collection of solid data. Given that many victims never report their experiences to the police, reliance on criminal justice data and information from court cases can only paint a limited picture of the realities on the ground with respect to the experiences of victims of crime. For more information on data collection and racist crimes, see Chapter 6 on racism and ethnic discrimination.

32 Council of the European Union (2010c), paragraph 3.
33 Council of the European Union (2010d) For more information, see Chapter 5 'Equality and non-discrimination', which deals with discrimination on the grounds of gender, and Chapter 6 'Racism and ethnic discrimination', which has a section dedicated to racist crime.
34 Council of the European Union (2010e).
35 Council of Europe, Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (2011).
36 European Commission (2010d).
37 United Nations, Committee on the Elimination of Discrimination Against Women (CEDAW) (2010a), paragraphs. 5, 26-27. CEDAW (2010b), paragraphs. 7, 22, 23.

FRA ACTIVITY

EU-wide survey on violence against women

On the occasion of International Women's Day 2010, the FRA Director was invited to give a speech in the hemicycle of the European Parliament in which he addressed violence against women as a human rights abuse and referred to the Agency's EU-wide survey on violence against women. In line with a European Parliament resolution of 25 November 2009[38] – which called on the FRA to collect reliable and comparable statistics on all grounds of discrimination, including "comparative data on violence against women in the EU" – the FRA began preparations for the first EU-wide survey on violence against women in 2010.

For more information, see: fra.europa.eu/fraWebsite/research/projects/proj_eu_survey_vaw_en.htm.

Regular criminal victimisation surveys have been in existence in some EU Member States, such as the **UK** and **Finland**, for several decades. Recognising the continued absence of comprehensive and comparable EU-wide data on crime victimisation, and building on the previous work of the International Crime Victims Survey (ICVS) that included some EU Member States, Eurostat launched a pilot initiative in 2009 to test a proposal for an 'EU Security Survey'. This survey is also confusingly referred to as the 'European Safety Survey' and the 'EU victimisation survey module' in the Eurostat Statistical Requirements Compendium 2010, and as the 'EU victimisation survey' in the Eurostat Statistical Programme 2010.[39] The results from Member States that tested the survey were reviewed in the course of 2010, and the findings will be used in the development of a full survey. It is proposed that between 5,000 and 8,000 people will be randomly surveyed in each Member State, the results of which will serve to provide rich information about victimisation experiences.

In some EU Member States, there is encouraging evidence that data collection on victims of crime continues to be supported as the basis for policy formulation. In **Finland**, which has a long tradition of research in this and related criminal justice fields, the National Research Institute of Legal Policy (*Rättspolitiska forskningsinstitutet*) has initiated a large-scale research project concerning the status of victims of crime. The project focuses on access to compensation and victim support services, and the results of the research will form the basis for future initiatives to ensure the effectiveness of the compensation process. The project report is planned for early 2011.[40] In **France**, the Ministry of Justice (*Ministère de la Justice et des Libertés*) published the results of a satisfaction survey based on 134,000 crime victims whose cases were judged in 2007.

In **Ireland**, the Commission for the Support of Victims of Crime commissioned research on the needs of victims of crime, which was launched in October 2010.[41] 300 victims of crime were interviewed for the study, which also gauged public and professional awareness of the availability of support services for victims of crime. The **Swedish** Crime Victim Compensation and Support Authority (*Brottsoffermyndigheten*) was commissioned by the government to carry out a study on the effectiveness of procedures for payment of criminal injuries compensation to persons in other States who were victims of human trafficking for sexual purposes. The study, presented in 2010, was carried out from a comparative perspective involving nine other EU Member States and Norway.[42]

In the **UK** – specifically in England and Wales – the British Crime Survey has been in existence since the early 1980s, with survey results for 2009 and 2010, based on interviews with 45,000 respondents, published in July 2010. Interviews for the latest Scottish Crime and Safety Survey (UK) began in June 2010, when it was also announced that a review of the 2001 Scottish Strategy for Victims Action Plan was underway. According to a response to a parliamentary question in the Scottish Parliament, the review will include consultation on options for improving victim support.[43]

Promising practice

Raising awareness of compensation funds among victims

In the **Netherlands**, a study revealed that victims rarely draw on compensation funds. Research from the Criminal Injuries Compensation Fund (*Schadefonds Geweldsmisdrijven*), published in February 2010, shows that 28,000 victims a year would like to and could make a claim based on the statutory regulations for financial compensation. However, only one fifth of about 37,000 victims a year actually do so in practice. The main reason for this seems to be that 72% of victims are not aware of the existence of the fund.

For more information, see: Netherlands, Huiselijkgeweld.nl (2010), 'Weinig beroep op schadefonds geweld', 16 February 2010

38 European Parliament (2010c).
39 For more information, see Eurostat Statistical Requirements Compendium 2010, p. 63; Statistical Programme 2010, p. 24.
40 Finland, *Oikeuspoliittinen tutkimuslaitos/Rättspolitiska forskningsinstitutet*, see: www.optula.om.fi/en/Etusivu.
41 Central Statistics Office (CSO) (2010). See also Kilcommins, S. *et al* (2010).
42 Sweden, Crime Victim Compensation and Support Authority (2010).
43 Scotland, Scottish Parliament, Written Answers to Parliamentary Questions, 30 June 2010.

Outlook

Ongoing work in the EU to promote the rights of victims appears promising. Initiatives on the rights of suspects and the accused, in particular the 'Roadmap' discussed in Chapter 8 on Access to justice, would benefit from consideration of parallel developments in the area of victims' rights. This would allow for clearer and more comprehensive legislation addressing the rights of suspects and the accused, and those of victims and witnesses.

Legislative reforms aside, the effective transposition of directives will remain crucial in the coming years. Research evidence from reports funded by the European Commission demonstrates that victim-centred laws are often poorly translated into practice and as a result there is no tangible impact on the ground. To this end, the forthcoming 'European Safety Survey', together with the FRA's Violence against Women survey – which includes violence in childhood, and reporting patterns among victims – will shed light on victims' enjoyment of their rights in practice. In this regard, these surveys may be considered as significant developments in the field of data collection on victims of crime that will underpin evidence-based developments in the future.

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International obligations

Human rights instruments

10

International obligations

The European Union (EU) is not a 'self-contained regime'; it operates – just as its Member States do – in an international environment and it is bound by international obligations. The year 2010 marked the debut of the modern post-Lisbon Union on the international stage, as discussions at EU level paved the way for the EU's accession to international human rights treaties. Since EU Member States are already bound by a variety of international human rights obligations, the spheres of international law and EU law stand in a communicative process of cross-fertilisation. Against this background, it is of relevance to observe the developments in 2010 with regard to EU Member States' international obligations.

On 15 December 2010, the European Parliament adopted a resolution on the situation of fundamental rights in the EU. In particular, this resolution focuses on the role the Treaty of Lisbon has played in designing "a new fundamental rights architecture" in the EU.[1] It is suggested in the resolution that, as part of this new 'architectural design', EU institutions and agencies must "cooperate better with international organisations committed to the protection of fundamental rights",[2] and, as a result, the effective protection and promotion of fundamental rights "requires actions at various levels (international, European, national, regional and local level)".[3] In other words the Parliament underlines the need for 'joined-up governance'. The concept of 'joined up-governance' recognises the fact that in a multi-level system of governance, efficient protection of fundamental rights can only be achieved through consistent and regular cooperation at the local, national and international level. Another aspect of this is the need for 'multi-agency partnerships', which interact with joined-up governance structures.

2010 marked a year of increased EU cooperation with international organisations with the negotiations relating to the EU's accession to the European Convention on Human Rights (ECHR) and the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), which will be discussed in more detail below. However, it is not only when the EU enters directly into international obligations that the relevance of international standards becomes apparent for

FRA ACTIVITY

Agency project on 'joined-up governance'

A large gap remains between the rights enshrined in international human rights instruments and the practical realisation of these rights on the ground. A FRA project has set up a network of local, regional, national and supranational actors, including the Congress of local and regional authorities of the Council of Europe. The project will map existing practices starting with a few pilot countries. On the basis of promising practices, it will develop a toolbox of joined-up governance methods for better implementation of fundamental rights. In 2010, the Agency coordinated a preliminary assessment of identified practices in the pilot countries which is being followed up with systematic research in each of the Member States.

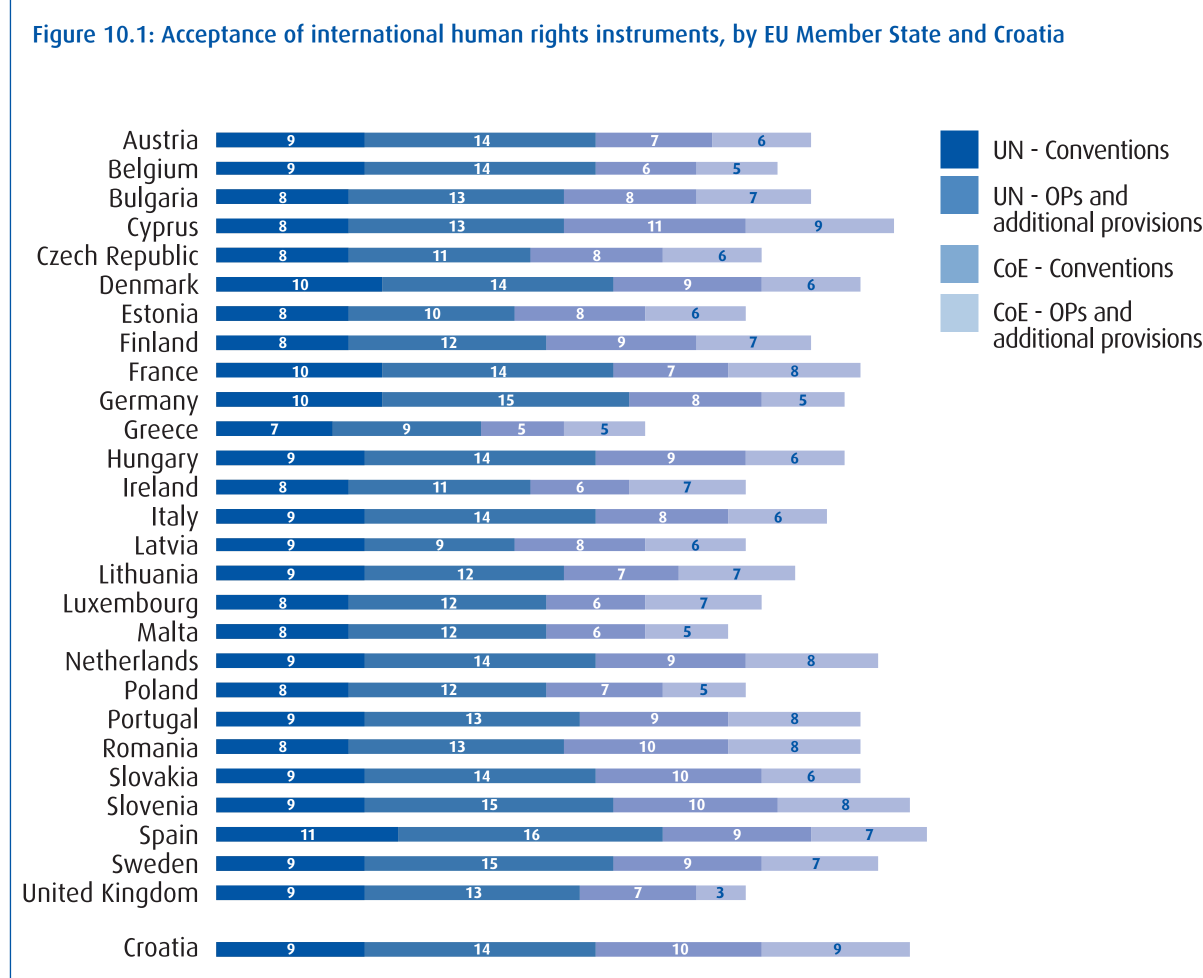
For more information, see: http://fra.europa.eu/fraWebsite/research/projects:Proj_joinedupgov_en.htm

1 European Parliament (2009).
2 *Ibid.*, paragraph 43.
3 *Ibid.*, paragraph 1.

the EU system. International human rights standards that are not directly binding on the EU itself can be relevant for the interpretation of EU law. For instance, the Court of Justice of the European Union (CJEU) has made reference to the European Social Charter,[4] International Labour Organization (ILO) Conventions[5] and the International Covenant on Civil and Political Rights (ICCPR),[6] which evidences the practice of interpreting EU law in conformity with recognised international fundamental rights standards. Also, when identifying general principles of law, the Court "draws inspiration from [...] the guidelines supplied by international treaties for protection of human rights on which the Member States *have collaborated* or to which they are signatories" (emphasis added).[7]

Given the relevance of international standards for the EU, the FRA published an annex in its last annual report, which provided a snapshot of EU Member States' international human rights obligations. In its Resolution of 15 December 2010 on the situation of fundamental rights in the EU, the European Parliament explicitly welcomed this innovation.[8] Taking this into consideration, the Agency has decided to integrate this overview of Member States' ratification of international human rights instruments as a permanent

Figure 10.1: Acceptance of international human rights instruments, by EU Member State and Croatia



Notes: OPs = optional protocols. Acceptance includes both being a state party as well as accepting additional monitoring provisions. The figure includes the following Council of Europe instruments: ICERD, ICCPR, ICESCR, CEDAW, CAT, CRC, ICRMW, CRSR, CTOC ICPED, CRPD, ILO C169 and all corresponding protocols. Please note the full names of these instruments are provided in the context of Tables 10.3 and 10.4.

Source: FRA, 2010

4 CJEU, C-149/77, *Defrenne v. Sabena (No. 3)*, 15 June 1978.

5 CJEU, C-41/90, *Höfner and Elser v. Macrotron*, 23 April 1991; C-158/91, *Levy*, 2 August 1993; C-197/96, *Commission v. France*, 16 January 1997.

6 CJEU, C-374/87, *Orkem v. Commission*, 18 October 1989; C-249/96, *Grant v. South-West Trains Ltd.*, 17 February 1998.

7 Opinion of the Court of Justice of the European Union (1996).

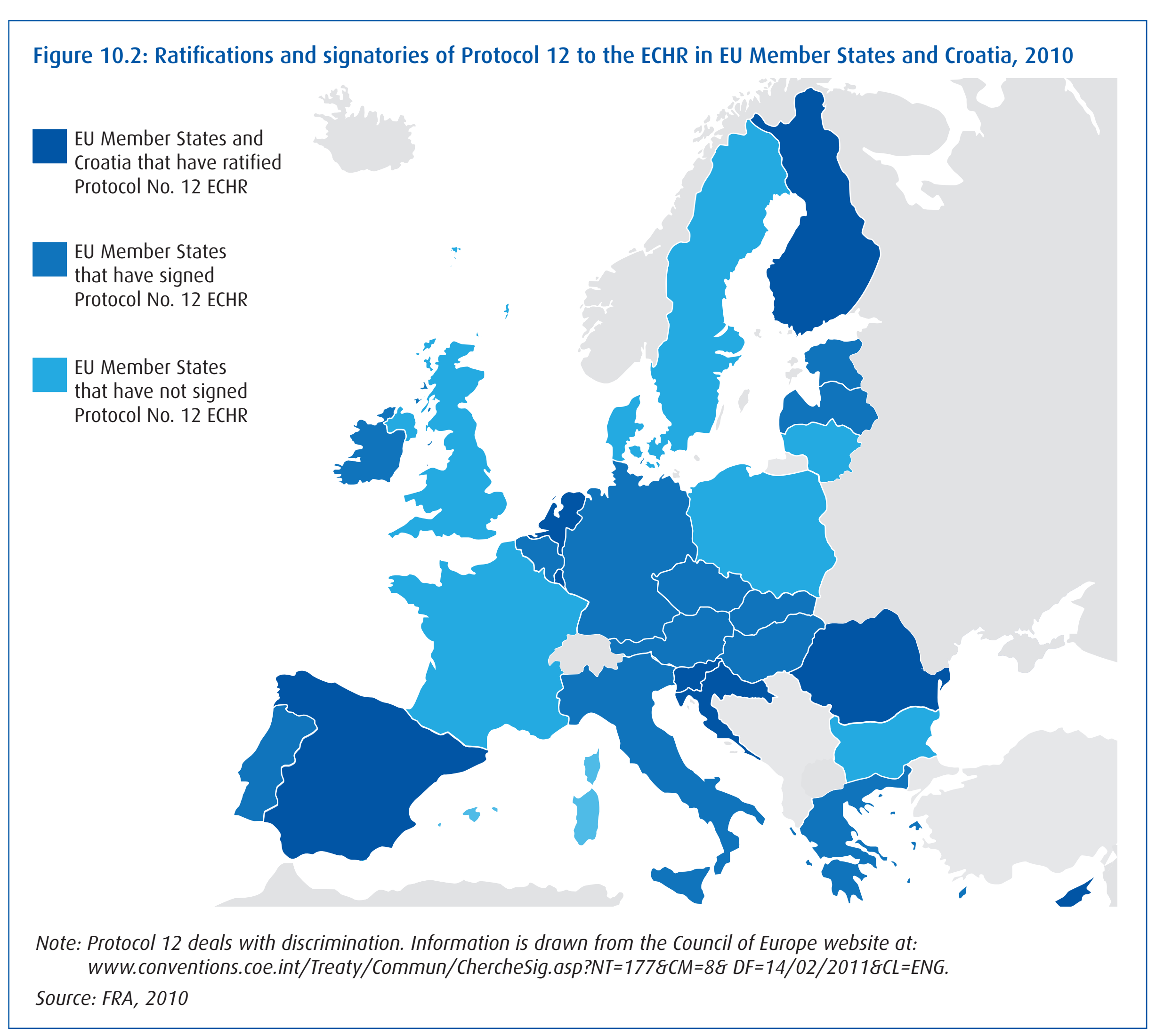
8 European Parliament (2009), paragraph 31.

chapter in its annual reports. Thus, this chapter traces the level of EU Member States[9] formal commitment to international human rights obligations, while highlighting recent developments (in grey) in the following figures and tables. Figure 10.1 provides an overview of these commitments.

It must be acknowledged that the ECHR remains the leading instrument on human rights protection in the EU. The pivotal role which the ECHR has played in shaping the fundamental rights landscape in the EU has recently been acknowledged in the discussions surrounding the EU's accession to the ECHR. While the ECHR is applicable in all EU Member States, this does not equate to universal compliance – namely, within the EU – with every obligation set out in the Convention, in particular the Protocols to the Convention. For example, not all EU Member States are a party to each of the ECHR protocols. However, in 2010 **Slovenia** ratified Protocol No. 12 (dealing with discrimination), which brings the total number of EU Member States who are state parties to that protocol to seven. While the level of Member States commitment to all ECHR protocols is outlined in Table 10.3, by way of illustration of the level of commitment to this instrument, Figure 10.2 provides a visual overview of EU Member States' ratification of Protocol No. 12.

Moreover, recent statistics from the ECtHR, which includes data on all 47 Council of Europe Member States, indicate that EU Member States are not in compliance with all ECHR obligations: with regard to the 27 EU Member States plus Croatia, the Court handed down 795 judgments in 2010.

Figure 10.2: Ratifications and signatories of Protocol 12 to the ECHR in EU Member States and Croatia, 2010



Note: Protocol 12 deals with discrimination. Information is drawn from the Council of Europe website at: www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=177&CM=8& DF=14/02/2011&CL=ENG.

Source: FRA, 2010

9 According to Article 28 (1) of Regulation 168/2007 establishing the FRA, "the Agency shall be open to the participation of candidate countries as observers." On the basis of Decision 1/2010 of the EU-Croatia Stabilisation and Association Croatia is a participating country in the work of the FRA and for this reason has been included in all the figures and tables of this chapter.

Table 10.1: Number of judgments handed down by the ECtHR, by ECHR Article and respondent EU Member State and Croatia

Countries	Number of judgments	Judgments finding at least one violation	Judgments finding no violation	Friendly settlements / Striking out judgments	Other judgments**	Right to life - deprivation of life	Lack of effective investigation	Prohibition of torture	Inhuman or degrading treatment	Lack of effective investigation	Prohibition of slavery / forced labour	Right to liberty and security	Right to a fair trial
ECHR Article						**2**	**2**	**3**	**3**	**3**	**4**	**5**	**6**
AT	**19**	16	3										6
BE	**4**	4							1			1	3
BG	**81**	69	10	1	1	5	7	1	5	3		14	6
CY	**3**	3					1		1	1	1	1	
CZ	**11**	9	1		1							6	3
DK													
EE	**2**	1	1									1	
ES	**13**	6	7							1			4
FI	**17**	16	1										2
FR	**42**	28	13		1				3			5	10
DE	**36**	29	6		1				1				2
EL	**56**	53			3				5	2		4	8
HU	**21**	21							1			1	1
IE	**2**	2											
IT	**98**	61	3		34				1				9
LV	**4**	3	1			1	1		1				1
LT	**8**	7	1									1	3
LU	**7**	5	2										2
MT	**4**	3			1							3	
NL	**4**	2	1	1					1				
PL	**107**	87	15		5	2	2		2	1		14	20
PT	**19**	15	2		2								2
RO	**143**	135	3		5	1	2	1	22	3		17	30
SK	**40**	40				1	1					10	2
SI	**6**	3	3										
SE	**6**	4	2						2				1
UK	**21**	14	7						2			1	
HR	**21**	21										5	6
Sub Total		**657**	**82**	**2**	**54**	**10**	**14**	**2**	**48**	**11**	**1**	**84**	**121**
Total		**795***											

*Notes: * One judgment concerns Cyprus and Russia; ** other judgments: just satisfaction, revision judgments, preliminary objections and lack of jurisdiction; P = Protocol*

Source: Based on ECtHR, Annual Report 2010, *pp. 130-131*

Table 10.1: (cont'd)

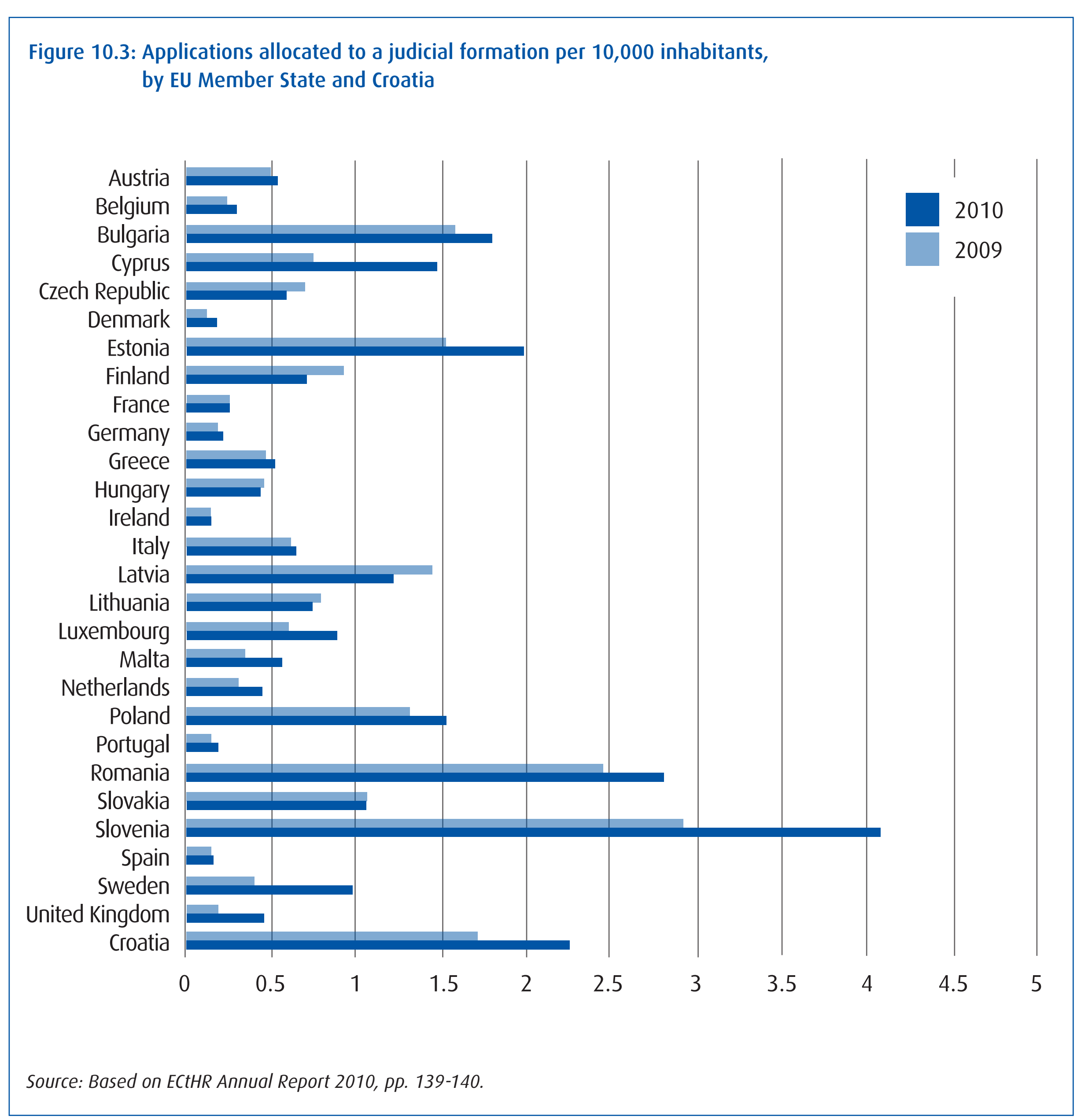
Length of proceedings	Non enforcement	No punishment without law	Right to respect for private and family life	Freedom of thought, conscience and religion	Freedom of expression	Freedom of assembly and association	Right to marry	Right to an effective remedy	Prohibition of discrimination	Protection of property	Right to education	Right to free elections	Right not to be tried or punished twice	Other Articles of the Convention
6	**6**	**7**	**8**	**9**	**10**	**11**	**12**	**13**	**14**	**P1-1**	**P1-2**	**P1-3**	**P7-4**	*****
9								2	4			1		
31	3		8					27	1	18			1	2
			2					1						
1			1					1		2				
					1					1				
9			2		8									
1	1		2		4					5				
29			2					8						
33	6		2	1	1			17	2	1		1		
14			3							1		1		
1			1					1						
44	5		3							6				2
								1						
3								1						
3														
			1											
					1									
37	2		12	1	2		2	2	2	2				
6					3			5		6				
16	30		2		5			5	1	58		1		1
29			2					7						
2			1					3						
1														
1			5				1	4	4			1		1
8	1		2					3	2	2				
278	**48**		**51**	**2**	**25**		**3**	**88**	**16**	**102**		**5**	**1**	**6**

While Table 10.1 provides an overview of the number of judgments handed down by the ECtHR, it is also interesting to look at other statistics prepared by the Court on the number of applications allocated to a judicial formation per population. This is graphically illustrated in Figure 10.3 based on ECtHR statistics.

2010 also witnessed the completion of the ratification process of Protocol No. 14 ECHR, which significantly amended aspects of the Convention's procedural machinery.[10] One of the positive aspects of this reform is the introduction of a new judicial formation (a single judge) to deal with inadmissible cases, which aims to tackle the backlog of applications before the Court. Nevertheless, many problems remain with regard to the workload of the Court, as is evident from Figure 10.4, which indicates that 57,050 applications from individuals in EU Member States and Croatia were pending before judicial formations by the end of 2010.

While the ECHR focused primarily on civil and political rights, the European Social Charter (ESC), which celebrates its 50th

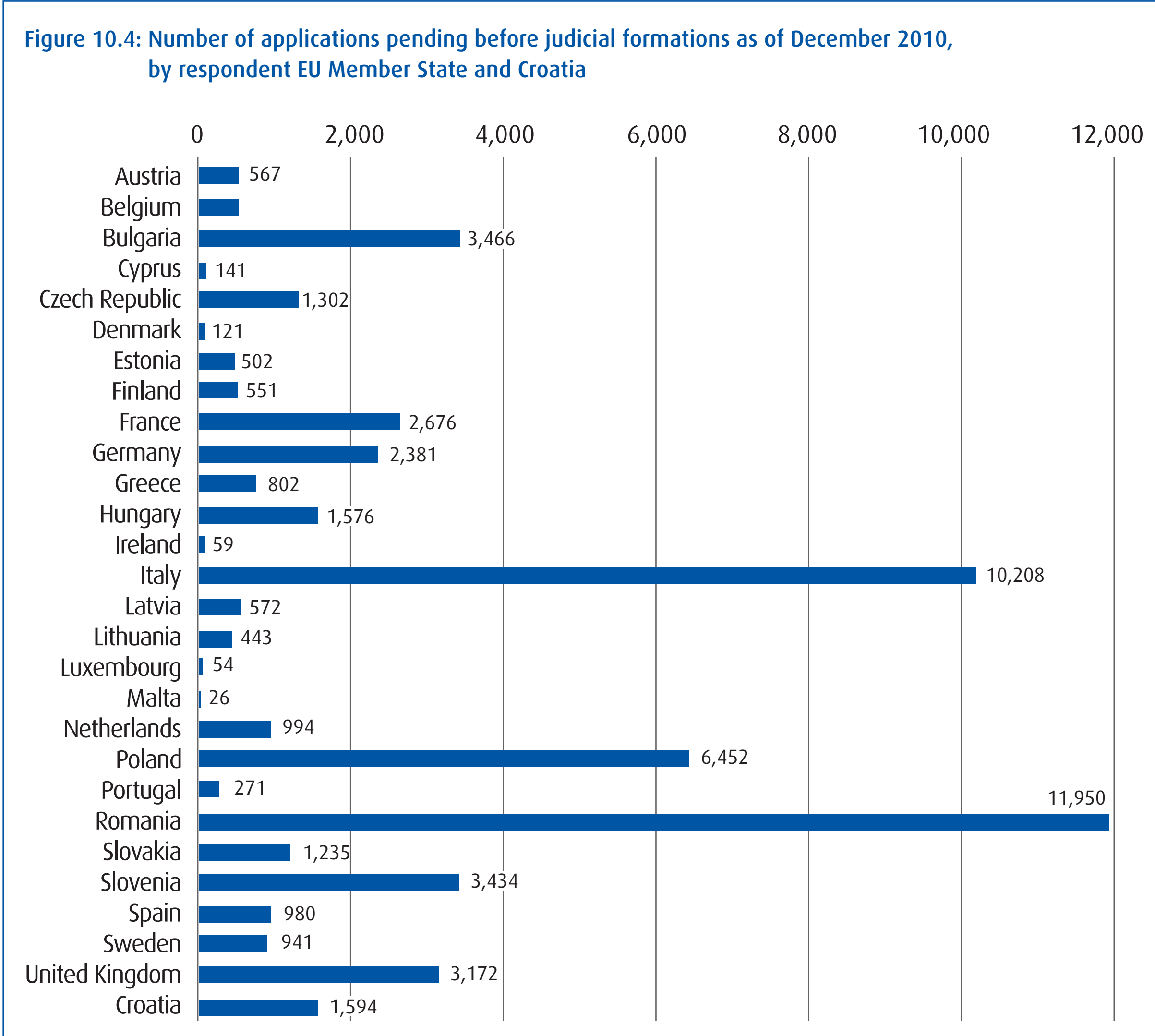
Figure 10.3: Applications allocated to a judicial formation per 10,000 inhabitants, by EU Member State and Croatia



Source: Based on ECtHR Annual Report 2010, pp. 139-140.

10 As a result, Protocol 14bis has ceased to be in force as from 1 June 2010.

Figure 10.4: Number of applications pending before judicial formations as of December 2010, by respondent EU Member State and Croatia



Note: Please note that this figure has been modified to reflect the scope of the FRA; the original figure included statistics on all 47 Council of Europe Member States.

Source: Based on ECtHR Annual Report 2010, p. 126

anniversary in 2011, complements the Convention. However, 10 EU Member States have not yet adopted the revised version of this Charter (providing for additional rights) which the European Committee of Social Rights encouraged in its 2010 Conclusions.[11] It is worthwhile noting that Croatia has not yet adopted the revised version of the Charter either. Moreover, given that state parties may choose to accept or reject individual articles in the ESC, it is interesting to note the level of commitment to the Charter, as outlined in Table 10.2.

Measuring the success of the ESC against the ECHR, it is arguable that social rights have not enjoyed as much protection as other categories of rights at the national level in the EU – at least not as 'rights'. According to the European Parliament Resolution on the situation of fundamental rights in the EU, the EU Charter of Fundamental Rights represents a "modern codification of fundamental rights",[12] which incorporates the full spectrum of rights – from civil to social – and seemingly allows for the equal protection and enjoyment of all fundamental rights.

11 European Committee of Social Rights (2010).

12 European Parliament (2009), paragraph 6.

Table 10.2: Acceptance of different provisions of the European Social Charter, by EU Member State and Croatia

	European Social Charter (1996 revised)									
Country	**BE**	**BG**	**CY**	**EE**	**FI**	**FR**	**HU**	**IE**	**IT**	**LT**
Total accepted	*24*	*17*	*13*	*20*	*26*	*31*	*18*	*28*	*30*	*24*
Art 1 - right to work	√	√	√	√	√	√	√	√	√	√
Art 2 - just conditions of work	√	½	½	½	√	√	√	√	√	√
Art 3 - safe and healthy work conditions	√	√	½	½	½	√	√	√	√	√
Art 4 - fair remuneration	√	½	x	½	½	√	x	√	√	√
Art 5 - right to organise	√	√	√	√	√	√	√	√	√	√
Art 6 - right to bargain collectively	√	√	√	√	√	√	√	√	√	√
Art 7 - protection of children and young persons	√	√	½	½	½	√	√	√	√	√
Art 8 - protection of maternity of employed women	√	√	½	√	½	√	√	½	√	√
Art 9 - vocational guidance	√	x	√	√	√	√	√	√	√	√
Art 10 - vocational training	√	x	√	½	√	√	√	√	√	√
Art 11 - protection of health	√	√	√	√	√	√	√	√	√	√
Art 12 - social security	√	½	√	√	√	√	½	√	√	½
Art 13 - social and medical assistance	√	½	½	½	√	√	√	√	√	½
Art 14 - benefit from social welfare services	√	√	√	√	√	√	√	√	√	√
Art 15 - persons with disabilities	√	x	√	√	√	√	√	√	√	√
Art 16 - protection of the family	√	√	x	√	√	√	√	√	√	√
Art 17 - protection of children and young persons	√	½	x	√	√	√	√	√	√	√
Art 18 - work in the territory of other Parties	√	½	½	x	√	√	x	√	√	½
Art 19 - protection and assistance of migrant workers	½	x	√	√	½	√	x	√	√	½
Art 20 - non-discrimination on the grounds of sex	√	√	√	√	√	√	√	√	√	√
Art 21 - information and consultation	√	√	x	√	√	√	√	x	√	√
Art 22 - participation in improvement of working conditions	√	√	x	√	√	√	√	√	√	√
Art 23 - social protection of elderly persons	x	x	x	x	√	√	x	√	√	x
Art 24 - protection in cases of termination of employment	x	√	√	√	√	√	x	√	√	√
Art 25 - protection in case of employer's insolvency	√	√	x	√	√	√	x	√	x	√
Art 26 - dignity at work	½	√	x	x	√	√	x	√	√	√
Art 27 - workers with family responsibilities	x	½	½	√	√	√	x	√	√	√
Art 28 - protection of workers' representatives	x	√	√	√	√	√	x	√	√	√
Art 29 - consultation in collective redundancy procedures	√	√	x	√	√	√	x	√	√	√
Art 30 - protection against poverty and social exclusion	√	x	x	x	√	√	x	√	√	x
Art 31 - housing	x	x	x	x	√	√	x	x	√	½

Note: Based on information provided on European Committee of Social Rights website (updated on 5 March 2010), available at: www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionsIndex_en.asp

Source: FRA, 2010

Table 10.2: (cont'd)

								European Social Charter (1961)										
	MT	NL	PT	RO	SK	SI	SE	AT	CZ	DK	DE	EL	ES	LV	LU	PL	UK	HR
	21	*30*	*31*	*17*	*25*	*29*	*23*	*14*	*16*	*18*	*15*	*21*	*23*	*10*	*16*	*11*	*14*	*15*
	√	√	√	√	√	√	√	√	½	√	√	√	√	√	√	√	√	√
	½	√	√	½	√	√	½	½	√	½	√	√	√	x	√	½	½	√
	√	√	√	½	√	√	½	√	√	√	√	√	√	x	√	√	√	x
	√	√	√	√	√	√	½	½	½	½	½	√	√	x	½	½	½	x
	√	√	√	√	√	√	√	√	√	√	√	x	√	√	√	√	√	√
	√	√	√	√	√	√	√	½	√	√	√	x	√	√	½	½	√	√
	√	√	√	√	√	√	½	½	√	x	½	√	√	x	√	½	½	√
	½	√	√	√	√	√	½	√	√	½	½	√	√	√	½	√	½	√
	√	√	√	√	√	√	√	√	x	√	√	√	√	√	√	√	√	√
	√	√	√	x	√	√	√	√	x	√	½	√	√	x	√	½	√	x
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	½	√	√	√	√	√	½	√	√	√	√	√	√	x	√	√	½	x
	√	√	√	½	½	½	√	√	√	√	√	√	√	√	√	½	√	√
	√	√	√	x	√	√	√	√	√	√	√	√	√	√	√	½	√	√
	√	√	√	½	½	√	√	√	½	√	√	√	√	x	√	√	√	x
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	½	√	√	½	½	½	√	√	½	√	√	√	√	x	√	½	√	x
	x	½	√	½	½	√	√	½	½	x	√	√	√	x	√	√	√	x
	√	√	√	√	√	√	√	x	√	√	x	√	√	x	x	x	x	√
	x	√	√	√	√	√	√	x	√	√	x	√	√	x	x	x	x	√
	x	√	√	x	√	√	√	x	√	√	x	√	√	x	x	x	x	√
	√	√	√	x	√	√	√	x	√	√	x	√	√	x	x	x	x	x
	√	√	√	√	√	√	x											
	√	√	√	√	√	√	√											
	√	√	√	x	√	√	√											
	½	√	√	½	½	√	√											
	√	√	√	√	√	√	x											
	√	√	√	√	√	√	√											
	x	√	√	x	√	√	√											
	x	√	√	x	x	√	√											

Articles 20-23 correspond to Article 1-4 to the additional protocol to the original European Social Charter from 1961.

√ = accepted

½ = accepted in part

x = not accepted

Moreover, considering the fact that fundamental rights play an instrumental role in all facets of life, it is necessary for EU Member States to comply with the full range of international obligations. This includes the nine core United Nations human rights treaties as well as a number of Council of Europe conventions. For instance, in the European Parliament resolution, EU Member States are called upon to sign and ratify a non-exhaustive list of 'core' human rights conventions. Member States commitments to these conventions are outlined in Table 10.3 and Figure 10.5 (Council of Europe) as well as in Table 10.4 and Figure 10.6 (UN).

Regarding the Council of Europe conventions, there has been a moderate level of activity in 2010. For example, three Member States – **Ireland**, **Italy** and **Sweden** – have ratified the Convention Against Trafficking of Human Beings (CATHB), which brings the total number of EU Member States which are state parties to 19. The EU relevance of this convention has been identified by the Parliamentary Assembly of the Council of Europe (PACE), which issued a final declaration on 3 December 2010 stating that "accession by the European Union (EU) to the Convention would ensure that its high standards and human rights approach are uniformly applied throughout Europe".[13]

13 Council of Europe, Parliamentary Assembly (2010).

Table 10.3: Acceptance of selected Council of Europe conventions, by EU Member State and Croatia

Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES
Total accepted	*13*	*11*	*15*	*20*	*14*	*13*	*15*	*14*	*11*	*16*
ECHR (as amended by P14)	√	√	√	√	√	√	√	√	√	√
ECHR P1 (property, education, etc)	√	√	√	√	√	√	√	√	√	√
ECHR P4 (No prison for debt, etc)	√	√	√	√	√	√	√	√	X	√
ECHR P6 (death penalty)	√	√	√	√	√	√	√	√	√	√
ECHR P7 (criminal appeal)	√	S	√	√	√	S	√	√	√	√
ECHR P12 (discrimination)	S	S	X	√	S	S	X	S	S	√
ECHR P13 (death penalty)	√	√	√	√	√	√	√	√	√	√
ESC rev*	S	√	√	√	S	S	S	√	S	S
ESC Protocol Collective Complaints**	S	√	√	√	S	S	S	S	√	S
CPIPPD	√	√	√	√	√	√	√	√	√	√
AP to CPIPPD	√	S	**√**	√	√	√	S	**√**	S	**√**
CCVVC	√	√	X	√	√	√	√	√	√	√
ECPT	√	√	√	√	√	√	√	√	√	√
ECRML	√	X	X	√	√	√	√	X	X	√
FCNM	√	S	√	√	√	√	√	√	S	√
ECECR	S	X	X	√	√	√	X	X	√	S
'Oviedo Convention'	X	X	√	√	√	X	√	√	√	√
Convention on Cybercrime	S	S	√	√	S	√	√	√	S	**√**
AP to Convention on Cybercrime	S	S	X	√	S	S	√	S	S	X
CATHB	√	√	√	√	X	S	√	S	S	√
CSEC	S	S	S	S	X	S	S	X	S	X
CAOD	X	X	X	X	X	X	X	S	X	X

Notes: Greyed-in boxes indicate developments in 2010.

ECHR (as amended by P14)	European Convention on Human Rights (as amended by P14)
ESC (rev)*	European Social Charter (revised)
CPIPPD	Convention for the protection of individuals with regard to automatic processing of personal data
CCVVC	Convention on the Compensation of Victims of Violent Crimes
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECRML	European Charter for Regional or Minority Languages
FCNM	Framework Convention for the Protection of National Minorities
ECECR	European Convention on the Exercise of Children's Rights

Moreover, in 2010 two EU Member States ratified the Convention on Cybercrime – **Portugal** and **Spain** – and three EU Member States – **Netherlands**, **Portugal** and **Romania** – ratified the additional protocol to this convention. This brings the total number of Member States which are state parties to these instruments to 18 and 10, respectively.

As shown in Table 10.3, there have not been any new developments in 2010 with respect to a number of instruments. There were still, for example, 23 ratifications and another three signatures to the Framework Convention for the Protection of National Minorities (FCNM) among the EU Member States, with **France** being the only Member State which has neither signed nor ratified the convention. In relation to the European Charter for Regional or Minority Languages (ECRML) there are 16 ratifications, three additional signatures and eight EU Member States have not even signed this Charter. **Croatia** has ratified both the FCNM and the ECRML.

Finally, in 2010 two EU Member States – **Hungary** and **Sweden** – ratified the Council of Europe Convention on Access to Official Documents, which only opened for signature in 2009.

Table 10.3: (cont'd)

	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	RO	SE	SI	SK	UK	HR
	16	*15*	*16*	*14*	*15*	*15*	*13*	*15*	*12*	*17*	*13*	*17*	*18*	*16*	*19*	*16*	*10*	*20*
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	s	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	s	√	√	√	√	√	√	x	√
	√	x	s	s	s	x	√	s	x	√	x	s	√	x	√	s	x	√
	√	√	√	√	√	√	√	s	√	√	s	√	√	√	√	√	√	√
	√	√	√	√	√	√	s	s	√	√	s	√	√	√	√	√	s	√
	√	√	s	√	√	s	s	s	s	√	s	√	s	√	√	s	s	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	s	√	√	√	s	√	√	√	x	√	√	√	√	√	x	√	s	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	s	√	x	s	x	√	x	s	√	√	x	√	√	√	√	√	√
	√	x	√	√	√	√	s	√	√	√	√	√	√	√	√	√	√	√
	s	s	s	s	√	x	s	√	s	x	√	s	x	s	√	s	x	√
	√	s	√	x	s	√	s	√	x	s	s	√	√	s	√	√	x	√
	√	√	√	s	√	√	s	√	s	√	s	√	√	s	√	√	s	√
	s	√	x	x	x	√	s	√	s	√	s	√	√	s	√	s	x	√
	s	√	s	√	√	s	√	√	√	√	√	√	√	√	√	√	√	√
	s	s	s	s	s	s	x	x	x	s	s	s	s	s	s	x	x	s
	s	x	√	x	x	s	x	x	x	x	x	x	x	√	s	x	x	x

'Oviedo Convention'	Oviedo Convention on Human Rights and Biomedicine
CATHB	Convention 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
*	All European MS are state parties to the original ESC
**	Signature of ESC (rev) automatically includes signature of the Additional Protocol

Source: FRA, 2010

√ = State party

s = signed

x = not signed

Focusing on the United Nations (UN) level, it is evident from the following figures and tables that in 2010 the most significant developments have taken place in relation to the relatively recent Convention on the Rights of Persons with Disabilities (CRPD), which was adopted on 13 December 2006. In 2010, five EU Member States – **Czech Republic, France, Latvia, Lithuania** and **Slovakia** – ratified the convention, which brings the total number of CRPD ratifications by EU Member States to 16. Eleven Member States had previously signed the convention; so, at the end of 2010 all EU Member States are, at least, signatories to the CRPD. Croatia has also ratified the convention. More significantly, the CRPD is the first UN human rights instrument which provides the possibility for regional organisations to accede to the convention. On 23 December 2010, the EU took advantage of that provision and this is to be welcomed as an example of the entrenchment of international human rights law into the new EU fundamental rights architecture.[14]

Furthermore, there have also been some developments with regard to the Optional Protocol to the CRPD which allows for individual complaints. **Greece** has signed the protocol, and **France**, **Latvia**, **Lithuania** and **Slovakia** have also ratified it. This brings the number of EU Member States who have signed, but not yet ratified, the Optional Protocol to nine – 14 Member States have ratified it. **Croatia** had already ratified the Optional Protocol.

It is encouraging that in 2010, two EU Member States have also accepted optional provisions and/or optional protocols to other UN human rights treaties which allow for individual complaints. This is obviously important since it provides individuals whose rights have been violated with a means of redress. In 2010, **Spain** became the first EU Member State to ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). In that year, **Estonia** also accepted an optional provision in the International Convention on the Elimination of Racial Discrimination (ICERD), which allows for individual complaints. This brings the total number of EU Member States to have accepted this provision to 23.

In relation to children's rights, it should not be forgotten that while the Convention on the Rights of the Child (CRC) itself enjoys almost universal ratification (but for two non-EU Member States), the optional protocols have not received as much support. In 2010, **Hungary** and **Cyprus** ratified the Optional Protocol on the involvement of children in armed conflict, which has now been ratified by all 27 EU Member States. In the same year, **Hungary** and **Malta** also ratified the Optional Protocol on the sale of children, child prostitution and child pornography, bringing the total number of EU Member States ratifications to 23. **Croatia** had already ratified both optional protocols.

It has already been acknowledged above, in relation to Council of Europe conventions, that there has been some activity in the area of combating human trafficking. In 2010, **Ireland** ratified the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime.

Lastly, it is regrettable that in the areas of minorities and migrant protection, EU Member States have not been as active at the UN level as they have at the Council of Europe level. This is evidenced by the fact that no EU Member State has either signed or ratified the International Convention on the protection of the rights of all migrant workers and members of their families (ICRMW). Speaking on the anniversary of the ICRMW, the UN Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, called on states which have not ratified the Convention to "seize the opportunity to undertake an important step to ensure the human rights of every person".[15] Furthermore, the International Labour Organisation Convention C169 (on indigenous and tribal peoples) has only been ratified by three EU Member States – **Denmark**, **Netherlands** and **Spain** – while the remaining 24 EU Member States have not signed the convention. **Luxembourg** and the **Netherlands** ratified in 2010 the Optional Protocol to the Convention against Torture (CAT), while **Bulgaria** signed it.

Lastly, it must be noted that formally committing to rights is not enough. It is also necessary for EU Member States to actively participate in the monitoring processes which are provided for by mechanisms under the various conventions. It is also highly important for Member States to make meaningful contributions to the Universal Periodic Review (UPR) of the UN Human Rights Council, as has been outlined in the European Parliament Resolution on the situation of fundamental rights in the European Union.[16] Indeed, the International Court of Justice has recently praised the Human Rights Committee (the International Covenant on Civil and Political Rights (ICCPR) monitoring body) for its contribution to the interpretation of the covenant. According to the Court, "it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty". [17]

Table 10.5 indicates which EU Member State and Croatia were monitored by UN treaty bodies and Council of Europe monitoring bodies, as well as setting out which EU Member State took part in the UN Universal Periodic Review procedure in 2010. It should also be noted that state parties' compliance with the European Social Charter is monitored by the European Committee of Social Rights on an annual basis, whereby the Committee analyses whether states are in compliance with a group of specific articles each year.

14 European Commission (2011).

15 Human Rights Education Association (2010).
16 European Parliament (2009), paragraph 46.
17 International Court of Justice, *Ahmadou Sadou Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, 30 November 2010, paragraph 66.

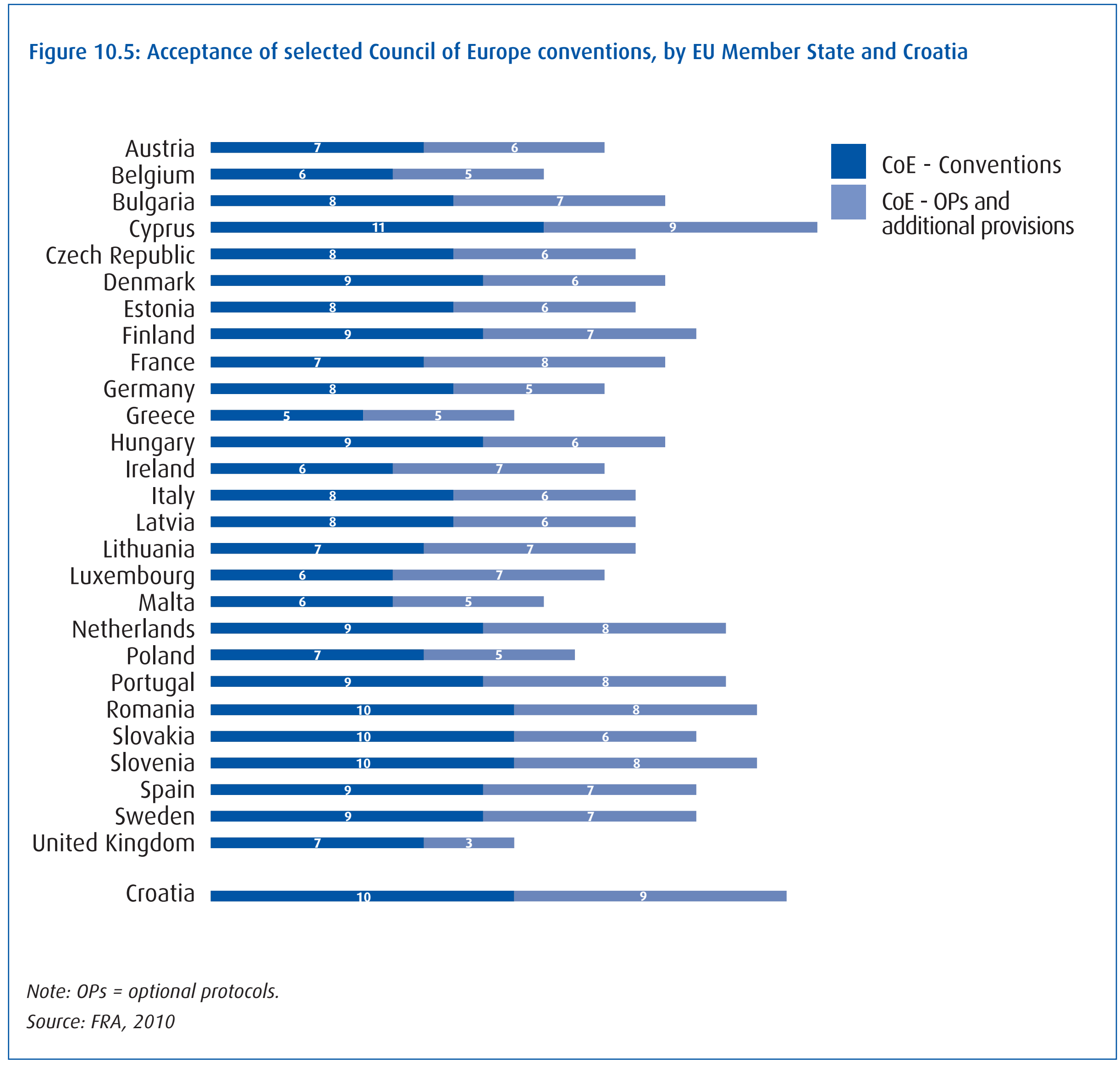


Figure 10.5: Acceptance of selected Council of Europe conventions, by EU Member State and Croatia

Note: OPs = optional protocols.
Source: FRA, 2010

The Committee is also mandated to receive complaints and in 2010 it dealt with four admissibility decisions concerning EU Member States.[18]

In conclusion, it is essential for EU Member States to go beyond ratifications and monitoring in order to put their international legal obligations into practice at national level. For measurement of enjoyment or abuse of fundamental rights in the EU, it is essential to also consider the extent to which people are aware of and can exercise their rights, as well as having the opportunity to seek redress. Court cases only reveal the 'tip of the iceberg' when the number of unreported incidents of fundamental rights abuses are taken into account. Hence, a combination of legislation, monitoring of the situation on the ground, and enforcement is key for guaranteeing the realisation and protection of fundamental rights in the EU.

18 Council of Europe, European Committee of Social Rights, Decisions on Admissibility: *European Roma Rights Centre (ERRC) v. Portugal*, 17 September 2010; *European Council of Police Trade Unions (CESP) v. Portugal*, 22 June 2010; *European Trade Union Confederation (ETUC) v. Belgium*, 8 December 2009; *Centre on Housing Rights and Evictions (COHRE) v. Italy*, 8 December 2009.

Table 10.4: Acceptance of selected United Nations' conventions, by EU Member State and Croatia

Country	AT	BE	BG	CY	CZ	DE	DK	EE	EL	ES
Total accepted	*23*	*23*	*21*	*21*	*19*	*25*	*24*	*18*	*16*	*27*
ICERD	√	√	√	√	√	√	√	√	√	√
ICERD - Individual complaints (Art. 14)	√	√	√	√	√	√	√	**√**	x	√
ICCPR	√	√	√	√	√	√	√	√	√	√
ICCPR - State complaints (Art. 41)	√	√	√	x	√	√	√	x	x	√
ICCPR - OP1 (individual complaints)	√	√	√	√	√	√	√	√	√	√
ICCPR - OP2 (death penalty)	√	√	√	√	√	√	√	√	√	√
ICESCR	√	√	√	√	√	√	√	√	√	√
ICESCR - OP	x	s	x	x	x	x	x	x	x	**√**
CEDAW	√	√	√	√	√	√	√	√	√	√
CEDAW - OP	√	√	√	√	√	√	√	x	√	√
CEDAW - Inquiry procedure (Art. 8)	√	√	√	√	√	√	√	x	√	√
CAT	√	√	√	√	√	√	√	√	√	√
CAT - OP	s	s	**s**	√	√	√	√	√	x	√
CAT - State complaints (Art. 21)	√	√	√	√	√	√	√	√	√	√
CAT - Individual complaints (Art. 22)	√	√	√	√	√	√	√	√	√	√
CAT - Inquiry procedure (Art. 20)	√	√	√	√	√	√	√	√	√	√
CRC	√	√	√	√	√	√	√	√	√	√
CRC - OP1 (armed conflict)	√	√	√	**√**	√	√	√	s	√	√
CRC - OP2 (prostitution)	√	√	√	√	s	√	√	√	√	√
ICRMW	x	x	x	x	x	x	x	x	x	x
CRSR	√	√	√	√	√	√	√	√	√	√
CTOC	√	√	√	√	s	√	√	√	s	√
Protocol to CTOC (smuggling of migrants)	√	√	√	√	s	√	√	√	s	√
Protocol to CTOC (trafficking)	√	√	√	√	s	√	√	√	s	√
ICPED	s	s	s	s	x	√	s	x	s	√
CRPD	√	√	s	s	**√**	√	√	s	s	√
CRPD - OP (individual complaints)	√	√	s	s	s	√	x	x	**s**	√
ILO C169	x	x	x	x	x	x	√	x	x	√

Notes: Greyed-in boxes indicate developments in 2010.

Full names of United Nations conventions:

ICERD - International Convention on the Elimination of Racial Discrimination

ICCPR - International Covenant on Civil and Political Rights

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 - OP1 - Optional Protocol to the CRC on the involvement of children in armed conflict

CRC - OP2 - Optional Protocol to the CRC on the sale of children, child prostitution and child pornography

ICRMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

Table 10.4: (cont'd)

	FI	FR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	SE	RO	SI	SK	UK	HR
	20	24	23	19	23	21	20	18	20	23	20	22	24	21	24	23	22	23
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	x	√	x	√	√	√	√	√	√	√	√	x	x
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	x	√	√	√	x	√	x	√	√	√	x	√	x	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	x	√
	√	√	√	√	√	√	√	x	√	√	s	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	s	x	x	x	s	x	s	x	x	s	x	s	x	x	s	s	x	x
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	x	x	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	x	x	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	s	√	x	s	s	x	√	x	√	√	√	s	√	√	√	x	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	x	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	s	√	√	s	√	√	s	√	√	√	√	√	√	√	√	√	√	√
	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x	x
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	s	√	√	s	√	√	√	√	√	√	√	√	√	√	√
	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√	√
	s	√	x	s	s	s	s	x	s	s	x	s	s	s	s	s	x	s
	s	√	√	s	√	√	s	√	s	s	s	√	√	s	√	√	√	√
	s	√	√	x	√	√	s	√	s	x	x	√	√	s	√	√	√	√
	x	x	x	x	x	x	x	x	x	√	x	x	x	x	x	x	x	x

CRSR - Convention relating to the Status of Refugees

CTOC - Convention on Transnational Organised Crime

ICPED - International Convention for the Protection of All Persons from Enforced Disappearance

CRPD - Convention on the Rights of Persons with Disabilities

CRPD - OP - Optional Protocol to the CRPD

ILO C169 - International Labour Organization Convention No. 169 on Indigenous and Tribal Peoples

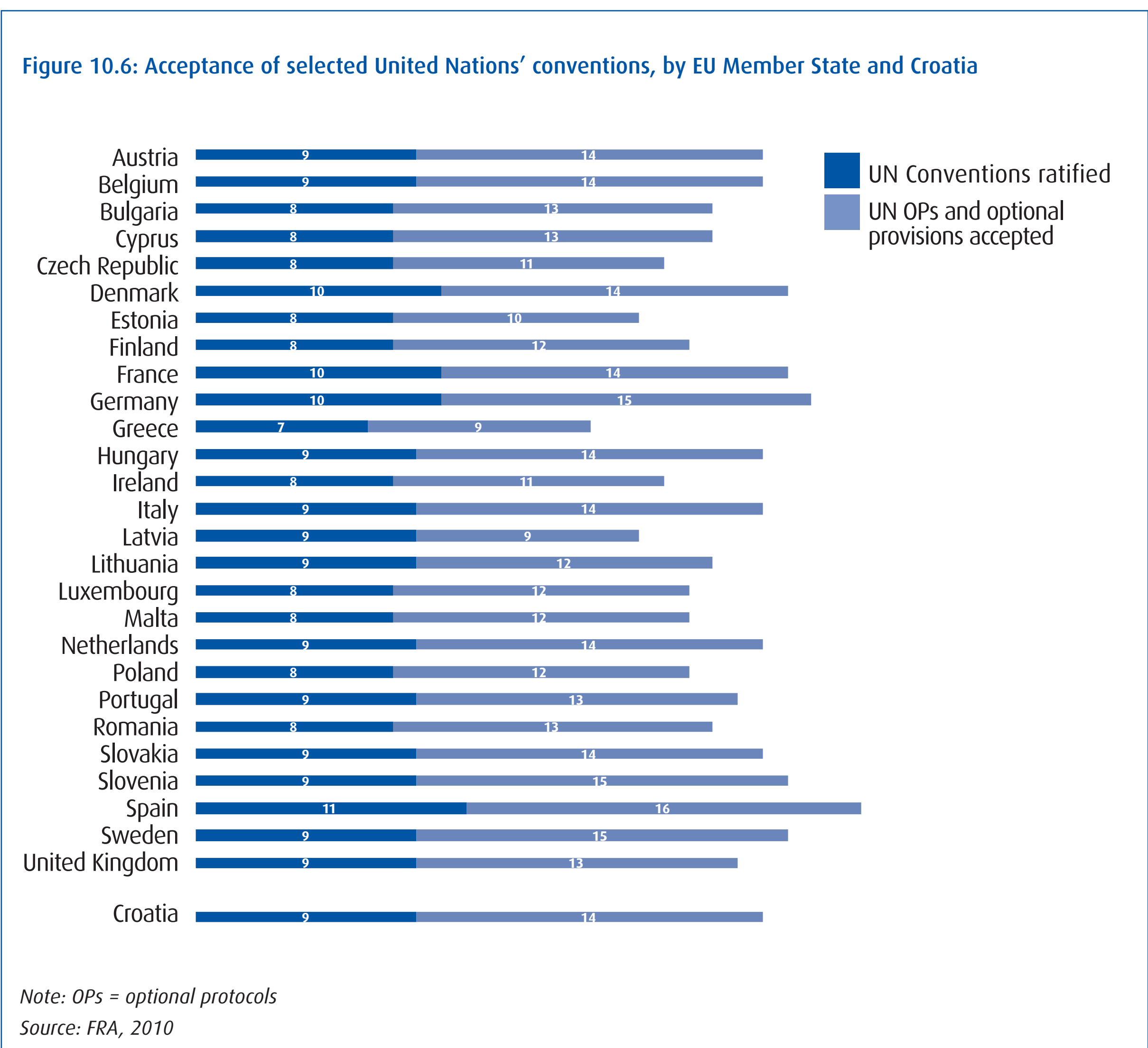
√ = State party / accepted provisions

s = signed

x = not signed

Source: FRA, 2010

Figure 10.6: Acceptance of selected United Nations' conventions, by EU Member State and Croatia



Note: OPs = optional protocols

Source: FRA, 2010

Table 10.5: Reports adopted in 2010 by the monitoring bodies established under the UN and Council of Europe conventions, by EU Member States and Croatia

Countries	CERD	HRC	CESCR	CEDAW	CAT	CRC	CRC-OP-SC	UPR	ECPT	ECRML	FCNM	ECRI	Total
AT					√				√			√	3
BE		√				√	√		√				4
BG								√	√		√		3
CY											√		1
CZ				√					√				2
DE											√		1
DK	√									√			2
EE	√	√					√						3
EL													0
ES						√		√					2
FI											√		1
FR	√				√							√	3
HU		√							√		√		3
IE													0
IT								√	√		√		3
LT													0
LU									√	√			2
LV													0
MT				√									1
NL	√		√	√									3
PL		√										√	2
PT													0
RO	√								√				2
SE								√					1
SI	√							√					2
SK	√								√		√		3
UK												√	1
HR								√		√	√		3
Total	7	4	1	3	2	2	2	6	9	3	8	4	51

√ = Monitoring report adopted

Notes:

CERD	*Committee on the Elimination of All Forms of Racial Discrimination*
HRC	*Human Rights Committee (Monitoring body of 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)*
UPR	*Universal Periodic Review*
ECPT	*European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*
ECRML	*Committee of Experts on Regional and Minority Languages*
FCNM	*Advisory Committee on National Minorities*
ECRI	*European Commission against Racism and Intolerance*

Source: FRA, 2010 (own calculations), based on information available at www.tb.ohchr.org/default.aspx and www.coe.int/t/dghl/overview_monitoring_en.asp

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HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

FRA

Fundamental rights: challenges and achievements in 2010

2010 marked the first year the European Union (EU) operated on the basis of a legally binding bill of rights – the Charter of Fundamental Rights of the EU. This year's annual report of the European Union Agency for Fundamental Rights puts the spotlight on the achievements and challenges of the EU and its Member States as they strive to inject robust life into their fundamental rights commitments. Steps forward in 2010 included, among many, the reinforcement of a fundamental rights check of EU legislative proposals and the adoption of the regulation on the Citizens' Initiative – an important new EU participatory democracy tool. Moves by several Member States to strengthen or create National Human Rights Institutions or the ratification of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) by the EU complemented this picture.

Still, there is no room for complacency. The EU continues to face various issues of concern in the fundamental rights field, such as persisting and extreme poverty as well as social exclusion among Roma communities and deteriorating conditions of asylum seekers in certain Member States. In 2010, the European Court of Human Rights delivered over 600 judgments for violations of human rights against almost all 27 EU Member States.

This report examines progress on EU and Member State rights obligations under the Charter of Fundamental Rights of the EU, covering the following topics: situation of Roma in the EU; 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 victims' protection.

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