



# Fundamental Rights Report 2018



**FRA**

EUROPEAN UNION AGENCY  
FOR FUNDAMENTAL RIGHTS



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# Fundamental Rights Report 2018



# Foreword

We are not getting any younger! It is a simple truth we must face both about ourselves and Europe as a whole. In two generations, by 2080, those aged 65 or above will account for almost 30 % of the European Union's population.

Traditionally, we tend to see this development in terms of its considerable economic and societal implications, and focus on the resources required to address them. This can encourage an ugly rhetoric that belittles older people's myriad contributions – as carers in the family, mentors and volunteers, for example – and instead emphasises their supposed 'deficits' and needs.

But a shift is gradually taking place. While the EU Charter of Fundamental Rights has long affirmed older people's right to live in dignity and participate in social and cultural life, diverse initiatives introduced during the past decade have helped increase awareness of both their rights and their potential.

This year's focus chapter, 'Shifting perceptions: towards a rights-based approach to ageing', discusses how this new approach to ageing is gradually taking hold. Anchored in the recognition that equal treatment is a right regardless of age, it does not ignore the reality of age-specific needs, but refuses to let these define a vital part of Europe's population.

The signing of the European Pillar of Social Rights has the potential to add momentum to this shift. The Pillar's 20 principles and rights mark an encouraging step forward. But while legal and policy texts provide crucial bases for action, tangible improvements on the ground can take long to materialise. As our continuing analysis of the use of the EU Charter of Fundamental Rights underscores, such texts must be proactively promoted if they are to fulfil their potential.

In addition to these issues, the *Fundamental Rights Report 2018* explores the main developments of 2017 in eight specific areas: equality and non-discrimination; racism, xenophobia and related intolerance; Roma integration; asylum, borders and migration; information society, privacy and data protection; rights of the child; access to justice, including rights of crime victims; and implementation of the Convention on the Rights of Persons with Disabilities.

The report also presents FRA's opinions. These outline evidence-based, timely and practical advice on possible policy responses for consideration by the main actors within the EU.

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

**Sirpa Rautio**  
*Chairperson of the FRA Management Board*

**Michael O'Flaherty**  
*Director*

A fully annotated version of this report, including the references in endnotes, is available for download at: <http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018>.

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

#### **EQUALITY**

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

#### **FREEDOMS**

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

#### **JUSTICE**

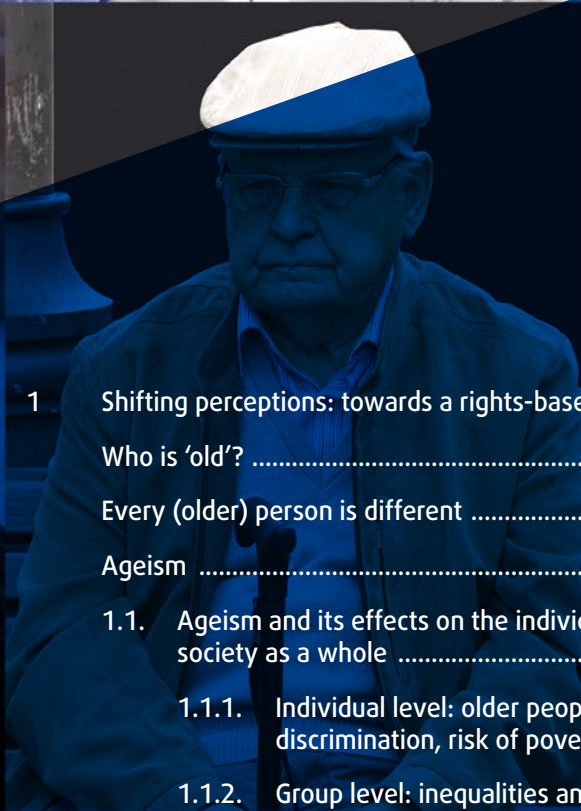
- ▶ Access to justice including rights of crime victims

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# 1

## Shifting perceptions: towards a rights-based approach to ageing



*This chapter explores the slow but inexorable shift from thinking about old age in terms of ‘deficits’ that create ‘needs’ to a more comprehensive one encompassing a ‘rights-based’ approach towards ageing. This gradually evolving paradigm shift strives to respect the fundamental right to equal treatment of all individuals, regardless of age – without neglecting protecting and providing support to those who need it. A human rights approach does not contradict the reality of age-specific needs; on the contrary, a rights-based approach enables one to better meet needs, as required, while framing them in a human rights-based narrative.*

All individuals have an inherent right to human dignity, which is inviolable and must be protected and respected. Fundamental rights, whether civil and political or social and economic, as enshrined in the Charter of Fundamental Rights of the European Union, and all other international human rights instruments, do not carry an expiry date. Rights do not change as we grow old, and their full respect on equal terms is an essential precondition for living a dignified life, defined by choice and control, autonomy and participation, whatever one’s age.

In modern societies, however, ‘old’ age has come to bear negative connotations and ‘old people’ are often thought of as a burden, especially those who need the support of social protection systems. Ageing appears more in public discourse in connection to a progressive loss of physical and mental capabilities than to positive aspects, such as the accumulation of experience. This understanding of ageing is confirmed by policy responses focusing primarily on the physical or mental ‘deficits’ individuals accumulate as they age and on how their ‘needs’ should be met by state and society, neglecting older people’s contribution to society.

In addition to broader negative attitudes towards ageing affecting day-to-day experiences of older people, there is evidence of discriminatory practices, to which older people might be more exposed. These range from discrimination when looking for a job to structurally embedded ageist practices. The latter include discriminatory age limits in accessing goods and services, as well as low policy attention to

issues such as exposure to poverty and the increased risk of violence and abuse for those in care. The 2015 Eurobarometer survey on discrimination shows that discrimination or harassment because of old age is the most frequently mentioned type of discrimination: 42 % of Europeans perceive discrimination due to old age (being over 55 years old) as “very” or “fairly” widespread in their country.

Moreover, aspects such as gender, health condition, income and financial means to support an independent living, the broader socio-economic environment or a person’s place of residence (e.g. urban or rural), as well as his or her self-perception, may increase or decrease the risk of fundamental rights violations. As such, focusing on a single ground of discrimination – age – fails to capture the various forms in which unequal treatment and exclusion can manifest themselves. Older women, older migrants, older people with disabilities and older people living in poverty face compound and aggravated challenges and a higher risk of experiencing human rights violations.

*“[A]lthough the Universal Declaration on Human Rights proclaims that all human beings are born free and equal, it is evident that the enjoyment of all human rights diminishes with age, owing to the negative notion that older persons are somehow less productive, less valuable to society and a burden to the economy and to younger generations.”*

*Report from the Eighth working session of the UN Open-ended Working Group on Ageing, 28 July 2017*

Ageist and deficit-based approaches and perceptions also affect how older people are treated as a social group. Stereotypes of ageing and old age lead to ageist rhetoric. This portrays older people as a 'silver tsunami' curtailing economic growth and being a 'burden' to society. Older people are characterised as unproductive, frail and incapable, especially in the context of an ageing society facing challenges regarding its demographic future and the sustainability of its pensions and social protection systems.

At a societal level, such ageist perceptions can reinforce exclusion, discrimination and marginalisation and affect intergenerational solidarity by pitting younger people against older people.

Such one-sided views fail to recognise the valuable contributions older people make to their families, communities and wider society in many ways. Many older people are unpaid, informal carers of grandchildren and family members, participate in volunteer activities in their communities and act as mentors.

Building on selected illustrative data, this chapter addresses the effects of ageism by adopting a multilevelled approach which focuses on, respectively, the individual, older people as a social group and the society as a whole. It sheds light on distinct challenges older people face and examines their experiences, taking into account other characteristics, such as gender, immigrant or minority status, disability or living in rural areas. Second, this chapter briefly reflects on legal and policy developments in the EU by examining how selected legal and policy instruments affect the rights and experiences of older people. Noting the move towards a human rights-based approach to ageing in the EU, the section identifies opportunities to strengthen that shift. Set against developments on the international and broader European level, the chapter calls for further development and implementation of a comprehensive human rights-based approach to ageing, to ensure that life in old age is defined just as much by choice, control and autonomy as in other stages of life.

## Who is 'old'?

Referring to 'old people' and to 'ageism', one should consider how society views the concept of being 'old' and how it treats 'older people'. This is not only related to a person's 'chronological age' (for example, being over 55, 60, 65 or 70 years) and the biological process of getting older. Being 'old' and treated as an 'old person' is also a social construction linked to social realities and perceptions about age that change over time and differ across societies within Europe and globally.

Individuals also have different perceptions of what age means depending on where they are on the age

continuum, as they experience throughout their life cycle what it means to be 'young', 'middle-aged' or 'old'.<sup>1</sup> Moreover, defining an age group under a common denominator 'older people' is not possible, and varies depending on the policy field. For example, an older adult may find it harder to get a job as early as at 50 years. Access to the old age benefits of social security systems is tied with pensionable age – commonly around 65 years in the EU. Very old age is often associated with the use of long-term care, commonly concentrated in the last years of a person's life – late 70s with the average life expectancy in the 28 EU Member States (EU-28) at 80.6 years.<sup>2</sup>

Age and ageing are usually discussed and addressed from four distinct but intersecting perspectives:

- chronological age, based on the date of birth;
- biological age, linked to physical changes;
- psychological age, referring to mental and personality changes during the life cycle;
- social age, which defines the change of an individual's roles and relationships as they age.<sup>3</sup>

These four aspects of ageing can develop at different speeds and affect individual experiences as well as social reaction differently, influenced also by the social, historical and cultural environment. This affects not only how society views older people, but also how older people perceive themselves.<sup>4</sup>

## Every (older) person is different

We all experience ageing in a different, individual, way. Understanding and addressing older people as a social group – defined by chronological age – leads to generalised views. Experiences in old age are not determined by simply reaching a certain age or only by individual characteristics, such as health condition, but are largely determined by various structural, social and cultural contexts throughout an individual's life-course. Individuals have diverse life experiences which accumulate over a life-time and determine old age outcomes – both in terms of opportunities as well as challenges. If people have not enjoyed equal rights and opportunities in earlier stages of life, these disadvantages will accumulate and also affect the enjoyment of rights in later stages of life.<sup>5</sup>

However, societal perceptions and policy responses are often based on a conception of older people as a homogenous 'group' with common needs and experiences. This has led to polarised and distorted views of older people, affecting their human rights. One



## Younger generations face greater risks of inequality in old age

A report by the Organisation for Economic Co-operation and Development (OECD) stresses that rising inequality will hit young generations hard and calls for preventing inequality throughout the life course which cumulates over time and materialises in old age.

The report highlights that demographic changes combined with entrenched inequalities lead to changing balances in society, and that a risk of increasing inequality among future retirees is building up in many countries. For now, current generations of retirees experience higher incomes and a lower risk of poverty than other age groups. However, inequalities in education, health, employment and earnings will dramatically change how younger generations will experience old age.

For more information, see OECD (2017), *Preventing ageing unequally*.

view sees older people as 'dependent and vulnerable', associating old age with a withdrawal from economic activity and increased illness and disability. This view influences policy approaches aimed at compensating deficits and meeting needs. The other view sees older people as active contributors to economic and social life. This view calls for policies that focus on active ageing and increasing opportunities for participation. Such polarised views, "portraying later life as common experience", fail to capture the distinct experiences of individuals with different life courses, incomes or genders, which affect their later life.<sup>6</sup>

## Ageism

### What is ageism?

Ageism is the stereotyping of, prejudice or discrimination against individuals or groups based on their age. Although ageism can target young people, most studies in this area focus on the unfair treatment of older people.

Ageism is deeply structural, "find[ing] expression in institutional systems, individual attitudes and inter-generational relationships."<sup>\*</sup> All manifestations of ageism – at the individual, group or societal level – gravely undermine older people's right to human dignity and reduce their potential to contribute actively to society.

For a definition of ageism, see World Health Organisation (WHO) (2016), *Valuing older people: time for a global campaign to combat ageism*; read more at: Swift, H. J., Abrams, D., Lamont, R. A., Drury, L. (2017), 'The risks of ageism model: how ageism and negative attitudes toward age can be a barrier to active ageing', *Social Issues and Policy Review*, 13 January 2017; Trusínová, R. (2013), 'No two ageism are the same: testing measurement invariance in ageism experience across Europe', *International Journal of Social Research Methodology*, 17 (6), pp. 659-675.

<sup>\*</sup> Equinet Secretariat (2011), *Tackling ageism and discrimination*, p. 7, Brussels; see also: Levy, S. R., Macdonald, J. L. (2016), 'Progress on Understanding Ageism', p. 14, *Journal of Social Issues*, 72 (1), pp. 5-25.

Ageism, commonly defined as a negative social construct of a particular age group, can affect people at any life stage. 'Old' age, however, bears a particular negative connotation and 'old people' are often viewed as carrying no value to society. In contrast with other forms of discrimination, such as racism or sexism, it often tends to be 'normalised', with age stereotypes accepted and going unchallenged.<sup>7</sup> It is not uncommon that age in itself is a valid justification for differential treatment, setting age limits, or excluding people from treatments or services – all undermining older people's right "to lead a life of dignity and independence and to participate in social and cultural life", as enshrined in Article 25 of the EU Charter of Fundamental Rights.

### 1.1. Ageism and its effects on the individual, the group and society as a whole

*"Older persons have exactly the same rights as everyone else, but when it comes to the implementation of these rights, they face a number of specific challenges. For example, they often face age discrimination, particular forms of social exclusion, economic marginalisation due to inadequate pensions, or are more vulnerable to exploitation and abuse, including from family members."*

Nils Muiznieks, former Commissioner for Human Rights, *Human rights comment*, Strasbourg, Council of Europe, 18 January 2018

Demographic changes in Europe and other highly developed countries have placed the growing number of older people at the centre of public debate on the allocation of social and public resources. The increasing number of older persons has also prompted an evolving discussion around better protection of individuals' fundamental rights in older age. While the universality of rights is one of the basic principles of the human rights framework, and rights do not change or diminish as we grow older, evidence points to a number of barriers older people face in the exercise of their fundamental rights.

### Population ageing in the 28 EU Member States

The EU population's age structure will continue to change due to increasing life expectancy accompanied by decreasing or stable fertility rates. This change is also quickened by people born during the 'baby boom' years (1950-1960) now reaching retirement age.

By 2080, Eurostat projects that those aged 65 years or over will account for 29.1 % of the EU-28 population, compared with 19.2 % in 2016. This will result in a sharp increase of the old-age dependency ratio, from 29.3 % in 2016 to 52.3 % by 2080.<sup>\*</sup>

This puts a heavier burden on a diminishing population of workers to provide for the social expenditure required for a range of public services.\*\* In 2016, more than three persons of working age (15 to 64 years) were supporting one older person. In 2080, this will drop to fewer than two persons. This can spur ageist rhetoric, undermining intergenerational solidarity.

\* Old-age dependency ratio is the ratio between people aged 65 or above (typically in retirement) relative to those typically in the labour force (aged 15-64). The value is expressed per 100 persons of working age (15-64). For more information, see Eurostat, *Population structure and ageing*.

\*\* Eurofound (2017), *Working conditions of workers of different ages*, Research Report, Luxembourg, Publications Office of the European Union.

This section explores distinctive barriers and situations which could result in violating older people’s fundamental rights and undermine their ability to contribute and participate in society on an equal footing. It aims to highlight how stereotypes, prejudice and discrimination on the ground of age may affect:

- each individual rights holder, albeit differently depending on an individual’s life course, social status, gender and other characteristics (Section 1.1.1.);
- older people as a social group who could experience increased barriers and be exposed to more vulnerable situations (Section 1.1.2.);
- eventually, society as a whole (Section 1.1.3.).

Figure 1.1: Effects of ageism



Source: FRA, 2018

### 1.1.1. Individual level: older people’s experiences of discrimination, risk of poverty and violence

*“Ageism remains a form of abuse that is largely ignored by society although it is a very common phenomenon [...]. The worst is that many people are not even aware of their ageist attitudes as they have subconsciously internalized stereotypes about older persons.”*

*Rosa Kornfeld-Matte, Independent Expert on the enjoyment of all human rights by older persons, ‘Ageism should not be downplayed: it is an infringement of older person’s human rights’, Press release, 1 October 2016*

Enabling older people’s equal participation in society requires fighting discrimination and the differential treatment of individuals because of their old age. This involves countering often structurally and societally accepted practices. This section provides data illustrating some distinct barriers older people face, addressing discrimination in employment, access to healthcare, poverty, and the risk of abuse and violence against older people in need of support. These areas are not exhaustive. Age-related barriers may also limit older people’s participation in other aspects of life, ranging from renting a car or accessing bank credit, to being a member of a jury service or an association. However, in light of the limited scope of this chapter

and a lack of statistical data, it is not possible to provide an overview of all challenges that affect and undermine older peoples’ right to dignity, autonomy, independence and participation.

### Employment

#### Eurobarometer: Discrimination against older people perceived to be widespread

The 2015 Eurobarometer survey on discrimination finds that 42 % of the respondents in the EU-28 perceived discrimination due to old age (being over 55 years old) as “very” or “fairly” widespread in their country. This perception varies widely among Member States, ranging from 22 % in **Denmark** to close to 60 % in **Bulgaria**, the **Czech Republic**, **Hungary** and **Romania**. With 5 % of all respondents reporting to have personally felt discriminated against or harassed because of old age, this becomes the most frequently mentioned type of discrimination.

*See European Commission (2015), *Discrimination in the EU in 2015*, Special Eurobarometer 437, pp. 16, 70, 71, Brussels.*

The Eurobarometer survey shows that 56 % of the respondents consider being over 55 years to be a disadvantage when looking for work, while 16 % consider this to be the case for those under the age

of 30.<sup>8</sup> Older people also face negative stereotyping and ageist attitudes at work.<sup>9</sup> While 80 % of Eurobarometer survey respondents reported being comfortable working with someone over 60 years,<sup>10</sup> the European Working Conditions Survey shows that 7 % of employees aged 50 or above experienced age discrimination in the 12 months before the survey.<sup>11</sup>

The European Commission's 2018 Ageing Report projects an increase in labour force participation by older workers due to implemented pension reforms.<sup>12</sup> While some may wish to work longer, others might be burdened by increases in the pension age or the financial need to continue working. These preferences and experiences are strictly individual and depend on the individual life course and working conditions. Therefore, optimising opportunities for, and combating discrimination against, older people who can and wish to remain in work for longer should be complemented with sufficient instruments addressing the support needs of older people.

### Access to healthcare

The concept of 'active ageing' was introduced by the World Health Organisation (WHO), and is widely used to frame current policy discourse at the international and EU levels. It refers to a "process of optimizing opportunities for health, participation and security [...] allow[ing] people to realize their potential for physical, social, and mental well-being throughout the life course and to participate in society, while providing them with adequate protection, security and care when they need".<sup>13</sup>

Therefore, measures to safeguard older persons' independence and dignity – also ensuring active ageing – include addressing discriminatory practices and barriers in accessing health and care services. Growing old is associated with an increased risk of health deterioration and limitation in daily activities, making it necessary to call upon different types of health and support services. In 2016, one third of persons (35 %) aged 50 to 64 in the EU indicated that they have at least one chronic physical or mental health problem or disability, compared to 49 % of those aged 65 or over.<sup>14</sup> There are significant differences between Member States. For example, 73 % of persons aged 65 or over in **Estonia** declared that they have a chronic physical or mental health problem or disability, compared to 31 % in Ireland.<sup>15</sup>

There are different reasons for difficulties in accessing health services. For instance, in 2016, one out of four persons (26 %) aged 65 or over in the EU reported having at least some difficulties reaching a doctor's office because of the distance. Additionally, one out of five (20 %) had difficulties accessing health care because of the costs related to the medical visit.<sup>16</sup> Furthermore, across the EU, one third of persons

(36 %) aged 65 or over had at least some difficulties accessing long-term care due to the related costs. The figures are diverse and show great disparities across the EU Member States. While 60 % of older persons in **Greece** reported great difficulties in accessing long-term care because of the costs, in **Denmark**, the **Netherlands** and **Sweden**, 90 % of persons aged 65 or above declared no cost-related difficulties.<sup>17</sup> Distance and costs are not the only barriers. Although statistical data are limited, evidence suggests that old age can limit access to surgical treatment or rehabilitation services. This can be because of age screening, prejudicial attitudes towards older patients, or limited access to health insurance due to age limits or prohibitively higher premiums.<sup>18</sup>

### Risk of poverty

The EU average risk of poverty for those 65 or older is lower than that for the total population – 14.6 % and 17.3 %, respectively. However, the situation varies significantly across countries. In **Latvia** and **Estonia**, for example, the proportion of people aged 65 and above at risk of poverty is 16 to 19 percentage points higher than that for the population as a whole. In contrast, in **Spain** and **Greece**, the proportion of older persons at risk of poverty is around nine percentage points lower than that of the total population.<sup>19</sup> These variations reflect differences in the pension and social protection systems in the Member States and in the kind and extent of support provided by families and the state. In most EU Member States, the majority of older people are at least in general at lower risk of poverty and are better off than the general population. However, evidence suggests that this will not be the case for future generations.

### Violence, abuse and neglect

The manner in which support is provided can put older people in need of support in situations of vulnerability to inhuman or degrading treatment, violence, abuse and neglect. In 2011, the WHO estimated that, in the European region, every year "at least 4 million people aged 60 years and older experience elder maltreatment in the form of physical abuse, 1 million sexual abuse, 6 million financial abuse and 29 million mental abuse."<sup>20</sup> Violence and abuse may also result from neglect and failure to provide care to persons in need; it can be both physical and psychological. Such abuse can be a single occurrence or repeated and can target an individual or be part of institutional practices.<sup>21</sup> WHO evidence shows that women were slightly less likely than men to be victims of physical abuse (2.6 % versus 2.8 %), psychological abuse (18.9 % versus 20.0 %), and financial abuse (3.7 % versus 4.1 %), but more women than men were victims of sexual abuse (1.0 % versus 0.3 %) and suffered injuries (0.9 % versus 0.4 %).<sup>22</sup>

The settings vary. Violence and abuse can take place in the home, by family members, friends or professional care workers; or in institutional settings by professional staff. A recent study by the European Network of National Human Rights Institutions (ENNHRI) found that “although there were no clear signs of torture or deliberate abuse or ill treatment, several practices witnessed in all six countries [covered in the study] raised concerns, particularly in upholding dignity, the right to privacy, autonomy, participation, and access to justice”. This points to a need for a human rights-based approach in all aspects of service planning, policy and practice.<sup>23</sup>

### 1.1.2. Group level: inequalities and intersectional discrimination affecting specific groups

Little research, and none across all EU Member States, addresses the complex aspects of multiple and intersectional discrimination affecting older persons depending on their gender, disability, sexual orientation<sup>24</sup> or minority and migrant status. Older people are a widely heterogeneous group with quite diverse needs, possibilities and preferences. Understanding intersecting forms of discrimination and how they affect older people is therefore key to crafting effective policies across a range of issues to safeguard the dignity of all older people. The following examples serve as an illustration of some challenges some groups face, undermining their fundamental rights.

#### Older women

Gender creates particular inequalities and discrimination in old age, as life-course inequalities accumulate and inevitably undermine the full enjoyment of rights. In 2015, the EU average gender pension gap – the average difference between a man’s and a woman’s pension – was 37.6 % for those 65 and over.<sup>25</sup> In contrast, the 2015 gender pay gap was 16.3 %.<sup>26</sup> While there are variations across Member States, women receive lower pensions in all countries.<sup>27</sup> Reasons for these differences include the principles on which pension benefits are calculated; these “generally privilege men, as women’s life course often involve periods of unpaid care work and an average of five years shorter working lives than men”.<sup>28</sup>

At birth, life expectancy differs according to gender, and women generally outlive men. In the EU-28, life expectancy was estimated at 83.3 years for women and 77.9 years for men in 2015.<sup>29</sup> In 2015, Eurostat data show life expectancy at age 65 to be estimated at 21.2 years for women and 17.9 years for men.

Therefore, the proportion of older women among older people increases with age.

#### Older people with immigrant or ethnic minority background

Older people with migrant backgrounds are not a homogenous group, and their experiences and needs in older age may differ. However, evidence points that life trajectories of migrants are affected by “lower income, poorer working and housing conditions, including their concentration in low-income neighbourhoods”.<sup>30</sup> Such situations might place them at a disadvantage compared to those without migrant backgrounds. This results in social exclusion and worse socio-economic and health status.

As an illustration, FRA’s second European Union Minorities and Discrimination Survey (EU-MIDIS II)<sup>31</sup> collected information on the socio-economic conditions of 34,000 Roma household members in nine EU Member States. The results show that, when compared to the general population, “on average only 16 % of Roma aged between 55 and 64 years are in paid work, compared with, on average, 53 % of the same age group in the EU-28. Only in **Portugal** (46 %) and **Greece** (39 %) are the paid work rates for Roma older than 55 close to employment rates in the general population, but for all groups the rates are far below the Europe 2020 target of 75 % in employment”.<sup>32</sup> These results suggest that being part of an ethnic minority increases the difficulties older people face in the area of employment.



#### Older people with disabilities

In the EU-28, an estimated 49 % of people aged 65 years and over reported long-standing limitations in usual activities due to health conditions in 2016. The results also show that more women than men experience long-standing limitations (51.5 % versus 44.4 %), which is likely because the proportion of older women among older people increases as age increases.<sup>33</sup> This number can be seen as a proxy for older people in need of some sort of support.

While old age *per se* does not mean disability and not all old people have an impairment, the probability of developing a disability or requiring support increases with age. As older people make up an increasing proportion of the EU’s population, the number of people who might face cumulative challenges both because of their age and disability, and at the intersection of the two, also rises.



## Convention on the Rights of Persons with Disabilities

The Convention on the Rights of Persons with Disabilities (CRPD), to which the EU acceded in 2010 and which is ratified by all 28 EU Member States, applies to all people with disabilities. While not all old people have a disability, developing an impairment with age is more likely. The convention does not provide any special rights to people with disabilities, young or old, nor does it single out older people for special protection.

However, it does reiterate the principle of universality of human rights and sets out some key concepts that are especially tailored. The CRPD sets out the right to dignity, autonomy and non-discrimination, full participation and equal recognition before the law. Beyond this, its conceptual frame puts the individual at the center, focusing on self-determination, autonomy and choice and control over one's life.

*For more on the CRPD and developments across the EU in 2017, see Chapter 10.*

Regardless of whether people age with existing disabilities or they develop disabilities in old age, all older people in the EU should have equal access to quality health care or long-term care support. However, evidence points to a number of barriers contributing to inequalities. These include age requirements for access to support services that enable older people to live independently and unmet care needs across the EU.

*"All too often double standards apply in law and practice, excluding older people from some benefits, applying different eligibility criteria or giving less support when disability occurs in old age. Moreover, when ageism interferes with disability assessments, older people are not offered the same level, quality or ranges of support as younger people with disabilities."*

*AGE Platform Europe submission to Draft General Comment in Article 5, CRPD, 30 June 2017*

The World Health Organisation (WHO) estimates that roughly 5 % of the world population are affected by dementia. Increased longevity contributes to its growing prevalence. Dementia is "an umbrella term for several diseases that are mostly progressive, affecting memory, other cognitive abilities and behaviour, and that interfere significantly with a person's ability to maintain the activities of daily living. Women are more often affected than men"<sup>34</sup> Especially in its later stages, dementia is a major cause of disability and dependency, gravely affecting a person's memory and cognitive abilities. This means that older people with dementia need the necessary support to avoid the risk of having their legal capacity (their ability to autonomously hold and exercise their rights before the law) restricted.

The capacity to make one's own decisions is a precondition to individual autonomy. Depriving an individual of legal capacity – be it partially, regarding certain decisions, or fully restricting their right to make any legally binding decisions – results in a clear denial of legal personality to people under guardianship. Equality before the law is one of the key provisions provided for in Article 12 of the CRPD, affirming people with disabilities', including older people with disabilities', right to exercise their legal capacity by providing necessary support.<sup>35</sup>

## Older people living in rural areas

According to Eurostat data based on a 2011 population and housing census, a higher proportion of the older population lived in rural areas; the majority of regions with high numbers of older people (over 65) were also rural and sometimes quite remote.<sup>36</sup> Living in rural areas can entail additional challenges for older people, especially in the enjoyment of their right to health. This is particularly relevant for remote regions or regions and Member States with poor health and social service infrastructure.<sup>37</sup> Particular challenges include availability and accessibility of public transport, home- and community-based services and long-term care.<sup>38</sup>

### 1.1.3. Societal level: ageism's effects on society as a whole

*"Longevity offers an enormous potential for the economy and society, which has not been fully realized. Older persons contribute to the generation of wealth as entrepreneurs and employees. As consumers they stimulate innovation and contribute to developing new markets in the 'silver economy'. They volunteer in civil society organizations and in their communities. They provide unpaid care and support for their families."*

*Economic Commission for Europe, Synthesis Report on the implementation of the Madrid International Plan of Action on Ageing in the ECE region between 2012 and 2017, p. 5*

A recurrent stereotype linked to ageism is that older persons are a burden. Such negative societal attitudes affect policy responses relating to old age, which can undermine the potential positive contribution of older people to economic, social and cultural life.

Scientific evidence contradicts these stereotypes, showing the valuable and important contribution of older people to their families and community. For example, a recent European Quality of Life Survey finds that, in 2016, persons aged 65 or above spent at least several days a week caring for grandchildren (23 %), children (14 %) and disabled or sick relatives or friends (7 %). They also spent a significant part of their time volunteering in the community and social services (8 % at least every month), or participating in social activities in a club, society or association (17 % at least once a week).<sup>39</sup>

Furthermore, intergenerational learning – the transfer of knowledge and experience between generations by, for example, older workers mentoring and coaching younger generations or taking up apprenticeships – spreads benefits across a number of areas. It fosters innovation and “can also strengthen intergenerational relations and help to break down negative stereotypes and attitudes”.<sup>40</sup>

Still, public debate is often dominated by issues related to the inter-generational distribution of costs and risks,<sup>41</sup> instead of encouraging measures to bridge the gap between younger and older persons to restore fairness and equity across generations.<sup>42</sup> In the context of fiscal consolidation, structural ageism<sup>43</sup> targets old people as a burden for the younger generation to bear, instead of pointing out opportunities of older people to participate and contribute equally to society. One aspect, for instance, is that older people may choose to stop working and care for the grandchildren to “ease the pressure on their children and enhance the work-ability of this intermediate generation”.<sup>44</sup> This is why attempts to curb age-related expenditures should not ignore the potential of older persons to contribute positively to different aspects of economic, social and cultural life.<sup>45</sup>

Moving away from viewing old age merely in terms of burden or losses<sup>46</sup> and towards acknowledging the positive role of older persons in the community can reinforce the respect of their human rights and dignity.

### Need for more and better data

Developing effective policies to promote active ageing and older people’s potential to live independently and contribute to their communities requires robust and reliable data. Such policies should promote the 2030 Agenda for Sustainable Development, which seeks to realise the human rights of all people by “leaving no one behind”, regardless of age. Some goals are of particular importance to older people, including: Goal 3 on ensuring healthy lives and promoting well-being for all at all ages; Goal 1 on poverty; Goal 5 on gender equality; Goal 8 on decent work; and Goal 10 aiming to reduce inequalities.



Many Sustainable Development Goal (SDG) indicators specifically call for data to be presented by age. While UN member states agree on specific age groups for each indicator, it would be important to collect sufficient data relating to the situation of older people.

The indicators for the goals mentioned above should be populated with data disaggregated by sex and other important characteristics, such as ethnic origin, religion or belief, sexual orientation and gender identity or place of residence (for example urban or rural areas).

Ageing cuts across all goals. Collecting and using good quality data would not only improve the monitoring of the SDGs, but also assist policymakers in defining and implementing policy initiatives to address ageing.

It remains to be seen, however, if and what data will be collected and how they will be presented. Lumping the evidence into one single group, such as 55 years and over or 60 years and over (the age group usually used for UN statistical practices when addressing older people) would fail to reflect distinct experiences of a very heterogeneous target group. Old age spans 40 years; not breaking it down into smaller clusters will fail to capture a true and clear picture of the situation of older people. In addition, it would also be essential to capture and reflect on experiences of older individuals with intersecting characteristics, such as being an older woman, an older immigrant or an older person with a disability.

Collecting data and understanding how exclusion and intersectional discrimination affect achieving the 2030 Agenda is important. However, affirming the contributions of older people to their communities and society, and not just focusing on addressing needs and challenges of a group often perceived as ‘vulnerable’, is essential to “achieve truly transformative, inclusive and sustainable development outcomes” and realise the fundamental rights of all people.<sup>47</sup>

### Including older people in large-scale surveys

Older persons are included in the large EU-wide surveys that build, among others, the basis for Eurostat’s social database. These surveys mostly set only lower, and no upper, age limits, covering all persons from 15 or 16 years onwards, as long as they fulfil the eligibility criteria. Some EU Member States, nonetheless, have introduced an upper age limit of 74 years for the EU labour force survey. Results for older persons are often presented for large, open-ended age groups, as the sample sizes of surveys include too few respondents in older age groups to allow for detailed analysis. One solution to this problem is increasing the sample sizes or ensuring targeted oversampling. Both practices, however, lead to increased survey costs.

The Survey of Health, Ageing and Retirement in Europe (SHARE) targets particularly older persons aged 50 years or over, collecting information on health, ageing and retirement. By concentrating on a specific age group, statistically significant conclusions can be drawn regarding the living conditions of older persons.



An additional challenge for the representative coverage of older people is that surveys generally only target people in private households. This excludes all persons living in institutions or residential care settings, where older residents make up a considerable proportion. Some national surveys in the European Health Interview Survey (EHIS) included people living in institutions, and SHARE as a longitudinal survey follows persons even if they move into institutionalised care. However, as part of the Synergies for Europe's Research Infrastructures in the Social Sciences (SERISS) project, possibilities and existing practices for including persons in institutions in social surveys are examined.

*For more information, see: EU labour force survey: Methodology; SHARE website, Survey of Health, Ageing and Retirement in Europe and Europe's Research Infrastructures in the Social Sciences (2017), 'Report on sampling practices for the institutionalized population in social surveys.'*

## 1.2. EU's increasing focus on rights of older people

Societal and demographic transformation calls for policy and legislative responses in many different fields. These range from respecting fundamental civil, political and social rights regardless of age and combating discrimination against older people to addressing concerns about pensions and the old-age dependency ratio. At the EU level it has led to EU policies relating to older people evolving from a welfare care-orientated approach, based on needs and protection, to a more participative one revolving around rights and the concept



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of active ageing. The EU's increasing efforts towards a human rights-approach to ageing are reflected in both the EU legal framework and the design and implementation of its policies.

### 1.2.1. From the Community Charter of Fundamental Social Rights of Workers to the EU Charter of Fundamental Rights

The first attempt to establish a protective framework for older people at the EU level dates back to the 1989 political Declaration of the Community Charter of Fundamental Social Rights of Workers. The approach is narrow and addresses older people under their capacity and status as 'workers' or former workers, focusing on access to "resources affording [...] a decent standard of living" or to "sufficient resources" for those without any means of subsistence, as well as access to medical and social assistance "specifically suited to [their]

needs".<sup>48</sup> This narrow approach reflects a deficits- and needs-based standpoint addressing older people as people "in retirement", recipients of old-age benefits and in need of protection.

Since 1989, developments have marked a slowly evolving paradigm shift towards a new and more encompassing rights-based approach to older people. However, in the EU's primary legal framework, explicit fundamental rights references to older people are rather scarce and, from a normative point of view, weak. A closer and fairer overview of the EU primary rules, as adopted by the Treaty of Lisbon, suggests that there is a significant untapped normative potential. EU primary law does provide the basis for developing comprehensive policies at the EU and national level that implement a rights-based approach towards older people by ensuring a life in dignity for all persons, independent of age. In this respect, recognising the binding nature of the EU Charter of Fundamental Rights and making it an integral part of primary EU law was a decisive step forward.

The most promising provision for changing perceptions about people in older age and their rights in the context of primary EU law is the non-discrimination clause, introduced in EU primary law by the Treaty of Amsterdam in 1999. It is currently enshrined in Article 19 of the TFEU. It provides a legal basis for the EU to establish and implement policies addressing discrimination based on age. Furthermore, non-discrimination is not the only legal basis for EU action. It is true that most of the competences regarding issues such as social policies, employment or public health lie primarily with Member States. Nevertheless, the EU does have the competence to support and complement Member States' activities in these fields.<sup>49</sup> Moreover, the EU is competent to take initiatives to ensure cooperation and coordination between national states. Processes such as the European Semester monitor policies implemented in all the areas of as social policies, employment or public health. Furthermore, EU funding instruments, particularly European Structural and Investment Funds (ESIF), can drastically affect national policies in accordance with EU policies (see [Section 1.2.2](#)).

### EU Charter of Fundamental Rights and rights of older people

When EU institutions exercise their competences and when Member States implement EU law, they are bound by the EU Charter of Fundamental Rights. The Charter constitutes primary EU law and encompasses a very broad spectrum of rights. It does not distinguish or limit the enjoyment of rights on the basis of age. Human dignity, the integrity of the person and the prohibition of torture and inhuman or degrading treatment or punishment, the right to private and

family life, freedom of expression, the right to property, the right to access vocational training, to engage in work and to have access in placement services, social assistance and health care and all other civil, political and socio-economic rights listed in the Charter are universally valid fundamental rights unequivocally applied to everyone, regardless of age. To dispel any doubts, Article 21 on non-discrimination provides explicit and clear protection from age discrimination. Moreover, under Article 10 of the TFEU, the EU is explicitly and horizontally obliged to actively “combat discrimination based on [...] age” in “defining and implementing [any of] its policies and activities”.

Most importantly, the Charter goes beyond generally applicable fundamental rights clauses to include in Article 25 one of the first legally binding human rights provisions addressing particularly the rights and principles regarding the treatment of older people, stipulating that: “[t]he Union recognises and respects the rights of the elderly [older people] to lead a life of *dignity* and *independence* and to *participate* in social and cultural life” (emphasis added).

With this, the Charter is signalling acceptance and respect for the fundamental rights of older people. It aims to ensure their equal participation in society and their independence, which is pivotal in shifting perceptions about people’s agency in older age. Meanwhile, Article 34 recognises older people’s right to a social protection safety net. It leaves space for duty bearers to re-design social support systems into more personalised social services. The scope of these provisions is not restricted to persons in the work environment (as was the case for the Community Charter), and hence can be far-reaching. When acting within the scope of EU law, the EU and its Member States are under the obligation to respect rights and observe principles deriving from the Charter, in particular those enshrined in Article 25, in view of promoting older people living an independent life in dignity. EU policies and relevant legislative measures need to be designed and implemented in light of these rights and principles, whereas adopted EU secondary legislation should be interpreted accordingly.

The emphasis on acceptance, respect and inclusion of older people enshrined in the Charter reflects a broader equal opportunities philosophy focusing on ‘personhood’, autonomy and active citizenship. This philosophy also characterises other international human rights instruments, in particular the Convention on the Rights of Persons with Disabilities (CRPD), to which the EU acceded in 2010, making it an integral part of the EU legal order (see [Chapter 10](#) on CRPD developments). The CRPD is clearly applicable to older people with disabilities, and even though not all old people have a disability, developing an impairment with age is likely.<sup>50</sup> More importantly, it marks a shift

from a traditional narrowed welfare state approach, based on needs to compensate for ‘deficits’, to a more comprehensive participatory approach based on dignity, autonomy and rights. Among others, it introduces the concept of “reasonable accommodation” that entails necessary and appropriate modifications in the physical environment, public transport, schools and universities or workplaces to ensure that persons with disabilities enjoy or exercise on an equal basis with others all fundamental rights.<sup>51</sup>

To summarise, from the Declaration of the Community Charter of Fundamental Social Rights of Workers in 1989, to the adoption of the Treaty of Lisbon making the Charter of Fundamental Rights a legally binding instrument, there has been a shift towards adopting a more comprehensive and rights-based approach towards older people. Older people are no longer perceived solely as ‘retired’ former workers, nor as a homogenous, vulnerable group. On the contrary, they are considered largely as ‘persons’ with rights, who deserve equal treatment and recognition of their potential to participate and contribute actively in all aspects of life, in spite of their age, and to enjoy their right to live independently and be included in the community.

### 1.2.2. EU legislative measures and policies: mainstreaming a rights-based approach to ageing?

#### EU legislative measures

Transforming the new rights-based approach reflected in the Charter of Fundamental Rights into concrete EU legislative measures and policy actions has been a slow process. The EU has not yet succeeded in delivering a comprehensive secondary legal framework ensuring substantive equality for older people. The only exception is the Employment Equality Directive.<sup>52</sup> This directive, although limited to employment-related issues, was ground-breaking when adopted, since it introduced the criterion of age as a prohibited ground for discrimination in a legally binding text for the first time.

However, the prohibition of discrimination on the ground of age is far from absolute. Article 6 of the directive allows for differential treatment on the basis of age, providing for a “broader range of exceptions to the principle of equal treatment than is permitted in connection with any other protection characteristic” in so far as this is “objectively and reasonably justified by a legitimate aim” (e.g. legitimate employment policies or labour market objectives) and the means used are “appropriate and necessary” (proportionality principle). In this context, differential treatment may

also include measures that promote young or old people in the labour market to fight unemployment, particularly long-term unemployment, or to promote better distribution of work among generations.<sup>53</sup>

Despite its narrow scope and broad range of exceptions, the Employment Equality Directive has been a useful tool for embedding fundamental rights in legal and policy instruments in this area. First of all, it has led to very interesting and rights-promoting case law by the Court of Justice of the European Union. The *Mangold* case remains emblematic, recognising that non-discrimination on grounds of age is a general principle of EU law.<sup>54</sup> This ruling has since been constantly reaffirmed by the court, which additionally invokes Article 21 of the Charter in its more recent judgments.<sup>55</sup>

#### FRA ACTIVITY

### 2018 edition of the *Handbook on European non-discrimination law*

A specific section in the *Handbook on European non-discrimination law* looks at the developments in jurisprudence on age discrimination. It highlights the different scope of and approach to age as a ground of discrimination in international instruments. In so doing, the handbook illustrates the differences in the application of non-discrimination law by the relevant bodies, including the European Committee of Social Rights.

FRA, together with the Council of Europe and the European Court of Human Rights (ECtHR), published in March 2018 an update of the *Handbook on European non-discrimination law*. The handbook is designed to assist legal practitioners – such as judges, prosecutors and lawyers, as well as law-enforcement officers – and improve knowledge of relevant EU and Council of Europe standards, particularly through case law of the Court of Justice of the EU (CJEU) and the ECtHR.

*For more information, see FRA (2018), Handbook on European non-discrimination law, Publications Office, Luxembourg.*

At the national level, the directive resulted in the introduction of legislation prohibiting age discrimination in employment throughout all Member States. In addition, although it does not provide explicitly for the setting up of equality bodies – as is the case in the EU anti-discrimination directives on the grounds of gender or race – it contributed to establishing equality bodies and/or attributing to them relevant competences. However, not all equality bodies have competences on age discrimination.<sup>56</sup>

The directive has also raised awareness on the rights of older people in the area of employment and contributed to changing attitudes of state authorities and private employers on a range of issues. These

issues range from formulating job vacancy notes to debates on extending working life. For example, since the adoption of the directive, “more attention is paid to avoiding stereotype ‘age requirements’ (like looking for a ‘young and dynamic’ colleague) in job vacancy notes”, which could also be seen as stereotyping gender or family situation.<sup>57</sup> Moreover, in relation to the sustainability of pension systems, the directive has triggered controversial debates relating to extending working life and postponing retirement. This could be achieved by abolishing mandatory retirement ages or encouraging people receiving pensions to continue working, so as to earn some income without losing their pension entitlement.<sup>58</sup>

Outside the scope of the Employment Equality Directive, areas of particular importance for older people – such as social protection, health care, access to goods and services or housing – are not covered by EU legislation as regards the ground of age, in contrast with the Race Equality Directive.<sup>59</sup> The proposal for an Equal Treatment Directive (ETD)<sup>60</sup> – presented by the Commission in 2008 – could fill this gap. It provides for extending the principle of non-discrimination horizontally, on the basis of various grounds, including age, to these areas of importance for older people.<sup>61</sup>

However, its adoption is still pending – even though, following the model of the Employment Equality Directive, it leaves a large margin of discretion to Member States, which is even broader regarding acts differentiating the treatment of older people. The EU Council has not yet reached the necessary unanimity, which reveals the reluctance and difficulties in moving forward faster. Major issues of concern remain, necessitating further political discussions. These include the directive’s scope, with certain delegations opposing the inclusion of social protection and education. The division of competences and the principle of subsidiarity also remain issues, as does legal certainty regarding the obligations that the directive would entail.<sup>62</sup>

Furthermore, given that older people, especially those in need for support, may more often be exposed to the risk of suffering neglect, abuse or violence, the Victims’ Rights Directive is also particularly relevant for their well-being.<sup>63</sup> In accordance with the directive, older people who are victims of crime should benefit from all rights enshrined therein on an equal basis with any other victim. Moreover, age is among the personal characteristics to be taken into account in the context of an individual assessment,<sup>64</sup> when identifying specific protection needs and special measures for victims in criminal proceedings. The directive also underlines that special attention should be paid to victims whose relationship to and/or dependence on the offender puts them into particularly vulnerable situations.

A number of more recent EU legislative initiatives could also contribute to mainstreaming a rights-based approach to ageing. These include the draft European Accessibility Act, the draft Directive on work-life balance for parents and carers, and the draft Regulation on a Pan-European Personal Pension Product (PEPP).<sup>65</sup> For instance, the European Accessibility Act could lead in providing people with disabilities and older people facing ‘functional limitations’ with more accessible, affordable and quality goods and services. This would foster independent living and inclusion in the community. For more information, see [Chapter 10](#) on the CRPD.

For its part, the adoption of the Work-life Balance Directive could improve intergenerational solidarity, resulting in better and more respectful tailor-made and home-centred caring services for older people. However, this does not mean and should not result in exempting states from their care responsibilities in the context of a modern welfare state. At the same time, the Work-life Balance Directive would be the first step in recognising and supporting the contribution of family members in informal unpaid assistance to older people in need of care.

As regards the Pan-European Personal Pension Product Regulation, it is expected to offer more options to people who want to invest financial resources in view of supplementing their future retirement income, thus enhancing their independence and, by extension, their participation.

### EU policies fostering a human rights-approach to older people

The slow transition towards a human rights approach concerning the treatment and rights of older people is not limited to the EU legislative level. A whole spectrum of different efforts and EU policy initiatives address challenges faced by older people. These efforts strive to promote the new human rights approach, linked closely to the concept of active ageing.

Ageing societies and the role of older people has thus become a key issue for the EU 2020 Strategy.<sup>66</sup> It focuses on the need to develop technologies allowing older people to live independently and in dignity, as active members of society. This focus is reflected in the European Innovation Partnership on Active and Healthy Ageing (EIPAH), which seeks to promote the perception of ageing as “an opportunity [more] than a burden” and to replace reactive and hospital-based care with proactive and home-based services and health care.<sup>67</sup>

Active ageing and intergenerational solidarity has also been the topic of the 2012 European Year for Active Ageing and Solidarity between Generations, which

resulted in a relevant Council Declaration and guiding principles,<sup>68</sup> as well as in the development of the Active Ageing Index (AAI). The AAI aims to provide comparative data and evidence among EU Member States regarding the contribution and potential of older people in various aspects of life and to help identify challenges, priorities and possible policy developments in the future. The AAI toolkit is comprised of 22 statistical indicators grouped in four domains: employment; social participation; independent living, and capacity for active ageing. The latest data are from 2014, but further activities are foreseen.<sup>69</sup>

The implementation of policies promoting a human rights paradigm towards older people also requires appropriate funding both at EU and national levels. In this respect, the European Structural and Investment Funds (ESIF)<sup>70</sup> are crucial, since for many Member States they are the key source of funding to introduce and support reforms and innovative policies. The ESIF Regulation<sup>71</sup> acknowledges demographic ageing as a challenge and calls on Member States to use ESIF “to create growth linked to an ageing society”. It therefore sets out active and healthy ageing as an investment priority under thematic objective eight concerning the promotion of sustainable and equality employment and the support of labour mobility.

Other ESIF thematic objectives are also relevant for the rights of older people. For example, objective nine on promoting social inclusion, combating poverty and any discrimination defines active inclusion, equal opportunities and improving employability as investment priorities. This is in addition to investing in health and social infrastructure to reduce inequalities, improve social, cultural and recreational services, and assist the transition from institutional to community-based services. These investment priorities apply to everyone, including people in older age in so far as they count among the target groups of each investment priority.

More importantly, the regulations that govern the 2014–2020 funding period introduce new measures aiming to ensure that ESIF funding complies with the EU’s fundamental rights obligations. Chief among these are the *ex-ante* conditionalities, which set sector-specific and horizontal conditions to be met by Member States. These include: a) *ex-ante* conditionality 8.4, which addresses active and healthy ageing, requiring the development of active ageing policies retaining older people in the labour market and reducing early retirement; and b) *ex-ante* conditionality 9.1 on poverty reduction and inclusion of people excluded from the labour market, which calls on Member States, depending on the identified needs, to develop measures for the shift from institutional to community-based care to all people



in need of such care, including older persons.<sup>72</sup> In this way, EU legislation compels Member States to develop comprehensive rights-promoting policies for older people and links EU funding to the effective implementation of these policies. This strong preference for independent and community living for older people in the ESIF is reflected in the EU Social Pillar, which states that “everyone has the right to long term care services of good quality, in particular home care and community based services” (Principle 18).

The monitoring and coordination process of the European Semester is also a major EU tool for affecting national reform policies, especially through the Country Specific Recommendations (CSRs) to the Member States. In response, Member States adopt the appropriate policy decisions. An analysis prepared for the European Parliament in 2016<sup>73</sup> shows that the CSRs continue to focus more on employment issues such as facilitating the access to labour market and reducing early retirement, rather than issues linked to a more comprehensive rights approach, such as social policies, financial resources or health care.

However, the European Commission, in its 2017 Communication on the European Semester’s CSRs,<sup>74</sup> refers explicitly to the concept of active ageing when defining the key objectives of its recommendations. It underlines that “a combination of pension reforms, labour market policies, lifelong learning and health policies is required to support a more active older population”.

Meanwhile, the Commission’s Annual Growth Survey<sup>75</sup> for the 2018 European Semester notes that to ensure the sustainability and adequacy of pension systems for all, Member States should go beyond ensuring the sustainability of public pension systems, even under adverse conditions. In addition, they should boost retirement incomes by extending working lives, linking retirement age to life expectancy, avoiding early exit from the labour market, etc. Moreover, taking into consideration the ageing population, it underlines the need for health care reforms and long-term care systems. This is to enhance their cost-effectiveness and ensure their fiscal sustainability and affordable access to quality preventive and curative healthcare.

### 1.2.3. Potential of the European Pillar of Social Rights

The joint proclamation of the European Pillar of Social Rights, adopted by the EU institutions on 17 November 2017 in Gothenburg, is the most recent and promising development in the field of social rights. It is undoubtedly a step forward and an opportunity for a more “social Europe”, for a Europe with stronger social rights protection both at the EU and the national level. In particular for older people, the proclamation

of the European Pillar of Social Rights could be the occasion to renew and intensify efforts to promote the implementation of the human rights approach enshrined in the Charter of Fundamental Rights. The political will and commitment of all stakeholders is a *sine qua non* condition. But now, it should be translated into concrete actions in terms of legislative measures and policy initiatives at both the EU and the national level.

*“This should be a landmark moment – with the proclamation of the European Pillar of Social Rights, we are showing our joint commitment to protect and uphold the rights of equality, fairness and opportunity that we all stand for and that all citizens are entitled to. And it must also be the first step of many in this direction.”*

*European Commission President Juncker, Press release, 16 November 2017*

The weakness of the European Pillar of Social Rights – similarly to the 1989 Community Charter on the fundamental social right of the workers – is its nature as a legally non-binding text of rights and principles. In the Preamble, Member States point out that the Pillar “does not entail an extension of the Union’s powers and tasks as conferred by the Treaties” and “does not affect the right of Member States to define the fundamental principles of their social security systems and manage their public finances”. It is hence unequivocally stipulated that for the rights and principles enshrined in the text to be legally enforceable, it would “first require dedicated measures or legislation to be adopted at the appropriate level”.

However, the common political will and commitment expressed in the European Pillar of Social Rights should not be underestimated. As stated again in the Preamble, all Member States agree that “economic and social insecurity needs to be addressed as a matter of priority” in view to “safeguard[ing] of our way of life”. It calls for Member States to acknowledge that, in an era of globalisation, digital revolution, changing work patterns and societal and demographic developments, “challenges, such as significant inequality, long-term and youth unemployment or intergenerational solidarity, are often similar across Member States although in varying degrees”. Besides, some of the rights and principles enshrined in the Pillar are “already present in the Union acquis”.

The linkage between the rights enshrined in the European Social Charter of the Council of Europe and the rights and principles of the Pillar is not clearly articulated, which arguably limits the Social Charter’s relevance in terms of using it to interpret and implement the Pillar. Nonetheless, as stated by the Commission, the Pillar also builds on existing international law, including the European Social Charter of 1961, as well as its revised version of 1996.<sup>76</sup>

In view of the above, the proclamation of the European Pillar of Social Rights signals the opportunity for EU institutions and Member States to make full use of existing tools. These include the EU primary legal framework and the competences already conferred to the Union by the Treaties in a wide range of areas related to social rights of particular significance for the well-being of older people. Such areas include social policy, employment and vocational training, health or non-discrimination. It is an opportunity to try to “give more weight” to these “less well-known rights enshrined in the EU legislation”, as already pointed out in FRA’s *Fundamental Rights Report 2017*.<sup>77</sup>

### European Pillar of Social Rights – selected key principles relevant to older people

**3. Equal opportunities.** Regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation, everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public. Equal opportunities of under-represented groups shall be fostered.

**9. Work-life balance.** Parents and people with caring responsibilities have the right to suitable leave, flexible working arrangements and access to care services. Women and men shall have equal access to special leaves of absence in order to fulfil their caring responsibilities and be encouraged to use them in a balanced way.

**15. Old age income and pensions.** Workers and the self-employed in retirement have the right to a pension commensurate to their contributions and ensuring an adequate income. Women and men shall have equal opportunities to acquire pension rights.

**17. Inclusion of people with disabilities.** People with disabilities have the right to income support that ensures living in dignity, services that enable them to participate in the labour market and in society, and a work environment adapted to their needs.

**18. Long-term care.** Everyone has the right to affordable long-term care services of good quality, in particular home-care and community-based services.

In addition to the key principles set out in the European Pillar of Social Rights referring directly to older people, most of the rights and principles in the Pillar are recognised on equal terms, regardless of any differentiating ground, including age. This is the case, for example, regarding the right of “everyone” to:

1. life-long learning (Principle 1);
2. adequate minimum income benefits ensuring a life in dignity at all stages of life (Principle 14);

3. affordable, preventive and curative health care of good quality (Principle 16);
4. access to social housing or housing assistance of good quality (Principle 19);
5. access to essential services of good quality (Principle 20).

Proclaiming all these social rights and principles on equal terms to everyone, the Pillar reaffirms the importance of older people exercising their rights, and participating in all aspects of life equally, as already enshrined in the Charter of Fundamental Rights. At the same time, the European Pillar of Social Rights’ special provision on issues such as old-age income and pensions or housing assistance for vulnerable people (Principle 19) shows that the EU and Member States recognise the need to elaborate and maintain a protective framework for older people. This is done keeping the balance between independence, participation and protection under the common denominator of “dignity”.

In conclusion, the European Pillar of Social Rights reaffirms and builds on the concept of “active ageing” already enshrined in the EU legal order as reflected in the Charter of Fundamental Rights, particularly in Article 25. It is a positive development towards a more social and respectful EU for older people. However, given its non-binding nature, it is up to EU institutions and Member States to transform their expressed political commitment into concrete legal action and policies. Adopting legislative proposals already presented by the Commission, in particular the proposal for the Equal Treatment Directive, and introducing considerations regarding the rights of older people in the European Semester, would mark significant progress.

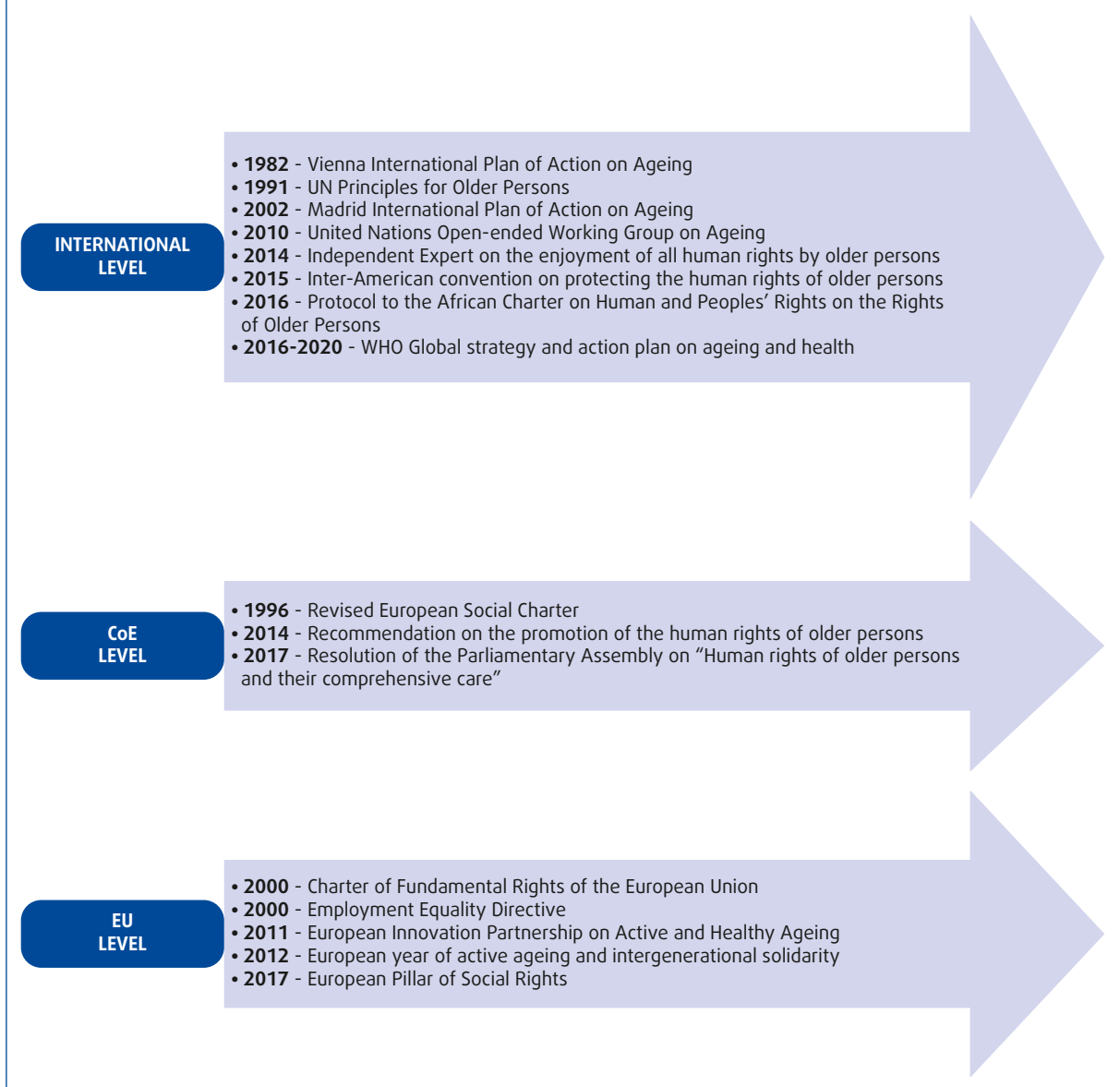
#### 1.2.4. EU policy responses reflecting global developments

Legal and policy developments at the EU level signal a slow but clear shift towards a human rights-based approach to older people. This is reflected in ongoing debates and actions at the broader European and international level. With the exception of South America and Africa, where dedicated legal instruments were recently signed,<sup>78</sup> there are no legally binding instruments specifically addressing the human rights of older people. Nevertheless, important non-binding instruments and policy responses have been developed over the last 30 years. This points to the growing attention paid by international stakeholders to increasing efforts towards fulfilling all universal rights for people of all ages.





Figure 1.2: Selected international and European instruments and initiatives on ageing



In 2002, 20 years after the first World Assembly on Ageing in 1982, 159 UN member states adopted the most recent instrument on ageing, the Madrid International Plan of Action on Ageing (MIPAA). This marked a turning point in promoting a "society for all ages".<sup>79</sup> In this context, the European regional strategy (MIPAA/RIS) sets a focus on "securing gender-sensitive and evidence-based co-ordinated and integrated policies to bring societies and economies into harmony with demographic change". The European regional strategy makes 10 commitments covering different facets of population and individual ageing.<sup>80</sup> More recently, the 2017 Lisbon Ministerial Declaration outlines the three policy goals for European states to work towards for 2022. These are:

- recognising the potential of older persons;
- encouraging longer working life and ability to work;
- ensuring ageing with dignity.<sup>81</sup>

The MIPAA is also relevant to Sustainable Development Goals that address the needs of older persons, in particular those related to social protection, health, reducing inequalities and ending poverty (Goals 1, 3, 10, and 11). Older persons are also mentioned under targets related to nutrition, resource use, healthcare, accessibility, safety and age-specific data collection and analysis.<sup>82</sup>

All the policies outlined above are, however, soft-law instruments. While commitments are wide ranging and MIPAA addresses more aspects of older people's lives than its predecessors, it "was not drafted as a human rights instrument; [but] a series of recommendations to achieve socio-economic objectives."<sup>83</sup> To respond to these shortcomings and ensure that older people can fully enjoy their human rights, the UN General Assembly has recently established two additional processes.

The UN Open-ended Working Group on Ageing was established in 2010. A mandate for an Independent Expert on the Enjoyment of all Human Rights by Older Persons was created in 2014. Both instruments mark a clear “paradigm shift from a predominant economic and development perspective to ageing to the imperative of a human rights-based approach that views older persons as subjects of law, rather than simply beneficiaries, with specific rights, the enjoyment of which has to be guaranteed by [s]tates.”<sup>84</sup> The Open-ended Working Group on Ageing is the first global process set up to assess existing instruments. If gaps are identified, it seeks to “consider proposals for an international legal instrument to promote and protect the rights and dignity of older persons”.<sup>85</sup> In the context of its work, the independent expert on the enjoyment of all human rights by older persons concluded that the existing policy framework – MIPAA – is “not sufficient to ensure full enjoyment of [...] human rights by older people”. It called on states to step up efforts to protect the rights of older people, including by considering the elaboration of a new convention for older people.<sup>86</sup>

The Council of Europe’s existing instruments do not address age and age discrimination explicitly, neither under Article 14 of the European Convention on Human Rights (ECHR) or the Protocol No. 12 to the ECHR on anti-discrimination nor in Article E addressing discrimination in the Revised European Social Charter. However, the European Court of Human Rights (ECtHR) has recognised that “age might constitute ‘other status’ for the purposes of Article 14 of the Convention” and hence discrimination on grounds of age is prohibited by the Court.<sup>87</sup>

The revised European Social Charter (ESC) contributes to the further recognition of the rights of older persons to lead a life of dignity and independence and to participate in social and cultural life.<sup>88</sup> Interestingly, Article 23 of the revised ESC, setting forth the right of older people to social protection, explicitly links adequate resources, housing and health care – as aspects of the right to social

protection – with enabling older people to participate in social life and “lead independent lives in their familiar surroundings”. In addition, Article 30 of the revised ESC, establishing a right to protection against poverty and social exclusion, provides that such a right entails the effective access of people living or at risk of living in a situation of poverty or social exclusion to employment, housing, training, education, culture and social and medical assistance.

A review of Council of Europe soft law instruments shows that the Council of Europe Committee of Ministers recommendations addressing older people primarily focus on two aspects:

1. on situations of vulnerability – for example, they address the “protection of incapable adults” or the “organisation of palliative care”;<sup>89</sup>
2. they examine aggravating disadvantage from intersecting grounds – for example, by looking at “older people with disability” or “elderly migrants”.<sup>90</sup>

However, the Committee of Ministers adopted a dedicated Recommendation on the rights of older people in 2014. It marked the first dedicated European human rights instrument, albeit of non-binding nature.<sup>91</sup> Furthermore, in 2017, the Parliamentary Assembly of the Council of Europe adopted a resolution on ‘Human rights of older persons and their comprehensive care’, calling on member states to take measures to combat ageism, improve care and prevent social exclusion of older people.<sup>92</sup> Moreover, a Recommendation was adopted asking the Committee of Ministers to “consider the necessity and feasibility of drawing up a legally binding instrument” devoted to the rights of older persons.<sup>93</sup>

All these developments – at the EU and broader European and international level – point to a slow but inexorable development towards recognising the need for stronger protection of older persons’ rights. This indicates a move towards a human rights-based approach to ageing.



## FRA opinions

Labour markets and national social protection systems have already undergone profound transformations to respond to longevity and the challenges an ageing society poses to national economic and social systems. This process has started with a number of initiatives in the EU and the world. These include fighting old age discrimination in the area of employment, promoting active ageing and incentivising longer working lives, as well as introducing reforms in social protection systems addressing old age, namely in pensions, health services and long-term care provision. Reforms are also starting to move away from needs-based approaches aimed at responding to age-related 'deficits', towards shifting the focus to the individual, a human being with fundamental rights and inherent human dignity. According to Article 1 of the EU Charter of Fundamental Rights, human dignity is inviolable and must be protected and respected, regardless of age.

However, this shift should not overlook the age-specific needs of older people, nor downgrade the importance of the state's responsibilities towards individuals – including older people – who may need support. Moreover, older people are a heterogeneous group with quite diverse needs and preferences. Many preferences and experiences in the life course affect outcomes at older age. Gender, immigrant or ethnic minority status, disability as well as socio-economic status and geographical or other aspects can have a compound negative impact on older people. This largely determines to what extent they enjoy their rights.

The civil, political, economic, social and cultural rights enshrined in the EU Charter of Fundamental Rights apply to everyone, regardless of age. Nevertheless, age features specifically under Article 21 as a protected ground for discrimination and under Article 25, which recognises a right for older people "to lead a life of dignity and independence and to participate in social and cultural life".

Non-discrimination and equal opportunities for older people in various areas of life, as well as their living in dignity, are also embedded in the recently proclaimed European Pillar of Social Rights. According to the European Commission, the European Pillar of Social Rights "partially goes beyond the current acquis". The objective is to reflect on how to extend protection against discrimination on the grounds of age to the areas of social protection, including social security and healthcare, education, and access to goods and services available to the public.

The proclamation of the Social Rights Pillar, albeit a non-legally binding set of principles and rights, signals a strong political will and commitment by EU institutions and Member States to work towards a more social and inclusive Europe – a Europe that makes better and more respectful use of all its human capital without excluding anyone. It is an opportunity for the EU and Member States to deliver concrete results on promoting and implementing the rights of older people, who are an important part of human capital and have the potential to contribute substantially to all aspects of life.

However, setting rules and minimum standards is only the first step in this process. Raising awareness and using coordination and monitoring mechanisms are all equally essential to fulfil fundamental rights of all, including older people, as provided in the Charter. In this effort, the engagement of both the EU institutions and the Member States is more than necessary.

In this respect, FRA's opinions outlined below should be seen as building blocks in support of the shift towards a comprehensive human rights-based approach to ageing.

### FRA opinion 1.1

*The EU legislator should continue its efforts for the adoption of the Equal Treatment Directive. The directive will extend horizontally protection against discrimination based on various grounds, including age, to areas of particular importance for older people, including access to goods and services, social protection, healthcare and housing.*

### FRA opinion 1.2

*To deliver on stronger social rights protection, the EU legislator should proceed with concrete legal action, further implementing the principles and rights enshrined in the Pillar of Social Rights. In this regard, it should ensure the rapid adoption of the proposed Work-life Balance Directive and accelerate the procedures for the adoption of a comprehensive European Accessibility Act. To ensure coherence with the wider body of EU legislation, the Accessibility Act should include provisions linking it to other relevant acts, such as the regulations covering the European Structural and Investment Funds.*

FRA opinion 1.3

*EU institutions and Member States should consider using the European Structural and Investment Funds, as well as other EU financial tools, to promote a rights-based approach to ageing. To enhance reforms which promote living in dignity and autonomy, as well as opportunities to participate for older people, EU institutions and Member States should reaffirm and reinforce in the coming programming period (post 2020) ex-ante conditionalities. Such measures should provide for monitoring their implementation, seeking to ensure that EU funding is used in compliance with fundamental rights obligations.*

*Furthermore, EU institutions and Member States should systematically address challenges older people face in core policy coordination mechanisms, such as the European Semester.*



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- 91 Council of Europe (2014), *Recommendation of the Committee of Ministers to member States on the promotion of human rights of older persons*, CM/Rec(2014)2.
- 92 Council of Europe, Parliamentary Assembly (2017), *Resolution: Human rights of older persons and their comprehensive care*, 30 May 2017.
- 93 Council of Europe, Parliamentary Assembly (2017), *Recommendation: Human Rights of older persons and their comprehensive care*, 30 May 2017.





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# 2

## EU Charter of Fundamental Rights and its use by the Member States



*In 2017, the Charter of Fundamental Rights of the European Union was in force as the EU's legally binding bill of rights for the eighth year. It complements national human rights documents and the European Convention on Human Rights (ECHR). As in previous years, the Charter's role and usage at national level was mixed: there appears to be no significant improvement in its use by the judiciary or in legislative processes; and it proved hard to identify government policies aimed at promoting the Charter. Instead, with references in national courts, parliaments and governments remaining limited in number and often superficial, the Charter's potential was once again not fully exploited.*

The EU Charter of Fundamental Rights applies to the European Union itself, as well as to the EU Member States "when they are implementing Union law", that is, when they are acting within the scope of EU law.<sup>1</sup> While it is not always easy to draw the borders of the Charter's field of application, its role is central for a proper implementation of EU law. Given that EU law is predominantly implemented at national level, and not directly by the EU institutions themselves, national judges, parliamentarians and government officials are core 'Charter agents' that the EU system relies on.

*"The Council acknowledges that the protection of fundamental rights is a horizontal issue which affects all fields of EU activity and can only be realised with the support and active cooperation of all stakeholders at EU as well as at national level. The Council recalls the importance of awareness-raising on the application of the Charter at national as well as at EU level among policymakers, legal practitioners and the rights holders themselves."*

Council of the European Union, Conclusions on the application of the EU Charter of Fundamental Rights in 2016, adopted on 12 October 2017

Against this background, since 2013, the EU Agency for Fundamental Rights (FRA) has dedicated a chapter of its Fundamental Rights Report to the use of the Charter at national level. The agency asked its research network, Franet, to provide up to three specific and relevant examples under each of the following categories:

- court decisions where judges use the Charter in their reasoning;

- impact assessments/legal scrutiny that make references to the Charter in the context of legislative proposals;
- parliamentary debates referring to the Charter;
- national legislation referring to the Charter, as well as academic writings on the Charter, comprising, for instance, general articles on the Charter,<sup>2</sup> on the Charter's role and its impact at national level,<sup>3</sup> or on specific Charter rights or the Charter's effect in specific policy areas.<sup>4</sup>

This methodology only provides a small sample that does not allow for a quantitative assessment. However, it brings to the fore those judicial and administrative decisions that national experts considered as most relevant for the use of the Charter in the given Member State. Based on this and additional information on national Charter-related policies requested from the agency's contact persons in national administrations – the National Liaison Officers (NLOs) – this chapter looks at the use of the Charter in national courts, in national parliamentary debates and in legislative procedures. Given that neither Franet nor the NLOs identified relevant national policies promoting the Charter, no section is dedicated to such policies. The necessity for such policies stems in particular from Article 51 of the Charter, which obliges the Member States to respect the rights it covers and to "promote the application thereof in accordance with their respective powers."

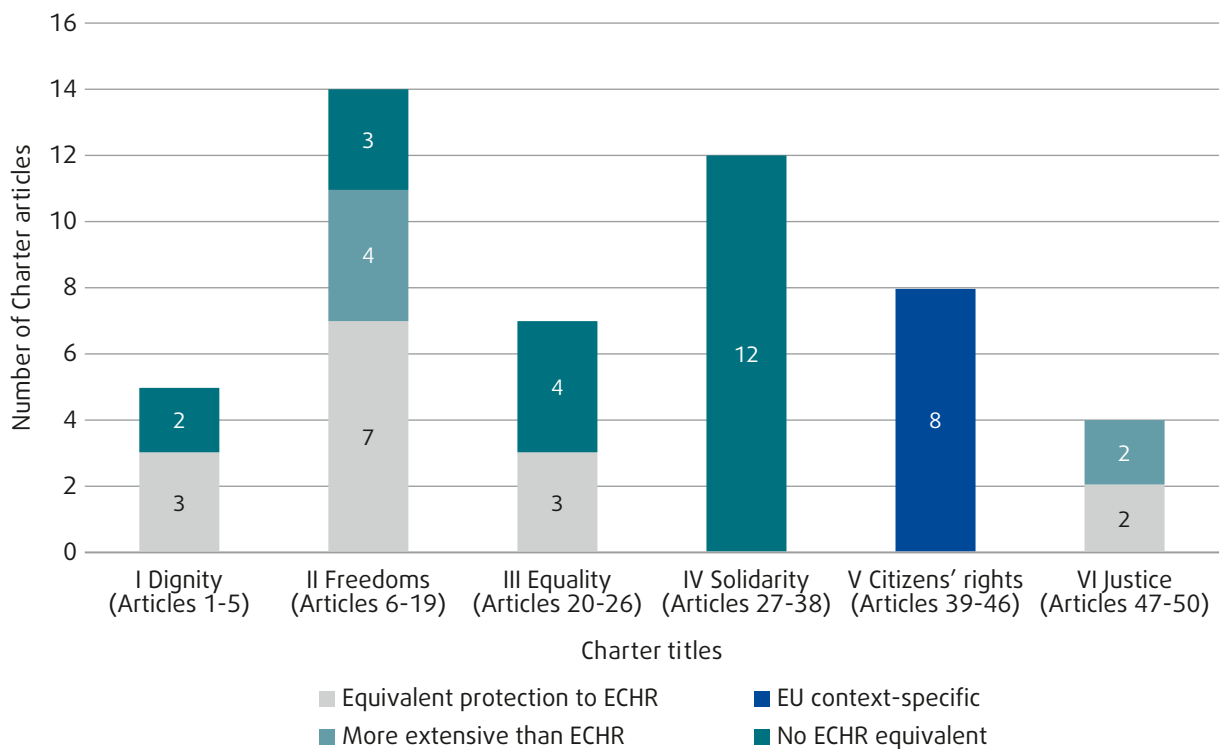
## 2.1. National (high) courts' use of the Charter: a mixed picture

The analysis below is based on 71 court decisions from 28 EU Member States. Fradet was to report three court decisions per Member State by selecting those where the Charter was most relevant to the reasoning of the court, giving preference to decisions from high courts, which handed down more than two thirds of the analysed decisions. In many Member States, the absolute numbers of court decisions using the Charter continue to be hard to identify – for example, because electronic databases covering all case law are lacking. Often, the frequency of Charter references varies from court to court within a country itself. By way of illustration: in **Austria**, the Supreme Court referred to the Charter 14 times, the Constitutional Court did so 34 times and the Supreme Administrative Court did so 140 times. The data collection considered only those court decisions where the judges used the Charter in their reasoning and did not merely report that the parties had referred to the Charter.

### 2.1.1. Charter's overall role in national case law: some trends emerge

Looking back five years, a mixed picture emerges on the role of the Charter in national legal systems. For many countries, it is difficult to identify three judgments a year in which a national court has made substantial use of the Charter. In the majority of judgments reported to FRA, the Charter did not have a decisive impact on the outcome. This might indicate that awareness of the Charter and its added value compared with other sources is still limited. This is despite the fact that the Charter offers great potential, which becomes obvious when we compare the fundamental rights protection provided by the Charter articles with those of the ECHR (see Figure 2.1). Just as in previous years, in 2017 there were court decisions where the Charter indeed played a decisive role. For instance, in the **United Kingdom**, the Supreme Court noted that fees introduced in 2013 by employment tribunals contravened EU law's guarantee of an effective remedy before a tribunal as enshrined in Article 47 of the Charter. Because the fees were unaffordable in practice, the Fees Order was deemed a disproportionate limitation on Article 47 in light of Article 52 (1) of the Charter.<sup>5</sup>

**Figure 2.1: Number of Charter articles offering protection equivalent to or greater than the ECHR, by Charter title**



Note: Based on a comparative analysis of articles of the EU Charter of Fundamental Rights and the ECHR.

Source: FRA, 2017

When national judges use the Charter, they refer to it alongside other legal sources. The ECHR is an especially prominent ‘twin source’ in this regard (see Figure 2.2). Like in the previous four years, in 2017 the ECHR, national constitutional provisions and relevant CJEU case law were the sources used most frequently in conjunction with the Charter.

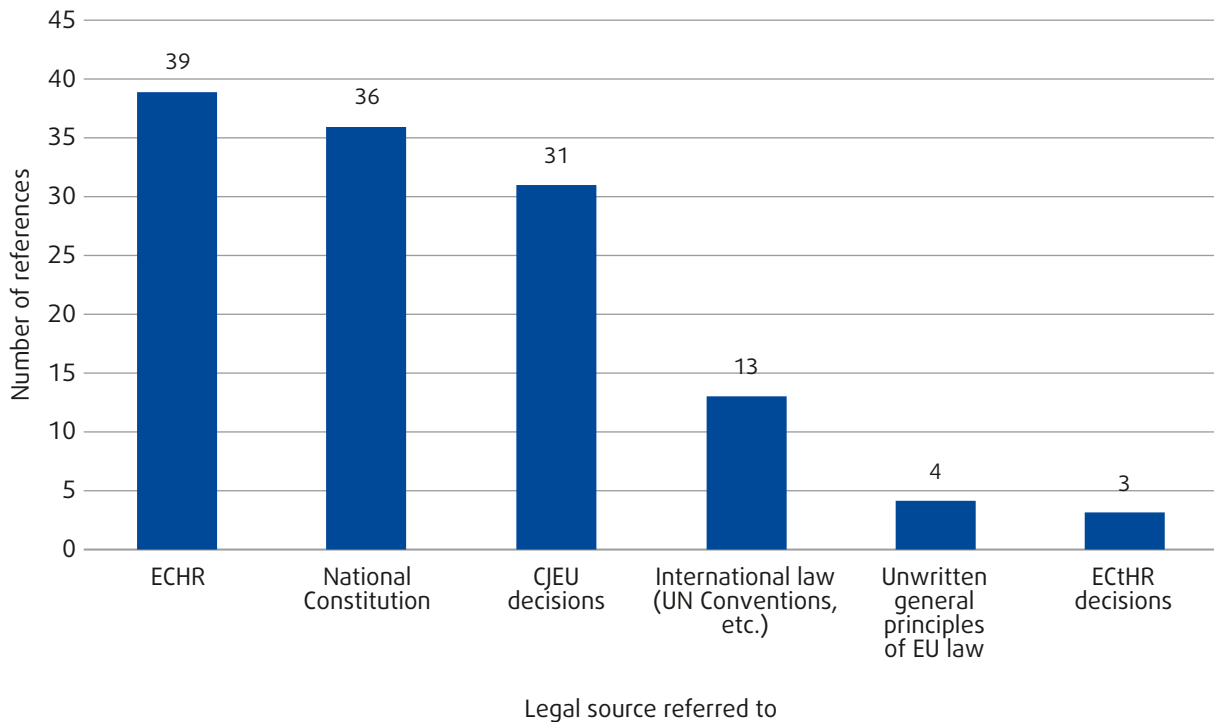
The continuing mixture of sources might signal that judges are aware of the existence of the Charter, but less aware of its scope and the potential value of individual Charter provisions, so they ‘package’ various human rights sources in order to ‘play it safe’. The agency has in previous years called for more emphasis on awareness raising. That judges are aware of the Charter is confirmed by the fact that national judges continued to raise Charter-related arguments on their own initiative in 45 % of the 71 cases analysed in 2017. In the other cases, the parties had already referred to the Charter.

Of the Charter-relevant court decisions reported in 2017, 30 % dealt with border checks, asylum and migration (Figure 2.3). This is in line with the previous four years, when this policy area was always among the four policy areas to which most of the reported Charter cases related.

The right to an effective remedy and to a fair trial (Article 47) remained the provision most often referred to. Indeed, in the past five years (2013–2017), this provision was always – aside from the general Charter provisions, such as the scope of guaranteed rights (Article 52) – the most frequently used Charter provision among the Charter relevant cases reported to the agency (Figure 2.4). This does not come as a surprise, as the provision is horizontal in nature and relevant in all policy contexts. Whereas the prohibition of torture and inhuman or degrading treatment or punishment (Article 4) surfaced only in 2017 as a prominent substantial right in the national court decisions analysed, the right to respect for private and family life (Article 7) was often referred to in recent years. The right to good administration (Article 41) also featured prominently throughout the past five years in the national court decisions reported to the agency.

When it comes to the use of the Charter in the context of requests for CJEU preliminary rulings, diversity persists. In 2017, 50 such requests mentioned the Charter, including references to different articles of the Charter. The number of references to the Charter remained relatively stable in the past years. The most prominent article referred to is Article 47, followed by Article 21. Figure 2.5 shows the number of times Charter articles

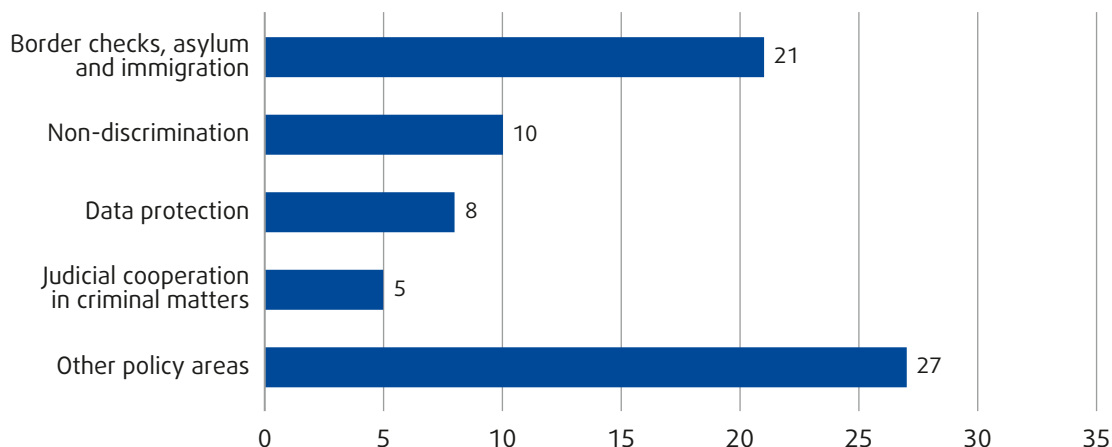
**Figure 2.2: Number of references to other legal sources alongside the Charter in analysed court decisions, by legal source referred to**



Notes: Based on 71 court decisions analysed by FRA. These were issued in 28 Member States in 2017. Up to three decisions were reported per Member State. More than one legal source can be referred to in one court decision.

Source: FRA, 2017

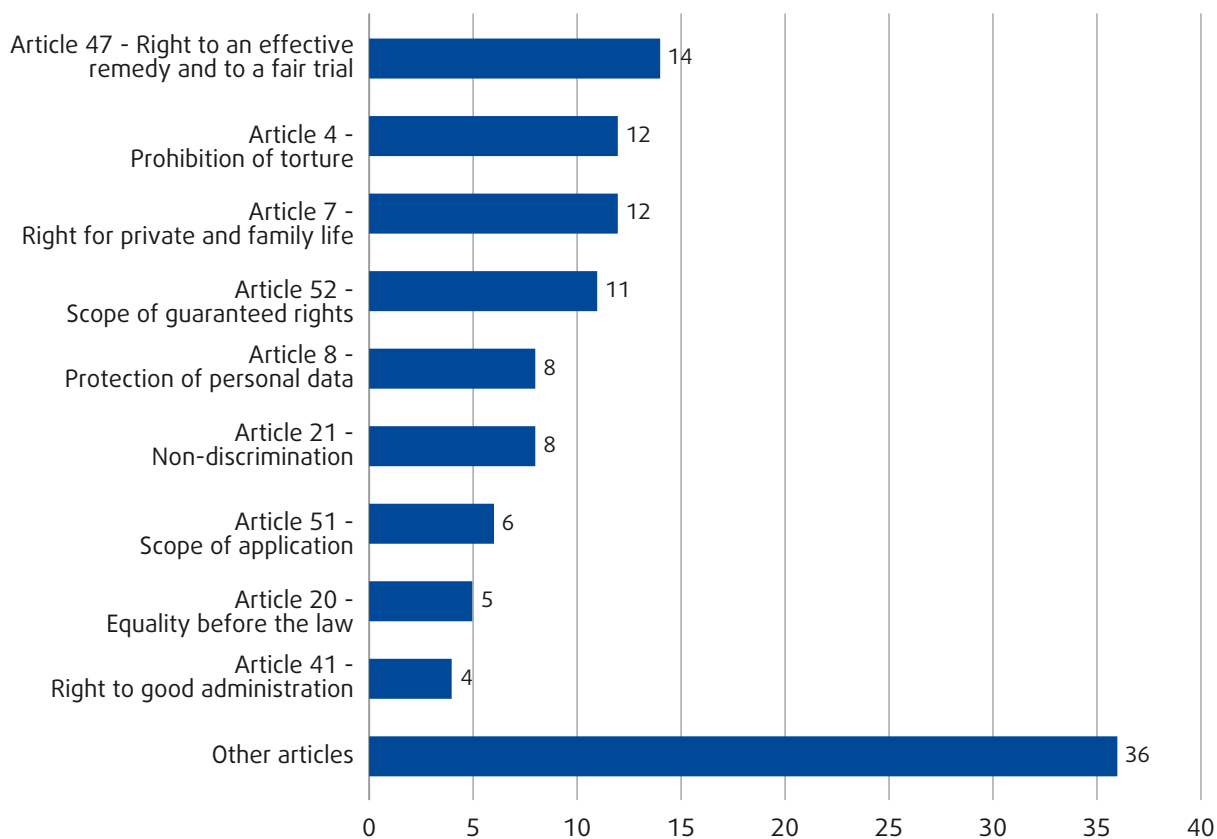
**Figure 2.3: Policy areas addressed in analysed court decisions**



*Notes: Based on 71 court decisions analysed by FRA. These were issued in 28 Member States in 2017. Up to three decisions were reported per Member State. For every case, only the predominant policy area was taken into account. The category 'Other policy areas' includes policy areas that were referred to in fewer than three court decisions. The categories used in the graph are based on the subject matters used by EUR-Lex.*

*Source: FRA, 2017*

**Figure 2.4: Number of references to Charter articles in the 2017 court decisions analysed, by article**

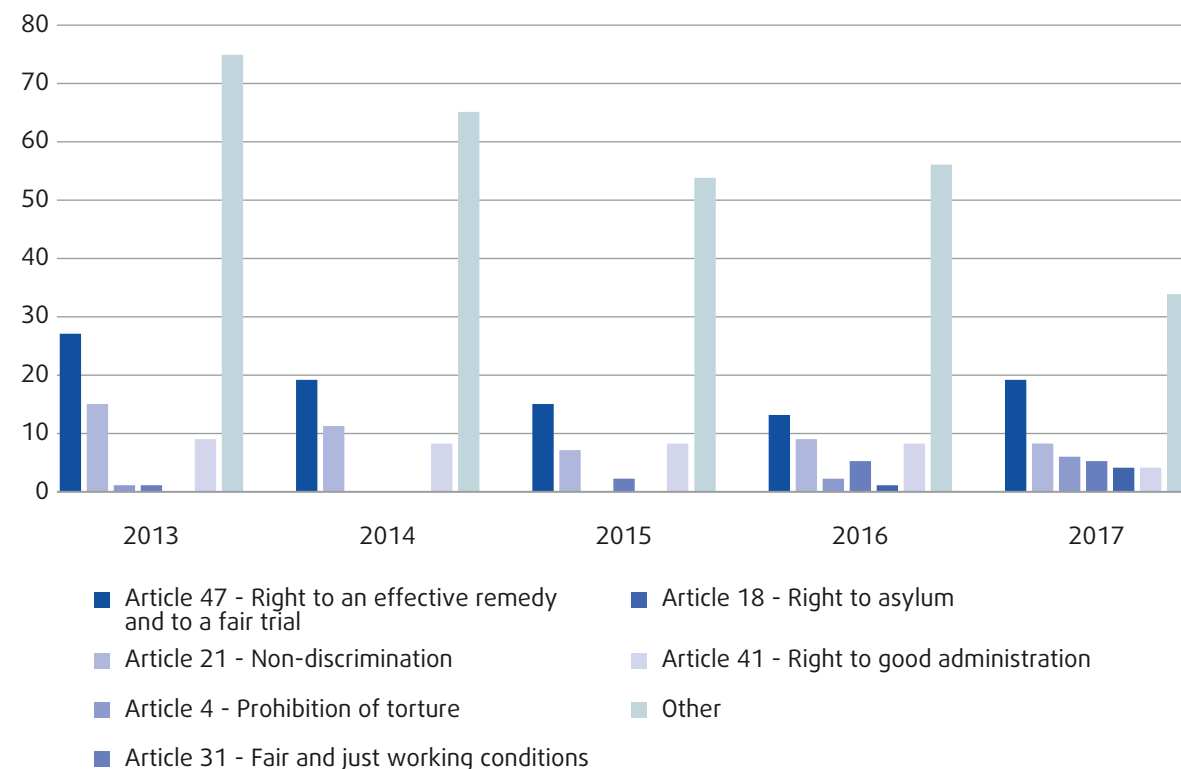


*Notes: Based on 71 court decisions analysed by FRA. These were issued in 28 Member States in 2017. Up to three decisions were reported per Member State. The category 'Other articles' includes articles that were referred to in fewer than four analysed court decisions. More than one article can be referred to in one court decision.*

*Source: FRA, 2017*





**Figure 2.5: Most prominent articles mentioned in preliminary ruling requests, 2013–2017**

Source: FRA, 2017 (based on data provided by CJEU on all preliminary ruling requests mentioning the Charter between 2013 and 2017; statistical analysis prepared by FRA)

were mentioned in preliminary ruling requests between 2013 and 2017. In 2017, Article 47 was mentioned most often, in 19 requests; followed by Article 21 (8 times), Article 4 (6 times) and Article 31 (5 times). Most Charter-relevant requests for preliminary rulings in 2017 came from Italy (10), followed by Germany (8), Austria (6) and the Netherlands (6).

### 2.1.2. Scope of the Charter: still an often ignored question

Article 51 of the Charter defines its scope by stressing that it applies to Member States “only when they are implementing Union law”. CJEU case law interprets this widely as “acting within the scope of EU law”. However, the limits of the scope of EU law are not always easy to delineate. This might contribute to the fact that, just as in previous years, in the majority of the 2017 court decisions analysed, the questions of whether or not and why the Charter applied to the specific case in question remained unaddressed.

A case decided by a regional court in **Poland** serves as an example.<sup>6</sup> It concerned an application to the local self-government authority for the ‘500+’ social benefit. This benefit is available to families who have at least two children. The applicant did not properly explain his family situation, so the local self-government

authority ordered a social interview. The applicant refused the interview and the authority therefore decided not to grant the benefit. The court held that the authority had not violated Article 7 (respect for private and family life) of the Charter. It did not first examine whether EU law applied to the case.

In 2017, courts continued to use the Charter to interpret national law in contexts where it does not appear to apply. This was especially obvious with Charter provisions that offer more specific wording than one would traditionally find in fundamental rights provisions, such as the right to good administration and the best interests of the child. In this context, the Charter is used to complement national law. For example, the Supreme Administrative Court of **Lithuania** used Article 41 of the Charter, the right to good administration before EU institutions and bodies, to interpret national law. In light of this Charter provision, the court obliged national authorities to re-examine requests to renew temporary residence permits because the applicants had no opportunity to provide explanations and information to dispel any doubts about the reason for their presence in Lithuania.<sup>7</sup>

In **Portugal**, a court of appeal dealt with a case in which the father of a child complained that the child’s mother had failed to comply with the parental responsibility

agreement.<sup>8</sup> He claimed that the child's mother had decided to change the child's residence and school without his consent and that she had not complied with the court-ordered visiting arrangements. The court concluded that the mother had not breached parental responsibilities and had not violated any of the child's rights. The court made a rather detailed reference to the child's best interests and to Article 24 of the Charter, without explaining if and why the Charter would apply at all.

Article 1 (human dignity) of the Charter is also often referred to in cases beyond the scope of EU law. In a case concerning a supposed theft in a store in Rijeka and the subsequent behaviour of the security guards, the Constitutional Court of **Croatia** gave the Charter considerable prominence. A boy and his father went shopping and, when they left the store, the anti-theft alarm went off. The security guard started checking the boy in a manner causing fear and shame in front of a large group of people and continued even after the police had concluded that nothing had been stolen. The court of first instance granted him compensation for non-material damages in relation to the violation of the right to human dignity and reputation and for the violation of his personal rights. The county court confirmed the first, but decided to deny the second violation on the basis that a 12-year-old child could not develop a sense of personality. The Constitutional Court declared void the decisions of the lower courts. It emphasised, among other things, that "by joining the European Union, the Republic of Croatia has accepted the contents of the Charter, whose chapter I is titled Dignity [...]. In this way, by committing to the contents of the Charter, human dignity becomes a component of the human rights catalogue of the Croatian Constitution."<sup>9</sup>

Where courts are applying an act of EU secondary law, they are more likely to refer explicitly to the Charter's applicability. For instance, in **Bulgaria**, the Supreme Administrative Court had to decide on an appeal against the denial of family reunification. It stated that, "[a]s the right to family life of third country nationals is subject to regulation by EU law, the Charter of Fundamental Rights of the European Union (the Charter) is applicable to this right."<sup>10</sup>

Sometimes, when dealing with the applicability of the Charter, national courts simply repeat the wording of Article 51. In some cases, the court makes reference to earlier CJEU and national case law on the question of when the Charter applies. The federal Administrative Court in **Germany**, for instance, did this when it had to decide on the argument of a plaintiff who claimed that the fee for public service broadcasting violated the principle of equal burden. In addition, the plaintiff argued that the right to information also covers the right to escape from information for which fees are required. Hence, the plaintiff raised an issue under

Article 11 (1) of the Charter (freedom of expression and information). The Administrative Court referred to the case law of the Constitutional Court, stating that "the law of the Member States only needs to be assessed in the light of the fundamental rights guaranteed by the Charter if it is determined by the law of the Union. The law of the Union has to substantially determine national law; it especially has to state the obligation of transposition. Moreover, the Charter is applicable if fundamental freedoms of the Treaty on the Functioning of the European Union are at stake."<sup>11</sup>

However, this year cases were also reported where the judges analysed the Charter's applicability in greater detail. For instance, in the **United Kingdom**, in a case concerning the rights of so-called 'Zambrano carers' (citizens of third countries taking care of their children who are EU citizens), the Supreme Court addressed the applicability of the Charter and Article 21 thereof in greater detail.<sup>12</sup> The Supreme Court in **Spain** also provided full-fledged argumentation about why the Charter did not apply in a case concerning the use of the national flag and emblem on envelopes used by the political party Vox in the Spanish elections. The Spanish Electoral Board declined to distribute the envelopes to the electorate. The Supreme Court made it clear that the Charter was not applicable and therefore could not be invoked against the decision of the Electoral Board. The court referred in detail to relevant case law of the CJEU and concluded: "The Spanish courts, in the same way as European Union judges, can and must apply the Charter; however, in this case there is no connection with any European legislation, so it is enough to take into consideration the constitutional provisions."<sup>13</sup>

*"However, the Charter is considered to be ordinary law, as opposed to the Constitution, and is only applicable with respect to matters that fall within the competencies and duties of the European Union. This is not the situation in this case as it deals with matters that fall within national competence. Therefore, inasmuch as the plea is based on the Treaty, it will not be accepted due to the fact that the subject raised in front of this Court is not within Treaty competence."*

*Malta, First Hall Civil Court, Case 52/2016/LSO, decision of 28 March 2017*

Another political case concerned a quota for women in **Cyprus**. Parliament voted for a law and the President of the Republic referred it to the Supreme Court for an opinion. The law introduced a quota of one third of women on the management boards of public organisations. The court unanimously concluded that the specific provision is not allowed under Cypriot law, as it is a measure of positive discrimination and affirmative action in favour of women, in breach of basic equality provisions of the Cypriot constitution, and cannot be defended with reference to EU law. In fact, the court stated explicitly that Article 23 (equality between men and women) "does not apply because



the issue at stake does not concern Union law, as per Article 51 of the Charter<sup>14</sup>. In **Malta**, a case brought before a civil court concerned the requirement for women, but not men, to include their marital status when, for instance, registering a contract of sale with the Public Registry. Although the administrative court found that the requirement violated the constitution and the ECHR, it clarified that the Charter did not apply.<sup>15</sup>

### 2.1.3. The Charter as legal standard: reviewing compatibility of national law with fundamental rights

National judges' use of the Charter was again manifold. They most frequently used it to interpret national law. Sometimes they used it to interpret EU law. Sometimes they also used the Charter to check the legality of national law. In **Austria**, since 2012, the Constitutional Court has used the Charter in the context of constitutional reviews, thereby granting the Charter a constitutional role. In a case concerning online booking platforms and whether or not 'vertical parity clauses', which oblige hotels to offer the same price on the platform as on their own online sale systems, were prohibited, the Constitutional Court confirmed its case law. It underlined that, "if a constitutionally guaranteed right [...] has the same scope as a right of the Charter of Fundamental Rights, the decision of the Constitutional Court is usually based on the Austrian constitutional situation".<sup>16</sup> However, even where the Charter is not formally acknowledged as part of the standards for use in constitutional reviews, the Charter can play a role.

The Constitutional Court in **Bulgaria** referred to the Charter in the context of a constitutional review of a provision in the Judiciary Act (*Закон за съдебната власт*), which prohibits discharging judges or prosecutors from their duties when they resign, if there is a pending disciplinary procedure against them, until the closing of the procedure. The court concluded that the provision violated the principle of freedom of work, enshrined in Article 48 (3) of the Bulgarian Constitution. It then also prominently referred to the Charter, "in accordance with which everyone has the right to engage in work and to pursue a freely chosen or accepted occupation."<sup>17</sup>

The Supreme Administrative Court in **Finland** checked the Personal Data Act (523/1999) against the Charter and the ECHR. The case concerned the Finnish Embassy in Switzerland, which had rejected a passport application because the applicant had not agreed to have his fingerprints stored not only in the passport's data chip but also in the passport register. The court concluded that the provisions in the Passport Act concerning storage of fingerprint data in the passport

register and the limitations imposed on the right to private life and the protection of personal data are precise and defined in sufficient detail.<sup>18</sup>

Data protection was also at the centre of a case decided by a Higher Administrative Court in **Germany**. The court dealt with whether the relevant provisions of the Telecommunication Act, implementing the EU e-Privacy Directive (2002/58/EC), are compatible with various Charter provisions. The court deemed the limitation of the freedom to conduct business (Article 16 of the Charter) unjustified and hence incompatible with the Charter.<sup>19</sup>

### 2.1.4. The Charter as legal standard: interpreting national law in a fundamental rights-compliant manner

In the cases analysed, courts most frequently used the Charter in the context of interpreting national law. For instance, the Supreme Administrative Court of **Bulgaria** was the last instance court in litigation concerning a teacher who had refused to allow a pupil with a disability to join a school excursion – an alleged violation of the Protection against Discrimination Act (*Закон за защита от дискриминация*). The Supreme Administrative Court confirmed the lower court's decision and rejected the teacher's appeal. To reinforce its argument, the court referred to various rights under the Charter, including Article 1 (human dignity), Article 24 (rights of the child) and Article 26 (integration of persons with disabilities).<sup>20</sup>

Another example is a case decided by the Supreme Court of **Croatia**, which dealt with a Finnish citizen arrested in Croatia pursuant to a Turkish international arrest warrant. The person had thrown a homemade Molotov cocktail at the Turkish Embassy in Helsinki, causing fire and material damage. A Finnish court had convicted the defendant of sabotage in 2009. The question arose of whether or not the Finnish final judgment could be considered equivalent to a domestic judgment in accordance with Croatian legislation. The court confirmed that the Dubrovnik County Court had correctly concluded that the term 'domestic court' in Article 35, paragraph 1, point 5, of the Act on International Legal Assistance in Criminal Matters (*Zakon o međunarodnoj pravnoj pomoći u kaznenim stvarima*) in this case covered not only the courts of the Republic of Croatia, but also of other EU Member States. The provision has to be interpreted in light of Article 50 of the Charter, according to which no one shall be tried or punished twice in criminal proceedings for the same criminal offence.<sup>21</sup> Similarly, in **Denmark**, the Supreme Court found that the relevant provisions of the Danish Extradition Act

“should be interpreted in accordance with Article 4 of the EU Charter and Article 3 of the ECHR”.<sup>22</sup>

### 2.1.5. The Charter as legal standard: interpreting EU law

National courts also refer to the Charter when interpreting EU law – typically secondary law, i.e. EU legislation. However, in certain cases, national courts may also interpret a provision of EU primary law in light of the Charter. In **Germany**, the Federal Court of Justice dealt with a case concerning a woman who had received in-vitro fertilisation (IVF) treatment as well as prolonged embryo cultivation (blastocyst transfer) in the Czech Republic.<sup>23</sup> She was charged around € 11,000 by the IVF centre and sought reimbursement from her German insurance company, arguing that, according to the general insurance conditions, treatments in other European countries are insured. She was refused reimbursement, which she believed violated the freedom to provide services (Article 56 of the Treaty on the Functioning of the European Union). The court, however, agreed with the insurance company that – since fertilisation by means of egg cell donation is prohibited under German law – the insurance did not cover the treatment in the Czech Republic, although egg cell donation is permitted there. The court did not find that the insurance conditions violated EU law. In any event, a possible restriction of the freedom to provide services in the event of disputes is to be considered justified by the insurance company’s freedom to conduct a business (Article 16 of the Charter).

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

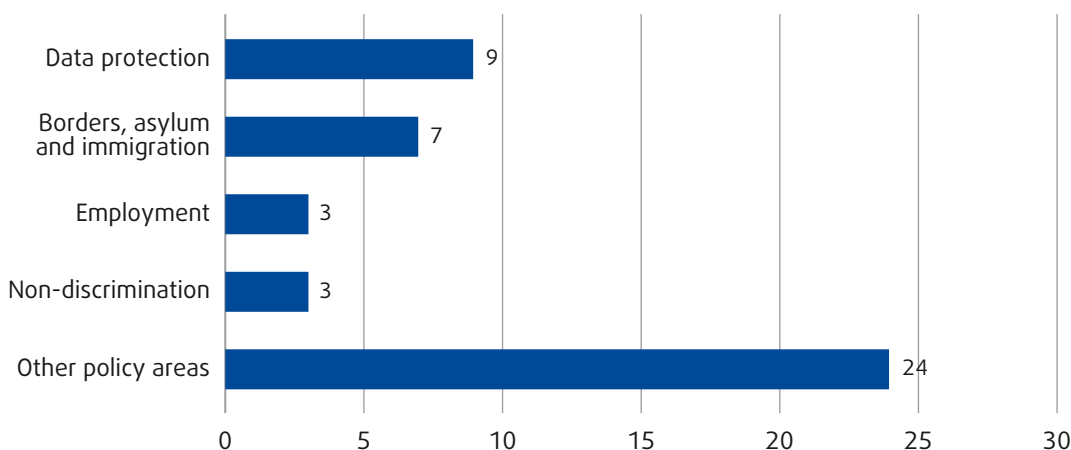
The Charter is sometimes referred to in the legislative process. Parliamentarians occasionally mention the Charter, and legislatures – be they government or parliaments – do use the Charter, even if only occasionally rather than consistently, when assessing bills or their impact. Sometimes references to the Charter are even incorporated in the text of national laws.<sup>24</sup> The following evidence, however, points to a rather limited significance of the Charter in these contexts.

### 2.2.1. Parliamentary debates

FRA collected information on 46 examples of Charter references registered in parliamentary debates of Member States, covering a wide spectrum of thematic areas. It asked Franet to select examples of such references where the Charter played a relevant role. Data protection and borders, asylum and immigration were the predominant topics (Figure 2.6).

Data protection was, for instance, a central topic in a parliamentary debate in **France**, where a legislative proposal raised concerns under Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter. A Member of Parliament expressed the view that systematically collecting personal data

**Figure 2.6: Policy areas addressed in parliamentary debates identified as referring to the Charter in 2017**



*Notes:* Based on 46 parliamentary debates analysed by FRA. These took place in 20 EU Member States in 2017. Up to three debates were reported per Member State; no parliamentary debates were reported for Bulgaria, Cyprus, the Czech Republic, Latvia, Lithuania, Malta, Romania and Slovenia. The category ‘Other policy areas’ includes policy areas that were referred to in fewer than three parliamentary debates analysed. The categories used in the graph are based on the subject matters used by EUR-Lex.

*Source:* FRA, 2017

of flight passengers who are not criminal suspects and being able to share those data with other countries would violate the right to respect for private life and data protection as enshrined in the Charter.<sup>25</sup>

During a plenary debate in **Germany** on various traffic laws, a Member of Parliament invoked the Charter when criticising the working conditions of employees. The member pointed out that “Article 31 of the Charter of Fundamental Rights of the European Union states that every worker has the right to working conditions which respect his or her health, safety and dignity. The European road transport industry has now developed into a sector in which human dignity does not count much, not to mention the protection of safety and health.”<sup>26</sup>

In light of judicial reforms in **Poland**, the importance of Article 47 (right to an effective remedy and to a fair trial) of the Charter was highlighted in a parliamentary debate on the separation of powers and the independence of the justice system. The Ombudsman expressed concern about a draft law that aimed, among other things, to introduce a retirement regime for Supreme Court judges and to widen political control over the process of appointing and dismissing them.

► For more information on this issue, see [Chapter 9](#).

*“We can’t forget that Poland is an EU Member State and each of the Polish courts is also a court of the European Union which has to interpret and apply EU law. That’s why the standards set by Article 47 of the Charter are essential. It matters that the courts are independent from the executive.”*

Poland, Adam Bodnar, Ombudsman, *Stenogram of the Sejm’s session*, 18 July 2017

Some debates that referred to the Charter did not necessarily deal with issues falling within the scope of EU law. For instance, a Member of Parliament in **Belgium** asked about the possibility of the Turkish population in Belgium participating on Belgian territory in a Turkish referendum on the death penalty. The Prime Minister replied that this would not be tolerated, citing the Charter as one of the sources from which the prohibition of capital punishment stems.<sup>27</sup>

In **Spain**, the High Court of Catalonia prohibited the Catalan autonomous broadcaster from airing content that could enable the organisation or holding of a referendum on the self-determination of Catalonia. This prompted a Member of Parliament to ask if this decision violated Article 11 (freedom of expression and information) of the Charter.<sup>28</sup> Another reference to Article 11 of the Charter occurred in the **Danish** Parliament, where representatives of the Danish People’s Party made a motion for a parliamentary resolution requesting the government to announce to the Council of the European Union that it would

seek to repeal the EU’s Code of Conduct countering illegal hate speech online, which was developed by the European Commission, Facebook, Twitter, YouTube and Microsoft.<sup>29</sup>

*“The Government must remind the Council of the European Union and the Commission that Article 11 of the EU’s Charter on Fundamental Rights protects the freedom of expression and that it is a requirement that limitations of the freedom of expression are strictly necessary, measure up to the pursued aim and have a clear and transparent basis in national law. The Code of Conduct does not comply with these requirements.”*

Members of Parliament, Danish People’s Party (2017), ‘Motion for a bill repealing the EU’s Code of Conduct countering illegal hate speech online’, 29 November 2017

Not all Charter-related statements in parliaments are necessarily restricted to the national territory. In **Portugal**, the Charter was referred to in a debate on amendments to the Hungarian Act on National Higher Education, which especially caused concern regarding its effects on Central European University in Budapest. The law was criticised in the parliamentary debate for violating Article 13 (freedom of the arts and sciences) of the Charter, which provides for freedom of academic and scientific research.<sup>30</sup> The Charter was also referred to in the context of the **United Kingdom’s** withdrawal from the EU, during a debate concerning the European Union (Withdrawal) Bill. A Member of Parliament stressed that the envisaged bill did not allow the rights enshrined in the Charter to be retained in British law, and called for an extensive discussion of the topic.<sup>31</sup>

*“The hon. and learned Lady is ably illustrating why we need a debate about this. Despite the fact that the EU charter of fundamental rights will not be part of domestic law, she thinks that those rights will, nevertheless, still be protected. Let us have a debate about how we are going to do that. That is my point. On the face of the Bill, it looks like these rights will be lost.”*

United Kingdom, UK Parliament, House of Commons (2017), ‘Emergency debate (Standing Order No. 24) – Volume 627’, 17 July 2017

A similar concern was raised during a debate in the **Irish** Parliament on the Good Friday Agreement in relation to Brexit. In response to a question about how equivalent human rights protection in Ireland and Northern Ireland could be ensured, Deputy Charles Flanagan referred to the Charter, underlining that “the Charter provides an important and effective common reference on rights across the island of Ireland, as it does across the EU as a whole. [...] The British Government expressly indicated that the provisions of the EU Charter of Fundamental Rights in Northern Ireland will not be applied as part of British law after the UK leaves the EU. This may require that a consideration may be given to alternative means of ensuring the coherence of rights frameworks across the island of Ireland.”<sup>32</sup>

### 2.2.2. Legislative processes

A considerable part of national legislation is directly or indirectly influenced by EU law and is thus likely to fall within the scope of EU law. It is therefore advisable to check such legislation for potential effects on rights enshrined in the Charter. Fundamental rights considerations can be raised during the legislative process in different ways, including in impact assessments or when a bill comes under legal scrutiny. An impact assessment is an exercise evaluating potential impacts of upcoming legislation. It typically happens when a bill has not yet been fully defined, so that various legislative options can be compared. Member States have procedures that examine the potential impact of different aspects of legislative proposals. While these assessments predominantly focus on economic, environmental and social impacts of bills, many also consider effects on fundamental rights. As the exercise focuses on potential effects rather than on compatibility with higher ranking legal norms, the exercise is not necessarily legal in nature but employs social science, natural science, statistical and other methods.

Another avenue is for legislating bodies – units in the government or the parliament – or independent expert bodies to subject legislation to legal scrutiny. Contrary to impact assessments, which do not necessarily constitute a legal exercise, the legal scrutiny of a bill is a legal assessment based on the specific wording of a final bill, examining the

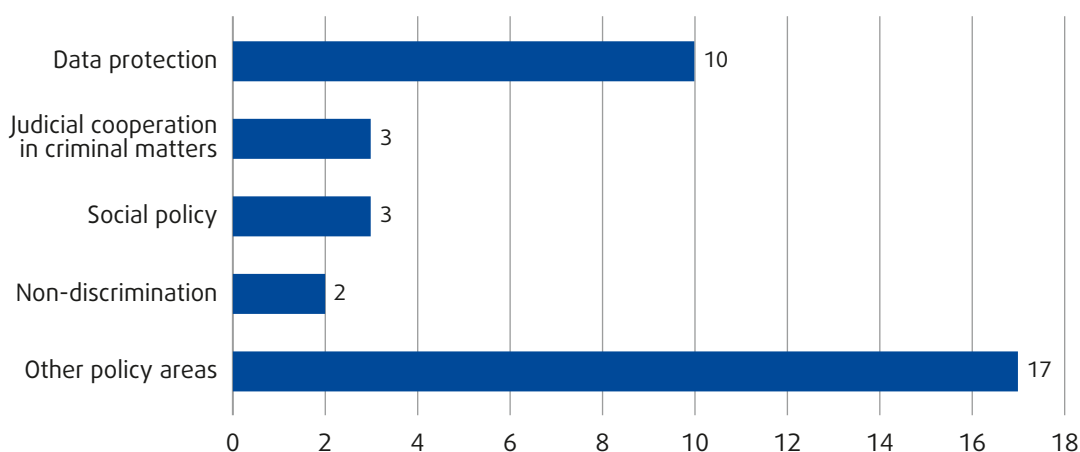
draft legislation’s compatibility with constitutional, supranational and international law. Since some national systems do not neatly differentiate between impact assessments and legal scrutiny, this section analyses both procedures together.

Looking at the 35 examples of impact assessments and legal scrutiny reported in 2017, it appears that the areas of data protection and judicial cooperation in criminal matters are most prone to raising Charter concerns – as was the case, for instance, in **Germany**,<sup>33</sup> **Portugal**<sup>34</sup> and **Romania**<sup>35</sup> (Figure 2.7).

Many of the references were general and only briefly mentioned the Charter without going into further detail – for example, in **Greece**<sup>36</sup> and **Poland**.<sup>37</sup> Others, however, were more explicit.

**Latvia**, for instance, amended its National Security Law in response to security concerns relating to radicalisation and extremism in Europe. The amendment introduces the right of the Minister of the Interior to issue a decision prohibiting an individual from leaving the country if there is sufficient ground to believe that he or she intends to engage in terrorist activities or join armed conflicts abroad. The legislative amendment was assessed to ensure its compliance with Article 45 of the Charter (freedom of movement), with the review pointing out that freedom of movement can be subject to certain restrictions imposed by law if the public interest of a democratic society prevails in the specific context.<sup>38</sup>

**Figure 2.7: Number of impact assessments and legal assessments referring to the Charter in 2017, by policy area**



*Notes: Based on 35 impact assessments and legal assessments (legal scrutiny) analysed by FRA. These took place in 18 EU Member States in 2017. Up to three examples were reported per Member State; none were reported for Cyprus, Estonia, Hungary, Lithuania, Malta, Romania, Slovakia, Slovenia, Spain and the United Kingdom. The category ‘Other policy areas’ includes policy areas that were referred to in only one assessment analysed. The categories used in the graph are based on the subject matters used by EUR-Lex.*

*Source: FRA, 2017*

An assessment in **Denmark** provides an example in the area of data protection. The Ministry of Justice issued a report to ensure the correct implementation of the General Data Protection Regulation. The regulation formed the basis for the government's proposal for the Danish Act on Data Protection. The report emphasised Article 6 (right to liberty and security), Article 8 (protection of personal data) and Article 28 (right of collective bargaining and action) of the Charter.<sup>39</sup>

Impact assessments and legal scrutiny often refer to the Charter alongside other international legal instruments, making it difficult to assess the relevance of the Charter itself. For instance, in **Belgium**, the Council of State stressed the need to find the right balance between animal rights and freedom of religion in the context of the implementation of Council Regulation 1099/2009 on the protection of animals at the time of killing and prohibiting ritual slaughter without stunning. The Council of State concluded in its impact assessment that the legislative proposal should be revised to include necessary adjustments ensuring respect for freedom of religion as laid down in, among others, Article 10 (freedom of thought, conscience and religion) of the Charter. The Walloon Parliament took this assessment into consideration by adding that it must be possible to purchase meat coming from a Member State that authorises ritual slaughter without prior stunning.<sup>40</sup>

In **Belgium**, the Federal Migration Centre (Myria) concluded that Bills 2549/001 and 2548/001 of 22 June 2017 modifying the law of 15 December 1980 on removal and detention were not in line with Article 27 of the Dublin III Regulation (Remedies). Considering the latter in combination with Article 47 (right to an effective remedy and to a fair trial) of the Charter, Myria called for an effective remedy to have a suspensive effect on an asylum seeker's transfer where such transfer carried a serious risk of mistreatment. The legislature ultimately did not take this concern into account.<sup>41</sup>

### 2.2.3. National legislation

While the Charter does play somewhat of a role during the legislative process, the texts of adopted national legislation rarely mentions it. However, as the past five years have shown, some examples can be identified. The data collected from 2017 contain 12 examples of explicit references to the Charter in the legislation of seven EU Member States, covering a wide range of thematic areas. The references range from rather symbolic references in a law's preamble to references in operational provisions.

In Article 15 of the law incorporating Directive 2014/92/EU related to payment accounts, **Greece** refers to Article 21 (non-discrimination) of the Charter. The latter serves as a point of reference for the prohibited grounds of discrimination that credit institutions must be aware of when persons legally residing in the EU want to open or access a payment account in Greece.<sup>42</sup> In **Germany**, paragraph 28 (2) No. 4 of the Federal Criminal Police Office Law, which comes into force on 25 May 2018, clarifies that the transmission of data to Member States of the EU and non-EU countries is precluded in cases where it would amount to a violation of the principles contained in the Charter.<sup>43</sup> In **Belgium**, a law on the execution of a European investigation order refers to the Charter as a possible ground for refusal to follow such an order in cases where the latter is incompatible with the rights enshrined in the Charter.<sup>44</sup>

In some cases where the law itself did not mention the Charter, explanatory memoranda to bills mentioning it were reported, instead. An explanatory memorandum for a proposed bill regulating integrated prevention and protection services for people with Down syndrome in **Romania** emphasises Article 26 (integration of persons with disabilities) of the Charter, pointing out that Member States have to develop mechanisms that ensure the full integration of persons with disabilities and their independent living.<sup>45</sup>

## FRA opinions

According to the case law of the Court of Justice of the European Union (CJEU), the EU Charter of Fundamental Rights is binding on EU Member States when they act within the scope of EU law. The EU legislature affects, directly or indirectly, the lives of people living in the EU across almost all policy areas. In light of this, the EU Charter of Fundamental Rights should form a relevant standard when judges or civil servants in the Member States deliver on their day-to-day tasks. However, as in recent years (2012–2016), FRA's evidence suggests that judiciaries and administrations make only rather limited use of the Charter at national level. It appears that hardly any policies aim to promote the Charter although Member States are obliged not only to respect the rights covered by the Charter, but also to "promote the application thereof in accordance with their respective powers" (Article 51 of the Charter). Where the Charter is referred to in the legislative process or by the judiciary, its use often remains superficial.

### FRA opinion 2.1

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

*EU Member States should promote awareness of the Charter rights and ensure that targeted training modules are offered for national judges and other legal practitioners.*

According to Article 51 (field of application) of the EU Charter of Fundamental Rights, all national legislation implementing EU law has to conform to the Charter. As in previous years, the Charter's role in legislative processes at national level remained limited in 2017: the Charter is not a standard that is explicitly and regularly applied during procedures scrutinising the legality or assessing the impact of upcoming legislation – whereas national human rights instruments are systematically included in such procedures. Moreover, just as in previous years, many decisions by national courts that used the Charter did so without articulating a reasoned argument about why the Charter applied in the specific circumstances of the case.

### FRA opinion 2.2

*National courts, as well as governments and/or parliaments, could consider a more consistent 'Article 51 (field of application) screening' to assess at an early stage whether or not a judicial case or legislative file raises questions under the EU Charter of Fundamental Rights. The development of standardised handbooks on practical steps to check the Charter's applicability – so far the case only in very few EU Member States – could provide legal practitioners with a tool to assess the Charter's relevance in a particular case or legislative proposal. The FRA Handbook on the applicability of the Charter could serve as inspiration in this regard.*





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# UN & CoE

January

February

March

10 March – Parliamentary Assembly of the Council of Europe (PACE) adopts a resolution on the political rights of persons with disabilities: a democratic issue

17 March – United Nations (UN) Human Rights Committee (HRC) adopts a resolution on freedom of religion or belief

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

April

6 April – In *A.P., Garçon and Nicot v. France* (Nos. 79885/12, 52471/13 and 52596/13), the European Court of Human Rights (ECtHR) holds that requiring sterilisation or treatment involving a risk of sterility to change entries indicating the applicants' sex on their birth certificates violates the right to respect for private and family life (Article 8 of the ECHR)

19 April – UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity issues first report

27 April – PACE adopts a resolution on the protection of rights of parents and children belonging to religious minorities

May

30 May – PACE adopts a resolution on the human rights of older persons and their comprehensive care

June

16 June – UN HRC adopts a resolution on the Special rapporteur on the rights of persons with disabilities

23 June – UN HRC adopts a resolution on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health in the implementation of the 2030 Agenda for Sustainable Development

July

11 July – In *Belcacemi and Oussar v. Belgium* (No. 37798/13), the ECtHR holds that banning the wearing in public of clothing that partly or totally covers the face does not violate the right to respect for private and family life (Article 8 of the ECHR); freedom of thought, conscience and religion (Article 9); or the prohibition of discrimination (Article 14)

11 July – In *Dakir v. Belgium* (No. 4619/12), the ECtHR holds that banning clothing that covers the face from being worn in public does not violate the right to respect for private and family life (Article 8 of the ECHR); freedom of thought, conscience and religion (Article 9); or the prohibition of discrimination (Article 14), in combination with Articles 8 and 9 of the ECHR

19 July – UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity issues second report

25 July – In *Carvalho Pinto de Sousa Morais v. Portugal* (No. 17484/15), the ECtHR holds that reducing compensation awarded for a medical error committed during gynaecological surgery on account of the applicant's gender and advanced age violates the prohibition of discrimination (Article 14 of the ECHR) in conjunction with the right to respect for her private and family life (Article 8)

August

September

28 September – UN HRC adopts a resolution on mental health and human rights

October

12 October – PACE adopts a resolution on promoting the human rights of and eliminating discrimination against intersex people

26 October – In *Ratzenböck and Seydl v. Austria* (No. 28475/12), the ECtHR holds that excluding heterosexual couples from entering into registered partnerships reserved exclusively for same-sex couples does not violate the prohibition of discrimination (Article 14 of the ECHR) in conjunction with the right to respect for private and family life (Article 8 of the ECHR)

November

December

5 December – In *Ribač v. Slovenia* (No. 57101/10), the ECtHR holds that not granting an old-age pension on the ground of not having Slovenian citizenship violates the prohibition of discrimination (Article 14 of the ECHR) in conjunction with the protection of property (Article 1 of Protocol No. 1 of the ECHR)

14 December – In *Orlandi and Others v. Italy* (Nos. 26431/12; 26742/12; 44057/12 and 60088/12), the ECtHR holds that the inability for same-sex couples to have marriages contracted abroad registered as a union in Italy violates their right to respect for private and family life (Article 8 of the ECHR)

# EU

## January

19 January – European Parliament (EP) adopts a resolution on a European Pillar of Social Rights

## February

15 February – EP adopts a resolution on the European Semester for economic policy coordination: Employment and Social Aspects in the Annual Growth Survey 2017

## March

9 March – In *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol (C-406/15)*, the Court of Justice of the EU (CJEU) holds that national law giving additional protection to employees with certain disabilities in the event of dismissal but not to civil servants with the same disabilities is permissible, provided this does not infringe on the principle of equal treatment, in line with the UN Convention on the Rights of Persons with Disabilities in conjunction with the general principle of equal treatment enshrined in Articles 20 and 21 of the EU Charter of Fundamental Rights

14 March – In *Achbita, Centrum voor Gelijkheid van kansen en voor racismebestrijding v. G4S Secure Solutions (C-157/15)*, the CJEU (Grand Chamber) holds that internal rules of an undertaking prohibiting employees from wearing visible political, philosophical or religious signs do not constitute direct discrimination under the Employment Equality Directive (2000/78/EC); such rules may, however, constitute indirect discrimination if they put persons of a specific religion at a particular disadvantage

14 March – In *Boungaoui and Association de défense des droits de l'homme (ADDH) v Micropole Univers (C-188/15)*, the CJEU (Grand Chamber) holds that an employer cannot stop an employee from wearing an Islamic headscarf upon a customer's wish not to be served by said employee; such wishes cannot be considered genuine and determining occupational requirements within the meaning of the Employment Equality Directive (2000/78/EC)

## April

## May

22 May – European Commission releases country specific recommendations under the European Semester 2017, also specifically addressing age and disability

## June

14 June – EP adopts a resolution on the protection of vulnerable adults

14 June – EP adopts a resolution on the need for an EU strategy to end and prevent the gender pension gap

## July

19 July – In *Abercrombie & Fitch Italia Srl v. Antonio Bordonaro (C-143/16)*, the CJEU holds that an employer can dismiss workers on an on-call contract when they reach 25 years of age, since that provision pursues a legitimate aim of employment and labour market policy and the means laid down to attain the objective are appropriate and necessary, in line with the Employment Equality Directive (2000/78/EC – Article 2(1), Article 2(2)(a) and Article 6(1))

## August

## September

## October

## November

16 November – EP adopts a resolution on combating inequalities as a lever to boost job creation and growth

17 November – EP, Council of the EU, and European Commission proclaim the European Pillar of Social Rights, including gender equality, equal opportunities, old age income and pensions, and the inclusion of people with disabilities among its 20 key principles

30 November – EP adopts a resolution on the implementation of the European Disability Strategy

## December





# 3

## Equality and non-discrimination



*The year 2017 brought mixed progress in promoting equality and non-discrimination in the European Union (EU). While the Equal Treatment Directive – proposed in 2008 – had not been adopted by year-end, the EU proclaimed the European Pillar of Social Rights, which is rooted in the principle of non-discrimination. Restrictions on religious clothing and symbols at work or in public spaces remained a subject of attention, particularly affecting Muslim women. Equality for lesbian, gay, bisexual, transgender and intersex (LGBTI) persons made some advances, particularly regarding the civil status of same-sex couples. Meanwhile, findings drawing on a wide range of equality data – including data obtained through discrimination testing – show that unequal treatment and discrimination remain realities in European societies.*

Discrimination and unequal treatment manifest themselves in many ways, in a range of contexts and across all areas of life. This chapter begins by considering progress made relating to equality and non-discrimination in the EU. It then moves to the issue of restrictions on religious symbols, followed by an analysis of advances made in EU Member States with regard to the fundamental rights of LGBTI persons. A section on equality data – crucial for evidence-based policymaking – provides evidence of (in)direct discrimination in employment and housing and highlights that social exclusion and unequal treatment persist throughout Europe. The chapters on ageing, on racism and xenophobia, on Roma integration, and on the implementation of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD) complement the findings outlined in this chapter.

### 3.1. Mixed progress in promoting equality and non-discrimination in the EU

The multiplicity of ways in which people in the EU experience discrimination and unequal treatment reinforces the need for the Council of the EU to progress in its negotiations on the adoption of the proposed

Equal Treatment Directive. These entered their ninth year in 2017, and had not been concluded by year-end.<sup>1</sup> Adopting this directive would ensure that the EU does not operate an artificial hierarchy of grounds. Instead, the EU would offer people comprehensive protection against discrimination in key areas of life, irrespective of their sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. For more information on the proposed Equal Treatment Directive, see [Chapter 1](#).

If adopted, this directive could also contribute to the realisation of a range of principles and rights included in the European Pillar of Social Rights. The European Parliament, the Council of the EU and the European Commission proclaimed the Pillar in November 2017. This provides the Union with an additional means through which to promote equality and non-discrimination. The Pillar includes gender equality, equal opportunities, old age income and pensions, and the inclusion of people with disabilities among its 20 key principles.<sup>2</sup> For more information on the European Pillar of Social Rights, see [Chapter 1](#).

*“The [European] Pillar [of Social Rights] partially goes beyond the current acquis by extending protection against discrimination on the grounds of religion or belief, disability, age and sexual orientation to the areas of social protection, including social security and healthcare, education, and access to goods and services available to the public. The Pillar also extends the prohibition of discrimination based on gender to the area of education, which is not covered by the current acquis.”*

European Commission (2017), *Establishing a European Pillar of Social Rights*

As noted in previous editions of the Fundamental Rights Report, one way to promote equality and non-discrimination in the EU is to provide national equality bodies with the necessary human, technical and financial resources, premises and infrastructure. This would allow them to fulfil their functions and deploy their powers within their legal mandate effectively and independently.



The Racial Equality Directive requires all EU Member States to designate an equality body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin (Article 13.1). However, the directive only provides minimum standards for the competences of such bodies. Article 13.2 of the directive lists the competences of these bodies as follows: providing assistance to victims of discrimination; conducting surveys on discrimination; and publishing reports and making recommendations in relation to discrimination.

Against this backdrop, the European network of equality bodies (Equinet) continued working on developing standards for equality bodies during 2017, following up on the publication of its working paper on the topic in November 2016.<sup>3</sup> Further development of these standards will be based on the revision of the general policy recommendation issued by the Council of Europe’s European Commission against Racism and Intolerance (ECRI), which urges setting up specialised bodies to combat racism, xenophobia, antisemitism and intolerance at the national level.<sup>4</sup> While ECRI adopted a revised recommendation in December 2017, the final text had not been published by year-end.

### 3.2. Religious symbols remain centre of attention

About one in three self-identified Muslim men and women who took part in FRA’s Second EU Minorities and Discrimination Survey (EU-MIDIS II) and who wear visible religious symbols indicated that they experienced discrimination, harassment or police stops. This contrasts with Muslim men and women

who do not wear such symbols, about one in four of whom indicated having had such experiences. The survey findings also show that about three in 10 women who wear a headscarf or a niqab are in employment, compared to about four in 10 for women who do not.<sup>5</sup>

Restrictions on religious clothing or symbols at work or in public spaces remained a subject of attention in the EU in 2017, particularly regarding face-covering garments worn by some Muslim women. This is evidenced in findings from an analysis of related legislation in the EU 28;<sup>6</sup> in preliminary rulings issued by the CJEU (*Achbita* and *Bouagnaoui*) and judgments of the European Court of Human Rights (ECtHR – *Belcacemi and Oussar v. Belgium* and *Dakir v. Belgium*) in 2017; and in legal developments in some EU Member States (**Austria, Germany, Latvia**). These developments mainly concern the religious practices of some Muslim women.

*“[A] minority of [EU] Member States have national, regional and/or local legal prohibitions relating to the wearing of (some forms of) religious clothing and symbols at work in public and/or private employment, in other areas or even in all public spaces. A few other Member States are considering such legislation. There is case law from just over half of the 28 EU Member States but there are also Member States where the issue has not (or not yet) arisen. Therefore, practices vary significantly between Member States, but the issue of the wearing of religious clothing or symbols has arisen in case law or debates in a considerable number of EU Member States.”*

European network of legal experts in gender equality and non-discrimination (2017), *Religious clothing and symbols in employment – A legal analysis of the situation in the EU Member States*, p. 6

In *Achbita*, the CJEU held that internal rules prohibiting employees from wearing visible political, philosophical or religious signs do not constitute direct discrimination within the meaning of the Employment Equality Directive. The CJEU did hold, however, that such rules may constitute indirect discrimination if they put persons of a specific religion at a particular disadvantage.<sup>7</sup> On 7 October, the Belgian Court of Cassation ordered a retrial of the *Achbita* case,<sup>8</sup> finding that the arguments of the Antwerp Labour Court had failed to test the employer’s policy of neutrality against the Belgium antidiscrimination law.<sup>9</sup>

In *Bouagnaoui*, the CJEU held that an employer cannot stop an employee from wearing an Islamic headscarf if a customer does not wish to be served by said employee. Such wishes cannot be considered genuine and determining occupational requirements within the meaning of the Employment Equality Directive.<sup>10</sup> On 22 November, the French Court of Cassation annulled the judgment of the Paris court of appeals and ordered a retrial of the *Bouagnaoui* case. Among others, the Court of Cassation found that

banning the wearing of a veil in a private commercial enterprise, even if only when in contact with clients, is an unjustified and disproportionate restriction on religious freedom.

The ECtHR also issued relevant judgments in this area in 2017. In *Belcacemi and Oussar v. Belgium*, as well as in *Dakir v. Belgium*, the ECtHR held that banning the wearing in public of face-covering clothing does not violate the right to respect for private and family life (Article 8 of the ECHR); freedom of thought, conscience and religion (Article 9); or the prohibition of discrimination (Article 14). Both cases drew on jurisprudence established by *S.A.S. v. France*, where such restrictions were analysed in light of the principle of ‘living together’.

Meanwhile, legislation banning face-covering in public spaces was adopted in **Austria** and **Germany**, with **Latvia** tabling a bill to that effect in 2017. While the **Austrian** legislation adopted in October<sup>11</sup> applies to all forms of face-covering gear, the media and public debates commonly referred to the law as a ban on burqas.<sup>12</sup> The stated aim of the law is to facilitate integration by increasing participation in society, with the legal text premising integration on how people interact with each other.

Comparable legislation was adopted in Lower Saxony, **Germany**, in August.<sup>13</sup> The relevant act provides that pupils must not make it significantly difficult to communicate with others at school because of their behaviour or dress. It was adopted in the wake of a case involving a Muslim pupil who refused to come to school without wearing a niqab.<sup>14</sup>

Still in August, the **Latvian** Cabinet of Ministers approved a bill from the Ministry of Justice that would put restrictions on covering one’s face in public, except where necessary for professional, health or artistic reasons.<sup>15</sup> According to the Minister of Justice, the “main aim of the law is prevention, so that people know beforehand that they will have to observe the rules of our cultural historical environment”.<sup>16</sup> The bill seeks to ensure unity and harmony in society, foster communication between members of the public and promote living together. It foresees a complete ban on face-covering in public places, except in churches, prayer rooms or premises reserved for religious activities. In November, the parliament’s legal office advised against adopting this bill, because there was not sufficient justification to conclude that the restrictions it proposes are proportionate and in compliance with either the Latvian constitution or the European Convention on Human Rights.<sup>17</sup>

EU Member States sometimes also adopt legislation banning religious symbols with the intention of preserving the neutrality of public authorities, as

was the case in Baden-Wuerttemberg in **Germany** in May.<sup>18</sup> The relevant act prohibits judges and state prosecutors from wearing religious headgear, such as the hijab or the kippah, to ensure that they are not seen as being religiously or politically biased.<sup>19</sup> The law will come into force on 1 January 2018. In June 2017, similar national legislation took effect, prohibiting civil servants in Germany from covering their faces when completing their duties, except for health reasons.<sup>20</sup>

### 3.3. LGBTI equality in the EU advances

The European Commission published a list of actions to advance equality for lesbian, gay, bisexual, trans and intersex (LGBTI) persons in December 2015. This list covers the period 2016–2019, and includes improving rights and ensuring legal protection of LGBTI people and their families, as well as monitoring and enforcing existing rights among its objectives. A number of EU Member States introduced relevant legal changes and policy measures throughout the year.

Several EU Member States aligned the civil status of same-sex couples to that of married couples (**Austria, Finland, Germany, Ireland, Malta**), although sometimes with limitations regarding adoption or assisted procreation (**Slovenia**). Other EU Member States took steps to de-medicalise the process of gender reassignment (**Austria, Denmark, the United Kingdom**), with another adopting simplified procedures for trans persons to alter their registered sex (**Greece**). The issue of binary gender markers came to the foreground in some EU Member States (**France, Germany, Luxembourg, Malta**). Concerning intersex persons, the **Austrian** bioethics commission published a position paper on intersexuality and trans identity (*Transidentität*).

Regarding same-sex couples, the ECtHR held in *Orlandi and Others v. Italy* that not registering or recognising the union of same-sex couples who had their marriages contracted abroad violates the right to respect for private and family life (Article 8 of the ECHR). Marriage became gender neutral in **Malta**, with the amended marriage act coming into force in September.<sup>21</sup> Similarly, an act took effect in **Germany** in October, allowing same-sex couples to marry.<sup>22</sup> In December, the constitutional court in **Austria** deemed discriminatory existing legislation preventing same-sex couples from marrying. This legislation will be annulled as of 31 December 2018.<sup>23</sup>

In **Finland**, amendments to the marriage act allowing same-sex marriage came into force in March 2017,<sup>24</sup> thereby also making it possible for married same-sex couples to adopt children.<sup>25</sup> In October, it became possible for unmarried couples, including

same-sex couples in civil partnerships, to adopt children in **Ireland**.<sup>26</sup> Civil unions became equivalent to marriage in **Slovenia** in February, including for same-sex couples, except as regards adoption and medically assisted procreation.<sup>27</sup>

In the United Kingdom, the **Scottish** Government announced measures to promote equality for LGBT persons in July.<sup>28</sup> One of these aims to de-medicalise the process for gender reassignment through a review of the gender recognition act.<sup>29</sup> At the time of writing, individuals still needed a diagnosis of gender dysphoria and to provide evidence that they have been in transition for at least two years before they can apply to legally change their gender.

In June, the **Austrian** Ministry for Health and Women published updated recommendations on the treatment procedure for gender dysphoria; the first such recommendations were published 20 years earlier. The recommendations cover the steps to take regarding the diagnostic process; the treatment plan; the therapeutic process; preparations for hormonal therapy; the hormonal therapy itself; preparations for the operation; the operation itself; and the post-operative phase.<sup>30</sup>

Similarly, the **Danish** Ministry of Health published guidelines on health assistance in the context of gender identity and gender reassignment in September.<sup>31</sup> Notable aspects of the guidelines include efforts to de-stigmatise transgender people within the health care system, as well as reducing the threshold for hormonal treatment for adults undergoing gender reassignment.

Legislation establishing a framework for a simplified procedure enabling trans persons to alter their registered gender came into force in **Greece** in October.<sup>32</sup> Previously, trans persons could only alter their registered gender by filing a petition with the magistrate court, which would issue a decision ordering the registry office to alter the registered gender. This required applicants to submit evidence of having undergone a psychiatric evaluation and gender reassignment surgery. Though a court decision is still needed under the new law, it is now sufficient for trans persons to make a declaration before a magistrate judge for a decision to be made on altering their registered gender.

Changing attitudes towards gender identity, gender expression and gender characteristics can also be observed in **Germany**, as evidenced in a position paper published by the Ministry for Family Affairs, Senior Citizens, Women and Youth in November.<sup>33</sup>

In this paper, the ministry called for the existing transsexual persons act<sup>34</sup> to be replaced with an act on the protection and acceptance of gender diversity; banning sex reassignment surgery for intersex children; and introducing a third gender category in the civil status act.<sup>35</sup> In addition, the National Action Plan to Fight Racism, which the German Cabinet passed in June 2017, includes measures to combat homophobia and transphobia.<sup>36</sup>

Concerning gender markers, the German Federal Constitutional Court ruled, in October, that the civil status act is discriminatory towards intersex persons on the ground of their gender. The act will have to be revised by the end of 2018.<sup>37</sup> This relates to a complaint lodged by an intersex person who wanted to be registered as 'inter/diverse' or 'diverse' rather than as 'female' or without any gender in the civil registry.

In November, the **Luxembourg** Government Council mandated an inter-ministerial committee to reflect on the possibility of adding a third sex category to the civil code, in response to a parliamentary question.<sup>38</sup> Following up on the LGBTIQ action plan 2015-2017,<sup>39</sup> it has been possible to introduce an 'X' gender marker in passports and identity cards in **Malta** since September 2017.<sup>40</sup> This marker is not considered a third gender, but rather as a recognition of non-binary or genderqueer persons. The only requirement to opt for the 'X' marker is for the applicant to take an oath before a notary and to submit the necessary forms indicating 'X' for gender.<sup>41</sup> This change did not require any legal amendments, but simply approval at Cabinet level.

This contrasts with the situation in **France**. In May, the court of cassation rejected a person's request to have their gender recorded as 'neutral' in the civil registry. The court argued that granting this request "would have profound repercussions on the rules of French law based on the binary nature of the sexes and would require many legislative coordination modifications".<sup>42</sup>

As noted above, the **Austrian** bioethics commission published a position paper on intersexuality and trans identity (*Transidentität*), addressing 25 recommendations to the Federal Government. These cover preventing exclusion of and discrimination against intersex and trans persons; gender assignment; and gender reassignment.<sup>43</sup>



## Promising practice

## Public authorities actively engage to advance LGBTI equality

The Finnish Ministry of Justice launched *Project Rainbow Rights Promoting LGBTI Equality in Europe* on 1 January 2017, to support the implementation of non-discrimination legislation in **Finland** and in the Baltic States. The project includes four objectives: mainstreaming equality and non-discrimination in Finnish municipalities; raising awareness of LGBTI-relevant issues at the local level; enhancing transnational and cross-border cooperation on LGBTI policy; and tackling multiple discrimination. The project is funded by the EU's Rights, Equality and Citizenship Programme and runs until 31 December 2018. The Finnish Ministry of Justice coordinates the project, and implements it in cooperation with the Association of Finnish Local and Regional Authorities and two civil society organisations active in the field of LGBTI rights (Seta – LGBTI Rights in Finland and Lithuanian Gay League). The Ministry of Social Affairs and Health also participates in the project.

*For more information, see Finland, Ministry of Justice (2017), Project Rainbow Rights Promoting LGBTI Equality in Europe.*

In **France**, on the international day against homophobia, transphobia and biphobia, the French defender of rights unveiled a guide to prevent and identify discrimination towards LGBT people at work. The guide invites employers to take a stand against such discrimination, within and outside their organisations, including if it comes from suppliers or customers. The guide suggests concrete action that can be taken in this regard, such as awareness raising and training for staff, adopting internal equality policies, or taking decisive action against homophobic or transphobic behaviour.

*For more information, see France, Défenseur des droits (2017), Agir contre les discriminations liées à l'orientation sexuelle et à l'identité de genre dans l'emploi.*

In **Italy**, the Ministry of Education, Higher Education and Research sent a circular to all seven school authorities in the country to mark the international day against homophobia, transphobia and biphobia. Calling for its wide diffusion among educational institutions, the circular stressed the important role schools play in raising awareness of discrimination on all grounds. The circular encourages school authorities to provide educational institutions with the means to enable staff to promote an inclusive culture. To support this initiative, the ministry relaunched an online platform called "We are equal" (*Noi siamo pari*) to enable an exchange of good practices implemented by educational institutions to promote equal opportunities.

*For more information, see Italy, Ministero dell'Istruzione, dell'Università e della Ricerca (2017), 17 maggio - Giornata internazionale contro l'omofobia and Noi siamo pari – il portale delle pari opportunità.*

Over 1,000 schools in the United Kingdom will launch projects during the course of the academic year 2017–2018 to address homophobic, biphobic and transphobic bullying in the classroom. This is part of a £ 3 million initiative led by the Government Equalities Office, which aims to ensure that children are not subject to bullying due to their sexual orientation or gender identity. As part of this initiative, primary and secondary schools will establish partnerships with the National Children's Bureau and civil society organisations active in the fields of LGBT rights and children's rights.

*For more information, see UK, Government Equalities Office (2017), Schools around the country to stamp out LGBT bullying.*

Intersex & Transgender Luxembourg organised the Intersex Days 2017 on March 20 and 21, under the patronage of the **Luxembourg** Minister of Health. Noting that about 1.7 % of human beings are estimated to be intersex, these days aimed to break taboos surrounding the issue. One of the main themes discussed was non-consensual surgical and hormonal treatment of children and adults and the impact of such treatments on their health, education and social relations. The Commissioner for Human Rights of the Council of Europe, public authorities and non-governmental organisations supported the initiative.

*For more information, see Luxembourg, Intersex & Transgender Luxembourg (2017), Journées Intersexes 2017.*

### 3.4. Discrimination and unequal treatment remain realities, data underscore

#### *Solid data crucial to foster equality*

EU and national policy actors need to rely on robust data if they are to identify and act upon patterns of inequality. There is a need for data that measure the outcome of policies put in place to foster equality, increase social inclusion and combat discrimination. Systematic data collection provides the EU and its Member States with baseline information they can use to ensure that people who live there are treated equally and in full respect of their fundamental right to non-discrimination.



Different types of data, such as statistical and administrative data, as well as scientific evidence can be used to support policymaking to promote equal treatment and combat discrimination. Such data can be used to assess the implementation of the Racial Equality Directive (2000/43/EC) or the Employment Equality Directive (2000/78/EC). The European Commission against Racism and Intolerance (ECRI) further stresses the need for good data to support the fight against discrimination in its general policy recommendations No. 1 and No. 4.<sup>44</sup> The United Nations Convention on the Rights of Persons with Disabilities (CRPD) offers guidance on the collection of equality data.

In addition, EU Member States and the European Commission<sup>45</sup> are committed to the 2030 Agenda for Sustainable Development,<sup>46</sup> in which the work of FRA is anchored. The agenda outlines 17 sustainable development goals (SDGs), each of which includes specific targets and indicators. SDG 10 on reducing inequality within and among countries is of particular relevance when considering equality data. The availability of such data would enable the EU and its Member States to measure progress with regard to meeting targets 10.2 and 10.3 of the Agenda for Sustainable Development:

- **Target 10.2:** By 2030, empower and promote the social, economic and political inclusion of all, irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status.
  - **Indicator 10.2.1:** Proportion of people living below 50 per cent of median income, by age, sex and persons with disabilities.
- **Target 10.3:** Ensure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and

promoting appropriate legislation, policies and action in this regard.

- **Indicator 10.3.1:** Proportion of the population reporting having personally felt discriminated against or harassed within the previous 12 months on the basis of a ground of discrimination prohibited under international human rights law.

Equality data are powerful tools through which to uncover patterns of discrimination on different grounds. The *European Handbook on Equality Data* defines data as “any piece of information, whether in numerical or in some other form. The function of data is that they reveal something about some aspect of reality and can therefore be used for analysis, reasoning or decision-making”. The handbook defines equality data as “any piece of information that is useful for the purposes of describing and analysing the state of equality”.<sup>47</sup>

Following up on the publication of this updated handbook, the EU High Level Group on Non-Discrimination, Equality and Diversity agreed, in October 2017, to set up a Subgroup on Equality Data. The European Commission invited FRA to facilitate the work of this subgroup, which has been mandated to draft non-binding guidelines on improving the collection and use of equality data. The subgroup will be formally set up in 2018, bringing together EU Member States, the European Commission, the statistical office of the EU (Eurostat) and FRA.

#### *Data reveal persistence of inequality*

The year 2017 saw the publication of research findings drawing on equality data (including nationally representative surveys), showing some of the manifold ways in which discrimination and unequal treatment affect European societies. EU institutions and Member States can draw on such findings to assist them in monitoring the implementation of policies and measures put in place to foster equality and promote non-discrimination. Such data thereby offer a solid foundation on which to develop evidence-based policymaking.

In 2017, FRA published findings from its Second European Union Minorities and Discrimination Survey (EU-MIDIS II). The survey looked at experiences of perceived discrimination among immigrants, descendants of immigrants and members of ethnic and religious minorities across a range of areas of life. EU-MIDIS II is the most comprehensive survey in the field to date and provides comparable data at EU Member State level that are otherwise not available.

The survey as a whole collected information from over 25,500 respondents drawn from seven target population groups in all 28 EU Member States.<sup>48</sup>

These groups include immigrants and descendants of immigrants from Asia and South Asia, North Africa, Sub-Saharan Africa and Turkey, as well as recent immigrants, Roma and members of the Russian minority. Detailed findings on these people's experiences of discrimination drawn from EU-MIDIS II are available on [FRA's website](#). For more information ► on ethnic and racial discrimination, see Chapter 4.

Research conducted by equality bodies and public authorities further show that members of the general population also experience discrimination and unequal treatment on a number of grounds, with many not reporting incidents to any authority (**Bulgaria, Croatia, France, Germany, Hungary, Poland**).

Other research conducted or published by public authorities 2017 sheds light on the social exclusion of people in situations of vulnerability (**Latvia**); limitations on the inclusion of foreigners in the labour market (**Estonia**); and unequal working and living conditions for persons with disabilities compared to persons without disabilities (**Denmark, Germany, Ireland, Sweden**).

The **Bulgarian** commission for protection against discrimination conducted a national representative survey to identify those most often exposed to discrimination.<sup>49</sup> The results show that slightly more than one in 10 respondents perceived themselves as victims of discrimination, mostly on the ground of ethnicity, followed by age, religion and then disability. About one in 20 respondents claimed they experienced discrimination at work, most often on the grounds of ethnicity, followed by age and gender.

Similarly to findings of EU-MIDIS II, only one in 10 of those who said they experienced discrimination in Bulgaria reported this to the authorities. The most common reasons for not reporting include a lack of confidence that anything would change as a result of reporting; solving the problem alone or with family or friends; the case was trivial and not worth reporting; and not knowing where to report a case. Just under two-thirds of respondents said they were not informed about their rights in cases of discrimination, with more than eight in 10 of those who reported incidents to the police not satisfied with the police's reaction.

The **Croatian** Ombudsperson Office repeated, for the third time, a general population survey on attitudes to and awareness of discrimination.<sup>50</sup> The findings show that people in Croatia perceive nationality/ethnicity as the most common ground of discrimination in the country. In terms of specific population groups, the respondents perceived Roma as the most discriminated against, followed by LGBT people, persons with

disabilities and poor people. Employment is perceived as the most common area where people experience discrimination, with public authorities regarded as the main culprits. As far as their own experiences are concerned, one in five respondents stated that they had been discriminated against in the past five years. About two-thirds of these did not take any steps to seek redress, mainly because they thought that nothing would change as a result. Where people reported incidents of discrimination, they mainly turned to the police, followed by the Ombudsperson Office.

The **Hungarian** Equal Treatment Authority published the findings of a nationally representative survey on personal experiences of discrimination, social perceptions of discrimination, and rights awareness.<sup>51</sup> The survey findings show that slightly more than one third of the Hungarian population experienced discrimination on the basis of at least one of the 20 protected grounds. Age, financial situation, state of health and social origin were the most frequently mentioned grounds of discrimination. Concerning social perceptions, the most frequent ground of discrimination identified by the respondents was someone's Roma origin, followed by age and disability. As regards rights awareness, just over one in four people knew of the Equal Treatment Authority.

Similarly, other nationally representative research commissioned by the **Polish** commissioner for human rights shows low levels of awareness of legislation prohibiting discrimination and any form of compensation to which a person facing discrimination may be entitled.<sup>52</sup>

Slightly under one in three people in **Germany** stated that they had experienced discrimination in the past two years. This is evidenced in findings of research published jointly, and for the third time, by the federal anti-discrimination agency and the commissioners of the Federal Government and the Federal Parliament.<sup>53</sup> The most commonly experienced ground of discrimination was age, followed by sex, religion or belief, race/ethnicity, disability and then sexual orientation. The research further shows that women experience discrimination on the ground of sex five times more often than men, also frequently on a combination of grounds. This includes, for example, in combination with age, when women are not hired because they might become pregnant; in combination with sexual orientation, when lesbian women are predominantly exposed to homophobia or sexual assault; or in combination with religion, when Muslim women who wear different forms of head-coverings are primarily affected by prohibitions of religious symbols.

## Promising practice

## Providing guidance on fighting discrimination to public authorities

The Secretary of State for towns and cities in **France**, in partnership with the *Délégation Interministérielle à la Lutte Contre le Racisme, l'Antisémitisme et la Haine anti-LGBT* (DILCRAH), produced an inter-ministerial guide for public authorities at national and local level. This practical guide to combat discrimination covers four main areas of relevance to public authorities:

- the regulatory framework and institutional environment relating to non-discrimination;
- training that public and private sector stakeholders are entitled to;
- tools to support how to respond to victims of discrimination;
- existing anti-discrimination measures and actions in the areas of education, employment, culture, housing and citizenship.

A booklet was also produced for users of local public services, such as town halls, employment centres, family allowance offices, social centres and public service buildings. The booklet comprises examples of discrimination drawn from daily life and aims to help citizens identify discriminatory situations, as well as whom to contact and what action to take in such cases.

*For more information, see France, Ministère de la ville, de la jeunesse et des sports (2017), Guide pratique de lutte contre les discriminations and Discriminations, c'est non!*

In March 2017, the **French** public defender of rights and the International Labour Organization presented findings of the 10<sup>th</sup> barometer on the perception of discrimination in employment.<sup>54</sup> The findings indicate that one in two people consider discrimination to be common when looking for work. One in three consider discrimination a frequent occurrence during the course of one's career. Regarding personal experiences, about a third of the working population said it experienced at least one instance of discrimination in the past five years, on the grounds of either sex, health or disability, age, pregnancy or maternity, religious beliefs or origin.

Research conducted in **Latvia** concerning the social inclusion of persons in situations of vulnerability shows that public awareness of discrimination is low, with gender discrimination often perceived as not being a problem.<sup>55</sup> The findings also show that persons with intellectual disabilities and Roma people often face discrimination in employment. As is the case in other EU Member States, most people who experience discrimination do not know where to turn to report incidents.

The research included an opinion poll,<sup>56</sup> which shows that Latvian residents often harbour negative attitudes towards asylum seekers and visible minorities. The poll shows that about one third of Latvian residents do not want to either live next to, work with or be friends with Roma. Similar findings emerge with regard to Muslims, refugees and asylum seekers.

The position of non-Estonians on the labour market is worse than that of Estonians, findings from the regular integration monitor of **Estonian** society show.<sup>57</sup> This is reflected in (un)employment rates, pay gaps and security on the job market, as well as perceptions of experiences of discrimination based on nationality. According to the monitor's findings, this mainly concerns Russian-speaking non-Estonians, while non-Estonian women were found to be the most likely to perceive experiencing inequalities in the job market. Other areas where non-Estonians were found to perceive experiencing discrimination and unequal treatment include participation in politics and education. According to findings of the monitor, one in 10 non-Estonians believed they experienced intolerance based on their nationality or ethnicity, with one in five feeling that they are second-class citizens in the country.

Persons with disabilities are particularly vulnerable to social exclusion and likely to experience unequal living and working conditions (see also [Chapter 10](#)). This is reflected, for example, in the application of statistical outcome indicators developed by the **Danish** institute for human rights to monitor the implementation of the CRPD – in 'The Disability Index'.<sup>58</sup> The second wave of a survey on health, impairment and living conditions in Denmark applied all 10 indicators, covering about 20,000 people. The findings show that, for nine of the 10 indicators, persons with disabilities are at a disadvantage compared to the rest of the population. This included health conditions and experiences of violence or discrimination.<sup>59</sup>

An analogous pattern emerges from research published in **Germany** in 2017, which shows that the participation of people with disabilities is limited in many areas of life.<sup>60</sup> For example, in 2014, only about a third of pupils with special educational needs attended a regular school. In 2013, 47 % of women and 52 % of men with disabilities went to work, compared to 64 % of women and 77 % of men without disabilities. This research drew on the official micro-census, the socio-economic panel and official statistics such as social security statistics, statistics of the Federal Employment Agency, care statistics, child care statistics, and statistics on child and youth welfare, as well as existing quantitative and qualitative research.

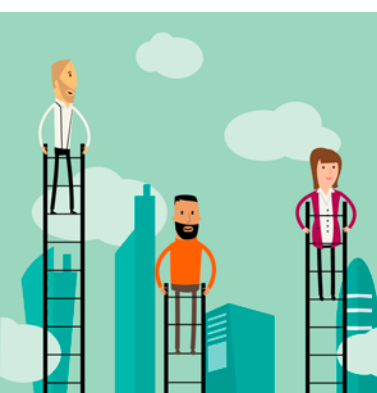
Similarly, an analysis of the **Irish** quarterly national household survey published in 2017 shows that



people with disabilities “were less likely to enter work and more likely to leave work, even when they do not report difficulties with self-care, going out alone, participating in a job or business or school/college”.<sup>61</sup>

**Sweden’s** Public Employment Agency drew on the population register to identify persons with disabilities and assess their experiences of discrimination in the labour market.<sup>62</sup> Persons who self-identified as having a disability were interviewed, regardless of whether they were employed at the time of the survey. Among persons with disabilities with a reduced ability to work, two-thirds answered “yes” to at least one of the questions on discrimination. Negative attitudes among employers was the most common type of discrimination they reported experiencing in the past five years. This was nearly twice as common as violations of integrity, discrimination in access to employment, or bullying.

### 3.5. Discrimination testing provides empirical evidence of discrimination



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Discrimination testing is a reliable and robust method for generating empirical evidence of discrimination that usefully complements information on perceptions of discrimination collected through surveys. In such tests, fictitious applications are used to uncover discrimination, often in access to employment or housing. Implemented since the 1970s, this method to detect discrimination is being used more regularly in EU Member States.<sup>63</sup> In addition,

findings of discrimination testing are accepted in court in a number of EU Member States, including Belgium, the Czech Republic, Finland, France, Hungary, the Netherlands and Sweden. In 2017, legal developments in the field occurred in **Belgium**. In addition, relevant research findings were published in **Belgium, Finland, the Netherlands, and Sweden**.

Flanders and the Brussels-Capital region in **Belgium** adopted instruments that relate to the regulation of situation testing. In July, Flanders adopted a decree that obliges companies that want to be accredited as suppliers of service vouchers (*dienstencheques*) to perform situation testing (*praktijktesten*). Having come into force in August, the decree obliges these

companies to report breaches of anti-discrimination legislation to the Flemish labour inspectorate.<sup>64</sup>

In October, the Brussels-Capital Region adopted an ordinance relating to the use of fictitious CVs for the purposes of situation testing in the labour market. The ordinance, which comes into force in January 2018, allows labour inspectors to perform situation tests to verify whether employers discriminate in recruitment. Labour inspectors can also perform so-called ‘mystery calls’ to see whether employers would accept instructions to discriminate. Where conclusive, findings of such tests can be used to establish direct or indirect discrimination in legal proceedings.<sup>65</sup>

In **Sweden**, a field experiment that involved sending fictitious CVs to employers showed a strong negative effect for age, also in combination with gender.<sup>66</sup> Over 6,000 spontaneous applications were sent to potential employers, with information on applicants’ age and gender randomly assigned. The findings show that, across all occupations, the likelihood of being contacted by an employer falls sharply from the age of 40, with women more affected than men. For applicants close to the retirement age of 65, the response rate was found to be close to zero. For more information on ► discrimination based on age, see [Chapter 1](#).

Situation testing conducted in the **Netherlands** examined the influence of a person’s criminal record on their employment chances, in combination with ethnicity.<sup>67</sup> This test consisted of sending CVs and motivation letters in response to online job vacancies. All 520 job applications were identical, except for the type of criminal offence (none, violent offence, property offence, sexual offence); the period of time that elapsed between the conviction and the application; the business sector applied for; and the ethnicity of the applicant. The marker for ethnicity consisted of the applicant’s name, which could either be a typically Dutch name or a non-Western name. The findings showed no overall effect for the type of offence. Meanwhile, they did show a strong effect for ethnicity, albeit on the basis of a low number of CVs: members of ethnic minorities without criminal convictions were found to have lower chances of receiving a positive response than applicants with Dutch names who had been convicted of violent offences.

Comparable findings emerge from research conducted on access to housing in **Finland**, which shows discrimination against men with Arabic names in the rental market.<sup>68</sup> In the study, 1,459 enquiries were sent out across Finland in response to apartment vacancies. Those interested were divided into six groups: men and women with an Arabic name; men and women with a Finnish name; and men and women with a Swedish name. The findings show a response rate of 42 % for women with a Finnish-sounding name, compared to

16 % for men with an Arabic-sounding name. Overall, men received fewer responses than women, and enquiries signed with an Arabic name received fewer than those signed with a Finnish or Swedish name. The landlord's gender had no effect on the results.

A wide-ranging study on access to the rental housing market in Brussels, **Belgium**, showed discrimination on a number of grounds.<sup>69</sup> The study implemented 10,978 correspondence tests and 1,542 situation tests by phone, covering discrimination on the grounds of ethnic origin, age, mental or physical disability, source of income, family composition and gender. For these tests, potential tenants contacted real estate agents in response to vacancies advertised on an online platform. The study also placed 648 mystery calls to real estate agents, with instructions to discriminate on the grounds of either ethnicity or source of income.

The correspondence and situation tests found widespread discrimination against potential tenants with North-African or sub-Saharan African names compared to those with French-sounding names. No effect was found for candidates with Eastern European-sounding names. The study also uncovered discrimination based on the source of income, regardless of the actual level of income, which affects people on

unemployment benefits. Blind candidates and those with mental disabilities also faced discrimination. The findings indicate gender differences, although in combination with other grounds. For example, female North African and Eastern European candidates were treated less favourably, as were unemployed males and male single parents.

The mystery calls found that real estate agents do grant discriminatory requests, even when they are aware that this is illegal. When requested to discriminate based on ethnicity, about half of the real estate agents responded that such requests are illegal. About one third noted this in response to instructions to discriminate based on the source of income. Nonetheless, about one third of real estate agents granted requests to discriminate based on ethnicity, compared to 16 % for requests based on the source of income. The level of discrimination was found to be influenced by the price category of the housing unit, as well as by the ethnic composition of the municipality where the housing unit is located. Specifically, more discrimination was found for pricier housing units in boroughs where fewer members of ethnic minorities tend to live.



## FRA opinions

The findings of FRA's Second European Union Minorities and Discrimination Survey (EU-MIDIS II) and diverse national research published in 2017 confirm that discrimination and unequal treatment on different grounds remain realities in key areas of life throughout the EU. The EU and its Member States can, however, draw on policy instruments to foster equality, with the European Pillar of Social Rights promoting protection against discrimination beyond the current *acquis* in the area of equality. Nonetheless, with the proposed Equal Treatment Directive not yet adopted, the EU operates a hierarchy of grounds. Negotiations on the proposed directive in the Council of the EU entered their ninth year in 2017 and had not been completed by year-end.

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

### FRA opinion 3.1

*The EU legislator should continue its efforts for the adoption of the Equal Treatment Directive to ensure that the EU offers comprehensive protection against discrimination in key areas of life, irrespective of a person's sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

### FRA opinion 3.2

*The EU legislator should proceed with concrete legal action to deliver on stronger social rights protection and further implement the principles and rights enshrined in the Pillar of Social Rights.*

Restrictions on religious clothing and symbols at work or in public spaces continued to shape debates on religion in the EU in 2017. These restrictions particularly affect Muslim women who wear different forms of head or face-covering garments. The CJEU and the European Court of Human Rights (ECtHR) offered further guidance in this area, regarding genuine occupational requirements, the prohibition of visible religious symbols, and the wearing in public of religious

garments that fully cover the face. Some EU Member States put restrictions on face-coverings in public places to promote their ideal of inclusive societies, or to preserve the neutrality of civil servants, judges and public prosecutors.

Article 10 of the EU Charter of Fundamental Rights guarantees everyone's right to freedom of thought, conscience and religion. This right includes the freedom to change religion or belief and the freedom to manifest religion or belief in worship, teaching, practice and observance, either alone or in community with others. Article 21 of the EU Charter of Fundamental Rights prohibits any discrimination on the ground of religion or belief. Article 22 of the EU Charter of Fundamental Rights further provides that the Union shall respect cultural, religious and linguistic diversity.

### FRA opinion 3.3

*EU Member States should ensure that fundamental rights and freedoms are safeguarded when considering any restrictions on symbols or garments associated with religion. Any legislative or administrative proposal that risks limiting the freedom to manifest one's religion or belief should embed fundamental rights considerations and respect for the principles of legality, necessity and proportionality.*

EU Member States continued to implement measures to advance the equality of lesbian, gay, bisexual, trans and intersex (LGBTI) persons. Several EU Member States aligned the civil status of same-sex couples to that of married couples, although sometimes with limitations regarding adoption or assisted procreation. Others took steps to de-medicalise the process of gender reassignment, with one EU Member State adopting simplified procedures for trans persons to alter their registered sex. The issue of binary gender markers came to the fore in some EU Member States, with one making it possible to use the 'X' marker in official documents, as an alternative to male or female.

Article 21 of the EU Charter of Fundamental Rights prohibits discrimination based on sex and sexual orientation. The European Commission published a list of actions to advance LGBTI equality in December 2015, including improving rights and ensuring legal protection of LGBTI people and their families, as well as monitoring and enforcing existing rights. The list of actions covers the period 2016–2019. Although not legally binding, the list provides guidance as to where and how EU Member States can work towards ensuring that LGBTI persons can avail themselves of their right to equality and non-discrimination. The EU and its Member States have committed to meeting the targets of the 2030 Agenda for

Sustainable Development. Sustainable Development Goal 10 on reducing inequality within and among countries sets, as one of its targets, ensuring equal opportunity and reducing inequalities of outcome. This includes eliminating discriminatory laws, policies and practices, and promoting appropriate legislation, policies and action.

FRA opinion 3.4

*EU Member States are encouraged to continue adopting and implementing specific measures to ensure that lesbian, gay, bisexual, trans and intersex (LGBTI) persons can fully avail themselves of all their fundamental rights. In doing so, EU Member States are encouraged to use the list of actions to advance LGBTI equality published by the European Commission to guide their efforts.*

Equality data offer a powerful means to uncover patterns of inequality in EU Member States, as well as a solid foundation for evidence-based policymaking. Findings of EU-MIDIS II and of research published by national equality bodies and public authorities in 2017 amply demonstrate that discrimination and unequal treatment deeply affect European societies. Findings of research implementing the discrimination testing method provide further empirical evidence of discrimination in access to employment and housing on a number of grounds in several EU Member States. By systematically collecting data on patterns of inequality, the EU and its Member States can monitor the impact of policies and measures put in place to foster equality and promote non-discrimination and adjust them to improve their effectiveness. The EU and its Member States have committed to meeting the targets of the 2030 Agenda for Sustainable Development. The

availability of robust and reliable equality data would enable the EU and its Member States to measure progress with regard to meeting targets 10.2 and 10.3 under Sustainable Development Goal 10 on reducing inequality within and among countries.

Different types of data, such as statistical and administrative data, as well as scientific evidence can be used to support policymaking to promote equal treatment and combat discrimination. Such data can also be used to assess the implementation of the Racial Equality Directive (2000/43/EC) or the Employment Equality Directive (2000/78/EC). In its general policy recommendations, the European Commission against Racism and Intolerance (ECRI) highlights the need for good data to support the fight against discrimination. In addition, the United Nations Convention on the Rights of Persons with Disabilities offers guidance with regard to the collection of equality data.

FRA opinion 3.5

*EU institutions and EU Member States are encouraged to continue supporting and funding the collection of reliable and robust equality data by EU agencies and bodies, national statistical authorities, national equality bodies, other public authorities and academic institutions. In addition, EU Member States are encouraged to provide the Statistical Office of the European Union (Eurostat) with robust and reliable equality data, so as to enable the EU to develop targeted programmes and measures through which to foster equal treatment and promote non-discrimination. Where possible and relevant, the collected data should not only be disaggregated by sex and by age, but also by ethnic origin, disability and religion.*



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# UN & CoE

## January

17 January – In *Király and Dömötör v. Hungary* (No. 10851/13), the European Court of Human Rights (ECtHR) holds that shortcomings of an investigation into an anti-Roma demonstration amounted to a violation of the right to respect for private and family life (Article 8 of the ECHR)

25 January – PACE adopts Resolution 2144 (2017) on ending cyber discrimination and online hate

31 January – UN Committee on Convention on the Elimination of All Forms of Racial Discrimination (CERD) publishes concluding observations on 15th to 17th periodic reports of Portugal

## February

28 February – European Commission against Racism and Intolerance (ECRI) publishes its fifth monitoring report on Luxembourg and conclusions on the implementation of a number of priority recommendations made in its country reports on Germany and Belgium released in 2014

## March

## April

## May

16 May – ECRI publishes its fifth monitoring report on Denmark and conclusions on the implementation of a number of priority recommendations made in its country reports on Bulgaria, Romania and the Slovak Republic released in 2014

16 May – CERD publishes concluding observations on the combined 20th to 22nd periodic reports of Bulgaria

## June

2 June – CERD publishes concluding observations on the combined 23rd and 24th periodic reports of Cyprus

2 June – UN Human Rights Council adopts a report of the Intergovernmental Working Group on the Effective Implementation of the Durban Declaration and Programme of Action

8 June – CERD publishes concluding observations on the 23rd periodic report of Finland

22 June – ECRI publishes its annual report 2016

28 June – In *Škorjanec v. Croatia* (No. 25536/14), the ECtHR reiterates that the national authorities' failure to carry out a thorough investigation into the link between the applicant's relationship with her partner, a man of Roma origin, and the racist motive for the attack on both of them, amounted to a violation of the procedural aspect of the prohibition of torture (Article 3 of the ECHR) in conjunction with the prohibition of discrimination (Article 14 of the ECHR)

## July

22 July – No Hate Speech Movement Youth Campaign (NHSM) of the Council of Europe organises a Europe-wide Action Day in support of victims of hate crime

## August

## September

19 September – ECRI publishes its conclusions on the implementation of a number of priority recommendations made in its country report on Slovenia, Germany and Belgium released in 2014

## October

9 October – UN Human Rights Council extends the mandate of the Working Group of Experts on People of African Descent for a further period of three years

31 October – In *M.F. v. Hungary* (No.45855/12), the ECtHR holds that the Hungarian authorities failed to investigate the ill-treatment of a Roma man by the police, violating the prohibition of torture (Article 3 of the ECHR) in conjunction with the prohibition of discrimination (Article 14 of the ECHR)

## November

## December

# EU

January

February

February – EU High Level Group on combating racism, xenophobia and other forms of intolerance publishes *'Hate crime training for law enforcement and criminal justice authorities: 10 guiding principles'*

March

April

6 April – In *Jyske Finans A/S v. Ligebehandlingsnævnet* (No. 668/15), the Court of Justice of the European Union (CJEU) clarifies in a preliminary ruling request regarding the interpretation of direct and indirect discrimination under the Racial Equality Directive, that a person's country of birth cannot, in itself, justify a general presumption that the person is a member of a given ethnic group, such as to establish the existence of a direct or inextricable link between those two concepts

May

June

1 June – European Commission releases the results of the second evaluation of the Code of Conduct on countering online hate speech

1 June – European Parliament (EP) adopts a resolution calling on all Member States and their institutions to apply the working definition of anti-Semitism of the International Holocaust Remembrance Alliance

July

August

September

28 September – European Commission adopts a communication on *'Illegal Content Online. Towards an enhanced responsibility of online platforms'*

October

November

December

December – EU High Level Group on combating racism, xenophobia and other forms of intolerance publishes key guiding principles on *'Ensuring justice, protection and support for victims of hate crime and hate speech: 10 key guiding principles'*

5 December – EU High Level Group on combating racism, xenophobia and other forms of intolerance endorses the key guiding principles on *'Improving the recording of hate crime by law enforcement authorities'*



# 4

## Racism, xenophobia and related intolerance



*Seventeen years after the adoption of the Racial Equality Directive and nine years after the adoption of the Framework Decision on Racism and Xenophobia, immigrants and minority ethnic groups continue to face widespread discrimination, harassment and discriminatory ethnic profiling across the EU, as the findings of FRA's second European Union Minorities and Discrimination Survey (EU-MIDIS II) show. The European Commission supported EU Member States' efforts to counter racism and hate crime through the EU High Level Group on combating racism, xenophobia and other forms of intolerance. It also continued to monitor closely the implementation of the Racial Equality Directive and of the Framework Decision. Although several EU Member States have been reviewing their anti-racism legislation, in 2017 only 14 of them had in place action plans and strategies aimed at combating racism and ethnic discrimination.*

### 4.1. No progress in countering racism in the EU

Racism and intolerance ranged from everyday harassment to outright violence in 2017. In the **United Kingdom**, a man was charged with terrorism-related murder and attempted murder after driving a van into a crowd of Muslim worshippers, killing one person and injuring 11.<sup>1</sup> In the **Czech Republic**, a group of 20 football fans violently assaulted a West African man travelling in a tram because he was black.<sup>2</sup> In **Greece**, a group of masked teenagers used iron bars and knives to beat and stab two migrant workers in a field, while yelling racist insults. Police arrested the three teenagers.<sup>3</sup>

Refugees and asylum seekers continued to be violently attacked and harassed across the EU in 2017, but few EU Member States record or publish data on such hate crimes. **Finland** records data on attacks against accommodation centres for asylum seekers, while **Germany** also records and publishes data on attacks targeting refugees and asylum seekers themselves. In the first nine months of 2017, there were 243 attacks on refugee homes throughout the country, compared

with 873 attacks in the first nine months of 2016, data from the German Federal Criminal Police Office show.<sup>4</sup> More than 3,500 attacks against refugees and asylum shelters were recorded in 2016, according to data made available by the German Federal Government in 2017 in response to a parliamentary question.<sup>5</sup> A total of 2,545 attacks against individual refugees were reported in 2016. These attacks left 560 people injured, including 43 children.<sup>6</sup>

In 2017, FRA published the results of the second European Union Minorities and Discrimination Survey (EU-MIDIS II) on experiences of ethnic minorities and immigrants with discrimination and hate crime. Many of the respondents experienced racism in the form of discrimination incidents, harassment or hate crime, but few reported these to the authorities. Overall, the results show very little progress compared with eight years earlier, when the survey's first wave was conducted. Persisting harassment, discrimination and violence limit the ability of people with a minority background to fully enjoy their fundamental rights and freedoms, and undermine their equal participation in society. Lack of progress in preventing and countering racism indicates that laws and policies may inadequately protect the people they are meant to serve.

Such incidents occurred against a backdrop of persisting racist and xenophobic attitudes and rhetoric, which some opinion leaders and EU politicians embrace, normalising such discourse. A Bloomberg analysis of 30 years of election results across 22 European countries reveals that ‘populist far-right parties’ won, on average, 16 % of the overall vote in the most recent parliamentary elections in each country, up from 5 % in 1997.<sup>7</sup> In Austria, for example, a coalition was formed with the Freedom Party of Austria (FPÖ) in government, prompting the European Jewish Congress to express, in December 2017, grave concerns about the coalition’s impact on minorities.<sup>8</sup> Overall, these election results throughout Europe foster a social climate that provides fertile ground for racism, discrimination and hate crime.

#### 4.1.1. EU and Member States respond to persisting hate crime and hate speech

People with ethnic or immigrant minority backgrounds in the EU face harassment and violence – both online and offline – evidence from EU-MIDIS II demonstrates. In the 12 months preceding the survey, one in four respondents (24 %) experienced at least one form of hate-motivated harassment, and 3 % experienced a hate-motivated physical attack. Harassment is defined as a range of actions that the respondent found ‘offensive’ or ‘threatening’, namely offensive or threatening comments in person; threats of violence in person; offensive gestures or inappropriate staring; offensive or threatening emails or text messages (SMS); and offensive comments made about them online. Second-generation immigrants experience more hate-motivated harassment than do first-generation immigrants (32 % vs 21 %). Second-generation immigrants are also more likely to experience recurrent incidents. Half of them experienced at least six incidents of hate-motivated harassment in the 12 months preceding the survey. Overall, the survey respondents identified perpetrators as being from the majority population in 71 % of cases of hate-motivated harassment and 64 % of cases of violence.

The findings also show that as many as 90 % of incidents of hate-motivated harassment and 72 % of incidents of hate-motivated violence are never reported. Since 2008, the Framework Decision on Racism and Xenophobia has criminalised certain forms of racist and xenophobic hate speech and hate crime. As reported in last year’s Fundamental Rights Report, the European Commission – having acquired, in December 2014, the power to review Member States’ compliance with Framework Decisions under the supervision of the CJEU – initiated formal inquiries with

Member States that still had major gaps in transposing the Framework Decision on Racism and Xenophobia into national law. The Commission intended to launch infringement procedures where necessary. This prompted notable legislative developments in a number of Member States in 2017.

For example, **Italy** adopted legislation that increases the penalty for intentionally denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes. The law also introduces administrative responsibility for companies that engage in racist and xenophobic conduct.<sup>9</sup> Likewise, **Portugal** amended its Penal Code to punish – with imprisonment ranging between six months and five years – anybody who establishes an organisation or develops or encourages propaganda activities inciting discrimination, hatred or violence against a person or group of persons because of their race, colour, ethnic or national origin, ancestry, religion, sex, gender, sexual orientation, and physical or intellectual disability.<sup>10</sup>

Relevant legislative developments regarding hate crime and hate speech also occurred in other Member States. **Cyprus** amended its Criminal Code by empowering the national courts to take into account as an aggravating factor the motivation of prejudice on the grounds of race, colour, national or ethnic origin, religious or other beliefs, ‘genealogical origin’, sexual orientation or gender equality.<sup>11</sup> Similarly, **Latvia** amended its legislation to prohibit associations and foundations from propagating openly Nazi, fascist or communist ideology and conducting activities aimed at inciting national, ethnic, racial and religious hatred or enmity.<sup>12</sup>

**France** adopted a law generalising aggravating sanctions in cases of racism, homophobia and sexism to all crimes and offences punished by imprisonment.<sup>13</sup> The **German Bundestag** passed a law requiring operators of social media networks to fight and remove unlawful content from their platforms.<sup>14</sup> Manifestly unlawful content must be taken down or blocked within 24 hours after receipt of a complaint. Other criminal content must generally be taken down or blocked within 7 days of receiving a complaint. Social networks that fail to set up a complaints management system or do not set one up properly are committing a regulatory offence. This is punishable with a fine of up to € 50 million. Critics of the law point out that it enables unjustified censorship, leading to violations of freedom of expression by private companies without granting the possibility of redress; they also fear that it will serve as a precedent for other countries to follow.<sup>15</sup> Social networks, such as Facebook, also expressed their concern about the law’s effect on freedom of expression. They also emphasised that the transition period for putting into place new mechanisms is too short, that the law is not precise enough, and that the penalties are disproportionate, harming especially smaller companies.<sup>16</sup>



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The European Commission has put in place a range of policy measures to support the implementation of the Framework Decision on Racism and Xenophobia and of the Victims' Rights Directive. Among these, the EU High Level Group on combating racism, xenophobia and other forms of intolerance has published two sets of key guiding principles<sup>17</sup> – on hate crime training and on supporting victims of hate crime – to provide information about the work of national authorities and practitioners in these two key areas. For more information on the

► Victims' Rights Directive, see [Chapter 9](#).

Antisemitism manifests itself in many forms, FRA's annual overview of the available data shows.<sup>18</sup> Even events that not everyone deems antisemitic<sup>19</sup> can create major concerns, fears and worries within Jewish communities. Hungary's largest Jewish organisation, Mazsihisz, called on the prime minister to stop a government campaign against a Hungarian-born Jewish émigré, adding that the "poisonous messages harm the whole of Hungary".<sup>20</sup> In June, the European Parliament approved a resolution on antisemitism, calling on politicians to oppose antisemitic statements, and urging Member States to appoint a national coordinator to combat antisemitism.<sup>21</sup> The European Parliament also called on Member States and the EU institutions and agencies to adopt and apply the International Holocaust Remembrance Alliance's (IHRA's) working definition of antisemitism.

#### FRA ACTIVITY

### Improving hate crime recording and data collection in Member States

In 2016, the European Commission invited FRA to become a permanent member of the EU High Level Group on combating racism, xenophobia and other forms of intolerance. FRA coordinates the Subgroup on improving recording and collecting data on hate crime. In December 2017, the High Level Group endorsed key guiding principles on improving the recording of hate crime by law enforcement authorities, which the Subgroup had developed. Three of these guiding principles concern organisational and structural aspects of police work, and two relate to operational and everyday police work. The principles are tested and implemented through national workshops that FRA and the Office for Democratic Institutions and Human Rights (ODIHR) facilitate jointly. These workshops aim to raise awareness of the need to properly record hate crimes; to identify gaps in existing hate crime recording and data collection frameworks; and to identify practical steps to improve these frameworks.

Source: European Commission (2017), *Improving the recording of hate crime by law enforcement authorities: key guiding principles*, Brussels, December 2017. For more information, see FRA's [web page on the Subgroup](#).

Alongside Roma and Muslims, people of African descent and black Europeans are particularly vulnerable to racist crime and discrimination, according to EU-MIDIS II. An estimated 15 million people of African descent and black Europeans live in Europe, many of whom have been living in Europe for several generations.<sup>22</sup> Historical abuses and racism still profoundly affect their everyday lives, EU-MIDIS II and other evidence<sup>23</sup> show. EU-MIDIS II interviewed 5,803 persons with sub-Saharan African background and found that, on average, one in five respondents of this group (21 %) felt harassed because of their ethnic or immigrant background in the year preceding the survey. Many respondents with a sub-Saharan background who were victims of hate-motivated harassment were repeatedly harassed, as [Figure 4.1](#) shows. Nonetheless, three years after the launch of the United Nations International Decade for People of African Descent, only a few EU Member States have taken measures to ensure full participation and equal rights for people of African descent or marked the decade in any way.

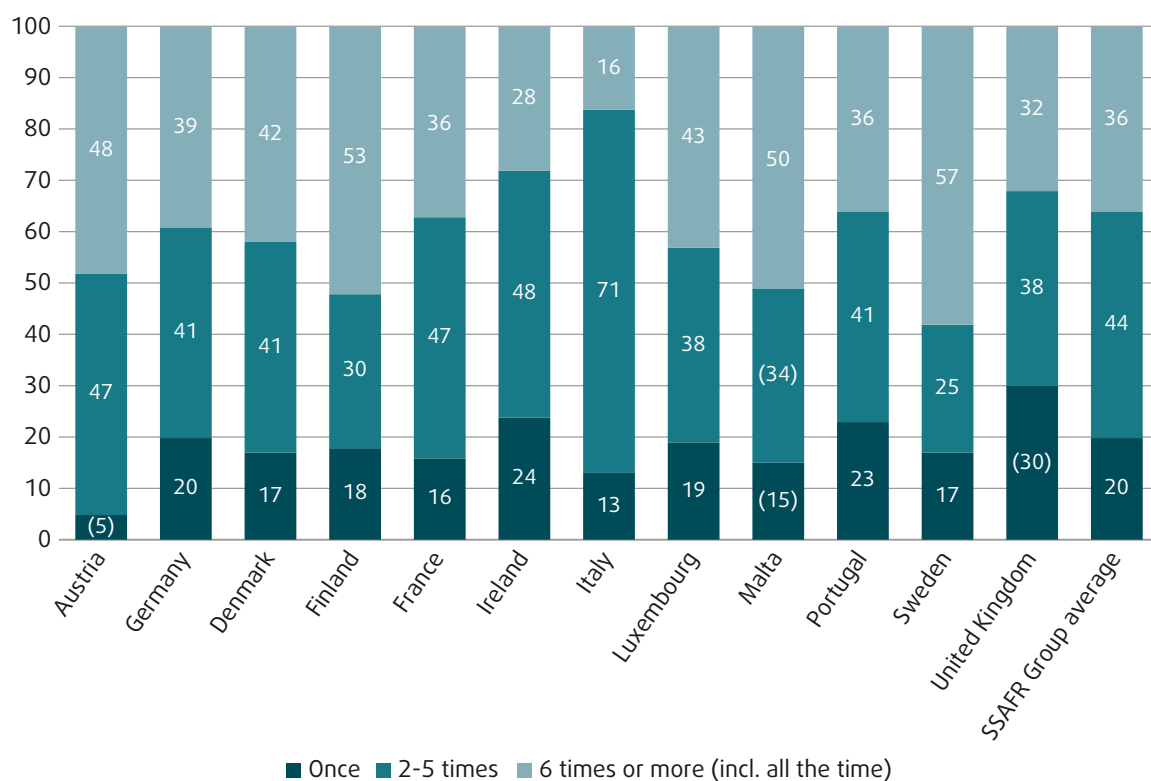
#### 4.1.2. Tackling online hatred

Certain forms of xenophobic and racist speech are illegal in the EU, as outlined in the 2008 Framework Decision on Racism and Xenophobia. This includes online hate speech. Acknowledging the spread of such illegal content online, the European Commission under the motto 'What is illegal offline is also illegal online' adopted a communication entitled *Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms* in September 2017.<sup>24</sup> The Communication lays down a set of guidelines and principles for online platforms to step up the fight against illegal content online in cooperation with national authorities, Member States and other relevant stakeholders. It complements other non-legislative measures, such as the Code of Conduct on Countering Illegal Hate Speech Online and the work of the EU Internet Forum as regards terrorist propaganda.

The second evaluation of the Code of Conduct on Countering Illegal Hate Speech Online took place in June 2017. It indicated that removal of hate speech had increased from 28 % to 59 % in some EU Member States over six months.<sup>25</sup> The speed of removals also improved: 51 % of the content was removed after 24 hours (as prescribed by the Code of Conduct), compared to 40 % six months earlier. The results on the implementation of the Code of Conduct were also taken into account for mid-term review of the implementation of the Digital Single Market Strategy.<sup>26</sup>

The Commission's proposal for a revision of the Audiovisual Media Services Directive<sup>27</sup> contains provisions that would oblige social media platforms to set up a system to flag audiovisual material containing hate speech.

**Figure 4.1: Number of times respondents with sub-Saharan African background experienced harassment due to ethnic or immigrant background in the past 12 months, by Member State (%)**



**Notes:** Out of all respondents with sub-Saharan African background (n = 5,803); weighted results. Results based on a small number of responses are statistically less reliable. Results based on 20–49 unweighted observations in a group total or based on cells with fewer than 20 unweighted observations are noted in parentheses. SSAFR refers to immigrants and descendants of immigrants from sub-Saharan Africa. Question: “How many times have such incidents [that is, each of the five acts of harassment asked about in the survey] related to your ethnic or immigrant background happened in the past 12 months?”

**Source:** FRA, EU-MIDIS II 2016

Social media often amplify xenophobic and racist speech that publicly incites hatred and violence. For example, the Centre for the Analysis of Social Media, part of the UK-based cross-party think tank Demos, conducted research to measure the volume of messages on Twitter in a one-year period. It detected 143,920 derogatory and anti-Islamic tweets – this is about 393 a day. Over 47,000 different users sent them, and they range from directly insulting individuals to broader political statements.<sup>28</sup>

### 4.1.3. Courts confront racist and related offenses

Several European Court of Human Rights (ECtHR) rulings adopted in 2017 concluded that Member States violated rights guaranteed by the European Convention on Human Rights (ECHR) by failing to efficiently investigate incidents potentially involving discriminatory and racist motives. At national level, various court decisions further clarified what kind

of acts and statements constitute incitement to hatred and insult.

In *Škorjanec v. Croatia*,<sup>29</sup> the ECtHR found that the failure of the investigating authorities to carry out a thorough assessment of the link between the applicant’s relationship with her partner, a man of Roma origin, and the racist motive for the attack on them amounted to a violation of the procedural aspect of Article 3 (prohibition of torture) in conjunction with Article 14 (prohibition of discrimination) of the ECHR. The court concluded that the prosecuting authorities’ focus on the fact that the applicant herself was not of Roma origin led them to ignore the connection between the racist motive for the attack and the applicant’s association with her partner. The court ordered **Croatia** to pay € 12,500 for the non-pecuniary damage. The Croatian authorities have undertaken measures to prevent similar violations and to execute this judgment by disseminating the judgment to the authorities competent for processing hate crimes,

and incorporating the judgment into the material for seminars on hate crimes aimed at judges, prosecutors, police officers and civil society organisations.

Similarly, in *M.F. v. Hungary*<sup>30</sup> the ECtHR ruled in favour of a man of Roma origin who claimed that the police subjected him to ill-treatment and discriminatory practice after arresting him for a crime. The court established that the applicant's injuries were caused by his ill-treatment in police custody and that the authorities failed in their duty to effectively investigate the allegations of such ill-treatment, violating Article 3 (prohibition of torture) of the ECHR. In addition, the authorities failed to take all possible steps to investigate whether or not discrimination played a role in the alleged incident, hence violating Article 14 (prohibition of discrimination) of the ECHR, taken together with Article 3 (prohibition of torture) in its procedural aspect. The court ordered **Hungary** to pay € 10,000 for non-pecuniary damage and € 4,724 for costs and expenses.

In *Király and Dömötör v. Hungary*,<sup>31</sup> the ECtHR concluded that shortcomings in an investigation of an anti-Roma demonstration amounted to a violation of Article 8 (right to respect for private and family life). The case concerned a protest that, although not violent per se, caused the applicants, Hungarian nationals of Roma origin, to suffer a well-founded fear of violence and humiliation. The court found that the investigating authorities' failure to prepare themselves for the event and interrogate more people after the protest, and the subsequent lack of a thorough law-enforcement procedure, allowed an openly racist demonstration to take place without legal consequences. The court concluded that the applicants' right to psychological integrity had not been protected, and ordered **Hungary** to pay € 7,500 to each of them for non-pecuniary damage.

In **Austria**, the Supreme Court found that asylum seekers also fall under the protection of the first sentence of § 283 (1) of the Criminal Code (*Strafgesetzbuch* (StGB)). The court deemed inaccurate Graz's High Regional Court's interpretation of this provision, which had concluded that asylum seekers could not form a 'defined group' in the sense of that law.<sup>32</sup> In the case in question, a man had been indicted for incitement to hatred and violence after posting, on his Facebook page, a picture of two snipers lying in a trench with machine guns, including the caption 'The fastest asylum procedure in Germany ... rejects up to 1,400 requests per minute'. The court established that the provision in question does not require the group to be defined according to the existence or absence of one or multiple criteria for it to be protected. Rather, it also includes clearly defined subcategories, such as asylum seekers, that fulfil one of the listed criteria, e.g. nationality.

In **Bulgaria**, the Regional Court of Vratsa convicted one adult and three juveniles of a violent attack against a group of Roma.<sup>33</sup> The court found that the victims were attacked because of their Roma ethnic origin. The adult offender received a suspended sentence of three months' imprisonment, while the three juvenile offenders were sentenced to probation.

In **France**, an appeals court of Aix-en-Provence found that Jean-Marie Le Pen incited hatred and made racist statements at a public event in Nice in 2013. The court fined him € 5,000 for inciting hatred against Roma and ordered him to pay € 2,000 in damages to SOS Racisme, a civil party plaintiff, and € 1,000 to the League of Human Rights, a civil party in the first instance.<sup>34</sup>

An **Italian** member of the European Parliament (MEP) was tried for incitement to racist hatred over discriminatory statements he made during a radio broadcast targeting the former Minister for Integration, an Italian citizen of African origin. The ordinary Court of Milan considered in its decision Article 10 of the ECHR (freedom of expression) and its limitations when a political debate is at stake and concluded that the MEP offended the former minister on the grounds of her African origin and skin colour. The MEP was fined € 1,000 and ordered to pay € 50,000 in compensation to the victim.<sup>35</sup>

In **Lithuania**, the Supreme Court dismissed a defendant's cassation appeal, ruling that the right to hold beliefs and freedom of expression are not in conformity with public insult, incitement to hatred and discrimination, and incitement to violence against a group of people of a certain nationality.<sup>36</sup> The defendant was tried for having publicly written comments to various articles published on the news portal [www.15.min.lt](http://www.15.min.lt), which insulted persons and incited hatred, discrimination and violence against them based on their Russian nationality.

## 4.2. More efforts needed for correct implementation of the Racial Equality Directive

The Racial Equality Directive (2000/43/EC) represents a key legal measure for combating ethnic and racial discrimination, and its practical implementation is crucial for promoting equality. Despite its strong legal provisions, immigrants, descendants of immigrants, and minority ethnic groups continued to face widespread discrimination across the EU and in all areas of life, as the findings of EU-MIDIS II underscored.

The European Commission continued to closely monitor implementation of this directive in 2017, pursuing infringement proceedings against Member States found to be in breach of its provisions. In particular, the European Commission focused on education and housing. Cases of systematic discrimination against Roma on grounds of their ethnicity have been investigated. Infringement proceedings concerning discrimination against Roma children in education have been ongoing in the **Czech Republic, Hungary and Slovakia**.<sup>37</sup> For more information, see [Chapter 5](#) on Roma integration.

A number of Member States amended their legislation to incorporate provisions of the directive in 2017. **Hungary** amended its legislation in the field of education, guaranteeing that “the organisation of education on the basis of religious or other ideological conviction may not lead to unlawful segregation on the basis of race, colour, ethnicity or ethnic affiliation”.<sup>38</sup> Similarly, **Sweden** amended its legislation to state that employers and educational actors should take preventive and active measures to combat discrimination and promote equal rights and opportunities covering all seven discrimination grounds, including racial and ethnic discrimination.<sup>39</sup> **Portugal** also adopted legislation prohibiting discriminatory practices on ethnic and racial grounds in access to employment, education, housing and services.<sup>40</sup>

In 2017, the CJEU’s judgment in *Jyske Finans A/S v. Ligebehandlingsnævnet* on a preliminary ruling request regarding the interpretation of direct and indirect discrimination on ethnic grounds under the Racial Equality Directive clarified that ethnic origin cannot be determined on the basis of a single criterion, such as a country of birth. On the contrary, ethnic origin is based on a number of factors, such as common nationality, religious faith, language, cultural and traditional origin, and background.<sup>41</sup> The court concluded that the practice of requesting additional proof of identity for individuals born outside the EU or EFTA was neither directly nor indirectly connected with the ethnic origin of the person applying for a loan.

Formulating policies to effectively target ethnic discrimination requires reliable and comparable data, including data disaggregated by ethnicity. Surveys on experiences and perceptions of discrimination are a useful tool to inform policymakers about the prevalence and types of discriminatory practices experienced by ethnic and immigrant groups. See also [▶ Chapter 3](#) on equality and non-discrimination.

A considerable proportion of respondents believe they experienced discrimination because of their ethnic or immigrant background, EU-MIDIS II results show. In the five years before the survey, four out of 10 respondents

(38 %) felt discriminated against because of their ethnic or immigrant background in one or more areas of daily life. This happened more often when they were looking for work and when accessing public and private services, as [Figure 4.2](#) shows. Some 29 % of all respondents who looked for a job in the five years before the survey felt discriminated against on this basis; 12 % experienced this in the year preceding the survey.<sup>42</sup> Among all groups surveyed, similarly to the findings of EU-MIDIS I, respondents with a North African background, Roma respondents and respondents with a sub-Saharan African background continued to indicate the highest levels of discrimination based on ethnic or immigrant background.<sup>43</sup>

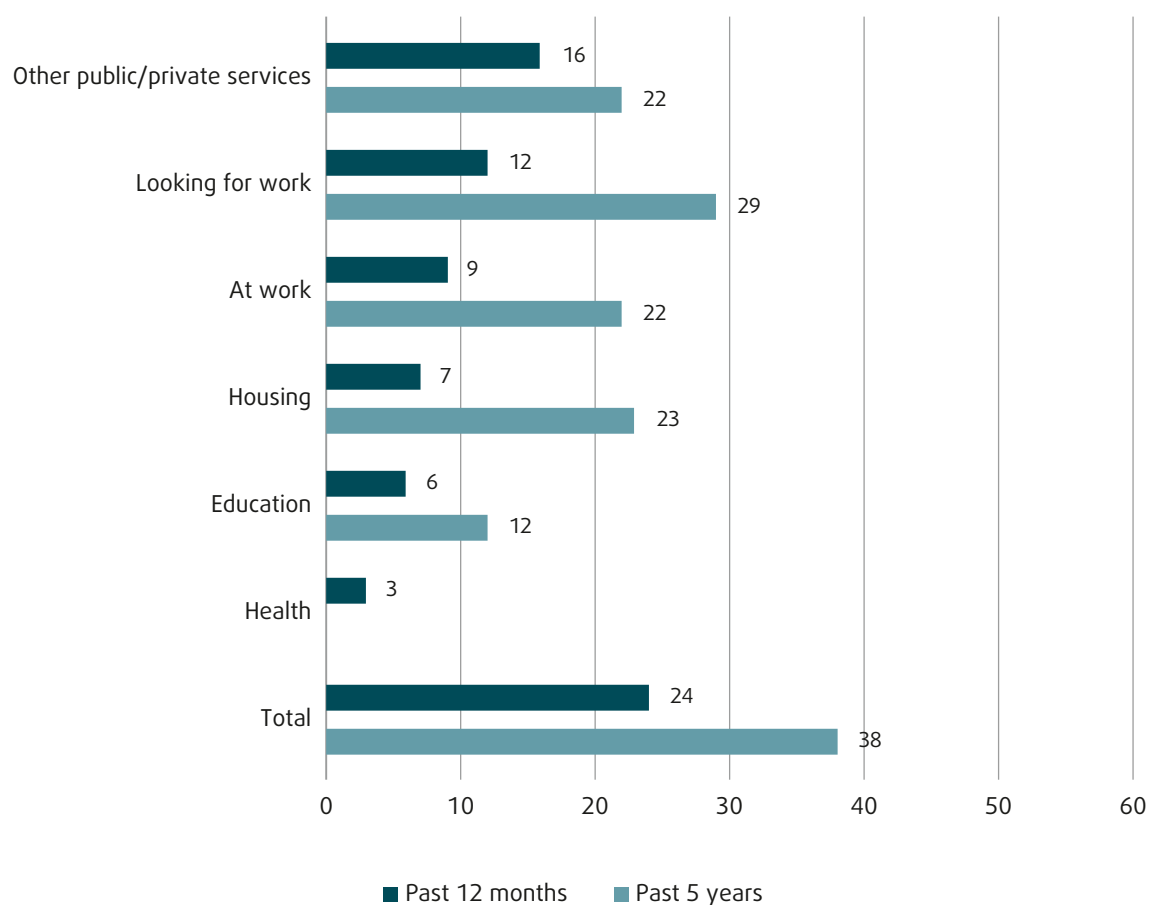
Regarding awareness of antidiscrimination legislation, a majority of EU-MIDIS II respondents (67 %) knew that discrimination based on skin colour, ethnic origin or religion is unlawful in their country. However, 71 % of respondents were not aware of any organisation that offers support or advice to discrimination victims and 62 % were not aware of any equality body. This could partly explain the low rates of reporting of discrimination among members of ethnic minorities.<sup>44</sup>

#### 4.2.1. Ethnic minorities face discrimination on multiple grounds

Members of ethnic minorities in the EU experience discrimination on more grounds than their ethnicity, such as their sex, religious beliefs or origins, evidence collected by FRA consistently shows.<sup>45</sup> More than one in three Muslim women who wear a headscarf or niqab in public experience harassment because of their ethnic or immigrant background (31 %), compared with under one quarter (23 %) of women who do not wear such clothing, EU-MIDIS II found.<sup>46</sup> While perpetrator(s) of both bias-motivated harassment and violence were mostly not known to the victim and did not have an ethnic minority background, about half (48 %) of Muslim women respondents identified someone from another ethnic minority group as perpetrator, compared with just over one in four (26 %) Muslim men.

Refugee and asylum-seeking women and girls are often victims of racist and gender-based violence and harassment, FRA’s research on challenges to women’s rights in the EU indicates.<sup>47</sup> In addition, they face particular barriers to accessing their social and economic rights regarding employment, housing, health, education, social protection and welfare. For more information on 2017 developments concerning measures addressing violence against women in [▶ general](#), see [Chapter 9](#).

**Figure 4.2: Discrimination based on ethnic or immigrant background in different areas of life in 12 months and 5 years before the survey (%)**



*Notes:* Out of all respondents at risk of discrimination based on ethnic or immigrant background in the particular domain (total n: 'in 5 years before the survey', n = 25,228; 'in 12 months before the survey', n = 25,403); weighted results, sorted by 12-month rate.  
 Domains of daily life summarised under 'other public or private services': public administration, restaurant or bar, public transport, shop.  
 Discrimination experiences in 'access to health care' were asked about only for the 12 months preceding the survey due to a routing mistake in the questionnaire.

*Source:* FRA, EU-MIDIS II 2016

Racism plays a significant role in how children and young people are treated, according to research on refugee children and young people by the United Nations Children's Fund (UNICEF) and the International Organization for Migration: over 80 % of refugee adolescents and young people from sub-Saharan Africa reported exploitation, compared with around 55 % of those originating from elsewhere.<sup>48</sup>

Over 850 black, white, Asian, Arab, and mixed race gay men participated in a survey by the Fact Site in the UK, where they shared their thoughts on experiencing racism in the 'gay community'. The survey found that 80 % of black men, 79 % of Asian men, 75 % of South Asian men, 64 % of mixed race men, and most Arab men who responded had experienced some form of racism by other members of the 'gay community'.<sup>49</sup>

### Promising practice

#### 'Be honest: we need a reality check on racism'

On the International Day for the Elimination of Racial Discrimination, the International Lesbian, Gay, Bisexual, Trans and Intersex Association – Europe (ILGA-Europe) launched a campaign to acknowledge that racism and ethnic discrimination exists both inside and outside the lesbian, gay, bisexual, trans and intersex (LGBTI) communities. ILGA-Europe called on LGBTI organisations to make sure that their doors are open to everyone in the LGBTI communities, of all races, ethnic backgrounds and identities.

*For more information, see ILGA-Europe's website.*

#### 4.2.2. Promoting national action plans against racism, xenophobia and ethnic discrimination

The UN Durban Declaration and Programme of Action emphasises states' responsibility to combat racism, racial discrimination, xenophobia and related intolerance<sup>18</sup> and calls upon states "to establish and implement without delay" national policies and action plans to combat these phenomena. The European Commission, in its joint report on the application of the Racial Equality and Employment Equality Directives, stressed that legislation alone is not enough to

ensure full equality and needs to be combined with appropriate policy action.<sup>50</sup> Nearly 16 years after the adoption of the UN Durban Declaration and Programme of Action, only 14 EU Member States had in place dedicated action plans against racism, racial/ethnic discrimination and related intolerance in 2017 (see [Table 4.1](#)). States that do not have such plans and policies in place could consider the practical guide of the Office of the UN High Commissioner for Human Rights to develop national action plans against racial discrimination.<sup>51</sup>

**Table 4.1: EU Member States with action plans and strategies against racism, xenophobia and ethnic discrimination in place in 2017**

EU Member State	Name of strategy or action plan in English	Period covered
BE	French-speaking community – Transversal Action Plan to Counter Xenophobia and Discrimination	2014-2019
CZ	<a href="#">Concept on the Fight against Extremism for 2017</a>	2017
DE	<a href="#">National Action Plan to Fight Racism</a> <a href="#">Federal Government Strategy to Prevent Extremism and Promote Democracy</a>	2017 onwards 2016 onwards
ES	<a href="#">Comprehensive Strategy to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance</a>	2011 onwards
FI	<a href="#">Action Plan against Hate Speech and Hate Crimes</a> <a href="#">The National Action Plan on Fundamental and Human Rights</a>	2017 onwards 2017-2019
FR	<a href="#">Mobilizing France against Racism and Anti-Semitism 2015-2017</a> Action Plan	2015-2017
HR	<a href="#">National Plan for Combating Discrimination</a> Accompanying Action Plan	2017-2022 2017-2019
IT	<a href="#">The National Plan of Action against Racism, Xenophobia and Intolerance</a>	2015-2018
LT	<a href="#">The Action Plan for Promotion of Non-discrimination</a>	2017-2019
LV	<a href="#">Guidelines on National Identity, Civil Society and Integration Policy (2012-2018)</a>	2012-2018
NL	<a href="#">National Antidiscrimination Action Programme</a>	2016 onwards
SE	<a href="#">National Plan to Combat Racism, Similar Forms of Hostility and Hate Crime</a>	November 2016 onwards
SK	<a href="#">Action Plan for Preventing and Elimination of Racism, Xenophobia, Antisemitism and Other Forms of Intolerance for the Years 2016-2018</a>	2016-2018
UK – Scotland	<a href="#">Race Equality Framework for Scotland 2016-2030</a> <a href="#">Race Equality Action Plan</a>	2016-2030 2017-2021
UK – Northern Ireland	<a href="#">Racial Equality Strategy 2015-2025</a>	2015-2025
UK – Wales	<a href="#">Equality Objectives 2016-2020: Working towards a Fairer Wales</a>	2016-2020

### 4.3. Stepping up efforts to counter discriminatory profiling

*“Racial profiling shall mean: ‘The use by the police, with no objective and reasonable justification, of grounds such as race, colour, language, religion, nationality or national or ethnic origin in control, surveillance or investigation activities’.”*

*European Commission against Racism and Intolerance (ECRI) (2007), General Policy Recommendation No 11 on Combating Racism and Racial Discrimination in Policing, Doc. CRI (2007) 39, 29 June 2007, p. 4*

When a decision to stop an individual is motivated solely or mainly by a person’s race, ethnicity or religion, this constitutes discriminatory ethnic profiling. Such practices can alienate certain communities in the EU, and in turn contribute to inefficient policing, as disproportionate policing practices do not necessarily match higher crime detection rates. Discriminatory ethnic profiling is unlawful; it offends human dignity and can spur the deterioration of relations between different groups in society.

Nevertheless, such practices persisted in several EU Member States in 2017, as the findings of EU-MIDIS II and other national surveys reveal. A number of national courts’ rulings, which confirmed that discriminatory ethnic profiling is unlawful, complement this evidence.

A relatively high proportion of the respondents who were stopped by the police in the five years before the survey believe that this was because of their immigrant or ethnic minority background, very valuable evidence from EU-MIDIS II shows. The survey interviews were conducted during a period that included major terrorist attacks in France and Belgium, which prompted an increase in police surveillance and identity checks. Overall, discriminatory police practices affect certain respondent groups more than others, the EU-MIDIS II results indicate, which is consistent with findings in EU-MIDIS I. On average, of those who have recently been stopped by the police, nearly every second (47 %) respondent with an Asian background, 41 % of those with a sub-Saharan background and 38 % of those with a North African background perceived the most recent stop as ethnic profiling. Similarly, nearly every second Roma respondent stopped (42 %) believed that this was because of their ethnic background. By contrast, this proportion is much lower (17 %) among the stopped respondents with a Turkish background<sup>52</sup> (Figure 4.3).

In **France**, young men of Arab and African descent are 20 times more likely to be stopped and searched than any other male group, results of a national survey with more than 5,000 respondents reveal.<sup>53</sup> The *Commission Nationale Consultative des Droits de l’Homme* expressed concerns about increased

discriminatory profiling exercised by the police forces.<sup>54</sup> In the **United Kingdom**, people with ethnic minority backgrounds are three times more likely to be stopped and searched than white people, Home Office statistics show. This is particularly true for individuals who are black, who are over six times more likely to be stopped.<sup>55</sup>

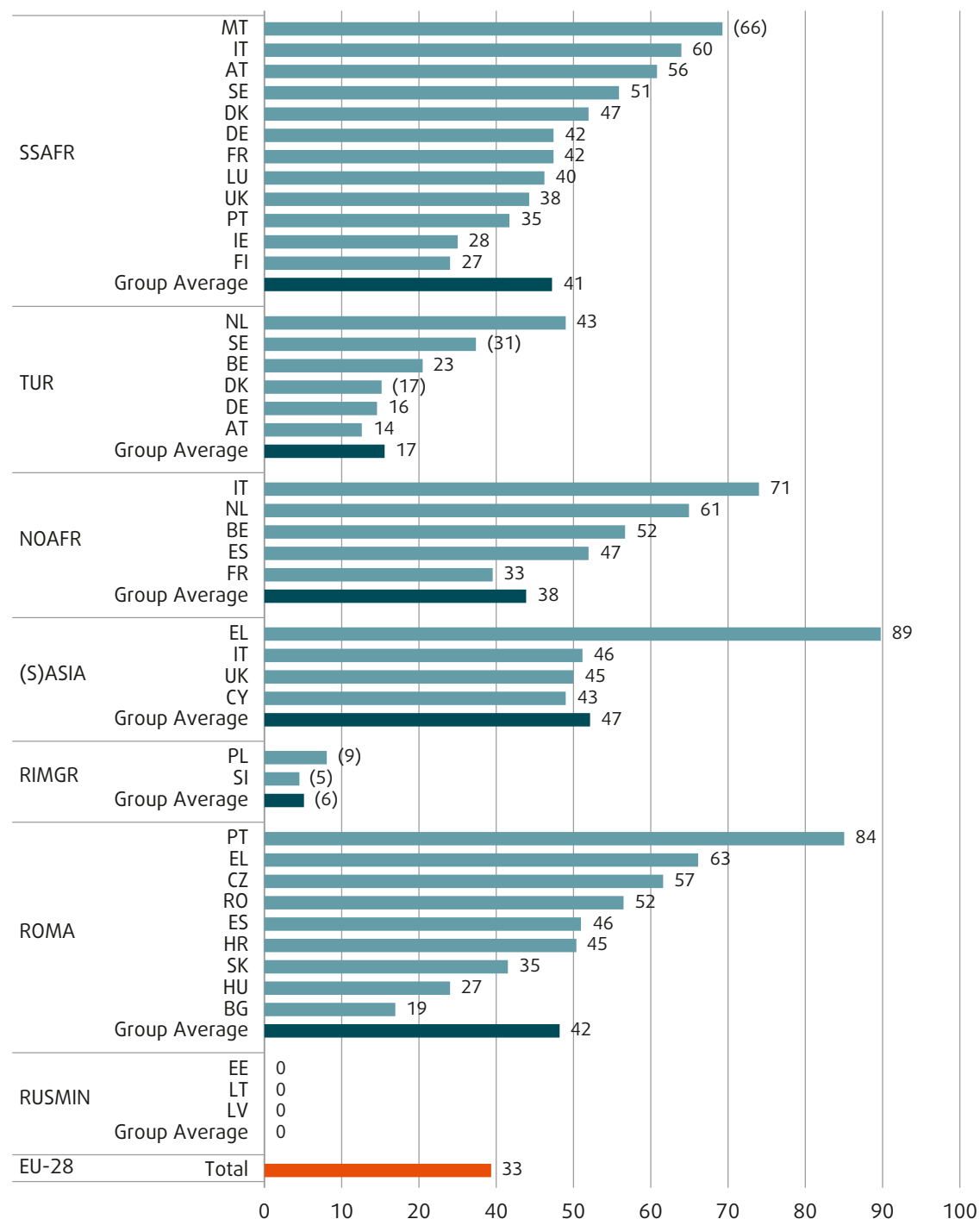
Still in the **United Kingdom**, based on a series of freedom of information requests sent to the Home Office, the Bureau of Investigative Journalism revealed that large numbers of British citizens are being caught up in immigration checks. Nearly one in five of those stopped between January 2012 and January 2017 were UK citizens, the figures showed. As a result, a number of lawyers and Members of Parliament have criticised the Home Office for using ethnic profiling.<sup>56</sup>

A number of national court rulings issued in various Member States in 2017 found unlawful discriminatory ethnic profiling. For example, in **Germany**, the Administrative Court of Dresden reviewed claims by a man alleging that he was chosen for a police check at the train station in Erfurt based on his skin colour.<sup>57</sup> The defendants, two police officers, denied such claims and said that they based their decision to check the plaintiff on his suspicious behaviour. The court found that the two defendants could not sufficiently prove that the police check was based on lawful reasoning about suspicious activities by the plaintiff and that it was based on ethnic profiling, making it illegal.

In **Sweden**, the Svea Court of Appeal reviewed the claims of 11 persons of Roma origin who alleged that they were included in a Swedish police registry because of their Roma ethnic origin, as they were friends or relatives of three Roma families with a criminal record.<sup>58</sup> The court applied the burden of proof principle and asked the State to prove that there was another valid reason for including the persons in the registry. As the State could not prove this, the court concluded that ethnicity was the sole reason, which amounted to a violation of the Police Data Act and of Article 14 (prohibition of discrimination) of the ECHR in conjunction with Article 8 (right to respect for private and family life).

In **France**, the Constitutional Council assessed the conformity of the Code of Penal Procedure and the provisions of the Code of Entrance and Residence of Foreigners and of Asylum Law<sup>59</sup> with the Constitution. The Court of Cassation challenged the provisions, alleging that they could be interpreted to allow discriminatory identity checks based on physical characteristics and a constant and generalised use of police controls over time and space. Clarifying the proper interpretation of the provisions in question, the council rejected that claim.

**Figure 4.3: Most recent police stop perceived as ethnic profiling among those stopped in five years before the survey, by EU Member State and target group (%)**



Notes: Out of respondents who were stopped by the police in the five years before the survey (n = 6,787); weighted results. Results based on a small number of responses are statistically less reliable. Therefore, results based on 20 to 49 unweighted observations in a group total or based on cells with fewer than 20 unweighted observations are noted in parentheses. Results based on fewer than 20 unweighted observations in a group total are not published. Questions: "In the past five years in [COUNTRY] (or since you have been in [COUNTRY]), have you ever been stopped, searched or questioned by the police?"; "Do you think that THE LAST TIME you were stopped was because of your ethnic or immigrant background?"

Abbreviations for target groups refer to immigrants from [country/region] and their descendants: ASIA, Asia; NOAFR, North Africa; RIMGR, recent immigrants from non-EU countries; ROMA, Roma minority; RUSMIN, Russian minority; SASIA, South Asia; SSAFR, sub-Saharan Africa; TUR, Turkey.

Source: FRA, EU-MIDIS II 2016



All EU Member States are parties to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and are bound by its provisions. The UN Committee on the Elimination of all Forms of Racial Discrimination (CERD) underlined the need to address ethnic discriminatory profiling by law enforcement officers. In its concluding observations on **Bulgaria**,<sup>60</sup> **Cyprus**<sup>61</sup> and **Finland**,<sup>62</sup> it recommended that the respective authorities continue to conduct training programmes with law enforcement officers on the prevention of racial profiling and non-discrimination. CERD also raised concerns about the abusive acts of the police against members of ethnic minorities in **Portugal**.<sup>63</sup>

Several countries implemented educational measures and initiatives aimed at raising human rights awareness among law enforcement officials. These included initiatives to counter racism and ethnic discrimination, and on policing diverse societies.

In **Romania**, the police continued to include special places for national minorities at admittance examinations for police schools and the Police Academy.<sup>64</sup> In **Sweden**, the police introduced a project aimed at hiring civilians from diverse ethnic backgrounds for 12 months to foster relations with different ethnic communities and encourage more applicants to the Swedish Police Academy.<sup>65</sup> In **Belgium**, the Ministry of Security, Interior and Justice included training on 'Discrimination, hate speech and hate crimes: circular 13/2013' in its new National Security Plan 2016–2019 to give a bigger role for reference officers responsible for discrimination and hate crime.<sup>66</sup> Furthermore, in an effort to ensure that all citizens are treated equally and to fight ethnic profiling, the police zone of Mechelen-Willebroek has been registering every identity check of civilians since May 2017.<sup>67</sup> In **Greece**, the Ombudsman provided training courses to police forces on how to tackle racist violence and combat discrimination.<sup>68</sup> In **Portugal**, the Inspectorate General of Home Affairs developed a manual of procedures aiming to improve police practices by preventing racial discrimination and defending human rights.<sup>69</sup> In **Spain**, the Ombudsman recommended the use of templates for police identity checks that provide information about the police officers and about the nationality and ethnic origin of the individuals stopped and searched.<sup>70</sup> The EU Agency for Law Enforcement Training offers

a variety of training courses, including online, on the topics of policing and fundamental rights.<sup>71</sup>

## Promising practice

### Providing guidelines for identity checks

The **Dutch** police adopted guidelines for police officers when conducting proactive checks. Proactive checks are checks that police officers carry out on selected persons without noticing (in advance) a violation of a rule or an offence. The guidelines state that proactive checks by the police can be done when there is an objective reason to stop and search a person. According to the guidelines, skin colour, ethnic origin or religion are not objective reasons, except in the case of a description of, for example, a wanted person. Instead, a person's behavior can provide an objective reason for stopping and searching a person.

The guidelines are designed to strengthen police officers' awareness during the decision process. They state that police officers – without being asked – have to explain to persons why they decided to check them. The guidelines also include a new definition of ethnic profiling, which is very similar to ECRI's definition.

*Source: The Netherlands, Politie (2017), 'Guidelines on carrying out proactive checks' (Handelingskader proactief controleren), 27 October 2017.*

### Promoting inclusive police forces

In the **United Kingdom**, the College of Policing has been commissioned to develop a national programme to improve the recruitment, development, progression and retention of black and minority ethnic (BME) officers and staff. The programme aims, among other things, to support forces in improving recruitment, retention and progression of BME officers through the provision of advice; to design, deliver, test and evaluate positive action learning and development programmes; to collate and share effective practice on the recruitment, retention and progression of BME officers; and to undertake relevant research, evaluation and surveys to inform the support being provided to forces and to provide evidence to enable standards to be set.

*Source: UK College of Policing (2017), BME Progression 2018 programme.*

## FRA opinions

Despite the policy initiatives undertaken within the framework of the EU High Level Group on combating racism, xenophobia and other forms of intolerance, racist and xenophobic hate crime and hate speech continue to profoundly affect the lives of millions of people in the EU. This is illustrated in findings from EU-MIDIS II and reported in FRA's regular overviews of migration-related fundamental rights concerns.

Article 1 of the Framework Decision on Racism and Xenophobia outlines measures that Member States shall take to punish intentional racist and xenophobic conduct. Article 4 (a) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) further obliges State parties to make incitement to racial discrimination, as well as acts of violence against any race or group of persons, offences punishable by law.

### FRA opinion 4.1

*EU Member States should ensure that any case of alleged hate crime, including hate speech, is effectively recorded, investigated, prosecuted and tried. This needs to be done in accordance with applicable national, EU, European and international law.*

*EU Member States should make further efforts to systematically record, collect and publish annually comparable data on hate crime to enable them to develop effective, evidence-based legal and policy responses to these phenomena. Any data should be collected in accordance with national legal frameworks and EU data protection legislation.*

Despite the strong legal framework set by the Racial Equality Directive (2000/43/EC), EU-MIDIS II results and other evidence show that a considerable proportion of immigrants and minority ethnic groups face high levels of discrimination because of their ethnic or immigrant backgrounds, as well as potentially related characteristics, such as skin colour and religion. The results show little progress compared with eight years earlier, when the first EU-MIDIS survey was conducted; the proportions of those experiencing discrimination remain at levels that raise serious concern. They also reveal that most respondents are not aware of any organisation that offers support or advice to discrimination victims, and the majority are not aware of any equality body.

### FRA opinion 4.2

*EU Member States should ensure better practical implementation and application of the Racial Equality Directive. They should also raise awareness of anti-discrimination legislation and the relevant redress mechanisms, particularly among those most likely to be affected by discrimination, such as members of ethnic minorities. In particular, Member States should ensure that sanctions are sufficiently effective, proportionate and dissuasive, as required by the Racial Equality Directive.*

In 2017, only 14 EU Member States had dedicated national action plans in place to fight racial discrimination, racism and xenophobia. The UN Durban Declaration and Programme of Action resulting from the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance assigns State parties primary responsibility to combat racism, racial discrimination, xenophobia and related intolerance. The EU High Level Group on combating racism, xenophobia and other forms of intolerance provides EU Member States with a forum for exchanging practices to secure the successful implementation of such action plans.

### FRA opinion 4.3

*EU Member States should develop dedicated national action plans to fight racism, racial discrimination, xenophobia and related intolerance. In this regard, Member States could draw on the practical guidance offered by the Office of the United Nations High Commissioner for Human Rights on how to develop such plans. In line with this guidance, such action plans would set goals and actions, assign responsible state bodies, set target dates, include performance indicators, and provide for monitoring and evaluation mechanisms. Implementing such plans would provide EU Member States with an effective means for ensuring that they meet their obligations under the Racial Equality Directive and the Framework Decision on Combating Racism and Xenophobia.*

As reported in previous Fundamental Rights Reports, evidence from EU-MIDIS II shows that members of ethnic minority groups continue to face discriminatory profiling by the police. Such profiling can undermine trust in law enforcement among persons with ethnic

minority backgrounds, who may frequently find themselves stopped and searched for no reason other than their appearance. This practice contradicts the principles of the ICERD and other international standards, including those embodied in the European Convention on Human Rights and related jurisprudence of the ECtHR, as well as the EU Charter of Fundamental Rights and the Racial Equality Directive.

#### FRA opinion 4.4

*EU Member States should end discriminatory forms of profiling. This could be achieved through providing systematic training on antidiscrimination legislation to law enforcement officers, as well as by enabling them to better understand unconscious bias and challenge stereotypes and prejudice. Such training could also raise awareness of the consequences of discrimination and of how to increase trust in the police among members of minority communities. In addition, to monitor discriminatory profiling practices, EU Member States could consider recording the use of stop-and-search powers. In particular, they could record the ethnicity of those subjected to stops – which currently happens in one Member State – in accordance with national legal frameworks and EU data protection legislation.*

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# UN & CoE

## January

27 January – Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2153 (2017) on promoting the inclusion of Roma and Travellers

## February

28 February – European Commission against Racism and Intolerance (ECRI) publishes fifth monitoring report on Luxembourg and conclusions on the implementation of a number of priority recommendations made in its country reports on Germany and Belgium, released in 2014

## March

8 March – CoE Commissioner for Human Rights issues report following a country visit to Portugal in March 2017

29 March – Congress for Local and Regional Authorities of the Council of Europe adopts Declaration of Mayors and Elected Local and Regional Representatives of Council of Europe Member States against anti-Gypsyism

29 March – CoE Commissioner for Human Rights issues report following a country visit to Ireland in November 2016

## April

## May

12 May – CoE Commissioner for Human Rights releases statement urging the Czech Republic to create the necessary conditions to build a monument on the former Nazi concentration camp for Roma in Lety u Pisku

16 May – ECRI publishes fifth monitoring report on Denmark and conclusions on the implementation of a number of priority recommendations made in its country reports on Bulgaria, Romania and the Slovak Republic, released in 2014

## June

8 June – Launch of European Roma Institute for Arts and Culture in Berlin

22 June – ECRI publishes its annual report on 2016

## July

11 July – CoE Commissioner for Human Rights issues report regarding the protection of vulnerable people, following a visit to Slovenia in March 2017

## August

2 August – CoE Commissioner for Human Rights issues statement calling for CoE member states to enhance their efforts towards fully acknowledging the Roma genocide and other past atrocities committed against the Roma

## September

12 September – CoE Commissioner for Human Rights publishes a position paper on fighting school segregation in Europe through inclusive education

19 September – ECRI publishes conclusions on the implementation of a number of priority recommendations made in its country reports on Slovenia, Germany and Belgium, released in 2014

## October

## November

## December

# EU

January

February

March

April

26 April – European Commission presents the European Pillar of Social Rights

May

22 May – European Commission publishes Country Specific Recommendations (CSRs) for 2017, as part of the European Semester process; four Member States receive CSRs related to Roma (Bulgaria, Hungary, Romania and Slovakia)

June

July

August

30 August – European Commission issues a Communication on the midterm review of the EU Framework for national Roma integration strategies

30 August – European Commission issues an accompanying Staff Working Document presenting a scoreboard that assesses the changes in Roma integration indicators between 2011 and 2016

September

October

25 October – European Parliament adopts a resolution on fundamental rights aspects in Roma integration in the EU: fighting anti-Gypsyism (2017/2038(INI))

November

December



# 5

## Roma integration



*The EU Framework for national Roma integration strategies has not yet resulted in significant and ‘tangible progress’, despite the continued implementation of measures to improve Roma inclusion in the Member States. Roma participation in education has increased, but early school leaving and segregation in education remain problems. The situation of Roma in employment, housing and health shows little improvement, while persisting anti-Gypsyism, which manifests itself in discrimination, harassment and hate crime, remains an important barrier to Roma inclusion. The need to tackle anti-Gypsyism became a higher political priority in 2017, reflected in the European Parliament Resolution on fundamental rights aspects in Roma integration in the EU. Enhanced efforts to monitor the implementation and effectiveness of integration measures are necessary, while special attention should be paid to marginalised and socially excluded young Roma and Roma women.*

### 5.1. Taking stock of progress on Roma integration

The situation of Roma in the EU in 2017 did not change significantly from the previous years. The overwhelming majority of Roma remain at risk of poverty (80 % in 2016). Early childhood education enrolment increased to 53 % on average, but dropping out early from education remains a problem, particularly among Roma girls. The situation for young Roma, and particularly young Roma women, worsened; the proportion of young Roma not in education, employment or training (NEET) increased from 56 % to 63 %, on average.

Limited progress and persisting challenges to social inclusion indicate that the political tools in place to foster Roma inclusion have not yet achieved the desired results. In the EU, with some of the world’s richest economies, Roma continue to live in conditions similar to those in the world’s poorest countries. Promoting Roma inclusion is therefore also important in light of the 2030 Agenda for Sustainable Development,<sup>1</sup> in particular Goal 1, to end poverty in all its forms; Goal 4, to ensure inclusive and equitable quality education and promote lifelong learning

opportunities for all; and Goal 10, to reduce inequality within and among countries.

#### Who are the Roma?

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

*See the Council of Europe’s webpage dedicated to Roma and Travellers.*

In 2017, the European Commission launched an evaluation of the EU Framework for national Roma integration strategies, which will build on the mid-term review published in 2017, engaging Roma civil society at grassroots, national and EU levels. The Council of Europe through its JUSTROM, ROMACT<sup>2</sup> and ROMED joint programmes with the European Commission, and FRA through its Local Engagement for Roma Inclusion (LERI) research project, which published relevant findings in 2017,<sup>3</sup> have increasingly promoted a participatory approach to Roma inclusion.

The European Commission issued a Communication in August, highlighting the results of the mid-term review and taking stock of the progress in Roma integration since 2011.<sup>4</sup> It took into account data and indicators from FRA<sup>5</sup> surveys, reports of national Roma contact points, and consultations with civil society, international organisations and other partners. The review “confirms the added value of the framework, the relevance of EU Roma integration goals and the continued need for a combination of targeted and mainstream approaches”.<sup>6</sup>

The mid-term review acknowledges some progress in education, noting the growing participation of Roma children in early childhood education and care, but specifies that early-school leaving and risk of poverty remain serious concerns. It also notes that “the growing proportion of young Roma who are not in education, employment or training (NEET) is an alarming signal that translating results in education into employment and other areas requires a more effective fight against discrimination”.<sup>7</sup> It also links the still-limited impact of the EU Framework in improving the situation of Roma with persisting anti-Gypsyism, a lack of local capacity to implement integration measures and access funding, and declining levels of political commitment. The mid-term review concludes by identifying priority areas for strengthening the implementation of the EU Framework, such as strengthening the focus on anti-Gypsyism; promoting the participation and empowerment of Roma women and young people; reinforcing structural areas such as coordination structures, cooperation with civil society, transparent reporting and monitoring; and promoting more effective use of and better access to EU funds.<sup>8</sup>

## FRA ACTIVITY

### Collecting data on Roma

In 2011, FRA carried out its Roma survey in eleven EU Member States. In 2016, the second wave of its European Union Minorities and Discrimination Survey (EU-MIDIS II) covered Roma in nine Member States with the largest Roma populations.

FRA carried out analysis in 2017 to identify changes in key indicators on education, employment, health, housing and discrimination. These results fed directly into the mid-term review of the EU Framework and were annexed to the Commission Communication as a staff working document containing a Roma integration indicators scoreboard.

*For more information, see FRA (2011), Multi-Annual Roma Programme: Pilot Survey; FRA (2016), Second European Union Minorities and Discrimination Survey (EU-MIDIS II): Roma – Selected Findings, Publications Office of the European Union (Publications Office), Luxembourg, November 2016; European Commission (2017), Commission Staff Working Document: Roma integration indicators scoreboard (2011–2016), SWD/2017/286 final accompanying COM(2017)458 final, Brussels, 30 August 2017.*

The European Commission, as guardian of the Treaties, monitors Member States’ compliance with anti-discrimination legislation. In this context, it initiated infringement proceedings against the **Czech Republic, Hungary and Slovakia** for failure to correctly implement the Racial Equality Directive (2000/43/EC), due to different situations of systemic discrimination and segregation of Roma children in schools. In response, Hungary in 2017 amended the legislative provisions criticised in the infringement procedures, with the new provisions coming into effect in July.<sup>9</sup> During 2017, FRA supported these ongoing proceedings through country visits and data collection.<sup>10</sup> For more information on the implementation of the Racial Equality Directive, see ► [Chapter 4](#) on Racism, xenophobia and related intolerance.

The European Semester provides a policy framework for monitoring and guiding economic and social reforms by EU Member States to reach the Europe 2020 targets. Country-specific recommendations, which the Council of the EU has adopted, reflect challenges and proposed solutions specific to each EU Member State. Regarding Roma inclusion, since 2012 the European Commission has issued country-specific recommendations for **Bulgaria, the Czech Republic, Hungary, Romania and Slovakia**. In 2017, these recommendations – with the exception of the **Czech Republic**, which did not receive a recommendation on Roma – focused on the need to promote Roma participation in inclusive, mainstream education.<sup>11</sup>

The European Pillar of Social Rights, proclaimed in 2017, makes reference to education, training and lifelong learning to help manage successful transitions into the labour market, as well as gender equality, equal opportunities and active support to employment, particularly for young and unemployed people. It does not explicitly mention Roma, but they would benefit from the majority of measures.

With these EU policy frameworks, legal and funding instruments in place,<sup>12</sup> and a number of targeted and mainstream measures implemented in the Member States, the focus in 2017 was on the intermediate progress achieved in terms of changes in the situation of Roma on the ground.

## 5.2. Overview of the fundamental rights situation of Roma

### 5.2.1. Combating anti-Gypsyism

Anti-Gypsyism remained a challenge to Roma inclusion in 2017 despite the existing EU legal frameworks, which envisage the adoption of measures to eliminate race-motivated crime and harassment. During 2017, tensions escalated and resulted in prolonged clashes

between Roma and non-Roma residents – for example, in the Menidi district of Athens in **Greece**;<sup>13</sup> and in **Bulgaria**, where an increase in racist mob attacks on Roma communities and settlements was recorded.<sup>14</sup> Anti-Gypsyism<sup>15</sup> manifests itself in discrimination, harassment and hate crime, and is a barrier to Roma inclusion. For more information on discrimination on the grounds of ethnic origin and hate crime affecting Roma,

- ▶ see [Chapter 3](#) on Equality and non-discrimination and
- ▶ [Chapter 4](#) on Racism, xenophobia and related intolerance.

Article 21 of the EU Charter of Fundamental Rights prohibits discrimination based on any ground, explicitly including membership of a national minority.<sup>16</sup> Article 2 (3) of the Racial Equality Directive prohibits all acts of harassment and discrimination on the grounds of ethnicity or race, and the Framework Decision on Racism and Xenophobia (2008/913/JHA) requires Member States to impose criminal penalties to combat racism.

There was a greater focus on anti-Gypsyism at EU level in 2017. A large proportion of Roma continue to feel discriminated against in key areas of daily life, according to FRA data.<sup>17</sup> While experiences of discrimination when looking for work decreased by 10 percentage points between 2011 and 2016, there was no significant change regarding discrimination in housing and in education. European Parliament Resolution [2017/2038\(INI\)](#) marked an important development in recognising the urgency of the challenge,<sup>18</sup> and independent research on “Combating Institutional Anti-Gypsyism” provided examples of promising practices and experiences from five Member States.<sup>19</sup> Several Member States enhanced their efforts to collect information on the topic. In **Germany**, Amaro Foro e.V. published a report of all recorded incidents of anti-Gypsyism in Berlin.<sup>20</sup> In **Austria**, the Roma organisation Romano Centro published its third incident report, covering the period 2015–2017.<sup>21</sup> In **Italy** the “Don’t say Roma” programme continued to research the language used in the media and its impact on racial stereotypes targeting Roma.<sup>22</sup>

Anti-Gypsyism manifests itself in various aspects of daily life, as some national court rulings from 2017 show. For example, in **Ireland**, a court ruled that a property owner neglected their contractual responsibilities to perform maintenance work because of the tenant’s Roma background.<sup>23</sup> Meanwhile, in the **Czech Republic**, the Ombudsman tested discrimination by sending housing applications under a fictitious, typically Roma, name to a real estate agency. In response, the Regional Court in Ostrava ruled that it was neither discriminatory nor humiliating for the agency to ask the applicant if they were Roma.<sup>24</sup> In **Spain**, the Supreme Court upheld a decision to deny a Roma widow recognition of her late husband’s pension, holding that their traditional Roma marriage was not recognised by Spanish civil authorities.<sup>25</sup>

At policy level, the renewed National Traveller and Roma Inclusion Strategy in **Ireland**<sup>26</sup> and the National Programme of Measures for Roma of the Government of the Republic of **Slovenia**<sup>27</sup> highlight the fight against discrimination as a key priority. **Portugal** launched a national campaign against Roma discrimination, with particular emphasis on Roma children.<sup>28</sup> Similarly, the **United Kingdom** announced a Legal Support Project aiming to increase access to justice for victims of identity-based bullying and discrimination in schools.<sup>29</sup> The project is a mainstream measure, but may benefit Roma and Traveller students in particular.

There are promising practices in certain Member States regarding raising awareness of Roma culture. UNICEF **Bulgaria** launched a programme in March in which young people identify examples of negative attitudes and hate speech towards Roma children, and initiate discussions on how to change such attitudes.<sup>30</sup> Similarly, **Latvia** promoted Roma arts to counter stereotyping and promote mutual understanding and intercultural dialogue.<sup>31</sup> Finally, the Flemish Ministry of Culture in **Belgium**<sup>32</sup> recognised caravan culture as part of Flanders’ cultural heritage, and **Ireland** recognised Travellers as an ethnic group.<sup>33</sup>

### Promising practice

#### Working with professionals to tackle anti-Gypsyism

The federal programme “Live Democracy!” of the **German** Ministry of Family Affairs, Senior Citizens, Women and Youth funds a number of pilot projects and NGOs that address the issue of anti-Gypsyism – amongst other phenomena of group-focused enmity.

Within this framework, Lower Saxony continued its programme of educating and sensitising professional groups on anti-Gypsyism, focusing on public institutions, municipal authorities, police and prisons. The Lower Saxony Memorials Foundation provides the educational project “Competence against discrimination against Sinti and Roma” in cooperation with Roma and Sinti organisations and experts. It offers educational seminars to different professional groups each year, with the objective of promoting critical reflection over one’s own behaviour and raising awareness of structural barriers and institutional discrimination. Examples of both historical and current forms of anti-Gypsyism with practice-oriented exercises are incorporated into the training.

*For more information, see Germany, Federal Ministry for Family Affairs, Senior Citizens, Women and Youth (2017) “Live Democracy”; Lower Saxony Memorials Foundation (Stiftung niedersächsische Gedenkstätten) (2017), Project ‘Competent against anti-Gypsyism’ (Projekt ‘Kompetent gegen Antiziganismus’).*

### 5.2.2. Education

Significant challenges remain in achieving full inclusion of Roma in education, despite some progress recorded



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in a number of EU Member States in recent years. The EU Framework sets a target for all Roma children to complete at least primary school, and calls on Member States to “ensure that all Roma children have access to quality education and are not subject to discrimination or segregation.”<sup>34</sup> Although participation in education has improved in many

Member States, segregation in education increased. National measures in 2017 focused on funding support for schools, scholarships, tutoring programmes, and measures to foster diversity in schools such as teacher training. It is still too early to assess how effective these measures are.

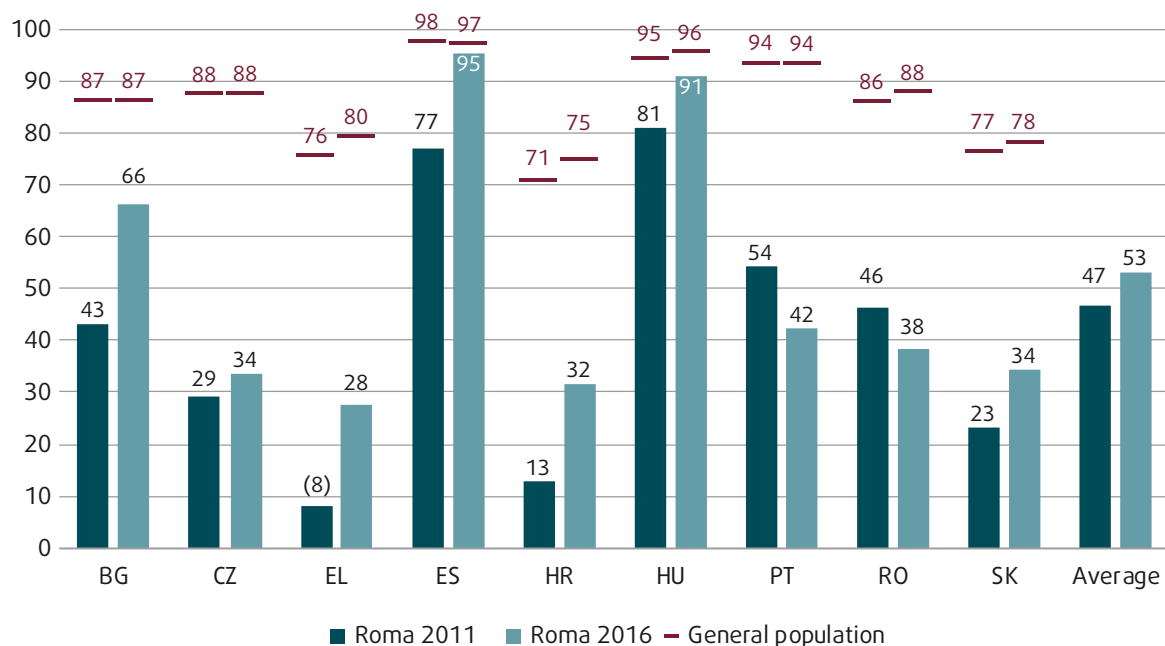
Article 14 of the EU Charter of Fundamental Rights stipulates that free, compulsory education is a fundamental right for all, while Article 21 prohibits

discrimination on grounds of racial or ethnic origin. Furthermore, Article 24 of the Charter and Article 3 (3) of the Treaty on European Union (TEU) outline the importance of combating social exclusion and discrimination and protecting the rights of the child, including the right to education. Article 9 of the Treaty on the Functioning of the European Union (TFEU) also stresses the need of promoting advanced education and training.

Enrolment in education increased slightly, an analysis of FRA survey data shows. On average, 9 out of 10 Roma of compulsory schooling age are enrolled in education, converging towards the general population’s enrolment rate. However, enrolment rates remain low in **Greece** and **Romania**, with nearly 7 and 8 out of 10 Roma enrolled in education, respectively.<sup>35</sup>

Early childhood education enrolment rates for Roma also increased on average, from 47 % in 2011 to 53 % in 2016, according to FRA’s analysis. This marks an improvement in most Member States, and reflects an increased number of investments and measures by governments to support early education.<sup>36</sup> However, the gap between the general population and Roma remains significant, especially in the **Czech Republic**, **Greece**, **Portugal** and **Romania** (see Figure 5.1).<sup>37</sup> Early childhood education enrolment was similar for Roma

**Figure 5.1: Children, aged between 4 years and the (country-specific) starting age of compulsory primary education, who attend early childhood education (%)**



Notes: Results based on a small number of responses are statistically less reliable. Thus, results based on 20 to 49 unweighted observations in a group total or based on cells with fewer than 20 unweighted observations are noted in parentheses. Results based on fewer than 20 unweighted observations in a group total are not published.

Sources: FRA, EU-MIDIS II 2016, Roma; FRA, Roma Pilot Survey 2011; UNDP, World Bank and EC 2011 (for Croatia); Eurostat 2016, General population; Eurostat 2011, General population



and non-Roma children only in **Hungary**, where early childhood education has been compulsory from the age of 3 since 2015,<sup>38</sup> and in **Spain**. Worryingly, despite a drop in the rate of young Roma early school leavers, approximately 7 out of 10 Roma aged 18–24 years still left school early in 2016.<sup>39</sup> Furthermore, in **Bulgaria**, **Croatia** and **Slovakia**, more Roma girls than boys left education early.<sup>40</sup>

Troublingly, segregation in education – Roma children attending classes where all classmates are Roma – on average increased in the Member States FRA surveyed, from 10 % in 2011 to 15 % in 2016.<sup>41</sup>

To address this situation and promote the participation of Roma in education, some Member States introduced legislative measures in 2017. For example, the Amendment to the Education Act in the **Czech Republic** came into effect in September 2017, ensuring that compulsory early childhood education starts at the age of five.<sup>42</sup> **Slovakia** introduced a subsidy to increase access to pre-school education.<sup>43</sup> Moreover, **Slovakia** revised the criteria for determining if a child is socially disadvantaged to increase schools' access to funds earmarked for teaching support of pupils from socially disadvantaged backgrounds.<sup>44</sup> Legislative changes in **Bulgaria** allow funds to be distributed directly to schools for additional Bulgarian language classes.<sup>45</sup> Several Member States also made legislative amendments in primary school legislation through education and equal treatment acts, to address concerns raised by the European Commission under the infringement proceedings. **Hungary** published a modification of its equal treatment act and its public education act in 2017.<sup>46</sup>

At policy level, **Bulgaria** approved an Action Plan for 2017–2018 that – among other provisions – envisages project-based funding for additional courses for national minority children.<sup>47</sup> **Slovenia** adopted a National Programme of Action for Roma for 2017–2021, to promote early childhood education and prioritise the strengthening of language skills through learning supports.<sup>48</sup> **Slovakia** adopted the revised Action Plans of the Strategy for Roma Integration until 2020 to improve access to early childhood education.<sup>49</sup>

Furthermore, **Hungary**,<sup>50</sup> **Poland**,<sup>51</sup> **Portugal**,<sup>52</sup> **Slovenia**<sup>53</sup> and **Spain**<sup>54</sup> implemented measures to provide learning support or financial support for young Roma in the form of scholarships, grants and apprenticeships. Additional policies adopted include the provision of professional orientation in schools in **Bulgaria**,<sup>55</sup> while **Hungary**<sup>56</sup> expanded its vocational training and study halls programmes. **Greece** introduced legislation for the appointment of psychologists and social workers to support children in vulnerable situations, including in schools situated in areas with high concentrations of Roma.<sup>57</sup>

**Bulgaria**,<sup>58</sup> the **Czech Republic**,<sup>59</sup> **Hungary**,<sup>60</sup> **Latvia**,<sup>61</sup> **Romania**<sup>62</sup> and **Slovenia**<sup>63</sup> continued, expanded or introduced programmes using Roma mediators and teaching assistants. In some cases, Member States introduced sanctions in cases where children are left out of compulsory education (**Bulgaria**<sup>64</sup> and the **Netherlands**<sup>65</sup>); in other cases, they provided material assistance in the form of stationary and school equipment (**Cyprus**<sup>66</sup>) or vouchers for pre-schools (**Greece**<sup>67</sup>) or by providing public transport to schools (**Lithuania**<sup>68</sup>).

Member States also introduced measures to foster diversity and the inclusion of minorities, such as Roma. For example, **Lithuania** introduced legislative changes to improve the integration of national minorities in education through educational material and guidelines for cultural diversity.<sup>69</sup> **Austria** approved a major reform of the school system in June 2017.<sup>70</sup> It plans to create regional advisory boards of the Department of Education, which can include representatives of national minorities, such as Roma. The Ministry of Education in **Spain** committed itself to including Roma history and culture in the national curriculum.<sup>71</sup> Some Member States developed policies aimed at sensitising and training teachers about ethnic or cultural minorities – for example, in **Ireland**,<sup>72</sup> **Lithuania**,<sup>73</sup> **Portugal**,<sup>74</sup> **Slovakia**<sup>75</sup> and **Slovenia**.<sup>76</sup>

### Promising practice

#### Fostering local-level participation to improve education

FRA's Local Engagement for Roma Inclusion (LERI) research project published a number of case studies in 2017 that illustrate how local-level approaches to education can provide promising examples for replication and scaling up.

For example, in Aghia Varvara, **Greece**, Roma and non-Roma students took photos of their everyday lives, then discussed these in groups to gain insights into inter-ethnic relations in school. This so-called photovoice technique allowed students to openly address existing tensions, as well as to engage with local authorities in presenting students' ideas for how to improve the community.

Other promising practices in education emerged through the LERI research. In Sokolov, **Czech Republic**, and in Medway, **United Kingdom**, early school leaving and other educational needs were addressed through participatory community-level actions and family learning models that engaged with Roma parents through educational workshops, continuing education, leisure activities and parents' groups.

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

### 5.2.3. Employment

Improved educational attainment is expected to result in greater employment and labour market participation rates. For Roma, this has not been the case, as the mid-term review in 2017 noted. The European Roma Platform in November 2017 discussed the barriers facing young Roma in their transition from education to employment, as well as the effectiveness of measures taken by Member States to support youth employment.<sup>77</sup>

The EU Framework sets a target to reduce the gap between the employment rates of Roma and of the majority population, and to provide “full access in a non-discriminatory way to vocational training, to the job market and to self-employment tools and initiatives”;<sup>78</sup> fulfilling the fundamental right to engage in work, which Article 15 (1) of the EU Charter of Fundamental Rights enshrines. This



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is also relevant to UN Sustainable Development Goal (SDG) 8 on promoting inclusive and sustainable economic growth, employment and decent work for all.

Overall, key employment indicators have not improved, a comparison of FRA survey results from 2011 and 2016 shows.<sup>79</sup> The proportion of Roma in paid work remains at only 25 %, and the average percentage of Roma women in paid work is nearly half that of Roma men. Linked to the limited improvements in employment, the overwhelming majority of Roma remain at risk of poverty despite small improvements (80 % in 2016, compared with 86 % in 2011). Country differences are important: whereas the **Czech Republic**, **Hungary**, and **Romania** saw improvements in the rate of Roma at risk of poverty, this rate increased in **Greece** and in **Spain**.<sup>80</sup> The severity of the situation becomes even more striking when compared with the national at-risk-of-poverty rates for the general population, which remained between 10 % and 25 % across Member States from 2011 to 2016. The situation of Roma is alarming, including in light of SDG 1 on ending poverty in all its forms everywhere.

Some Member States adopted legislation in 2017 to support Roma in employment. For example, **Greece** passed a law to make it easier for Roma street vendors to obtain permits for selling in street markets and for organising markets through unions and associations.<sup>81</sup> **Slovakia** relaxed the qualification criteria for community workers who provide crisis interventions in marginalised Roma communities, to allow more Roma to apply for these positions.<sup>82</sup> In the **Czech Republic**, a legislative proposal on social entrepreneurship

would give businesses the status of “integrated social businesses”, which provide employers with additional benefits, if at least 30 % of employees are from groups that are disadvantaged in the job market and if they are also provided with psycho-social support.<sup>83</sup>

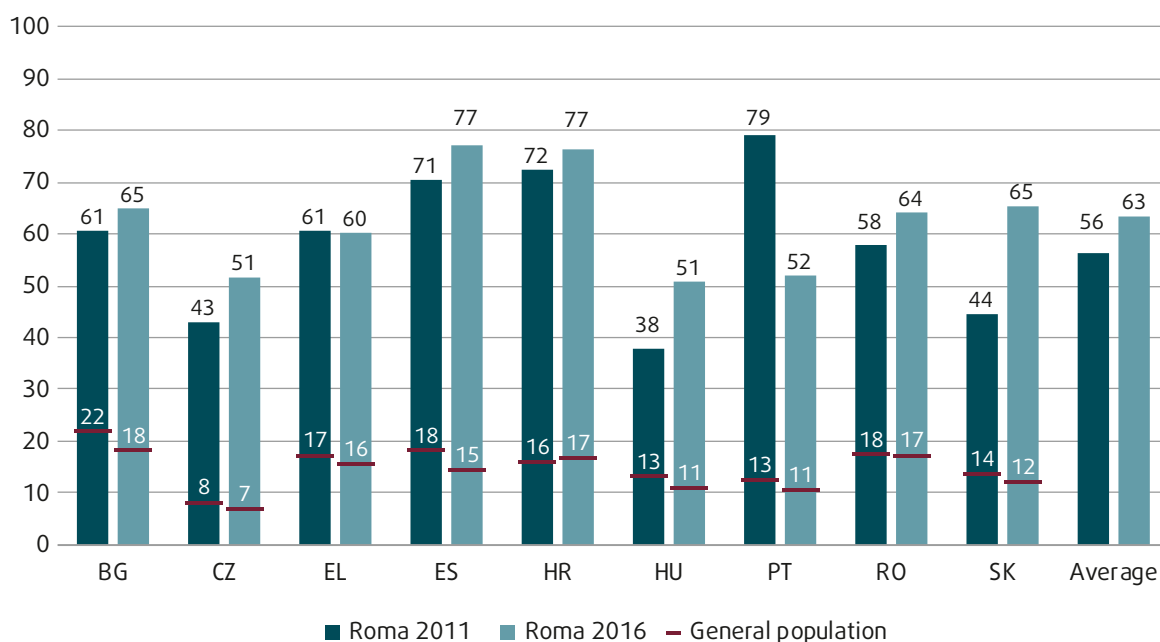
In **Greece**, the Union of Roma Mediators and Partners was established, and cooperates with the Special Secretariat for Social Inclusion of Roma in the Ministry of Labour to explore how Roma mediators can be recognised as a profession.<sup>84</sup> **Croatia** took measures to employ Roma in local government to enhance cooperation between local authorities and Roma communities.<sup>85</sup> **Croatia** also put in place active employment measures to allow persons to continue receiving social benefits while employed under the ‘public works’ measure.<sup>86</sup>

Additional measures to support Roma in employment include qualification courses and counselling for the long-term unemployed – for example, in **Bulgaria**<sup>87</sup> through qualification courses and subsidised employment; in **Hungary**<sup>88</sup> through training for the low skilled, long-term unemployed and public workers as well as by providing employment and labour market services; and in **Romania** through counselling, mediation and training courses.<sup>89</sup> **Ireland**’s updated national Traveller and Roma inclusion strategy also plans similar measures to ensure that those who register as job seekers receive good-quality offers of employment, continued education and apprenticeships.<sup>90</sup>

Local-level actions to improve labour market inclusion continue. For example, the *Acceder* and *Aprender Trabajando* programmes continued in **Spain**.<sup>91</sup> In **Sweden**, the National Employment Office continued informational campaigns for job seekers from the Roma community in pilot municipalities, increasing the number of Roma using these services and the number of employed Roma.<sup>92</sup> FRA’s LERI research also focused on community-level solutions to employment. Case studies from **Greece**, **France** and **Hungary** published in 2017 show that training and other participatory support activities to support integration into the labour market can help micro-enterprises and support Roma entrepreneurs.<sup>93</sup>

Another key focus of employment has been on supporting young Roma into the labour market, as the proportion of Roma NEET aged 16–24 years remains far higher than that of the general population (see Figure 5.2). Between 2011 and 2016, the situation among young Roma actually worsened: the proportion increased from 56 % to 63 % on average, with the biggest increases in **Slovakia**, followed by **Hungary** and the **Czech Republic**.<sup>94</sup> The increase in young Roma NEET was larger for Roma women than men, further widening the gender gap to 17 percentage points.

**Figure 5.2: Percentage of persons aged 16–24 years with current main activity not in employment, education or training (%)**



Sources: FRA, EU-MIDIS II 2016, Roma; FRA, Roma Pilot Survey 2011; UNDP, World Bank and EC 2011 (for Croatia); Eurostat NEET rate 2016; Eurostat NEET rate 2011

Member States continued to put, or put additional, measures in place to address the situation of young people in the labour market in 2017, sometimes through general measures that also have an impact on young Roma. For example, **Hungary** continued its Youth Guarantee Programme to support NEETs gain certificates from vocational schools and place them in jobs. While the programme does not target Roma exclusively, many young Roma have benefited. By the end of 2017, more than 50,000 participants were employed within the programme, more than 27,000 participated in training and almost 11,000 obtained certificates.<sup>95</sup> **Romania** provided personalised assistance to young people at risk of marginalisation, in particular Roma, through solidarity contracts and other services under the national employment programme for 2017.<sup>96</sup>

Few Member States focused specific employment measures on Roma women; however, some projects and practices were identified. For example, **Hungary** developed several schemes to improve the social acceptance and employment of unemployed Roma women in particular, reaching out to nearly 1,000 women and providing training and jobs in the public sector.<sup>97</sup> In **Sweden**,<sup>98</sup> awareness-raising efforts by the national employment office reached out to Roma women.

### Promising practice

#### Municipalities find new ways to generate employment

The Municipality of Ulič in Slovakia has developed a model to address long-term unemployment and create employment opportunities for low-skilled and disadvantaged job seekers, such as Roma. It ran an employment workshop and set up a municipal waste management firm to provide services in neighbouring villages and heating for municipal buildings in Ulič. As the firm developed into a self-sustaining company, it used revenues to pay wages, invest in new technologies and fund a local municipal community centre that provides joint activities for Roma and non-Roma.

The firm and the centre have slowly improved interethnic relations and increased the chances of its employees in the open labour market. The initiative dates back to 2006 and was financed by a combination of EU Structural Funds and national and municipal budgets.

Several other municipalities in Slovakia have developed similar approaches – for example, Spišský Hrhov and Raslavice.

For more information, see the Ulič municipality's website.

### 5.2.4. Housing

One of the EU Framework’s objectives is to increase access to housing and public utilities for Roma. Despite some positive legislative developments and measures, housing remained an area of concern in many Member States in 2017. The proportion of Roma living in severely deprived housing conditions remained constant, while evictions continued to take place.



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Housing assistance is recognised as a fundamental right under Article 34 (3) of the Charter, to ensure a decent existence for all those who lack sufficient resources. Moreover, Article 31 of the revised European Social Charter declares that “everyone has the right to housing”.<sup>99</sup>

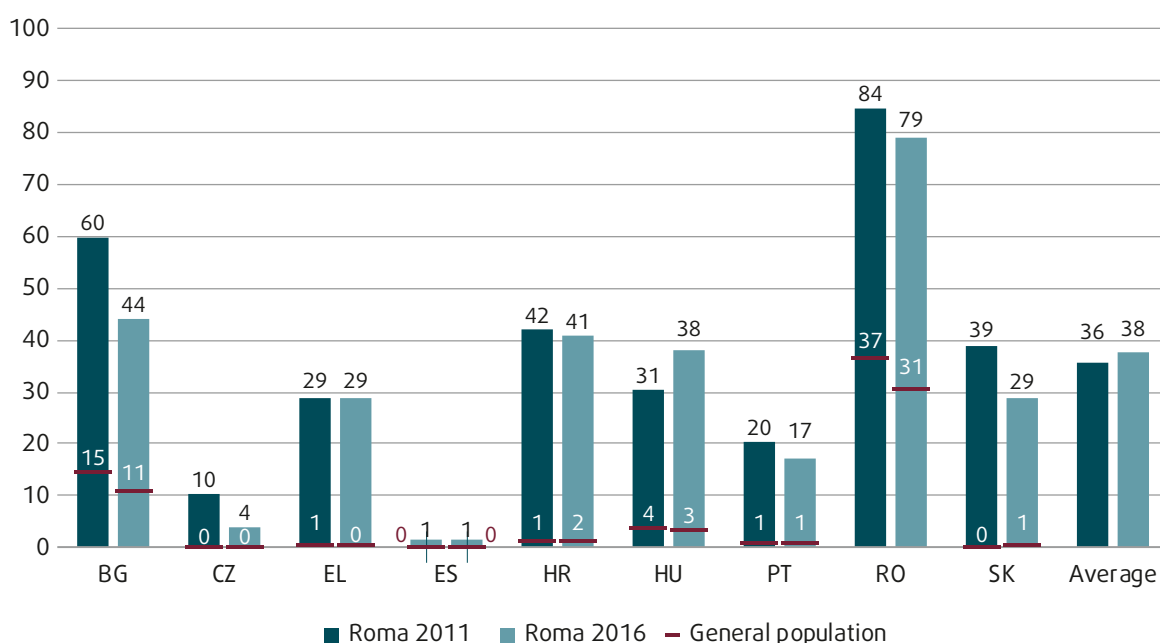
While some positive trends concerning access to basic amenities are evident, Roma continue to live in overcrowded households and face conditions of severe housing deprivation, FRA analysis in 2017 shows (see Figure 5.3). Some improvements, however, are noticeable in **Bulgaria**, the **Czech Republic**, **Romania** and **Slovakia**. Despite measures to promote non-discriminatory access to social housing, rates of perceived discrimination when looking for housing because of being Roma increased in many countries,

including the **Czech Republic**, **Portugal** and **Spain**. Only **Slovakia** saw an improvement, with the rate of perceived discrimination in access to housing decreasing from 44 % to 30 %.<sup>100</sup>

In 2017, the European Roma Rights Centre (ERRC) published a report based on field research in 93 Roma neighbourhoods and settlements across three EU Member States (**France**, **Hungary** and **Slovakia**) and four non-EU countries (Albania, the former Yugoslav Republic of Macedonia, Moldova, and Montenegro), highlighting the large disparities between Roma and non-Roma in access to water and sanitation services.<sup>101</sup>

Several relevant legislative developments in the area of housing took place in 2017. **Greece** introduced a new law with a special procedure concerning social housing policy and a mechanism for relocating Roma from rough/irregular accommodation.<sup>102</sup> Dependent on the approval of the population to be relocated, the law permits social groups living in makeshift or illegally built accommodation to be temporarily relocated to appropriate social housing complexes, in addition to receiving social support services. A new law on equality and citizenship in **France** grants those residing in shanty towns the same rights as the tenants of squats regarding evictions.<sup>103</sup> It will impose a ban on evictions during winter, apply a two-month deadline following an order to leave the premises, and allow judges to grant deadlines from three months to three years before an eviction.

**Figure 5.3: Percentage of people living in households that have no toilet, shower or bathroom inside the dwelling (household members)**



Sources: FRA, EU-MIDIS II 2016, Roma; FRA, Roma Pilot Survey 2011; UNDP, World Bank and EC 2011 (Croatia 2011); Eurostat, EU-SILC 2015; Eurostat, EU-SILC 2011, General population

In contrast, some legislative developments may negatively affect Roma. For example, the **Czech Republic** amended the Act on Material Needs Benefits, allowing municipalities to deny the provision of supplementary housing benefits in regions with a high prevalence of social inclusion challenges.<sup>104</sup> According to the Inter-ministerial Commission for Roma Community Affairs, this will probably hinder the ability of poor Roma to secure housing.<sup>105</sup>

At policy level, several Member States made efforts to map Roma housing needs in 2017. For example, **Finland** adopted the National Action Plan on Fundamental and Human Rights for 2017–2019, which envisages a study of homelessness among Roma and their access to housing.<sup>106</sup> In **Ireland**, the newly adopted National Traveller and Roma Inclusion Strategy 2017–2021 requires reviews of the barriers that Travellers face in access to social housing.<sup>107</sup> The Ombudsman in the **Netherlands** published a report concluding that local governments have to take account of the specific housing needs of Travellers, Roma and Sinti, and have to ensure enough locations and pitches based on actual local needs.<sup>108</sup> In **Portugal**, a study conducted by the Institute of Housing and Urban Rehabilitation – a public institute under the Ministry of the Environment – found that the housing situation of Roma has not improved.<sup>109</sup> In **Spain**, a study of Roma housing showed that a considerable number of Spanish Roma still live in substandard housing.<sup>110</sup>

Member States continued to focus attention on social housing and expanding access to housing and infrastructure for marginalised groups in 2017. Several implemented relevant measures, including **Bulgaria**<sup>111</sup> and **Croatia**.<sup>112</sup> Scotland, **United Kingdom**, published a reviewed social housing charter, including minimum site standards.<sup>113</sup> A guide for local authorities addresses how to manage unauthorised camp sites following basic principles of minimising disruption for all and respecting common standards of behaviour.<sup>114</sup>

Evictions continued and the legalisation of irregular housing remains controversial. In **France**, civil society organisations repeatedly raised concerns. The number of forced evictions by French authorities increased in the second half of 2017, according to a report published by the ERRC. Many cases were not supported by a legal decision and did not include an offer of adequate alternative accommodation, it said.<sup>115</sup> Similarly, civil society organisations raised concerns regarding the increasing number of forced evictions in **Italy**.<sup>116</sup> In response, the municipality of Rome earmarked € 1.5 million to provide Roma with alternative housing options to encampments.

Several court cases addressed informal encampments. For example, in **Italy**,<sup>117</sup> a court upheld a complaint that the mayor of Milan issued, requesting the closing of an informal encampment. The court found that health and safety reasons prevailed over the right to “maintain Roma identity”.

Other court decisions were more positive. For example, in **Slovenia**, an administrative court ruled that Roma should enjoy special protection in housing even when living in illegally constructed buildings, as enshrined in Article 8 of the European Convention on Human Rights.<sup>118</sup> This judgment was also approved by the Constitutional Court.<sup>119</sup> In the **Netherlands**, the Dutch Human Rights Institute ruled that the so-called “extinction policy” and “reduction policy” – which allow municipalities to reduce the number of caravan sites – are discriminatory towards Travellers because they reduce the number of camps, which are essential to the Travellers’ way of life.<sup>120</sup>

Some Member States took measures to address evictions and legalise irregular housing. For example, in Vidin, **Bulgaria**, the NGO Organisation Drom continued to implement a pilot model through its project Equal Access to Housing for Roma in Vidin, to legalise informal settlements in a preventive effort to avoid evictions.<sup>121</sup> The organisation also cooperated with the municipality to organise round-table discussions, training and a housing-rights campaign. In **Slovakia**, the Ministry of Interior approved a national project that aims to legalise the use of land in marginalised Roma communities across 150 municipalities.<sup>122</sup>

Local-level approaches to housing challenges have had promising results. In the context of FRA’s LERI research,<sup>123</sup> local communities tested participatory approaches to housing exclusion and risk of evictions, particularly in Stara Zagora, **Bulgaria**, where mapping evicted families helped the local authorities to find appropriate solutions, while at the same time raising awareness among Roma households of legal options to rebuild their homes. In Aiud and in Cluj-Napoca, **Romania**, the project developed local action groups on housing inclusion to address the housing insecurity of families in informal settlements, looking for ways to give houses official legal status, submit social housing applications, and propose changes to criteria for social housing allocation that are less likely to exclude socially marginalised groups.

Promising practice

**Providing guidance materials and training for property owners**

National authorities in **Sweden** have taken an initiative to combat discrimination against Roma in the housing market in recent years. Activities include guidance materials aimed at property owners and landlords, as well as the establishment of a network consisting of Roma representatives, property owners and landlords. The Swedish National Board of Housing, Building and Planning uses the materials for awareness-raising activities, including training programmes. Roma representatives also received free training about their rights in the housing market.

*For more information, see Sweden, National Board of Housing, Building and Planning (Boverket) (2017), New education on equal treatment of Roma persons in the housing market (Ny utbildning för likabehandling av romer på bostadsmarknaden), 5 September 2017.*

**5.2.5. Health**

The EU Framework calls on Member States to provide access to quality healthcare for Roma, under the same conditions as the rest of the population. However, in 2017, healthcare did not appear to be a priority on the legislative agenda in comparison with education, employment and housing. Member State efforts concentrated on specific health challenges and

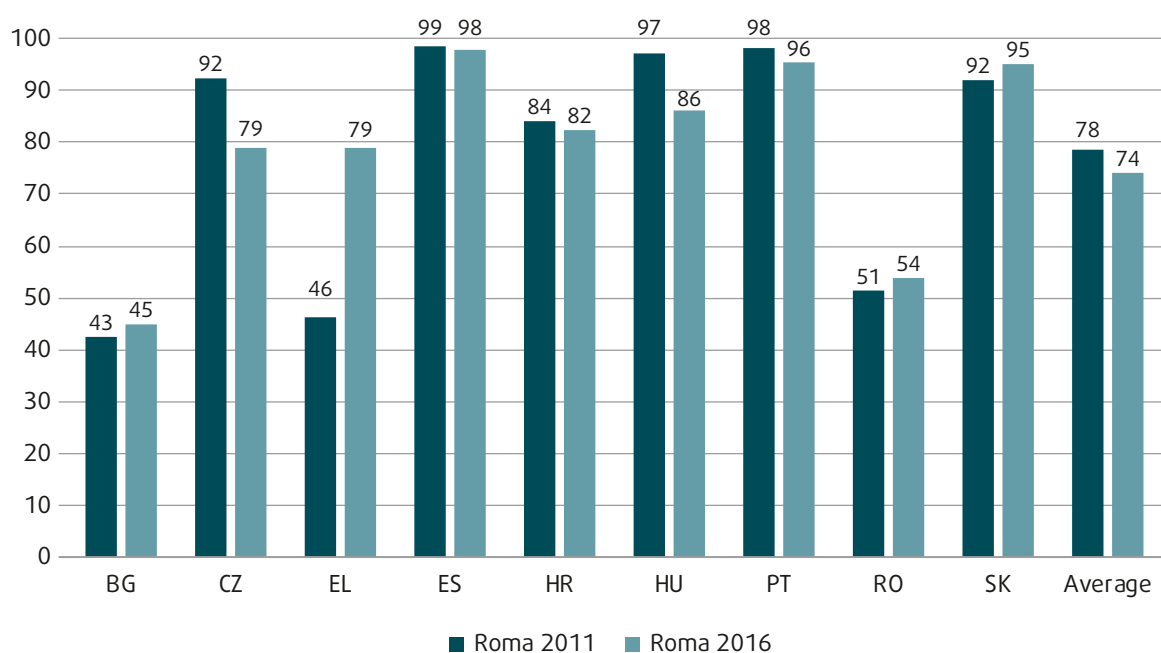
measures to address discriminatory treatment in the healthcare system.

The picture is mixed, an analysis of FRA survey data in 2017 indicates. The proportion of those who say that they are covered by medical insurance fell by more than 10 percentage points in the **Czech Republic** and **Hungary**, while **Greece** achieved a considerable increase (Figure 5.4). On average, the number of Roma respondents who self-assessed their health in positive terms (“very good” or “good”) increased from 55 % in 2011 to 68 % in 2016. However, a small gender gap in self-reported health conditions remains, with Roma men on average reporting slightly better health than Roma women in most countries. Overall, roughly 1 in 10 Roma still reported that they had felt discriminated against while accessing healthcare services.<sup>124</sup>

In terms of legislative developments, **Greece** introduced Law 4486/2017, which grants free healthcare coverage to vulnerable social groups, including Roma.<sup>125</sup> In addition, legislative changes in **Romania** included the adoption of Emergency Ordinance No. 6/2017, which increased investments in medical units, among other public infrastructure.<sup>126</sup> While not directly affecting Roma, the distribution of additional funds has the potential to benefit marginalised populations.

Member States also adopted policy initiatives and measures to combat the exclusion of Roma from the national healthcare systems. In its new National Programme of Measures for Roma, **Slovenia** plans to

**Figure 5.4: Roma respondents, aged 16 years and over, with medical insurance coverage (%)**



Sources: FRA, EU-MIDIS II 2016, Roma; FRA, Roma Pilot Survey 2011; UNDP, World Bank and EC 2011 (for Croatia)

carry out research and evaluation on any potential structural, institutional or individual barriers to accessing healthcare.<sup>127</sup> The Foundation for the Roma Secretariat in **Spain** continued to assist Roma families in marginalised communities to access health and social services.<sup>128</sup> In **Italy**, the municipality of Naples created a reception centre for Roma, which provides access to healthcare services.<sup>129</sup> Meanwhile, the integrated case management approach adopted in **Romania** envisages measures to facilitate access to healthcare through community nurses and Roma health mediators.<sup>130</sup> The use of Roma mediators, who act as community representatives and liaise with local authorities and health services, was common practice in a number of Member States, such as **Bulgaria**, which continued to fund the work of 215 health mediators (€ 800,000 in 2017).<sup>131</sup>

Member States also took action to address specific health challenges affecting Roma. For example, **Bulgaria** concentrated efforts on preventing, screening and treating tuberculosis,<sup>132</sup> while Roma doctors and health mediators played a central role in managing a measles epidemic that affected Roma children.<sup>133</sup> Similarly, **Greece** targeted Roma in the pan-European measles vaccination,<sup>134</sup> while **Hungary**<sup>135</sup> and **Ireland**<sup>136</sup> developed measures to prevent and combat drug addiction within Roma communities.

Some Member States developed policies to make healthcare systems more inclusive. Such measures target both the general population and Roma, and seek to promote the active engagement of Roma as both healthcare providers and receivers. For example, **Hungary**,<sup>137</sup> **Ireland**,<sup>138</sup> **Slovenia**<sup>139</sup> and **Sweden**<sup>140</sup> developed policies to provide diversity training for health-service providers, and **Bulgaria** developed programmes to train Roma medical professionals.<sup>141</sup>

### 5.3. Implementing monitoring frameworks

The EU Framework for national Roma integration strategies envisages “strong monitoring methods to evaluate the impact of Roma integration actions”, including consultation with Roma civil society and local authorities.<sup>142</sup> Several Member States further developed monitoring mechanisms in 2017, incorporating both quantitative and qualitative indicators. However, a number of Member States still do not have effective monitoring mechanisms in place.

Quantitative indicators – such as enrolment rates in education, employment rates or the number of beneficiaries receiving certain services – are a useful tool to measure progress towards targets and objectives. They also help to assess the efficiency and quality of projects. Such information could improve

the use of European Structural and Investment Funds (ESIF), which would enhance the impact and success rate of projects combating Roma exclusion.

In 2017, Member States adopted various approaches to incorporating quantitative indicators in their monitoring. For example, in **Bulgaria**, an annual monitoring report on the implementation of the national Roma integration strategy collects information regarding the projects conducted under ESIF funding, using quantitative indicators when possible.<sup>143</sup> Similarly, **Lithuania**’s annual report on the implementation of the Action Plan for Roma Integration for 2015–2020 is based on yearly outputs, including indicators such as the number of Roma children in general schools, the number of Roma women involved in social activities and the number of illegal buildings in Roma ghettos.<sup>144</sup> **Poland** assesses expenditures within the 2014–2020 Roma integration programme and collects information on indicators such as the number of Roma who have undergone preventive medical treatment, whose accommodation has been renovated or who have received new accommodation.<sup>145</sup> The Supreme Audit Chamber conducted further monitoring at municipal level.<sup>146</sup>

**Hungary** considers quantitative targets, outputs, results and impact indicators in its annual monitoring report of its national strategy. Notably, all stages of monitoring include gender and age, and it also measures the situation of children where applicable.<sup>147</sup> A mid-term monitoring report of the Hungarian National Social Inclusion Strategy was also developed in 2017, focusing on results and recommendations for the upcoming three-year period.<sup>148</sup> **Slovakia** applies a holistic approach using quantitative indicators for all thematic areas, including financial inclusion and non-discrimination.<sup>149</sup>

Following governmental decisions adopted in late 2016, an annual evaluation cycle in the **Czech Republic** will use quantitative indicators to assess the fulfilment of major targets outlined by the National Roma Integration Strategy in any given year.<sup>150</sup> In **Greece**, the Special Secretariat for the Social Integration of Roma is tasked with developing quantitative targets for assessing progress on Roma integration in education, employment, housing and health.<sup>151</sup> However, official data disaggregated by Roma origin are still not available.

Several Member States opted to develop, monitor and evaluate qualitative indicators. In **Austria**, the Federal Chancellery commissioned qualitative studies on an *ad hoc* basis, in preparation of an update of the national Roma strategy. In addition, the Roma Dialogue Platform regularly meets to discuss issues related to Roma, including such studies.<sup>152</sup> Examples of indicators include the experiences of Roma students and teachers,

barriers to education and the level of family support.<sup>153</sup> Similarly, in **Slovenia**, a network of coordinators has the task of evaluating the implementation of measures in the National Programme of Measures for Roma for 2017-2021.<sup>154</sup> **Croatia** will provide base-line qualitative – and quantitative – data for measuring the efficiency of implementation of the National Roma Inclusion Strategy and accompanying Action Plan.<sup>155</sup>

**Sweden** upheld gender mainstreaming as a cross-cutting principle that all projects financed by the European Social Fund should use, including during their implementation and monitoring phases.<sup>156</sup> As a result, qualitative impact indicators consider women and children as especially prioritised groups.<sup>157</sup>

A number of Member States do not use qualitative or quantitative indicators, partly because of challenges in data collection on ethnicity or race. In these Member States, a lack of statistical data disaggregated by ethnicity can prevent the population of robust indicators that track progress in the implementation of measures to promote Roma inclusion. However, some Member States have attempted to work around these constraints to monitor their Roma integration efforts. For example, the Advisory Group for the Integration of Roma Communities in **Portugal** holds

regulation meetings every four months and carried out an operational evaluation in March 2017, although it considered no impact assessments or indicators beyond recording the number of actions and activities implemented in each thematic area.<sup>158</sup>

**Finland** appointed a new National Advisory Board on Romani Affairs for 2017-2019, which along with the Ministry of Social Affairs and Health carried out an evaluation of the outcomes of the first Roma political programme (ROMPO1). In addition, the National Institute for Health and Welfare carried out a national Roma research project tasked with developing indicators for measuring progress in health and welfare related issues.<sup>159</sup> In **Ireland**, the Department of Justice and Equality established a steering group with the mandate of producing annual and mid-term reports about the implementation of the National Traveller and Roma Inclusion Strategy. In both countries, the precise nature of the indicators and monitoring agreements has yet to be confirmed.<sup>160</sup>

Finally, a report published in May 2017 monitored Roma-related institutional, training-related and education-related initiatives, their access to justice and the nature of media and political discourses, and compared the situation in selected Member States.<sup>161</sup>





## FRA opinions

Anti-Gypsyism remains an important barrier to Roma inclusion, findings of FRA surveys on Roma show. Roma continue to face discrimination because of their ethnicity in access to education, employment, housing and healthcare. Discrimination and anti-Gypsyism violate the right to non-discrimination as recognised under Article 21 of the EU Charter of Fundamental Rights, the Racial Equality Directive (2000/43/EC) and other European and international human rights instruments. Furthermore, the 2013 Council Recommendation on effective Roma integration measures recommends that Member States take necessary measures to ensure the effective practical enforcement of the Racial Equality Directive. The need to tackle discrimination against Roma by implementing the Racial Equality Directive and the Framework Decision on Combating Racism and Xenophobia, with a particular focus on gender aspects, was highlighted in previous FRA reports, including the EU-MIDIS II report on *Roma – Selected findings* and the *Fundamental Rights Report 2017*.

### FRA opinion 5.1

*EU Member States should ensure that combating anti-Gypsyism is mainstreamed into policy measures and combined with active inclusion policies that address ethnic inequality and poverty, in line with the Racial Equality Directive and the Framework Decision on Combating Racism and Xenophobia. They should also include awareness-raising measures on the benefits of Roma integration, targeted towards the general population, service providers, public educational staff and the police. Such measures could include surveys or qualitative research conducted at national or local level to understand the social impact of anti-Gypsyism.*

Early-childhood education enrolment rates for Roma have increased, reflecting investments and measures by governments to support early education. Despite a drop in the rate of young Roma early school leavers, about 7 out of 10 Roma aged 18–24 years still leave school early. Furthermore, segregation in education has increased in several EU Member States and discrimination in education has not significantly improved. Article 3 (3) of the Treaty on European Union (TEU) outlines the importance of combating social exclusion and discrimination, and of protecting the rights of the child, which include the right to education. Article 21 of the EU Charter of Fundamental

Rights explicitly prohibits discrimination on the grounds of ethnicity or race. The 2013 Council Recommendation on effective Roma integration measures calls for the elimination of any school segregation and to ensure the sustainability and long-term impact for eliminating segregation. The Racial Equality Directive also applies to the area of education. Infringement procedures brought against three Member States concerning segregation in education in the context of violations of the Racial Equality Directive reflect the severity of this issue.

### FRA opinion 5.2

*National educational authorities should provide necessary support and resources to schools with Roma student populations to address all aspects of educational inclusion: to increase participation in education and to reduce dropout rates. EU Member States should implement further efforts to address segregation in education that focus on longer-term sustainability and in parallel address discrimination and anti-Gypsyism. Desegregation measures should be accompanied by awareness-raising efforts and diversity promotion in schools addressed to teachers, students and parents.*

Improved educational participation of Roma has not always resulted in higher employment rates or labour market participation. Long-term unemployment remains a challenge, while integration in the labour market is even more difficult for young Roma and Roma women. While some specific projects and policy measures have targeted the needs of young Roma and Roma women in employment, little systematic attention has been paid to these particular groups. The 2013 Council Recommendation on effective Roma integration measures asks EU Member States to take effective measures to ensure equal treatment of Roma in access to the labour market – for example, through measures to support first work experience and vocational training, self-employment and entrepreneurship, access to mainstream public employment services and eliminating barriers such as discrimination. The European Pillar of Social Rights, proclaimed in 2017, makes reference to education, training and lifelong learning to help manage successful transitions into the labour market, as well as gender equality, equal opportunities and active support to employment, particularly for young people and the unemployed.

FRA opinion 5.3

*EU Member States should strengthen measures to support access to the labour market for Roma. Employment policies, national employment offices and businesses, particularly at local level, should provide support to enable self-employment and entrepreneurship activities. They should also implement outreach efforts to Roma to support their full integration into the labour market, with a focus also on Roma women and young people.*

For Roma integration measures to succeed, the meaningful participation of Roma in projects and in the design and implementation of local policies and strategies is essential. National-level participation by Roma is important for the design and monitoring of national Roma integration strategies or integrated sets of policy measures and should be supported through national-level dialogue and participation platforms. Particularly at the local level, mechanisms for cooperation with local authorities and civil society organisations can facilitate the involvement of local people, including Roma. The 2013 Council Recommendation on effective Roma integration measures calls for active involvement and participation of Roma, and appropriate local approaches to integration. FRA's experience through its Local Engagement for Roma Inclusion (LERI) research shows how local communities can become empowered to participate in projects and strategy development.

FRA opinion 5.4

*EU Member States should review their national Roma integration strategies or integrated sets of policy measures to advance efforts to promote participatory approaches to policymaking and in integration projects, paying particular attention to the local level and supporting community-led efforts. European Structural and Investment Funds and other funding sources should be used to facilitate participation of Roma and community-led integration projects.*

The 2013 Council Recommendation on effective Roma integration measures calls on EU Member States to appropriately monitor and evaluate the effectiveness of their national strategies and social inclusion policies. Such monitoring mechanisms need to include relevant qualitative and quantitative data where possible, ensuring that the data collection is in line with applicable national and Union law, particularly regarding the protection of personal data. While several Member States have included quantitative and qualitative indicators to measure progress in Roma integration, some still do not have any monitoring mechanisms in place. Few monitoring mechanisms include information on effective use of EU funds.

FRA opinion 5.5

*Member States should improve or establish monitoring mechanisms on Roma integration, in line with the 2013 Council Recommendation on effective Roma integration measures in the Member States. Monitoring mechanisms should include further collection of anonymised data disaggregated by ethnicity and gender, in line with EU data protection legislation, and include relevant questions in large-scale surveys such as the Labour Force Survey and the EU Statistics on Income and Living Conditions. Monitoring mechanisms should involve civil society and local Roma communities. Independent assessments, involving Roma, should also review the use and effectiveness of EU funds, and should feed directly into improving policy measures.*



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## January

26 January – Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2147 (2017) on the Need to reform European migration policies

## February

## March

3 March – Council of Europe Lanzarote Committee adopts the Special Report on Protecting Children affected by the Refugee Crisis from Sexual Exploitation and Abuse

14 March – In *Ilias and Ahmed v. Hungary* (No. 47287/15), the ECtHR holds that Hungary violated the right to liberty and security (Article 5 (1) and (4) of the ECHR) and the right to an effective remedy (Article 13 – read in conjunction with Article 3 of the ECHR) of two asylum seekers by confining them without any legal basis in the transit zones, and violated Article 3 of the ECHR by expelling them to Serbia and exposing them to a risk of inhuman and degrading treatment (case referred to the Grand Chamber)

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

22 March – Special Representative of the Secretary General of the Council of Europe on Migration and Refugees publishes a thematic report on migrant and refugee children

30 March – In *Chowdury and Others v. Greece* (No. 21884/15), the ECtHR condemns Greece for not preventing the trafficking and forced labour of 42 Bangladeshi migrants in an irregular situation, for not protecting them as victims and for not conducting an effective investigation

## April

## May

19 May – Committee of Ministers of the Council of Europe (CoE) adopts Action Plan on protecting refugee and migrant children (2017-2019)

## June

19 June – CoE Commissioner for Human Rights publishes an issue paper and recommendations on realising the right to family reunification of refugees in Europe

27 June – PACE adopts Resolution 2174 (2017) on the Human rights implications of the European response to transit migration across the Mediterranean as well as Resolution 2173 and Recommendation 2108 (2017) on a Comprehensive humanitarian and political response to the migration and refugee crisis

## July

## August

## September

26 September – European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment publishes its report on immigration detention in Greece

## October

3 October – In *N. D. and N. T. v. Spain* (Nos. 8675/15 and 8697/15), the ECtHR holds that the immediate return of migrants who were trying to enter Spain irregularly in Melilla constitutes a violation of the prohibition of collective expulsions of aliens (Article 4 of Protocol No. 4) and the right to an effective remedy (Article 13 of the ECHR taken together with Article 4 of Protocol No. 4) (case was referred to the Grand Chamber)

5 October – UN Security Council renews the enforcement powers of UN member states to fight migrant smuggling and human trafficking off the coast of Libya (S/RES/2380 (2017))

11 October – PACE publishes a guide on monitoring places where children are deprived of their liberty for immigration purposes and presents a study on immigration detention practices and the use of alternatives to immigration detention of children, calling on states to end immigration detention of children

19 October – CoE Special Representative of the Secretary General on Migration and Refugees publishes report on the fact-finding mission to Serbia and the situation in the two transit zones in Hungary

26 October – Drafting Group on Migration and Human Rights (CDDH-MIG), CoE, adopts an analysis of the legal and practical aspects of effective alternatives to detention in the context of migration

## November

17 November – Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and Committee on the Rights of the Child (CRC) adopt two joined General Comments (No. 3 and No. 4) on human rights of children in migration, calling for a ban on immigration detention of children

## December

6 December – Committee against Torture (CAT) adopts its revised General Comment (now No. 4) on the implementation of Article 3 of the Convention against Torture in the context of Article 22 (on the application of the principle of *non-refoulement*)

7 December – In *S.F. and Others v. Bulgaria* (No. 8138/16), the ECtHR holds that Bulgaria violated the prohibition of inhumane and degrading treatment (Article 3 of the ECHR) by detaining three accompanied migrant children for a brief time period in a border police detention facility unsuitable for children

# EU

## January

31 January – In *Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani* (C-573/14), the CJEU holds that persons participating in the activities of a terrorist group may be excluded from refugee status, even if they have not committed, attempted or threatened to commit a terrorist act

## February

9 February – In *M. v. Minister for Justice and Equality, Ireland and the Attorney General* (C-560/14), the CJEU rules that the right to be heard as applicable in the context of the Qualification Directive does not require that an applicant for subsidiary protection has the right to an interview and the right to call or cross-examine witnesses where two separate and successive procedures for examining applications – first for refugee status and then for subsidiary protection – are prescribed in national legislation; an interview must nevertheless be held in certain specific circumstances to examine the application with full knowledge of the facts

16 February – In *C. K., H. F., A. S. v. Slovenia* (C-578/16), the CJEU holds that the discretionary clause in the Dublin Regulation concerns the interpretation of EU law; a Dublin transfer could constitute inhuman or degrading treatment in certain circumstances and national authorities need to eliminate any serious doubts; they may choose to conduct the examination of the application instead, by using the discretionary clause

## March

2 March – European Commission presents a renewed EU Action Plan on returns

7 March – European Commission issues recommendation on making returns more effective

7 March – In *X. and X. v. État belge* (C-638/16 PPU) the CJEU holds that the issuance of humanitarian visas to third-country nationals to enable them to apply for international protection after their arrival to the Member State is outside the scope of EU law

15 March – In *Salah Al Chodor and Others v. Czech Republic* (C-528/15), the CJEU holds that an applicant for international protection can be detained under the Dublin Regulation only if national law provides for objective criteria to determine if there is a risk of absconding

15 March – European Parliament (EP) and Council adopt Regulation (EU) 2017/458 obliging Member States to check all people, including EU nationals, in relevant databases when they cross the external border

## April

12 April – European Commission issues a communication on the protection of children in migration

## May

## June

8 June – Council of the EU and the representatives of the governments of the Member States issue Conclusions on the protection of children in migration

21 June – In *A.* (C-9/16), the CJEU holds that identity or travel document checks near an internal EU border (for example, on trains) are only allowed if in practice they do not have an equivalent effect to border checks

## July

4 July – EP and Council adopt Regulation (EU) 2017/1370 amending Council Regulation (EC) No 1683/95 laying down a uniform format for visas

25 July – Council decision (CFSP) 2017/1385 extends the mandate of EUNAVFOR MED operation SOPHIA until 31 December 2018

26 July – In *Tsegezab Mengesteab v. Bundesrepublik Deutschland* (C-670/16), the CJEU holds that an applicant for international protection may rely in legal proceedings on the fact that the three-month period for a take charge request (two-month in case of a Eurodac hit) under the Dublin Regulation expired, even if the requested Member State is willing to take charge of the application

26 July – In *A.S. v. Republic of Slovenia* (C-490/16) and *Khadija Jafari and Zainab Jafari v. Bundesamt für Fremdenwesen und Asyl* (C-646/16), the CJEU confirms that the Dublin Regulation also applies in situations where an unusually high number of third-country nationals transit through a Member State to seek asylum in another Member State, as occurred in 2015 and 2016

26 July – In *Ouhrami* (C-225/16), the CJEU holds that the period of the application of an entry ban starts when a person has actually left the territory of the Member States

## August

## September

6 September – In *Slovak Republic and Hungary v. Council of the European Union* (joined cases C-643/15 and C-647/15), the CJEU dismisses the actions brought by Hungary and Slovakia against a mandatory relocation mechanism of asylum seekers from Greece and Italy

13 September – In *Mohammad Khir Amayry v. Migrationsverket* (C-60/16), the CJEU explains how the time limits for detention in Dublin transfer cases must be interpreted, and to what extent time limits enshrined in national law are precluded by the Dublin Regulation

14 September – In *K. v. Staatssecretaris van Veiligheid en Justitie* (C-18/16), the CJEU holds that the detention of an applicant for international protection to determine or verify his or her identity or nationality can be compatible with the right to liberty, if compliant with a series of conditions

27 September – European Commission publishes revised Return Handbook (Annex to Commission Recommendation No. C(2017) 6505)

27 September – European Commission publishes progress report on the delivery of the European Agenda on Migration recommending to increase legal pathways for persons in need of international protection

## October

12 October – Bulgaria and Romania gain passive access to the Visa Information System but are still not allowed to enter, alter or delete data

25 October – In *Majid Shiri v. Bundesamt für Fremdenwesen und Asyl* (C-201/16), the CJEU rules that an applicant for international protection must be able to challenge a Dublin transfer if this is not implemented within the six months set in the Regulation

25 October – EP and Council adopt Regulation (EU) 2017/1954 amending Council Regulation (EC) No 1030/2002 laying down a uniform format for residence permits for third-country nationals

## November

30 November – EP and Council adopt Regulations (EU) 2017/2226 and (EU) 2017/2225 on the registration of entry and exit data of third-country nationals at border crossing points (EU Entry/Exit System)

## December

12 December – European Commission presents its proposals on interoperability of EU information systems in the field of police and judicial cooperation, asylum and migration, and in the field of borders and visa

13 December – CJEU rules in *Soufiane El Hassani v. Minister Spraw Zagranicznych* (C-403/16) that Member States must provide for appeal procedures when authorities issue a decision refusing a visa under the Visa Code, including the possibility for a judicial appeal at a certain stage of proceedings





# 6

## Asylum, visas, migration, borders and integration



*Irregular arrivals by sea halved compared to 2016, totalling some 187,000 in 2017. However, more than 3,100 people died while crossing the sea to reach Europe. Along the Western Balkan route, allegations of police mistreating migrants increased. Some EU Member States still struggled with the reception of asylum applicants. Migration and security challenges were increasingly linked, with large-scale EU information systems serving to both manage immigration and strengthen security. Meanwhile, the push to address irregular migration more effectively exacerbated existing fundamental rights risks.*

### 6.1. Fundamental rights challenges persist as arrivals drop

Migration continued to be largely associated with people trying to reach Europe by sea in an irregular manner in 2017, with pictures of unseaworthy and crowded boats dominating media coverage. In terms of numbers, however, as Figure 6.1 illustrates, persons who come to the EU for study, research, or work purposes outweigh those who have received some form of international protection. In 2016, some 855,000 third-country nationals came to the EU for work, as did almost 700,000 students. The number of first residence permits granted to third-country nationals for family reasons amounted to 780,000 people. Meanwhile, in 2015, some 180,000 persons received residence permits based on being granted international protection, and some 465,000 did so in 2016. (Data for 2017 were not available at the time this report went to print.)

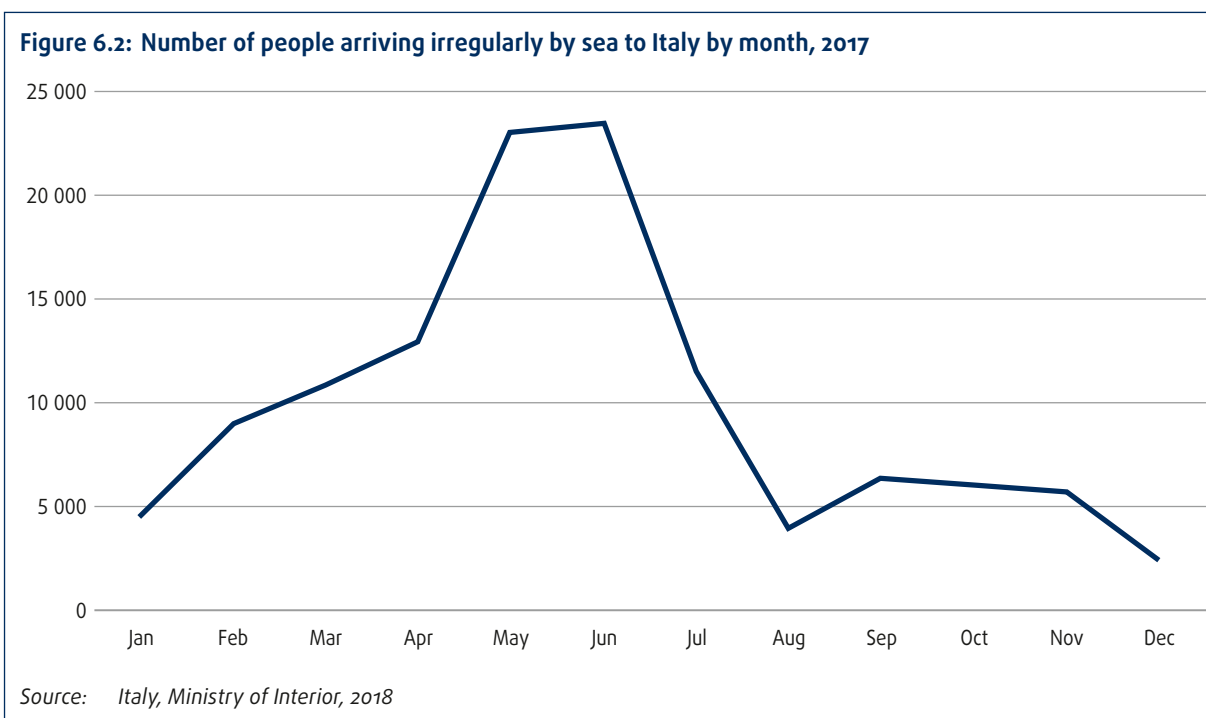
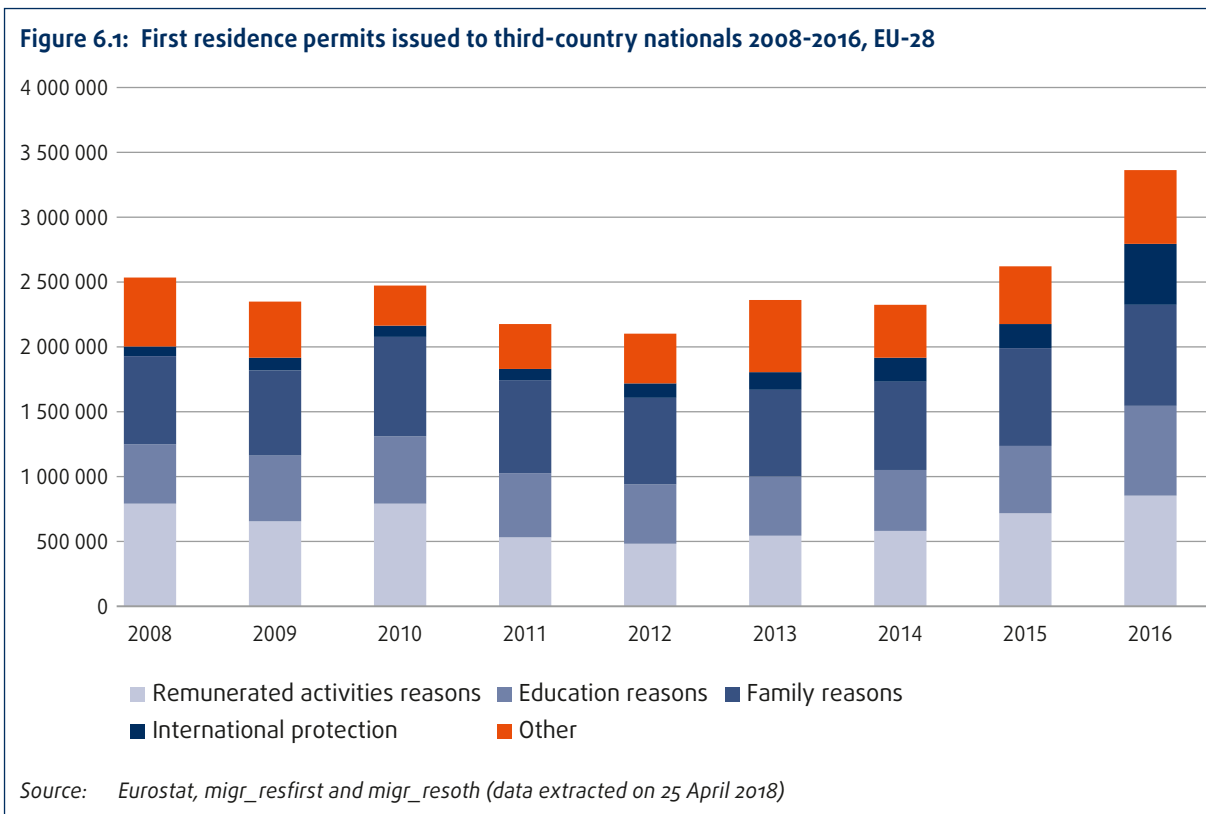
Globally, the number of displaced persons remained at a record, but arrivals in the EU dropped significantly. According to the European Border and Coast Guard Agency (Frontex), some 204,300 people entered EU territory irregularly in 2017 (compared to some 500,000 in 2016). Nigerians and Syrians formed the largest shares. Most crossed the Mediterranean Sea to reach Italy (some 119,000 people) or Spain (nearly 22,900); or crossed the land or sea borders into Greece

(some 45,600 people). The number of people detected after entering the EU through the Eastern land borders and the Western Balkans remained limited (with some 10,500 people crossing the Croatian and Hungarian land borders irregularly in 2017).<sup>1</sup>

The main change in 2017 concerned **Italy**. Bilateral cooperation with the Libyan authorities resulted in a significant drop in the number of arrivals to Italy in the second half of the year, as Figure 6.2 shows.

Several measures contributed to the drop in arrivals. First, in February, Italy signed a Memorandum of Understanding with the Libyan Government of National Accord covering various areas, including the fight against irregular migration and trafficking in human beings.<sup>2</sup> In early August, following a Libyan request, the Italian Parliament gave the green light to deploying military assets inside Libyan territorial waters.<sup>3</sup> Financial support to enhance Libyan border and migration management followed.<sup>4</sup> Meanwhile, the Libyan Coast Guard increased their search and rescue capacities. According to data reported to the Italian National Coordination Centre established under the European Border Surveillance System (Eurosur), the Libyan Coast Guard rescued 6,118 people in 2017, compared to some 2,490 in 2016.<sup>5</sup>

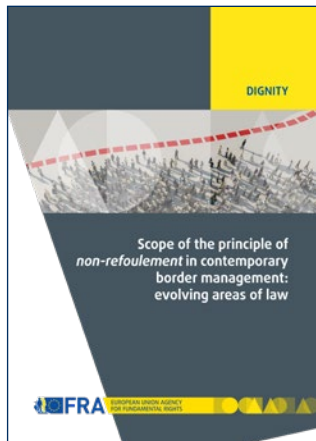
Although primarily implemented as part of bilateral initiatives, the cooperation with Libya reflects a more general EU approach.<sup>6</sup> In this spirit, in July 2017, the



EU Trust Fund for Africa adopted a programme of work with € 46.3 million in funding “to reinforce the integrated migration and border management capacities of the Libyan authorities”.<sup>7</sup> Operationally, the developments in Italy reflect the approach taken by **Spain**, where the Spanish authorities cooperate with states on the West African coast and Morocco.<sup>8</sup>

Amnesty International commented that “Italy and other European governments have substituted clearly prohibited push-back measures with subsidised, or subcontracted, pull-back measures”.<sup>9</sup> Indeed, the enhanced cooperation between Italy and Libya raises the question of whether Italy’s assistance to Libya complies with the EU Charter of Fundamental Rights and in particular with the principle of *non-refoulement*.

Could, for example, the real-time sharing with Libyan authorities of co-ordinates of locations where migrants are embarking or found at sea engage Italy's responsibility, if as a result the intercepted migrants are brought back to Libya, detained, and subjected to ill-treatment? In the absence of case law, this remains an open question.



The possible legal consequences for EU Member States supporting operationally third countries to prevent the departure of migrants towards the EU depend on the individual circumstances of each operation. It is presumably for this reason that the Council of Europe's Commissioner for Human Rights requested clarification about the details of Italy's bilateral cooperation.<sup>10</sup> FRA developed practical guidance on preventive steps EU Member States can take to avoid *refoulement*; in 2017,

it translated this into several official EU languages, including Greek, Italian and Spanish.<sup>11</sup> Frontex used the guidance, inserting it as an important reference document on fundamental rights in the document regulating their operation off the West African coast.

In practice, these new policies resulted in many refugees and migrants on their way to Europe being stranded in Libya, often detained in inhuman conditions and subjected to serious forms of ill-treatment.<sup>12</sup> Efforts to address their plight prompted discussions on new opportunities for legal entry into the EU.<sup>13</sup> These resulted in a first group of 162 vulnerable refugees being directly evacuated from Libya to Italy at the end of the year.<sup>14</sup> Other vulnerable refugees, including unaccompanied children, women at risk, victims of torture or severe ill-treatment, and persons with serious medical conditions, were temporarily transferred from Libya to an Emergency Transit Mechanism UNHCR established in Niger, with a view to identifying solutions for them. UNHCR also issued an urgent call for an additional 40,000 resettlement places for refugees (on top of states' regular pledges) from the 15 countries hosting refugees along the Central Mediterranean route.<sup>15</sup> Fewer than one third of the requested resettlement places had been pledged by the end of 2017.

### 6.1.1. Death at sea

Continuing fatalities at sea served as a stark reminder that the emergency is not over. The International Organization for Migration (IOM) estimates that some 3,139 migrants died or went missing at sea in 2017 – against some 172,000 arrivals recorded by IOM.<sup>16</sup> Most fatalities occurred in the Central Mediterranean in

the first six months of the year.<sup>17</sup> Fatalities did drop in absolute numbers compared to 2016, when they were estimated to total 5,143 people. However, calculated in proportion to the number of arrivals, the death rate increased from 1.41% to 1.75%, as Figure 6.3 illustrates.

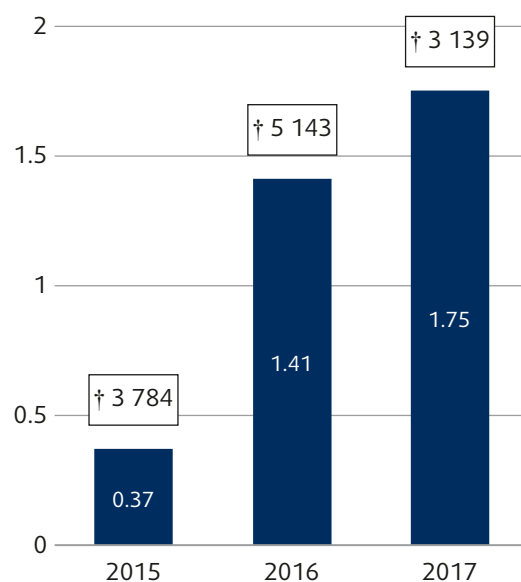
Most fatalities occurred near the North African coast, mainly off the shores of Libya or near the Tunisian coast, with incidents increasing on the Alboran Sea and near the Strait of Gibraltar in the last months of the year.<sup>18</sup>

### 6.1.2. Mistreatment of migrants

Reports of the mistreatment of migrants who crossed borders by circumventing border controls increased significantly in 2017, particularly on the Western Balkan route. Allegations include heavy beatings, such as kicking or hitting people with batons (sometimes on the head or the genitals); throwing sand in people's eyes; forcing people to take off their clothes or shoes; attacks by police dogs; and other humiliating practices, such as taking photos or video of the injured individuals.

*Médecins Sans Frontières* (MSF) reported that most migrants who visited their mental health clinics in

**Figure 6.3: Deaths at sea as proportion of arrivals in the Mediterranean, 2015-2017 (%)**



*Notes:* The proportion of deaths reported by IOM out of the total number of arrivals. Data on fatalities represent minimum estimates.

*Source:* FRA, 2017 [based on data from IOM, *Mixed Migration Flows in the Mediterranean and Beyond 2015, 2016 and Migration flows to Europe 2017 Overview (for number of arrivals)* and IOM, *Missing Migrants Project, Mediterranean (for fatalities)*]

Serbia in the first half of 2017 and had experienced physical violence identified police or border authorities in Bulgaria, Hungary and Croatia as the perpetrators. Between January and June of 2017, MSF treated and documented 62 cases of intentional violence against people returned from the Serbian-Hungarian border. These mainly involved beatings (95 % / 59 cases), dog bites (24 % / 15 cases), and the use of irritant spray (16 % / 10 cases).<sup>19</sup> Similar allegations were reported in Croatia.<sup>20</sup> In April 2017, Oxfam published a briefing paper alleging mistreatment by police or border guards in these same three EU Member States.<sup>21</sup>

As of late 2017, a dedicated webpage documents allegations of violence and ill-treatment inflicted on migrants by EU Member State. For 2017, it lists some 110 alleged incidents, mainly concerning people claiming mistreatment in Croatia and Hungary. Volunteers working for various organisations in Serbia who meet the migrants as part of their daily work collect the data.<sup>22</sup> The seriousness of the mistreatment allegations is also illustrated by the demarches taken by UNHCR. The UN Refugee Agency referred some 145 alleged incidents of ill-treatment (affecting some 1,300 individuals) to the responsible authorities in Croatia, and 11 cases (affecting some 110 people) in Hungary.<sup>23</sup>

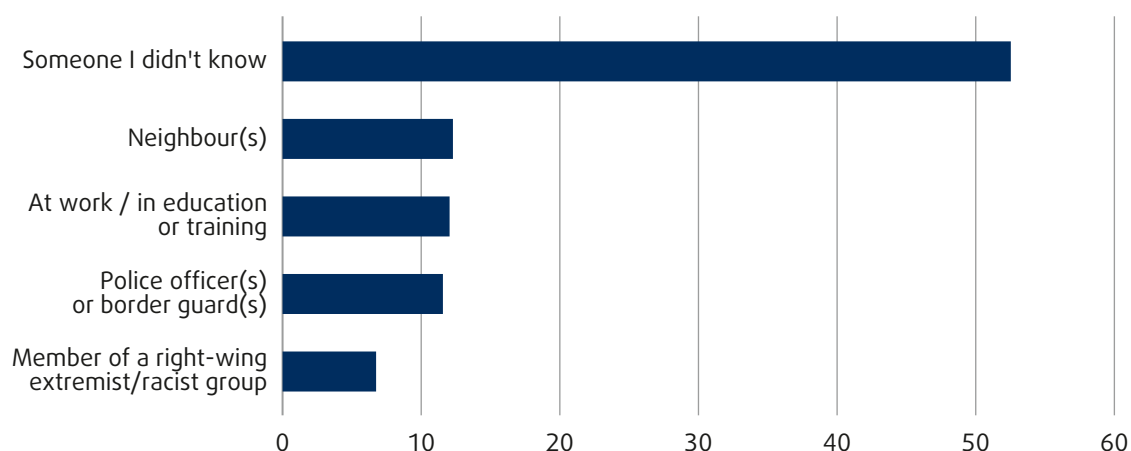
Despite the significant number of allegations, some of which were brought to the attention of the Public Prosecutor, to FRA's knowledge, none of the investigations resulted in formal court proceedings. FRA also could not identify a single 2017 court case in which police or border guards were convicted of mistreating migrants. However, a case was brought before the European Court of Human Rights against Hungary concerning police violence and brutality against a Syrian man; this case was still pending at

year's end.<sup>24</sup> In this context, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) returned to Hungary in October 2017 to review the treatment and conditions of detention in the transit zones and border police holding facilities, and held interviews with foreign nationals who had recently been escorted by border police officers to the other side of the fence.

The issue of mistreatment is not limited to the Western Balkan route. Refugees and migrants trying to reach the United Kingdom often temporarily stay in Calais and Dunkirk, **France**. A joint investigation by the General Inspectorates of the Administration, the National Police and the National Gendarmerie noted plausible arguments to conclude that officers had breached rules on the use of force. For example, they referred to violence and the disproportionate use of tear gas, particularly in the makeshift camp in Calais.<sup>25</sup>

Although not border-specific, a recent FRA survey shows that, amongst people with migrant backgrounds, experiences with violence by police or border guards are not insignificant. FRA's EU-MIDIS II survey interviewed selected groups of immigrants and ethnic minorities in the EU between September 2015 and November 2016. Of the over 12,700 first-generation immigrants included in the survey, 3 % experienced violence because of their ethnic or immigrant background in the five years before the survey interview. Violence against first-generation migrants was especially high among immigrants from Southeast Asia in Greece, at 17 %. When asked about the perpetrator of the most recent incident of hate-motivated violence, of those having experienced such violence, some 12 % indicated that this was a police officer or a border guard (see Figure 6.4).<sup>26</sup>

**Figure 6.4: Perpetrators of hate-motivated violence against migrants, as identified in EU-MIDIS II (%)**



Note: Based on all first-generation migrants included in EU-MIDIS II who experienced any violence because of their ethnic or immigrant origin in the five years before the survey (N = 657).

Source: FRA EU-MIDIS II, 2016

### 6.1.3. Reception conditions

In most EU Member States, dropping arrivals allowed reception of applicants for international protection to largely normalise. Many temporary shelters were closed down. For example, in mainland **Greece**, 13 camps were closed in 2017. This included Elleniko, the site at the former Athens airport described as unsafe,<sup>27</sup> after asylum seekers and refugees received support for moving to flats. The container facility in Mauer/Amstetten in **Austria** also closed in November.<sup>28</sup>

However, reception conditions remained critical in some locations. Among the EU Member States hosting larger numbers of asylum applicants, France, Greece and Italy continued to face emergency situations, with overcrowded facilities and/or homeless asylum applicants. In **France**, at year's end, the reception capacity of 70,000–80,000 places remained inadequate, with some 100,000 asylum applicants in need of housing.<sup>29</sup> Informal camps reappeared, against which authorities tried to take evacuation measures.

In **Greece**, on the Eastern Aegean islands, the Reception and Identification Centres – generally referred to as 'hotspots' – remained overcrowded, exposing people hosted there to heightened protection risks, including the risk of sexual and gender-based violence. In December 2017, the three hotspots in Lesbos, Chios and Samos hosted over twice as many people as their maximum capacities. Many – including pregnant women and children – lived in unheated and non-waterproof tents as winter approached. In some cases, tents were put up in extended areas of the camps, which were not properly guarded or lit; during heavy rain, access roads became muddy and unpassable, making it difficult to reach sanitary facilities, for example. Some hotspots lacked non-food items, such as clothing or shoes. Although a number of steps were taken to enable asylum-seeking children to attend school on the mainland, significant gaps in access to formal education remained on the Greek islands.

**Italy** faced massive challenges in providing adequate housing to an ever-increasing number of asylum applicants, as the following two examples illustrate. In June, a parliamentary commission published a report on the largest Italian reception facility in Mineo (Sicily), noting disrespect of hygienic standards, serious gaps in medical and psychosocial services, as well as security issues.<sup>30</sup> In May, at the reception centre in Sant'Anna in Isola di Capo Rizzuto (Calabria), the police arrested 67 people accused of having embezzled € 36 million from funds allocated to the reception of asylum applicants over the years.<sup>31</sup> In response, the Ministry of Interior established the Permanent Observatory for the Reception of Asylum Seekers to organise the oversight and discuss the findings of inspections,<sup>32</sup> and

announced the closure of all large reception facilities.<sup>33</sup> It also implemented an EU-funded project on "Monitoring and improvement of reception conditions (MIRECO)". Auditors coordinated by the ministry have carried out inspection missions since May 2017, visiting a significant number of reception facilities by year's end. Plans exist to make the oversight work more permanent (and not project-based), but – at the time of writing – little information was available on follow-up measures taken to address situations where serious disrespect of standards persists.

### 6.1.4. Temporary restrictions on family reunification

EU law regulates family reunification for refugees – but not explicitly for beneficiaries of subsidiary protection – in the Family Reunification Directive (2003/86/EC).<sup>34</sup> Many beneficiaries of international protection who reached the EU in 2015 and 2016 have family members abroad. Bringing them to the EU lawfully remains difficult. In 2016, **Germany** and **Sweden** adopted temporary measures excluding beneficiaries of subsidiary protection from applying for family reunification for a certain time period after being granted protection.<sup>35</sup> These temporary measures remained in force throughout 2017.

The Dublin Regulation (Regulation (EU) No 604/2013), which determines which Member State is responsible for examining an application for international protection, contains rules to facilitate keeping or bringing together family members. Applicants in **Greece** – including many unaccompanied children – faced significant delays in joining their family members in **Germany**, after the German authorities asked Greece to better coordinate the number of persons to be transferred.<sup>36</sup> Combined with the administrative delays, applicants on average had to wait for 13–16 months from the date of registration (and significantly longer from the time of arrival in Greece) until their transfer. The time after formal acceptance ranged between 8–9 months, instead of the six months set by Article 29 of the Dublin Regulation.<sup>37</sup> As of mid-August 2017, only 221 of the 4,560 applicants accepted by Germany in 2017 had been transferred. Over 60 % of those awaiting a transfer were children, some of whom were unaccompanied.<sup>38</sup> After one of these cases was brought to court, in September, the Administrative Tribunal in Wiesbaden clarified that the applicant has a right to be transferred within the six-month period set by the Dublin Regulation.<sup>39</sup>

### 6.1.5. Relocation comes to an end

In response to the large number of arrivals, the Council of the EU in 2015 established a temporary relocation scheme in support of **Greece** and **Italy**. It foresaw transferring to another Member State some 160,000 persons in clear need of international

protection over a two-year period.<sup>40</sup> This number was subsequently reduced, as Member States were given the option of resettling 54,000 people directly from Turkey.<sup>41</sup> By 10 November 2017, Member States had resettled 11,354 people from Turkey (data for 31 December not available).<sup>42</sup>

The two-year period for processing applications for relocation expired on 26 September 2017. According to data provided by the Greek and Italian authorities, by year's end, only 21,704 asylum applicants had been relocated from Greece (primarily Syrians), and 11,464 from Italy (mostly Eritreans).<sup>43</sup> Under the scheme, almost 600 unaccompanied children were relocated – 492 from Greece and 99 from Italy. The relocation requests of some 300 applicants in Greece and 1770 applicants in Italy were still pending. Although overall only a small portion of the originally envisaged number of applicants benefitted from relocation, this temporary scheme helped significantly reduce the pressure on the Greek and Italian reception systems, which, as noted in [Section 6.1.4.](#), remained challenging throughout the year.

A mandatory intra-EU relocation scheme remained politically controversial and subject to litigation. In September, the CJEU dismissed the actions brought by Slovakia and Hungary against the provisional mechanism for the mandatory relocation of asylum seekers.<sup>44</sup> In December, the European Commission referred Hungary and Poland (the two EU Member States which did not relocate anyone) as well as the Czech Republic (which relocated only a few) to the CJEU for non-compliance with their EU law obligations on relocation.<sup>45</sup> In December 2017, the European Council debated the question of mandatory quotas. Summarising the discussions, its president noted that mandatory quotas did not prove effective, and suggested abandoning this approach in the revision of the Dublin Regulation.<sup>46</sup>

### 6.1.6. Border checks within the Schengen area

The significant number of people who crossed the EU's external border and moved onwards without authorisation, together with threats to internal security, prompted Member States to reintroduce internal border controls within the Schengen area in recent years. As shown in Figure 6.5, at the end of 2017, internal border controls within the Schengen area were in place at some sections of the borders of five EU Member States (**Austria, Denmark, France, Germany and Sweden**) as well as **Norway**.<sup>47</sup> These temporary controls have not yet been lifted and will continue at the same border sections as in the past – with the exception of Germany, where flight connections from Greece are now also subject to controls – until 12 May 2018 (30 April in France).

Such controls adversely affect one of the main achievements of the EU: the right of EU citizens to move freely within the common area without being subject to border checks.

## 6.2. Information systems multiply

The management of asylum, borders and visa policies heavily relies on information technology.

Three large-scale EU information technology systems (IT systems) in the field of migration and security are operational:

- the Schengen Information System (SIS II),<sup>48</sup> to aid police and border checks;
- Eurodac (standing for European Dactyloscopy),<sup>49</sup> to identify the Member State responsible for examining an asylum application submitted in the EU;
- the Visa Information System (VIS),<sup>50</sup> for visa processing.

Changes to all three are either planned or underway. A fourth system – the Entry-Exit System (EES) for registering travel of all third-country nationals admitted for a short stay in and out of the EU – was set up in November 2017 and will become operational in 2020-2021.<sup>51</sup>

Two new IT systems are planned, including:

- the European Travel Information and Authorisation System (ETIAS),<sup>52</sup> for conducting pre-border checks for visa-free travellers;
- the extension of the European Criminal Records Information System to third-country nationals (ECRIS-TCN).<sup>53</sup>

In addition, the proposed Interoperability Regulations<sup>54</sup> will establish:

- a **European search portal – ESP**, to allow competent authorities to search multiple IT systems simultaneously, using both biographical and biometric data;
- a **shared biometric matching service – BMS**, to enable the searching and comparing of biometric data (fingerprints and facial images) from several IT systems;
- a **common identity repository – CIR**, containing biographical and biometric identity data of third-country nationals available in existing EU IT systems;

- a **Multiple-Identity Detector – MID**, to check whether the biographical identity data contained in a search exists in other IT systems to enable the detection of multiple identities.

Most of the existing and planned systems store biometric data, such as fingerprints and/or facial images. Biometrics are unique to the person in question and considered the most reliable method to identify a person. The large-scale processing of personal data, including sensitive biometric data, affects people's fundamental rights in different ways, as FRA's opinions on ECRIS-TCN, Eurodac and ETIAS underline.<sup>55</sup>

The European Commission estimates that the number of people whose data will be stored in the different IT systems that will be made interoperable amounts to close to 218 million.<sup>56</sup> Once pending legislative reforms are completed, data – including biometrics – on most

third-country nationals coming to or staying in the EU will be stored. Taken together with national databases, these systems will give authorities access to data on a large number of persons, presenting an attractive tool also for law enforcement.

### 6.2.1. Swift adoption of legislation leaves little time to assess fundamental rights implications

The EU gave high priority to reforming and improving its large-scale IT systems in the field of migration and security in 2017. Initially created for specific purposes, most IT systems are being redesigned to also fulfil two horizontal purposes: to help Member States enforce immigration law and to fight terrorism and serious crime. This has important consequences for fundamental rights.

Figure 6.5: Border controls within the Schengen area on 31 December 2017

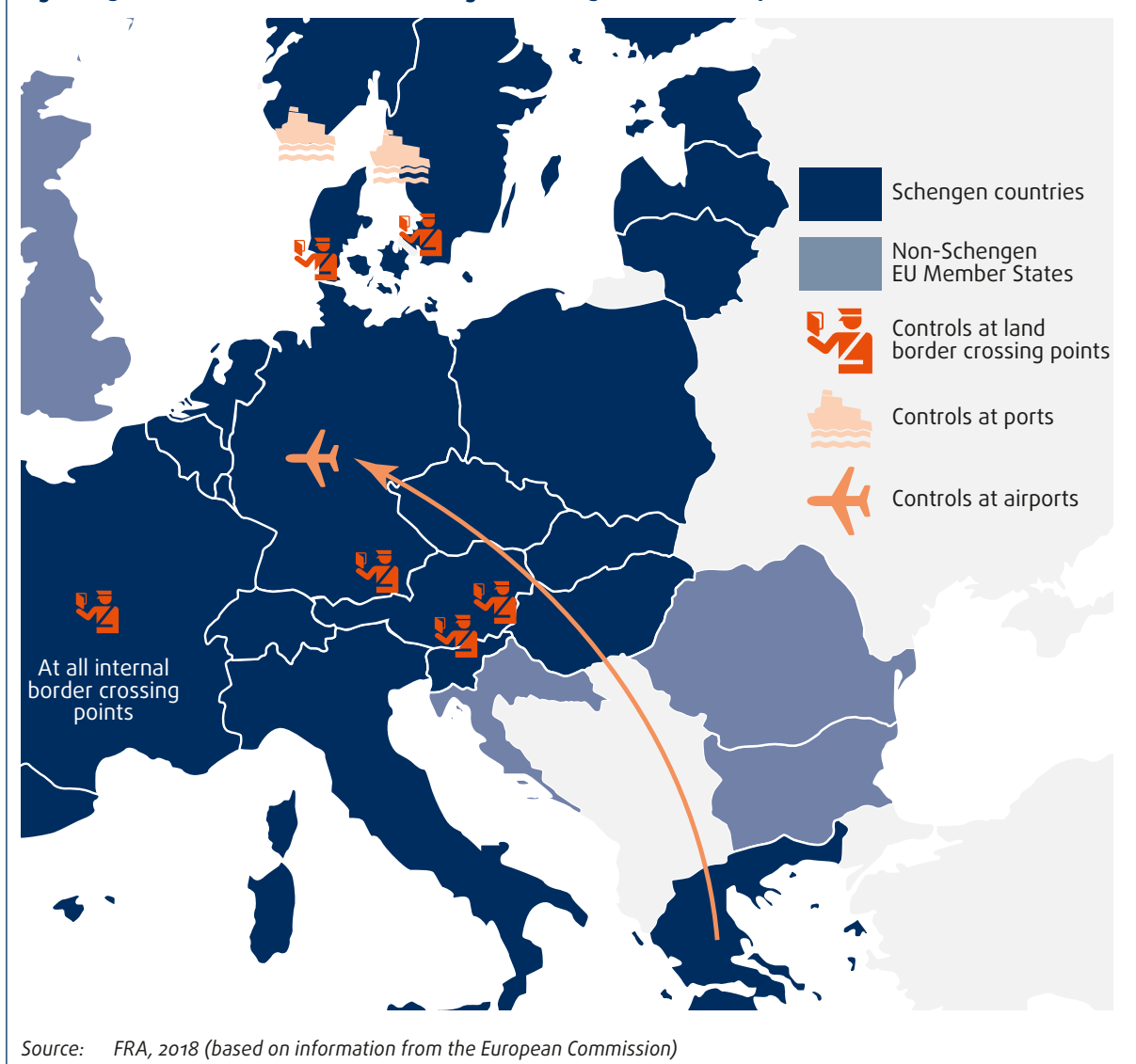



























Table 6.1: Large-scale EU IT systems in the field of migration and security

IT system	Main purpose	Persons covered	Applicability	Biometric identifiers
European dactylography (Eurodac)	Determine the Member State responsible to examine an application for international protection  <i>Assist with the control of irregular immigration and secondary movements</i>	Applicants and beneficiaries of international protection, <i>migrants in an irregular situation</i>	all EUMS + SAC	 
Visa Information System (VIS)	Facilitate the exchange of data between Schengen Member States on visa applications	Visa applicants and sponsors	24 EUMS (not CY, HR, IE, UK) <sup>1</sup> + SAC	
Schengen Information System (SIS II) - police	Safeguard security in the EU and Schengen Member States	Missing or wanted persons	26 EUMS (not CY, IE) <sup>2</sup> + SAC	   
Schengen Information System (SIS II) - borders	Enter and process alerts for the purpose of refusing entry into or stay in the Schengen Member States	Migrants in an irregular situation	25 EUMS (not CY, IE, UK) <sup>2</sup> + SAC	  
<i>Schengen Information System (SIS II) - return</i>	<i>Enter and process alerts for third-country nationals subject to a return decision</i>	<i>Migrants in an irregular situation</i>	<i>25 EUMS (not CY, IE, UK)<sup>2</sup> + SAC</i>	  
<i>Entry-Exit System (EES)</i>	<i>Calculating and monitoring the duration of authorised stay of third-country nationals admitted and identify over-stayers</i>	<i>Travellers coming for a short-term stay</i>	<i>22 EUMS (not BG, CY, HR, IE, RO, UK)<sup>3</sup> + SAC</i>	 
<i>European Travel Information and Authorisation System (ETIAS)</i>	<i>Assess if a third-country national who does not need a visa poses a security, irregular migration or public health risk</i>	<i>Visa free travellers</i>	<i>26 EUMS (not IE, UK)<sup>3</sup> + SAC</i>	None
<i>European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN)</i>	<i>Share information on previous convictions of third-country nationals</i>	<i>Third-country nationals with a criminal record</i>	<i>27 EUMS (not DK)<sup>4</sup></i>	 
<i>Interoperability – Common Identity Repository</i>	<i>Establish a framework for interoperability between EES, VIS, ETIAS, Eurodac, SIS II and ECRIS-TCN</i>	<i>Third-country nationals covered by Eurodac, VIS, SIS II, EES, ETIAS, and ECRIS-TCN</i>	<i>28 EUMS<sup>5</sup> + SAC</i>	  

Notes: *Planned systems and planned changes within systems are in italics, or shown by a light blue background*

 : Fingerprints; : Palm prints; : Facial image; : DNA profile.

EUMS: EU Member States; SAC: Schengen Associated Countries, i.e. Iceland, Liechtenstein, Norway and Switzerland.

<sup>1</sup> Ireland and the United Kingdom do not participate in VIS. Denmark is not bound by the Regulation but has opted in for VIS. VIS does not yet apply to Croatia and Cyprus, and only partially applies to Bulgaria and Romania as per Council Decision (EU) 2017/1908 of 12 October 2017.

<sup>2</sup> Cyprus and Ireland are not yet connected to SIS. Denmark is not bound by the Regulation or the Council Decision but has opted in for the SIS II, and must decide whether to opt in again upon the adoption of the SIS II proposals. The United Kingdom is participating in SIS but cannot use or access alerts for refusing entry or stay into the Schengen area. Bulgaria, Croatia and Romania cannot issue Schengen-wide alerts for refusing entry or stay in the Schengen area as they are not yet part of the Schengen area.

<sup>3</sup> Denmark may decide to opt in for EES and ETIAS.

<sup>4</sup> ECRIS-TCN does not apply to Denmark. The United Kingdom and Ireland may decide to opt in.

<sup>5</sup> Denmark, Ireland and the United Kingdom will take part as they participate in the IT systems made interoperable.

Source: FRA, based on existing and proposed legal instruments, 2018



Negotiations on the EU legal instruments establishing new IT systems or revising existing ones proceed quickly compared with those for most asylum instruments. The Council as well as the LIBE Committee of the European Parliament agreed on their respective positions on all seven proposals concerning IT systems tabled by the Commission in 2016 – in ETIAS and the three proposals concerning the revision of SIS II – in less than one year. In contrast, two core asylum instruments – the proposed Dublin and Asylum Procedures regulations (tabled in May and July 2016, respectively) – were still discussed in the Council (and the proposed Asylum Procedures Regulation also in the LIBE Committee of the European Parliament) at year's end. The EES proposal – tabled just one month before three of the still pending asylum proposals (Eurodac, Dublin and the EU Asylum Agency) – was adopted in November 2017.

The speed at which negotiations on IT systems progress leaves limited time to explore and understand



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the possible consequences of an increasing use of databases for people's rights. The European Commission's increased investment in preparatory work – best illustrated by the establishment of a High-Level Expert Group on Information Systems and Interoperability, in which FRA participated<sup>57</sup> – only

partially mitigates this. To illustrate this, FRA – as a member of this group – produced a report mapping the relevant fundamental rights issues.<sup>58</sup> However, in a fast-changing environment, new elements – such as the Multiple-Identity Detector (MID) described in the next sub-section – only emerged at a late stage of the preparations. FRA therefore did not analyse its possible impact on fundamental rights.

Apart from the data protection angle – primarily analysed in publications by the European Data Protection Supervisor<sup>59</sup> – the impact of large-scale EU IT systems on fundamental rights remains largely unexplored. A FRA project is partly filling this gap. Recent FRA research analyses the immediate fundamental rights implications of processing biometric and other data in large-scale EU IT systems in the field of asylum and migration. The use of IT systems entails both risks and opportunities for fundamental rights. IT systems can offer more robust and timely protection – for example, for missing children and victims and witnesses of crime – and can help prevent identity fraud and identity theft. At the same time, many fundamental rights challenges result from the weak position of the individuals whose data are stored in large-scale IT systems. They range from respect of human dignity when taking fingerprints and challenges in correcting or deleting data inaccurately or unlawfully stored, to the risk of

unlawful use and sharing of personal data with third parties. One of the most serious risks concerns data of people in need of international protection: if such data get into the hands of the persecuting agent – be it a state authority or a private actor – they may result in serious harm for the persons concerned (including a risk of kidnapping) or their family members remaining in the country of origin.<sup>60</sup>

Next to these immediate benefits and concerns, there are also longer-term implications, the fundamental rights consequences of which are difficult to assess. According to some experts, curtailing privacy by processing large amounts of personal data, including biometric data, may affect democracy since privacy is a value inherent to a liberal democratic and pluralist society, and a cornerstone for the enjoyment of human rights.<sup>61</sup>



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The development of face-recognition technology brings new potential fundamental rights risks. It is conceivable that, in the future, technology will make it possible to match faces recorded on video taken from surveillance cameras – installed, for example, at the entrance of a shopping mall – against biometric pictures stored in IT systems. These developments could drastically change the way immigration law is enforced, opening up new possibilities to find migrants in an irregular situation or asylum applicants who moved on from one Member State to another without authorisation. Police in a number of countries, including the United States and the United Kingdom, are already developing and testing facial-recognition systems, utilising surveillance footage to find criminal suspects, as eu-LISA reported.<sup>62</sup> The extension of such pilots to immigration law enforcement – which is not planned under the proposed initiatives on the table – would raise serious necessity and proportionality questions.

### 6.2.2. Interoperability: the Common Identity Repository (CIR) and the Multiple-Identity Detector (MID)

In its December 2017 proposals on interoperability, the European Commission suggests, among other things, replacing the basic identity data of all people whose data are stored in large-scale EU IT systems with a central identity repository. This data repository would be common and used by all IT systems – except SIS II, for which a separate technical solution is envisaged. In other words, the fingerprints, facial images and other data, such as names, nationality, dates and places of birth, sex and travel document references, are removed from the individual IT systems and stored in a common platform – the Common Identity Repository (CIR), illustrated in Figure 6.6 – which

the EES, VIS, Eurodac, ETIAS, and ECRIS-TCN will use. Such a common platform will store a reference to the IT system from which the data originated. Officers will not search for a person in an individual database anymore, but will directly consult the common repository through a European Search Portal, which will allow for searches using biometrics.

Attached to the proposed Common Identity Repository, there will be a mechanism to detect if data on the same person are stored in the IT systems with different names and identities: the Multiple-Identity Detector. Different identities used by one and the same person will be linked. The officer searching the system will see – provided he or she has access rights – all entries relating to the individual, regardless of whether they have been stored under a different name.

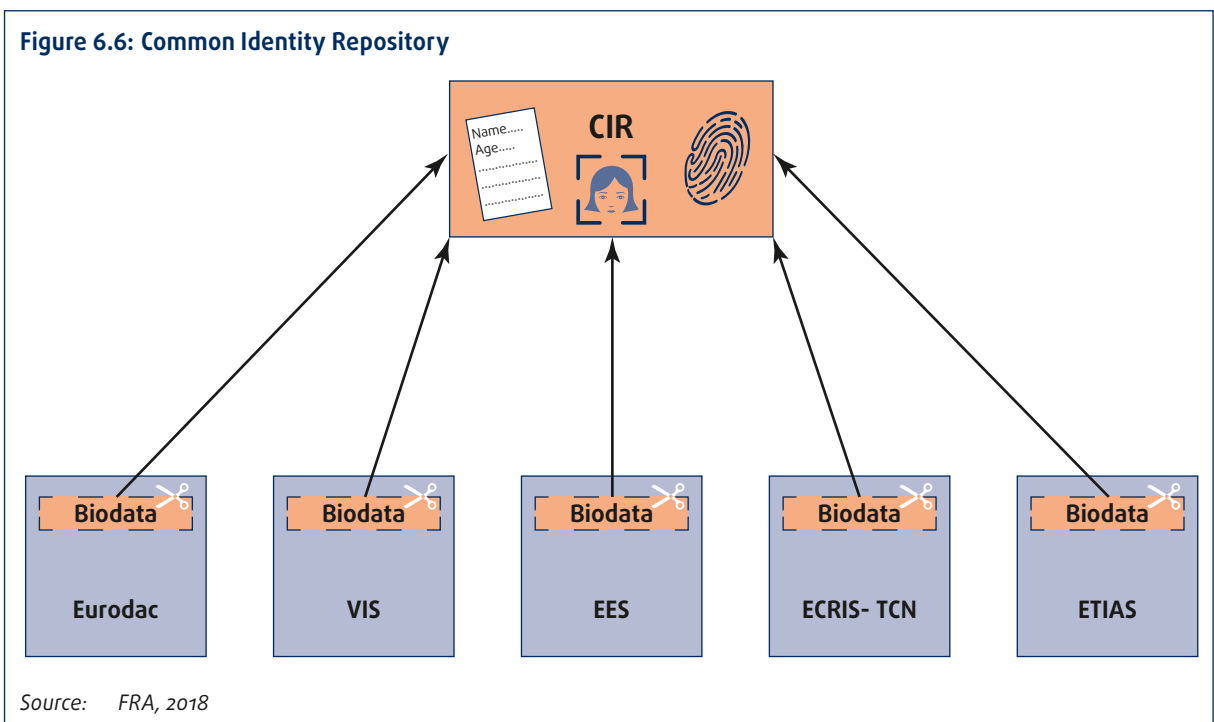
Such reforms will result in an overhaul of the large-scale EU IT systems insofar as they will create a new database – the Common Identity Repository – storing the identity data of virtually all third-country nationals who entered or applied to enter into the EU for a short stay, sought asylum or stayed irregularly. Combined with the Multiple-Identity Detector, the Common Identity Repository is intended to become an efficient tool to ensure the correct identification of a person whose data are stored in one or more IT systems. If deemed necessary and proportionate, in future, the Common Identity Repository and the Multiple-Identity Detector could also be used for purposes beyond those currently envisaged.

However, the Common Identity Repository and the Multiple-Identity Detector also have new fundamental rights implications. For example, in case personal data on an individual are stored in different systems under multiple identities, any officer entitled to query the Common Identity Repository will be able to see which IT systems store data on an individual. In such situations, even if an authority is not entitled to consult ECRIS-TCN – as this system stores sensitive data on past criminal records, it is only accessible to a restricted number of authorities – it will be able to deduce that an individual has a past criminal record as soon as the Common Identity Repository flags that the person is included in ECRIS-TCN. Such information, which the officer should not be entitled to have, will likely affect the officer’s perception of the individual and actions taken.

In other cases, interoperability will exacerbate existing fundamental rights challenges. FRA’s research on the existing IT systems found serious difficulties with informing data subjects about what will happen with the personal data being processed. In addition, in cases of mistakes in the system, a person trying to get wrong information corrected or deleted already faces many practical obstacles. Interoperability will make more complex exercising the right to information as well as the right to access, correction and deletion of data. Therefore, the fundamental rights safeguards will need to be carefully reviewed.



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## 6.3. Fight against irregular immigration intensifies fundamental rights risks

In 2017, the European Union and its Member States made significant efforts to return more migrants in an irregular situation and to combat migrant smuggling. Such actions implicate core fundamental rights, including the right to life, the prohibition of torture, the right to liberty, the right to an effective remedy, and the principle of *non-refoulement*.

After briefly outlining the main EU-level policy developments regarding returns, this section highlights the increasing risk of arbitrary detention, and addresses effective return monitoring. The last sub-section looks at the collateral effects of policies to combat migrant smuggling.

### 6.3.1. Detention for purposes of return

At EU Member State level, the number of returns increased from fewer than 200,000 in 2014 to over 250,000 in 2016 and decreased to 213,000 in 2017, as Figure 6.7 shows. In **Germany**, removals increased from 10,884 in 2014 to 23,966 in 2017.<sup>63</sup> According to the Ministry of Security and Justice, in the **Netherlands**, the total number of returns increased from 16,590 in 2015 to 20,770 in 2017.<sup>64</sup>

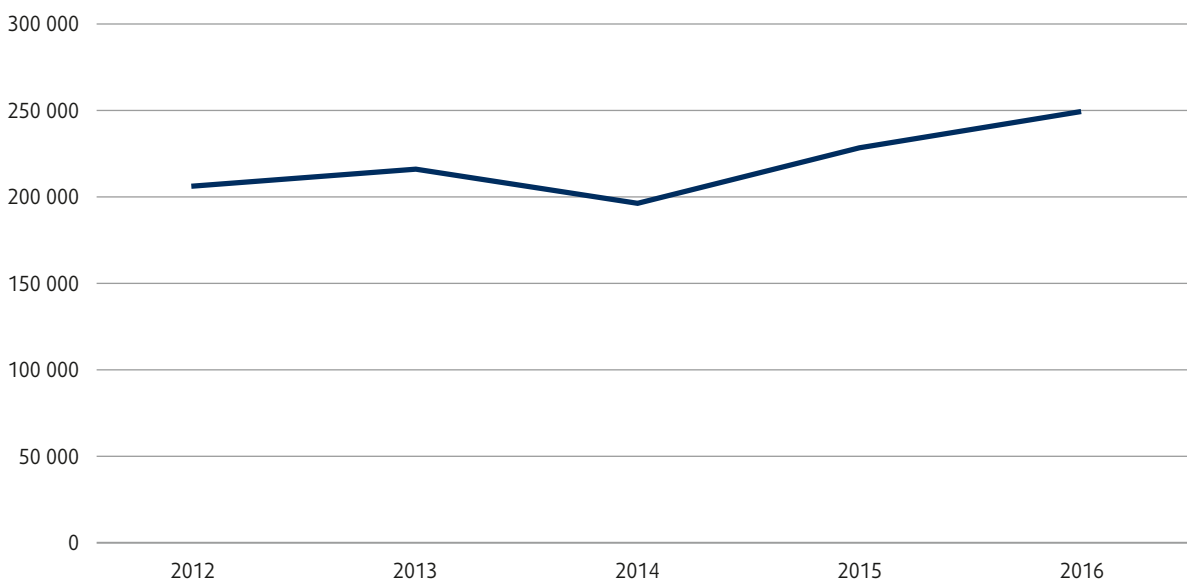
In March 2017, the European Commission published recommendations, accompanied by a renewed Action Plan, to make returns more effective.<sup>65</sup> Suggested

measures cover different areas, such as improving cooperation between authorities, making full use of existing large-scale EU IT systems, simplifying procedures (for example, issuing return decisions together with decisions ending legal stay), and more effective enforcement of return decisions.

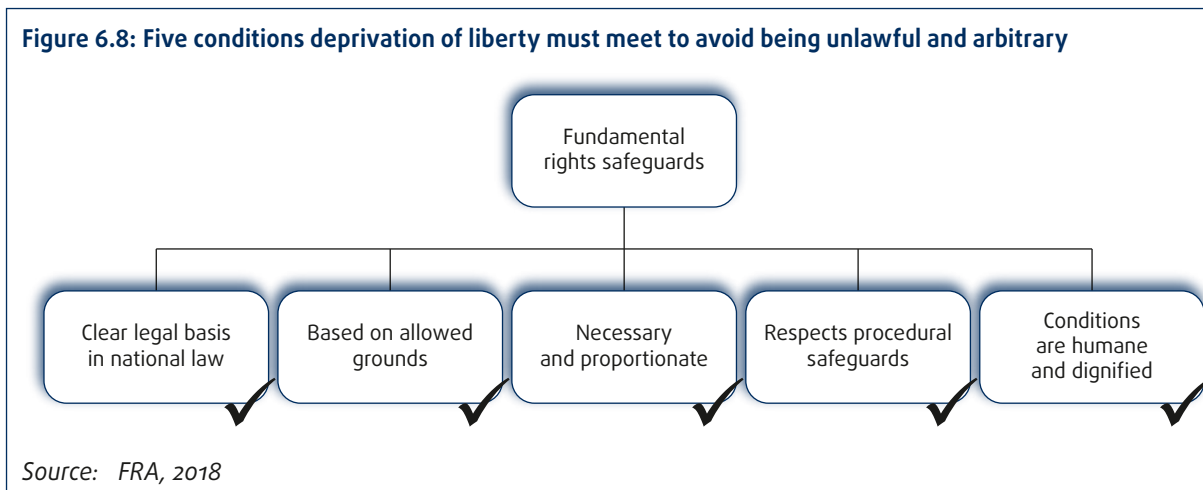
In the recommendations, deprivation of liberty features as an important building block for effective returns. EU Member States are encouraged to implement in their national laws the upper limits of pre-removal detention set in Article 15 (6) of the Return Directive (six months extendable to 18 months in certain exceptional situations); and to bring detention capacities in line with actual needs. The revised Return Handbook, adopted later in the year, contains a list of situations which EU Member States should consider as indications of a 'risk of absconding' – in practice, the most frequent justification for ordering detention. It also defines circumstances where a risk of absconding should be presumed, shifting to the individual the burden to rebut the presumption. It also recommends that EU Member States adopt a stricter approach in the granting of voluntary departure to persons issued a return decision.<sup>66</sup>

Detention constitutes a major interference with the right to liberty protected by Article 6 of the Charter. Any deprivation of liberty must, therefore, respect the safeguards established to prevent unlawful and arbitrary detention. Figure 6.8 summarises schematically the five conditions detention must fulfil to respect fundamental rights. To support the judiciary, the European Law Institute analysed these safeguards in a statement published in September 2017.<sup>67</sup>

**Figure 6.7: Third-country nationals returned following an order to leave, EU-28**



Source: Eurostat, migr\_eirtn, data extracted on 17 January 2018

**Figure 6.8: Five conditions deprivation of liberty must meet to avoid being unlawful and arbitrary**

One of the many controversial issues relating to deprivation of liberty is the maximum length a person can be detained for the purpose of return. European and international law requires that immigration detention be only as long as necessary. This means, for example, that detention in view of implementing a removal becomes arbitrary where a reasonable prospect of removal no longer exists.<sup>68</sup>

Neither international nor European human rights law establishes a maximum time for detention of adults or children. The Return Directive is the first binding supranational document limiting it, albeit only for pre-removal detention. The directive sets two ceilings. The first ceiling is set at six months (Article 15 (5)). Pre-removal detention should normally not be extended beyond such a period. Article 15 (6) of the directive specifies two exceptional situations in which detention can be extended for a further 12 months (up to 18 months in total), provided that the possibility is set forth in national law and the authorities make all reasonable efforts to carry out the removal. The first is when the removal procedure is likely to last longer because the person does not cooperate. The second is beyond the person's influence; it is if the country of return delays issuing the necessary documentation. Further extension is not possible beyond these deadlines for any reason whatsoever.<sup>69</sup>

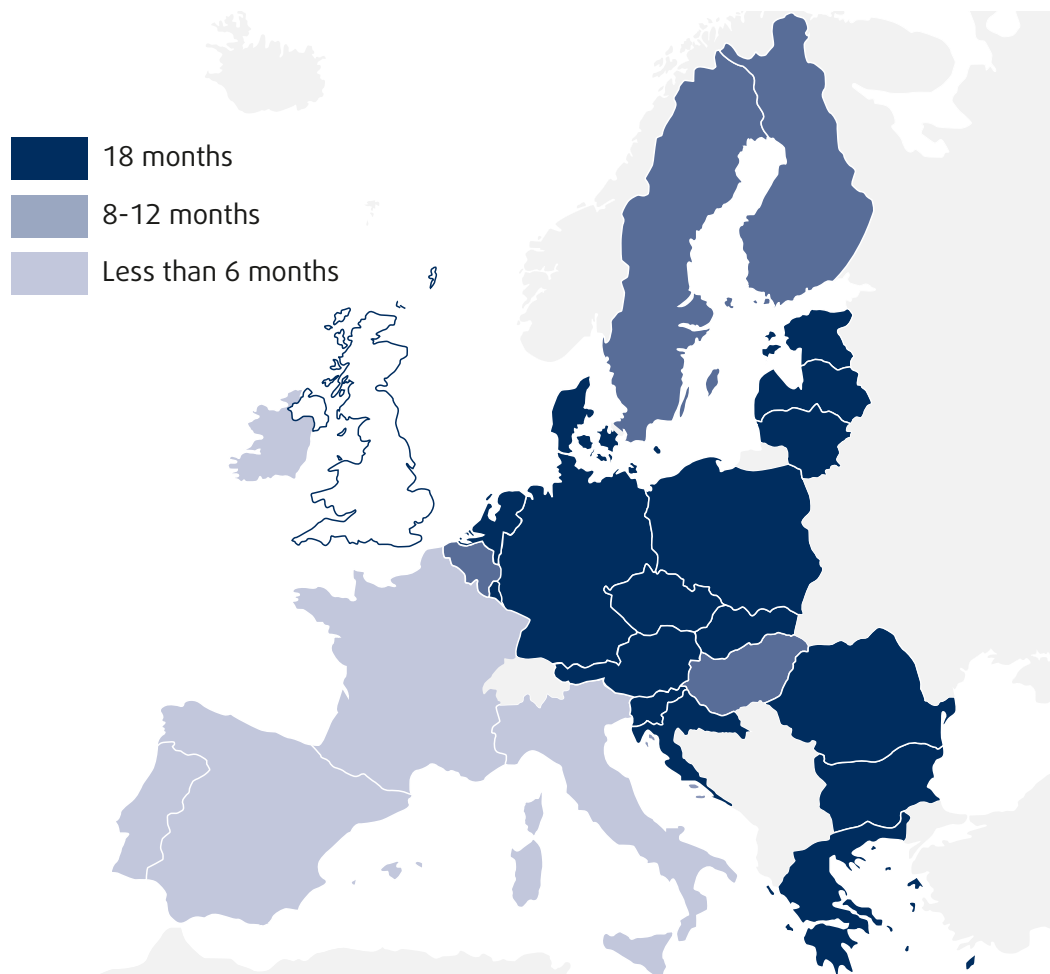
The national laws of all EU Member States bound by the Return Directive, as well as Ireland (which is not bound by it),<sup>70</sup> set maximum time limits for detention pending removal. The United Kingdom – which does not apply the Return Directive – is the only EU Member State that does not set a maximum time limit (Figure 6.9).<sup>71</sup> Of the 26 EU Member States bound by the Return Directive, 17 apply the maximum limit of pre-removal detention of 18 months set out in the Return Directive and four (Belgium, Finland, Hungary, and Sweden) apply a maximum length between 8-12 months. In 2017, Austria increased its upper limit from 10 to 18 months in exceptional cases,<sup>72</sup> in line with the Return Directive and the European Commission's recommendations.

The lack of comparable statistics on immigration detention in the EU makes it difficult to assess to what degree the reinforced attention on making returns more effective has prompted an increase in the use of immigration detention – as, for example, reported from the **Netherlands**. The Dutch authorities indicated that, in the first half of 2017, the total number of people in immigration detention rose by 33 % compared to the same period in 2016, apparently caused by an increase in the apprehension of people from the Western Balkans and North Africa.<sup>73</sup>

Nevertheless, reports pointing to patterns of arbitrary detention emerged from different EU Member States, as the following three examples show. In mainland **France**, the organisation *La Cimade* noted that, since 2 October 2017, instances of judges overturning immigration detention decisions have increased to 41 % – compared to 30 % in 2016.<sup>74</sup> The French Public Defender of Rights also criticised the greater use of administrative detention in cases of families with children in an irregular situation.<sup>75</sup> In **Spain**, the authorities started to hold migrants in facilities other than formal immigration detention centres. This included the Archidona facility in Málaga – a newly created but not yet used prison – which the Ombudsman criticised for not respecting minimum standards, recommending improving healthcare, providing adequate means of communication to detainees, and addressing other identified shortcomings.<sup>76</sup> The **Danish** Refugee Council, which offers advice to asylum seekers in detention, noted that the police are detaining some rejected asylum applicants (in particular from Iraq) to encourage them to cooperate with their return, as envisaged in Article 36 (5) of the Danish Aliens Act.<sup>77</sup> This may raise issues in light of the strict approach taken by the ECtHR on Article 5 (1) (b) of the ECHR, which regulates deprivation of liberty to secure the fulfilment of any obligation prescribed by law.<sup>78</sup>

Deprivation of liberty being imposed systematically without assessing whether it is necessary and proportionate in an individual case appeared more frequent at the external borders. In two of the **Greek**

Figure 6.9: Maximum length of pre-removal detention, 27 EU Member States



Notes: The United Kingdom is not bound by the Return Directive and has no maximum length of detention.

In Cyprus, 'prohibited immigrants' can be detained for up to three years under the Aliens and Immigration Law, Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος (ΚΕΦ.105), Article 19 (2).

Source: FRA, 2018 (based on national legislation listed in the Annex)

hotspots (Moria in Lesbos and Pyli in Kos), newly arriving men of specific nationalities considered to have only small chances of receiving international protection are systematically held in closed facilities. In **Hungary**, virtually all asylum applicants, except for unaccompanied children under 14 years of age, are placed in the two transit zones in Röszke and Tompa at the Serbian border. Under international and European law, these are to be considered places where people are deprived of liberty,<sup>79</sup> as those held there can only leave the facility if they agree to return to the Serbian side of the border fence. Finally, in Southern **Spain**, migrants who arrive by sea are systematically detained, according to the Spanish Commission of Aid to Refugees (CEAR).<sup>80</sup>

The groups of immigrants covered by FRA's EU-MIDIS II survey include some who have experience with irregular residence. Some 3 % of first-generation immigrants included in EU-MIDIS II indicated that they did not hold a residence permit at the time of the survey. A higher number – 8 % – indicated that they did not have

a residence permit when they arrived in the EU. As many as 16 % of immigrants in the sample indicated that they did not have a valid residence permit at least once during their stay in the EU. Among them, more than one third indicated that they were without papers several times (i.e. 6 % of all immigrants in the sample).

Out of those who stayed irregularly in the EU at least once, 8 % were detained at one point. Looking at all immigrants who arrived in their country of residence in the five years before the survey (2010 to 2015 – hence more recent immigrants), this percentage increases to 11 %. Of all respondents who were detained at one point, slightly more than half (56 %) were in detention for two days or less. Some 30 % of those detained were in detention for more than one week.<sup>81</sup>

Reacting to the fact that immigration detention often takes place in facilities that do not respect human dignity, the Council of Europe continued to work on developing European Rules on the Administrative

Detention of Migrants.<sup>82</sup> One controversial point is immigration detention of children, a matter regarding which significant developments occurred in 2017 (see ► [Section 8.1.1. in Chapter 8 on the Rights of the Child](#)).

### 6.3.2. Forced return monitoring

FRA has repeatedly highlighted the importance of forced return monitoring pursuant to Article 8 (6) of the Return Directive as a tool to promote fundamental rights-compliant returns. The implementation of this provision has only progressed slowly. By the end of 2017, Cyprus, Germany, Slovakia and Sweden had no operational monitoring systems in place. In **Germany**, pre-return procedures are only occasionally monitored by charity organisations at *Länder* level. In **Cyprus**, monitoring bodies have been appointed, but did no monitoring in 2017. In **Slovakia**, monitoring is not effective, as it is implemented by an agency that belongs to the branch of government responsible for returns. In **Sweden**, legislation adopted in 2017 established that the Swedish Migration Board is responsible for monitoring forced returns.<sup>83</sup> Structural changes are underway to establish a functioning return monitoring mechanism within the service's international relations entity.

Table 6.2 compares developments in EU Member States over the past four years. Two aspects warrant highlighting. First, in 2014, ten EU Member States lacked operational return monitoring systems that FRA considered sufficiently independent to qualify as "effective". By 2017, that number dropped to four – and two of them, **Germany** and **Sweden**, were taking steps to have effective monitoring systems by 2018. Second, developments have not been linear: in **Croatia** and **Lithuania**, monitoring was project-based and was suspended when funding came to an end and only resumed when funds were available again. In **France**, the independent authority tasked with forced return monitoring did not carry out any monitoring missions in 2016, resuming them in February 2017. At the same time, even where systems are operational their effectiveness may be questioned: as an illustration, Myria, the **Belgian** Federal Migration Centre, criticised the lack of transparency and independence of the General Inspectorate.<sup>84</sup>

In 2017, Frontex coordinated and co-financed 341 return operations by charter flights at EU level, an increase of 47 % compared to 2016. A monitor was physically present on board during 188 of these return operations, including all "collecting return operations" (i.e. for which the forced-return escorts are provided by a country of return) and over 80 % of the joint return operations. By contrast, in 130 out of 150 national return operations supported by Frontex, there was no monitor.

Under Article 29 of the European Border and Coast Guard Regulation (EU) 2016/1624 (EBCG Regulation), Frontex established different pools of experts, including of forced-return monitors, which it started using as of 7 January 2017. The pools consist of experts trained in cooperation with FRA and the International Centre for Migration Policy Development (ICMPD).<sup>85</sup> By year's end, the pool included 61 monitors, all associated with the organisation responsible for forced-return monitoring at the national level. Based on the requests received from Member States, Frontex deployed forced-return monitors from the pool in 94 return operations. These deployments concerned return operations that could not be covered by the national forced-return monitors established under Article 8 (6) of the Return Directive. As it lacked a national return monitoring system, upon request, Frontex supported **Germany** with a monitor from the pool in 48 national return operations.<sup>86</sup> Although such support filled an important gap, if continued in the longer term, it undermines the purpose of the European pool of forced-return monitors, which is primarily intended to support return operations involving more than one returning Member State.

During 2017, the forced-return monitors who reported to Frontex did not note any serious incidents. They did, however, provide suggestions and recommendations for enhancing compliance and protection of vulnerable persons during return operations.

Recurrent issues identified by monitors concern the provision of specific measures for the return of families with children, communication between escorts and returnees, the unsystematic issuance of fit-to-fly certificates, privacy during body searches, and the protection of sensitive health data while ensuring its exchange between medical personnel in the Member States and medical personnel on board the return flight. At the same time, reports analysed by Frontex's Fundamental Rights Officer indicate that, in general, means of restraint and force were applied based on individual assessments, with escort officers treating detainees subject to these measures in a humane and professional manner.<sup>87</sup>

The monitors recommended increasing female escort officers, providing separate waiting areas for families at airports, adapting pre-departure facilities to the special needs of families with children and vulnerable groups, and using interpreters. They noted that this would not only reduce the risk of violating the rights of children or of vulnerable individuals, but would also help avoid unnecessary tensions.



Table 6.2: Forced return monitoring systems 2014-2017, EU-28

EU Member State	Organisation responsible for monitoring forced return	Operational?*			
		2014	2015	2016	2017
AT	Human Rights Association Austria ( <i>Verein Menschenrechte Österreich</i> ) and Austrian Ombudsman Board ( <i>Volksanwaltschaft</i> )	✓	✓	✓	✓
BE	General Inspectorate of the General Federal Police and the Local Police (AIG) ( <i>Inspection générale de la police fédérale et de la police locale, Algemene inspectie van de federale politie en van de lokale politie</i> )	✓	✓	✓	✓
BG	Ombudsman ( <i>Омбудсманът</i> ), Centre for the Study of Democracy NGO (national and international NGOs)	✗	✓	✓	✓
CY	Office of the Commissioner for Administration (Ombudsman)	✗	✗	✗	✗
CZ	Public Defender of Rights (PDR) ( <i>Veřejný ochránce práv, VOP</i> )	✓	✓	✓	✓
DE	Fora at various airports (Frankfurt, Hamburg, Düsseldorf, Berlin)	(✗)	(✗)	(✗)	(✗)
DK	Parliamentary Ombudsman ( <i>Folketingets Ombudsmand</i> )	✓	✓	✓	✓
EE	Estonian Red Cross ( <i>Eesti Punane Rist</i> )	✓	✓	✓	✓
EL	Greek Ombudsman ( <i>Συνήγορος του Πολίτη</i> )	✗	✓	✓	✓
ES	Ombudsman ( <i>Defensor del Pueblo</i> )	✓	✓	✓	✓
FI	Non-Discrimination Ombudsman ( <i>Yhdenvertaisuusvaltuutettu</i> )	✗	✓	✓	✓
FR	General Inspector of All Places of Deprivation of Liberty ( <i>Contrôleur général des lieux de privation de liberté</i> )	✗	✓	✗	✓
HR	Croatian Ombudsman and Croatian Law Centre ( <i>Hrvatski pravni centar</i> )	✗	✓	✗	✓
HU	Hungarian Prosecution Service ( <i>Magyarország ügyészsége</i> )	✓	✓	✓	✓
IE**	No monitoring system in law	-	-	-	-
IT	National Authority for the Rights of Persons Deprived of Liberty ( <i>Garante nazionale dei diritti delle persone detenute o private della libertà personale</i> )	✗	✗	✓	✓
LT	Lithuanian Red Cross Society ( <i>Lietuvos Raudonojo Kryžiaus draugija</i> )	✓	✗	✗	✓
LU	Luxembourg Red Cross ( <i>Croix-Rouge luxembourgeoise</i> )	✓	✓	✓	✓
LV	Ombudsman's Office ( <i>Tiesībsarga birojs</i> )	✓	✓	✓	✓
MT	Board of Visitors for Detained Persons (DVB)	✓	✓	✓	✓
NL	Security and Justice Inspectorate ( <i>Inspectie Veiligheid en Justitie</i> )	✓	✓	✓	✓
PL	Various NGOs, e.g. the Helsinki Foundation for Human Rights, Rule of Law Institute Foundation, Halina Nieć Legal Aid Centre, MultiOcalenie Foundation	✓	✓	✗	✓
PT	General Inspectorate of Internal Affairs ( <i>Inspecção-geral da Administração Interna, IGAI</i> )	✗	✓	✓	✓
RO	Romanian National Council for Refugees ( <i>Consiliul Național Român pentru Refugiați, CNRR</i> ) (NGO)	✓	✓	✓	✓
SE	Swedish Migration Board ( <i>Migrationsverket</i> )	✗	✗	✗	✗
SI	Karitas Slovenia	✗	✓	✓	✓
SK	Ministry of Interior		✓	✓	✓
UK**	Her Majesty's Inspector of Prisons (HMIP), Independent Monitoring Boards (IMBs)	✓	✓	✓	✓

Notes: ✓ = Yes

✗ = No. In Slovakia and Sweden, monitoring is implemented by an agency belonging to the branch of government responsible for returns. Thus it is not sufficiently independent to qualify as 'effective' under Article 8 (6) of the Return Directive. In France, the "Contrôleur général des lieux de privation de liberté" did not monitor any forced return operations during 2016.

(✗) = In Germany, the return monitoring system covers only parts of the country.

\* Operational means that a monitoring entity which does not belong to the branch of government responsible for returns has been appointed and has carried out some monitoring activities during the year.

\*\* Ireland and the United Kingdom are not bound by the Return Directive.

Source: FRA, 2018

### 6.3.3. Fundamental rights impact of actions against migrant smuggling

Activities to implement the EU Action Plan against migrant smuggling (2015-2020) continued.<sup>88</sup> The European Commission published its evaluation of the EU Facilitation Directive (2002/90/EC) and Framework Decision (2002/946/JHA) in March.<sup>89</sup> It concluded that there is no need to revise the EU facilitation acquis, but acknowledged that some actors perceive a risk of criminalisation of humanitarian assistance. The Regulation establishing the European Border and Coast Guard (Regulation (EU) 2016/1624) also recognises that the EU Facilitation Directive allows Member States not to impose sanctions where the aim of the behaviour is to provide humanitarian assistance to migrants (recital (19)).

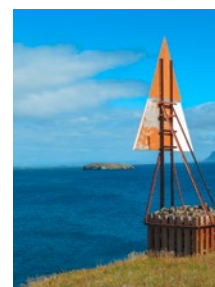
Although there is limited evidence of the prosecution and conviction of individuals or organisations that facilitate irregular border crossings or transit and stay for humanitarian reasons, individuals providing humanitarian assistance to migrants in an irregular situation within a Member State territory, at land borders or on the high seas, are fearful. To strengthen legal clarity and avoid punishing humanitarian actions, the European Commission recommends enhancing the exchange of knowledge and good practices between prosecutors, law enforcement and civil society, and has indicated that it plans to closely cooperate with Eurojust and FRA in this endeavour.<sup>90</sup>

At Member State level, in **Croatia**, the protection of humanitarian actors improved with a change of legislation introducing a safeguard clause.<sup>91</sup> In the past, police indirectly threatened to pursue for migrant smuggling volunteers and some NGO staff who accompanied asylum seekers to police stations to apply for international protection. Such incidents stopped.<sup>92</sup> Eurojust analysed selected French court cases on migrant smuggling from 1996 to 2016: only cases adjudicated before 2012 (the year when **France** introduced legislative changes exempting humanitarian actions from punishment) concerned individuals prosecuted for sheltering migrants without papers.<sup>93</sup> In the **Netherlands**, where the law does not provide for a humanitarian exception, the Dutch Supreme Court ruled that if the person was brought into the Netherlands to avoid an emergency, this constitutes a ground for not punishing a person who would otherwise be found guilty of migrant smuggling under the criminal code.<sup>94</sup>

In practice, in 2017, reports of threats of punishment for providing humanitarian assistance emerged from **France**, particularly around Calais and at the French-Italian border. For instance, in March, in the Italian border town of Ventimiglia, three volunteers with the NGO "*Roya Citoyenne*" were arrested for distributing food to irregular migrants, an action banned by local

decree.<sup>95</sup> Similarly, the Paris prefect banned food distribution outside the *La Chapelle* reception centre, which led to arrests and fines for members of the NGO "*Solidarité Migrants Wilson*" in February.<sup>96</sup> In Calais (France), after the charity organisation "*Secours Catholique*" installed portable showers in an informal camp for homeless migrants, riot police arrested one of the charity's employees for providing assistance to the illegal residence of a foreigner, prohibited by the French law on foreigners; charges were ultimately dropped.<sup>97</sup>

In the Central Mediterranean, vessels deployed by civil society organisations continued to play an important role in search and rescue at sea. During the first six months of 2017 (1 January – 30 June), some ten vessels deployed by NGOs<sup>98</sup> rescued more than a third of the persons rescued at sea (33,190 of the 82,187 persons rescued at sea during this period).<sup>99</sup> Nevertheless, allegations that some NGOs are cooperating with smugglers in Libya prompted a shift in perceptions of their contribution. The **Italian** Senate, which examined this issue in detail, dismissed such allegations. It found that NGOs were not involved directly or indirectly in migrant smuggling, but recommended better coordination of their work with the Italian coast guard.<sup>100</sup>



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The Action Plan on measures to support Italy indicates that "Italy should draft, in consultation with the Commission and on the basis of a dialogue with the NGOs, a Code of Conduct for NGOs involved in search and rescue activities."<sup>101</sup> The Code of Conduct subsequently drawn up prohibits NGOs from entering Libyan territorial waters, envisages the presence of police officers aboard NGO vessels, prohibits NGOs from communicating with smugglers, forbids NGOs to switch off their transponders, and obliges them not to obstruct the Libyan coast guard.<sup>102</sup> Several civil society organisations criticised the code, indicating that it would increase the risk of casualties at sea.<sup>103</sup> Some NGOs signed the code, while others – such as *Médecins Sans Frontières* – refused, indicating that it mixes EU migration policies with the imperative of saving lives at sea.<sup>104</sup> With departures from Libya decreasing in the second half of 2017, the role of NGOs in the Central Mediterranean also diminished, and some suspended or ended their operations.

At the same time, the Italian authorities took measures to address actions by NGO-deployed vessels considered to exceed their rescue-at-sea activities. In August, a court in Trapani (Italy) ordered the seizure of the "*Juventa*", the rescue boat deployed by the NGO "*Jugend Rettet*".<sup>105</sup> In October, the Italian police conducted a search on board of the "*Vos Hestia*", the Save the Children ship, after an undercover agent worked on the ship.<sup>106</sup> These legal proceedings will have to deal with the delicate question of determining the scope of acts covered by the humanitarian clause excluding punishment for what would otherwise be deemed smuggling of migrants.



## FRA opinions

Although the number of people arriving at the EU's external border in an unauthorised manner dropped in 2017, significant fundamental rights challenges remained. Some of the gravest violations involve the mistreatment of migrants who cross the border by circumventing border controls. Reports of abusive behaviour increased significantly in 2017, particularly on the Western Balkan route. Respondents in FRA's EU-MIDIS II survey, which interviewed over 12,000 first-generation immigrants in the EU, also indicated experiences with violence by police or border guards. Despite the significant number of allegations, criminal proceedings are rarely initiated – partly due to victims' reluctance to pursue claims, but also because of insufficient evidence. Convictions hardly occur.

Article 4 of the EU Charter of Fundamental Rights prohibits torture, inhuman or degrading treatment. The prohibition is absolute, meaning that it does not allow for exceptions or derogations.

### FRA opinion 6.1

*EU Member States should reinforce preventive measures to reduce the risk that individual police and border guard officers engage in abusive behaviour at the borders. Whenever reports of mistreatment emerge, these should be investigated effectively and perpetrators brought to justice.*

In 2017, the EU gave high priority to reforming its large-scale information technology (IT) systems in the field of migration and asylum. Through 'interoperability', the different systems will be better connected with one another. A central repository will pull together the identity of all persons stored in the different systems, and a mechanism will detect if data on the same person are stored in the IT systems under different names and identities. Not all aspects of the proposed regulations on interoperability have been subjected to careful fundamental rights scrutiny.

The reforms of the IT systems affect several rights protected by the EU Charter of Fundamental Rights, including the right to protection of personal data (Article 8), the rights of the child (Article 24), the right to asylum (Article 18), the right to an effective remedy (Article 47) and the right to liberty and security of person (Article 6).

### FRA opinion 6.2

*The EU should ensure that either the EU legislator or independent expert bodies thoroughly assess all fundamental rights impacts of the different proposals on interoperability prior to their adoption and implementation, paying particular attention to the diverse experiences of women and men.*

The European Union and its Member States made significant efforts to increase the return of migrants in an irregular situation. Immigration and other relevant authorities consider deprivation of liberty as an important building block for effective returns. The revised Return Handbook, adopted in 2017, contains a list of situations which EU Member States should consider as indications of a 'risk of absconding' – in practice, the most frequent justification for ordering detention. It also defines circumstances where a risk of absconding should be presumed, shifting the burden to rebut the presumption on the individual. The lack of comparable statistics on immigration detention in the EU makes it difficult to assess to what degree the reinforced attention on making returns more effective has prompted an increase in the use of immigration detention. However, reports pointing to patterns of arbitrary detention emerged from different EU Member States.

Detention constitutes a major interference with the right to liberty protected by Article 6 of the EU Charter of Fundamental Rights. Any deprivation of liberty must, therefore, respect the safeguards established to prevent unlawful and arbitrary detention.

### FRA opinion 6.3

*When depriving individuals of their liberty for immigration-related reasons, EU Member States must respect all safeguards imposed by the Charter as well as those deriving from the European Convention on Human Rights. In particular, detention must be necessary in the individual case.*

FRA has consistently highlighted the importance of forced return monitoring pursuant to Article 8 (6) of the Return Directive as a tool to promote fundamental rights-compliant returns. Not all EU Member States have set up operational forced return monitoring systems.

The implementation of returns entails significant risks related to core fundamental rights set out in the EU Charter of Fundamental Rights, including the right to life (Article 2), the prohibition of torture, inhuman or degrading treatment or punishment (Article 4), the right to liberty (Article 6), the right to an effective remedy and the principle of non-*refoulement* (Article 19).

### FRA opinion 6.4

*All EU Member States bound by the Return Directive should set up an effective return monitoring system.*

## Annex – Maximum permitted length of detention pending removal

EU Member State	National legislation
AT	Police Act ( <i>Fremdenpolizeigesetz 2005</i> ), version of 18.04.2017, Section 80 (4)
BE	Aliens Act ( <i>Loi du 15 Décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers</i> ), Art. 74/6
BG	Law on Foreigners ( <i>Закон за чужденци</i> ), last amended 27 December 2016, Art. 44 (8)
CY	Aliens and Immigration Law ( <i>Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος</i> ), Cap 105, Art. 18 (7) and (8)
CZ	Act on the Residence of Foreign Nationals ( <i>Zákon č. 326/1999 Sb. o pobytu cizinců na území České republiky</i> ), Section 125 (1)
DE	Residence Act ( <i>Aufenthaltsgesetz</i> ), last amended on 22 December 2016, BGBl. I S. 3155, Section 62 (4)
DK	Aliens Act, Consolidated Act No. 1117, 2 October 2017, Section 37 (8)
EE	Obligation to Leave and Prohibition on Entry Act (OLPEA) ( <i>Väljasõidukohustuse ja sisesõidukeelu Seadus</i> ), Section 23(1), 25(1); 2005 Act on Granting International Protection to Aliens (AGIPA) ( <i>Välismaalasele rahvusvahelise kaitse andmise Seadus</i> ), Section 36 (2)
EL	Law 3907/2011, Art. 30 (5) and (6)
ES	Organic Law 4/2000 of 11 January 2000 on rights and liberties of aliens in Spain and their social integration (Aliens Law) ( <i>Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social</i> (LOEX)), Art. 62 (2)
FI	Aliens Act ( <i>Ulkamaalaislaki, Utlänningslag</i> ), Art. 127
FR	Code of Entry and Residence of Foreigners and of the Right to Asylum, as amended by Law no. 2016-274 of 7 March 2016 ( <i>Code de l'entrée et du séjour des étrangers et du droit d'asile</i> (Ceseda)), Art. L.552-1, L.552-
HR	Law on Foreigners ( <i>Zakon o izmjenama i dopunama Zakona o strancima</i> ), 1475, Art. 124–126
HU	Act No. 2 of 2007 on the Entry and Stay of Third-Country Nationals ( <i>2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról</i> ), Art. 54 (4)-(5), 55 (3) and 58 (1)-(2); Act No. 80 of 2007 on Asylum ( <i>2007. évi LXXX. törvény a menedéjogról</i> ), Art. 31/A (6)-(7)
IE	Immigration Act 1999, Section 5 (6)
IT	Legislative decree No. 286/1998 ( <i>Testo unico sull'immigrazione</i> ), as amended, Art. 14 (5)
LT	Law on the Legal Status of Aliens ( <i>Istatymas dėl užsieniečių teisinės padėties</i> ), Art. 114 (4)
LU	Immigration Law ( <i>Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration</i> ), Art. 120 (3)
LV	Immigration Law 2003 ( <i>Imigrācijas likums</i> ), Section 54 (7)
MT	Subsidiary Legislation 217.12, <i>Common standards and procedures for returning illegally staying third-country nationals regulations</i> , Section 11 (12) and 11 (13)
NL	Netherlands, Aliens Act 2000 A ( <i>Vreemdelingenwet 2000</i> ), Art. 59 (5) and (6) as well as Art. 59b (2), (3), (4), and (5)
PL	Law on Foreigners ( <i>Ustawa o cudzoziemcach</i> ), Art. 403 (3, 3a, 5)
PT	Act 23/7 of July 4 on the entry, stay, exit and removal of foreign citizens from Portuguese territory ( <i>Lei No. 23/2007, de 4 Julho entrada, permanência, saída e afastamento de estrangeiros do território nacional</i> ), Art. 146 (3)
RO	Act on the Regime of Aliens in Romania, Official Gazette No. 421 of 5 June 2008, Art. 101 (6) and (7)
SE	Aliens Act ( <i>Utlänningslag (2005:716)</i> ), Ch. 10, Section 4
SI	Aliens Act ( <i>Zakon o tujcih</i> ), Art. 76 (4) Art. 79 (1)
SK	Act No. 404/2011 of 21 October 2011 on Residence of Aliens and Amendment and Supplementation of Certain Acts, Art. 88 (4)
UK	Not applicable

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- 74 LaCimade, [Deux fois plus de personnes enfermées en rétention: la machine à expulser s’affole](#), 9 November 2017.

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- 80 *Comisión Española de Ayuda al Refugiado (CEAR), Refugiados y migrantes en España: Los muros invisibles tras la frontera sur*, Madrid, 2017.
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- 90 *Ibid*, pp. 35-36.
- 91 Croatia, Foreigners Act, Article 43 (2); the new provisions entered into force in July 2017.
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- 94 The Netherlands, Supreme Court (*Hoge Raad*). *Case No. 14/05623*, 16 May 2017, ECLI:NL:HR:20178:888.
- 95 Institute of Race Relations, *Humanitarianism: the unacceptable face of solidarity, November 2017*, pp. 45, 55; *France, Citoyens Solidaires*, 22 March 2017.
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- 99 Frontex, personal communication, 16 January 2018.
- 100 Italian Senate, *Commissione Difesa*, Doc. XIIIV No. 9, *Conclusione dell'indagine conoscitiva sul contributo dei militari italiani al controllo dei flussi migratori nel Mediterraneo e l'impatto delle attività delle organizzazioni non governative*, 16 May 2017, pp. 16-17.
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- 102 The Code of Conduct is available in Italian on the [Ministry of Interior web page](#) and has been published in English by [Statewatch](#).
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- 106 [Save the Children, press release, Migranti: rassicurazioni dalla procura di Trapani, perquisizioni non collegate ad accuse contro l'Organizzazione](#), 24 October 2017.





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# UN & CoE

## January

24 January – Guidelines on big data adopted by the Consultative Committee of the Council of Europe's data protection convention (Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data)

## February

24 February – UN Special Rapporteur on privacy issues a report to the UN Human Rights Council (A/HRC/34/60), focusing on the relation between privacy and surveillance activities, and the need for increased privacy-friendly oversight

## March

22 March – UN Human Rights Council adopts a resolution on right to privacy in the digital age (A/HRC/34/L.7/Rev.1), calling on states to ensure that privacy rights are effectively respected, notably in context of digital communications and surveillance activities

## April

28 April – Parliamentary Assembly of the Council of Europe (PACE) adopts Recommendation 2102 (2017) on Technological convergence, artificial intelligence and human rights, which calls upon the Committee of Ministers to better define regulations applying to robotics

## May

5 May – UN OHCHR issues a report on ways to bridge the gender digital divide from a human rights perspective (A/HRC/35/9), which insists on the crucial importance of ensuring that new technologies do not exacerbate gender discrimination

## June

22 June – In *Aycaguer v. France* (No. 8806/12), the ECtHR holds that being convicted for refusing to be registered in the national automated registry of genetic fingerprints is contrary to the right to respect for private life (Article 8 of the ECHR)

27 June – In *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (No. 931/13), the ECtHR holds that banning mass publication of personal tax data in Finland did not violate the right to freedom of expression (Article 10 of the ECHR)

## July

## August

## September

5 September – In *Bărbulescu v. Romania* (No. 61496/08), the ECtHR holds that states should ensure that, when an employer takes measures to monitor employees' communications, these are accompanied by adequate and sufficient safeguards against abuse (Article 8 of the ECHR)

## October

19 October – Report of the UN Special Rapporteur on the right to privacy to the 72nd Session of the UN General Assembly (A/72/540), focusing on Big Data and Open Data, highlights the need for better and clearer regulatory frameworks for the use of new technologies

October – Council of Europe publishes its new Internet Literacy Handbook (ILH) meant to support children, parents, teachers and policymakers of the 47 member states in making positive use of the internet

## November

28 November – In *Antovic and Mirkovic v. Montenegro* (No. 70838/13), the ECtHR holds that video surveillance of university auditoriums amounted to an interference with the applicants' right to privacy and was incompatible with Article 8 of the ECHR, since domestic authorities failed to show any legal justification for the surveillance measure

## December

# EU

## January

10 January – European Commission adopts a Proposal for a Regulation of the European Parliament (EP) and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications or e-Privacy Regulation)

10 January – European Commission adopts a Proposal for a Regulation of the EP and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No. 1247/2002/EC (EU institutions data protection Regulation)

## February

## March

14 March – EP adopts a Resolution on fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law-enforcement, insisting on crucial importance of respecting data protection principles to ensure both effectivity of, and trust in, big data techniques

## April

4/5 April – Article 29 Working Party adopts final guidelines on right to data portability, designation on the lead supervisory authority and on Data Protection Officers

6 April – LIBE Committee adopts Resolution 2016/3018(RSP) on EU-US Privacy Shield: MEPs alarmed at undermining of privacy safeguards in the US

24 April – EDPS issues Opinion 6/2017 on the Proposal for a Regulation on Privacy and Electronic Communications (e-Privacy Regulation)

## May

## June

## July

26 July – CJEU issues Opinion 1/15 on the envisaged EU-Canada Agreement on the transfer and processing of passenger name record data (PNR Agreement), stating that the agreement could not be concluded as its current form is incompatible with the EU Charter of Fundamental Rights

## August

## September

13 September – European Commission and High Representative for Foreign Affairs and Security Policy adopt a joint communication to the European Parliament and the Council on '*Resilience, Deterrence and Defence: Building strong cybersecurity for the EU*'

## October

3/4 October – Article 29 Working Party adopts final guidelines on data protection impact assessment and on administrative fines

18 October – Report of European Commission on the first annual review of the Privacy Shield concludes that the United States continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the Union to organisations in the United States; practical implementation of the Privacy Shield framework can be further improved to ensure that the guarantees and safeguards provided therein continue to function as intended

## November

## December



# 7

## Information society, privacy and data protection



*For both technological innovation and protection of privacy and personal data, 2017 was an important year. Rapid development of new technologies brought as many opportunities as challenges. As EU Member States and EU institutions finalised their preparatory work for the application of the EU Data Protection package, new challenges arose. Exponential progress in research related to 'big data' and artificial intelligence, and their promises in fields as diverse as health, security and business markets, pushed public authorities and civil society to question the real impact these may have on citizens – and especially on their fundamental rights. Meanwhile, two large-scale malware attacks strongly challenged digital security. The EU's recent reforms in the data protection and cybersecurity fields, as well as its current efforts in relation to e-privacy, proved to be timely and relevant in light of these developments.*

### 7.1. Data protection and privacy developments

The General Data Protection Regulation (GDPR)<sup>1</sup> and the Data Protection Directive for Police and Criminal Justice Authorities<sup>2</sup> (together, the data protection reform package) were published in May 2016<sup>3</sup> and come into effect in May 2018. Throughout 2017, EU Member States adapted their national frameworks to the new legislation, and national data protection authorities – cooperating within the Article 29 Working Party – provided guidelines on the new rules. The European Commission presented proposals for two regulations, the EU institutions data protection Regulation and the e-Privacy Regulation. These would replace the existing regulation and directive on these matters, respectively, to update the regulatory framework in line with the GDPR.

The GDPR will apply as of 25 May 2018. As a regulation rather than a directive, it will be directly applicable. However, it allows Member States to implement national legislation through a number of so-called 'opening clauses', thereby providing some flexibility.<sup>4</sup>

Member States are also required to incorporate into their national law before 6 May 2018 the Data

Protection Directive for Police and Criminal Justice Authorities. It seeks to facilitate information exchange and ensure a high level of personal data protection in the context of criminal law enforcement.

#### 7.1.1. National implementation of EU data protection reform enters final stretch

The long-awaited data protection reform follows four years of difficult negotiations. The substantial changes introduced by the GDPR and the Data Protection Directive for Police and Criminal Justice Authorities justified the long implementation period of two years. **Austria**<sup>5</sup> and **Germany**<sup>6</sup> already have in place the implementing legislation for the regulation and the directive, while the majority of EU Member States have submitted legislative proposals to public consultation, as FRA recommended in its *Fundamental Rights Report 2017*.<sup>7</sup>

Some EU Member States addressed the potential impact of the GDPR on the tasks and powers of their national data protection authorities (DPAs), as independent oversight bodies, in 2017. The GDPR<sup>8</sup> and the Data Protection Directive for Police and Criminal Justice Authorities<sup>9</sup> reinforce the independence of DPAs, ensuring that

they have the human, technical and financial resources, premises and infrastructure necessary for the effective performance of their tasks and exercise of their powers. In the **Netherlands**, a report commissioned by the Dutch DPA highlighted the need to significantly increase the first estimate of the DPA's budget to cope with the new requirements of the GDPR.<sup>10</sup>

*“Member States need to equip DPAs to act independently as centres of excellence for protecting individuals’ rights and interests. At the moment, there are major disparities in the budgets for individual authorities in proportion to the number of people they are meant to protect: from 50 EUR per 1000 population in one Member State to 7,600 EUR per 1000 population in another.”*

European Data Protection Supervisor, *blog post*, 7 December 2017

DPAs have also been working at EU level to address the challenges in the implementation of the GDPR through the Article 29 Working Party (WP29), the institutional coordination mechanism created by Directive 95/46/EC (Data Protection Directive). The WP29 has produced different guidelines clarifying compliance requirements for controllers and processors, such as the Guidelines on the right to portability, on Data Protection Officers, on the designation of the lead supervisory authority, on Data Protection Impact Assessments, and on the administrative fines on data breach notification.<sup>11</sup> The adoption of the final version of those guidelines followed public consultations open to stakeholders.

### Promising practice

#### Helping controllers conduct data protection impact assessments

The French DPA (*Commission nationale de l’informatique et des libertés*, CNIL) developed in 2017 an open software that helps controllers to conduct a Data Protection Impact Assessment (DPIA), which is a “process designed to manage the risks to the rights and freedoms of natural persons resulting from the processing of personal data by assessing them and determining the measures to address them”.<sup>\*</sup> This software provides a contextual database accessible at any time during the execution of the impact assessment. Its contents, based on the GDPR, the DPIA guides and CNIL’s Security Guide, adapt to the elements of the treatment under study.

<sup>\*</sup>Article 29 Working Party, *Guidelines on Data Protection Impact Assessment (DPIA)*, wp248, 4 April 2017.

For more information, see the website of the French DPA.

### Senior and vulnerable citizens: enhancing awareness

The GDPR tasks DPAs with promoting public awareness and understanding of the risks, rules, safeguards and rights related to data processing. Notably, DPAs are

to give particular attention to activities addressed specifically to children.<sup>12</sup> Children’s awareness has a direct impact on their capacity to give consent for the processing of their personal data.<sup>13</sup>

Indeed, one of the GDPR’s relevant opening clauses allows Member States to specify the conditions applicable to a child’s consent in relation to information society services. According to Article 8 of the GDPR, where the child is below the age of 16 years, such processing shall be lawful on the basis of consent only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child. However, Member States may set by law a lower age for those purposes, provided that this is not below 13 years. Several Member States, such as the **Czech Republic, Denmark, Estonia, Ireland, Poland, Spain, Sweden** and the **United Kingdom**, proposed in 2017 to reduce the minimum age requirement to 13 years. **Austria** opted for 14 years.<sup>14</sup>

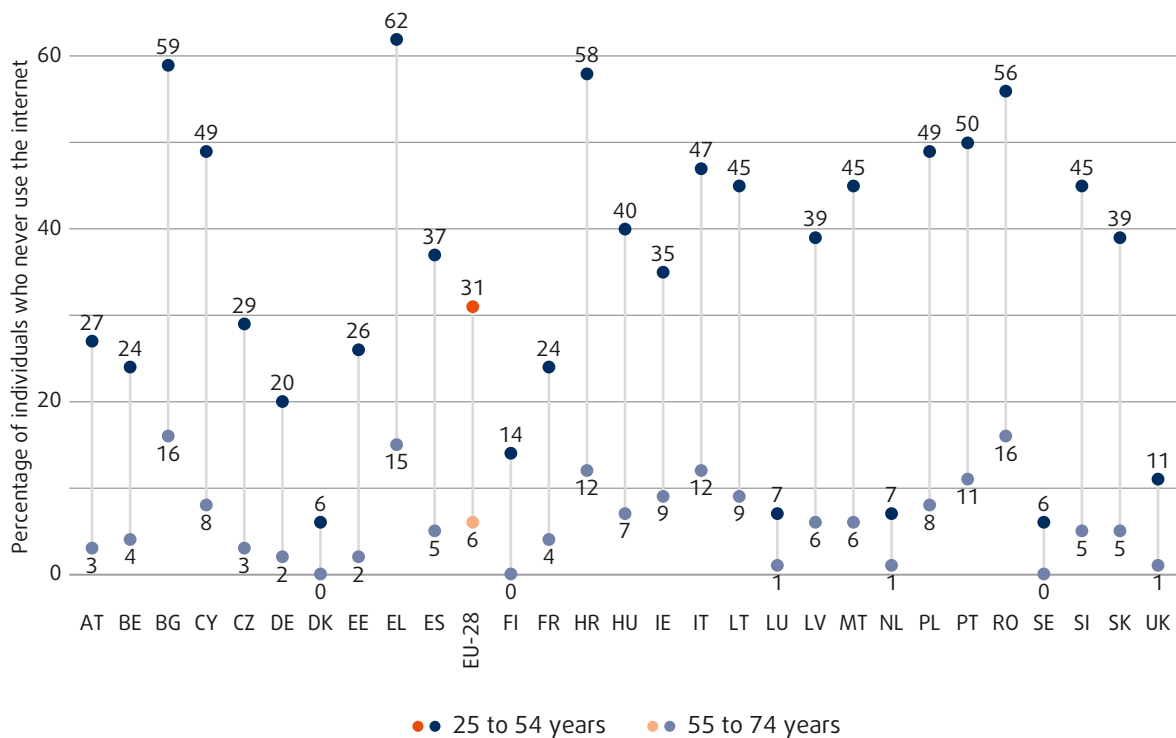
The age requirements for children to consent to the processing of their personal data are very diverse. (For more information, see FRA’s [mapping of minimum age requirements](#)<sup>15</sup> concerning the rights of the child in the EU.) However, the age and maturity of the child, linked to their fundamental right to express their views freely on matters that concern them (Article 24 of the Charter), must be taken into account, and complemented with other positive obligations of public and private institutions considering the best interest of the child. Thus, Article 57 (1) (b) of the GDPR gives DPAs the task of promoting children’s awareness and understanding of risks, rules, safeguards and rights related to data processing.

Age remains linked to the level of use of new technologies in most EU Member States, as shown in [Figure 7.1](#). **Denmark, Luxembourg, the Netherlands, Sweden** and the **United Kingdom** have a low ‘digital divide’ of less than 10 % between the proportions of individuals in different generations who in 2017 had never used the internet. The average difference between generations for the EU-28 is 25 %.

The average number of people in the EU who never use the internet has decreased significantly since 2010, especially for older persons (see [Figure 7.2](#)). This is a major positive trend, as digital illiteracy is a key factor of vulnerability in relation to the level of awareness about the risks and the rights of individuals in the EU while using new technologies. In **Estonia**, the strong governmental push for digital uptake across various sectors was a key issue during the Estonian EU Presidency; FRA took part in those efforts, working to ensure recognition of fundamental rights in digitalisation.



Figure 7.1: Individuals never using the internet in 2017, by age group (%)



Source: FRA, 2018 (based on Eurostat data extracted on 25 January 2018)

### 7.1.2. Passenger Name Records collection needs safeguards

The Passenger Name Record (PNR) Directive (2016/681)<sup>16</sup> allows air carriers to transfer PNR data of passengers, and EU Member States (all but Denmark, who opted out) to process these data for the purposes of preventing, detecting, investigating and prosecuting terrorist offences and serious crime.

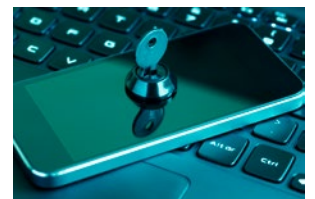
At the end of 2017, significant disparities remained between EU Member States' progress in setting up their national PNR systems: **Belgium**,<sup>17</sup> **Germany**<sup>18</sup> and **Hungary**<sup>19</sup> have transposed the PNR Directive, while the other Member States are preparing the ground for its transposition with relevant legislation.<sup>20</sup>

The EU has concluded PNR agreements with the USA and Australia, and negotiated another one with Canada. However, on 26 July 2017, the CJEU<sup>21</sup> deemed the envisaged PNR Agreement between Canada and the EU incompatible with the Charter in so far as it does not preclude the transfer of sensitive data from the EU to Canada and the use and retention of that data. FRA raised similar concerns in its 2011 Opinion and its *Fundamental Rights Report 2017*.<sup>22</sup> Notably, the court declared that the continued storage of the PNR data of all air passengers after the passengers' departure was not limited to what is strictly necessary, and therefore

should be limited to the data of passengers who may objectively be held to present a terrorism or serious transnational crime risk.<sup>23</sup>

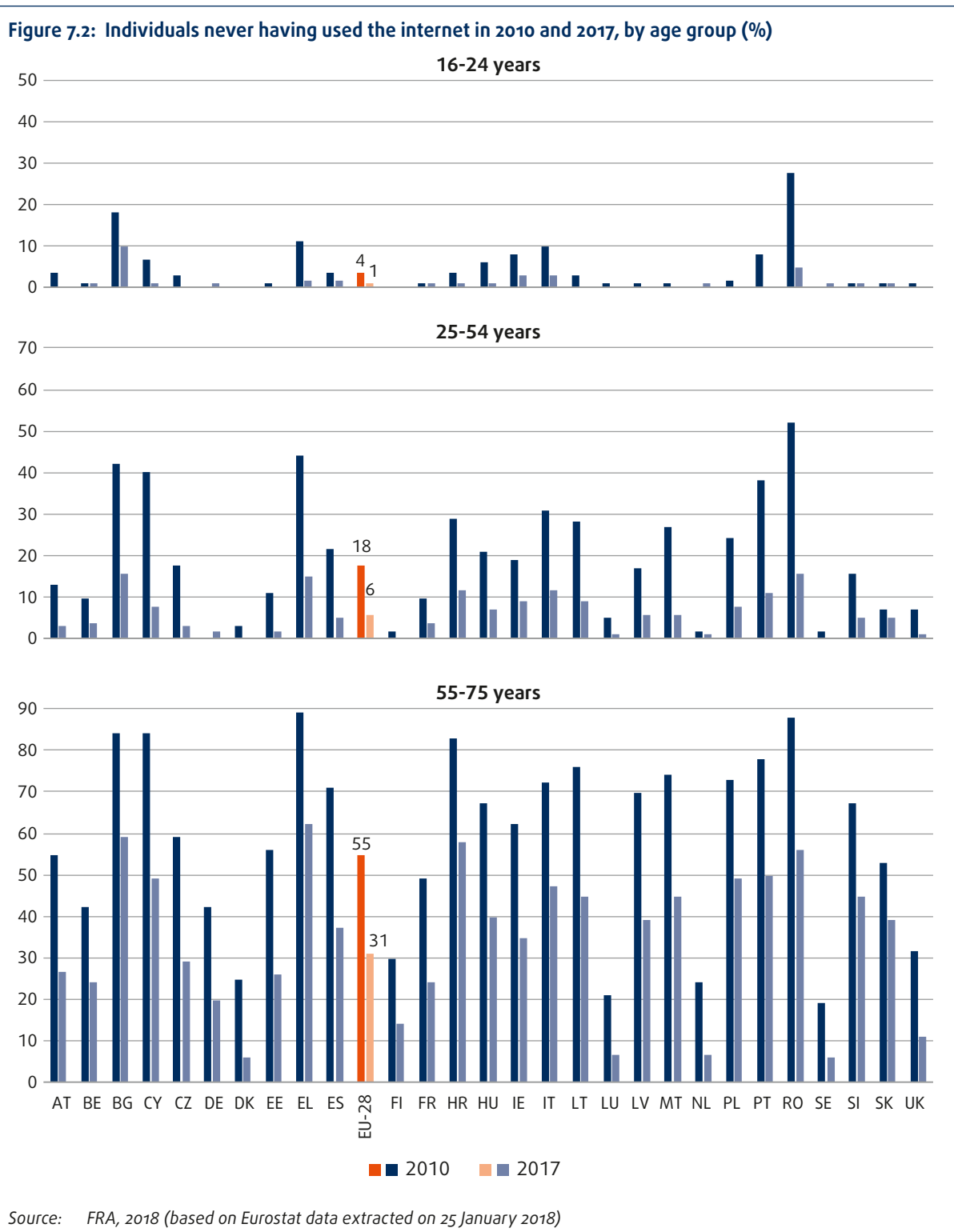
### 7.1.3. Draft e-Privacy Regulation: the latest EU proposal to modernise data protection rules

The e-Privacy Regulation Proposal<sup>24</sup> will adapt the previous e-Privacy Directive (2002/58/EC) to new technologies and market realities and will complement and particularise the GDPR. The e-Privacy Regulation will thus be *lex specialis* to the GDPR. The new draft regulation covers the processing of "electronic communications data", including electronic communications content and metadata that are not necessarily personal data. The territorial scope is limited to the EU, including when data obtained in the EU are processed outside it, and extends to over-the-top communications service providers, which do not provide internet networks but deliver content, services or applications over the internet – such as WhatsApp, Skype or Viber.



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The Council of the EU issued its first revisions to the e-Privacy Regulation on 8 September 2017.<sup>25</sup> The



European Parliament published a draft resolution, including its report on the e-Privacy Regulation, on 23 October 2017.<sup>26</sup> On 5 December 2017, the Council of the Bulgarian Presidency released a progress report,<sup>27</sup> which summarises the work done so far in the Council as a basis for its future work. After the publication of the proposal, European Data Protection Authorities raised some points of concern.<sup>28</sup>

The e-Privacy Regulation Proposal repeats and widens the derogations included in the e-Privacy Directive, which allow data retention and access to data that authorities retain; it therefore has an impact on the regulation of data retention and data encryption of electronic communications. The proposal does not include any specific provisions restricting retention of, and access to, data on the basis of a targeted retention scheme and after a prior review by a court, as the



CJEU required in *Tele2* for data retention and access to conform with the fundamental rights to privacy, protection of personal data and freedom of speech.<sup>29</sup>

Another topical amendment to the draft e-Privacy proposal that the European Parliament proposed relates to encryption's role in strengthening privacy. Encryption allows users to shield their internet communications and safeguard their personal data against unauthorised access or leaks. FRA already suggested reinforcing privacy through encryption in its *Fundamental Rights Report 2017*,<sup>30</sup> as did the European Data Protection Supervisor in its Opinion 6/2017.<sup>31</sup> In October 2017, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) voted in favour of an amendment<sup>32</sup> that precludes EU Member States from imposing any obligation that would result in weakening the security of networks and electronic communication services, such as the creation of "back doors".

In 2017, the European Commission also looked at the issue of encryption in criminal investigations. While stressing the importance of encryption in ensuring appropriate security for the processing of personal data, it noted that law enforcement and judicial authorities increasingly encounter challenges posed by the use of encryption by criminals. It discussed the technical and legal aspects, including potential impact on fundamental rights, with relevant stakeholders, drawing upon the expertise of Europol, Eurojust, the European Union Agency for Network and Information Security (ENISA) and FRA, as well as Member States' law enforcement agencies, industry and civil society organisations. In October, it announced a set of technical measures aiming to support Member State authorities, without prohibiting, limiting or weakening encryption. Exchange of expertise, provision of additional funding for training of law enforcement and judicial authorities, and supporting Europol in further developing its decryption capabilities were among the envisaged measures. Measures that could weaken encryption or could have an impact on a larger or indiscriminate number of people are excluded.<sup>33</sup>

## 7.2. Intensification of cyberattacks triggers diverse cybersecurity efforts

Interlinked with the challenges that the use of encryption raises, cybersecurity became a top priority in the EU in 2017, as cyberattacks of international nature and unprecedented scale hit Member States. Cyberattacks are a borderless<sup>34</sup> and rapidly evolving problem, which often results in disruption of services and can undermine citizens' trust in online

activities.<sup>35</sup> They can have serious implications for the fundamental rights to privacy and data protection, since they usually target computer systems where large amounts of (sensitive) personal data are stored, such as passwords, medical files, company documents and financial information, and may reveal those data to unknown networks.<sup>36</sup> The 2017 WannaCry and NotPetya malware cyberattacks affected hundreds of thousands of users and organisations, and highlighted the need for a coordinated and effective response, as well as for more strengthened protection, at both EU and national levels.<sup>37</sup> These malware cyberattacks acted as wake-up calls and triggered the first ever case of cyber-cooperation at EU level.

*"Cyber-attacks can be more dangerous to the stability of democracies and economies than guns and tanks. Last year alone there were more than 4,000 ransomware attacks per day and 80 % of European companies experienced at least one cyber-security incident."*

Jean-Claude Juncker, President of the European Commission, 'State of the Union address 2017', Speech/17/3165, 13 September 2017

### 7.2.1. 'WannaCry' and 'NotPetya' prompt unprecedented cooperation

Both the WannaCry and NotPetya cyberattacks had an impact on critical European infrastructure operators in the sectors of health, energy, transport, finance and telecoms, as well as service providers and computer systems dedicated to specific tasks, such as robotics, medical scanners or production manufacturing plants.<sup>38</sup> The virus hit several EU companies quickly: **Spain, France, Germany and Belgium** were amongst the first Member States where the attack was reported.

In the **United Kingdom**, for example, the WannaCry cyberattack had potentially serious implications for the National Health Service, leading to widespread disruption in at least 81 of 236 hospital trusts in England.<sup>39</sup> WannaCry involved a type of malware that prevents access to information systems by encrypting multiple common file types and then demands a ransom for the files to be unlocked (ransomware).<sup>40</sup> According to the UK National Audit Office, which conducted an independent investigation into the WannaCry cyberattack, between 12 and 18 May 2017, about 19,000 medical appointments were cancelled, computers at 600 general practitioner surgeries were locked and five hospitals had to divert ambulances elsewhere. The conclusions of the independent investigation highlighted the importance of developing, among other things, a coordinated plan for responding to such threats.<sup>41</sup>

Following the WannaCry cyberattack, and by virtue of Article 12 of Directive 2016/1148 on security of network and information systems (the NIS Directive),<sup>42</sup>

an EU Computer Security and Incident Response Team (CSIRT) was set up to assess, with ENISA's dedicated taskforce, the situation and provide effective operational cooperation. The CSIRT deployed the EU Standard Operating Procedures, which ENISA and Member States developed.<sup>43</sup> When the subsequent global outbreak of the NotPetya malware affected IT systems mostly in Europe, the EU CSIRTs Network also responded by exchanging synchronised information in a prompt and secure manner.<sup>44</sup> In addition, the 'Innovation Activity' of the European Institute of Innovation and Technology started developing a cloud-based Security Operations Centre focusing on the protection of critical infrastructures against so-called advanced persistent threats.<sup>45</sup>

### 7.2.2. EU and Member States strengthen their stance

#### Cybersecurity strategy: enhanced resilience, deterrence and defence

Even before these attacks, cybersecurity was already at the heart of the EU agenda, ranking high in the Digital Single Market Strategy. The fight against cybercrime was one of the three pillars of the European Agenda on Security. In May 2017, the European Commission published its mid-term review of the 2013 EU Cybersecurity Strategy. The evaluation took stock of the progress made so far and outlined further actions in the field of cybersecurity.<sup>46</sup> It reviewed the mandate of ENISA to define its role in the changed cyberspace context and developed measures on cybersecurity standards, certification and labelling, to make systems based on information and communication technology, including connected objects, more cybersecure.<sup>47</sup>

Specifically, the European Commission adopted a cybersecurity package on 13 September 2017, presenting new initiatives to further improve EU cyber-resilience and responses.<sup>48</sup> Regarding ENISA, the package outlines a reform proposal for a permanent mandate – which the agency currently lacks – to ensure it can provide support to Member States, EU institutions and businesses in key areas,<sup>49</sup> including implementing the NIS Directive. The cybersecurity package provides guidance on the practical implementation of the directive and further interpretation of its provisions. In addition, the Commission developed a blueprint recommendation so that the EU has in place a well-rehearsed plan in case of a large-scale cross-border cyber incident or crisis.<sup>50</sup>

On 20 November 2017, the General Affairs Council adopted conclusions on the *Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building Strong Cybersecurity for the EU*,<sup>51</sup> as the European Council had asked it to in October 2017. Specifically, the conclusions stress the

need for both the EU and Member States to enhance cyberresilience, as well as the need for strong and closer cooperation among Member States and ENISA. Therefore, the conclusions welcome the proposal for ENISA to have a strong and permanent mandate.

A 2017 Eurobarometer survey on cybersecurity showed that ever more European residents use the internet for their daily activities.<sup>52</sup> At the same time, they are increasingly concerned about the security of internet transactions and cybercrime. This reiterates the findings of the 2015 and 2013 Eurobarometer surveys.

#### Eurobarometer survey signals increasing concerns about cybersecurity and cybercrime

In a 2017 special Eurobarometer survey on cybersecurity, a majority of respondents (87 %) regarded cybercrime as an important challenge to the internal security of the EU. Half of the respondents (49 %) said that law enforcement agencies in their respective countries were doing enough to combat cybercrime. Nearly half of respondents (46 %) said that they feel well informed about the risks of cybercrime, with significant differences among Member States (e.g. 76 % in Denmark and 27 % in Bulgaria).

The two most common concerns about using the internet for online banking and purchases were the misuse of personal data (45 %) and the security of online payments (42 %). Nearly a fifth (19 %) of respondents expressed no concerns about the security of online transactions. Victimization rates are rising, the survey suggests. This is particularly true for "phishing" (38 % in 2017, 32 % in 2013); online fraud (16 % in 2017, 10 % in 2013); online banking fraud (11 % in 2017, 7 % in 2013); encountering racial hatred (18 % in 2017, 14 % in 2013); and hacking of social media profiles (14 % in 2017, 12 % in 2013). This trend towards increased reporting of incidents may reflect the public's raised awareness of such threats in the online world, which the media highlighted during 2017.

Most of the respondents would contact the police if they experienced cybercrime, especially if they were the victim of identity theft (85 %) or online banking fraud (76 %), or if they accidentally encountered child pornography online (76 %).

Source: European Commission (2017), *Special Eurobarometer 464a on Cybersecurity*, Brussels, September 2017.

#### NIS Directive implementation: aligning security principles with privacy and data protection safeguards

To effectively prevent and combat cybercrime, the NIS Directive aims to enhance the overall level of network and information system security by, among others, imposing a variety of obligations on national "operators of an essential service" to ensure that Members States

have implemented an effective strategy across all vital sectors. It sets up a cooperation group so that Member States can coordinate prompt responses and exchange information against potential threats.<sup>53</sup> EU Member States have until 9 May 2018 to transpose the directive into domestic law and until 9 November 2018 to identify operators of essential services.<sup>54</sup>

The **Czech Republic**,<sup>55</sup> **Germany**<sup>56</sup> and **Hungary**<sup>57</sup> have already implemented the directive into their national legal frameworks. However, the majority of EU Member States are currently in the process of adapting the provisions of the NIS Directive, either by setting up working groups<sup>58</sup> or by initiating public consultations<sup>59</sup> to assess if they need to amend existing national laws and adopt new legislation.

Article 8 of the directive obliges Member States to designate one or more national competent authority, as well as a national single point of contact on the security of network and information systems, which “shall, whenever appropriate and in accordance with national law, consult and cooperate with the relevant national law enforcement authorities and national data protection authorities”.<sup>60</sup> National implementation efforts thus need to pay due regard to aligning the security principles contained in the directive with fundamental rights safeguards, particularly the data protection principles enshrined in the GDPR – notably the principles of purpose limitation, data minimisation, data security, storage limitation, and accountability.<sup>61</sup>

For example, various public institutions will be involved in the **Polish** national cybersecurity system. The draft law proposal enables them to process sensitive data within the meaning of Article 9 (1) of the GDPR.<sup>62</sup> However, the opinion that the Polish data protection authority issued on the draft proposal considered the right to process such data excessive and unjustified in the context of the tasks of these institutions.<sup>63</sup> The opinion voices additional concerns about the exemption of data controllers from a series of GDPR duties pertaining to subjects’ rights of access, rectification and erasure, notification, and data portability,<sup>64</sup> without any prior impact assessments.<sup>65</sup> It also underlines that the draft proposal should refer more precisely to the safeguarding of personal data, instead of allowing data retention for the “period necessary for the completion of the tasks”, which is too general and vague.

In **Germany**, the Act for the implementation of the NIS Directive came into force on 29 June 2017.<sup>66</sup> The IT Security Act had already anticipated many of the provisions of the directive in 2015. The Act makes no explicit reference to the GDPR, but, in principle, the Federal Office for Information Security (BSI) is obliged to delete as soon as possible any data that are processed for IT security purposes. In addition, any use of data by the BSI for other purposes is strictly forbidden, except for national security, counterterrorism and the investigation of serious crimes and cybercrimes. In these cases, it may transfer personal data to public prosecutors, the police and the three federal intelligence agencies.<sup>67</sup>

### 7.3. Big data: EU and international bodies urge respect for fundamental rights amidst push for innovation

The security of digital data in case of cyberattacks is not the only area where the need to establish data protection safeguards is increasingly important. Nowadays, personal data are collected in areas such as transport, communications, financial services, healthcare and energy consumption. These data can be subject to automatic processing by computer algorithms and advanced data-processing techniques, and may be used to generate correlations, trends or patterns. These techniques provide unprecedented insight into human behaviour and both public and private sectors are willing to use such datasets to bolster competitiveness, innovation, scientific research and policymaking. The development of the Internet of Things (IoT) and of ‘big data’<sup>68</sup> analytics, allowing unprecedented availability, sharing and automated use of data, brings opportunities in terms of innovation and economic growth. However, it also poses a number of challenges for individuals’ fundamental rights,<sup>69</sup> such as the protection of privacy and personal data, and the rights to equality and non-discrimination. Indeed, intelligence services of Member States have increasingly been relying on processing and analysing such datasets, as FRA highlighted in its report on surveillance activities and fundamental rights.<sup>70</sup>

## FRA ACTIVITY

## In-depth research on the impact of surveillance on fundamental rights

Terrorism, cyberattacks and sophisticated cross-border criminal networks pose growing threats. The work of intelligence services has become more urgent, complex and international. But intelligence work to counter these threats, particularly large-scale surveillance, can also interfere with fundamental rights, especially privacy and data protection. Following a specific request by the European Parliament, FRA published, in October 2017, its second report on the impact of surveillance on fundamental rights. It updates FRA's 2015 legal analysis on the topic, and supplements that analysis with field-based insights gained from extensive interviews with diverse experts in intelligence and related fields, including overseeing intelligence.

Digital surveillance methods serve as important resources in intelligence efforts, ranging from intercepting communications and metadata to hacking and database mining. Most EU Member States have enacted intelligence laws and have given independent expert bodies the task of overseeing the work of their intelligence services, FRA's 2017 report shows. It also reveals that opinions of these bodies' efficiency are mixed. Similarly, although law provides for diverse remedies, critics contend that actually accessing them is less straightforward. Failing to confront these flaws raises fundamental rights concerns, and carries the risk of undermining the public's trust in their governments' pledges to uphold the rule of law even when confronted with challenges that may make short-cuts look tempting.

*For more information, see FRA (2017), Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU. Volume II: Field Perspectives and Legal Update, Publications Office, October 2017.*

In 2017, authorities at national, EU, and international levels took stock of these realities, and their potential impact on citizens and fundamental rights.

### 7.3.1. EU and international guidelines: catching up with big data challenges

The latest contributions of EU and international bodies or agencies on the use of big data analytics offer important clarifications to policymakers and legislators. The common idea reflected in the work of the EU, the Council of Europe and the United Nations is that technological innovation must go hand-in-hand with human rights compliance. Strong and effective supervisory mechanisms and a consistent

legal framework at an international level can address security risks and issues of privacy, data protection and discrimination that emerge from big data analytics.

The European Parliament adopted a resolution on fundamental rights implications of big data in March 2017.<sup>71</sup> The resolution stresses that fundamental rights should be at the centre of attention when big data analytics are used for commercial, scientific and law enforcement purposes. Big data analytics could result in infringements of individuals' fundamental rights, and in differential treatment of or discrimination against some groups of people. Therefore, EU institutions and bodies, such as the European Commission and the European Data Protection Board, as well as the national data protection authorities, have the job of promoting and ensuring concrete safeguards for fundamental rights.

Similarly, the Council of Europe adopted *Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data* in 2017,<sup>72</sup> drawing attention to the fact that data subjects' control over their personal data is at risk. Indeed, while they may choose what data they provide for processing, it is almost impossible to control data that have been observed or inferred about them, such as data derived from closed-circuit television cameras, or created through big data analytics.

This capacity to create profiles and make automated decisions has not gone unnoticed. The WP29 in its *Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679*<sup>73</sup> underlines its opacity and its potential to significantly affect individuals' rights and freedoms. In addition, ENISA, in its latest report on *Baseline Security Recommendations for IoT*,<sup>74</sup> insists on the right of individuals not to be subject to a decision based solely on automated processing, as enshrined in the GDPR.<sup>75</sup>

Furthermore, attention has been brought to big data analytics related to artificial intelligence appliances and robotics. The Council of the EU in its conclusions on the Tallinn Digital Summit on September 2017<sup>76</sup> invites the European Commission to put forward a European approach on emerging trends, such as artificial intelligence and blockchain technology, while ensuring a high level of fundamental rights protection and ethical standards. In addition, the European Parliament stresses in its *Resolution with recommendations on Civil Law Rules on Robotics*<sup>77</sup> that robotics research should respect fundamental rights. In addition, it calls for the designation of a European Agency for Robotics and Artificial Intelligence, which would provide the technical, ethical and regulatory expertise needed. Furthermore, the Parliamentary Assembly of the Council of Europe (PACE), in its Recommendation 2102,<sup>78</sup> recognises that it is

increasingly difficult for law to adapt to the speed at which technology evolves. It concludes that the only way forward is close cooperation of the Council of Europe, the EU and the United Nations on this matter.

However, big data analytics can be also used as a tool to support fundamental rights compliance. The Office of the United Nations High Commissioner for Human Rights (OHCHR), in its latest Report of the Special Rapporteur on the Right to Privacy,<sup>79</sup> underlines that big data has the potential to help states respect, protect and fulfil their human rights obligations. More precisely, it offers the means to develop new insights into intractable public policy issues such as climate change, the threat of terrorism and public health.

### 7.3.2. National initiatives assessing big data challenges slowly emerge

In some Member States, data protection authorities offered clarifications in 2017 on what the concept of big data analytics encompasses, what laws apply in this area and what risks to the individual's rights and freedoms arise.

At national level, Article 22 of the GDPR and its provisions on automated decision making are a matter of discussion and debate. In **Belgium**, for example, the Privacy Commission<sup>80</sup> stresses the need to define practically the meaning of the right of access and rectification in the context of big data analytics, and to clarify the relation between these rights and the operational part of algorithms. In **Germany**, the Federal Commissioner for Data Protection and Freedom of Information has noted that Article 22 is not sufficient, as it lacks effective limitations.<sup>81</sup> Automated decision making, including profiling, in the era of big data analytics can lead to social exclusion and discrimination, and algorithmic bias is a major societal issue that constitutes a risk to fundamental rights and freedoms.

In **Hungary**, the national data protection authority challenged<sup>82</sup> the fundamental rights compliance of a draft Act. The latter would have established a central system for storing image and voice recordings from police, public transportation companies, road management companies, road tax collectors, public safety offices and financial service providers. Such a central system could systemise these recordings by using a computer algorithm to find correlations and connections between these data and analyse patterns. The data protection authority's intervention prompted the Hungarian Parliament to adopt the draft Act without all of the provisions relating to the establishment of the central image and voice recording storing system.<sup>83</sup> This clearly demonstrates the power of data protection authorities to challenge and influence the regulatory powers and the decision-making process.

#### Promising practice

##### Raising awareness on legal and ethical concerns arising from use of algorithms

In **France**, the national data protection authority has developed a system intended to help people understand how algorithms structure and influence our digital interactions. The aim is to raise awareness about the functioning of algorithms so that individuals will be able to retain their free will and not allow algorithmic calculations to constrain them. In addition, with its latest survey, the French data protection authority aims to raise public awareness of the role of algorithms and artificial intelligence in everyday life. This work does not touch upon legal matters exclusively, but also assesses the ethical concerns that arise from these new technologies.

*For more information, see Commission nationale de l'informatique et des libertés (CNIL), 'The Oracle of the Net' (L'oracle du net), September 2017; and CNIL, 'Report on the ethical matters raised by algorithms and artificial intelligence', December 2017.*

## FRA opinions

Article 8 (3) of the EU Charter of Fundamental Rights and Article 16 (2) of the TFEU recognise the protection of personal data as a fundamental right. They affirm that compliance with data protection rules must be subject to control by an independent authority. The oversight and enforcement of data protection rights can become reality if such authorities have the necessary human, technical and financial resources, including adequate premises and infrastructure, to ensure effective performance of their tasks and exercise of their powers. Such a requirement is grounded in Article 52 (2) of the General Data Protection Regulation (GDPR).

### FRA opinion 7.1

*EU Member States should thoroughly assess the human and financial resources, including technical skills, necessary for the operations of data protection authorities in view of their new responsibilities deriving from the enhanced powers and competences set out under the General Data Protection Regulation.*

The GDPR requires that data protection authorities ensure awareness and understanding of the rights and risks related to the processing of personal data. However, most of the guidelines and awareness-raising campaigns are mainly accessible online, so access to the internet is crucial for awareness of rights. In a majority of Member States, there is still an important digital divide between generations in terms of the use of the internet.

### FRA opinion 7.2

*Data protection authorities should ensure that all data controllers give specific attention to children and older EU citizens to guarantee equal awareness of data protection and privacy rights, and to reduce the vulnerability caused by digital illiteracy.*

Taking into account the analysis of the CJEU, the scope of data retention carried out pursuant to the Passenger Name Record (PNR) agreement and PNR Directive should be limited to what is strictly necessary. This means excluding the retention of data of passengers who have already departed and who do

not present, in principle, a risk of terrorism or serious transnational crime – at least where neither the checks and verifications nor any other circumstances have revealed objective evidence of such a risk.

### FRA opinion 7.3

*When reviewing the PNR Directive pursuant to Article 19, the EU legislator should pay particular attention to the analysis of the Court of Justice of the European Union (CJEU). Notably, it should consider reviewing the provisions of the PNR Directive to limit the scope of data retention, after air passengers' departure, to those passengers who may objectively present a risk in terms of terrorism and/or serious transnational crime.*

Data protection authorities have the task of monitoring and enforcing the application of the GDPR, and promoting the understanding of risks, rules, safeguards and rights in relation to personal data processing. This role becomes even more important in the context of 'big data' analytics, which allows for unprecedented availability, sharing and automated use of personal data. As the European Parliament and the Council of Europe have highlighted, such processing – operated by natural persons, private companies and public authorities – could pose a number of challenges to individuals' fundamental rights, notably their rights to privacy, protection of personal data and non-discrimination. Further research is still necessary to identify such challenges clearly and address them promptly.

### FRA opinion 7.4

*EU Member States should evaluate the impact of 'big data' analytics and consider how to address related risks to fundamental rights through strong, independent and effective supervisory mechanisms. Given their expertise, data protection authorities should be actively involved in these processes.*

The Directive on security of network and information systems (NIS Directive) enhances the overall level of network and information system security by, among other strategies, imposing a variety of obligations on national "operators of an essential service", such as electricity, transport, water, energy, health and digital infrastructure, to ensure that an effective strategy





is implemented across all these vital sectors. In particular, Article 8 of the directive obliges Member States to designate one or more national competent authorities, as well as a national single point of contact on the security of network and information systems, which “shall, whenever appropriate and in accordance with national law, consult and cooperate with the relevant national law enforcement authorities and national data protection authorities”. Implementation initiatives in several Member States have highlighted the need to ensure that the data protection principles enshrined in the GDPR are properly taken on board and reflected in national legislation transposing the NIS Directive.

#### FRA opinion 7.5

*EU Member States should ensure that the national provisions transposing the NIS Directive into national law adhere to the protection principles enshrined in the General Data Protection Regulation (GDPR). In particular, national provisions need to adhere to the principles of purpose limitation, data minimisation, data security, storage limitation and accountability, especially as regards the NIS Directive’s obligation for national authorities to cooperate with national law enforcement and data protection authorities.*

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# UN & CoE

January

February

March

3 March – Council of Europe Lanzarote Committee adopts the Special Report on Protecting Children affected by the Refugee Crisis from Sexual Exploitation and Abuse

8 March – UN Committee on the Rights of the Child issues concluding observations on the periodic report of Estonia

April

18 April – Croatia ratifies Third Optional Protocol to the UN Convention on the Rights of the Child (CRC) on a communications procedure

May

12 May – In *International Federation for Human Rights (FIDH) v. Ireland* (110/2014), the European Committee of Social Rights holds that Irish law, policy and practices on social housing do not comply with European housing, social protection and anti-discrimination standards, violating Article 16 of the Revised European Social Charter (right of the family to social, legal and economic protection)

19 May – Council of Europe adopts Action Plan on protecting refugee and migrant children (2017-2019)

June

July

13 July – UN Committee on the Rights of the Child issues its concluding observations on the fifth periodic report of Romania

August

September

11 September – Cyprus ratifies Third Optional Protocol to the CRC on a communications procedure

October

3 October – In *D.M.D. v. Romania* (No. 23022/13), a case concerning domestic abuse proceedings against a father, the ECtHR finds a violation of the prohibition of inhuman and degrading treatment (Article 3 of the ECHR) because of the lengthy investigation, which lasted over eight years and was marred by other serious shortcomings; and a violation of the right to a fair trial (Article 6 § 1 of the ECHR) because the courts failed to examine the merits of the children's complaint about the failure to award him compensation, as guaranteed by the domestic law

13 October – UN Committee on the Rights of the Child issues concluding observations on the periodic report of Cyprus

26 October – UN Committee on the Rights of the Child issues concluding observations on the fifth periodic report of Denmark

November

17 November – Adoption of Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the UN Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration

17 November – Adoption of Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the UN Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return

December



# EU

## January

## February

## March

7 March – European Commission issues revised EU Guidelines on the Promotion and Protection of the Rights of the Child (6846/17)

31 March – European Parliament (EP) and Council of the EU adopt Directive (EU) 2017/541 on combating terrorism

## April

12 April – European Commission sets out actions to reinforce the protection of all migrant children in the Communication on 'The protection of children in migration' (COM(2017) 211 final)

## May

10 May – In *C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others* (C-133/15), the CJEU holds that a non-EU citizen, as the parent of an under-aged child who is a citizen of an EU country, may rely on a derived right of residence, if their child's rights as a EU citizen could be violated if forced to leave the EU

## June

8 June – Council of the EU adopts Conclusions on the protection of children in migration

## July

27 July – European Commission sets up the High-level Commission Expert Group on radicalisation

## August

## September

28 September – European Commission adopts Communication on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms

## October

## November

7-8 November – 11th European Forum on the rights of the child, devoted to children deprived of their liberty and alternatives to detention

17 November – European Pillar of Social Rights is proclaimed by the EP, the Council and the Commission

## December

1 December – First joint meeting of the informal expert group on children in migration and the rights of the child

6 December – European Economic and Social Committee adopts an opinion on cooperation with civil society to prevent the radicalisation of young people



# 8

## Rights of the child



*Child poverty rates in the EU decreased slightly overall, but remained high. Almost 25 million children are at risk of poverty or social exclusion. Severe housing deprivation affects 7 % of families with children in the EU. The European Pillar of Social Rights underlines children's right to protection from poverty and to equality; it specifically focuses on affordable early childhood education and good-quality care. Migrant and refugee children continued to arrive in Europe seeking protection, although in lower numbers than in 2015 and 2016. While the European Commission provided policy guidance through a Communication on the protection of children in migration, Member States continued efforts to provide appropriate accommodation, education, psychological assistance and general integration measures for children. Implementing the best interests of the child principle remained a practical challenge in the migration context. There was very limited progress in reducing immigration detention of children. Meanwhile, diverse European and national initiatives focused on the risks of radicalisation and violent extremism among young people.*

### 8.1. Tackling child poverty and social exclusion

#### 8.1.1. European Pillar of Social Rights calls for protection from poverty, but child poverty rate remains high

Despite important policy developments in 2017, child poverty remained a persistent challenge. The number of children at risk of poverty or social exclusion (AROPE) in the EU remains high. The AROPE indicator measures the EU 2020 target on poverty 'Population at risk of poverty or social exclusion'. It combines three different indicators: 'at risk of poverty', 'severe material deprivation' and 'very low household work intensity'.<sup>1</sup> In 2016, 26.4 % of children were living in such circumstances, according to the latest EUROSTAT data<sup>2</sup> – almost 25 million persons below the age of 18 years. However, in recent years the trend has improved, albeit slowly, as the *Fundamental Rights Report 2017* indicated.<sup>3</sup>

The European Pillar of Social Rights was proclaimed in 2017. (For more information on the Pillar, see

► **Chapter 1).** One of its 20 principles – principle 11 – focuses on child poverty, childcare and support to children. The Pillar states that children have the right to protection from poverty, and that children from disadvantaged backgrounds have the right to specific measures to enhance equal opportunities. It also enshrines the right of children to affordable early childhood education and care of good quality. Other principles, such as principle 2 on gender equality and principle 3 on equal opportunities, also have direct relevance for the well-being of both boys and girls.<sup>4</sup>

*"Being a poor child is like paying for a crime you didn't commit at all."*

*Girl participating in FRA symposium 'Is Europe doing enough to protect fundamental rights?', Brussels, 28 June 2017*

Civil society's response to the Pillar has been ambivalent, welcoming the package in general, but raising some significant criticisms. Anti-poverty and children's rights organisations have welcomed the explicit reference to children and child poverty in the Pillar, but would have also appreciated cross-references to children's rights in other principles related to health, housing and employment, issues that affect children and their families.<sup>5</sup> Concrete legislative proposals<sup>6</sup> in areas such as minimum

income, minimum wage and funding levels for social protection would all have an impact on families' living standards. The lack of these raised concerns, including among trade unions.<sup>7</sup> Furthermore, some organisations criticised the lack of an implementation plan.<sup>8</sup> Critics suggested that an exclusive focus on employment ignores in-work poverty or job insecurity,<sup>9</sup> issues that many families also face.

In its April proposal on the Social Rights Pillar, the European Commission included a state-of-play on the implementation of the 2013 Recommendation 'Investing in children', the key European policy framework for combating child poverty.<sup>10</sup> The Staff Working Document suggests progress in mainly the first two pillars:<sup>11</sup> the areas of parents' access to resources (employment and social services) and to social services (such as early childhood and childcare services).

The least amount of progress has taken place with respect to the third pillar, regarding child participation. The document suggests there is much more scope to involve children in actions and decisions that affect them, such as involving children in policy or service design, or ensuring that policy planning reflects the views of children on services delivered to them.

In the context of the European Semester, the number of country-specific recommendations relating to

children increased from 12 in 2016 to 16 in 2017 (see Figure 8.1). A total of 13 EU Member States received recommendations on childcare services, early childhood education or inclusive education. For the first time, no recommendation in 2017 directly focused on child poverty. Despite high levels of child poverty, the European Commission considers that the reduction in the number of country-specific recommendations on children in recent years was due to the need to focus on areas where Member State action was most needed and because some Member States had improved their policies.<sup>12</sup>

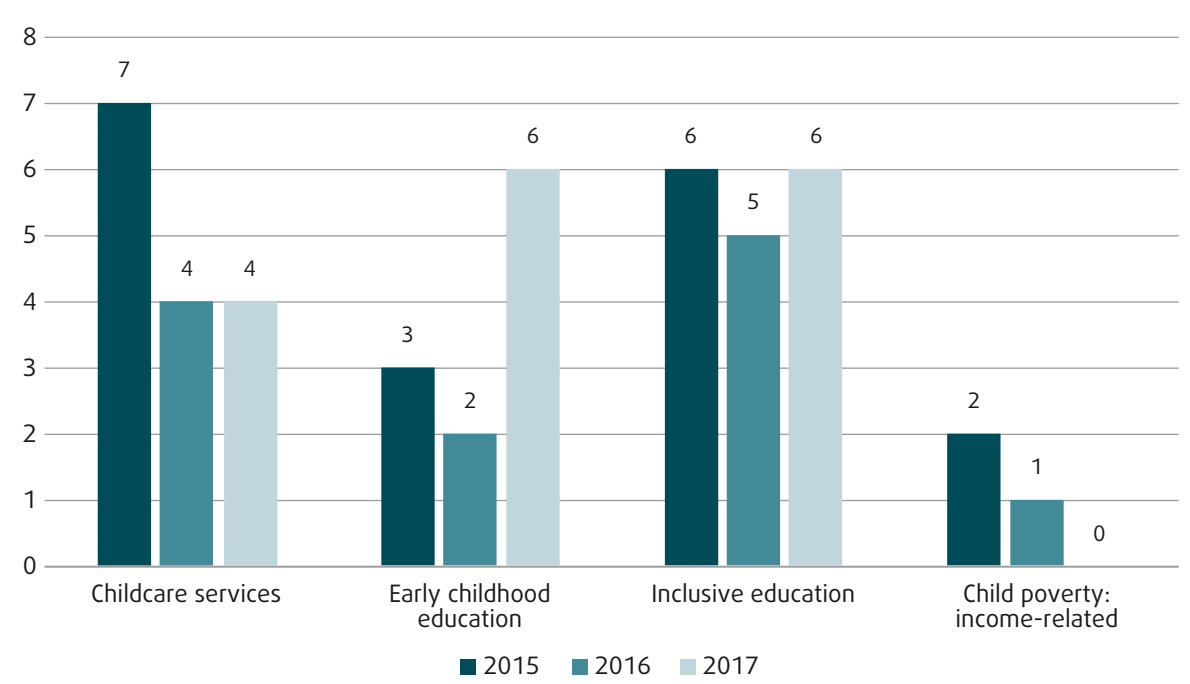
In addition, national reform programmes, which are developed in the European Semester context, do not use the 2013 Recommendation as a guiding policy. Out of 27 national reform programmes, only the **Irish** one made specific reference to the 2013 European Commission recommendation to invest in children.<sup>13</sup> This shows the limited leverage such recommendations have in national policy developments and the European Semester process.

The European Parliament voted for a Preparatory Action on a Child Guarantee in 2017, to be implemented by the Commission, to ensure that every child in poverty can access free healthcare, free education, free childcare, decent housing and adequate nutrition.<sup>14</sup> The preparatory action's general aim is to analyse the feasibility and possible design, governance and implementation options of a future Child Guarantee Scheme, and whether or not such a scheme would



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Figure 8.1: Number of country-specific recommendations focusing on children in 2015, 2016 and 2017, by area



Source: FRA, 2017 (based on European Semester – Country Specific Recommendations for 2015, 2016 and 2017)

bring added value compared with the current situation. The European Commission intends to use a € 2 million budget on research, regional seminars and an EU-wide conference to analyse the current state of play and the feasibility of such a child guarantee, with a focus on four specific vulnerable groups of children.<sup>15</sup>

There has been progress on only some of the indicators related to Sustainable Development Goal (SDG) 1, 'End poverty in all its forms everywhere', Eurostat data indicate.<sup>16</sup> In March 2017, the UN Human Rights Council adopted a resolution on the protection of the rights of the child in the implementation of the 2030 Agenda, in which it encouraged states to promote a child rights-based approach in implementing the SDGs. It also calls on states to pay additional attention to children living in poverty or from marginalised groups when developing measures intended to comply with the SDGs.<sup>17</sup>

### 8.1.2. Housing and homelessness in Member States under the lens

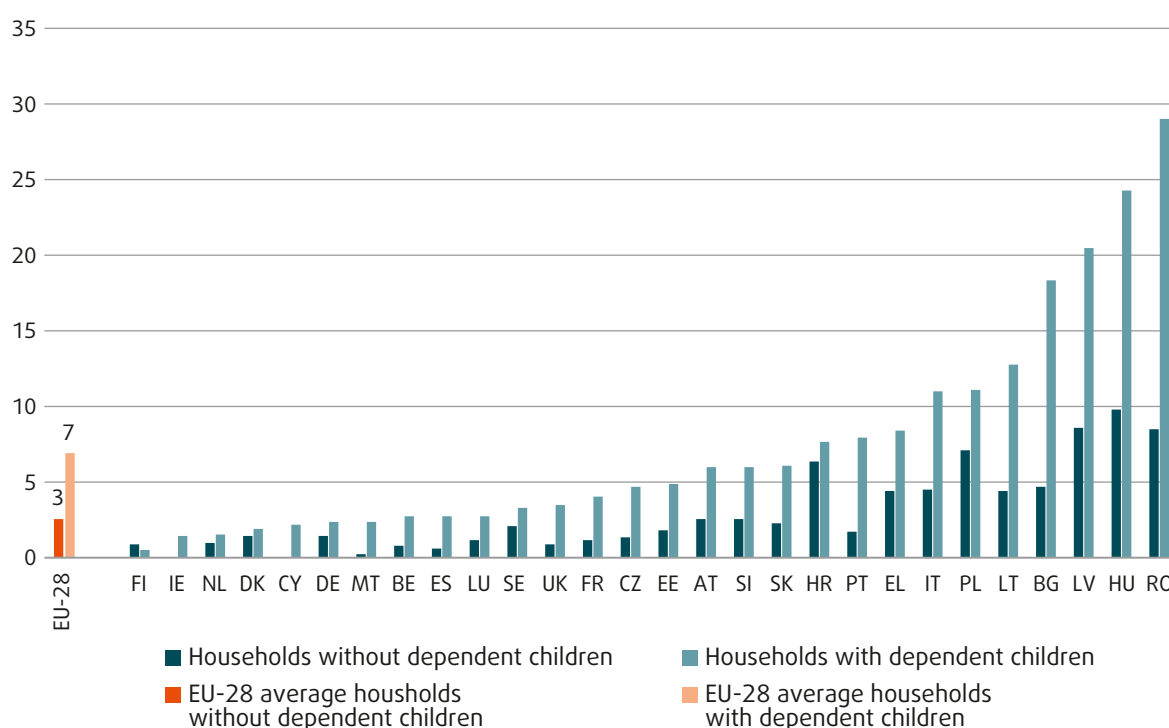
When examining the implementation of the 2013 Recommendation, the European Commission highlighted the problem of severe housing deprivation affecting children and the increased number of children in homeless shelters. It also acknowledged that child poverty is linked with housing deprivation and barriers to accessing education, school attendance, educational attainments, good health and overall wellbeing.<sup>18</sup>

### Severe housing deprivation

'Severe housing deprivation' is defined as living in an overcrowded household with a leaking roof, no bath/shower or no indoor toilet, or in a dwelling considered too dark. A household is overcrowded if it does not have a minimum number of rooms equal to one room for the household; one room per couple in the household; one room for each single person aged 18 or above; one room per pair of single people of the same gender between 12 and 17 years of age; one room for each single person between 12 and 17 years of age and not included in the previous category; and one room per pair of children under 12 years of age.

Figure 8.2 shows the rate of severe housing deprivation in households with and without dependent children in the EU-28. The total for the EU is 7 % for families with children and 3 % when there are no children in the household. Having or not having dependent children has almost no impact on the rate in some Member States, such as **Croatia** or **Denmark**. In other Member States, the likelihood of severe housing deprivation is much higher for families with children, such as in **Portugal** (with a difference of 6 points) or **Lithuania** (difference of 9 points). It is highest in **Romania** (difference of 20 points). Only **Finland** shows a higher rate, although marginally, of housing deprivation for households with no dependent children. Severe housing deprivation particularly affects Roma people

Figure 8.2: Percentage of severe housing deprivation rate by household type, 2016



Source: FRA, 2017 (based on Eurostat (2017), *Severe housing deprivation rate by household type: EU-SILC survey, [ilc\_mdho06b]*, last update 19 December 2017)

within the EU, as shown in FRA's second European Union Minorities and Discrimination Survey (EU-MIDIS II).<sup>19</sup> For example, 'insufficient space' is more frequent in Roma households than in the general population, the survey results show.<sup>20</sup> For more information on Roma ► integration, see Chapter 5.

Housing is a matter of national, regional and local competence. However, several European policies have dealt with housing, such as the 2013 Recommendation 'Investing in children'<sup>21</sup> and the European Pillar of Social Rights. The Pillar provides for access to social housing, protection from forced eviction and support for homeless people, all of which can have a direct impact on the living situation of children.<sup>22</sup> Civil society, however, has raised concerns over the implementation of the aspects of the Pillar that deal with housing, given the non-binding nature of the principles and the lack of legislative proposals.<sup>23</sup>

In the European Semester, country-specific recommendations often include the topic of housing. In 2017, **Ireland**,<sup>24</sup> the **Netherlands**,<sup>25</sup> **Sweden**<sup>26</sup> and the **United Kingdom**<sup>27</sup> received recommendations on housing. The European Commission established a Housing Partnership<sup>28</sup> and an Urban Poverty Partnership under the Urban Agenda.<sup>29</sup> Both partnerships are developing action plans touching upon affordable housing as a way to support social cohesion, as well as national measures to combat child poverty and homelessness.

The EU is also supporting the efforts of Member States by funding various housing programmes, the majority of which specifically support families. It does this through the Urban Innovative Actions funds,<sup>30</sup> the Regional Policy EU Invest<sup>31</sup> and the European Regional Development Fund or Cohesion Fund.<sup>32</sup> The projects funded are very diverse, and range from supporting housing for unaccompanied children in Antwerp (**Belgium**)<sup>33</sup> to the construction of 71 social houses for families with children with health problems or disabilities in Sofia (**Bulgaria**).<sup>34</sup>

The Revised European Social Charter, a treaty of the Council of Europe, provides for the right to housing, and addresses adequate standard of housing, reduction in homelessness and affordability of housing.<sup>35</sup> However, only **Finland**, **France**, **Greece**, the **Netherlands**, **Portugal**, **Slovenia** and **Sweden** accepted the right to housing (Article 31) when ratifying the Revised European Social Charter.<sup>36</sup>

Housing is a broad and multifaceted issue and Member States approach it through different actions. In 2017, several Member States adopted new laws or regulations related to social housing, eviction or homelessness. For example, in **Italy**, the Law on urgent provisions on the safety of cities<sup>37</sup> establishes

that, in cases of squatting of buildings, the mayor can decide to prevent forced eviction if children or particularly vulnerable people live in the building. In **Romania**, the parliament adopted an amendment on housing, introducing the concept of 'support housing'. This is a type of social housing for individuals and families who have been evicted through forced implementation procedures because they cannot pay their mortgages.<sup>38</sup> In the Walloon region in **Belgium**, a new decree aims to extend the obligation to provide emergency housing; it introduces modifications to help bring unoccupied dwellings into use, and creates a mechanism to force the sale of social housing to its inhabitants.<sup>39</sup>

## Evictions

The number of families with children evicted every year in Europe is not known and there is no EU-wide collection of such data. National data are not always disaggregated to show if the household had children, and, if so, their gender and age. In 2015, 13 out of 28 EU Member States had no data regarding the characteristics of households affected by eviction, a study shows. Only seven countries had reliable and structured information on eviction.<sup>40</sup>

Local authorities generally ensure that families with children fall within the priority categories for accessing social housing. In addition, some Member States have adopted measures to protect families with children from eviction. For example, in **Sweden**, the National Board of Health and Welfare compared all Swedish municipalities' policies on homelessness and found that 23 % of the municipalities had action plans on how to protect children from evictions.<sup>41</sup> In **Portugal**, it is possible to postpone, also in private contracts, by one year the enforcement of the rental contract termination if the tenant has children below 18 years, or for persons under 26 years attending secondary or higher education.<sup>42</sup>

In **Spain**, the government approved a decree with measures to protect mortgage debtors in particularly vulnerable situations, such as households with children, single-parent households and large families.<sup>43</sup> Measures include suspending eviction for up to four years. Problems with evictions in Spain, however, have prompted severe criticism from civil society<sup>44</sup> and international human rights bodies. In 2017, the UN Committee on Economic, Social and Cultural Rights indicated that Spain had violated the right to housing in the case of a family with two young children, who were evicted from a rented room in a flat without being provided with alternative housing.<sup>45</sup> In addition, the Supreme Court declared the eviction of a family with three children in Madrid inappropriate until protection measures for the children were established, and required the previous instance to revise the

eviction decision.<sup>46</sup> A study on the demolition of illegal dwellings in Roma neighbourhoods in **Bulgaria** claimed that, despite the existence of a Roma strategy and action plan, alternative housing is available only as part of pilot projects funded by the EU, while the lack of funds prevents most municipalities from offering municipal housing to evicted Roma families.<sup>47</sup> For more information on Roma integration, see Chapter 5.

#### Promising practice

##### Private sector tackles energy poverty

A private gas company in **Spain**, Gas Fenosa, developed an action plan in 2017. It contains 20 measures to address energy poverty, and has a budget of € 4.5 million. The measures include a free-of-charge phone number with 24-hour support for clients in vulnerable situations and the establishment of a so-called Energy School. The courses at the Energy School target social workers working with families and answer questions such as how to read the bill, reduce the total due amount, reduce energy use or request a deadline extension to pay the bill.

Gas Fenosa also offers a discount of between 25 % and 40 % to clients who fulfil certain need criteria: disability, families with more than three children, long-term unemployed people, etc. For certain categories of persons at risk of social exclusion, the energy supply cannot be interrupted even when bills are not paid.

For more information, see Gas Fenosa's foundation's website.

## Homelessness

The unsystematic nature of measures to prevent eviction, and the delays in accessing social housing, are reflected in the number of homeless people in Europe, including children. Although Eurostat does not collect data on homelessness, some figures are available from national statistical offices and NGO reports. Statistics are often not comparable as some Member States register homeless households as one case, irrespective of the number of individuals concerned. In its 'Second overview of housing exclusion in Europe 2017', the European Federation of National Organisations Working with the Homeless (FEANTSA) draws attention to the alarming trend in Europe of worsening homelessness in all Member States except Finland. This exception shows the effectiveness of implementing a long-term homelessness strategy.<sup>48</sup>

In **Ireland**, recent statistics indicate that 3,000 children are currently homeless, with a reported 27 % increase in the number of homeless families from June 2016 to June 2017.<sup>49</sup> In the **Netherlands**, the Statistics Office publishes figures about the number of homeless people each year, but the information does not

include any figures about children.<sup>50</sup> Disaggregated information is, however, collected at municipal level and a new collaborative project with the central level will start in 2018.

#### Promising practice

##### Providing support to families at risk of homelessness in Austria

In **Austria**, there are a number of support services for people at risk of or in homelessness. They range from consulting, prevention of eviction, help in finding a new home, emergency shelter, day-centres, temporary apartments and assisted living.

During 2017, in seven out of the nine Austrian regions – Burgenland and Carinthia being the exceptions – social organisations provided a dedicated service for the prevention of eviction. People who have difficulties with paying the rent or are at risk of eviction for other reasons can get advice and counselling on how to proceed. There are also specialised services for specific groups, such as women with children and pregnant women.

For more information, see the website of the Austrian government.

International human rights monitoring bodies have raised concerns about the lack of access to adequate housing. In its decision in the case of the *International Federation for Human Rights (FIDH) v. Ireland*,<sup>51</sup> the European Committee of Social Rights found a violation of Article 16 of the Revised European Social Charter<sup>52</sup> (right of the family to social, legal and economic protection). The complaint was that the Irish legal, policy and administrative framework for housing was insufficient, as were the adequacy, habitability and regeneration of local authority housing. The Department of Housing, Planning and Local Government of **Ireland** has since adopted 'Rebuilding Ireland', an Action Plan for Housing and Homelessness.<sup>53</sup> The plan envisages concrete targets in the areas of homelessness, social housing and the rental market, and includes several legislative proposals.

## 8.2. Protecting children in migration remains a daunting challenge

People continue to arrive in Europe and apply for asylum, but their number has considerably decreased. More than 656,800 persons applied for asylum in the EU in 2017, including 199,665 children.<sup>54</sup> The number of children decreased almost by half compared to 2016, when 398,260 applied for asylum.<sup>55</sup> Given the temporary reintroduction of border controls,

the EU-Turkey statement<sup>56</sup> and changing migration routes, there were drastically fewer applications in some Member States, such as **Austria, Bulgaria** and **Germany**. However, in other Member States, mainly on the Mediterranean arrival route, such as **Italy, Greece, Spain**, as well as in **France**, the number of applications remained similar or increased compared to 2016.<sup>57</sup>

Unaccompanied children filed 63,245 asylum applications in 2016, according to the latest available Eurostat figures.<sup>58</sup> In **Italy**, by 31 December 2017, 18,303 unaccompanied children, 93 % male and 7 % female, were registered as being present, according to the Ministry of Labour and Social Politics.<sup>59</sup> In **Greece**, 5,446 unaccompanied children arrived between January and December 2017, according to UNHCR: 5,204 boys and 242 girls.<sup>60</sup>

These statistics, however, represent only part of the picture. Data collection about children in migration remains a critical issue. The European Commission's Knowledge Centre on Migration and Demography has expanded the datasets within its Dynamic Data Hub to include data on children in migration, disaggregated by age, on asylum, residence permits, resettlement, arrivals and UNHCR's populations of concern. Nevertheless, to better understand the necessary policy interventions, data are still needed in areas such as Dublin transfers, family unity and reunification procedures, irregular border crossings, children returned, children in immigration detention, missing children, as well as disaggregation by gender. Eurostat, as a follow-up to the Commission's 2017 Communication on the protection of children in migration, is already working on specific proposals to respond to policy needs raised. Eurostat has added a separate folder on children in migration to improve the visibility of children in data already collected.<sup>61</sup>

### 8.2.1. International and European efforts to protect children in migration

In April 2017, the European Commission published the long-awaited Communication on the protection of children in migration. It sets out a series of actions to be taken in view of the high numbers of migrant children arriving and living in the EU and the growing pressure on national migration and child protection systems.<sup>62</sup> The Council of the EU upheld the recommendations in its conclusions on the protection of children in migration adopted on 8 June 2017.<sup>63</sup> Meanwhile, in May 2017, the Council of Europe adopted its Action Plan on protecting refugee and migrant children 2017–2019.<sup>64</sup>

In its Communication, the Commission raises a series of issues, ranging from addressing root causes of migration and protecting children on migration routes,

to suggesting actions and appropriate treatment of children arriving or staying in the EU. It calls on Member States to actively implement in relations with non-EU countries the 2017 EU Guidelines on the Promotion and Protection of the Rights of the Child.<sup>65</sup> The Communication requires child-friendly and gender-sensitive procedures when, for instance, assessing age or taking fingerprints and biometric data. FRA has published a report on the fundamental rights implications of large-scale EU information systems and the use of biometrics, including the implications for children.<sup>66</sup> As one of the actions that the Communication planned, the European Asylum Support Office (EASO) is developing a guide on age assessment.<sup>67</sup> The Council of Europe's Ad hoc Committee for the Rights of the Child is elaborating recommendations on age assessment and guardianship, for consideration and adoption by the Committee of Ministers in 2019. These recommendations will also support the network of guardianship authorities created in 2017 by the European Commission, and coordinated by the Dutch guardianship authority, NIDOS.

A positive development has been the appointment of child protection staff in the hotspots in **Greece**, a recommendation deriving from the Communication. However, the reception conditions in Greek hotspots are still a major challenge. These include a lack of appropriate accommodation – with unheated containers or tents being used – and very limited educational activities.<sup>68</sup> During 2017, FRA, together with EASO, provided training to the appointed child protection staff and other local actors to identify the best ways to deal with the protection of unaccompanied children. Following an urgent monitoring round, the Lanzarote Committee adopted a Special report outlining 37 recommendations to Member States to protect refugee and migrant children, especially girls, from sexual exploitation and sexual abuse.<sup>69</sup>

Appropriate accommodation is not enough to secure the future well-being of children. Indeed, the Communication stresses that children also need access to education, healthcare, psychosocial support, leisure activities and integration-related measures. Member States need to ensure durable solutions for all children. The 2017 Recommendation on the Return Directive also calls on them to establish clear rules on the legal status of unaccompanied children, based on an individual best interests assessment.<sup>70</sup> The return of unaccompanied children is highly contested and often difficult to implement in practice, especially when the family members are not found. According to the latest guidance by the UN Committee on the Rights of the Child and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW Committee), children can be returned only if there are guarantees that they will be appropriately cared for and that their fundamental





rights will be respected, and if it is in the best interests of the child.<sup>71</sup>

### 8.2.2. Immigration detention of children

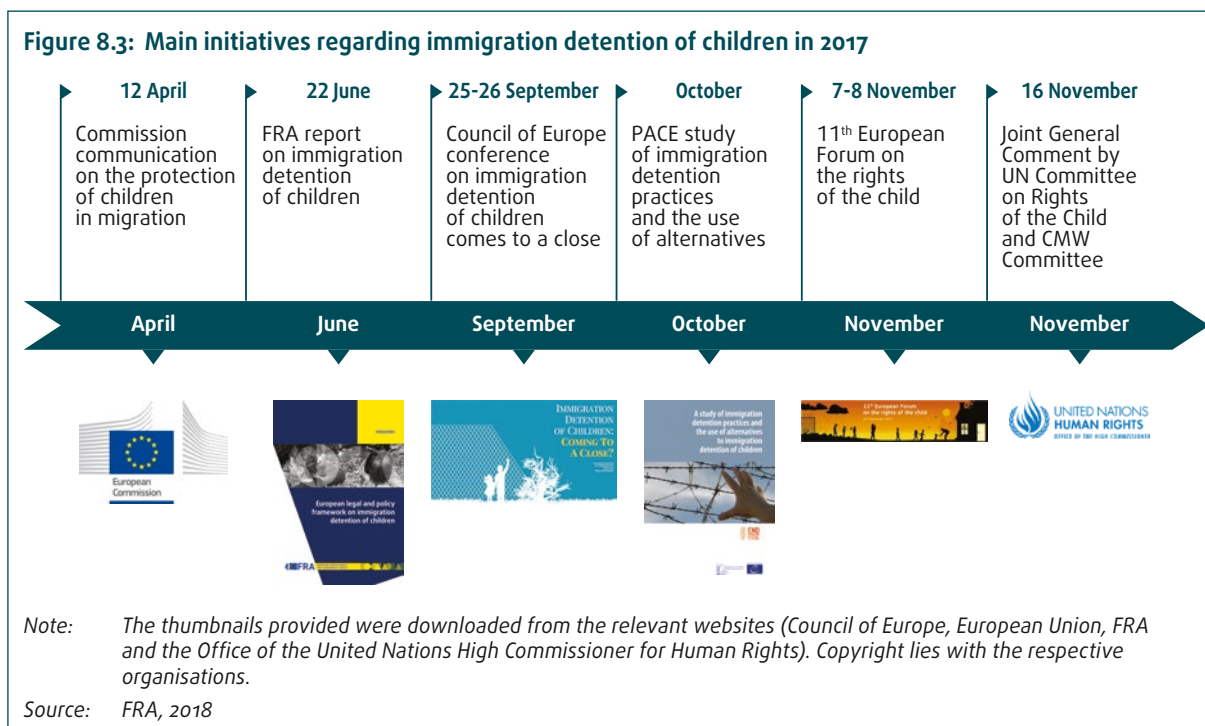
Under EU law, the Return Directive regulates the detention of migrants in an irregular situation pending removal, and the Reception Conditions Directive governs detention of applicants for international protection. Article 28 of the Dublin Regulation also envisages detention in the context of transfers between Member States. These instruments emphasise that children are to be detained only as a last resort and only if less coercive measures cannot be applied effectively. Such detention must be for the shortest time possible.<sup>72</sup> The stringent requirements flowing from the Charter and from Article 3 (prohibition of torture) and Article 5 (right to liberty and security) of the ECHR mean that deprivation of liberty will be in line with EU law only in exceptional cases.

Different European actors paid particular attention to immigration detention of children with various important initiatives in 2017, as illustrated in Figure 8.3. At the EU level, the European Commission's Communication on the protection of children in migration underlined that deprivation of liberty is allowed only under exceptional circumstances and never in prison accommodation.<sup>73</sup> This clarification is important, given that, a few weeks earlier, it had also recommended to Member States not to ban immigration detention of children.<sup>74</sup> The European Forum on the Rights of the Child was devoted to children deprived

of liberty, and discussed concrete ways to promote alternatives to detention for children.<sup>75</sup> FRA published a report on the European legal and policy framework on immigration detention of children.<sup>76</sup> Later in the year, the Council of Europe (CoE) held a major conference on ending immigration detention of children.<sup>77</sup> The CoE's Parliamentary Assembly continued its campaign to end immigration detention of children, publishing a guide on monitoring<sup>78</sup> and a study of immigration detention practices and the use of alternatives.<sup>79</sup>

At the UN level, the Committee on the Rights of the Child and the CMW Committee issued two Joint General Comments in which they deemed immigration detention of children a violation of the rights of the child. They affirmed that children "should never be detained for reasons related to their or their parents' migration status".<sup>80</sup>

Children's right to protection and care and the principle of the best interests of the child are the starting points when examining deprivation of liberty of children. Detention has a negative impact on children, no matter in which context it takes place. Deprivation of liberty can have short- and long-term negative effects on the physical, psychological, social and general development of a child, as research shows.<sup>81</sup> The impact of detention can persist long after the child has been released. Detention has undeniable immediate and long-term mental-health effects on asylum-seeking children, mental-health experts report.<sup>82</sup> Although some children recover, for others, mental-health effects may continue for a long time, according to child psychiatrists who work with



children after their release.<sup>83</sup> For this reason, the European Court of Human Rights (ECtHR) considers the child's "extreme vulnerability" to be the "decisive factor and takes precedence over considerations relating to the status of illegal immigrant".<sup>84</sup> In a case decided in December 2017, the ECtHR found that the detention of an Iraqi family in an inadequate facility for a period of 32 or 41 hours – the exact length of detention was disputed – amounted to the **Bulgarian** authorities having subjected the family to inhuman and degrading treatment.<sup>85</sup>

Respecting the right to liberty and security requires states to adopt less intrusive alternatives to detention. Where the authorities fail to examine all alternatives – including placement in an open facility without restrictions on the child's fundamental rights – the detention of children will be considered arbitrary and a violation of the right to liberty and security. Against this background, the European Commission encouraged EU Member States to ensure that alternatives to detention are available and accessible and to monitor their use, indicating that it would support initiatives in this direction.<sup>86</sup>

Some EU Member States made progress in the use of alternatives to detention. In **Poland**, apprehended migrants in an irregular situation include a significant number of families with children. The percentage of decisions imposing an alternative to detention increased from 11 % in 2014 to over 23 % in 2017. Almost 80 % of the 2,139 migrants subject to alternatives to detention in 2017 respected the conditions imposed.<sup>87</sup> This did not, however, result in a decrease in the number of children in detention, given that families who breached the conditions imposed with the alternatives to detention were subsequently placed in administrative detention. In **France**, administrative detention in cases of families with children in an irregular situation has increased,<sup>88</sup> despite recent ECtHR judgments condemning such practices as incompatible with children's rights and best interests.<sup>89</sup> In **Belgium**, a coalition<sup>90</sup> of more than 100 NGOs has taken a stand against the construction of a new closed centre for the detention of families with children.

One tool to reduce the need for deprivation of liberty in the context of returns is case management. This approach prioritises social work and engagement with migrants over the use of coercive measures. Through regular contacts with social workers who are independent from the immigration authorities, migrant children are given an opportunity to understand their situation and the realistic options they have. A European Alternatives to Detention Network, established in 2017, links civil society organisations developing case-management-based pilot projects.<sup>91</sup> This network supports different projects in EU Member States, including a case-management pilot project with

50 people in **Bulgaria**. This specific project currently mainly addresses single men, but could equally be applied to children. Nevertheless, the results, in terms of preventing people from absconding, are revealing: after one year, in December 2017, only two persons had absconded, four had returned voluntarily, two had obtained humanitarian status and the remaining 42 were still participating in the project.<sup>92</sup>

Although no legal norm in human rights or EU law explicitly prohibits immigration detention of children, there is an increasing consensus among international organisations, treaty bodies and other human rights protection mechanisms that immigration detention of children contradicts the duty to provide care imposed by the Convention on the Rights of the Child. As international human rights law is evolving, an increasing gap is emerging between EU law and the way international human rights law is interpreted.

### 8.2.3. Implementing best interests of the child in migration context proves challenging

Protecting migrant children remains challenging, as FRA's monthly updates on migration have shown.<sup>93</sup> Given the reduction in the number of children arriving, the focus is increasingly on long-term needs, where a durable solution for each child needs to be found. In this context, assessing the best interests of the child becomes even more essential.

The best interests of the child is a complex concept which, according to the UN Committee on the Rights of the Child, forms a principle of law, an actual right, and a rule of procedure.<sup>94</sup> It is established in the UN Convention on the Rights of the Child (Article 3), in the EU Charter of Fundamental Rights (Article 24), in EU secondary law and in most national legislation related to children. In the area of asylum, EU directives and regulations have made abundant reference<sup>95</sup> to the need to consider the best interests of the child in different processes. The UN Committee on the Rights of the Child often mentions the need to apply best interests in practice in its concluding observations when examining national reports.<sup>96</sup>

The best interests of the child is an important element in decisions taken by the CJEU, such as in *C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others*,<sup>97</sup> or in pending cases, as evidenced in the Opinion by Advocate-General Bot in the case on family reunification.<sup>98</sup> It is also important in national case law. For example, in **Slovenia**, an administrative court rejected the Ministry of the Interior's decision to return a Somali woman and her child to Italy, the Member State through which they entered the EU; it held that assessing the best

interests of the child required the authority to make a more detailed and deliberate investigation of the conditions in the Member State to which it proposed to return them.<sup>99</sup> In **Luxembourg**, an administrative court granted permission to an Albanian boy to stay until the age of 18, based on the best interests of the child, going against the Ministry of Foreign Affairs' decision to remove the boy, who did not qualify for international protection.<sup>100</sup>

*“An adult’s judgment of a child’s best interests cannot override the obligation to respect all the child’s rights under the Convention.”*

*UN Committee on the Rights of the Child, General Comment No. 14, paragraph 4*

*“Children should be always involved when adults take decisions that affect them.”*

*Girl participant at FRA symposium ‘Is Europe doing enough to protect fundamental rights?’, Brussels, 28 June 2017*

Despite its broad inclusion at all levels of legislation, the practical implementation of the best interests principle remains a challenge. The Committee on the Rights of the Child and the CMW Committee<sup>101</sup> provided some guidance on best interests implementation in 2017, as shown in [Table 8.1](#).

Best interest-assessment practices in Member States are diverse, and depend not only on the Member State but also on the different actors or specific procedure involved. Some Member States might assess best interests on a regular basis and rather informally, or more formally only in certain procedures. This more formal procedure may have different names in Member States: determination process, risk assessment or something else.<sup>102</sup> Initial evidence suggests that most assessments of best interests are considered informal, undertaken on an ad hoc basis, by one or two officials, with no systematic method, and with no record made of them.

Although the EU *acquis* enshrines the legal obligation to consider the best interests of the child, the data collection undertaken for this report found only a few structured systems in place where trained and competent staff follow a method, tools or concrete guidance.

Nevertheless, throughout 2017, different national authorities and organisations developed and used clear processes and methods that specify how the best interests of the child will be assessed in practice. For example, in the **Netherlands**, the University of Groningen developed a tool that allows a multidisciplinary team to assess the best interests of the child and prepare a report for use in administrative or judicial migration proceedings.<sup>103</sup> The model is based on the guidance provided by the UN Committee on the Rights of the Child and includes 14 aspects to consider when assessing the best interests of the child.<sup>104</sup>

In **Ireland**, the best interests assessment is called the ‘care plan’. It is a statutory requirement;<sup>105</sup> a social worker of the Child Protection Services carries it out during the first week of the stay in care. The voice of the child is central, and during the interview the child can bring a person of trust. Teachers, family members and NGOs can be consulted when developing the care plan.

**Table 8.1: Elements to consider when assessing the best interests of the child, according to the Committee on the Rights of the Child and the CMW Committee**

General elements	Specific elements in context of migration
Care, protection and safety of the child	Child’s specific reasons for migrating
Situation of vulnerability	Social and cultural contexts
Child’s views	Belonging to a minority group
Child’s identity	Need for comprehensive and long-term solutions
Right to health	Promoting integration
Right to education	Priority to family- and community-based accommodation
Family environment and relations	In case of a return to the country of origin, ensuring the child will be safe and cared for and his/her rights ensured
	Assessment carried out by actors independent from migration-enforcement authorities

Source: FRA, 2018 (based on UN, Committee on the Rights of the Child, General Comment No. 14; and UN, Committee on the Rights of the Child and CMW Committee, Joint general comment No. 3 on the general principles regarding the human rights of children in the context of international migration, 16 November 2017)

In **Sweden**, the assessment is called the 'child impact analysis'. It is carried out at municipal level and recorded in a digital online migration database. The case handler cannot proceed if best interests of the child-related steps have not been completed. The system was developed by national authorities together with the Ombudsperson for children and is currently under review. In **Luxembourg**, the government took the initiative to create an 'Evaluation Committee for the best interests of the child', which is to evaluate, on a case-by-case basis, the best interests of unaccompanied children who have not been granted international protection. The committee is to be formed of representatives of different authorities, such as from the youth system, reception, immigration and the National Children's Office. Its opinions will not be binding, but will have an advisory status.<sup>106</sup>

EASO is currently developing guidance on the best interests assessment to be published in 2018. It will provide guidance to Member States on specific elements of best interests assessments in the asylum procedure. For more information on asylum and migration, see Chapter 6.

### 8.3. Extremism and radicalisation of children and young people

Terrorist attacks in several Member States in 2017 again raised the debate about the danger of radicalisation leading to violent extremism and terrorism. However, available research data are scarce, with no EU-wide research, and they do not always focus on children and young people or include a gender perspective.<sup>107</sup> Regarding online radicalisation, the current evidence on the link between the internet, social media and violent radicalisation is limited and inconclusive.<sup>108</sup> Nevertheless, at the EU level, the issue of children and young people being at risk of radicalisation is attracting particular attention, since children might be more vulnerable to being influenced and manipulated by adults and extremist propaganda, requiring the development of tailored responses.<sup>109</sup>

#### 8.3.1. Stepping up efforts to counter radicalisation

Radicalisation is the process leading to violent extremism and terrorism. The EU institutions in 2017 multiplied their actions to support Member States in exercising their powers in the field of protecting children and young people from radicalisation and extremist propaganda. Preventing and countering it is a primary component of the EU policy to fight

against terrorist threats and a priority for the EU internal security strategy.<sup>110</sup> National security remains the sole responsibility of each Member State, as provided by Article 4 (2) of the Treaty on European Union.<sup>111</sup> However, fighting the spread of radicalisation, especially online, and preventing and countering violent extremism are among the priorities of Member States' cooperation at the EU level.<sup>112</sup>

The Directive on combating terrorism reflects the need to pay special attention to protecting and preventing children from being radicalised. The directive was adopted in March 2017 and is to be incorporated into national legislation by 8 September 2018.<sup>113</sup> It calls on Member States to adopt the necessary measures to ensure that, in sentencing, judges take into account that criminal offences related to recruiting and training for terrorism may have targeted children.<sup>114</sup>

The European Council updated the Guidelines for the EU Strategy for Combating Radicalisation and Recruitment to Terrorism in 2017. It pointed out that "policy responses need to make use of all relevant policy areas and instruments, including criminal justice, education, social inclusion, citizenship and European values" to protect children and prevent their radicalisation.<sup>115</sup>

The European Commission established a High-Level Commission Expert Group on Radicalisation (HLCEG-R) in 2017.<sup>116</sup> It brings together Member States' competent authorities, the European Commission and EU services, institutions and agencies, including FRA. It aims to enhance efforts to prevent and counter radicalisation, including of children and young people, and to improve coordination and cooperation among all relevant stakeholders.

In its first report in December 2017,<sup>117</sup> the HLCEG-R underlines that its work refers to all forms of radicalisation, but sets Islamist extremist ideology as a priority area. The report also points out that special attention should be paid to right-wing extremism. It provides a number of recommendations for the Commission and for Member States, recognising education, social inclusion and youth policies as important factors in tackling radicalisation. In this respect, it recommends raising awareness and implementing measures to prevent early school leaving or school exclusion; enhancing equity and social cohesion; and encouraging active citizenship and promoting such common fundamental values as freedom, tolerance and non-discrimination. Children are among the selected priority topics for the HLCEG-R in 2018.

One main focus of the EU's actions in 2017 was the treatment of young European 'foreign fighters' in conflict zones such as Syria and Iraq returning to Europe; children born to and raised by European

'foreign fighters' in those areas coming to Europe (child 'returnees'); children remaining in the EU but with parents or siblings who have left for Syria/Iraq; and refugee and migrant children arriving in Europe from that region. Because of their exposure to radicalised environments and, in some cases, violence, these children and young people are perceived as a potential threat, but also as victims. The EU Counter-Terrorism Coordinator carried out a survey in 2017 aimed at identifying Member States' approaches to dealing with child returnees, including refugee children who arrive in the EU.<sup>118</sup> There is not much experience yet in dealing with these children, the survey shows. Handling children in this context must give due importance to, among other considerations, the role of child protection authorities, the importance of an individual risk- and needs-assessment for each child, and tailored responses, as well as to respect for the rights of the child, the survey report suggests.

The Radicalisation Awareness Network (RAN), which the European Commission funds and supports, launched an initiative entitled RAN Young, calling for the involvement of young persons in the development of anti-radicalisation programmes.<sup>119</sup> Engaging children not just as beneficiaries, but as partners, is also a principle for any programme developed, as suggested by research.<sup>120</sup> Moreover, RAN has established a specific working group focusing on youth, families and communities and published a manual on responses to the issue of foreign fighters and their families returning to their home countries in the EU from conflict zones. The manual highlights the need for a gender perspective when dealing with women and girls. It suggests that women returnees are often isolated, and might require specific support given possible traumatic experiences.<sup>121</sup> A report by the European Parliament analyses the motivation of women and girls to join ISIS and provides a number of recommendations to address the misconception that female radicalisation can be explained as a single-causal process, predominately fed by emotional or personal factors.<sup>122</sup>

In December 2017, the EU's European Economic and Social Committee (EESC) adopted an Opinion highlighting the major role that civil society actors, especially youth organisations, play in preventing the radicalisation and extremism of young people.<sup>123</sup> The opinion underlines the importance of inclusive formal and non-formal education, the social responsibility of religious communities and the need for social media businesses to get involved in countering hate speech and extremist narratives.

The European Commission addressed the removal of terrorist and violent extremist online content in its Communication on tackling illegal content online, adopted in September 2017.<sup>124</sup> The EU Internet Forum

also adopted an Action Plan to combat terrorist propaganda online.<sup>125</sup> The Commission has established the Civil Society Empowerment Programme, which undertakes various activities to promote the involvement of civil society.<sup>126</sup> For example, RAN organised 27 training sessions around Europe for civil society organisations, covering the skills and knowledge needed to develop online counter- and alternative-narrative campaigns to address radicalisation and violent extremism, and promote moderate voices.<sup>127</sup>

The UN Security Council has also emphasised the need to support education programmes to prevent young people from accepting terrorist narratives, and the need to engage a wide range of actors, including youth, families, women and civil society in general.<sup>128</sup> The UN Office on Drugs and Crime (UNODC) produced a manual on recruitment and exploitation of children by terrorist groups, focusing on prevention, justice for children, rehabilitation and reintegration.<sup>129</sup>

### Promising practice

#### Developing counter-narratives in Germany

Germany has set up an umbrella programme to prevent extremism and radicalisation, with children and young persons a key target group. '*Demokratie leben!*' (Live Democracy!) began in 2015; the German Government gave it € 104.5 million in funding in 2017. Most of its initiatives focus on raising awareness regarding racism, antisemitism, homophobia and online hate.

One of the projects that it funds focuses on civic education on Islamophobia and Islamism among peers. Called '*Was postest du?*' ('What are you posting?'), it aims to provide alternative perspectives to challenge Islamist narratives in social networks. Muslim adults enter into online discussions with young Muslim people, encouraging them to develop individual responses to relevant societal topics. Follow-up projects are taking up these experiences – for instance, developing online videos or tools for schools, countering radical propaganda. All of the initiatives render visible the diversity of Muslim approaches and intervene in early stages of radicalisation.

*For more information, see the website of the 'Live Democracy' programme and of Ufuq.de.*

The HLCEG-R has also emphasised the need to map, promote research into and evaluate the impact of anti-radicalisation programmes.<sup>130</sup> There is little research on this. For example, the Department for Education in the **United Kingdom** surveyed how local authorities respond to radicalisation cases, and what social interventions worked in 10 municipalities. The report makes a number of recommendations,

including strengthening multiagency coordination and information sharing, working with the families of the children, and establishing a single referral system.<sup>131</sup> The European Commission funded the initiative IMPACT Europe, which aims to fill the gap in knowledge and understanding of what works in tackling violent extremism. This project came to an end in 2017, with the development of an evaluation guide, a database of interventions, a compilation of lessons learned and a training manual.<sup>132</sup>

### 8.3.2. Member States' national agendas target radicalisation

Addressing radicalisation and violent extremism remained high on the policy agenda of some Member States during 2017. Most Member States have implemented programmes in the field of radicalisation, ranging from action plans and training of police or teachers, to developing educational programmes for schools<sup>133</sup> and creating centres of expertise.

For example, the government of **Denmark** presented a National Action Plan to combat radicalisation. The priorities for 2017 include improving the capacities of educational institutions to prevent radicalisation and extremism through tailor-made educational material and guidance for professionals, dialogue activities, and online campaigns with a focus on strengthening critical thinking, particularly among children and young people.<sup>134</sup> In the **Netherlands**, a report from the Dutch General Intelligence and Security Service and the National Coordinator for Security and Counterterrorism focused on what to do with children and young people returning from Islamic State (IS) territory.<sup>135</sup>

The **Slovak** Ministry of Education published Pedagogical-organisational Guidelines for School 2017–2018, with recommendations on preventing extremism and radicalisation in schools.<sup>136</sup> The

**Swedish** Agency for Youth and Civil Society published a guide on how civil society actors and municipalities can cooperate in actions counteracting extremism that promotes violence.<sup>137</sup>

In **Belgium**, the Wallonia–Brussels Federation opened a centre for help and care of persons affected by radicalisation and violent extremism. It offers systematic individualised care to children and adults susceptible to radicalisation and provides support to families. Concretely, it provides a telephone contact line and psycho-social assistance, initiates tailor-made disengagement paths, and coordinates a research centre.<sup>138</sup>

#### Promising practice

##### Using education to address the radicalisation of young people

In **Belgium**, an educational tool accompanies *Lettres à Nour*, a play that tells the story of the correspondence between a father and his daughter who went to fight for IS. The tool is divided into nine chapters, each of which deals with a topic such as Islam, geopolitical considerations or manipulation methods. The tool is meant to serve as a resource for teachers of students in years 5 and 6 to generate in-depth reflection on the phenomenon of radicalisation in the classroom.

*For more information, see the webpage on the play.*

In **Sweden**, the Dialogue Compass offers governmental-developed educational material for professionals (such as social workers, teachers, police officers, nurses and youth leaders) who meet young people at risk of radicalisation. The material aims to prevent radicalisation of young people by engaging in supportive and preventive dialogue.

*For more information, see the project website.*

## FRA opinions

In line with the trend of the previous two years, the number of children in the EU living at risk of poverty or social exclusion continued to decrease. Nevertheless, almost 25 million children are at risk of poverty or social exclusion; this requires the urgent attention of the EU and its Member States. Article 24 of the EU Charter of Fundamental Rights provides that “[c]hildren shall have the right to such protection and care as is necessary for their well-being”. The European Semester in 2017 included an increased number of country-specific recommendations related to children – but, for the first time, none related to child poverty. EU Member States make very limited use of the European Commission’s 2013 Recommendation ‘Investing in children: breaking the cycle of disadvantage’ in their National Reform Programmes as part of the European Semester. Although it has been criticised by civil society actors, the European Pillar of Social Rights might present an opportunity to change child poverty rates and reinforce the Commission’s 2013 Recommendation, the implementation of which the Commission evaluated in 2017.

### FRA opinion 8.1

*The European Union and its Member States should ensure they deliver on the commitments included in the European Pillar of Social Rights to protect children from poverty, provide access to affordable early childhood education and care of good quality without discrimination. They should also ensure the right of girls and boys from disadvantaged backgrounds to specific measures to enhance equal opportunities. The implementation of the Pillar requires concrete legislative proposals, action plans, budgetary allocation and monitoring systems in all areas that affect children and their families, such as employment, gender equality, access to health services, education and affordable housing.*

*EU Member States should make use of the Commission’s 2013 Recommendation ‘Investing in children’ when presenting their National Reform Programmes for the European Semester.*

Seven per cent of families with children in the EU experience severe housing deprivation. They are living in overcrowded households with at least one of the following: a leaking roof, no bath/shower and no indoor toilet, or insufficient light. Despite the lack of EU-wide data on evictions and homelessness, reports from national statistical offices and NGOs highlight an increased number of children in homeless shelters. Article 34 (3) of the EU Charter of Fundamental Rights recognises “[t]he right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance

with the rules laid down by Community law and national laws and practices”. The European Pillar of Social Rights’ principles also include access to social housing, protection from forced eviction and support to homeless people – but, in contrast to the Revised European Social Charter, the Pillar does not establish any binding measures. However, when ratifying the Revised European Social Charter, only seven Member States accepted as binding the provision on the right to housing.

### FRA opinion 8.2

*EU Member States should establish the fight against severe housing deprivation as a political priority and ensure that families with children, especially those living at risk of poverty, have priority access to social housing or are provided with adequate housing assistance. Relevant authorities should address homelessness and implement measures that include the prevention or delay of evictions of families with children, especially during winter. While doing so, Member States should make use of various housing funding programmes that the EU offers.*

*The EU should promote regional and cross-national exchange of practices related to practical measures to prevent evictions of families with children. It should also promote EU-wide efforts to collect data on evictions of families with children and on homelessness.*

The number of asylum seekers and refugees arriving in Europe decreased in 2017. Fewer than 200,000 children applied for asylum in the EU, a reduction of almost 50 % compared with 2016. The European Commission’s 2017 Communication setting out actions to protect children in migration was a positive step forward. The best interests of the child is a well-established international human rights law principle enshrined in the Convention on the Rights of the Child (Article 3), the EU Charter of Fundamental Rights (Article 24) and EU secondary law, as well as in most national legislation related to children. However, there is a shortage of guidance, data collected for FRA’s *Fundamental Rights Report 2018* show; only a few Member States have developed structured processes and methods to implement the best interests of the child in practice.

FRA opinion 8.3

*EU Member States should formalise procedures appropriate for their national contexts for assessing the best interests of the child in the area of asylum or migration. Such procedures should clearly define situations when a formal best interests determination is necessary, who is responsible, how it is recorded and what gender and cultural-sensitive methodology it should follow.*

*The EU could facilitate this process by coordinating it, mapping current practice and guiding the process, through the existing networks of Member States on the rights of the child and the protection of children in migration, which the European Commission coordinates.*

Children continue to be detained for immigration purposes. However, a number of Member States have taken positive steps towards developing alternatives to detention. The EU *acquis* establishes that children are to be detained only as a last resort and only if less coercive measures cannot be applied effectively. Such detention must be for the shortest period of time possible. At the United Nations level, the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families issued two Joint General Comments in which they deem immigration detention of children a violation of the rights of the child. They affirm that children “should never be detained for reasons related to their or their parents’ migration status”. The stringent requirements flowing from the EU Charter of Fundamental Rights and from Articles 3 (prohibition of torture) and 5 (right to liberty and security) of the European Convention on Human Rights (ECHR) mean that deprivation of liberty will be in line with EU law only in exceptional cases.

FRA opinion 8.4

*To promote children’s right to protection and care, the EU and its Member States should develop credible and effective non-custodial alternatives that would make it unnecessary to detain children during asylum procedures or for return purposes, regardless of whether they are in the EU alone or with their families. This could include building on, for example, case management, alternative care, counselling and coaching.*

*The European Commission should consider the systematic monitoring of the use of immigration detention for children and other people in a vulnerable situation.*

Radicalisation and violent extremism, rooted in different ideologies, is a reality in Europe. The establishment of the EU High-Level Commission Expert Group on Radicalisation (HLCEG-R) is a promising development towards a comprehensive response. A number of fundamental rights concerns come into play in the area of radicalisation and in implementing the EU’s internal security strategy. Member States have implemented a combination of law enforcement measures, but also established educational programmes or centres of support for children at risk of radicalisation and their families, or promoted alternative narratives on online platforms.

FRA opinion 8.5

*EU Member States should address the complex phenomenon of radicalisation through a holistic, multidimensional approach going beyond security and law enforcement measures. For this, Member States should establish programmes that promote citizenship and the common values of freedom, tolerance and non-discrimination, in particular in educational settings. Member States should encourage effective coordination among existing actors in child protection, justice, social and youth care, health and education systems to facilitate comprehensive integrated intervention.*





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# UN & CoE

January

February

March

2 March – In *Talpis v. Italy* (No. 41237/14), the European Court of Human Rights (ECtHR) holds that the Italian authorities failed to protect a mother and son because they did not take prompt action on a complaint concerning conjugal violence, which resulted in violation of the right to life, inhuman or degrading treatment and discrimination (Articles 2, 3 and 14 of the European Convention on Human Rights (ECHR))

13 March – Council of Europe's Commission for Democracy through Law (Venice Commission) adopts its Opinion on questions relating to the appointment of judges of the Constitutional Court in Slovakia

April

26 April – Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2159 on protecting refugee women and girls from gender-based violence

May

12 May – Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Committee) adopts its 3<sup>rd</sup> activity report

19 May – Committee of Ministers of the Council of Europe adopts its revised Guidelines on the protection of victims of terrorist acts

June

29 June – PACE adopts resolution 2178 on the implementation of judgments of the ECtHR, stressing that the excessive length of judicial proceedings and lack of an effective remedy in this respect has remained an issue for more than ten years; this problem concerns, among others, Bulgaria, Hungary, Italy, Poland and Romania

PACE also adopts resolution 2177 on putting an end to sexual violence and harassment of women in public space

July

August

September

27 September – Monitoring mechanism GREVIO set out in the Istanbul Convention publishes the first evaluation report on the situation in Austria and its compliance with the convention

October

November

22 November – Austria, Bulgaria and Luxembourg sign the Council of Europe's Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons

24 November – GREVIO (Istanbul Convention monitoring mechanism) publishes first evaluation report on the situation in Denmark and its compliance with the convention

30 November – European Network of National Human Rights Institutions (ENNHRI) adopts a statement highlighting the need for strong and independent national human rights institutions to uphold the rule of law and democratic space across Europe

December

8 December – Council of Europe's Venice Commission adopts two opinions on the judicial reforms in Poland, concluding that they enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to judicial independence

# EU

## January

## February

## March

7 March – EU adopts Directive (EU) 2017/541 of the European Parliament (EP) and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

## April

4 April – European Parliament (EP) adopts a recommendation following an inquiry into emission measurements in the automotive sectors, calling for the establishment of an EU-wide system of collective redress regarding emission measurements in the automotive sector

28 April – Based on decisions of the Court of Justice of the EU (CJEU), the European Commission adopts a Notice on Access to Justice in Environmental Matters on how national courts should address questions of access to justice related to EU environmental legislation

## May

22 May – European Commission launches call for evidence on the operation of collective redress arrangements in the Member States of the EU within the meaning of Commission Recommendation 2013/396/EU

## June

13 June – EU signs the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

## July

## August

## September

12 September – EP issues a resolution asking the Council, the Commission and the Member States to speed up negotiations on ratification and implementation of the Istanbul Convention and to make sure that the Member States enforce the convention on national level

## October

12 October – In *Frank Sleutjes (C-278/16)*, the CJEU clarifies which documents must be translated to ensure a fair trial

12 October – Council Regulation establishing the European Public Prosecutor's Office (EPPO) 2017/1939 is adopted by 20 EU Member States that are part of the EPPO enhanced cooperation

26 October – EP issues resolution 2017/2897 (RSP) on combating sexual harassment and abuse in the EU

## November

14 November – In *Maximilian Schrems v. Facebook Ireland (C-498/16)*, Advocate-General Bobek observes that Regulation 44/2001 does not provide specific provisions for collective redress; the Opinion concluded that Article 16 (1) of the regulation, which deals with jurisdiction over consumer contracts, cannot be interpreted as allowing consumers to invoke at the same time as their own claim, claims on the same subject assigned by other consumers, irrespective of their domicile

## December

4 December – European Commission publishes a Communication containing a list of concrete actions to better prevent trafficking in human beings

12 December – Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 is adopted

14 December – European Parliament adopts resolution on the implementation of Directive 2011/93/EU of the EP and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (2015/2129(INI))

20 December – European Commission issues the Reasoned Proposal in accordance with Article 7(1) of the Treaty on EU regarding the Rule of Law in Poland accompanied by the Rule of Law Recommendation; it also refers the Polish Government to the CJEU for breach of EU law, concerning the Law on the Ordinary Courts and, specifically, the retirement regime it introduces



# 9

## Access to justice including the rights of crime victims



Despite various efforts by the EU and other international actors, challenges in the areas of the rule of law and justice posed growing concerns in the EU in 2017, triggering the first-ever Commission proposal to the Council to adopt a decision under Article 7 (1) of the Treaty on European Union. Meanwhile, several EU Member States took steps to strengthen their collective redress mechanisms in line with Commission Recommendation 2013/396/EU, which potentially improves access to justice. Victims' rights also saw progress. About a third of EU Member States adopted legislation to transpose the Victims' Rights Directive; many implemented new measures in 2017 to ensure that crime victims receive timely and comprehensive information about their rights from the first point of contact – often the police. The EU signed the Istanbul Convention as a first step in the process of ratifying it. Another three EU Member States ratified the Convention in 2017, reinforcing that EU Member States recognise the instrument as defining European human rights protection standards in the area of violence against women and domestic violence. This includes sexual harassment – an issue that received widespread attention due to the #metoo movement.

### 9.1. Rule of law challenges and hurdles to justice pose growing concerns

*“The rule of law means that law and justice are upheld by an independent judiciary. Accepting and respecting a final judgment is what it means to be part of a Union based on the rule of law ... To undermine [the judgments of the Court of Justice], or to undermine the independence of national courts, is to strip citizens of their fundamental rights. The rule of law is not optional in the European Union. It is a must.”*

*Jean-Claude Juncker, President of the European Commission, Speech on the State of the Union, 13 September 2017*

An independent judiciary is the cornerstone of the rule of law, which Article 2 of the Treaty on European Union (TEU) lists as one of the core values on which the Union is founded. The European area of justice can only work if all EU Member States adhere to the rule of law. An independent judiciary is also – as outlined in a study by the EU's Joint Research Centre – intrinsically linked to a country's prosperity and international standing.<sup>1</sup> According to Goal 16.3 of the 2030 Agenda for Sustainable Development, UN member states are

expected to promote the rule of law at the national and international levels and ensure equal access to justice for all.<sup>2</sup>

The rule of law situation in **Poland** continued to cause growing concern. In 2017, for the first time in the history of the EU, the European Commission recommended that the Council adopt a decision under Article 7 (1) of the TEU.<sup>3</sup> The main concerns related to Poland's executive and legislative branches interfering with the composition, powers, administration and functioning of the judicial branch. The situation worsened despite continued efforts to address these fundamental rights challenges by the EU, including the European Parliament<sup>4</sup> and the Council,<sup>5</sup> as well as various international actors. These included the Council of Europe – particularly its Venice Commission and Commissioner for Human Rights<sup>6</sup> – and the United Nations (via the Special Rapporteur on the independence of the judges and lawyers).<sup>7</sup>

The European Commission's reasoned proposal under Article 7 (1) was accompanied by the specific Rule of Law Recommendation, which identified justice-related laws that negatively affect the Supreme Court and the National Council for the Judiciary.<sup>8</sup> In addition to

activating Article 7 and issuing the recommendation, the Commission decided to take the next step in its infringement procedure. It referred Poland to the Court of Justice of the EU for breaches of EU law, based on the legislation that introduced different retirement ages for female and male judges and provided the Minister of Justice with discretionary powers to prolong the mandates of judges who have reached the retirement age and to dismiss and appoint court presidents.<sup>9</sup>

EU and international actors in 2017 also called for looking into the rule of law situation in the area of access to justice in three additional EU Member States: **Bulgaria**, **Malta** and **Romania**. In the case of **Malta**, the European Parliament adopted a resolution calling on the Commission to start dialogues on the functioning of the rule of law in the country.<sup>10</sup> According to the European Parliament, this was due to the specific circumstances of the investigation into the assassination of Daphne Caruana Galizia, an investigative journalist, and the country's worsening track record in prosecuting financial crimes.

The Council of Europe's Parliamentary Assembly (PACE) adopted a resolution on 11 October 2017, calling on several Council of Europe member states to fully implement the principle of the rule of law.<sup>11</sup> In relation to justice systems in **Bulgaria** and **Poland**, the assembly expressed concerns about, among others, the tendency to limit the judiciary's independence through attempts to politicise the judicial councils and the courts. Regarding **Romania**, PACE called for ensuring that the government and the judiciary respect the separation of powers as regards the competences of the parliament, especially by avoiding the excessive use of emergency ordinances.<sup>12</sup>

In its reports on progress in Romania and Bulgaria under the Co-operation and Verification Mechanism of November 2017, the European Commission – while welcoming the considerable progress made – concluded that more work was still needed in relation to the judicial independence benchmark. In relation to **Romania**, it stressed the need to, among others, safeguard the practical application of the newly introduced codes of conduct for parliamentarians as well as ministers, which include a broad provision on respect of the separation of powers.<sup>13</sup> As for **Bulgaria**, the Commission pointed out, among others, the need to eliminate any doubts regarding possible undue influence on judges through the Supreme Judicial Council, as such influence could undermine the impression of an independent decision-making process within this key institution.<sup>14</sup>

The European Commission in 2017 continued to support EU Member States' efforts to strengthen the efficiency, quality and independence of their national justice systems through its EU Justice Scoreboard, underlining

the crucial role of the national justice systems in upholding the rule of law.<sup>15</sup> The EU Justice Scoreboard contributes to the European Semester process by bringing together data from various sources and helping to identify justice-related issues that deserve particular attention for an investment, business- and citizen-friendly environment.

The 2017 Scoreboard looked into new aspects of justice systems – for example, how easily consumers can access justice and which channels they can use to submit complaints against companies. For the first time, it also showed the length of criminal court proceedings relating to money-laundering offences. The 2017 Scoreboard highlights improvements achieved regarding the length of civil and commercial court proceedings since last year's Scoreboard. However, the findings also show that the length of administrative proceedings and judicial review varies a lot depending on the country; that citizens whose income is below the Eurostat poverty threshold do not receive any legal aid in some types of consumer-related disputes; and that the use of ICT tools in justice systems is still limited in some countries.



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In the context of the existing recommendation by the European Parliament on the creation of an EU mechanism on democracy, the rule of law and fundamental rights, the Commission in 2017 followed up on the European Parliament resolution recommending that the variety of existing data and reports on human rights issues by diverse actors – such as the UN, the Organization for Security and Co-operation in Europe (OSCE), the CoE and the EU – become more accessible and visible, including at national level. In its follow up, the Commission referred to FRA's role in "making easily accessible a clear overview of existing information and reports relating to Member States or particular themes".<sup>16</sup>

## 9.2. Facilitating access to justice through collective redress mechanisms

### EU developments

Collective redress mechanisms allow individuals to jointly request unlawful business practices to be stopped or prevented, or to obtain compensation for the harm caused by them.<sup>17</sup> In 2011, the Flash Eurobarometer on 'Consumer attitudes towards cross-border trade and consumer protection' found that

79 % of European consumers agree that they would be more willing to defend their rights in court if they could join other consumers complaining about the same issue. Allowing individuals to join claims that concern breaches of law that affect identical or similar interests belonging to more than one legal or natural person improves access to justice. Such mechanisms allow multiple claimants to share the cost of judicial proceedings, reducing the financial burden on individuals; and expedite the resolution of their cases. They make remedies more accessible and so help fulfil EU citizens' rights to an effective remedy and to a fair trial – as protected under Article 47 of the Charter and Articles 6 and 13 of the ECHR – in practice.

The European Commission in 2017 declared that it will assess the practical implementation of Recommendation 2013/396/EU, which aims to establish national collective redress mechanisms (to request cessation of illegal behaviour and to obtain compensation for harm done) based on a set of common principles.<sup>18</sup> The recommendation requires such an assessment.<sup>19</sup> The Commission aims to assess the impact of the common principles, which Member States were supposed to have implemented by 26 July 2015, on access to justice.

## FRA ACTIVITY

### Promoting collective action for better rights protection

In 2017, FRA issued an Opinion on business and human rights, calling for the enactment of procedural rules to allow victims to “join forces to overcome obstacles” or so that “organisations may act on behalf of victims”, thereby making effective their access to a remedy for human-rights abuses caused by businesses.

As emphasised in the Opinion, which is also based on the 2016 Council of Europe recommendations and 2016 UN guidance, broad collective action has to be put in place with clear criteria and consistently applied to allow entities to bring claims on behalf of alleged victims. As it notes, a “uniform approach to criteria applied across the EU Member States would facilitate access to remedy in cases of business-related human rights abuse”.

*See FRA (2017), Opinion on Improving access to remedy in the area of business and human rights at the EU level, Vienna, 10 April 2017, pp. 6-7; Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)3 to member States on human rights and business, 2 March 2016, para. 42; UN, Human Rights Council (2016), Business and human rights: improving accountability and access to remedy for victims of business-related human rights abuse, 10 May 2016, para. 15.3; UN Human Rights Office of the High Commissioner, The OHCHR Accountability and Remedy Project – Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, 5 July 2016, p. 30.*

## Progress at Member State level

The vast majority of EU Member States have some form of collective redress mechanism in place. These mechanisms vary widely. Some EU Member States establish collective mechanisms with a wide scope, while others restrict collective forms of relief to certain areas – for example, consumer protection. Throughout the year, while the European Commission began assessing the impact of Recommendation 2013/396/EU on access to justice, a number of related developments took place at national level.

A few Member States adopted new legislation to introduce collective redress mechanisms in line with the recommendation. In **Slovenia**, a new law that aims to implement the recommendation entered into force in 2017. The Class Action Act<sup>20</sup> for the first time introduced a wide mechanism for collective action, the provisions of which by and large mirror the common principles of Recommendation 2013/396/EU. In **Hungary**, Act CXXX of 2016 on Civil Procedures was adopted in 2017, and will enter into force on 1 January 2018; it introduces a mechanism enabling collective action.<sup>21</sup> Legislators referred to the recommendation while drafting this law, showing that it played a role in the law's development.<sup>22</sup>

Several other Member States amended their legal frameworks to improve or reinforce existing collective redress mechanisms. For example, **Belgium** and **Poland** did so, making reference to Recommendation 2013/396/EU. In **Belgium**, with the Law of 6 June 2017, violations of rules applying to undertakings – particularly the prohibitions concerning practices or activities that affect trade between Member States or the functioning of the internal market, as described in Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) – will join the list of grounds that can lead to collective action.<sup>23</sup> In **Poland**, an amendment of the Act on group redress mechanisms aimed to eliminate issues relating to the length of proceedings, legal certainty and the costs of the process.<sup>24</sup> According to the rationale of the draft act, this was necessary to ensure that collective redress mechanisms as described in Recommendation 2013/396/EU are fair, equitable, timely and not prohibitively expensive.<sup>25</sup>

Other Member States tabled draft bills on collective redress in their national parliaments. At the stage of parliamentary consultation, following the “Plan of Legislative Work of the Government for 2017”,<sup>26</sup> the Ministry of Justice in the **Czech Republic** tabled a draft bill on collective actions.<sup>27</sup> In **Italy**, the Senate conducted informal hearings to assess the impact of, and reforms introduced by, Draft Law No. 1950<sup>28</sup> on “Dispositions Concerning Class Actions”. Notably, in one of the hearings, civil society organisations proposed changes

to the draft law based on the common principles of Commission Recommendation 2013/396/EU.<sup>29</sup>

Other Member States – such as **Austria**<sup>30</sup> and **Germany** – continued their efforts to develop draft bills in 2017. In **Germany**, a discussion paper prepared by the Federal Minister of Justice and for Consumer Protection proposed a draft bill that introduces a model declaratory procedure, which was explicitly based on Recommendation 2013/396/EU.<sup>31</sup>

The recommendation has also been used as an instrument of interpretation by national courts. For example, in **Belgium**, a new law was adopted in 2017 following a ruling of the Constitutional Court.<sup>32</sup> In this ruling, the court held that excluding representative entities from other Member States of the EU and European Economic area from the possible entities that can represent a group of people breaches Article 10 and 11 of the Constitution in conjunction with Article 16 of the Services Directive.<sup>33</sup> The court relied on, among other things, Recommendation 2013/396/EU to determine whether the difference in treatment was justified by an objective criterion, since the aim of the impugned law and the recommendation were aligned as they both dealt with consumer protection.<sup>34</sup>

### 9.3. Advancing victims' rights

#### EU developments

About one third of Member States adopted legislation in 2017 to transpose the Victims' Rights Directive (2012/29/EU) and thus improve the rights of crime victims across the EU. These included Bulgaria,<sup>35</sup> Croatia,<sup>36</sup> the Czech Republic,<sup>37</sup> Estonia,<sup>38</sup> Greece,<sup>39</sup> Ireland,<sup>40</sup> Luxembourg,<sup>41</sup> the Netherlands<sup>42</sup> and Slovakia.<sup>43</sup> FRA has reported on Member States' actions to implement the Victims' Rights Directive since 2015, and the past few years have seen steady progress in terms of many Member States putting into practice new laws and measures to ensure that crime victims can access their rights under the directive. However, while the deadline for transposing the Victims' Rights Directive passed in November 2015, the European Commission has yet to evaluate full compliance with the directive.<sup>44</sup>

At the EU level, the European Commission placed effective compensation for crime victims high on the agenda by appointing, in October 2017, Joëlle Milquet as Special Adviser to President Jean-Claude Juncker for the compensation of victims of crime. The Special Adviser is mandated to promote better enforcement of existing laws on compensation, including advancing cooperation between national authorities responsible

for compensation and expediting victims' access to compensation across the EU.<sup>45</sup>

Other key developments at EU level focussed on specific categories of crime victims. The year saw considerable political and policy-level interest in different categories of victims, such as victims of terrorism; victims of trafficking in human beings; victims of gender-based violence (dealt with in [Section 9.4.](#)); and victims of hate crime (see [Chapter 4](#) on Racism, xenophobia and related intolerance for developments in this area). These are all categories of victims to which the Victims' Rights Directive pays particular attention.

Eight EU Member States reported 142 failed, foiled and completed terrorist attacks in 2016 alone.<sup>46</sup> To strengthen the EU's response to terrorism, the European Parliament and Council adopted Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism (Directive on Combating Terrorism). In addition to strengthening the EU's legal framework for preventing terrorist attacks, it outlines a number of rights for victims of terrorism, such as the right to receive immediate access to professional support services, to receive legal and practical advice, as well as help with compensation claims. Member States must transpose the directive by 8 September 2018.

To support Member States in ensuring an effective legislative and policy response that safeguards the rights and needs of terrorism victims, the European Parliament commissioned and published a study on responses to the needs of victims of terrorism in Belgium, France, Germany, Hungary, Spain and the United Kingdom. It contains recommendations and best practices for Member States to follow to empower and support victims of terrorism and allow them effective access to justice.<sup>47</sup> The research and findings focus on the two main EU instruments in this field: the Victims' Rights Directive and the Directive on Combating Terrorism.

Building on the EU Strategy towards the eradication of trafficking in human beings 2012-2016, the European Commission published a Communication in December 2017, containing a list of concrete actions for the EU and its Member States to better prevent trafficking in human beings.<sup>48</sup> Key areas that require immediate action from the EU and the Member States include: providing better access to and realising rights for victims; disrupting the business model that trafficking in human beings depends on; and ensuring that EU internal and external actions provide a coordinated and consistent response. The communication stresses the need for all actions to follow a human rights-based, gender-specific and child-sensitive approach.





### Promising practice

#### Supporting the fight against severe forms of labour exploitation

In 2017, FRA followed up on its 2015 report on 'Severe labour exploitation' by extending the evidence beyond the views of professionals who deal with labour exploitation to interview foreign workers themselves about their experiences with criminal forms of such exploitation.

The agency – through face-to-face interviews and focus groups in selected EU Member States – reached 250 workers from diverse EU and third countries, covering sectors such as agriculture, construction, domestic work, manufacturing, transport and hotel/food services. Findings will be published in 2018 and 2019, and will provide a rich base of evidence concerning the main risk factors for severe labour exploitation from exploited workers' perspectives and experiences.

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

**Ireland** introduced specialist 'Protective Services Units' within the police that will specialise in the investigation of sexual and domestic violence and human trafficking, and will provide victims of these crimes with better support. The first four divisional units were operational on 2 June 2017. Further units will be established in other police divisions throughout the country by early 2018. The move has been welcomed by several national victims' groups.<sup>51</sup>

A new regulation introduced in the **Netherlands** in 2017 mandates police to inform victims about their rights at the start of criminal proceedings.<sup>52</sup> Finally, a 'Victim Support Unit' within the **Maltese** Police Force, providing a single point of contact for crime victims after they report to police, began operating in 2017.<sup>53</sup> The police will provide crisis counselling services to victims; facilitate effective and timely referrals to other support services; and monitor the number of victims that are accessing their rights and victim support services.

## Implementing the Victims' Rights Directive

EU Member States introduced new legislation and practical measures to implement the Victims' Rights Directive. This included introducing protection measures (for example, when interviewing victims/witnesses with specific protection needs); enhancing the possibilities for victims to access support services; and facilitating victims' rights to information in a language they understand.

A notable trend in 2017 was that police services in several Member States focussed on systematically providing better information to crime victims – to ensure that they can access their rights under the Victims' Rights Directive to receive information from their first contact with a competent authority (Article 4) and to access victim support services (Article 8). For example, police authorities in **Cyprus** issued instructions to police regarding their duties arising under the law transposing the directive. In addition, a new awareness leaflet comprehensively sets out the rights of victims (including the right to lodge a complaint against the police and contact details for support organisations in the private and public sectors). It is available in six languages (Greek, English, Turkish, Arabic, French and Russian).<sup>49</sup>

The European Public Law Organisation – supported by the Greek Ministry of Citizens' Protection and the Hellenic Police – published a guide for police officers on services across **Greece** for crime victims, as police are often uncertain as to what to advise victims concerning their right to support.<sup>50</sup>

### Promising practice

#### Improving the police's response to crime victims

The Human Rights Monitoring Institute, together with the **Lithuanian** Police School, began a project in 2017 that aims to equip law enforcement officers with the knowledge and tools necessary to effectively respond to victims of crime. The project also seeks to improve victims' access to information and raise public awareness on victims' rights. It is funded by the Justice Programme of the EU.

A toolset for officers will be produced, consisting of a handbook, dissemination material for victims, and professional training modules. More than 300 officers and lecturers will be trained in 10 regions of the country. A website for crime victims will also be launched, comprising information on victims' rights, available support services and what happens during criminal proceedings.

*For more information, see the Human Rights Monitoring Institute's webpage on the project.*

## Assessing victims' satisfaction with treatment received

Article 26 (2) of the Victims' Rights Directive states that Member States shall take action to raise awareness of the rights set out in the directive, among other things "reducing the risk of victimisation, and minimising the negative impact of crime and the risks of secondary and repeat victimisation". Meanwhile, Article 28 obliges Member States to report to the Commission every three years on how victims have accessed the

rights set out in this directive. Several Member States took action in this area throughout the year.

In November 2017, **Estonia** published a report on victims' experience and treatment. It concluded that, although 60 % of victims are satisfied with the way they have been treated by the criminal justice system, the system is still not considered 'victim-friendly'.<sup>54</sup> Findings show that information about victims and their cases is not passed smoothly from one institution to another, causing secondary victimisation to the victim.

The Ministry of Justice in **Denmark** published the findings of a study of 58 victims who reported sexual assaults to the police. Around one third of the victims found that the police handled their case in a "dissatisfactory" or "very dissatisfactory" way. A third of victims also experienced difficulties in reporting – for example, stating that the police doubted their statements or asked them to reconsider their report. One third of the victims also claimed that they were not properly informed about the proceedings of their case.<sup>55</sup> In a separate development, the Director of Public Prosecutions established an expert group of investigators and prosecutors and a consultancy forum (of police officers and organisations working with victims of sexual assaults) to exchange views and discuss new initiatives to improve responses to victims of sexual assaults.<sup>56</sup>

In **Finland**, the Ministry of Justice appointed a working group (comprised of representatives of relevant ministries, other relevant authorities and civil society) to advance best practices in respecting victims' rights in criminal proceedings – with a focus on victims of sexual offences and child victims.<sup>57</sup> The working group will assess criminal proceedings from the victim's perspective with particular attention to how victims are treated and how they access information about their rights and possibilities of support and protection. The group will then advise on how to improve the situation in line with victims' rights.<sup>58</sup>

The **Italian** Ministry of Justice released a Circular Letter in June, announcing the creation of a permanent monitoring mechanism on the implementation of the directive. It asked relevant public stakeholders, such as courts' presidents and public prosecutors, to regularly provide data and statistics concerning the applications of the instruments aimed at providing information and judicial protection to victims.<sup>59</sup>

Finally, in the **United Kingdom**, the Ministry of Justice started an online survey of crime victims in 2017. It looks into victims' views of the Code of Practice for Victims of Crime,<sup>60</sup> with the aim of improving services for victims.

## FRA ACTIVITY

### Collecting evidence to support the implementation of the Victims' Rights Directive

FRA carried out field research in 2017 for a project on victims' rights, collecting information on the state of play of the rights of adult victims of violent crime under the Victims' Rights Directive. The project was carried out in seven Member States (Austria, France, Germany, the Netherlands, Poland, Portugal, and the United Kingdom). Some 240 interviews were conducted with practitioners and victims, including 50 interviews with victims of domestic (partner or ex-partner) violence.

The agency will publish two reports in 2019. One will focus on victims' access to justice and their role and participation in proceedings. The other will focus specifically on effective protection of women as victims of domestic violence against repeat victimisation and their situation in criminal proceedings.

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

## Trends in support services for child victims

Throughout the year, various Member States introduced initiatives to protect child victims in line with their obligations under the Victims' Rights Directive – such as addressing child victims' specific protection needs during criminal proceedings (Article 24). For other 2017 developments relating to child rights, see **Chapter 8** on the Rights of the child.

In **Germany**, as of January 2017, children who have been victims of serious sexual or violent acts are now entitled to professional psychosocial support and care free of charge before, during and after criminal proceedings. This also applies to adult victims or witnesses of serious crimes deemed to be particularly vulnerable.<sup>61</sup>

**Finland** published a guide containing information on the different stages of the criminal procedure for parents and guardians of child victims of violent or sexual offences. It provides information on practical arrangements during criminal proceedings, includes answers to the most typical questions that parents/guardians have, and directs them to sources of help and support.<sup>62</sup>

**Malta** integrated existing child-related regulations into one coherent legislative framework by enacting 'The Child Protection (Alternative Care) Act, 2017'.<sup>63</sup> The law introduces the concept of mandatory reporting of 'significant harm' to the Director responsible for Child Protection or the Executive Police. The reporting

requirement applies to ‘any person’ who, in the context of their work, comes into contact with a child suffering or likely to suffer harm, including professional workers and volunteers. Failure to report such cases can result in four to twelve months’ imprisonment, a fine not exceeding € 5,000, or both. Upon receipt of such a report, the Director is obliged to conduct an investigation and assessment to determine whether the child is in need of care and protection, and to subsequently take action to protect the child.

Finally, although not bound by the Victims’ Rights Directive, **Denmark** in 2017 took an important step for the realisation of the rights of child victims of sexual crime. It published a draft bill (to enter into force in spring 2018) abolishing all current Danish rules regarding statute-barre in future cases concerning sexual abuse of minors. The bill also abolishes, with retroactive effect, statute-barre for compensation claims in cases involving a municipality’s omission and passivity on notifications about neglect or abuse.<sup>64</sup>

## 9.4. Violence against women and domestic violence

The Victims’ Rights Directive aims to protect all victims of criminal offences, but also notes that women victims of gender-based violence often require special support and protection. In 2017, the EU signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) – the first step in the process of ratifying the convention. The instrument continued to strongly influence developments relating to combating violence against women and domestic violence at EU and national levels, with several Member States taking steps towards ratifying or implementing its provisions throughout the year.

### 9.4.1. Developments at EU level

In June 2017, the EU signed the Istanbul Convention as a first step in the process of the EU joining the convention.<sup>65</sup> As mentioned in FRA’s *Fundamental Rights Report 2017*, the EU’s accession to the Istanbul Convention will ensure accountability for the EU at the international level as it would have to report to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the convention’s monitoring body. This would reinforce the EU’s commitment to combating violence against women and domestic violence.

The European Parliament issued a resolution on 12 September 2017, asking the Council, the Commission and the Member States to speed up negotiations on

the ratification and implementation of the Istanbul Convention and to make sure that the Member States enforce the convention at national level.<sup>66</sup>

As part of the Gender Equality Index 2017, the European Institute for Gender Equality (EIGE) published a methodology for assessing the extent of violence against women in the EU in terms of the prevalence, severity and level of disclosure of violence against women.<sup>67</sup> Several of the indicators used in the satellite domain on violence, which is included in the Gender Equality Index, are based on data provided by FRA’s 2014 *Violence against Women survey*.

### 9.4.2. Improvements at Member State level: legislation, policy and data collection

GREVIO is part of the monitoring mechanism set out in the Istanbul Convention, and is responsible, together with the Committee of the Parties to the Convention, for monitoring the convention’s implementation. The Istanbul Convention obliges State Parties to report to GREVIO on the legal and policy measures they have adopted to fulfil their obligations under the convention. On the basis of this reporting, GREVIO publishes evaluation reports assessing the legislative and other measures taken by states.

In 2017, GREVIO adopted and published its first evaluation reports on the situation in **Austria**,<sup>68</sup> **Monaco**,<sup>69</sup> **Albania**<sup>70</sup> and **Denmark**.<sup>71</sup> One – crucially important – issue addressed in the reports of Austria and Denmark concerns the failure of criminal codes to comprehensively criminalise sexual violence in line with the Istanbul Convention. Article 36 of the Istanbul Convention does not require the victim to express an opposing will for the act of sexual violence to be punishable; rather it suffices that the act was committed without the consent of the victim. In other words, what is decisive is not that the victim dissented, but that they did not consent. Thus the Istanbul Convention adopts an approach that highlights and reinforces a person’s unconditional sexual autonomy.

This challenge has been discussed in other EU Member States, as well. In December 2017, the Government of **Sweden** presented a proposal to the Council on new sexual offence legislation based on lack of consent, and the obvious: sex must be voluntary. Convicting a perpetrator of rape will no longer require that violence or threats were used, or that the victim’s particularly vulnerable situation was exploited. The Government also proposed introducing two new offences, ‘negligent rape’ and ‘negligent sexual abuse’. The negligence aspect focuses on the fact that the other person did not participate voluntarily.

In its *Fundamental Rights Report 2017*, FRA called upon all EU Member States to ratify and effectively implement the Istanbul Convention. **Cyprus, Estonia** and **Germany** ratified the Istanbul Convention, bringing to 17 the number of EU Member States that had ratified it by the end of 2017. In addition, several other EU Member States took measures towards ratifying or implementing the convention's provisions. **Latvia**<sup>72</sup> and **Lithuania**<sup>73</sup> proposed draft legislation to ratify the Istanbul Convention. In addition, **Luxembourg**<sup>74</sup> introduced a bill foreseeing its ratification, while **Bulgaria**<sup>75</sup> began discussions on how to harmonise national legislation with the convention's requirements. In **Greece**,<sup>76</sup> a draft law introducing the Istanbul Convention to the national legal system is under public consultation.

In line with the Istanbul Convention and Victims' Rights Directive, EU Member States should collect statistical data on violence against women at national level. In 2017, Eurostat set up a Task Force to develop a new survey on gender-based violence to be carried out in EU Member States. FRA's EU-wide survey on violence against women served as a benchmark for the development of this survey. Ten EU Member States have expressed their willingness to pre-test the survey, which is planned to interview both women and men concerning their experience of gender-based violence. The countries are expected to submit their final pilot results by January 2019. In addition, several EU Member States, including **Belgium**,<sup>77</sup> **Finland**<sup>78</sup> and **France**,<sup>79</sup> among others, conducted surveys or published statistics on violence against women. Furthermore, in 2017 a majority of EU Member States took initiatives to conduct research or collect data on violence against women, indicating EU Member States' willingness to address the issue.

In 2017, several EU Member States took measures to criminalise and combat violence against women, especially with regards to Female Genital Mutilation (FGM) and stalking. The Istanbul Convention requires states to criminalise various forms of violence through establishing criminal offences in national legislation. Article 38 of the Istanbul Convention requires State Parties to take measures to ensure the criminalisation of FGM, and Article 34 requires them to take measures to ensure the criminalisation of stalking. In **Belgium**, amendments to the criminal code are currently under discussion to allow physicians to report risks of FGM.<sup>80</sup> Belgium also adopted a new policy to enhance prosecution of FGM, forced marriage and so-called honour related violence and to improve collaboration between relevant actors for this purpose.<sup>81</sup> **Estonia**<sup>82</sup> and **Latvia**<sup>83</sup> also made changes to their penal codes to criminalise FGM. In addition, **Sweden** adopted legislation increasing the penalty scale for the crime of FGM.<sup>84</sup> In 2017, several EU Member States, such as **Estonia**,<sup>85</sup> **Germany**<sup>86</sup> and **Latvia**,<sup>87</sup> also introduced

or improved legislative measures to combat stalking by criminalising stalking and adopting protection measures for victims of stalking.

## Protecting victims of domestic violence

Several EU Member States introduced new laws specifically addressing domestic violence. For instance, **Croatia** enacted a new law on protection from domestic violence.<sup>88</sup> In the **United Kingdom**, the Domestic Abuse (Scotland) Bill was passed on 1 February 2018, with a similar bill planned to be introduced in England and Wales. This latter bill focuses on early intervention and prevention and will ensure victims feel safe and supported, both to seek help and to rebuild their lives. In **Portugal**, the civil code was amended to allow for the public prosecutor to consider imposing protection orders due to domestic violence when initiating and deciding on parental responsibilities.<sup>89</sup> **Ireland** also introduced a Domestic Violence Bill as part of its strategy to implement the Istanbul Convention.<sup>90</sup>

In its *Fundamental Rights Report 2017*, FRA also called upon EU Member States to ensure immediate and reliable protection from domestic violence in line with Article 52 of the Istanbul Convention, allowing the police to effectively adopt emergency barring orders in cases of domestic violence. **Ireland's** Domestic Violence Bill allows for the award of emergency barring orders even in cases where the victim has no legal or beneficial interest in the property in question.<sup>91</sup> **Croatia's** newly adopted law on protection against domestic violence introduced provisions on emergency barring orders and other measures of protection.<sup>92</sup> **Malta** also proposed legislation that includes provisions on emergency barring orders and the issuing of protection orders.<sup>93</sup> In **Romania**, legislation including several amendments in the field of protection orders is under public consultation.<sup>94</sup>

GREVIO's first report on the relevant situation in **Denmark** expressed criticism concerning the implementation of emergency barring orders. GREVIO called on Denmark to step up efforts to implement the full range of emergency barring and protection orders available under the Act on Restraining Orders and to ensure their vigilant enforcement.<sup>95</sup> Meanwhile, GREVIO's report on the situation in Austria acknowledged "the strong leadership Austria has shown in the past 20 years in introducing a system of emergency barring and protection orders for victims of domestic violence. Today, this system is well established and is widely considered a success."<sup>96</sup>



## Promising practice

### Improving the protection of domestic violence victims

The MARAK method aims to improve the security of persons who are victims of domestic violence or at risk of such violence. It was designed in **Finland** based on experiences in the United Kingdom, where it was originally developed. The method comprises a risk assessment of an individual at risk of domestic violence through a questionnaire and an evaluation of the case in a multi-professional team at municipality level.

The multi-professional team is composed of representatives from relevant sectors, such as the police, social services, health services, child protection and victim support services. The team, based on the questionnaire and their evaluation, establishes a security plan and a support person for the victim in question. In addition to improving security for the victim, the team also plays an important role in sharing information between relevant authorities.

In 2017, a study was conducted to measure the impact of the MARAK method, which showed a significant improvement in the protection of victims of domestic violence.

*For more information, see the website of the National Institute for Health and Welfare.*

## Countering sexual harassment

The recent global #metoo movement has drawn attention to the extent of sexual assault and harassment worldwide – which significantly affects women as victims, and also some men – and has sparked discussion about what is being done to prevent and combat this problem in Europe. FRA data have long highlighted the extent of sexual assault and harassment against women and girls in the EU. The agency's 2014 report on *Violence against women: An EU-wide survey* found that one in three women have been victims of physical and/or sexual violence during their lifetimes, and 55 % of women have experienced sexual harassment. In December 2017, the European Parliament issued resolution 2017/2897 (RSP) on combating sexual harassment and abuse in the EU, condemning all forms of sexual violence and physical or psychological harassment and recognising that such acts constitute a systematic violation of fundamental rights.<sup>97</sup>

Article 40 of the Istanbul Convention requires states to take necessary legislative or other measures

to ensure that sexual harassment is subject to criminal or other non-criminal legal sanctions. Directive 2006/54/EC recognises that sexual harassment in matters of employment and occupation are contrary to the principles of equal treatment between men and women and could constitute discrimination on grounds of sex. It also obliges EU Member States to take effective measures to prevent sexual harassment in the workplace. However, reports assessing the directive's implementation indicate that it has not had any major impact on EU Member State efforts in preventing and combating sexual harassment.<sup>98</sup>

Several EU Member States took action in 2017 to combat sexual harassment. **Austria** amended the criminal code to criminalise the intentional gathering of persons with the purpose of perpetrating sexual harassment in a group.<sup>99</sup> Furthermore, one of the major trade unions in **Cyprus** prepared a draft code of conduct for addressing sexual harassment at the workplace.<sup>100</sup> In **Denmark**<sup>101</sup> and **Sweden**,<sup>102</sup> measures were discussed to criminalise and combat non-consensual distribution of intimate images and videos, including through improvements relating to case administration by the police and public prosecutors.

## FRA ACTIVITY

### Challenges to women's human rights in the EU

FRA published a paper in 2017 underlining the need for EU institutions and Member States to maintain their commitment to safeguarding the dignity of all women and girls in the EU. This paper was highlighted during the 2017 Annual Fundamental Rights Colloquium, which focused on "Women's rights in turbulent times".

Evidence collected by FRA confirms that women and girls in the EU experience persistent gender discrimination and gender-based violence. This severely limits their ability to enjoy their rights and to participate on an equal footing in society. The paper highlights concrete areas of intervention, such as gender inequality contributing to persisting discrimination, hate speech and violence against women, where the EU and its Member States could work actively to turn commitment into reality.

*For more information, see FRA (2017), [Challenges to women's human rights in the EU: Gender discrimination, sexist hate speech and gender based violence against women and girls](#), November 2017.*

## FRA opinions

The EU and other international actors in 2017 continued to be confronted with growing challenges in the area of justice at the national level and, in particular, regarding the issue of judicial independence. An independent judiciary is the cornerstone of the rule of law and of access to justice (Article 19 of the TEU, Article 67 (4) of the TFEU and Article 47 of the EU Charter of Fundamental Rights). Despite continued efforts of the EU and other international actors, the rule of law situation in one of the EU Member States caused increasing concern, particularly in terms of judicial independence. This prompted the European Commission to submit, for the first time in the history of the EU, a proposal to the Council for adoption of a decision under Article 7 (1) of the TEU.

### FRA opinion 9.1

*The EU and its Member States are encouraged to further strengthen their efforts and collaboration to reinforce independent judiciaries, an essential rule of law component. One way forward in this context is to depart from the existing approach of tackling rule of law emergencies in individual countries in an ad-hoc manner. Instead, the existing efforts should be stepped up to develop criteria and contextual assessments to guide EU Member States in recognising and tackling any possible rule of law issues in a regular and comparative manner. In addition, existing targeted advice from European and international human rights monitoring mechanisms, including the remedial actions set out in the European Commission's recommendations issued as part of its Rule of Law Framework procedure, should be acted on to ensure compliance with the rule of law. All EU Member States should always stand ready to defend the rule of law and take necessary actions to challenge any attempts to undermine the independence of their judiciary.*

Collective redress mechanisms enhance access to justice, which is paramount to secure the effectiveness of Union law and ensure respect for fundamental rights, as required by Article 47 of the EU Charter of Fundamental Rights. For this purpose, European Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law has sought to facilitate access to justice and to that end recommended a general collective redress mechanism based on the same basic principles throughout EU Member States. In 2017, the Commission initiated its assessment of the implementation of Recommendation 2013/396/EU and several Member States took steps to directly implement it. Nevertheless, legislation at national level still

significantly diverges among Member States, creating different forms and levels of collective action.

### FRA opinion 9.2

*EU Member States – working closely with the European Commission and other EU bodies – should continue their efforts to ensure that Commission Recommendation 2013/396/EU on collective redress mechanisms is fully implemented to enable effective collective action and access to justice. The collective redress mechanisms should be wide in scope and not limited to consumer matters. The European Commission should also take advantage of the assessment of the implementation of Commission Recommendation 2013/396/EU, initiated in 2017, to provide the necessary support to EU Member States to introduce or reform their national mechanisms for collective redress in line with the rule of law and fundamental rights in all the areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant.*

The year 2017 saw positive developments in terms of more EU Member States adopting legislation to transpose the Victims' Rights Directive, including efforts to ensure that victims are informed about the rights they have under new legislation. Evidence at national level in some Member States shows that victims still encounter obstacles to reporting crime and that victims do not always receive comprehensive information about their rights. This can negatively affect the victims' opportunity to access their rights in practice.

### FRA opinion 9.3

*Following positive legal developments to transpose the Victims' Rights Directive up until 2017, EU Member States should focus on the effective implementation of the directive. This should include the collection of data disaggregated by gender on how crime victims have accessed their rights; such data should be used to address gaps in institutional frameworks to enable and empower victims to exercise their rights. Further data collection at national and at EU level will shed light on this and highlight gaps that need to be filled to ensure that victims of crime have access to rights and support on the ground.*

In 2017, another three EU Member States ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), bringing to 17 the total number of EU Member States that had ratified the convention by the end of the year. When it comes



to determining European standards for the protection of women against violence, the Istanbul Convention is the most important point of reference. In particular, Article 36 obliges State parties to criminalise all non-consensual sexual acts and adopt an approach that highlights and reinforces a person's unconditional sexual autonomy. However, the 2017 evaluation reports by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) revealed gaps in national legislation regarding the criminalisation of non-consensual sexual acts, which is not in line with the convention's requirements.

#### FRA opinion 9.4

*All EU Member States and the EU itself should consider ratifying the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). EU Member States are encouraged to address gaps in national legislation regarding the criminalisation of all non-consensual sexual acts. EU Member States should – in line with Article 36 of the Istanbul Convention – unambiguously and unconditionally criminalise the respective acts.*

The stark realities brought to the surface by the global #metoo movement underline FRA's findings from its 2012 Violence against Women survey, which showed that violence against women – including sexual harassment – remains widespread. Hence, there is a clear need for renewed emphasis in this area at both EU and Member State level.

#### FRA opinion 9.5

*EU Member States should reinforce their efforts and take further measures to prevent and combat sexual harassment. This should include necessary steps towards effectively banning sexual harassment as regards access to employment and working conditions in accordance with Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).*

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- 97 European Parliament (2017), [Resolution of 26 October 2017 on combating sexual harassment and abuse in the EU P8\\_TA-PROV\(2017\)0417](#), Strasbourg.
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# UN & CoE

January

February

March

23 March – In *A.-M.V. v. Finland* (No. 53251/13), the European Court of Human Rights (ECtHR) finds no violation of Article 8 (right to respect for private and family life) or Article 2 of Protocol No. 4 (freedom of movement) of the European Convention on Human Rights (ECHR) as the Finnish courts' decision not to replace the mentor of a man with intellectual disabilities was justified, taking into account his inability to understand what was at stake if he moved

April

May

8 May – CRPD Committee publishes concluding observations on the initial report of Cyprus

June

July

14 July – UN Special rapporteur on the rights of persons with disabilities publishes a report on the sexual and reproductive health and rights of girls and young women with disabilities

August

31 August – CRPD Committee adopts General Comment No. 5 on Article 19 (right to independent living) of the CRPD

September

October

3 October – CRPD Committee publishes concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland

10 October – CRPD Committee publishes concluding observations on the initial reports of Luxembourg and Latvia

November

28 November – In *N. v. Romania* (No. 59152/08), the ECtHR finds that Romania violated Articles 5 § 1 (right to liberty and security) and 5 § 4 (speedy review of the lawfulness of detention by a court) of the ECHR on account of prolonged psychiatric confinement without sufficient assessment of the applicant's dangerousness and lack of regular review of his confinement

December

12 December – UN Special rapporteur on the rights of persons with disabilities publishes a thematic study on the right of persons with disabilities to equal recognition before the law



# EU

## January

16 January – Council of the EU confirms the European Commission's withdrawal from the EU Framework to promote, protect and monitor the implementation of the CRPD

## February

2 February – European Commission publishes progress report on the implementation of the European Disability Strategy 2010-2020

14 February – Grand Chamber of the Court of Justice of the EU (CJEU) delivers an opinion (Opinion Procedure 3/15) concluding that the EU has exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled

## March

## April

## May

## June

## July

12 July – European Ombudsman opens a strategic inquiry (OI/6/2017/EA) on the accessibility for persons with disabilities of websites and online tools managed by the European Commission

## August

## September

14 September – European Parliament (EP) adopts its position on the European Accessibility Act

## October

## November

30 November – EP adopts a resolution on the implementation of the European disability strategy 2010-2020

## December

7 December – Employment, Social Policy, Health and Consumer Affairs Council agrees its position on the European Accessibility Act and adopts conclusions on enhancing community-based support and care for independent living



# 10

## Developments in the implementation of the Convention on the Rights of Persons with Disabilities



*The European Commission's progress report on implementation of the European Disability Strategy 2010-2020 provided an opportunity to take stock of the EU's efforts to realise the rights set out in the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD). Movement towards the adoption of the European Accessibility Act indicated that a major legislative milestone is moving closer. Despite significant achievements at the EU and national levels, however, implementation gaps persist in key areas such as accessibility and independent living. Tools such as indicators, as well as rulings by national courts on the justiciability of the CRPD, can help to ensure that practice follows the promise of legal obligations. Monitoring frameworks established under Article 33 (2) of the convention also have a crucial role to play, but a lack of resources, limited mandates and a lack of independence undermine their effectiveness.*

### 10.1. The CRPD and the EU: taking stock for the future

Important milestones at the start and close of 2017 provided an opportunity to take stock of the EU's progress in implementing the CRPD. These marked the latest step in efforts to follow up on the CRPD Committee's recommendations to the EU, published in September 2015.<sup>1</sup> In January, the European Commission replied to the CRPD Committee about steps to address the three most urgent recommendations:

- declaration of EU competence concerning the CRPD;
- adoption of the European Accessibility Act; and
- EU Framework to promote, protect and monitor the implementation of the CRPD (EU Framework).

The following month, the European Commission published its progress report on implementation of the European Disability Strategy 2010-2020. While showing significant progress, the report reaffirms that persons with disabilities "remain consistently disadvantaged in terms of employment, education and social inclusion".<sup>2</sup> Discrimination on the grounds of

- ▶ disability is covered in Chapter 3, and the intersection
- ▶ between age and disability is addressed in Chapter 1.

The brief response to the CRPD Committee focused on the three urgent recommendations. On the first and third recommendations – the declaration of EU competence and the EU Framework – the European Commission highlighted concrete progress. An annex to the progress report on the European Disability Strategy presented an updated overview of EU legal acts referring to the CRPD, which showed an increasing number of legislative acts relating to matters governed by the convention. On the third recommendation, the Council of the EU formally adopted the European Commission's withdrawal from the EU Framework (see [Section 10.3](#)). Adoption of the European Accessibility Act remains on the agenda for 2018 (see [Section 10.1.1](#)).

The progress report on the European Disability Strategy covers the full range of EU action to implement the CRPD as set out in the strategy's eight 'areas for action': accessibility, participation, equality, employment, education and training, social protection, health and external action.<sup>3</sup> This reflects the strategy's position as "the main instrument to support



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the EU's implementation of the [CRPD]".<sup>4</sup> A look at a few of the 'areas for action' illustrates some of the steps EU institutions and Member States took in 2017 to implement the CRPD. Each shows achievement tempered by ongoing challenges.

### 10.1.1. Improving accessibility of information and communications

Accessibility is one area in which concrete steps forward have been taken since the adoption of the CRPD and the European Disability Strategy, particularly in the area of information and communication. Member States began taking steps to implement the requirements for the accessibility of websites and mobile applications set out in the Web Accessibility Directive, which was adopted in 2016 and has a transposition deadline of 23 September 2018.<sup>5</sup> For example, as a first step, the responsible ministries in **Bulgaria**<sup>6</sup> and **Finland** established working groups to support transposition.<sup>7</sup> In July, the Finnish working group published its draft mid-term report, which emphasises that the national implementation should be based on the realisation of fundamental rights, including the CRPD. **Denmark** launched a public consultation on a draft bill to implement the directive.<sup>8</sup> Although broadly welcoming the proposal, the Danish Institute for Human Rights, the country's national human rights institution, expressed concern about weaknesses in the enforcement procedure for the bill.<sup>9</sup> The EU institutions' own websites are not covered by the Web Accessibility Directive, but they are "encouraged to comply" with its accessibility requirements.<sup>10</sup>

In February 2017, the Court of Justice of the EU (CJEU) ruled that the EU has exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled.<sup>11</sup> This paved the way for the adoption in September of a directive<sup>12</sup> and a regulation<sup>13</sup> introducing into EU law a new mandatory exception to copyright rules, in line with the treaty. This will "allow beneficiary persons and organisations to make copies of works in accessible formats, and to disseminate them across the EU and in third countries which are party to the treaty".<sup>14</sup>

The flagship piece of EU legislation in this area, the European Accessibility Act (EAA), is yet to be adopted, however. Following publication of the European Commission's proposed directive in late 2015, 2017 was marked by ongoing negotiations concerning the scope of the legislation and the technical

accessibility requirements it contains. In April, the European Parliament's internal market and consumer protection committee (IMCO), the main committee responsible for the directive, adopted its report on the proposal.<sup>15</sup> Civil society organisations criticised its position as weakening the Commission proposal, in particular by excluding microenterprises from the scope of the legislation, limiting the requirements for audiovisual services to websites and mobile applications, and weakening the obligation to replace self-service terminals.<sup>16</sup>

When the plenary of the European Parliament voted on its final position on the draft EAA in September, however, it strengthened the Commission's proposal in several important ways.<sup>17</sup> For example, it included mandatory provisions on accessibility of the built environment around goods and services, expanded the modes of transport and tourism services covered by the legislation, and underlined the applicability of the act to other EU law, as the Commission had proposed.<sup>18</sup> Limits on the applicability of the draft directive to microenterprises and small and medium-sized enterprises remain, however.

On the Council side, technical negotiations throughout 2017 culminated in the adoption of a general approach on the draft legislation in December.<sup>19</sup> The Council's approach reflects in several important ways the positions that IMCO adopted in April. For example, it limits provisions concerning audiovisual media services, reduces its applicability to transport services and weakens the requirements for self-service terminals. Moreover, it removes provisions addressing the built environment and linking the EAA to "other Union acts", including European Structural and Investment Funds (ESIF) and the Public Procurement Directive.<sup>20</sup> Now that each of the three main EU institutions have adopted their position, negotiations on the final text can start in 2018. For developments at the national level, see [Section 10.2.1](#).

### 10.1.2. Investing in independent living

Although not an explicit area for action, the right to independent living, set out in Article 19 of the CRPD, cuts across many of the main elements of the European Disability Strategy. As in previous years, deinstitutionalisation was a particular focus of attention. In October, FRA published three reports on the deinstitutionalisation process (see FRA activity box). The reports' publication coincided with a conference on the same topic hosted by the Estonian Presidency of the Council of the EU.<sup>21</sup>



## FRA ACTIVITY

## Promoting the right to independent living

In October, FRA published a series of three reports looking at different aspects of deinstitutionalisation for people with disabilities across the EU. The first report, exploring deinstitutionalisation plans and commitments, highlights the obligations the EU and its Member States have committed to fulfil, while the second one looks at how funding and budgeting structures can turn these commitments into reality. The final report assesses to what extent Member States have implemented the right to independent living, focusing on the impact that commitments and funds are having on persons with disabilities' daily lives.

FRA also conducted qualitative fieldwork research in five EU Member States (**Bulgaria, Finland, Ireland, Italy** and **Slovakia**) to explore the drivers of and barriers to deinstitutionalisation at the local level. The results of this fieldwork will be published in December 2018.

See FRA (2017), *From institutions to community living – Part I: commitments and structures*, Publications Office; FRA (2017), *From institutions to community living – Part II: funding and budgeting*, Publications Office; and FRA (2017), *From institutions to community living – Part III: outcomes for persons with disabilities*, Publications Office. For more information on the qualitative fieldwork, see the [project's webpage](#).

In follow up to the conference, the Employment, Social Policy, Health and Consumer Affairs Council adopted conclusions on enhancing community-based support and care for independent living in December.<sup>22</sup> The conclusions reiterate many of the main findings and

recommendations emerging from the FRA reports.<sup>23</sup> For instance, they highlight the importance of “a clear strategy and strong investment [...] to develop modern high-quality community-based services”<sup>24</sup> and invite Eurostat to look into the possibility of including collective households, such as institutions, in surveys. They also

underscore the importance of a holistic approach to deinstitutionalisation, encompassing a “change in mind-set [...] to secure wider recognition of the principle that everyone has the right to live independently within their community” and the “development of community-based services in accordance with the needs of the persons concerned”.<sup>25</sup>

Although civil society organisations broadly welcomed the conclusions, they highlighted concerns about the compatibility of some of the wording with Article 19 of the CRPD. In particular, the European Network on Independent Living suggested that some passages

implied that “rather than closing institutions, Member States should improve them” and that independent living is not possible for some people.<sup>26</sup>

Reflecting the importance of this issue across EU institutions and bodies, in November the Committee of the Regions also adopted an opinion on deinstitutionalisation in care systems at local and regional level. It notes that deinstitutionalisation “is more than closing down large institutions and creating alternative forms of care”, but also means “combating prejudice” and “changing mindsets”. Arguing that “developing a more community-based system of care should be a high priority for all EU Member States”, it calls for actions including training, reducing guardianship and guaranteeing assistance.<sup>27</sup>

*“There is no such thing as a ‘good institution’ as they all impose a certain type of living arrangement, which limits the individual’s capability to live a good life on an equal basis with others. Persons with disabilities, including those with high support needs, must have the opportunity to live in their communities, to choose their place of residence and with whom they live.”*

*Catalina Devandas-Aguilar, UN Special Rapporteur on the rights of persons with disabilities, End of mission statement on her visit to France, 13 October 2017*

Deinstitutionalisation also featured heavily in discussions concerning the fundamental rights compliance of the ESIF in 2017. As FRA’s 2017 report *From institutions to community living – Part II: funding and budgeting* shows, for many Member States ESIF are a key source of funding, in addition to national resources, to achieve the transition from institutional to community-based support for persons with disabilities.<sup>28</sup> However, evidence of ESIF funding the construction of new institutions or renovation of existing institutions has focused much civil society attention on how to prevent misuse of the funds.<sup>29</sup>

In November, for example, the Community Living for Europe: Structural Funds Watch initiative published a report on how to harness ESIF to promote deinstitutionalisation.<sup>30</sup> Drawing on practical case studies from EU Member States, the report highlights how the EU institutions, Member States and civil society can work to ensure the funds support independent living. Crucial to this is ensuring the full and effective use of the so-called ex-ante conditionality – or pre-condition – on deinstitutionalisation, to ensure that any projects that might perpetuate institutionalisation are rejected before funding decisions are made.

Looking ahead, the European Pillar of Social Rights, proclaimed in November, provides an additional policy tool to support CRPD implementation. The Pillar includes several principles linked specifically to persons with disabilities, including concerning the right to “income support that ensures living in dignity,



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services that enable [persons with disabilities] to participate in the labour market and in society, and a work environment adapted to their needs”.<sup>31</sup> It also underlines that “everyone has the right to affordable long-term care services of good quality, in particular home-care and community-based services”.<sup>32</sup> More information on the European Pillar of Social Rights is available in Chapter 1 and Chapter 3.

## 10.2. The CRPD in EU Member States: reforms, rulings and measuring results

Last year’s Fundamental Rights Report highlighted the role of two drivers of legal and policy changes in EU Member States to implement the CRPD: guidance from the CRPD Committee, and the growing body of national and European case law referring to the convention. These factors continued to spur reform processes in 2017, alongside the increasing use of indicators as a tool to measure CRPD implementation and the ongoing role of national strategies and action plans. At the end of 2017, **Ireland** remained the only EU Member State that has not ratified the convention; a further five Member States and the EU have not ratified the Optional Protocol to the CRPD, which allows the CRPD Committee to handle complaints and set up inquiries relating to CRPD implementation.

National monitoring mechanisms established under Article 33 (2) of the convention also play a key role; several can receive complaints, while others developed indicators to support their monitoring efforts (see also Section 10.3).<sup>33</sup>

### 10.2.1. Independent living far from realised

With much focus in 2017 centred on the CRPD Committee’s adoption of a general comment on Article 19 in August,<sup>34</sup> the topic of independent living provides a useful framework to look at the impact of guidance from the CRPD Committee in practice. The general comment provides the authoritative interpretation of the normative content of Article 19 and what States parties to the convention must do to implement it. Two key aspects of implementing the right to independent living were a particular focus of national reforms in 2017:

- personal assistance;
- accessibility.

Disabled persons’ organisations (DPOs) have long highlighted personal assistance as essential to realising the right to independent living in practice.

It is the only type of community support service specifically mentioned in Article 19 of the CRPD. The general comment strongly reinforces this position, identifying the “inadequacy of legal frameworks and budget allocations aimed at providing personal assistance” as one of the remaining barriers to implementing Article 19.<sup>35</sup> To support states in developing personal assistance services, the CRPD Committee provides an extensive ‘definition’ of personal assistance, highlighting four key elements: funding for personal assistance must be controlled by and allocated to the person with disability; personal assistance must be controlled by the person with disability; personal assistance is a one-to-one relationship; and persons with disabilities have “self-management of service delivery”.<sup>36</sup> In practice, however, two long-term trends impede the realisation of these requirements. First, family members and other informal carers provide a large part of the assistance people with disabilities receive.<sup>37</sup> Second, eligibility criteria for disability benefits have tightened because of ongoing fiscal consolidation, as the Social Protection Committee highlighted in its 2017 report.<sup>38</sup>



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Reforms in 2017 demonstrate these challenges. Following a trend that has seen personal assistance more widely available in the EU,<sup>39</sup> **Slovenia** adopted a law regulating personal assistance.<sup>40</sup> The law targets persons aged between 18 and 65 years who require at least 30 hours of personal assistance per week, and will enter into force in January 2019. However, the law does not enable beneficiaries to receive the funding for personal assistance directly, which could raise questions about its compatibility with the requirements set out by the CRPD Committee. **Sweden**, by contrast, has one of the most long-standing and comprehensive personal assistance systems. However, concerns about rising costs prompted the government to look for ways to reduce the overall funds attributed to assistance allowances in 2017. In response, the National Association for Mobility-Impaired Children and Youths (*Riksförbundet för rörelsehindrade barn och ungdomar*) started a campaign called ‘Stop the assistance lottery’ (*Stoppa assistanslotteriet*). It focuses on stories of persons with disabilities who have had their assistance allowance hours reduced or removed altogether, resulting in family members having to stop working.<sup>41</sup> A government-appointed special investigator looking at state-funded assistance will report back in 2018.

In light of these challenges, several Member States have adopted pilot projects to test ways of providing personal assistance. For example, **Portugal** established the Independent Living Support Model (*Modelo de Apoio à Vida Independente*) programme to provide

personal assistance for persons with disabilities, developed through a series of pilot projects between 2017 and 2020.<sup>42</sup> The provision of assistance is based on a personalised plan identifying: the assistance needs; how support activities are carried out; and how the assistance is monitored and evaluated. The assistance may include: support in hygiene and personal care, health, nutrition, travel, higher education, vocational training, culture, sports, job search, participation in society, and citizenship. While such projects can be a useful way to develop modalities of personal assistance, they can raise questions of sustainability and risk unequal provision of services across different parts of the country.

### Promising practice

#### Strengthening the role of municipalities in CRPD implementation

The involvement of and cooperation among all stakeholders at the local level is central to implementing the CRPD. In February 2017, the municipality of Ardea in Lazio, **Italy**, created a municipal council consisting of both delegates of municipal authorities and people with disabilities and their representative organisations. The council aims to promote policies and actions to overcome the barriers that persons with disabilities can face and to promote their rights.

The **Slovenian** Association of Disabled Workers runs a project to encourage municipalities to respond to the needs of their citizens with disabilities. It awards the title of “a municipality tailored to the needs of people with disabilities” to municipalities that analyse the situation of their residents with disabilities together with local disability organisations and adopt appropriate action programmes. The association, together with the disability organisations, then monitors the implementation of these activities. By the end of 2017, 30 municipalities had received this distinction.

*For more information, see Municipal Council for overcoming disability (Consulta comunale per il superamento delle disabilità) and Slovenian Association of Disabled Workers (Občina po meri invalidov).*

Independent living is closely tied to accessibility. Without it, persons with disabilities cannot access the services and facilities in the community mentioned in Article 19. The CRPD Committee emphasises this link in its general comment on Article 19, stating that “the general accessibility of the whole built environment, transport, information and communication and related facilities and services open to the public [...] is a precondition for living independently in the community”.<sup>43</sup> A few examples illustrate the range of reforms that Member States implemented in 2017 to

address the broad scope of the CRPD’s accessibility obligations. In several instances, these show Member States anticipating the adoption of the EAA by moving to implement some of its key provisions on accessibility of goods and services.

Taking a horizontal approach, a decree on the accessibility of services took effect in the **Netherlands** in June.<sup>44</sup> It stipulates that the national government encourages the drafting and implementation of accessibility plans covering different sectors, and that the government will monitor the implementation of the norm of accessibility in society. It also requires suppliers of goods and services to ensure they are accessible for persons with disabilities, unless such steps would constitute a disproportionate burden. The ‘disproportionate burden’ test is a central element of the proposed EAA.

Other Member States focused on specific services and sectors. FRA’s analysis of data from the European Statistics on Income and Living Conditions (EU-SILC) survey shows that, on average, persons with disabilities in the EU are more likely than other persons to have difficulty accessing services such as grocery shopping, banking, postal, primary healthcare and public transport.<sup>45</sup> Amongst these services, persons with disabilities most often face difficulties accessing public transport services (26 % compared to 19 % of persons without disabilities).

Reflecting this challenge, the **United Kingdom** Department for Transport published a draft transport accessibility action plan in August.<sup>46</sup> It sets out the department’s strategy to address barriers for people with disabilities in transport services. For example, it includes measures to ensure that accessibility features required by regulations are consistently monitored and that compliance is enforced; to improve information on passenger facilities at stations and on trains; and to enhance awareness training for transport staff about the requirements of people with visible and hidden disabilities or impairments.

**France** and **Germany** both adopted measures related to the accessibility of telephone services. In France, a decree adopted in May specifies which services electronic communications operators must make accessible, and sets a threshold for sales turnover above which companies must ensure their customer service number is accessible to persons with visual or hearing impairments.<sup>47</sup> It also sets out how the government intends to evaluate the implementation of these obligations. The German reforms relate to contacting emergency services, with an amendment requiring that people with hearing impairments can make emergency calls via text messages or in sign language at any time. Previously, this was only possible between 8 am and 11 pm.<sup>48</sup>

Promising practice

**Raising awareness of persons with disabilities’ sexual and romantic relationships**

FRA’s research has indicated a lack of attention to persons with disabilities’ romantic and sexual relationships. Two efforts have attempted to address this issue. In July 2017, the **Maltese** Commission for the Rights of Persons with Disabilities conducted a quantitative survey on the rights of persons with disabilities regarding intimate relationships, marriage, family, parenthood, and whether there is enough education on these matters. The survey looks at whether Malta is living up to its obligations under Article 23 of the CRPD (respect for home and the family) and was followed by the conference “Breaking the Silence: Sexuality, Intimate relationships and Disability”.

In the **Czech Republic**, for example, two non-governmental organisations, ‘Pleasure without Risk’ and ‘Freyja’, offer people with disabilities courses and coaching relating to sex and sexuality, and provide counselling on issues of sex and intimacy. They have helped support five specially trained sex counsellors to support persons with disabilities.

*For more information, see Commission for the Rights of Persons with Disabilities (Il-Kummissjoni għad-Drittijiet ta’ Persuni b’Diżabilità) and Pleasure without Risk/Freyja (Rozkož bez rizika/Freyja).*

**10.2.2. What gets measured gets done**

As already noted in last year’s Fundamental Rights Report,<sup>49</sup> one thread linking many of the developments in Member States is the role of evaluation and consolidation in driving reform processes. In 2017, this took two particular forms: steps to improve the

assessment of CRPD implementation and using the CRPD in national courts.

A consistent theme of FRA’s research is the role of strategies and action plans in guiding implementation of the CRPD. The year 2017 was no exception, with several Member States adopting either overall or sector-specific action plans linked to the CRPD. Those adopted in **Croatia, Italy** and the **Netherlands** are the most comprehensive. All three put significant focus on how best to assess and measure implementation of the plans.

One way to help make strategies and other legal and policy commitments effective is to ensure that they are accompanied by clear targets, timeframes and budgets.<sup>50</sup> In this respect, the National Strategy for Equalisation of Opportunities for Persons with Disabilities 2017-2020 adopted by the **Croatian** government in April marks an upgrade on the previous strategy.<sup>51</sup> It introduces more measureable indicators to give a realistic overview of the implementation of the 78 measures and 199 activities set out in the strategy. A budget of around HRK 1 billion (approximately € 135 million) will support the strategy’s implementation, with funding coming from the government budget, national lotteries and EU funds. Implementation assessments must, however, be underpinned by data. The second **Italian** Action Plan for the Promotion of the Rights and for the Integration of People with Disabilities, which was adopted by presidential decree in December, further develops the seven areas of action set out in the first plan.<sup>52</sup> However, it supplements these with a new area on the development of a reporting and statistical system on the implementation of disability policies.

Another implementation tool is the development of indicators, particularly those tied specifically to the fundamental rights standards set out in the CRPD.

**Table 10.1: Strategies and action plans relevant to the CRPD adopted in 2017, by EU Member State**

Member State	Strategy or action plan
<b>BE - Wallonia</b>	Walloon accessibility plan for persons with reduced mobility 2017-2019 ( <i>Plan Wallon accessibilité pour les personnes à mobilité réduite</i> )
<b>CY</b>	First National Strategy for Disability 2018-2028 and National Action Plan for Disability 2018-2020
<b>HR</b>	National Strategy for Equalisation of Opportunities for Persons with Disabilities 2017-2020 ( <i>Nacionalna strategija izjednačavanja mogućnosti za osobe s invaliditetom od 2017. do 2020. godine</i> )
<b>IT</b>	Second Action Plan for the Promotion of the Rights and for the Integration of People with Disabilities ( <i>Programma di Azione Biennale per la Promozione dei Diritti e l’Integrazione delle Persone con Disabilità</i> )
<b>NL</b>	Implementation plan for the UN Convention on the Rights of Persons with Disabilities ( <i>Implementatieplan VN Verdrag Handicap verdrag inzake de rechten van personen met een handicap</i> )
<b>UK</b>	Improving lives: the future of work, health and disability

Source: FRA, 2018





FRA has already adopted this approach for two CRPD articles: in 2014, on participation in political and public life (Article 29); and in 2015, on living independently and being included in the community (Article 19).<sup>53</sup> In the same vein, the **Netherlands** Institute for Human Rights, the country's national monitoring mechanism for the CRPD, commissioned research on indicators to monitor CRPD implementation. The preliminary report published in July details 17 quantitative indicators focused around independent living and employment (Articles 19 and 27 of the CRPD).<sup>54</sup> Using data from 2016 and 2017, the indicators will be applied and published in 2018.

In practice, a lack of data often hampers the use of indicators, including those developed by FRA.<sup>55</sup> As a consequence, FRA and other organisations sometimes have to use 'proxy indicators'. These make use of the best existing data to measure the situation approximately. This challenge is reflected in the research commissioned by the **Latvian** Ministry of Welfare on the development of indicators to monitor the CRPD. One of its first objectives was to evaluate the availability, adequacy and quality of existing administrative and survey data that monitor the policy areas the convention covers.<sup>56</sup> The proposed indicators were published in August, but have not yet been applied.

### National jurisprudence clarifies applicability of CRPD to domestic law

Several national-level judgments outlined in last year's Fundamental Rights Report helped to clarify the scope of convention obligations and how they should be met. In 2017, a number of cases looked at the justiciability of the CRPD. These judgments shed light on how the courts view the applicability of the CRPD to domestic law.

The **Austrian** Supreme Court considered this issue in the case of an applicant who had been denied care allowance because he did not have a main residence in Austria. The applicant's submission to the court referred to Articles 18 (liberty of movement and nationality) and 4 (cross-cutting non-discrimination provision) of the CRPD. In its ruling, the court upheld the decision of the lower court, arguing that the CRPD has to be implemented by way of domestic law. Without specific legislation to bring the CRPD into national law, the CRPD is not directly applicable, does not afford any subjective rights and is not a benchmark for assessing the lawfulness of another legal act.

The High Court in the **United Kingdom** used similar reasoning to find that "great care must be taken in deploying provisions of the UNCRPD [...], which set out broad and basic principles as being determinative tools for the interpretation of

a concrete measure, such as a particular provision of a UK statute. Provisions which are aspirational cannot qualify the clear language of primary legislation".

Sources: *Austria, Supreme Court (Oberster Gerichtshof, OGH), 10 ObS 162/16w, Vienna, 24 January 2017; United Kingdom, High Court, Queen's Bench Division (Administrative Court), R. (on the application of Davey) v Oxfordshire CC, [2017] EWHC 354 (Admin), 27 February 2017, para. 47.*

Given the EU's own ratification of the CRPD, another issue concerns the role of the CRPD in areas covered by EU law. A case heard by the High Court in **Ireland** – which has not itself ratified the convention – explored this question. The case concerned a man with a visual impairment who was required to use the assistance of a polling clerk to cast his ballot in local and European elections and referenda, undermining the secrecy of the ballot. EU law gives EU citizens the right to vote in European and municipal elections in any Member State of which they are resident under the same conditions as nationals of that state. However, Member States remain free to design and apply their own procedural rules to the extent that EU legislation does not harmonise respective procedures. In the ruling, the judge clarified that as "none of the [EU] Directives or regulations governed by the [CRPD] relate to electoral procedures [and] there is no common electoral procedure within the [EU]", any consideration of the UN convention in Irish law would require that the parliament had legislated to give the CRPD the status of domestic law.

Source: *Ireland, Sinnott v The Minister for The Environment [2017] IEHC 214, 30 March 2017, paras. 83-85.*

For more information, see also FRA (2014), *The right to political participation for persons with disabilities: human rights indicators*, Luxembourg, Publications Office.

Key jurisprudence related to discrimination on the grounds of disability is highlighted in the 2018 edition of the *Handbook on European non-discrimination law*, published by FRA and the European Court of Human Rights.

## 10.3. Familiar challenges impede effective CRPD monitoring

FRA's previous Fundamental Rights Reports have highlighted a number of recurring challenges that can impede the effectiveness of EU monitoring, both in Member States and at the EU level. These include the absence of a clear legal basis, insufficient financial and human resources, and a lack of independence. While these continued to pose a challenge, another feature of 2017 was a number of changes to the structures appointed under Article 33 of the CRPD. Such changes can both give renewed impetus to monitoring and risk a lack of continuity.

The EU Framework was among the monitoring bodies to see structural change. Although the European Commission stopped participating in EU Framework meetings after the publication of the CRPD Committee's concluding observations on the EU in autumn 2015, it remained an official member. The Council of the EU confirmed the European Commission's formal withdrawal on 16 January 2017, "in accordance with the recommendation of the [CRPD Committee] so as to ensure the independence of the monitoring framework".<sup>57</sup> The revised EU Framework adopted on the same day replicates that originally adopted in 2013, with references to the European Commission removed.<sup>58</sup>

In October, the new composition of the EU Framework met for the first time, with the European Commission in its role as the EU's focal point for CRPD implementation.<sup>59</sup> The meeting identified several concrete ways to strengthen regular and systemic dialogue between the EU's focal point and monitoring body, including through regular biennial meetings and contributions to mutually relevant activities, such as the annual Work Forum, events for the European Day of Persons with Disabilities, and the meeting between the EU and national monitoring frameworks for the CRPD.

On a day-to-day basis, EU Framework members continued to implement the Framework's 2017-2018 work programme.<sup>60</sup> A few examples serve to highlight some of the joint activities that EU Framework members undertook in 2017:

- Webinar on practical tools for implementing the CRPD: in March, the European Parliament, European Ombudsman and FRA each contributed to a webinar highlighting practical steps EU institutions and other parts of the public administration can take to implement the CRPD. Hosted by CEPOL, the EU's police training college, the webinar covered topics such as accessibility of offices, websites, events, human resources, and receiving and handling complaints.<sup>61</sup>
- Annual meeting with national monitoring mechanisms: in addition to allowing for an exchange of information about activities to promote, protect and monitor the implementation of the CRPD, the May meeting had a thematic focus on independent living. The Chair of the CRPD Committee presented the draft General Comment on Article 19, while a representative of the European Expert Group on the transition from institutional to community-based care discussed the role of ESIF in supporting deinstitutionalisation.
- Participation in key events on the EU's implementation of the CRPD: EU Framework members

contributed a number of events related to the mid-term review of the European Disability Strategy (see [Section 10.1](#)). In July, the European Ombudsman represented the Framework in an exchange with the European Parliament's Employment and Social Affairs Committee.<sup>62</sup> In October, all Framework members took part in a public hearing on the future of the EU disability strategy after 2020 organised by the European Economic and Social Committee.<sup>63</sup> In addition, FRA represented the EU Framework in a discussion with the Council working party on human rights in April concerning mainstreaming disability in all EU law, policies and programmes in external action, and the possibility of the EU ratifying the Optional Protocol to the CRPD, which allows for individual complaints to be brought to the CRPD Committee.<sup>64</sup>

## FRA ACTIVITY

### FRA evidence supports preparation of general comments

As in previous years, FRA supported the CRPD Committee's work in 2017 with evidence and expertise. In particular, FRA jointly organised two events to support the committee's work on general comments on Article 5 (equality and non-discrimination) and Article 19 (living independently and being included in the community) of the convention.

In March, FRA organised a side event on measuring the implementation of the right to independent living, alongside the UN Office of the High Commissioner for Human Rights and the European Disability Forum. This was followed up in August with a briefing co-organised with the International Disability Alliance and the Global Alliance of National Human Rights Institutions on how to ensure implementation of the Sustainable Development Goals and how the CRPD supports equality for persons with disabilities. The agency also submitted written input on the draft general comments.

*For more information, see FRA's webpage on [Measuring the right to independent living and the International Disability Alliance's webpage on \[SDG-CRPD implementation for equality for persons with disabilities: the role of organisations of persons with disabilities and National Human Rights Institutions\]\(#\)](#).*

At the national level, the most important structural development was the appointment in the **Czech Republic** and **Greece** of monitoring frameworks under Article 33 (2) of the CRPD. In the Czech Republic, the Public Defender of Rights – the ombuds organisation – was designated as the monitoring body and given new powers to fulfil this role.<sup>65</sup> From 1 January 2018, it will be able to propose legislative changes for the protection of the rights of persons with disabilities, and establish an advisory body composed of persons

with disabilities and their representative organisations to support its monitoring activities. The ombuds organisation will also fulfil this role in Greece. In addition, the Ministry of Justice, Transparency and Human Rights will act as focal point for implementing the CRPD and the Minister or State for coordinating government operations will act as the coordination mechanism under Article 33 (1) of the convention.

This leaves **Bulgaria, Estonia and Sweden** as the only three Member States yet to appoint monitoring bodies.<sup>66</sup> Preparations in Bulgaria took a step forward with the establishment of an interagency working group to design the coordination and monitoring mechanisms. The group includes representatives of the ombuds organisation, the Commission for Protection against Discrimination (*Комисия за защита от дискриминацията*), NGOs and DPOs.<sup>67</sup>

Less encouragingly, familiar concerns regarding funding, mandate and independence highlighted in FRA's 2016 Opinion on requirements under

Article 33 (2) of the CRPD in the EU context persisted.<sup>68</sup> In their shadow report to the CRPD Committee, civil society organisations in **Luxembourg** criticised the failure to provide additional funding to the monitoring framework and highlighted possible gaps in the protection mechanisms with respect to actions by the private sector.<sup>69</sup> The CRPD Committee reflected these concerns in its recommendations.<sup>70</sup> Similarly, a number of **Swedish** NGOs expressed concerns that the planned human rights institution will not have adequate resources to be able to monitor the implementation of the CRPD in accordance with the requirements of Article 33 (2).<sup>71</sup>

These concerns were also reflected in the CRPD Committee's recommendations to the four EU Member States it reviewed in 2017 (see Table 10.2). The committee expressed concern about insufficient resources for monitoring in **Cyprus**<sup>72</sup> and the **United Kingdom**,<sup>73</sup> and the limited capacity and involvement of persons with disabilities and their representative organisations in **Latvia**<sup>74</sup> and **Luxembourg**.<sup>75</sup>

**Table 10.2 CRPD Committee reviews in 2017 and 2018, by EU Member State**

Member State	Date of submission of initial report	Date of publication of list of issues	Date of publication of concluding observations
CY	2 August 2013	5 October 2016	8 May 2017
LU	4 March 2014	10 April 2017	10 October 2017
LV	3 April 2014	26 April 2017	10 October 2017
MT	10 November 2014	March 2018	
PL	24 September 2014	March 2018	
SI	18 July 2014	10 October 2017	March 2018
UK	24 November 2011	20 April 2017	3 October 2017

Note: Shaded cells indicate review processes scheduled for 2018.

Source: FRA, 2018 (using data from OHCHR)

## FRA opinions

The European Commission's progress report on implementation of the European Disability Strategy demonstrates how actions to implement the United Nations Convention on the Rights of Persons with Disabilities (CRPD) are helping to drive wide-ranging legal and policy reforms, from accessibility to independent living. Nevertheless, some initiatives at EU and Member State level do not fully incorporate the human rights-based approach to disability required by the CRPD, or lack the clear objectives, adequate budgets and operational guidance for effective implementation and assessment of progress.

### FRA opinion 10.1

*The EU and its Member States should intensify efforts to embed CRPD standards in their legal and policy frameworks to ensure that the human rights-based approach to disability is fully reflected in law and policymaking. This should include a comprehensive review of legislation for compliance with the CRPD. Guidance on implementation should incorporate clear targets and timeframes, and identify actors responsible for reforms. Member States should also consider developing indicators to track progress and highlight implementation gaps.*

Intense negotiations saw the Council of the EU and the European Parliament adopt their positions on the proposed European Accessibility Act in 2017, demonstrating the EU's commitment to this flagship legislation to implement the CRPD. Nevertheless, significant differences remain over important issues, such as the scope of the act's applicability to audio-visual media and transport services, as well as its interrelationship with other relevant EU law, including European Structural and Investment Funds (ESIF) and the Public Procurement Directive. This raises the prospect of the proposal being weakened in key areas during legislative negotiations, which risks undermining the act's capacity to improve the accessibility of goods and services for persons with disabilities in the EU.

### FRA opinion 10.2

*The EU should ensure the rapid adoption of a comprehensive European Accessibility Act, which includes robust enforcement measures. This should enshrine standards for the accessibility of the built environment and transport services. To ensure coherence with the wider body of EU legislation, the Act should include provisions linking it to other relevant acts, such as the regulations covering the European Structural and Investment Funds and the Public Procurement Directive.*

EU Structural and Investment Funds (ESIF) play an important role in supporting national efforts to achieve independent living. Civil society, including disabled persons' organisations, can play an important role in providing the information necessary for effective monitoring of the use of the funds.

### FRA opinion 10.3

*The EU and its Member States should ensure that the rights of persons with disabilities enshrined in the CRPD and the EU Charter of Fundamental Rights are fully respected to maximise the potential for EU Structural and Investment Funds (ESIF) to support independent living. To enable effective monitoring of the funds and their outcomes, the EU and its Member States should also take steps to include disabled persons' organisations in ESIF monitoring committees and to ensure adequate and appropriate data collection on how ESIF are used.*

By the end of 2017, Ireland was the only EU Member State not to have ratified the CRPD, although the main reforms paving the way for ratification are now in place. In addition, five Member States and the EU have not ratified the Optional Protocol to the CRPD, which allows individuals to bring complaints to the CRPD Committee and for the Committee to initiate confidential inquiries upon receipt of "reliable information indicating grave or systematic violations" of the convention (Article 6).

### FRA opinion 10.4

*EU Member States that have not yet become party to the Optional Protocol to the CRPD should consider completing the necessary steps to secure its ratification as soon as possible to achieve full and EU-wide ratification of its Optional Protocol. The EU should also consider taking rapid steps to accept the Optional Protocol.*

Two of the 27 EU Member States that have ratified the CRPD had not, by the end of 2017, established frameworks to promote, protect and monitor its implementation, as required under Article 33 (2). Furthermore, the effective functioning of some existing frameworks is undermined by insufficient resources, limited mandates and a failure to ensure systematic participation of persons with disabilities, as well as a lack of independence in accordance with the Paris Principles on the functioning of national human rights institutions.

FRA opinion 10.5

*The EU and its Member States should consider allocating sufficient and stable financial and human resources to the monitoring frameworks established under Article 33 (2) of the CRPD. As set out in FRA's 2016 legal **Opinion concerning the requirements under Article 33 (2) of the CRPD within an EU context**, they should also consider guaranteeing the sustainability and independence of monitoring frameworks by ensuring that they benefit from a solid legal basis for their work and that their composition and operation takes into account the Paris Principles on the functioning of national human rights institutions.*

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### Open data from the EU

The EU Open Data Portal (<http://data.europa.eu/euodp/en>) provides access to datasets from the EU. Data can be downloaded and reused for free, both for commercial and non-commercial purposes.

## HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

The year 2017 brought both progress and setbacks in terms of rights protection. The European Pillar of Social Rights marked an important move towards a more ‘social Europe’. But, as experiences with the EU Charter of Fundamental Rights underscore, agreement on a text is merely a first step. Even in its eighth year as the EU’s binding bill of rights, the Charter’s potential was not fully exploited, highlighting the need to more actively promote its use.

Results from FRA’s second European Union Minorities and Discrimination Survey (EU-MIDIS II), as well as myriad national research, left no doubt that much still needs to be done to ensure equality and non-discrimination across the EU. For immigrants and minority ethnic groups, widespread discrimination, harassment and discriminatory profiling remain realities. Anti-Gypsyism has proved to be particularly persistent.

Fewer migrants arrived, but continued to confront harrowing journeys. More than 3,100 died while crossing the sea, and allegations of police mistreatment caused concern. There was little progress in reducing immigration detention of children. Meanwhile, a growing number of large-scale EU information systems served to both manage immigration and strengthen security.

Child poverty rates remain high, and severe housing deprivation emerged as a major concern. The risks of radicalisation and violent extremism among young people spurred diverse initiatives.

The Convention on the Rights of Persons with Disabilities sparked significant achievements, but more needs to be done on accessibility and independent living. While monitoring frameworks can help, they remain hampered by limited resources and independence.

Rule of law challenges posed growing concerns, triggering the first-ever European Commission proposal to adopt a decision under Article 7 (1) of the Treaty on European Union.

Yet the news was not entirely grim. Equality for lesbian, gay, bisexual, trans and intersex (LGBTI) persons made some advances, particularly regarding the civil status of same-sex couples. Efforts to strengthen collective redress mechanisms held promise of better access to justice. Victims’ rights also saw progress, especially in terms of ensuring timely and comprehensive information about rights.

Technological developments relating to ‘big data’ and artificial intelligence brought both great opportunities and great risks. Large-scale malware attacks also prompted concern. The EU’s reforms on data protection and cybersecurity, as well as its ongoing efforts on e-privacy, proved to be timely and highly relevant in light of these realities.

**FOCUS** In modern and fast-paced societies, ‘older’ individuals are often dismissed as burdens and their important contributions to society overlooked. But, as this year’s focus chapter underlines, fundamental rights do not carry an expiration date.

The chapter explores the slow but inexorable shift from thinking about old age in terms of ‘deficits’ that create ‘needs’ to a more comprehensive one encompassing a ‘rights-based’ approach towards ageing. This gradually evolving paradigm shift strives to respect the fundamental right to equal treatment of all individuals, regardless of age – without neglecting protecting and providing support to those who need it.