FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

FUNDAMENTAL RIGHTS REPORT — 2020

REPORT

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

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Country abbreviations

AT Austria
BE Belgium
BG Bulgaria
CY Cyprus
CZ Czechia
DE Germany
DK Denmark
EL Greece
ES Spain
ET Estonia
FI Finland
FR France
HR Croatia
HU Hungary
IE Ireland
IT Italy
LT Lithuania
LU Luxembourg
LV Latvia
MK North Macedonia
MT Malta
NL Netherlands
NO Norway
PL Poland
PT Portugal
RO Romania
RS Serbia
SE Sweden
SK Slovakia
SL Slovenia
UK United Kingdom

Foreword

The year 2019 marked an important milestone for the EU's bill of rights: as of December, the Charter of Fundamental Rights of the European Union had been legally binding for 10 years. As a modern and comprehensive legal instrument, it has prompted important progress, especially at EU level. Yet much remains to be done.

This year's focus section of the agency's annual report, 'Ten years on: unlocking the Charter's full potential', outlines the past decade's achievements as well as persisting hurdles. It shows that national courts are making more use of the Charter. We hope the insights presented encourage others, including governments, to take ownership of this great instrument – and give it full force so that it can truly help transform people's lives.

The report's remaining chapters review the main developments of 2019 regarding: equality and non-discrimination; racism, xenophobia and related intolerance; Roma equality and inclusion; asylum, borders and migration; information society, privacy and data protection; rights of the child; access to justice; and implementation of the Convention on the Rights of Persons with Disabilities. Given the time range covered, the report addresses developments in the United Kingdom of Great Britain and Northern Ireland. For the first time, it also covers two candidate countries for accession to the EU, the Republic of North Macedonia (hereafter North Macedonia) and the Republic of Serbia.

The *Fundamental Rights Report 2020* also presents FRA's opinions on the outlined developments. Available in all EU languages, these opinions recommend a range of evidence-based, timely and practical actions for consideration by EU bodies and national governments.

As always, we thank FRA's Management Board for overseeing this report from draft stage through publication, as well as the Scientific Committee for its advice and expert support. Such guidance helps guarantee that the report is scientifically sound, robust, and well founded.

Special thanks go to the National Liaison Officers, whose input bolsters the accuracy of EU Member State information. The European Network of National Human Rights Institutions (ENNHRI), the European network of equality bodies (Equinet) and members of FRA's Fundamental Rights Platform also provided helpful input. In addition, we are 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

TEN YEARS ON: UNLOCKING THE CHARTER'S FULL POTENTIAL

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The Charter of Fundamental Rights of the European Union has been legally binding for 10 years. At EU level, it has gained visibility and sparked a new fundamental rights culture. At national level, awareness and use of the Charter are limited. Courts increasingly use the Charter, showing the impact of this modern instrument. But its use by governments and parliaments remains low. For instance, there is little indication of anyone regularly scrutinising national legislation that transposes EU law for compatibility with the Charter. The Council of the EU called on Member States to regularly exchange their experiences with the Charter and strengthen relevant national bodies. However, it is not easy to pinpoint exactly when the Charter applies at national level. This is a key hurdle to its fuller use. Low awareness of its added value compared with existing, long-established legal sources is another serious obstacle. Legal practitioners who understand the Charter and can put it into practice at national and regional/local levels can help widen its use and improve its implementation. More specialised training of national actors on the use of the Charter is thus essential.

1.1.

WHY THE CHARTER MATTERS AT NATIONAL AND LOCAL LEVELS

The EU Charter of Fundamental Rights provides persons living in the EU with specific rights. The Charter is the EU's bill of rights. It binds EU institutions in all contexts. Member States are bound to respect the Charter only when they are "implementing Union law" (Article 51 of the Charter).[1] However, since EU legislation directly or indirectly influences much law- and policymaking at national and local levels, the Charter is a relevant tool for national judges, lawmakers and administrators in a wide array of contexts.

The Charter entered into force on 1 December 2009. It has revamped the fundamental rights culture within the EU institutions and increased the human rights momentum across the EU (see Box on 'The EU and the Charter'). In contrast, Member States use the Charter far less. The reasons for this are manifold. **Section 1.3** analyses them.

Although it has been in force for a decade, over half of the respondents in a Eurobarometer survey had never heard of the Charter, let alone its relevance. In 2019, a large majority of the population (72 %) did not feel well informed about the Charter. Six in 10 (60 %) wanted more information about its contents.[2] More worryingly, exchanges with practitioners and consultations carried out for this chapter reveal that the Charter's added value appears to remain unclear to many legal professionals. These include lawyers, judges and representatives of national human rights institutions (NHRIs) and civil society organisations (CSOs) specialised in human rights.

This is a challenge, as the Charter, according to the European Commission, "is most effective, with a real impact on people's lives, when the entire enforcement chain applies it."[3] The implementation of EU law is decentralised within the EU legal system. It heavily depends on the Member States, since, according to the EU treaties, they "shall take any appropriate measures, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union".[4]

National legal systems tend to put a considerable part of the burden of implementing EU law on regional and local authorities.[5] There is thus a need for local and regional administrations to be well aware of the Charter and its implications. Already the official explanations of the Charter underline that the Charter "applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law".[6] Thus, local and regional administrations also need to take responsibility for implementing the Charter.

The EU's Committee of the Regions highlighted already in 2014 that EU values are best "upheld from the grassroots". It noted that "this is why it is important to strengthen the awareness and potential of [local and regional authorities] and civil society for preserving the rule of law and fundamental rights".[7] Strengthening the contributions of local and regional actors to protecting rights in a joined up manner can maximise protection.[8]

"The Charter is a great achievement. With the Charter, we agreed on a set of shared values and fundamental rights that serve as a compass to guide our actions. The Charter is a symbol of our shared European identity, the knowledge that we all belong to a community of values where fundamental rights are respected; where democracy and the rule of law prevail."

Věra Jourová, Vice-President for Values and Transparency, European Commission, **speech** at Charter-anniversary conference 'Making the EU Charter a reality for all', organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

Delivering rights at the local level will help "to close the gap between the fundamental rights framework in principle and fundamental rights outcomes in practice".[9] Indeed, sometimes the Charter is referred to at local level. The city of Madrid's Human Rights Action Plan (2017-2019) is an example.[10] Given that local and regional authorities deliver services related to many areas that directly affect the enjoyment of human rights by individuals, the Charter is also of major relevance for the local level.[11] Shared responsibilities in this field require close cooperation and coordination among authorities at national, regional and local level.

Therefore, this chapter looks at how the Charter is used at national and local levels. It assesses its added value (**Section 1.2**) and examines current hindrances to fully exploring its potential (**Section 1.3**). The chapter concludes with opinions on how to improve its use and application by law- and policymakers, judges and lawyers, as well as civil society actors across the EU.

The EU and the Charter

This chapter looks at the use of the Charter at national level, but the Charter equally addresses the EU itself. In fact, unlike the Member States, the Charter always and in all contexts binds the EU institutions, bodies, offices and agencies, even when they are acting outside the EU legal framework.*

In 2010, the European Commission presented a *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union* (**COM(2010) 573**). Ten years later, after the Lisbon treaty came into force, all EU institutions took steps to reduce the risk that any EU legislation would have a negative impact on rights that the Charter guaranteed.

In parallel, the Court of Justice of the European Union (CJEU) developed a prominent fundamental rights profile. This became visible to a wide audience when in 2014 it struck down EU legislation, the EU Data Retention Directive, because some of its provisions violated the Charter.** Cases in which the CJEU refers to the Charter have increased dramatically – from 27 in 2010 to 371 in 2019.*** This shows that the Charter became a regularly used judicial standard. Through its increasing use before the EU court, it is also of increasing relevance to national courts.

The EU legislature also strengthened the protection of fundamental rights in EU legislation. The Victims' Rights Directive, the Directive on combating the sexual abuse and sexual exploitation of children and child pornography, and the very recent Whistle-blower Directive are all examples. EU policy also more often referred explicitly to fundamental rights. Examples include the EU Framework for National Roma Integration Strategies up to 2020 or the 2016 Code of conduct on countering hate speech online.

Moreover, a member of the European Commission was given explicit and specific responsibility for monitoring the application of the Charter. In the current Commission, Vice-President Věra Jourová has this task and reports annually on the Charter's application. The Council of the EU's Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) became permanent in 2009, and the 2019 Council conclusions on the Charter committed FREMP to holding an annual dialogue on the Charter. The Council also adopted '**Guidelines** ***on methodological steps to be taken to check fundamental rights compatibility at the Council preparatory bodies'.***

More is to come. Internally, the Commission announced that it would revise its Charter strategy in 2020. Externally, an element that is still missing is the accession of the EU to the Council of Europe's European Convention on Human Rights, which would submit the EU to external human rights scrutiny.

** CJEU, Joined cases C-8/15 to C-10/15P, Ledra Advertising Ltd and Others v. European Commission and European Central Bank (ECB), 20 September 2016, para. 67.*

*** CJEU, Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, 8 April 2014.*

**** According to the data provided by the CJEU to FRA, this figure includes references by the Court (123 judgments and 53 orders) and the General Court (155 judgments and 40 orders).*

1.2. THE CHARTER'S ADDED VALUE AND ITS USE AT NATIONAL AND LOCAL LEVELS

The Charter is a new, strong human rights instrument. Part of EU primary law, it has "the same legal value as the [EU] Treaties".[12] It enjoys wide and solid legitimacy, as it was drafted by a multipartite European Convention composed of 62 members, about two thirds of whom were members of the European and national parliaments. The approach was more open and transparent than the classical model of treaty change through intergovernmental conferences.[13] The Charter "constitutes the expression, at the highest level, of a democratically established political consensus of what must today be considered as the catalogue of [the EU] fundamental rights guarantees".[14] It contributes to the overall promotion of human rights for at least four reasons:

— **It is supranational.** As a source of supranational, EU, law, the Charter has a more direct and stronger effect at national level than international human rights law. The principle of primacy means that national law may not be applied in the given case or context if it is not fully consistent with the Charter. National or local judges and civil servants in some sense become EU judges or EU civil servants when acting within the ever-increasing scope of EU law. They have to make sure that national law does not violate the application of the Charter.

— **It increases the visibility of fundamental rights.** Compared with the common principles of EU law, gradually derived since the 1960s from CJEU decisions, the Charter has the advantage of being a written catalogue of fundamental rights. That increases their visibility and accessibility. This can inspire legal practitioners at national level, especially in respect of rights that their national constitutions do not guarantee by explicit provisions.

— **Its wording is modern and more comprehensive than national and international law.** Given that the Charter is a young instrument, it took new developments into account. Certain Charter rights reflect this – for example, the right to consumer protection (Article 38) or the right to conduct a business (Article 16). The Charter combines civil and political rights with social and economic rights in a single legally binding text, which goes beyond the explicit wording of many of the Member States' constitutions. National constitutional or international law already explicitly reflects some, but not all, of the obligations flowing from the Charter.

— **It is EU-specific.** As the EU's bill of rights, the Charter includes many rights that are specific to the EU. As such, they would not be included in national or international law. Examples include the right to petition the European Parliament (Article 44), the right to access EU documents (Article 42), the right to refer cases of maladministration to the European Ombudsman (Article 43) and the right to freedom of movement and residence (Article 45).

Against this background, the Charter has a role to play in national courts (**Section 1.2.1.**), when they are deciding if national legislation is in conformity with constitutional law (**Section 1.2.2.**) or interpreting national and EU law (**Section 1.2.3.**); in national law- and policymaking (**Section 1.2.4.**); and even in relationships between private parties (**Section 1.2.5.**).

The cases and examples presented are taken from 2019. For earlier examples, see the chapters dedicated to the Charter in previous editions of FRA's annual **Fundamental Rights Report**.

FRA ACTIVITY

Providing assistance and expertise to EU Presidencies

In recent years, FRA has helped EU Presidencies apply the Charter. For example, it has organised informational events for civil servants of Member States' representations in Brussels in cooperation with the Legal Service of the Council of the EU, and large-scale training events for civil servants of all ministries in the capitals.

Under the Austrian Presidency, FREMP dedicated its first informal meeting to the implementation of the Charter. The agency provided input. It similarly did so at the second informal FREMP meeting under the Finnish Presidency. That meeting was dedicated to the fundamental rights dimension of hybrid threats – such as the manipulation of information, the targeting of logistical weakness of energy suppliers, blackmailing with biotechnological threats, undermining democratic nstitutions, etc.

All EU Presidencies have used FRA data when drafting the annual Council conclusions on the Charter. In the 2019 conclusions, the Council "welcomes the Charter-specific work of the Agency". It also encourages FRA to "continue developing tools and training, including for legal professionals, and supporting Member States and EU institutions, bodies and agencies in the implementation of the Charter and in promoting a culture of compliance with fundamental rights across the Union".*

** Council of the European Union, Conclusions on the Charter of Fundamental Rights after 10 years: State of play and future work adopted on 7.10.2019, para. 19.*

1.2.1. The Charter and the role of national courts

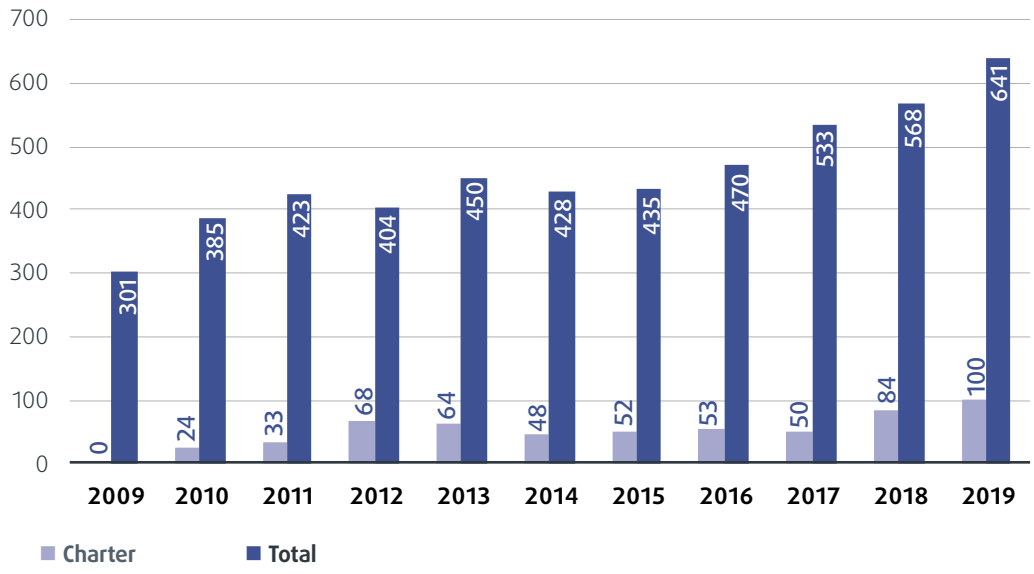
National courts increasingly use the Charter as a relevant legal source, according to data and evidence that FRA has collected over recent years (Figure 1.1). References to the Charter in national courts' decisions are growing more frequent and less superficial.

In addition, national courts use the Charter when asking the CJEU for interpretation. Between 2009 and 2019, national courts sent the CJEU 5,038 requests for preliminary rulings. Of them, 576 (over 11 %) contained questions related to the Charter. This percentage has remained rather stable over the last decade.

The CJEU is deeming inadmissible fewer and fewer Charter-related requests sent to it for preliminary rulings.[15] Among others, this signals a clear learning curve among national judges when it comes to determining whether or not the Charter is applicable in a given case. They are becoming increasingly familiar with the scope of the Charter. A more pronounced use of the Charter in the judiciary is also likely to influence the other two branches of governance, the administration and the legislature.

FIGURE 1.1: USE OF CHARTER IN REQUESTS FOR PRELIMINARY RULINGS SENT BY NATIONAL COURTS TO CJEU

Note: The percentages of requests for preliminary rulings that mention the Charter range from 6 % (2010) to 17 % (2012). On average, it was 12 % in 2010-2019.



Source: Data provided to FRA by the CJEU, 2020

National courts do not necessarily refer a case to the CJEU or a national higher court before applying the Charter. In fact, EU law requires all national judges to act as EU judges themselves. The national court, in collaboration with the Court of Justice, "fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed".[16] As the Regional Administrative Court in Wrocław in **Poland** put it: "The broad scope of application of the Charter [...] means that administrative courts gain the role of EU constitutional courts, examining the compliance of domestic law not only with EU law, but with fundamental rights recognised by the EU system as well."[17]

Indeed, national courts frequently have to interpret national legislation or examine administrative decisions without the CJEU coming into play. For instance, in June 2019, the Constitutional Court in **Austria** found that an administrative asylum decision infringed Article 47 (2) of the Charter on fair trials.[18] In **Finland**, the Supreme Court provided Charter-based advice to the government in a case concerning whether or not a person can be extradited to Turkey without the risk of violating human rights. It cited protection in the event of expulsion, as laid down in Article 19 of the Charter.[19]

1.2.2. The Charter and the constitutional review of national legislation

A prominent but less frequent use of the Charter before national courts is in constitutional reviews.[20] The Constitutional Court of **Germany** delivered a ground-breaking judgment in this regard on 6 November 2019. For the first time it decided to use the Charter as the relevant standard for constitutional review in areas that are fully harmonised under EU law.[21] The case concerned a manager who was interviewed in a TV show entitled 'Dismissal: The dirty practices of employers'. The NDR broadcasting corporation aired a segment of the show and uploaded it under the same title. When one typed the complainant's name into Google, the link to this content appeared among the top search results.

The search engine operator refused the complainant's request to remove the site from the search results. The complainant lodged an action with the Higher Regional Court, which rejected it. She consequently submitted a constitutional complaint claiming a violation of her general personality rights and her right to informational self-determination. On the merits, the complaint was not successful. The Constitutional Court concluded that the lower court had undertaken the necessary balancing, taking into account both the protection of the complainant's personality rights and the search engine operator's freedom to conduct a business.

However, the case provided the court with an opportunity to specify its relevant standard of review in the context of EU law. Where an area is fully harmonised under EU law, the relevant standard of review derives not from German fundamental rights, but solely from EU fundamental rights.[22] The judgment opens a new chapter, allowing the Constitutional Court to play an active role in the area of EU fundamental rights and allowing parties to raise Charter arguments before the court in Karlsruhe.[23]

In a second decision rendered the same day, the Constitutional Court held that, in areas that are not fully harmonised under EU law, the national human rights form the standard of constitutional review. But at the same time it held that the national human rights should be interpreted in light of the Charter.[24]

Constitutional courts from other Member States also occasionally use the Charter, in addition to national constitutional law, when reviewing national legislation. For instance, the Constitutional Court of **Croatia** referred to the Charter when asked to assess the constitutionality of provisions of the Public Procurement Act. The court acknowledged the Charter as a relevant standard by stressing that, since public procurement falls within the EU's jurisdiction, "when applying the provisions governing it, either directly through EU acts or through national implementing legislation, there is an obligation to respect the fundamental rights guaranteed by the Charter".[25]

FRA ACTIVITY

What happens at national level? FRA's regular data collection on the Charter's use

Back in 2012, the European Commission asked Member States to report national cases that refer to the Charter. Of the 27 Member States, 15 replied. The Commission asked FRA to analyse the judgments. From 2013 onwards, the agency has been collecting Charter-related national cases decided by national high courts. This collection is done through FRANET, the agency's multidisciplinary research network.

The analysis appears annually in a dedicated chapter of its annual fundamental rights report, which is one of the most often downloaded chapters of this report.* Alongside national case law, the chapter also deals with the use of the Charter in the legislative process (for instance examples how the Charter was used in impact assessments of bills) and parliamentary debates. It also refers to promising practices with regard to the use of the Charter at national level and relevant academic literature on the Charter.

FRA uses this evidence base in other activities, too. For instance, it has delivered an opinion on '**Challenges and opportunities for the implementation of the Charter of Fundamental Rights**' at the request of the European Parliament.

**In the Fundamental Rights Report 2020, the current chapter – which is also being published separately as this year's 'focus section' – replaces the usual Charter chapter.*

"Citizens must be confident that wherever they are in the huge area without internal frontiers that is the European Union – an area of freedom, security and justice – their fundamental rights under EU law will be effectively protected. That is the role of the Charter. It acts as a 'constitutional cement', binding the EU legal order together in a sustainable way."

Koen Lenaerts, President of the CJEU, interview with FRA at Charter-anniversary conference '***Making the EU Charter a reality for all***', organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

In **Portugal**, the Constitutional Court dealt with the procedure for special access to telecommunication and internet data by intelligence officers of the Portuguese Internal Intelligence Service and the Portuguese External Intelligence Service. While the court formally assessed the respective law against the Constitution, it also referred to the Charter, the relevant EU legislation and CJEU case law. The court stressed that it "must not fail to take into account the fundamental rights enshrined in the Charter" as well as the European Convention on Human Rights (ECHR) and "their interpretation by the competent authorities for their application, in particular the Court of Justice of the European Union and the European Court of Human Rights".[26]

1.2.3. The Charter and the interpretation of national and European law

As the cases above show, reviews of national legislation are often not done directly against the Charter but rather against EU secondary law as interpreted in light of the Charter. For instance, in **Ireland**, the High Court had to decide if the provisions of the Communications Retention of Data Act 2011 are consistent with Article 15 (1) of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, read in light of Articles 7, 8 and 52 (1) of the Charter.[27] Similarly, in **Slovenia**, the Supreme Court examined a provision in a national administrative act against the EU Procedures Directive as read in light of Articles 4 and 47 of the Charter.[28]

In **Lithuania**, the Constitutional Court dealt with a case comparable to the *Coman* case, which the CJEU had decided in 2018.[29] It concerned whether or not same-sex marriages concluded in another Member State have to be recognised. A Belarusian citizen had married a Lithuanian citizen of the same sex in Denmark and applied for a temporary residence permit in Lithuania on the grounds of family reunification.[30] The Constitutional Court interpreted the Law on Legal Status of Aliens in light of the EU Free Movement Directive and thus took Articles 7 (respect for private and family life), 21 (non-discrimination) and 45 (freedom of movement) of the Charter into account.

"Many things in national legislation are unclear where we don't know how far it should go or, you know, there are gaps in the law. [...] And we also have issues where the legislation is simply poor or inconsistent with the Charter, where we can actually also push back."

Max Schrems, Data protection activist, interview with FRA at Charter-anniversary conference '***Making the EU Charter a reality for all***', organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

Where national courts apply EU legislation or interpret national law in light of it, the Charter provides guidance for interpretation.

For instance, in the **Netherlands**, the Administrative Jurisdiction Division of the Council of State dealt with asylum claims in a case concerning a gay couple from Russia. The question arose whether or not the relevant EU directives require a second instance hearing of the case. Answering the Division's prejudicial questions to the CJEU, the CJEU found that neither Articles 47 nor 18 and 19 (2) of the Charter would require automatic suspensory effect for appeals against judgments delivered at first instance upholding a decision rejecting an application for international protection and imposing an obligation to return. The only requirement is that there must be a remedy before a judicial body. Based on this ruling by the CJEU, the Council of State confirmed that the Dutch practice conformed with EU law.[31]

In **Slovenia**, the Supreme Court clarified the time limit for lodging compensation claims under Regulation (EC) No. 889/2002 on air carrier liability in the event of accidents. It referred to Article 47 of the Charter.[32]

1.2.4. The Charter's role in national law- and policymaking

National legislators and policymakers have a major responsibility when transposing EU legislation or when designing and implementing policies that give effect to EU policies. They need to ensure that national measures respect the obligations flowing from the Charter. If a national measure falls within the scope of EU law, they should assess its potential impact on rights guaranteed by the Charter, to avoid any risk of violating EU law. However, national procedural norms on impact assessments and provisions on legal scrutiny in the law-making process rarely explicitly mention the Charter as a relevant standard.[33] There are, however, exceptions, as the example of Finland shows (see Promising Practice Box).

Organisations that may use the Charter when assessing the impacts of legislative proposals include judicial or quasi-judicial bodies, parliamentary committees, legal departments in ministries or the parliaments' administration, ombudspersons, NHRIs and non-governmental organisations (NGOs). They can point to potential violations of the Charter and suggest how the legislation or policies could proactively promote the application of Charter rights in the given context.

In 2019, FRA conducted interviews with the NHRIs in the EU Member States to gather detailed information on the status of NHRIs and their work across the EU. Among other topics, it asked about how they use the Charter in their work. It emerged that they use the Charter most when advising governments.[34] Moreover, NGOs also use the Charter when commenting on legislative proposals.

For instance, in **Ireland**, the NGO Free Legal Advice Clinics cited the Charter at a parliamentary hearing of the Joint Oireachtas Committee on Justice and Equality. It expressed concern that draft legislation on statutory compensation for breaches of the right to a hearing within a reasonable time under Article 6 of the ECHR did not sufficiently consider Article 47 of the EU Charter of Fundamental Rights.[35]

In **Austria**, Amnesty International used the same Charter article in a legal opinion on an act establishing the Federal Agency for Care and Support of Migrants.[36]

FRA ACTIVITY

Charterpedia – a central hub for Charter-relevant information

Charterpedia is an online **database** of European (CJEU and ECtHR) and national case law that makes use of the Charter. It currently includes around 1,000 cases. The case law is searchable by various criteria, including Charter right and country. For every Charter right, it also outlines relevant provisions in EU Member State constitutions, as well as relevant EU legislation and international legal documents.

In addition, FRA collects **academic references** to the Charter, including in less commonly used languages, and references to the use of the Charter in **parliamentary debates**. In 2020, Charterpedia will include information on the use of the Charter in national legislative processes. FRANET, FRA's multidisciplinary research network in all EU Member States, collects the data for Charterpedia.

In **Sweden**, a public inquiry assessed, among other things, if proposed legislation could make the public funding granted to CSOs dependent on whether or not they conform with "fundamental values of Swedish society".[37] The final report of the inquiry concluded that this form of conditionality cannot be considered an infringement of the right to freedom of association as formulated in Article 12 (1) of the Charter.[38]

In the **Netherlands**, the government asked the Council of State to assess the feasibility of introducing the possibility, if a bank received state aid, to retrieve part of the fixed remuneration of system-relevant bank managers from three years earlier.[39] The State Council advised the government not to do so. It noted that such a deduction from the part of the remuneration that is not dependent on the manager's performance would conflict with the right to property, laid down in Article 17 of the Charter, and with the freedom to conduct a business, laid down in Article 16 of the Charter.

In **Lithuania**, the Department of European Law in the Ministry of Justice raised Charter-related concerns about a bill amending the law on election to the European Parliament.[40] The bill aimed to introduce a new provision stating that the same person can be elected as a member of the European Parliament no more than two times in a row. The Department of European Law stressed that the right of every European Union citizen to vote and be a candidate in the European Parliament elections is enshrined in Article 39 (1) of the Charter. According to the Department, it was not clear from the draft proposal why the proposed limitation should be considered necessary for protecting general interests recognised by the Union.

Such Charter checks at national level can make a real difference. In **Luxembourg**, the Council of State *(Conseil d'Etat)* assessed a bill amending a 2014 law on the procedure applicable to the transnational exchange of information in tax matters.[41] The Council of State took the view that, to comply with Article 47 of the Charter, the judge from Luxembourg must have wider rights to review and must be able to decide on the formal validity of a request to exchange information on taxation. The bill was amended accordingly.

Another example comes from **Lithuania**. A draft law established that foreigners from countries where there was an outbreak of infectious disease would not be allowed to enter the country if they failed to prove that they had received prophylaxis for the disease.[42] The Legal Department of the Office of the Parliament stressed that Article 45 of the Charter enshrines the right of every EU citizen to move and reside freely in the territory of the Member States. It underlined the need to consider the principle of proportionality when limiting Charter rights. That includes taking into account the nature and gravity of the disease, how infectious it is, and other factors. After the impact assessment, the bill was revised accordingly.

PROMISING PRACTICE

Memorandum on Charter's interpretation and application

In 2016, the Ministry of Justice in **Finland** drew up a memorandum on the *Interpretation and application of the EU Charter*. The memorandum was inspired by guidelines developed in the Netherlands.*

The purpose of the Finnish memorandum was to make the Charter better known among civil servants and to promote and mainstream its active use across the administration. However, since the original issuance of the memorandum in 2016, the case law of the EU courts on the Charter has developed alongside the growing awareness of the importance of EU fundamental rights.

Currently, the greatest need seems to be on more practical assistance in determining the Charter's scope of application and balancing diverse rights. The Ministry of Justice therefore updated the memorandum in 2019, to provide further assistance in dealing with the applicability of the Charter and justify limitations to the Charter.

Note that, in 2020, the Dutch Ministry of the Interior will integrate the different Dutch guidelines into a comprehensive manual on constitutional review of draft legislation. All these instruments are available **online.*

1.2.5. The Charter's direct horizontal effect

For many years it was open to discussion whether or not the Charter could generate legal effects between private parties (i.e. horizontally).[43] It was clear that the Charter can, like other EU law in general, have direct effects in the sense that it would preclude national legislation that is contrary to a Charter provision. But it was unclear if this would also apply in a dispute between two private parties.

In the 2018 *Bauer et al.* judgment, the CJEU affirmed that this is the case for some of the Charter's provisions. Building on its earlier judgment in *Egenberger* (on the effects of Article 21 of the Charter, non-discrimination),[44] the Grand Chamber judgment stated that the fact that "certain provisions of primary law are addressed principally to the Member States does not preclude their application to relations between individuals".[45] In this light, the court recognised that the right to paid annual leave, as established in Article 31 (2) of the Charter, is horizontally applicable. Charter provisions that are both "unconditional and mandatory in nature" apply not only to the action of public authorities, but also in disputes between private parties.[46] The fact that a right is included in the Charter's Chapter IV, 'Solidarity', where most socio-economic provisions are, does as such not therefore imply that it is not horizontally applicable.

This is also of relevance to national courts. An example from **Malta** shows this. Previously the Charter had not played an important role before courts. The case concerned an evicted tenant.[47] A provisional measure to stop the eviction, after the tenant filed a constitutional case, was revoked on the day of the eviction without the tenant having the opportunity of a fair hearing. He claimed that the procedure had violated his fundamental rights protected by Article 47 (right to an effective remedy and fair trial) of the Charter. He argued that the Charter provisions have direct effect, implying that national norms conflicting with the Charter are rendered inapplicable. Moreover, he argued that the direct effect of the Charter can also lead to the recognition of rights that are not available in national law.

The court quoted extensively (in 11 pages of direct quotes) academic literature and a European Parliament study analysing the role of the Charter, including its (horizontal) direct effect. It then concluded that it "agrees with the applicant that the Charter today forms part of Maltese Law and that Maltese Courts should consider and apply it in the way they apply any other ordinary law that has direct effect".[48] The court established that this direct effect can also apply horizontally between two private parties.

1.2.6. The Charter in strategic litigation

Civil society organisations (CSOs) and others active in the field of fundamental rights, such as NHRIs, NGOs or lawyers specialising in human rights and other human rights defenders, can use the Charter in all the different aspects of their daily work. This includes strategic litigation and advocacy, awareness raising, education, monitoring and research.[49] The Charter's supranational nature and its explicit wording make it an important tool for strategic litigation. The right to data protection, the right to consumer protection, and the right to a fair trial serve as examples.

"European Union Law is a really powerful tool for citizens' rights. It gives judges in many countries more powers than they might have under national law to uphold those rights. It also allows citizens and NGOs to try and take their case to the Court of Justice of the European Union in Luxembourg."

Simon Cox, Barrister, interview with FRA at Charter-anniversary conference ***'Making the EU Charter a reality for all'***, organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

FRA ACTIVITY

The Charter and strategic litigation

On 20 and 21 May 2019, the agency convened a meeting with 25 NGOs working on strategic litigation. The workshop aimed to explore the role of the Charter and strengthen strategic litigation on human rights in the EU. Participants exchanged knowledge and explored topics of shared interest, but also agreed that, so far, the Charter's potential for strategic litigation remains underused.

Wherever EU law applies, arguments based on the Charter can be used before national courts. However, the degree to which third parties have access to courts depends on the respective legal system and the context. NGOs have used the Charter in amicus curiae submissions (opinions of the 'friend of the court') to national courts.[50] And even if the access for third parties to the CJEU is limited, the work of national human rights bodies has influenced various prominent cases that the CJEU has decided over the past few years.

For example, the Belgian Consumer Protection Association initiated the *Test Achats* case, which led in 2011 to the CJEU annulling parts of the Gender Equality Directive on Goods and Services (2004/113/EC).[51] CSOs can also use the Charter in litigation. In the *Digital Rights Ireland* case, the NGO Digital Rights Ireland challenged the legality of national measures implementing the Data Retention Directive and, in the end, the CJEU annulled the directive.[52] CSOs often provide attorneys to work on key cases. For example, in the *El Hassani* case (C-403/16), an attorney affiliated with the Helsinki Foundation for Human Rights represented the claimant.[53]

NGOs and other bodies such as NHRIs have fewer opportunities to intervene before the CJEU than before the ECtHR. An NGO can submit written statements to the CJEU only where it is a party to national proceedings in the course of which a question has been referred for a preliminary ruling.[54] A particular situation exists in the area of data protection, where supervisory authorities can use the Charter to protect privacy rights.[55] Anyone who believes that an EU body has violated her or his data protection rights can make a complaint to the European Data Protection Supervisor.

If EU bodies violate the right to good administration (Article 41) or access to documents (Article 42), a complaint to the European Ombudsman can trigger an investigation. Moreover, any natural or legal person residing or having its registered office in a Member State has the right to address a petition to the European Parliament on a matter that comes within the EU's fields of activity and affects her, him or it directly.[56]

Finally, infringement proceedings can also address violations of the Charter. Such proceedings have recently been deemed an efficient "fundamental rights tool".[57] Individuals or organisations can send complaints to the European Commission by using a specific form **available online**. Based on such a complaint, the Commission may decide to make informal contact with the national authorities of the Member State concerned. A study has proposed collecting information, on a more systematic basis, on whether Member States comply with fundamental rights in the scope of application of EU law. "This could allow a more systematic and principled use of the powers of the Commission, as guardian of the Treaties, to file infringement proceedings, prioritising cases which raise issues related to fundamental rights." [58]

1.2.7. The Charter's use in research, by civil society, and to raise rights awareness

NGOs, NHRIs and other relevant groups using the Charter in strategic litigation or in their other activities, such as human rights education, awareness raising or advisory functions, can benefit from academic research on the Charter. However, a lack of data often hampers research on the use of the Charter at national level.

Academic publications tend to address more general issues covering the Charter rather than its concrete use at national level. That was true in 2019: academic writing dealt with the Charter in general[59] or major aspects of the Charter, such as its scope of application[60] or its horizontal effect.[61] In 2019, FRA asked the members of FRANET to identify factors that could improve tracking and evaluation of the use of the Charter at national level. Most responses favoured enhanced exchange between relevant actors (such as courts, etc) as well as more academic analysis in national languages. Some responses indicated the publication of all judgments by all courts, since judgments of local courts are often not accessible; and the establishment of fully searchable court databases.

Over the years, academic interest has extended towards the use of the Charter at national level. In 2019, academic writing analysed the use of the Charter as a yardstick for national legislation[62] or its application by national courts.[63] Increasingly, studies examine more specific aspects or contexts. In 2019, various articles studied the Charter's relationship with the single market,[64] its impact on employment relationships,[65] the Charter and genome editing,[66] the Charter and the right to good administration,[67] Brexit and the Charter,[68] the Charter and digital privacy,[69] the Charter and hate speech,[70] the Charter and the right to housing,[71] and the Charter's relationship with copyright law.[72]

The reference year 2019 saw the finalisation of relevant international EU-funded research projects that had a very strong training component and aimed to bring together research and legal practitioners. The project e-learning National Active Charter Training (**eNACT**) is an example. It resulted in 16 training events, five thematic handbooks and a group of massive open online courses (MOOCs) on the **Charter and data protection**, the **application of the Charter**, **children's rights and the Charter**, **freedom of expression**, social rights and labour law, and asylum and immigration. At the same time, new projects were prepared that will also deal to a certain degree with the Charter, such as 'Trust, independence, impartiality and accountability of judges and arbitrators safeguarding the rule of law under the EU Charter' (**TRIIAL**). TRIIAL was launched at the beginning of 2020 and will lead to four transnational workshops, seven cross-border events and five national training events on the topic of independence, impartiality and accountability of legal professions.

New projects can build on ongoing projects, such as the Roadmap to European Effective Justice (**REJUS**, a judicial training project) or Fundamental Rights in Courts and Regulation (**FRICoRe**); as well as on past research and training projects, which have resulted in many relevant deliverables that legal practitioners can use. These projects include the following:

— Training for a European Area of Justice (**TrEAJus**) resulted in, among other outputs, five **training manuals**, one of them specifically on the Charter (a short article-by-article commentary).

PROMISING PRACTICE

Citizens' initiative: the Charter on the road

Citizens can also take the initiative to start public exchanges about the Charter, as the example of two artists from Germany shows. Stephan Köperl and Sylvia Winkler were curious about the Charter and wanted to know more – and they had an idea about how to engage the general public with the Charter.

In their art project 'Galley Proof' (*Druckfahnen*), they printed the Charter on large banners and put them into public spaces, confronting passers-by with the Charter's full text and inviting them to propose how the text could be improved. They thus engaged citizens in discussions on how to use the Charter for a vision of a more sustainable and social European Union.

Citizens could propose changes to the Charter, which were added with red and green markers – like proof-readers edit a galley-proof before publishing. That is where the name of the project comes from. This exercise was repeated in various cities in Germany.

More information is available on **the Galley Proof website**.

— Active Charter Training through Interaction of National Experiences (**ACTIONES**) focused on the vertical and horizontal interaction between courts. It resulted in a set of **handbooks** on how judges can interact in applying the Charter in four different thematic areas. The material provides case studies and '**Tips for trainers**'.

— Charterclick resulted in a **Charter tutorial** and an interactive **checklist**, both designed to help understand if the Charter applies to a given case. Both tools are now available on the European Commission' e-justice portal.

— **Judging the Charter** resulted in a set of training events, a **manual** on the role of the Charter in asylum cases, and a **website** that brings together a large amount of Charter-related information. It includes exercises and training materials, case law and a selection of relevant EU legislation.

— Making the Charter of Fundamental Rights a Living Instrument resulted in a user-friendly **manual** on the Charter and **guidelines** for civil society on how to best use the Charter.

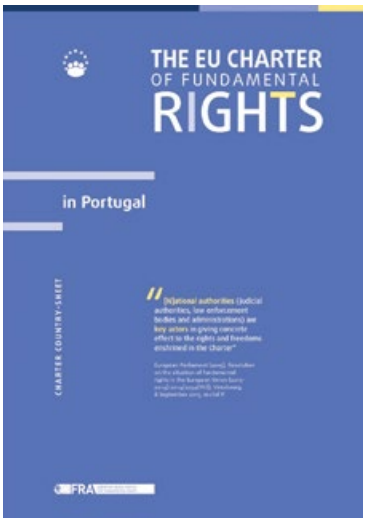
— The Charter **in Action** resulted in various workshops, a **best practices handbook** for Charter training sessions and a **training manual**.

Using research capacities to improve training opportunities in the area of the Charter appears key. Lack of awareness and of relevant training is one of the obstacles to fully using the potential of the Charter. It is therefore important that the results and materials from such EU-funded projects be regularly updated (databases that are not regularly maintained are not sustainable) and distributed to the relevant stakeholders to have the desired impact.

Academic research offers ideal tools to increase awareness of the Charter among legal practitioners. Article-by-article commentaries are especially important. These are well established in the German-speaking countries.[73] A new English-language commentary came out in 2019[74] and the second editions of a well-established English flagship commentary and a comparable French commentary will appear in 2020.[75] Such commentaries are also available in other languages such as Spanish[76] or Italian.[77] Recent examples show that academics are not only providing important expert know-how to legal practitioners but do sometimes also communicate with the wider public. This potential can also be used in the context of the Charter. Various formats can be used, ranging from briefing papers in simple language,[78] videoblogs,[79] interviews on radio and podcasts[80] to blogs dedicated to the Charter, such as the blog series **All EU-r rights**.[81]

In 2019, even public authorities used modern means to raise public awareness of the Charter. The Council of the EU presented a one-minute video entitled '**Sharing a peaceful future based on common values**'. The European Commission also launched a short video on the Charter in various languages.[82] The European Parliament produced a more substantial **video on the genesis of the Charter,** including interviews with key players. Political groups[83] and individual Members of the European Parliament (MEPs)[84] used videos to raise awareness of the Charter. FRA produced a **five-minute video** that gives an overall view of the Charter's content.

1



At the national level, it would be natural for NHRIs to promote the Charter. In France, the Commission consultative des droits de l'homme (Consultative Commission on Human Rights) presented a **video** on the Charter. European Advocacy published the video '**The Charter of Fundamental Rights of the EU at 10**', which shows that CSOs also communicate about the Charter and its added value.

Connect Europe is an interesting example of a civil society project aimed at increasing awareness of the Charter. The project encourages citizens of various countries to get involved in the EU. It also increases public awareness of the values of the Union, especially the Charter. Seven NGOs organise it under the lead of New Europe (*Nyt Europa*), a Danish organisation that promotes civic engagement. They ran four events, with three more to come, in seven European cities, reflecting the themes of the Charter.[85]

3

FRA ACTIVITY

Raising awareness of the Charter: new tools

FRA has developed various tools to increase awareness of the Charter. These include:

1 Charter country sheets give information in the national language about the Charter, its role, and how it is used in the Member State. They are available on FRA's **website**, and can also be ordered from **the Publications Office of the EU**.

2 A five-minute video entitled '**Apply the Charter, deliver our Rights**'. Produced in 2019, it provides information on all six themes of the Charter. FRA presents these in separate 90-second videos (on **dignity**, **freedoms**, **equality**, **solidarity**, **citizens' rights** and **justice**) on its social-media channels.

3 FRA has compiled products focusing on the Charter in a "Charter box". FRA sent this, for instance, to all MEPs who serve on the fundamental rights and constitutional affairs committees. It will continue to disseminate its deliverables to relevant stakeholders.

2

1.3. MAIN OBSTACLES TO MORE COMPREHENSIVE USE OF THE CHARTER

"In general, the Charter is not well known in Sweden and is rarely referred to. When fundamental rights issues are discussed or processed, they are almost exclusively framed with the European Convention of Human Rights and the UN conventions. The standing of the Charter is also quite unclear. When is it applicable and when will referring to the Charter influence court rulings? If this was clearer, there is a possibility that different actors would see the point of referring to it as they do with the international conventions."

Sweden, National FRANET expert, 2019

Despite the efforts and examples outlined above, the Charter's use at national level overall remains limited. There are hardly any national surveys or studies on the use of the Charter in the Member States. Where they have been carried out – such as in **Lithuania**, in 2019 – they confirm that countries do not use the Charter much.[86]

To better understand why the Charter is often not taken into account, FRA in 2019 consulted with CSOs, NHRIs and national judicial training institutions, in cooperation with the European Judicial Training Network (EJTN). Moreover, the agency approached its own FRANET legal experts, who have for years been collecting data and analysis concerning the Charter's use at national level.

The reply of the FRANET partner in Spain is illustrative of the responses: "[T]here is a considerable under-utilisation of the Charter at the Spanish national level, due to the confluence of three persistent factors: ambiguity of the Charter, little or lack of awareness of the Charter and the absence of national policies to promote its implementation." When asked who makes most use of the Charter, they clearly point to the judiciary as the branch of government that uses it most regularly. This confirms earlier agency findings. They did not perceive national or local governments as using the Charter.

Interviews with NHRIs and consultations with human rights CSOs confirm that the Charter is underused. Only four out of 30 NHRIs FRA interviewed in 2019 said that they are using the Charter sufficiently. All others indicated that they are not yet making full use of its potential. This is a remarkable finding given that NHRIs might be expected to be natural advocates of the Charter. A similar picture arose from the consultation with CSOs on the Fundamental Rights Platform, FRA's civil society network. About two thirds of the respondents believe that their organisation does not exploit the full potential of the Charter in its work (67 %); one out of four indicated that they use it often (26 %); and one in 10 indicated that their organisation never refers to the Charter (10 %).[87]

On the main reasons for not making more use of the Charter, stakeholders say that it is unclear what value it adds to national and international legal sources, and its scope of application is limited.

In the consultation with the CSOs, the Charter's scope of application came out as the third most important factor for the underuse of the Charter. Of the 153 respondents, 36 mentioned this. The consultation gave CSOs the opportunity to indicate another factor, namely "limited resources of the organisation (e.g. financial resources, expertise, etc.)". Most of the respondents (84) indicated this as relevant to the underuse of the Charter.

The Charter's language is concise and its content is attractive, but a closer look reveals complexities that make legal practitioners hesitate. It is "easy to read, but difficult to understand".[88] The following factors appear to limit the use of the Charter in legal practice:

— **Article 51 test:** In contrast to international and national human rights norms, the Charter binds Member States only when they are "implementing Union law", i.e. when they are acting within the scope of EU law (Article 51 of the Charter). Assessing whether or not a specific case falls within the scope of EU law requires good knowledge of the extensive case law of the CJEU.[89]

— **Unspecified standing:** In contrast to international and national human rights norms, the legal standing of the Charter is not explicit in national law. The Charter is an act of EU primary law, so the Member States do not have to incorporate it into domestic law by specific legislation. That would draw the attention of the legal practitioners to its existence and explain its legal standing in domestic law.

— **Distinction between rights and principles:** The Charter contains not only rights but also principles. The Charter does not clarify whether a provision is a right or a principle. Principles, according to Article 52, paragraph 5, are "judicially cognisable" only when they have been implemented by "legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law". This can leave legal practitioners in doubt about the nature and legal value of many Charter provisions.

— **Lack of experience:** The Charter is a new instrument in a rather crowded field. Legal practitioners may question why they should add a third layer of rights to those in well-known national and international sources. At first sight and without specialised training, it may seem like more of the same.

1.3.1. Extending the Charter's field of application? A reality check

The field of application of the Charter, as defined in Article 51, has provoked "perhaps, the most controversy".[90] There was never any intention to oblige the Member States to respect the Charter provisions always and everywhere. The very first draft restricted the Charter's field of application to the Member States to instances where they "transpose or apply" Union law.[91] This first proposal also stressed that the Charter is not meant to create new powers and tasks for the EU.

Debates followed in the European Convention that drafted the Charter. They show that how far the Charter should bind the Member States – in addition to the EU – was a sensitive issue. It was argued that the Charter could develop a "competence absorbing effect" that could affect the Member States' autonomy. The president of the convention aimed to rebut that concern.[92]

"There's still a lot of confusion about the application of the Charter. You can often see when this is being discussed that even judges and lawyers have difficulty sometimes sorting it out. This points to a real need for education of the judiciary and other actors in every member state and, of course, at EU level as well."

Emily O'Reilly, EU Ombudswoman, interview with FRA at Charter-anniversary conference ***'Making the EU Charter a reality for all'*** organised by the European Commission, the Finnish EU Presidency, and FRA on 12 November 2019

FRA ACTIVITY

The complex scope of the Charter – providing practical guidance in all languages

In 2018, FRA published a handbook entitled *Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level*. It provides national law- and policymakers, legal practitioners and civil servants with practical guidance. In 2019, the handbook was downloaded 3,000 times, showing significant demand.

The first part provides a general overview. It explains how the Charter relates to national and international human and fundamental rights instruments, how to check when and how it applies, and how to apply it in practice.

The second part includes a practical checklist on the Charter's applicability and a Charter compliance check for legal practitioners to use in their daily work. The handbook is currently available in English, Finnish, French and Swedish. Other language versions will follow in 2020. FRA will also develop an interactive online tool to help judges assess if the Charter applies to a case.

The Charter handbook is available on FRA's ***website****.*

The CJEU has interpreted Article 51 broadly as covering all situations where Member States are acting within the scope of EU law. However, the European Parliament expressed the view that the current interpretation of Article 51 "should be revised to meet EU citizens' expectations in relation to their fundamental rights".[93] It also welcomed statements by the former Vice-President of the European Commission, Viviane Reding, who called for the "deletion of Article 51".[94]

Legally it is doubtful if changing Article 51 would lead Member States to apply the Charter in all circumstances. Other provisions in the treaties would need to change as well, not least Article 6, paragraph 1, of the Treaty on European Union (TEU), but also key principles such as enumerated powers (Article 5 of the TEU).[95] However, enabling legal practitioners to ensure that the Charter is properly applied, when a matter does fall within its scope, would certainly improve its impact. This would require better targeting and a significant increase in the training available for legal practitioners, as well as civil servants, NHRIs and civil society.

1.3.2. Limited training on the Charter

The European Union has been enhancing national training for judges and lawyers over the past few years. In 2011, the European Commission set an ambitious target that half of all legal practitioners in the EU, around 800,000, should attend training on EU law or on the national law of another Member State by 2020. It already reached this goal in 2017. Between 2011 and 2018, more than 1 million legal practitioners took part in such training activities. The European Commission funds the training of at least 20,000 legal practitioners a year.

Nevertheless, only 7.6 % of the training activities on EU law or on the law of another Member State dealt mainly or exclusively with fundamental rights.[96] In the 2018 public consultation on the European Judicial Strategy, 67 % of respondents supported the idea of increased training on fundamental rights and the rule of law. According to the responses, the legal professions most in need of training on fundamental rights and the rule of law are judges (87 % of the responses), prosecutors (69 %) and lawyers (62 %).[97]

Civil society also can benefit from such training. Very few CSOs dealing with human rights have had Charter training, FRA's consultation showed.[98]

The agency also asked the EJTN's members about judicial training.[99] More than half of the 25 members, in 22 Member States, confirmed that providing Charter expertise is officially identified as an objective of the training provided in the Member States to judges and prosecutors. This applies to both initial and in-service training. However, fewer than half said that they provide regular training focused specifically on the Charter.

For initial judicial training, six respondents said such Charter training is part of a human rights module. Three respondents said it is part of an EU law module. Other legal modules also appear to teach jurisprudence on the Charter. For instance, for the initial training of judges, 13 of the 25 EJTN members said that the criminal law and procedure module also deals with such case law, and 12 said that the module on constitutional law does. Only seven, six and five members, respectively, said that the modules on private international law, on administrative law and procedure, and on asylum and migration law refer to the Charter.

However, these figures tend to be higher for in-service training. That suggests that it mainstreams the Charter rather than teaches it as a separate subject.

FRA asked EJTN members to describe any trend over the last 10 years in how important the Charter was in the judicial training of their country. Almost half of the respondents said more training was offered or there was greater awareness of the Charter.

1.3.3. Limited Charter policies and exchange of Charter experiences

According to Article 51 of the Charter, the EU and its Member States must both respect the Charter and "promote" the application of its provisions. That would require dedicated policies. As the agency has repeatedly stressed in recent years, these are rare. For example, of the 133 CSOs that responded to FRA's consultation, only 12 % said they knew of any national, regional or local government policies to promote the Charter and its implementation.

The agency submitted an opinion on 'Challenges and opportunities for the implementation of the Charter of Fundamental Rights' in 2018.[100] It called for the establishment of an annual "Charter exchange" in FREMP to help improve the promotion of the Charter. Proper preparation would involve an expert seminar and/or a structured process collecting relevant data, evidence and good practice. It would use information on local, regional and national practices and experiences about implementing the Charter.

Such an exchange could help promote a common understanding of the Charter's practical application and its needs. It would also help to generate more awareness of those few initiatives that exist.

On 12 November 2019, the European Commission, the Finnish Presidency of the Council of the EU, and FRA hosted a conference marking the 10th anniversary of the Charter becoming legally binding. The conference was about applying the Charter at national level. Participants identified ways to improve use and awareness of the Charter to make it more effective.[101]

It appears that the 10th anniversary has made policymakers more aware that they need to apply the Charter more proactively. Under the Finnish Presidency in 2019, the Council adopted conclusions that acknowledge three important ways for Member States to implement the Charter successfully: [102]

— **Dedicated national policies to promote the Charter:** These would include strengthening Charter awareness and enhancing Charter training "for policy makers, civil servants and legal practitioners, as well as national human rights institutions, civil society organisations and other human rights defenders". Moreover, the general public should have "accessible information about the rights enshrined in the Charter [...] in order to foster the citizens' ownership of the Charter." Finally, the Council "encourages Member States to ensure consistency with the Charter in their national procedural rules on legal scrutiny and impact assessments of national legislation that falls within the scope of EU law."

FRA ACTIVITY

Charter workshops organised in cooperation with NHRIs

In 2019, the **Croatian** NHRI and FRA jointly organised two training sessions on the Charter. One was for civil servants, focusing on policy and the applicability of the Charter in legislative procedure. The other was for NGOs, focusing on how to use the Charter in strategic litigation and how to communicate about such cases. It addressed victims' reparation and women's rights in particular.

The **Finnish** NHRI organised similar training sessions with FRA on the use of the Charter in Finland. They were for ministries and ombudspersons' offices. The particular themes were data protection, privacy and health data.

Also in partnership with FRA, the **Polish** NHRI organised two seminars, one for lawyers and one for NGOs. They paid special attention to practical aspects of formulating preliminary references to the CJEU in cases where the Charter might be useful.

See European Network of National Human Rights Institutions (2019), ***Implementation of the EU Charter of Fundamental Rights****, p. 11*

— **Exchange of experiences between countries:** The Council acknowledges "the usefulness of exchanging good practices on the implementation of the Charter at national level and between Member States and having thematic discussions on the Charter. The Council recalls the exchange of views that took place in FREMP on this topic during the Finnish Presidency and commits itself to continuing such dialogue on an annual basis."

— **Stronger NHRIs and CSOs:** The Council underlines "the necessity of safeguarding an enabling environment for independent national human rights institutions, equality bodies and other human rights mechanisms". Moreover, it encourages Member States, as well as the Commission, FRA and other Union institutions, bodies and agencies, to further "enhance their cooperation with these mechanisms and to support them in their respective mandates, including the implementation and promotion of the Charter." Finally, the Council recognises "the essential role of civil society organisations at local, regional, national and EU levels" and "recalls the importance of removing and refraining from any unnecessary, unlawful or arbitrary restrictions on the civil society space and acknowledges that transparent, sufficient and easily accessible funding is crucial for civil society organisations".

The Council also invited the Commission to further develop the e-Justice Portal. It should create a dedicated page on the e-Justice Portal where Member States "could publish and update their good practices on awareness-raising on, and use of, the Charter". In response, the Commission created questionnaires for Member States to share relevant initiatives with their peers, such as:

— government policies that promote the use and awareness of the Charter among the legislature, the administration, law enforcement bodies and the judiciary;

— tools that help people better understand the Charter and when it applies, such as checklists, awareness-raising and communication initiatives, online information tools/websites, handbooks, databases and training material;

— tools that other Member States or other stakeholders, such as CSOs, NHRIs, equality bodies, academia and EU bodies, have developed to help use and promote the Charter;

— cooperation between human rights defenders and national authorities, or between national authorities and academia, contributing to better awareness and use of the Charter;

— national non-governmental initiatives promoting use and awareness of the Charter.

FRA opinions

FRA OPINION 1.1

Following up on the 2019 Council conclusions on the Charter, EU Member States should consider launching initiatives and policies that aim to promote awareness and implementation of the Charter at national level. These should use the potential of all relevant national actors. The Charter-related initiatives and policies should be evidence based, building on regular assessments of the use and awareness of the Charter in each Member State. The evidence could be collected through structured multi-stakeholder dialogues on the use of the Charter at national and local levels.

The Member States could consider nominating 'Charter focal points' in their national administrations. Such focal points could facilitate coordination, information sharing and joint planning between national ministries. They could also serve as a link between the national administration and other bodies, including those with a human rights remit and civil society organisations, as well as between the EU and national levels. In addition, they could identify gaps in the system. The focal points could bundle relevant information on the use of the Charter and share these with national actors across all relevant sectors and, where appropriate, with the administrations of other Member States and the EU institutions.

Article 51 of the EU Charter of Fundamental requires the EU and Member States to promote the application of the Charter's provisions, but little has been done at national level in this regard. The Council conclusions on the Charter, adopted in October 2019, call on the Member States to increase awareness of the Charter and enhance training for policymakers, civil servants and legal practitioners, as well as national human rights institutions, civil society organisations and other human rights defenders. All of these can help fulfil the Charter's potential.

The provision of Charter-relevant information could improve. So far, there is no consolidated overview of initiatives and practical experiences in implementing the Charter at national, regional and local levels. Nor is there a single entry point in Member States' administrations for collecting information that refers to relevant experiences and links relevant bodies and individuals with each other so that they can promote promising practices and exchange experiences at national level.

The 2019 Charter conclusions of the Council encourage Member States to "ensure consistency with the Charter in their national procedural rules". National legislators have a responsibility to ensure consistency with the Charter when they incorporate EU legislation into national law. However, national procedural norms on impact assessments and legal scrutiny – in contrast to those used by the EU – rarely mention the Charter.

Many of the civil society organisations that cooperate with FRA in its Fundamental Rights Platform call for increased funding for Charter training, and for the EU to revamp its efforts to collect information on how Member States apply the Charter. Some also call for practical implementing guidelines that can help national bodies to implement EU law in compliance with the Charter.

FRA's research shows that National Human Rights Institutions (NHRIs) do not use the Charter's full potential. The Council conclusions adopted in 2019 underline their "crucial role in the protection and promotion of fundamental rights and in ensuring compliance with the Charter". This includes advising national lawmakers on upcoming law and policies in this regard. EU-level and national funding schemes can assist NHRIs and other bodies with a human rights remit in gaining expertise on the Charter.

FRA OPINION 1.2

EU Member States should consider strengthening their national procedural rules on legal scrutiny and impact assessments of bills to improve consistency with the Charter. Such procedures should explicitly refer to the Charter in a similar way as to constitutional human rights and, in some cases, to the European Convention on Human Rights (ECHR).

National legislators should pay particular attention to ensuring that legislation that transposes EU law fully complies with the Charter.

The European Commission could consider more opportunities for funding of statutory human rights institutions, such as National Human Rights Institutions, equality bodies or ombuds institutions, to assist them in developing expertise on the Charter's application at national level. This can facilitate their role in assisting Member States apply the Charter, including in law- and policymaking and when using European Structural and Investment Funds.

Legal practitioners and public administration officials need specialised training to apply the Charter, a comparatively new instrument, effectively. For many legal practitioners who trained in the law many years ago, the Charter was not part of their educational curricula. The use of the Charter requires sound knowledge of the case law of the Court of Justice of the European Union (CJEU). Legal practitioners need to be familiar with it to understand when the Charter applies, whether a specific Charter provision is a right or a principle, and if it can apply between private parties (horizontal direct effect) in a given context.

Judicial training seldom focuses on fundamental rights. Moreover, how much use practitioners make of the available training varies widely from Member State to Member State. FRA's research shows that human rights civil society organisations rarely offer or participate in training on the Charter. Fewer than half of the 25 national judicial training institutes that FRA consulted say that more Charter-relevant training was offered or more Charter awareness had been achieved over the last 10 years.

FRA OPINION 1.3

When revising the 2011-2020 European judicial training strategy, the EU should provide targeted and hands-on training on the application of the EU Charter of Fundamental Rights. Charter-related training opportunities should also be promoted in other EU policies and programmes to ensure that legal practitioners and civil servants, as well as experts working at national statutory human rights institutions, can also benefit from training schemes provided at EU and national levels.

EU Member States should offer their judges and other legal practitioners regular, targeted and needs-based training on the application of the Charter. National human rights institutions and their EU-level networks should be adequately resourced to train their staff on the application of the Charter.

FRA OPINION 1.4

The Council and the EU Member States should ensure regular updates of the newly introduced module on the e-justice platform that collects Charter-related experiences and activities. They should also raise awareness about this new tool among relevant national bodies, including National Human Rights Institutions, civil society actors, academia and professional associations. Evidence, such as that collected through the new platform, could form the basis for the new Charter exchange in the Council Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP).

The EU institutions and the Member States should explore additional fora and opportunities for exchange to bring together judges, national parliaments and civil society across the EU. For example, national parliaments could use the Conference of Parliamentary Committees for Union Affairs of Parliaments of the EU (COSAC) as such a forum. Moreover, various networks could build on past experience and engage in regular Charter dialogues among the national judiciaries. These include the European Judicial Training Network (EJTN), the Judicial Network of the European Union (RJEU), and the Association of the Councils of State and Supreme Administrative Jurisdictions (ACA). Exchanges among relevant civil society organisations could be arranged through appropriate platforms. Non-judicial bodies could build on past examples and establish regular Charter exchanges through the European Network of Equality Bodies (Equinet) and the European Network of National Human Rights Institutions (ENNHRI). The results of such exchanges should be disseminated in the respective national languages to guarantee that the information reaches the relevant actors at national and local levels.

Exchanging experiences made with the application of the Charter is crucial for two reasons. First, people still have limited experience in using the Charter. They are still pioneers. Second, many cases where the Charter plays a role have a transnational dimension, for instance if they involve a European Arrest Warrant. This makes international exchanges of practices especially important.

The Council has recently committed the Council Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP) to conducting an annual dialogue on the Charter. That acknowledges the added value of such exchanges. The discussion would benefit from a solid evidence base.

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81 The series is a sub-blog of Eureka! and aims to present the 54 articles of the Charter throughout 2020.

82 For the Italian version see **here**.

83 The European People's Party group presented a 30-second **video** stressing that "To reflect modern society" the Charter includes "'Third Generation' Fundamental Rights" such as data protection, "Guarantees on bioethics" and "Transparent administration".

84 For an example of a Charter video by an individual MEP see **here**.

85 They discussed dignity in **Helsinki**, freedoms in **Amsterdam**, equality in **Lisbon** and solidarity in **Gdansk**. Citizens' rights will be the topic in **Cologne**, and justice in **Copenhagen.** A final event will take place in **Brussels**.

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EQUALITY AND NON-DISCRIMINATION

2

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UN & CoE

January

23 Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2258 on a disability-inclusive workforce and Resolution 2257 on discrimination in access to employment.

29 In *Deaconu v. Romania* (No. 66299/12), the European Court of Human Rights (ECtHR) rules that the domestic court discriminated against two siblings who requested damages in criminal proceedings for involuntary manslaughter against the driver of the car that caused the applicants' sister's death. The Bucharest Court of Appeal dismissed their claim on the sole ground that they did not suffer as much as their older brothers owing to their young age. The Bucharest Court set an arbitrary minimum age of 14 years for when the claimants could start to feel pain and be negatively affected by the loss of their sister.

March

5 Council of Europe's European Commission against Racism and Intolerance (ECRI) publishes its fifth monitoring report on Latvia and conclusions on the implementation of the recommendations in respect of France.

June

4 ECRI publishes its fifth monitoring reports on Ireland and the Netherlands.

5 ECRI publishes its fifth monitoring reports on Romania and Slovenia.

6
- Committee on the Elimination of Racial Discrimination (CERD) publishes concluding observations on the combined 18th to 25th periodic reports of Hungary.
- ECRI publishes conclusions on the implementation of the recommendations in respect of Cyprus, Italy, Lithuania and the United Kingdom.

7 CERD publishes concluding observations on the combined ninth and 10th periodic reports of Lithuania.

26 PACE adopts Resolution 2291 on ending coercion in mental health.

September

10 ECRI publishes its fifth monitoring report on Finland.

19 CERD publishes concluding observations on the combined 12th and 13th periodic reports of Czechia.

24 CERD publishes concluding observations on the combined 22nd to 24th periodic reports of Poland.

30 ECRI publishes a 'Roadmap to effective equality'.

October

2 PACE adopts Resolution 2301 on the need for a set of common standards for ombudsman institutions in Europe.

4 PACE adopts Resolution 2309 on Jewish cultural heritage preservation.

December

12 CERD publishes concluding observations on the combined fifth to ninth reports of Ireland.

EU

January

15

In *E.B. v. Versicherungsanstalt öffentlich Bediensteter BVA* (C-258/17), the Court of Justice of the European Union (CJEU) rules that a disciplinary decision based on a difference of treatment between incitement to perform male homosexual acts and incitement to perform heterosexual or lesbian acts is direct discrimination precluded by Directive 2000/78/CE.

22

In *Cresco Investigation GmbH v. Markus Achatzi* (C-193/17), the CJEU rules that the additional pay granted to employees who are members of four specific churches if they work on Good Friday constitutes direct discrimination on grounds of religion. Those who are not formally members of these churches would otherwise have one paid public holiday fewer than the members of the four churches.

February

14

- European Parliament adopts a resolution on the rights of intersex people.
- European Parliament adopts a resolution on the future of the LGBTI List of Actions (2019–2024).

March

21

EU High Level Group on Non-Discrimination, Equality and Diversity launches an online compendium of equality data practices and a diagnostic mapping tool, prepared by the FRA-led Subgroup on Equality Data.

April

17

Adoption of Directive (EU) 2019/882 of the European Parliament and of the Council on the accessibility requirements for products and services (European Accessibility Act).

May

8

- In *Österreichischer Gewerkschaftsbund v. Republik Österreich* (No. C-24/17), the CJEU rules that a new system of remuneration and advancement of contractual public servants is based on age discrimination. It calculated the initial grading of the contractual public servants according to their last remuneration, paid under the previous system.
- In *Villar Láiz* (No.C-161/18), the CJEU rules that the Spanish legislation on the calculation of retirement pensions for part-time workers is contrary to EU law if it is found to be particularly disadvantageous to female workers.

June

20

Adoption of Directive (EU) 2019/1158 of the European Parliament and of the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU.

December

1

New Commissioner for Equality, Helena Dalli, starts mandate.

18

European Parliament adopts a resolution on public discrimination and hate speech against LGBTI people, including LGBTI-free zones.

The long-awaited adoption of the Equal Treatment Directive did not happen in 2019, leaving the EU's non-discrimination legal framework incomplete. However, the appointment of a new Commissioner for Equality and the adoption of new legal instruments linked to the European Pillar of Social Rights advanced the equality agenda. The effectiveness and independence of equality bodies, a key element of the equality policy framework, continued to raise concerns. The EU and Member States undertook initiatives to bolster the collection and use of equality data, including through discrimination testing. Meanwhile, national equality and non-discrimination policies brought about legislation and action plans. Some aim to improve the protection of particularly vulnerable groups. Others aim to better implement the prohibition of discrimination. The fundamental rights of lesbian, gay, bisexual, trans and intersex (LGBTI) persons advanced in several Member States. At the same time, there was a backlash against the basic right to non-discrimination in others.

2.1. EQUAL TREATMENT DIRECTIVE STILL STALLED, BUT OTHER EFFORTS ADVANCE EQUALITY AGENDA

The year 2019 saw renewed attempts from EU institutions to unblock the negotiations in the Council on the proposed Equal Treatment Directive.[1] They did not succeed. Eleven years after the European Commission tabled the proposal, EU Member States could not reach the political consensus needed to adopt this important legal instrument to fight discrimination.

The EU legal non-discrimination framework currently protects against discrimination on grounds of religion or belief, age, disability and sexual orientation in the area of employment and occupation.[2] It does not apply to other key areas of life, such as education, social protection, healthcare or access to goods and services, including housing. If adopted, the Equal Treatment Directive would close this gap.

It would also put an end to the artificial hierarchy of protected grounds in the EU. Some characteristics set out in Article 19 of the Treaty on the Functioning of the European Union (TFEU), namely sex and racial or ethnic origin, have more protection than others, namely religion or belief, age, disability and sexual orientation.[3]

In January 2019, the European Parliament adopted a resolution on the state of fundamental rights in the EU. It called on the Council "to immediately unblock and conclude the negotiations on the Equal Treatment Directive".[4]

In April, the European Commission suggested a possible way to deal with the protracted negotiations. In its Communication on more efficient decision-making in social policy, the Commission called for a move to qualified majority voting in areas still governed by unanimity, by applying the "general passerelle clause" under Article 48 (7) of the Treaty on European Union (TEU).[5] This could apply to the proposed Equal Treatment Directive as well.[6] However, moving to qualified majority voting would require a unanimous decision of the European Council after obtaining the consent of the European Parliament.

In June, the **Romanian** Presidency of the Council concluded that further technical work and political discussions would be needed before the Council could reach the required unanimity.[7] In October, the Finnish Presidency of the Council convened a ministers' debate on 'Enhancing anti-discrimination in the EU'[8] at the Employment, Social Policy, Health and Consumer Affairs Council. Before the ministers' exchange, the Commission, FRA, the European Network of Equality Bodies (Equinet) and Social Platform, the platform of European social NGOs, gave evidence of discrimination in the EU that supported the need for the proposed directive.[9]

Many EU Member States favour adopting the directive as a way to fill in the gaps in EU legislation and ensure the right of everyone to be treated on an equal basis, the debate revealed. It also showed that some Member States have persisting concerns about the principle of subsidiarity, the economic impact the directive would have, and compatibility between some of the legal concepts used and their national legislation.[10]

On a more general note, the Council published 'Conclusions on the Charter of Fundamental Rights after 10 years'. It acknowledged that, "as reflected in the reports by the Commission and the Fundamental Rights Agency, the challenges in the field of non-discrimination persist", and reiterated its commitment to combat discrimination on any ground listed in Article 21 (1) of the Charter.[11]

2.1.1. New Equality Commissioner appointed

On 1 December, the European Commission started its new mandate (2019–2024). Its structure includes for the first time a Commissioner for Equality. The commissioner's main task over the next five years is to strengthen the EU's commitment to inclusion and equality in all of its senses, irrespective of sex, racial or ethnic origin, age, disability, sexual orientation or religious belief. This includes leading the fight against discrimination, proposing new anti-discrimination legislation, leading on the EU's implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD), developing a new European Gender Strategy, cracking down on gender-based violence, and better supporting victims.[12]

"Freedom and equality are part of Europe's fundamental values, and are key to any functioning society. While our Union is home to some of the most equal societies in the world, there is still a lot more work to do."

Ursula von der Leyen, President of the European Commission, **Mission letter to Helena Dalli**, 10 September 2019

2.1.2. Delivering on the European Pillar of Social Rights advances the equality agenda

The European Pillar of Social Rights contains 20 rights and principles. The European Parliament, the Council of the European Union and the European Commission proclaimed it in December 2017. Principle 3, on equal opportunities, declares that everyone has the right to equal treatment and opportunities regarding employment, social protection, education, and access to goods and services available to the public regardless of gender, racial or ethnic origin, religion or belief, disability, age or sexual orientation.[13] Delivering on the European Pillar of Social Rights is a shared political commitment and responsibility of the EU and Member States, as the EU Heads of State and Government recalled in their New Strategic Agenda 2019–2024.[14]

In 2019, the EU adopted two new legal instruments under the European Pillar related to principle 3: the Directive on work-life balance[15] and the Accessibility Act.[16] The Directive on work-life balance introduces paternity leave of at least 10 days in addition to two months of parental leave. To encourage more equal sharing of parental leave between men and women, the parental leave is not transferable between parents. For more information on how the Accessibility Act advances the equality of people with disabilities, see **Chapter 9** on developments in the implementation of the CRPD.

2.2. EFFECTIVENESS AND INDEPENDENCE OF EQUALITY BODIES STILL UNDER SCRUTINY

Equality bodies are a cornerstone of enforcing and implementing EU anti-discrimination legislation. Their core functions under EU law are to provide independent assistance to victims of discrimination in pursuing their complaints, conduct independent surveys concerning discrimination, publish independent reports and make recommendations on any issue relating to such discrimination.[17] All Member States have established such equality bodies, in accordance with the EU directives on racial equality and on gender equality. Most of them go beyond the minimum standards set out in these directives and also include discrimination based on age, sexual orientation, gender identity, disability, religion and belief, or other grounds. However, different Member States' equality bodies have significantly different mandates, powers and resources.[18]

In its 2019 Conclusions on the Charter of Fundamental Rights, the Council of the EU underlined the need to safeguard an environment that enables equality bodies, independent national human rights institutions and other human rights mechanisms.[19] This follows the European Commission's 2018 Recommendation on standards for equality bodies,[20] which stressed the need for Member States to ensure that each equality body has the human, technical and financial resources, premises and infrastructure to perform its tasks and exercise its powers effectively.

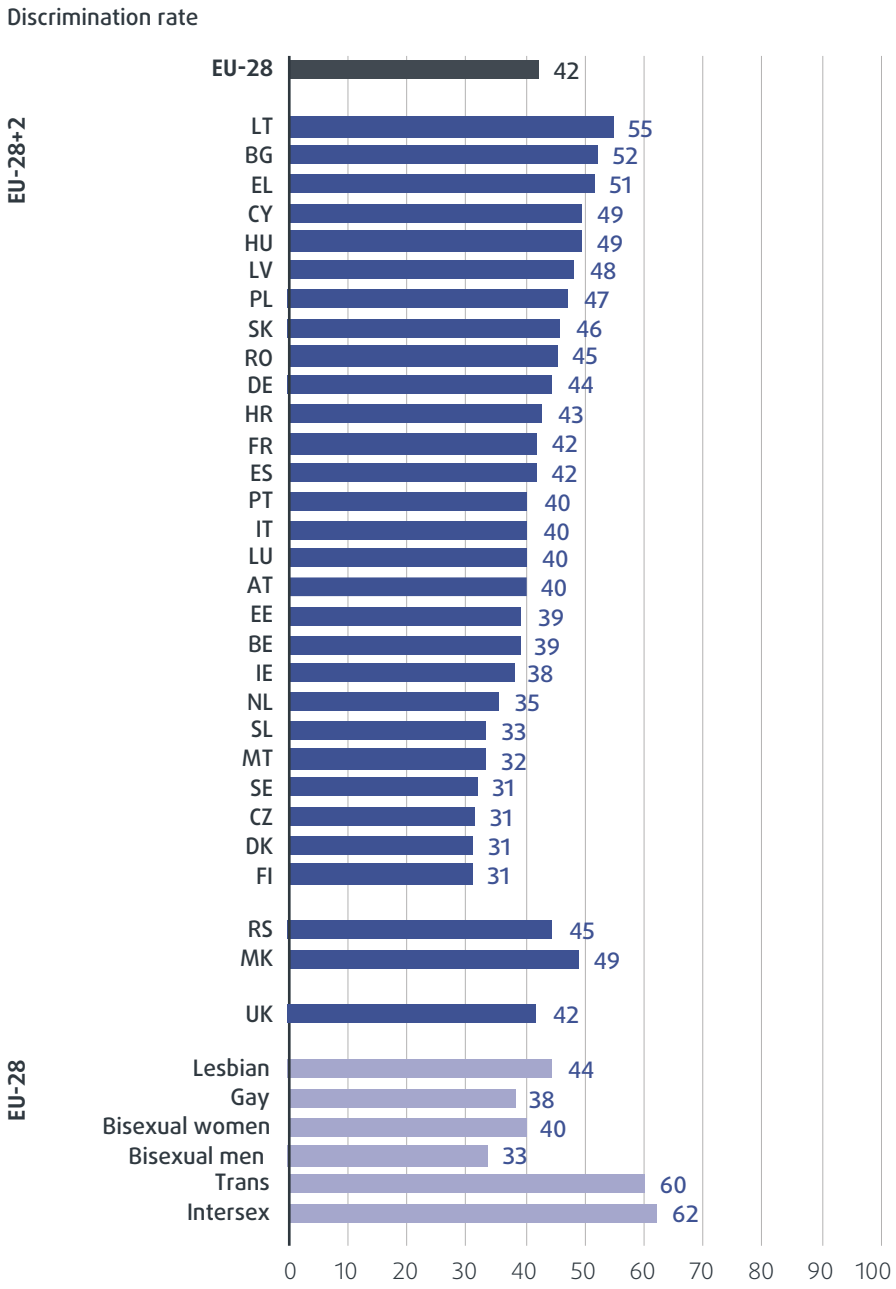
Two follow-up activities in 2019 prepared the ground to implement that recommendation. A seminar of the EU High Level Group on Non-Discrimination, Equality and Diversity (HLG) explored how best to meet specific challenges in establishing independent and effective equality bodies. The European Network of Equality Bodies, Equinet, developed a set of indicators to measure compliance with the standards for equality bodies,[21] based on the Commission's Recommendation and on ECRI's 2018 General Policy Recommendation No. 2.[22]

A useful indicator for the effectiveness of equality bodies are the reporting rates of those claiming to have experienced discrimination. FRA surveys consistently show that such reporting rates are low, regardless of the ground of discrimination. Of the respondents of African descent in FRA's EU-MIDIS II survey, only one in six (16 %) who felt racially discriminated against reported the most recent incident to any organisation or body, as noted in the report *Being Black in the EU*.[23]

The results are equally concerning in the area of rights of LGBTI persons. The second FRA LGBTI survey took place in 2019.[24] More than four in 10 respondents (42 %) had experienced discrimination because of their sexual orientation, gender identity or sex characteristics in the 12 months preceding the survey in the various areas of daily life. However, only one in 10 (11 %) reported the most recent incident of discriminatory conduct to any authority, including equality bodies (Figure 2.1).

Under EU law, Member States need only designate or establish equality bodies covering racial and gender equality. However, in 25 out of 28 EU Member States, the mandates of equality bodies go beyond these minimum standards to include sexual orientation and other grounds of discrimination, too.

FIGURE 2.1: DISCRIMINATION IN PAST 12 MONTHS AND REPORTING THE MOST RECENT INCIDENT OF DISCRIMINATION, BY COUNTRY AND LGBTI GROUP, EU-28 + 2 (%)[a,b,c,d]



Notes:

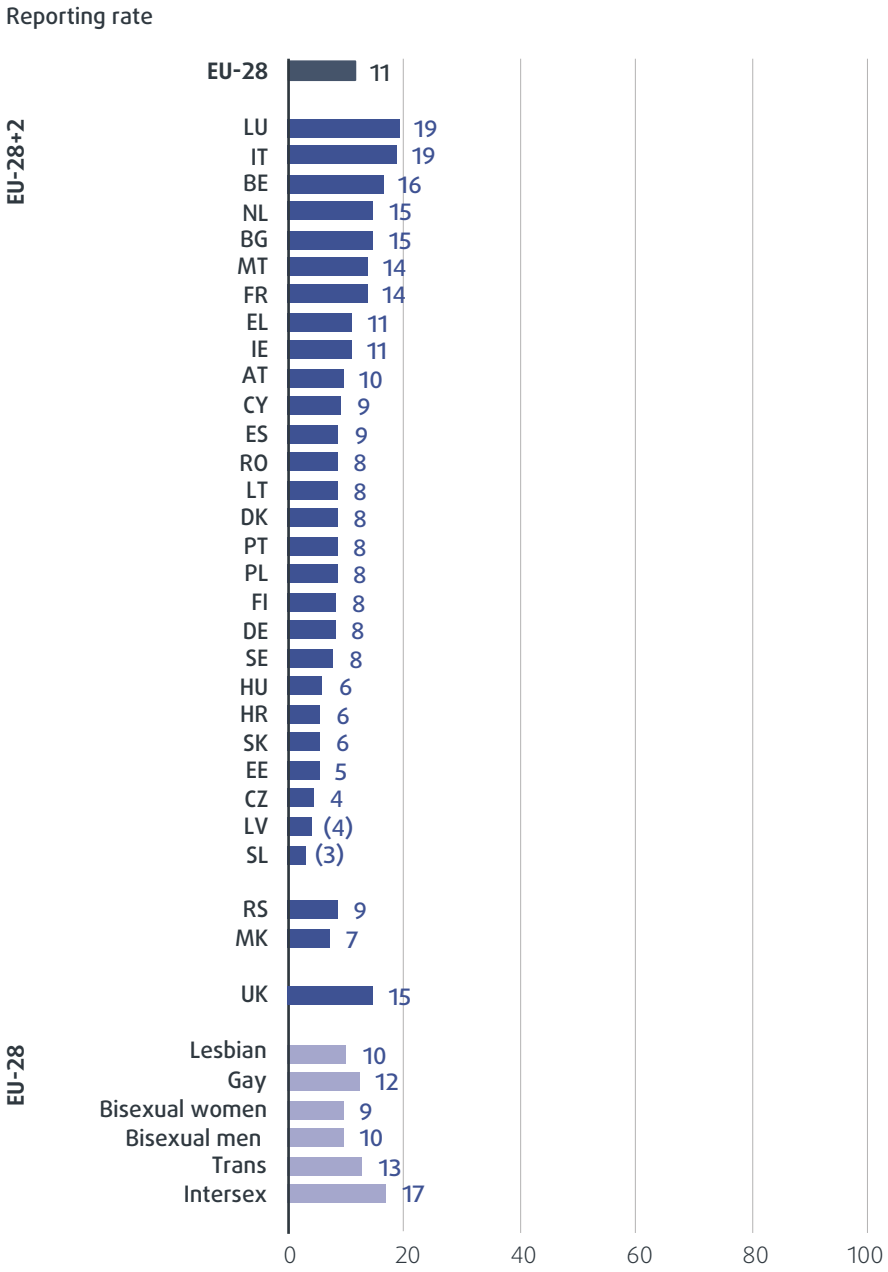
a Top panel: out of all respondents at risk of discrimination in at least one area of life in the 12 months preceding the survey (n = 127,996). Lower panel: out of all respondents who felt personally discriminated against in at least one area of daily life in the 12 months preceding the survey (EU-28, n = 59,383; EU-28 + 2, n = 60,424). Weighted results.

b Questions: "During the last 12 months, have you personally felt discriminated against because of being [RESPONDENT CATEGORY] in any of the following situations: A. When looking for a job, B. At work, C. When looking for a house or apartment to rent or buy (by people working in a public or private housing agency, by a landlord), D. By healthcare or social services personnel (e.g. a receptionist, nurse or doctor, a social worker), E. By school/university personnel. This could have happened to you as a student or as a parent, F. At a café, restaurant, bar or nightclub, G. At a shop, H. When showing your ID or any official document that identifies your sex"; "Did you or anyone else report it to any organisations or institutions?".

c 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 parenthesis. Results based on fewer than 20 unweighted observations in a group total are not published.

d The EU-28 aggregate includes the United Kingdom (UK) because the reference period of the data collection is from when the UK was a Member State.

Source: FRA, LGBTI survey II, 2019



The main reason for not reporting was the belief that nothing would happen or change as a result. Of the respondents who felt discriminated against in the year before the survey, 41 % mentioned this. One out of five (22 %) LGBTI respondents was concerned that the incident would not have been taken seriously. Every fifth respondent (21 %) did not report the last incident of discrimination because they did not trust the authorities.

Nonetheless, the majority of LGBTI respondents (61 %) knew of an equality body in the country where they reside. This suggests that the main challenge for reducing the high prevalence of underreporting is not a lack of awareness but a lack of trust in the effective response of the institutions that are supposed to protect against discrimination, including equality bodies.

Against this background, country reports and conclusions on the implementation of previous recommendations released in 2019 by the Council of Europe's Commission against Racism and Intolerance (ECRI) show that lack of independence and insufficient human and financial resources continue to affect a significant number of equality bodies across the EU. For example, according to ECRI, in **Romania**[25] the equality body lacks the financial and human resources necessary to fulfil its mandates effectively. In **Cyprus**,[26] the conclusions note that the equality body has not carried out any activities aimed at supporting vulnerable groups or any communication activities and has not issued any publications or reports, including annual reports, or recommendations on discrimination issues since 2016. However, the Commissioner for Administration and Protection of Human Rights rejected this criticism, pointing to different awareness raising activities and reports prepared in 2017 and 2018.[27]

In **Finland**,[28] the National Non-Discrimination and Equality Tribunal, the Non-Discrimination Ombudsman and the Equality Ombudsman lack sufficient resources to fully carry out their mandates, ECRI found. As a result, the Non-Discrimination Ombudsman demanded that the national parliament should discuss the Commission's Recommendation on Standards for Equality Bodies.[29] Lack of full independence was an important concern in the reports and conclusions on **Cyprus**[30] and **Italy**.[31] Similarly, the report on the **Netherlands** found that the antidiscrimination bureaus tasked with providing assistance against discrimination at the local level lacked independence.[32] The lack of a mandate to provide independent assistance to victims of discrimination came out in the report on **Latvia**.[33] Lack of awareness of the existence of the equality body due to its recent creation was a challenge in **Slovenia**.[34]

External threats can also hamper the effectiveness of equality bodies. In response to serious threats and hate speech in segments of the media targeting the **Polish** Commissioner for Human Rights, in June 2019, the European Network of National Human Rights Institutions (ENNHRI), Equinet, the Global Alliance of National Human Rights Institutions (GANHRI), the International Ombudsman Institute (IOI) and the Office of the High Commissioner for Human Rights (OHCHR) Europe published a joint statement. They expressed their strong support for the Office of the Commissioner in its work to promote and protect human rights and equality independently and effectively.[35]

In **Cyprus**, the Auditor General tried to launch an administrative audit regarding the efficient use of the resources of the Ombudswoman. The Ombudswoman claimed that this interfered with the independence of the institution she heads and declined to give access to the office's archives. The chair of the IOI expressed deep concern and recalled that, under the Venice principles, an audit can only concern financial issues and not the institution's operations.[36]

PROMISING PRACTICE

Raising awareness of equality bodies' actions to counter discrimination

The **Hungarian** National Equal Treatment Desk Officers' Network launched an awareness-raising campaign to mark its 10th anniversary. It aims to popularise the network and encourage victims to report discrimination and rely on legal procedures. It includes public displays on bikes, trains, local media, 12,000 billboards and social media, as well as a presence at festivals and local events.

For more information, see *Hungary, National Equal Treatment Authority (2019), The Desk' Officers Network is 10 years old (**Tíz éves a referensi hálózat**)*.

The **French** equality body, the Defender of Rights, has created an online stereotype machine. This is a tool that plays on widespread prejudices about minorities to show how stereotypes lead to discrimination. With it are a selection of real-life stories of victims of discrimination who were assisted by the equality body, and additional information on tools to combat discrimination.

*For more information, see France, Public Defender of Rights (2019), Sweep aside your clichés (**Balaye tes clichés**)*.

2.3. EU AND MEMBER STATES IMPROVE COLLECTION AND USE OF EQUALITY DATA

Equality data are defined as any piece of information that is useful for the purposes of describing and analysing the state of equality.[37] Equality data are necessary for an evidence-based non-discrimination policy. Yet in 2018 the EU High Level Group on Non-Discrimination, Equality and Diversity (HLG) acknowledged that Member States tend not to yet have a coherent and systematic approach to collection and use of equality data.[38]

In 2019, the EU and a number of Member States took action to improve the situation on the ground. In addition, several initiatives in Member States drew attention to situations of multiple and intersectional discrimination. An increasing number of institutions also applied discrimination testing to gather objective evidence on discrimination and monitor the implementation of anti-discrimination legislation.

Several Member States' activities prepared the ground for the practical implementation of the HLG's 2018 *Guidelines on improving the collection and use of equality data*. In March, the Office for National Statistics of the **United Kingdom** updated the outcome of its equalities data audit.[39] In October, the **Irish** Human Rights and Equality Commission (IHREC) convened a national roundtable on implementing the guidelines. It comprised senior decision makers from government departments, public bodies, academia and civil society organisations. In addition, the Equality Budgeting Expert Advisory Group chaired by the Irish Department of Public Expenditure and Reform (DPER) [40] set up a data subgroup. It aims to increase the availability of disaggregated equality data and is led by the DPER and the Central Statistics Office.

In **Finland**, the Ministry of Justice mapped national sources relevant to monitoring discrimination in 2018 and 2019. It published the results in 2019.[41] Similarly, the Ministry of Justice of **Slovakia** adapted the diagnostic mapping tool that the HLG's Subgroup on Equality Data prepared to gather information on existing sources of equality data and gaps in it.

The Ombudswoman of **Croatia** issued a recommendation to competent public authorities to start collecting and processing equality data, in particular in the areas of interior affairs, health, social welfare, employment, pensions and education.[42] Similarly, the **Slovenian** equality body, the Advocate of the Principle of Equality, issued a recommendation to public authorities to collect disaggregated data. They should base mandatory anti-discrimination policies on them and include a specific provision in the Personal Data Protection Act allowing the collection and processing of data related to personal characteristics.[43]

In December 2019, the UN Economic Commission for Europe (UNECE) launched a knowledge hub on statistics for Sustainable Development Goals (SDGs). It aims to help countries develop and communicate statistics on the SDGs and devise and evaluate evidence-driven policies.[44]

FRA ACTIVITY

Tacking stock of current practices

In March, the HLG's Subgroup on Equality Data, which FRA leads, published an online *Compendium of practices on equality data* and a diagnostic mapping tool.* Both instruments complement the Guidelines on improving the collection and use of equality data, which the HLG adopted in 2018.**

** The **Compendium of practices on equality data** and **Diagnostic mapping tool** are available on FRA's website.*

*** European Commission, HLG, Subgroup on Equality Data (2018), **Guidelines on improving the collection and use of equality data.***

Special Eurobarometer 493 – Discrimination in the European Union

In September 2019, the European Commission published the results of the most recent wave of its general population surveys on discrimination in the EU. The last one had been conducted in 2015.The findings show that:

- Out of a sample of 27,438 respondents, over one in 10 (12 %) consider themselves part of a minority group. These include religious minorities, sexual minorities, ethnic minorities and people with disabilities, for instance.
- People from minority groups are much more likely to have experienced discrimination or harassment on any ground in the 12 months before the survey. More than one in two (58 %) respondents who consider themselves part of a sexual minority say they have been discriminated against or harassed. Other minorities showing high rates of discrimination or harassment experiences are people with disabilities (52 %), Roma people (49 %), ethnic minorities (40 %) and religious minorities (38 %). By contrast, only 13 % of those who are not minorities say they have felt discriminated against or harassed.
- People experience discrimination or harassment most often in public spaces (23 %), at work (21 %) or when looking for a job (13 %).
- More than six in 10 respondents (61 %) consider discrimination against Roma to be widespread in their country. Almost six in 10 consider discrimination because of skin colour and ethnic origin to be widespread (both 59 %). Around half of respondents believe that discrimination based on sexual orientation (53 %), gender identity (48 %), religion or belief (47 %) and disability (44 %) is widespread. Some four in 10 consider that discrimination because of age (40 %) or being intersex (39 %) is widespread. Over a third (35 %) say discrimination against men or women is widespread.
- More than three quarters of respondents (76 %) agree that gay, lesbian and bisexual people should have the same rights as heterosexual people. Almost as many say there is nothing wrong in a sexual relationship between two persons of the same sex (72 %), and that same-sex marriages should be allowed throughout Europe (69 %). Almost six in 10 (59 %) think transgender persons should be able to change their civil documents to match their inner gender identity.
- Only a minority of respondents (26 %) think the efforts their country makes to fight discrimination are effective. A further 36 % say they are moderately effective.

Source: European Commission (2019),
Special Eurobarometer 493: Discrimination in the EU

2.3.1. Addressing multiple and intersectional discrimination

Multiple and intersectional discrimination tends to be the least developed dimension of equality data collection. Yet governments, equality bodies and civil society organisations increasingly recognise that addressing discrimination from the perspective of a single ground fails to capture adequately the various manifestations of unequal treatment that people may face in their daily lives. For example, in 2019 the IHREC called for an upcoming **Irish** survey[45] to document gender-related violence against women from minority groups. Examples are women with disabilities, women from the LGBTI+ community and women from minority ethnic and national groups.[46]

The **Belgian** equality body (Unia) reported that it is involved in a research project[47] that applies the concept of intersectionality to the analysis of discrimination in the labour market.[48] The **Italian** Federation for Overcoming Disability and the association Differences Women conducted an online survey on violence emergence, recognition and awareness (VERA). It focused on discrimination against women with disabilities.[49] On a more general line, the **Finnish** Ministry of Justice published a policy brief[50] on how to identify and tackle multiple discrimination. It includes collecting data disaggregated by gender, age, ethnicity, disability and religion, where possible.

2.3.2. Discrimination testing increasingly used to provide objective evidence of discrimination

Discrimination testing is a scientific method for generating experimental, objective evidence of discrimination. It usefully complements other evidence, such as surveys on experiences, attitudes or perceptions. Such tests use fictitious applications to uncover discrimination, often in access to employment, housing, or the use of public or private services. This can be in person (situation testing), through written applications (correspondence testing) or over the phone (mystery calls).

In 2019, a judicial case in **North Macedonia** accepted evidence from discrimination testing.[51] This was an important milestone since, at the time, the admissibility of discrimination testing was subject to judicial interpretation. Later that year, the newly adopted equality legislation explicitly included such evidence as valid proof of discrimination.[52] Governments and inspectorates in **Belgium**,[53] the **Netherlands**[54] and **France**[55] used discrimination testing to monitor and increase compliance with anti-discrimination legislation.

The *Journal of Ethnic and Migration Studies* published findings from large-scale cross-national correspondence testing. It took place in **Germany**, the **Netherlands**, **Norway**, **Spain** and the **United Kingdom**. The aim was to shed light on the role of ethnic hierarchies in discrimination in recruitment.[56] It was part of the EU-funded Growth, Equal Opportunities, Migration & Markets (GEMM) research project.[57] Job candidates of Moroccan origin in the **Netherlands** and **Spain**,[58] job applicants of Turkish origin in **Germany** and the **Netherlands**,[59] and Muslim job candidates in the **Netherlands** and the **United Kingdom**[60] all have significantly lower call-back rates than applicants with the same qualification from the majority population.

A study on employer discrimination in **Sweden**[61] reached similar conclusions on persistent ethnic hierarchies in recruitment practices.

Further testing experiments found evidence of discrimination in access to housing. A study in the city of Utrecht (**Netherlands**) used mystery calls and correspondence testing. It revealed that rental agencies discriminate against potential tenants on the grounds of their ethnicity and their sexual orientation.[62] Likewise, a study investigated discrimination on grounds of sexual orientation in access to rental housing in **Portugal**.[63] It revealed that male same-sex couples face significant levels of discrimination whereas the results for female same-sex couples match those for heterosexual couples.

2.4.
RIGHTS OF LGBTI PERSONS IN FOCUS

In 2015, the European Commission presented a **List of actions by the Commission to advance LGBTI equality.** It addressed policy areas such as non-discrimination, education, employment, health, free movement, asylum, hate speech and hate crime. The second wave[64] of FRA's EU LGBTI Survey shows that, four years later, LGBTI people continue to experience discrimination.

For example, 21 % of survey respondents felt discriminated against at work in the previous year because of being LGBTI, and 37 % felt discriminated against in other areas of life. These rates are highest for trans (59 %) and intersex (55 %) respondents. Meanwhile, in the year before the survey, 38 % of LGBTI respondents experienced harassment. Rates are higher (47 %) for respondents aged 15-17. Trans (48 %) and intersex respondents (42 %) indicate the highest rates. In the EU, 45 % of young respondents (aged 15-17) felt discriminated against at school. Data are publicly available online through a dedicated data explorer tool. The results show significant differences between Member States.

As the European Commission's list of actions covered 2016–2019, several Member States and EU institutions expressed a need to develop a follow-up document. In December 2018, a group of 19 Member States presented a joint non-paper[65] on the future of the list of actions. In February 2019, the European Parliament called on the European Commission to adopt a new strategic document to foster equality for LGBTI people.[66]

In September, the Finnish Presidency of the Council of the EU and the European Commission organised a high-level conference on 'Advancing LGBTI equality in the EU: From 2020 and beyond'. It assessed past actions, re-evaluated the situation of LGBTI people in today's EU, identified ongoing and new challenges and discussed how to tackle them.[67]

On 18 December, the European Parliament adopted a resolution on public discrimination and hate speech against LGBTI people.[68] The resolution takes stock of the current worrying trends throughout the EU. These include "attacks on LGBTI social centres in several Member States, homophobic statements and hate speech targeting LGBTI people, in particular in the context of elections; or legal instruments which might be applied to restrict media, education and other content in a manner that unduly restricts freedom of expression regarding LGBTI issues". It also denounces the so-called LGBTI-free zones in Poland. These result from resolutions passed since the beginning of 2019 in over 80 regions, counties or municipalities, declaring them free from 'LGBT ideology'.

"When my boss found out that I was gay, she didn't fire me (of course, she couldn't), but she just started to do everything so I would quit myself. She needed a month to break me – I did actually quit and she reached her goal."

Poland, lesbian woman, aged 27, cited in FRA's 2019 EU-LGBTI II survey

"In my opinion, the situation has improved significantly over the last few decades. The laws have also been adapted in many places (opening of marriage, third-gender regulations, etc.)."

Germany, gay man, aged 33, cited in FRA's 2019 EU-LGBTI II survey

"Our community needs much more support, especially from politicians, the media and, last but not least, the police. Their blind eye for homophobia is probably a major problem. If homophobia does not start to be punished, we will not move further."

Slovakia, lesbian woman, aged 39, cited in FRA's 2019 EU-LGBTI II survey

As outlined in this section, the rights of LGBTI persons did advance in several Member States in 2019, namely **Belgium**, **Finland**, **Greece**, **Ireland**, **Malta**, the **Netherlands**, **Spain**, and **Sweden**. In particular, same-sex couples gained rights relating to family life, and anti-discrimination laws were expanded to explicitly cover gender identity or sexual characteristics. However, at the same time, the basic right to non-discrimination suffered a backlash in others (**Poland**), or stagnated. In some Member States (**Latvia** and **Romania**), parliament rejected or stalled draft laws aimed at legal recognition of same-sex couples.

As in previous years, some Member States expanded the scope of anti-discrimination laws to improve the protection of trans and intersex persons. In the **Netherlands**, the Senate passed a bill amending the General Equal Treatment Act to explicitly protect transgender and intersex persons against discrimination.[69] Now "gender characteristics", "gender identity" and "gender expression" fall under the definition of discrimination on grounds of gender.

Greece has a new law on gender equality and combating gender-based violence, Law 4604/2019.[70] It introduced a national mechanism for gender equality, which will also address discrimination based on gender identity and sexual orientation. In **Spain**, a new law on the equality of LGTBI persons entered into force in the Valencian Autonomous Community.[71] One of its priority objectives is to promote the visibility of people with intersex variations or with differences in sexual development.

Several Member States implemented important legal changes concerning parental rights for same-sex couples, including for trans parents. In both **Finland** and **Sweden**,[72] a same-sex partner no longer needs to go through the adoption process to become the child's second parent.

Finland reformed its Maternity Act[73] to ensure that both women in a same-sex couple are legally recognised as mothers from the moment of a child's birth. If a female same-sex couple has a child through fertility treatment, both women can already be legally recognised as the child's parents before the child is born. Under the previous legislation, the partner who did not give birth to the couple's child was required to adopt the child to receive legal status as a parent.[74]

Following an amendment of the Parental Code in **Sweden**, parents in same-sex couples now have the same rights as heterosexual parents regarding assisted fertilisation abroad.[75] Furthermore, since January, the Parental Code also stipulates that persons who have changed their legal gender identity have the right to claim a parental designation (mother or father) that matches their legal identity. Thus, a person who has changed their legal gender identity to male and who gives birth will be registered as father. When a person who is already a parent changes legal gender identity, the data in the population registration are changed for both the parent and the child.

In Northern Ireland, same-sex marriage and opposite-sex civil partnership are now legal, in line with the rest of the **United Kingdom**. The regulations were adopted at the end of 2019 and entered into force in January 2020.[76]

PROMISING PRACTICE

Focus on LGBTI+ rights in school curricula

The **Danish** Ministry of Children and Education and the Danish Film Institute have funded a project of LGBT-Denmark and *"Ungdomsbyen"*, which develops educational material focusing on gender, body and sexuality. The programme is called LARM ('noise'), an acronym for equality, recognition, rights and citizenship.

The material aims to help pupils and teachers alike tackle the issues of gender, body and sexuality, as well as LGBTI+ rights and sexual orientation. It particularly focuses on minorities, family life and diversity in society and the classroom.

For more information, see the ***project website.***

The year also brought developments regarding the free movement of same-sex couples. The Supreme Administrative Court in **Bulgaria** issued a decision on recognition of a same-sex marriage in another Member State for the purpose of the couple's free movement.[77] Bulgaria's laws do not provide for recognition of same-sex couples and do not regulate the consequences of a same-sex marriage, registered partnership or cohabitation. The decision is the first one explicitly recognising the legal effect of a same-sex marriage.[78]

The Supreme Court of **Estonia** declared null and void the part of the Aliens Act that precluded granting temporary residence permits to same-sex registered partners of Estonian citizens.[79] The court invoked the fundamental right to family life, which also applies to same-sex partners who wish to live in Estonia as a family.

In **Lithuania**, the Constitutional Court stated[80] that the Constitution protects sexual orientation, sexual identity and same-sex family relationships. This decision lays the foundation for recognising the rights of same-sex couples in the field of migration. It explicitly adds the ground of sexual orientation as an integral part of the Constitutional equality clause.[81]

In some Member States, legal gender recognition still depends on surgery that prevents reproduction and transforms the genital organs. The **Czech** Supreme Administrative Court refused to allow the gender reassignment of a trans person (biological man) who had not undergone the compulsory surgery.[82] The court declared that the majority of Czech society perceives gender as a biologically determined binary category, and refused the possibility of subjective gender self-determination. In contrast, the **Spanish** Constitutional Court questioned the legal restriction that required a person to be at least 18 years old to apply for a change to the sex registration on his/her national identity card. The court found the legal restriction unconstitutional in so far as it prohibits changing the sex registration for children who are mature enough and are in a 'stable situation of transsexuality'.[83]

The **Belgian** Constitutional Court[84] addressed the controversial restrictions on blood donations from men who have sex with men. Such men, in particular gay and bisexual men, were not allowed to donate blood for 12 months after their last sexual contact with another man. This did not apply to the rest of the population. Articles 8 and 9 of the Law of 11 August 2017 introduced the difference.

The Constitutional Court annulled Article 8, in so far as it excluded these men from donating "fresh frozen plasma" taken by apheresis and placed in quarantine. (Apheresis is a technique that takes only certain blood components.)

Referring to the CJEU's *Léger* judgment,[85] the Constitutional Court explained that the principle of equality and non-discrimination does not preclude a difference in treatment between categories of persons, if the difference is based on an objective criterion and reasonably justified. The court found the double criterion of distinction in this case (sex of the aspiring blood donor or his sexual partner, and a certain type of sexual contact) to be objective and legitimate, in order to secure the safety of the transfusion chain. However, the court noted that different techniques make it possible to reduce the pathogens in the blood. It found that the legislature had failed to reasonably justify also applying the restrictions to the donation of plasma that is secured by placement in quarantine.[86]

In **Poland**, the protection of LGBTI persons against discrimination in access to goods and services suffered a setback. In June 2019, the Constitutional Tribunal declared that Article 138 of the Petty Offence Act was unconstitutional and repealed it. This provision prohibited unjustified refusals to provide publicly available services. On this ground a printer who had refused to print posters for a foundation supporting LGBT rights was found guilty by first- and second-instance courts.

In reaction to these judgments, the Prosecutor General (as well as the Minister of Justice) requested a constitutional review of the provision in question. According to the Constitutional Tribunal, the challenged provision infringes the principle of the rule of law and may interfere with the freedom of conscience and religion, as well as freedom to conduct a business.[87]

The organisation of gay pride marches (equality marches) in **Poland** remained controversial, and some mayors continued to ban them. In 2019, the mayors of Lublin and Nowy Sącz banned pride marches. In both cases, the mayors justified their decisions with the need to protect counter-demonstrators and prevent the disruption of public order. However, appellate courts quashed the bans as unjustified. Meanwhile, in Białystok, counter-demonstrators violently attacked the participants in a pride march.[88]

Poland[89] and **Cyprus**[90] reported homophobic hate speech in public discourse, in particular from religious leaders.

In 2019, some Member States introduced or modified national action plans in order to address different aspects of the rights of LGBTI persons. In **Lithuania**, the amendments to the Non-discrimination Promotion Action Plan for 2017–2019[91] provide for training on non-discrimination, tolerance and access to social services. It targets different groups such as youth, persons working in the area of integration of foreigners granted asylum in **Lithuania**, police officers who investigate cases of hate crimes against LGBT people, social workers and justice officers who deal with hate crimes.

Portugal established a health strategy for LGBTI people[92] and in July 2019 published an order[93] establishing administrative measures for non-discrimination against trans persons and intersex youth and children. The order is for schools at all levels of education. It requires schools to make sure that children and young people can exercise their rights to self-determination of gender identity and expression, and to the protection of their sexual characteristics.

FRA opinions

Article 19 of the Treaty of the Functioning of the EU (TFEU) provides the basis for EU legislation to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Until now, the Council of the EU has adopted legislation providing protection against discrimination on grounds of gender and of racial or ethnic origin in key areas of life. These include employment and occupation, education, social protection, and access to goods and services, including housing. By contrast, EU legislation protects against discrimination on grounds of religion or belief, disability, age and sexual orientation only in the area of employment. As a result, under EU law, some of the protected characteristics set out in Article 19 of the TFEU – sex and racial or ethnic origin – have more protection than others – religion or belief, age, disability and sexual orientation.

FRA OPINION 2.1

The EU legislator should continue exploring all possible avenues to adopt the Equal Treatment Directive without further delay, in view of the persistent evidence of discrimination on grounds of religion or belief, disability, age and sexual orientation in areas such as education, social protection, and access to goods and services, including housing. This would ensure that EU legislation offers comprehensive protection against discrimination in these key areas of life.

The European Commission proposed an Equal Treatment Directive (COM (2008) 426) in 2008. It would close this gap by extending protection against discrimination on grounds of religion or belief, age, disability and sexual orientation to the areas of education, social protection and access to goods and services.

The year 2019 saw renewed attempts to break the deadlock of negotiations in the Council on this crucial legal instrument. The European Commission proposed to move from a unanimity regime to a qualified majority regime by making use of the general *passerelle* clause under Article 48 (7) of the Treaty on the EU (TEU). The Finnish Presidency of the Council convened a ministers' policy debate to explore possible ways to move forward. The discussion revealed that many EU Member States favour adopting the directive as a way to fill in the gaps in EU legislation and ensure the right of everyone to be treated on an equal basis. However, by the end of the year the Council had still not attained the consensus it needed.

FRA OPINION 2.2

EU Member States should ensure that equality bodies can fulfil effectively the tasks assigned to them in the EU's non-discrimination legislation. This entails ensuring that equality bodies are independent and sufficiently resourced. When doing so, Member States should give due consideration to the European Commission's Recommendation on standards for equality bodies, as well as to ECRI's revised General Policy Recommendation No. 2.

Discrimination and inequalities on different grounds remain realities in everyday life throughout the EU. Findings of FRA surveys, the Special Eurobarometer on Discrimination in the EU, and national studies based on discrimination testing published in 2019 confirm this. People who experience discrimination seldom report it to any authority, as FRA surveys also consistently show. This is even though all EU Member States have equality bodies, as the Racial Equality Directive (2000/43/EC) and several directives on gender equality mandate.

One of the core tasks of these equality bodies is to provide independent assistance to victims of discrimination in pursuing their complaints. When asked why they did not report discrimination, victims' most frequent answer is that they think nothing would change if they did. This suggests the existence of challenges for the effectiveness, independence and adequacy of human, financial and technical resources of equality bodies; these are also reflected in the country reports published in 2019 by the Council of Europe's European Commission against Racism and Intolerance (ECRI) within its fifth monitoring cycle.

Equality data are indispensable for informing evidence-based non-discrimination policies, monitoring trends and assessing the implementation of anti-discrimination legislation. Yet, as the EU High Level Group on Non-Discrimination, Equality and Diversity (HLG) acknowledges, EU Member States do not yet have a coordinated approach to equality data collection and use.

The HLG recognises other challenges common to Member States. They include an imbalance in the grounds of discrimination and areas of life for which data are collected, as well as insufficient consultations with relevant stakeholders when designing and implementing data collection. The *Guidelines on improving the collection and use of equality data* that the HLG adopted in 2018 offer concrete guidance on addressing these challenges at national level.

In 2019, the HLG's Subgroup on Equality Data, led by FRA, published two additional tools. The compendium of practices on equality data provides inspiration for implementing the guidelines in practice. The diagnostic mapping tool can be used to identify data gaps and as a basis for developing an equality data hub. Some EU Member States are already applying both the guidelines and the complementary tools as a basis for improvements. Although the guidelines are for Member States, EU institutions and bodies can also apply them by analogy to strengthen diversity monitoring.

FRA OPINION 2.3

EU Member States should step up efforts towards a coordinated approach to equality data collection in order to use equality data as basis for evidence-based policies in the area of equality and non-discrimination. They should rely on a comprehensive set of data collection tools, including surveys and discrimination testing, and develop strategies to adequately capture situations in which different grounds of discrimination intersect or act in combination. When doing so, EU Member States should give due consideration to the Guidelines on improving the collection and use of equality data adopted by the EU High Level Group on Non-Discrimination, Equality and Diversity. They could also make use of the mapping tool and the compendium of practices that complement them. EU institutions and bodies should consider applying these guidelines within their own structures.

The year also saw increasing use of discrimination testing to produce objective evidence of discrimination. This usefully complements other sources such as surveys on discrimination experiences. Furthermore, a number of EU Member States paid more attention to discrimination that results from a combination or intersection of more than one ground – multiple and intersectional discrimination.

In February 2019, the European Parliament called on the European Commission to adopt a new strategic document to foster equality for LGBTI people in the coming years. It would follow up on the 2016-2019 *List of actions by the Commission to advance LGBTI equality*. In its 2020 work programme, the European Commission included a dedicated strategy to ensure the equality of LGBTI people across the EU.

In 2019, fundamental rights of LGBTI persons advanced in several Member States. In particular, same-sex couples gained more rights, and anti-discrimination laws expanded to explicitly cover gender identity or sexual characteristics.

However, in some Member States, parliaments rejected draft laws aimed at legal recognition of same-sex couples. In some others, the right to non-discrimination or freedom of assembly suffered a setback with respect to equality of LGBTI persons.

In 2019, FRA conducted its second LGBTI Survey. The results show that LGBTI persons continue to experience discrimination in many areas of life. On 18 December, the European Parliament adopted a resolution on public discrimination and hate speech against LGBTI people. The resolution takes stock of the current worrying trends observed throughout the EU. These include "attacks on LGBTI social centres in several Member States, homophobic statements and hate speech targeting LGBTI people, in particular in the context of elections; or legal instruments which might be applied to restrict media, education and other content in a manner that unduly restricts freedom of expression regarding LGBTI issues".

FRA OPINION 2.4

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 enjoy their fundamental rights under EU and national law. Member States should take measures to address the harmful impact of homophobic and transphobic statements public authorities or officials make. Member States should consider available evidence on discrimination, including data of FRA's LGBTI Survey II, to identify and adequately address protection gaps. In particular, measures should be taken to ensure safety for young LGBTI people at school.

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RACISM, XENOPHOBIA AND RELATED INTOLERANCE

3

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UN & CoE

January

8

In *Williamson v. Germany* (No. 64496/17), the European Court of Human Rights (ECtHR) rules that freedom of expression (Article 10 of the ECHR) does not cover denying the Holocaust.

22

In *Šimunić v. Croatia* (No. 20373/17), the ECtHR rules that fining a famous football player for expressing or inciting hatred on the basis of race, nationality and faith did not violate his right to freedom of expression (Article 10 of the ECHR).

March

5

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

April

16

In *Lingurar v. Romania* (No. 48474/14), the ECtHR rules for the first time that "ethnic profiling" is discriminatory and holds that the Romanian authorities failed to investigate the applicants' allegation of police racism.

June

4

ECRI publishes its fifth monitoring reports on Ireland and on the Netherlands.

5

ECRI publishes its fifth monitoring reports on Romania and on Slovenia.

6

- ECRI publishes its conclusions on the implementation of the recommendations in respect of Cyprus, Italy, North Macedonia and the United Kingdom.
- Committee on the Elimination of Racial Discrimination (CERD) publishes concluding observations on the combined 18th to 25th periodic reports of Hungary.

7

CERD publishes concluding observations on the combined ninth and 10th periodic reports of Lithuania.

11

ECRI publishes its annual report for 2018.

September

10

ECRI publishes its fifth monitoring report on Finland.

19

CERD publishes concluding observations on the combined 12th and 13th periodic reports of Czechia.

24

CERD publishes concluding observations on the combined 22nd to 24th periodic reports of Poland.

30

ECRI publishes its Roadmap to Effective Equality.

October

3

In *Pastörs v. Germany* (No. 55225/14), the ECtHR rules that Article 10 (freedom of expression) of the ECHR does not protect Holocaust denial.

4

Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2309 on Jewish cultural heritage preservation.

December

12

CERD publishes concluding observations on the combined fifth to ninth periodic reports of Ireland.

13

ECRI establishes working groups on combating intolerance and discrimination against Muslims and on the fight against antisemitism.

EU

February

4

European Commission presents the results of the fourth monitoring exercise on the implementation of the Code of conduct on illegal online hate speech.

June

20

First European Commission working group on antisemitism meeting focuses on security of Jewish premises and communities.

October

3

In *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (C-18/18), the Court of Justice of the European Union (CJEU) rules that EU law does not preclude a host provider such as Facebook from being ordered to remove identical and, in certain circumstances, equivalent comments, previously declared to be illegal, such as hate speech.

10

European Commission sends a reasoned opinion to Slovakia, calling upon the country to comply with the provisions of the Racial Equality Directive on equal treatment of Roma children in education.

November

20-21

First meeting of the Working group on hate crime recording, data collection and encouraging reporting.

December

3

European Parliament Anti-Racism and Diversity Intergroup appoints a new bureau to lead its work in the European Parliament on combating racism and promoting diversity at the European Union level, and establishes priorities for 2019–2024.

10

European Commission President announces the establishment of a dedicated team to combat antisemitism.

11

Second European Commission working group on antisemitism meeting focuses on education about Jewish life, antisemitism and the Holocaust.

Nineteen years after the adoption of the Racial Equality Directive and 11 years after the adoption of the Framework Decision on Racism and Xenophobia, several Member States had not correctly transposed and applied the relevant EU legislation. The European Court of Human Rights and national courts set standards on the limits of free speech and incitement to hatred and hate speech. At EU level, there were some policy developments regarding antisemitism in 2019, but very few developments addressed racism and xenophobia. Some Member States adopted policies to better address racism and to encourage people to report hate crime, but assessing their impact remained difficult. People with minority backgrounds and migrants continued to experience harassment, violence and ethnic and racial discrimination in different areas of life in the EU, according to survey and poll findings. Discriminatory ethnic profiling remained a persistent challenge in 2019, research in a number of Member States showed.

3.1. RACISM REMAINS A PERSISTENT PROBLEM

Racism and prejudice continued to pose serious challenges across the EU. Several people were murdered in hate crimes in 2019, as in previous years. Troublingly, diverse polls – exploring both general attitudes and individual experiences – suggest that tolerance of racism and right-wing extremism is growing.

Around one in three of 1,005 **Latvian** residents do not want to work alongside Roma (33 %), Afghan (30 %), Pakistani (29 %), Syrian (26 %) or African (25 %) persons, a poll revealed.[1] In **Romania**, 62 % of respondents to a national survey believe that physical aggression motivated by hatred exists in the country.[2] In **Austria**, almost 45 % of 1,200 respondents believe that Muslims should not have the same rights as "everyone else in Austria", the Social Survey 2018 showed.[3]

Victimisation surveys are a valuable source of information to understand the prevalence and forms of hate crime. They ask people about their own experiences of crime and if they report it to the police or other authorities.

In **Germany**, for example, a national victims' survey among 31,192 respondents aged over 16 years found that 1.5 % said that they had been a victim of bias-motivated physical assault in the 12 months before the survey. Motives included their "social status", "origin", "gender and gender identity", "age", "sexual orientation" and "disability".[4] In **Croatia**, the Ombudspersons' Office surveyed 501 people aged 18 to 30 years. In the last three months, 96 % had witnessed someone making offensive comments based on national or ethnic origin, skin colour, gender, religious affiliation or sexual orientation.[5]

In 2019, several high-profile incidents put racism on the political agenda in a number of Member States.

On 6 April, a man from Ivory Coast was shot dead and two other Africans were seriously injured. It is believed to be **Malta**'s first racially motivated murder. Two soldiers were arrested for their alleged involvement. This prompted the Maltese President and the armed forces to release press statements condemning the murder and warning of the "dangers of racist, xenophobic, and extremist discourse".[6] In addition, the Commander of the Armed Forces launched an internal investigation. Its tasks include finding out whether these were two individuals acting alone or there may be other xenophobic groups or tendencies within the Armed Forces of Malta.[7]

In **Germany**, a right-wing extremist tried to enter a synagogue in Halle and then shot dead two passers-by in an antisemitic attack.[8] In June, a neo-Nazi shot a local politician and leading advocate for migrants' rights dead at his home. The Federal Prosecutor's Office called it a political assassination.[9]
In **Belgium**, five years after two men shot four people dead in the Jewish Museum in Brussels in 2014, the Supreme Court found them guilty of quadruple murder.[10]

Politicians and policymakers across the EU increasingly recognise how widespread and serious the problem is. In **Austria**, "the climate of opinion, which is influenced by xenophobia and hostility towards asylum seekers, as well as right-wing extremist activities pose a threat to democracy."[11]

Europol's 2019 annual report on trends in terrorism also highlights the escalation of extreme right-wing sentiments and intolerance across the EU. They might lead to violence against the persons and property of minority groups. According to Europol, right-wing extremists exploit fears and grievances linked to the perceived threat from Islam and to the alleged loss of national identity.[12] The EU's Counter-Terrorism Coordinator called on the EU to strengthen its approach to tackling right-wing extremist violence. He recommends include research analysing the "social and political grievances", improving recording of right-wing extremist violence and promoting European values "to counter the right-wing violent extremist and terrorist threat."[13]

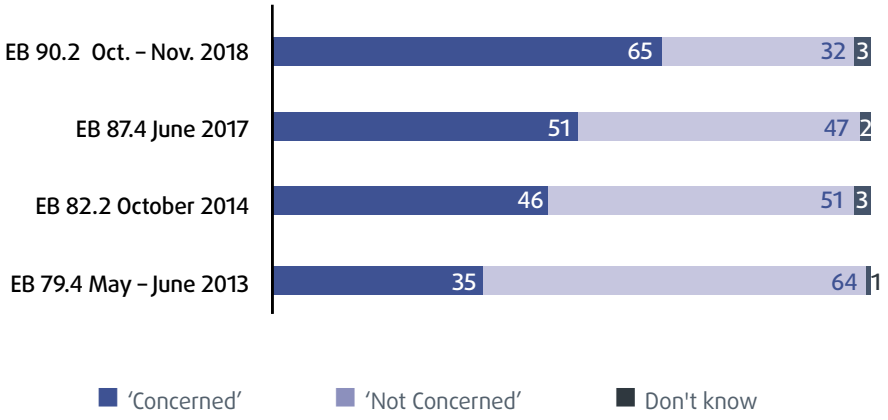
"Things that would have been unspeakable 10 years ago are today said by certain political groups. Lines are being crossed, basic values such as human dignity are being called into question, and clearly racist thoughts are being expressed."

Boris Pistorius, Interior Minister of Lower Saxony, cited by Deutsche Welle (2019), '**Lübcke: German politician's killing prompts call for tracking neo-Nazis**'

Racist and xenophobic hate speech and hate crimes are among the most severe manifestations of racism and xenophobia. The Framework Decision on Racism and Xenophobia (2008/913/JHA)[14] defines a common approach to them in criminal law. The general population is growing more concerned about encountering online material that promotes racial hatred or religious extremism, as the 2019 Eurobarometer on Europeans' attitudes to internet security shows. [15] See **Figure 3.1** and **Chapter 6** for more information on internet security and cybercrime.

FIGURE 3.1: RESPONDENTS WHO EXPRESS CONCERN ABOUT THE POSSIBILITY OF BEING EXPOSED TO ONLINE MATERIAL THAT PROMOTES RACIAL HATRED OR RELIGIOUS EXTREMISM, 2013–2018 (IN %)

Note:
EB=Eurobarometer.



*Source: European Commission, 2019 [**Special Eurobarometer 480: Europeans' attitudes towards internet security**, Brussels, p. 80]*

To address the spread of online hate speech, in 2016 the European Commission and several information technology companies agreed on a Code of conduct on countering illegal hate speech online. In 2019 these companies removed 89 % of notifications of illegal hate speech within 24 hours, the fourth evaluation of the code shows, compared with 2016, when they removed 40 % within 24 hours. On average, they remove 72 % of the illegal hate speech content notified to them.[16]

3.1.1. EU action against antisemitism

In January, the European Commission published the Eurobarometer findings on perceptions of antisemitism among the general population in the EU-28.[17] The results show a significant discrepancy with the views of the Jewish respondents in the FRA survey from 2018. For example, only 36 % of the general public say that antisemitism has increased in the past five years, compared with 89 % of Jews in the FRA survey.[18] Among FRA survey respondents, 70 % believe that the government in their country does not combat antisemitism effectively. Among the general population, 68 % feel that people in their country do not know much about the history and practices of Jewish people in their country.

In response to growing concern about the rise of antisemitism, in December 2019 the EU announced 'the establishment of a dedicated team' to work with the EC Coordinator on combating antisemitism.[19]

The European Commission launched a working group on antisemitism. It is part of the EU High level group on combating racism and xenophobia and other forms of intolerance, and is to help Member States implement the 2018 Council Declaration on the fight against antisemitism.[20] The declaration invites Member States to adopt a strategy to prevent and combat all forms of antisemitism. In 2019, Member States, Jewish communities and experts, including FRA, had two dedicated meetings. One was about the security of Jewish premises, and the second was about education on Jewish life, antisemitism and the Holocaust.

FRA ACTIVITY

Providing evidence to support efforts to counter antisemitism

In 2019, two FRA reports provided evidence to help develop policy against antisemitism in the EU. The first report, *Young Jewish Europeans: perceptions and experiences of antisemitism*, is based on FRA's second large-scale survey on experiences of antisemitism. It focuses on young Jewish Europeans (aged 16–34) living in 12 EU Member States.

Young Jewish Europeans are considerably more likely to have experienced antisemitic harassment or violence than older Jewish respondents, it finds. Almost half (44 %) of those surveyed say they were a victim of at least one incident of antisemitic harassment in the 12 months before the survey, compared with 32 % in the 35–59 age group. Four per cent experienced at least one incident involving antisemitic violence, compared with 2 % of the 35–59 age group.

The second report is FRA's annual overview of the most recent official and unofficial figures on antisemitic incidents across the EU. It highlights that EU Member States still collect insufficient official data. For example, no official data on reported antisemitic incidents in 2018 were available for six Member States.

For the first time, the report also includes information on using the non-legally binding working definition of antisemitism adopted by the International Holocaust Remembrance Alliance (IHRA). By November 2019, 14 Member States had adopted or endorsed the definition: **Austria**, **Belgium**, **Bulgaria**, **Czechia**, **France**, **Germany**, **Greece**, **Hungary**, **Lithuania**, the **Netherlands**, **Romania**, **Slovakia**, **Sweden** and the **United Kingdom**. Eleven countries indicated that they use or intend to use the definition mainly in education and training.

*For more, see International Holocaust Remembrance Alliance, '**Working definition of Antisemitism**', 26 May 2016; FRA (2019), '**Young Jews face harassment in Europe, but nevertheless express their Jewish identity**'; FRA (2019), '**Antisemitism – Overview of data available in the European Union 2008–2018**'.*

3.2. LEGAL AND POLICY INITIATIVES TO CURB HATE CRIME AND HATE SPEECH FALL SHORT

The Framework Decision on Racism and Xenophobia (2008/913/JHA) defines a common criminal law approach to racist and xenophobic hate speech and hate crimes and establishes objectives the Member States have to fulfil to ensure that certain serious manifestations of racism and xenophobia are punishable throughout the EU. The European Commission has repeatedly called on Member States to ensure the correct and full implementation of the Framework Decision.[21] Yet, 11 years after its adoption, several Member States have not fully and correctly transposed its provisions into their criminal codes, as reports by the European Commission,[22] international monitoring bodies, such as the Council of Europe's ECRI, and civil society organisations (CSOs) show. However, they also reported progress in some Member States.

In 2019, ECRI identified gaps in several Member States' legislation against the public expression of and incitement to hatred, which is also subject to EU legislation. Its reports on **Ireland,**[23] **Latvia,**[24] **Slovenia**[25] and **Romania**[26] raised concerns that no legislative provisions penalise the public expression of insults, or defamation on grounds of race, colour, language, religion, nationality or national or ethnic origin. The Framework Decision requires bias motivation to be considered as an aggravating circumstance or taken into consideration by the courts in determining the penalties imposed on offenders. ECRI called on the authorities in **Ireland**[27] and **Slovenia**[28] to amend their legislation to provide that racist and other hate motivation constitutes an aggravating circumstance for all criminal offences and is taken into account in sentencing.

Similarly, the United Nations (UN) Committee on the Elimination of Racial Discrimination (CERD) recommended that **Poland** amend its criminal code. Specifically, it should consider a racist motive an aggravating circumstance and allow enhanced punishment of such acts.[29]

In **Estonia**, the penal code explicitly prohibits incitement to hatred,[30] while punishment for hate crimes can be imposed by applying a provision regarding aggravating circumstances.

The Romanian equality body published a report on the situation 10 years after the implementation of the Framework Decision.[31] It concludes that a disproportionately low number of cases has been decided since the adoption of legislation regarding hate crime.

A number of Member States – including **Belgium**,[32] **Greece**[33] and the **Netherlands**[34] – amended their criminal codes in 2019. For example, **Greece** introduced a new provision. It punishes incitement to commit crimes or violence against groups or individuals based on their race, colour, ethnic origin and religion, among other grounds.[35] Similarly, the **Netherlands** amended its criminal code to increase the penalty for incitement to hatred, violence or discrimination against a person because of their race, religion or beliefs among other grounds.[36] The amendment increases the maximum penalty for incitement to hatred, discrimination or violence with a discriminatory motive from one to two years.[37]

North Macedonia amended its criminal code, introducing hate crime as a separate criminal offence, to approximate its national law to the EU law.[38]

Besides gaps in legislation, lack of guidance for criminal justice personnel makes it difficult to address hate crime effectively. In **Lithuania**, an analysis of 35 court cases from 2010–2018 on the application of criminal liability for hate crime and hate speech concluded that court practice is rather complicated without guidance on the pre-trial investigation of such crimes.[39] In 2019, **Estonia**,[40] **Hungary**[41] and **Spain**[42] published instructions and guidelines for criminal justice personnel for identifying, recording, investigating and prosecuting hate crimes. **Slovenia** adopted a Resolution on the national programme for the prevention and suppression of crime 2019–2023, including the prevention and suppression of hate speech.[43] It suggests a variety of preventative measures, and establishes a way to monitor instances of hate speech.

3.2.1. Courts address hate speech and hate crime

The European Court of Human Rights (ECtHR) has already issued several important judgments deeming illegal hate speech and incitement to hatred.[44] Similarly, in 2019, the ECtHR concluded that the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR) cannot protect hate speech on the grounds of religion and faith, ethnicity and race. The court also ruled on a defamation case, finding a violation of Article 8 of the ECHR (right to respect for private and family life). Likewise, in several judgments, domestic high courts deemed illegal hate speech and incitement to hatred and violence.

In *Williamson v. Germany,*[45] a bishop contested his criminal conviction in Germany for incitement to hatred for denying the Holocaust during an interview. The ECtHR found that Article 10 (right to freedom of expression) had not been violated. It concluded that denying the Holocaust was not covered by the right to freedom of expression, as such denial aims to promote ideas contrary to the text and the spirit of the Convention. It rejected the application as manifestly ill-founded. Similarly, a member of a German regional parliament was convicted of denying the Holocaust during a speech. In *Pastörs v. Germany,*[46] the ECtHR ruled that the conviction did not violate Article 10.

In *Šimunić v. Croatia*[47], the ECtHR found no violation of the applicant's freedom of expression under Article 10 of the ECHR. It ruled that his conviction for chanting a slogan of a totalitarian regime had not violated his rights. The case concerned a former Croatian international footballer who was fined HRK 25,000 (€ 3,300) for spreading racial hatred by chanting the slogan. The court concluded that "the applicant, being a famous football player and a role-model for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators' behaviour and should have abstained from such conduct".

In *Lewit v. Austria*,[48] the ECtHR found a violation of Article 8 (right to respect for private life) where a periodical published an article using terms such as "mass murderers", "criminals" and "a plague" to describe Holocaust survivors, like the applicant, who were liberated from the Mauthausen concentration camp in 1945. Noting that negative stereotyping of a group can, under certain circumstances, be seen as affecting the private life of members of the group, the court found that the domestic courts never dealt with the central issue of the applicant's claim of defamation. By not doing so, they failed to comply with their procedural obligation under Article 8 to comprehensively assess a matter affecting the applicant's privacy rights.

At national level, various court decisions further clarified that the right to freedom of expression and speech does not protect online hate speech. They condemned incitement to hatred and violence. In **Denmark,**[49] the Eastern High Court considered some discriminatory video statements by a politician and founder of the far-right wing party Hard Line, recorded in front of the residence of an activist of African descent. The court found that these were not protected by freedom of speech. It concluded that the statements were not part of an objective political debate, because of their character and where they were expressed.

A number of high court decisions in **Bulgaria,**[50] **Malta,**[51] the **Netherlands,**[52] **Slovakia**[53] and **Spain**[54] dealt with incitement to hatred against a group of persons, such as Roma and Muslims. For example, in **Slovakia**, a politician of a far-right political party made racist remarks about people of Roma origin during a radio talk show. The Supreme Court found him guilty and fined him € 10,000. The politician lost his seat at the National Council.

Similarly, in **Bulgaria**, a company managing a website allowed anonymous insulting comments targeting Roma. The Supreme Administrative Court confirmed the decisions of lower courts, which found the company guilty of incitement to hatred and harassment.

The Supreme Court in the **Netherlands** confirmed the conviction by the Court of Appeal of a woman who was preaching on the streets, of incitement to hatred against a group for making the statement 'Muslims are terrorists'. [55]

In **Slovakia** and **Slovenia**, Supreme courts looked at criminal law provisions regarding hate crime and hate speech. In **Slovakia,**[56] the Constitutional Court found that the definition of hate crime against another group of people was too vague. In **Slovenia,**[57] the Supreme Court interpreted the criminal code, in light of the implementation of the Framework Decision, in a case regarding hateful comments against Roma on a radio website. It found that public incitement to hatred, violence or intolerance is a crime not only when it can threaten public peace and order but also in case of threats, abusive language or insults. It clarified the precise scope of the criminal offence under Article 297 of the criminal code, which was previously interpreted more narrowly in practice.

3.2.2. Tackling racism and hatred through national coordination and policy

Structural racism and discrimination are deeply rooted in European societies and the relevant legislation is often not applied correctly. Intergovernmental organisations monitoring the implementation of human rights standards, such as ECRI and UN bodies, have stressed this. They have made recommendations on tackling racism, including through better coordination and development of strategies and action plans.[58] In 2019, several EU Member States decided to establish national anti-racism coordinating bodies. Although such developments are positive, there was little progress on developing national action plans on racism (see **Table 3.1**).

In **Germany**, responding to the rise of right-wing hate crime and antisemitism, the Federal Government adopted a "package of measures to combat right-wing extremism and hate crime."[59] This included a joint federal and state commission founded in June 2019 to fight antisemitism and protect Jewish life.[60] For example, at its latest meeting in November 2019, the commission discussed strategies to ensure greater protection for Jewish institutions in Germany following the attack on a synagogue in Halle. Germany's federal structure means that it is vital for the federal states to work together. At its November meeting, the commission also voted unanimously to add the subject of the National Socialist regime's perversion of justice to the legal studies curriculum. The package also includes addressing right-wing extremism and hate crime online.

In **Malta**, the Ministry for Home Affairs established a specialised unit to tackle hate speech and hate crime.61 In addition, the Integration Unit of the Human Rights Directorate of the Ministry will be renamed the Integration and Anti-Racism Unit to highlight the importance of combating racism.[62]

In **France**, the Minister of the Interior created a "national office to combat hatred" to coordinate prevention, intelligence gathering and investigations concerning antisemitic, anti-Muslim or anti-Christian acts.[63]

In **Romania**, the government established an interministerial committee to prepare a national strategy to combat antisemitism, xenophobia, radicalisation and hate speech.[64]

In **Italy**, the Senate approved the creation of the Special Committee to Combat Intolerance, Racism, Antisemitism, and Incitement to Hatred and Violence.[65] The committee consists of 25 senators across the political parties to monitor trends, make data publicly available and issue recommendations.

In **Ireland**, the Minister of State for Equality, Immigration and Integration established an Anti-Racism Committee. It brings together stakeholders from public sector organisations and experts, to discuss how to address racism systematically.[66] Importantly, in October 2019, the police force, *An Garda Síochána*, introduced a working hate crime definition as part of its diversity and integration strategy.[67] The strategy defines a hate crime as any criminal offence which is perceived by the victim or any other person to, in whole or in part, be motivated by hostility or prejudice, based on actual or perceived age, disability, race, colour, nationality, ethnicity, religion, sexual orientation or gender.

National action plans against racism, ethnic and racial discrimination can provide the basis for developing comprehensive public policies against racism and racial discrimination. Yet only 15 EU Member States had instigated government action plans against racism, racial/ethnic discrimination and related intolerance in 2019 (Table 3.1).

PROMISING PRACTICE

Embracing action plans at city level

In March 2019, the **Brussels-Capital Region** adopted its action plan against racism and discrimination. It contains 23 concrete measures including establishing a platform against racism, exchanging good practices and developing of method of data collection. Various bodies will carry out the plan, including the Belgian equality body Unia, the Institute for the Equality of Women and Men, the labour unions and others.

*See Belgium, Brussels Regional Public Service (Gewestelijke Overheidsdienst Brussel / Service Public Régional de Bruxelles) (2019), Brussels action plan against racism and discrimination 2019–2020 (**Brussels actieplan Ter bestrijding van racisme en discriminatie 2019-2020 / Plan d'action Bruxellois Pour lutter contre le racisme et les discriminations 2019–2020**), 29 March 2019. For more information, see Brussels Regional Public Service (Gewestelijke Overheidsdienst Brussel) (2019), '**Gewestelijk actieplan tegen racisme**'.*

The Austrian city of **Graz** joined UNESCO's Coalition of Cities against Racism in 2006. It produced its first action plan against racism then and updates it every three years. The action plans contain 10 commitments, about monitoring, data collection, information, victim support, the city as an employer, service provision, education, housing, culture and hate. The city regularly monitors and evaluates the implementation of the action plans.

*For more information, see Austria, Stadt Graz, '**Geschichte der Menschenrechtsstadt Graz**'.*

TABLE 3.1: EU MEMBER STATES / CANDIDATE COUNTRIES WITH ACTION PLANS AND STRATEGIES AGAINST RACISM, XENOPHOBIA AND ETHNIC DISCRIMINATION, 2019

Country code	Name of strategy or action plan in English	Period covered
BE – Brussels Capital Region	Brussels action plan to fight against racism and discrimination	2019–2020
BE – French-speaking community	Transversal action plan to counter xenophobia and discrimination	2014–2019
CZ	Concept on the fight against extremism for 2019	2019
DE	National action plan to fight racism	2017 onwards
	Federal Government strategy to prevent extremism and promote democracy	2016 onwards
ES	National Comprehensive strategy against racism, racial discrimination, xenophobia and related intolerance	2011 onwards
	National Action plan to combat hate crimes	2019–2021
FI	National action plan on fundamental and human rights	2017–2019
FR	National plan against racism and anti-semitism (2018–2020)	2018–2020
HR	National plan for combating discrimination	2017–2022
	Action plan for implementation of the national plan for combating discrimination	2017–2019
IE	The migrant integration strategy	2017–2020
	An Garda Siochana. Diversity & Integration Strategy 2019-2021	2019–2021
IT	National integration plan for persons entitled to international protection	2017–2019
LT	The action plan for promotion of non-discrimination	2017–2019
NL	National anti-discrimination action programme	2016 onwards
	Action plan labour market discrimination	2018–2021
PT	Strategic plan for migration	2015–2020
SE	National plan to combat racism, similar forms of hostility and hate crime	NOVEMBER 2016 onwards
SK	Strategy on combating extremism	2015–2019
UK – England and Wales	Hate crime action plan 2016 to 2020	2016–2020
UK – Scotland	Race equality framework for Scotland 2016–2030	2016–2030
	Race equality action plan	2017–2021
UK – Northern Ireland	Racial equality strategy 2015–2025	2015–2025
UK – Wales	Equality objectives 2016–2020: Working towards a fairer Wales	2016–2020
MK	2016–2020 national equality and non discrimination strategy	2016–2020

Source: FRA, 2019

3.2.3. Encouraging hate crime reporting

Hate crime is widely under-reported, as FRA and other evidence consistently document, mainly because victims do not believe that reporting it to the police would change anything.[68] If crime is not reported, victims lack support, perpetrators go unpunished, and police forces and policymakers do not know the extent of the problem. Throughout 2019, diverse efforts aimed to change this pattern by facilitating online reporting, increasing trust in the police and community engagement.

In **Ireland**, the progress report on the national migrant integration strategy notes persistent low rates of reporting hate crime. It highlights that only 18 % of governmental offices display information on how to report racism.[69] Research in **Lithuania** shows that victims do not believe that the offender will be punished.[70] In **Finland,** research for the Ministry of Justice found that victims' main reasons for not reporting include suspicion about police attitudes and actions about hate crimes.[71]

In **Greece**, the Racist Violence Recording Network documented 117 incidents of alleged racist violence. In 22, the perpetrators were allegedly law enforcement officials.[72] Between June 2017 and December 2018 the National Investigation Mechanism for Arbitrary Incidents dealt with 321 cases, the Greek Ombudsman found. It investigated a potential racist motive of law enforcement officers in 21 of them.[73]

Criminal justice professionals working in the field of hate crime believe that many victims do not report hate crimes because they feel police would not treat them sympathetically and without discrimination, FRA research shows.[74] One method that could encourage hate crime reporting is enabling anonymous reporting via online platforms run by CSOs.

Facing All the Facts[75] is an EU-funded research project by a consortium of three law enforcement agencies and six CSOs across eight countries. It finds that, for reporting to be meaningful to victims, it must be connected to victim support services. In **Malta**, 35 incidents were reported to an online platform between November 2018 and November 2019.[76] In **North Macedonia**, 214 hate speech incidents were reported to the online platform "Hate speech" in 2019, compared with 84 in 2018.[77] Both platforms direct victims to victim support services.

To increase trust in the police and to address hate crime under-reporting, ECRI recommended that **Latvia** establish a state police unit to reach out to vulnerable groups.[78] In **Portugal**, the parliament's study on racism also points out the need to build trust, particularly with the younger minority population. It recommends, for example, recruiting police officers with African and Roma backgrounds.[79] Reflecting increasing societal diversity in **Ireland**, the police force, *An Garda Síochána*, has altered its uniform policy to permit members of religious minorities to join it and maintain dress code requirements.[80]

The priorities of **Finland**'s strategy on preventative police work 2019–2023 include enhancing the sense of security of various population groups. The strategy aims to prevent violence and discrimination and to promote good relations between population groups.[81] In the **United Kingdom**, hate incidents increased following the 2016 Brexit referendum. The Ministry of Housing, Communities and Local Government issued guidelines for local authorities on how to understand, engage and reassure their communities before and after Brexit.[82]

FRA ACTIVITY

Working party on hate crime recording, data collection and encouraging reporting

The European Commission asked FRA to lead a working group on hate crime recording, data collection and encouraging reporting (2019–2021) under the EU High Level Group to combat racism, xenophobia and other forms of intolerance.

The working group met for the first time in November 2019 and approved its terms of reference. The group assessed national data collection as still insufficient and agreed on its activities. These include providing technical assistance to authorities in recording and collecting data, and launching research to encourage reporting of hate crime, including third-party reporting. In addition, it supports Member States and EU institutions to improve interagency collaboration and cooperation with CSOs.

The working group builds on the work of FRA's subgroup on methodologies on recording and collecting data on hate crime (2017–2018) and the working party on hate crime (2014–2016).

*For more information, see FRA's webpage on '***Technical assistance to national law enforcement and criminal justice authorities***'.*

PROMISING PRACTICE

Providing tools for policymakers to address hate crime

In 2019, several EU projects funded by the Rights, Equality and Citizenship Programme 2014-2020 developed multilingual tools and guidance for policymakers at national, regional and local level to address hate crime. These include:

— Proximity policing against racism, xenophobia, and other forms of intolerance (Proximity) – **Spanish** Observatory for Racism and Xenophobia (Oberaxe), Ministry of Employment and Social Security, with partners in **Bulgaria**, **Estonia**, **Finland**, **Italy**, **Latvia**, **Portugal**, **Spain** and the **United Kingdom**:

★ local action plan: addressed to local authorities and proximity police for tackling racism, xenophobia and other forms of intolerance
★ comparative report on best practices
★ practical tool kit for proximity policing

For more information, see ***Best Practices And Comparative Study: services, structures, strategies and methodologies on Proximity Policing.***

— Preventing racism and intolerance (PRINT) – Justice Ministry of France, Interministerial delegation to the fight against racism, antisemitism and LGBT hate in **France**, with partners in **Germany**, **Spain** and the **United Kingdom**

★ Good practice guidance for better implementation of criminal provisions to combat racism

For more information, see Direction des affaires criminelles et des grâces (2019), ***Preventing racism and intolerance (PRINT): Handbook of practices to better fight against racism and intolerance.***

— Network of Cooperation against Hate (NEw CHapter) – **Denmark**, **Greece**, **Italy** and the **United Kingdom**

★ *A manual of good practices against hate*, with focus on youth
★ NEw CHapter platform, listing tools to combat hate speech

For more information, see the website of NEw CHapter: ***NEtwork of Cooperation against Hate.***

— Facing All The Facts, with partners in **Greece**, **Hungary**, **Ireland**, **Italy**, **Spain** and the **United Kingdom**

★ European report – Connecting on hate crime: Recording and data collection – Emerging themes
★ national reports
★ bias indicator courses

For more information, see the website of ***Facing All the Facts****.*

3.3. More efforts needed to implement Racial Equality Directive correctly

Nineteen years after the adoption of the Racial Equality Directive, Member States need to step up efforts to implement its provisions correctly, reports by the European Commission and international monitoring bodies show. Ethnic minorities continue to face discrimination, especially in access to employment and housing, as various surveys and discrimination testing find. Meanwhile, the European Commission focused infringement proceedings on discrimination against Roma in education.

ECRI and CERD expressed concern about gaps in legislation against ethnic discrimination in a number of Member States. For example, in its report on **Latvia**, ECRI stressed that there is currently no comprehensive legislation dedicated to prohibiting racial discrimination.[83] Similarly, it raised concerns that, in the **Netherlands**, anti-discrimination legislation does not provide for sufficiently dissuasive sanctions and the scope of application of the General Equal Treatment Act is too narrow.[84] Furthermore, CERD called on **Poland** to ensure the full and effective implementation of existing legal provisions prohibiting racial discrimination.[85]

Victim surveys provide evidence of the extent, nature and effects of discrimination that ethnic minority groups experience. In 2017, FRA published the results of its second large-scale EU-wide survey on migrants and minorities. It had 25,515 respondents with different ethnic minority and immigrant backgrounds across 28 EU Member States.

The findings showed that descendants of immigrants and minority ethnic groups continue to face widespread discrimination based on ethnic or immigrant background across the EU and in all areas of life – most often when seeking employment. Some 29 % of all respondents who looked for a job in the five years before the survey felt discriminated against, based on their ethnic or immigrant background. Almost one out of four respondents (23 %) encountered discrimination in access to housing in the five years before the survey.[86]

In **Bulgaria**, 55 % of Bulgarian companies had recruited employees of Turkish ethnic origin and 49 % had hired Roma employees, a study found from the results of a national representative business survey.[87] At the same time, only 12 % of Bulgarian companies had appointed persons of different ethnic origins to managerial positions, more than 80 % had not taken any proactive steps to recruit persons of different ethnic origins and more than 50 % had no active policies to promote the career development of such employees, the findings show.[88] In **France**, the Defender of Rights, in an unprecedented decision,[89] found that a group of 25 Malian workers were victims of a systemic discrimination on the grounds of their origin and nationality by their employer in the construction field of construction. In the **Netherlands**, an experimental test investigated employment agencies' discrimination against temporary workers based on their ethnic or migrant background. Out of a sample of 467, 40 % of the requests by potential clients not to hire ethnic minorities were honoured and 60 % of them were rejected.[90]

In **France,** SOS Racisme carried out a discrimination test. It responded to 775 rental advertisements in the Ile-de-France using fictitious applications and different surnames.[91] A person of North African origin and a person from the French overseas territories or of sub-Saharan African origin have, respectively, 37 % and 40 % less chance of getting accommodation than a person with a "traditional French origin", the results show.

French estate agencies have been found to have been discriminatory against applicants of North African origin. The Defender of Rights conducted research[92] aiming to assess what impact his awareness-raising campaign had on them. These activities significantly reduced discrimination in access to housing in the short term, the results show. For more information on discrimination testing, see **Chapter 2** on Equality and non-discrimination.

Finally, developments in 2019 highlighted the persistence of discrimination against Roma children in education. As part of its close monitoring of the implementation of the Racial Equality Directive, the European Commission continued with infringement proceedings concerning discrimination against Roma children in education, which have been ongoing in **Czechia**, **Hungary** and **Slovakia.**

On 10 October 2019, the Commission sent a reasoned opinion to **Slovakia**, urging the country to comply with the directive's provisions on equal treatment of Roma children in education.[93] In **Czechia**, Roma children still disproportionately attend segregated schools and special schools for children with mental disabilities, civil society reports show.[94] CERD raised its concerns about the persistence of segregation in education that Roma children face in **Hungary.**[95] For more information, see **Chapter 4** on Roma equality and inclusion.

3.3.1. Discriminatory profiling remains a concern

Discriminatory profiling based on ethnicity remained an important challenge in 2019, as research and surveys in a number of Member States underlined. International monitoring bodies and national equality bodies called for action to prevent such profiling.

In a landmark case in 2019, the ECtHR used the term "ethnic profiling" for the first time and found the practice discriminatory. In *Lingurar v. Romania,*[96] the ECtHR found that the police discriminated against Roma families by using ethnic profiling to justify raids on their homes. The court found that the ill-treatment of the applicant family during the raid violated Article 3 of the ECHR (prohibition of inhuman or degrading treatment). It also found two violations of Article 14 (prohibition of discrimination) in conjunction with Article 3 because of the racial motive.

"Turning to the facts of the current case, the Court considers that the manner in which the authorities justified and executed the police raid shows that the police had exercised their powers in a discriminatory manner, expecting the applicants to be criminals because of their ethnic origin. [...] The authorities automatically connected ethnicity to criminal behaviour, thus their ethnic profiling of the applicants was discriminatory."

ECtHR, ***Lingurar v. Romania***, No. 48474/14, 6 April 2019, para. 76

The police are more likely to stop and search persons with ethnic minority backgrounds for identity checks, research in a number of Member States shows. For example, in **Belgium**, young people with an ethnic minority background are three times more likely to be stopped by the police for identity checks, research published by the University of Antwerp in June 2019 reveals.[97] Such profiling can undermine trust in law enforcement among persons with ethnic minority backgrounds, the research findings also show.

Similarly, in **Spain**, the police in Catalonia disproportionally stop and search ethnic minorities, research by SOS Racismo Catalunya revealed.[98] Likewise, in England and Wales (**United Kingdom**) the most recent policing statistics show that ethnic disparities in stop and search continue to exist.[99] Black people were stopped and searched at a rate of 38 people per 1,000 population, compared with a rate of 4 White people per 1,000 in 2018/19. Rates of stop and search have decreased for all ethnic groups but the disparity remains: between 2010/11 and 2018/19, the rates for White people decreased by 5 times, while rates for Asian people decreased by 4 times, and decreased for Black people by 3 times.

Guidance and raising awareness to prevent ethnic profiling are crucial for police officers. For example, in the **Netherlands**, among 1,064 police officers of the municipality of Amsterdam, only a quarter of the respondents were familiar with the framework on proactive policing, which aims to prevent ethnic profiling. A third of them had never even heard of any measure or intervention against ethnic profiling.[100]

In **France,** the Defender of Rights issued a decision stressing that instructions that the Public Safety Commission issued in a Paris district were discriminatory.[101] The decision highlights the ethnic profiling dimension of the instructions and notices that police officers received between 2012 and January 2018. The instructions required officers to carry out identity checks of "black and North African groups" and "systematic evictions of homeless and Roma" throughout the district.

Similarly, the **Spanish** Ombudsman[102] stressed that the authorities should take action to eradicate identity checks based on ethnic profiling. Likewise, ECRI's reports on **Ireland**[103] and **Romania**[104] stressed that the law should clearly define and prohibit racial and ethnic profiling by the police.

PROMISING PRACTICE

Fact sheet and compendium of promising practices on countering ethnic profiling

The European Network of Equality Bodies (Equinet) has developed a fact sheet and a compendium of promising practices on countering ethnic profiling. Both tools highlight that law enforcement authorities in Europe need to end ethnic profiling and that equality bodies play an essential role in combating this ineffective practice and promoting fair policing.

For more information, see Equinet (2019), ***Equality bodies countering ethnic profiling: Focus on law enforcement authorities in Europe.***

FRA opinions

FRA OPINION 3.1

EU Member States should fully and correctly transpose and apply the provisions of the Framework Decision on Combating Racism and Xenophobia. In addition, they should take the necessary measures to criminalise bias-motivated crime (hate crime), treating racist and xenophobic motivation as an aggravating circumstance.

EU Member States should put measures in place that encourage reporting of hate crime and facilitate directing the victim to support services. In addition, they should ensure that any alleged hate crime is effectively recorded, investigated, prosecuted and tried. This needs to be done in accordance with applicable national, EU, European and international human rights law.

EU Member States should make further efforts to systematically record data on hate crime, collect them and publish them annually. The data should be disaggregated at a minimum by bias motivation, type of crime, and sex and age of victim(s) and perpetrator(s), to enable them to develop effective, evidence-based legal and policy responses to this phenomenon. Any data should be collected in accordance with national legal frameworks and EU data protection legislation.

Article 1 of the Framework Decision on Racism and Xenophobia (2008/913/JHA) outlines measures that Member States are to take to punish intentional racist and xenophobic conduct. Article 4 also requires courts to consider bias motivation an aggravating circumstance or take it into consideration in determining the penalties imposed on offenders. Recital 63 of the Victims' Rights Directive (2012/29/EU) affirms that, to encourage and facilitate reporting of crimes, practitioners need to be trained and measures to enable third-party reporting should be put in place. The implementation of EU law entails ensuring that victims and witnesses can report hate crime, and that police identify hate crime victims and record the racist motivation at the time of reporting.

By 2019, several Member States had not fully and correctly transposed the provisions of the Framework Decision, as reports by international monitoring bodies and civil society organisations show. The European Court of Human Rights and national courts set limits on using free speech to justify hostile speech and incitement to hatred. Some Member States adopted guidelines for criminal justice personnel on investigation and prosecution of hate crime. A number of them addressed under-reporting through third-party reporting and community engagement. Still, hate crime remains widely unreported and unrecorded, and national hate-crime data collection is insufficient, FRA's research and other studies consistently show.

Article 21 of the Charter of Fundamental Rights prohibits any discrimination on the grounds of ethnic origin and race. Similarly, Article 3 of the Racial Equality Directive (2000/43/EC) prohibits any discrimination on ethnic or racial origin in access to education; employment; services, including housing; and social protection, including healthcare. Reports of the European Commission and of international human rights monitoring bodies show that Member States need to make more effort to implement the directive's provisions correctly. Members of minority ethnic groups, including those who are migrants, continue to face discrimination across the EU in all areas of life, as FRA's and other research findings show – most often when seeking employment and housing.

FRA OPINION 3.2

EU Member States should significantly improve the effectiveness of their measures and institutional arrangements for enforcing EU and national anti-discrimination legislation. In particular, Member States should ensure that sanctions are sufficiently effective, proportionate and dissuasive. This can reduce the barriers ethnic minorities and immigrants face when they try to access education, employment and services, including housing.

To combat potential bias towards persons who belong to minority ethnic groups, and to ensure equal access to and participation in the labour market, measures could include various elements. These include introducing name-blind recruitment policies; monitoring discriminatory practices; raising awareness and training on unconscious bias; supporting employers and social partners in combating discrimination and obstacles to labour market participation; and providing anti-discrimination training to employers in private companies and public services.

Research in a number of Member States shows the persistence of discriminatory ethnic profiling incidents by the police. Such profiling can undermine trust in law enforcement. It also contradicts the principles of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and other international standards, including those embodied in the ECHR and related jurisprudence of the ECtHR, as well as the EU Charter of Fundamental Rights and the Racial Equality Directive.

FRA OPINION 3.3

EU Member States should develop specific, practical and ready-to-use guidance to ensure that police officers do not conduct discriminatory ethnic profiling in the exercise of their duties. Such guidance should be issued by law enforcement authorities and included in standard operating procedures of the police, as well as in codes of conduct for police officers. Member States should systematically communicate such guidance to frontline law enforcement officers.

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ROMA EQUALITY AND INCLUSION

4

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UN & CoE

28 February

Committee on the Rights of the Child issues its concluding observations on Belgium recommending that Roma children benefit from housing suited to their lifestyle.

5 March

- European Commission against Racism and Intolerance (ECRI) publishes its report on Latvia and conclusions on the implementation of priority recommendations in respect of France.
- Committee on the Rights of the Child issues its concluding observations on Czechia encouraging the State Party to establish special programmes to target Roma children, children living in public housing, foster care and government institutions.

25-27 March

Council of Europe (CoE) organises the seventh International Roma Women's Conference "Access to Justice and Rights" under the Finnish Presidency of the Committee of Ministers.

16 April

In *Lingurar v. Romania* (No. 48474/14), the ECtHR rules for the first time that "ethnic profiling" is discriminatory and holds that the Romanian authorities failed to investigate the applicants' allegation of police racism.

14-15 May

6th meeting of the CoE-FRA-ENNHRI-EQUINET Operational Platform for Roma Equality (OPRE) takes place in Slovakia on the right of Roma and Traveller children to quality inclusive education.

4 June

ECRI publishes its fifth monitoring reports on Ireland and on the Netherlands.

5 June

ECRI publishes its fifth monitoring reports on Romania and on Slovenia.

6 June

- ECRI publishes its conclusions on the implementation of the recommendations in respect of Lithuania.
- Committee on the Elimination of Racial Discrimination (CERD) publishes concluding observations on the combined 18th to 25th periodic reports of Hungary and conclusions on the implementation of priority recommendations in respect of Cyprus, Italy, Lithuania, North Macedonia and the United Kingdom.

11 June

ECRI publishes its annual report 2018.

28 August

CERD publishes concluding observations on the combined 22nd to 24th periodic reports of Poland.

10 September

ECRI publishes its fifth monitoring report on Finland.

29 October

Committee on the Rights of Persons with Disabilities issues its concluding observations on Greece.

14 November

Committee on Economic, Social and Cultural Rights issues its concluding observations on Slovakia.

6 December

Human Rights Committee issues its concluding observations on Czechia.

9 December

Committee on the Rights of the Child issues its concluding observations on Portugal.

11 December

The CoE's Committee of Ministers' Deputies takes note of the final report on the implementation of the Council of Europe Thematic Action Plan on the Inclusion of Roma and Travellers (2016-2019).

12 December

CERD issues its concluding observations on Ireland.

17 December

CoE publishes thematic report by Committee of Experts on Roma and Traveller Issues (CAHROM) on governmental support for the promotion of Romani arts and culture, Holocaust remembrance, thematic report on national experiences of social and/or geographical mapping of Roma communities and thematic report on solving the lack of identity documents and statelessness of Roma.

31 December

CoE endorses the CAHROM thematic reports on national experiences of Roma self-reliability and responsibility to participate in society as any other citizen and on the role of the national health institutions in promoting Roma health.

EU

February 12

European Parliament adopts a resolution on the need for a strengthened post-2020 strategic EU framework for national Roma inclusion strategies and stepping up the fight against anti-Gypsyism.

March 5

High-level conference on the EU framework for national Roma integration strategies organised under the Romanian Presidency of the EU Council.

July 3

2019 European Semester country specific Recommendations on Roma inclusion: Bulgaria, Hungary, Romania and Slovakia.

September 5

- European Commission releases its Communication: Report on the implementation of national Roma integration strategies.
- European Commission releases its Commission Staff Working Document: Roma inclusion measures reported under the EU framework for national Roma integration strategies.

October 1

European Commission launches a consultation process on the post-2020 initiative on Roma equality and inclusion.

October 10

In the context of the ongoing infringement procedures, European Commission sends a reasoned opinion to Slovakia, calling upon the country to comply with the provisions of the Racial Equality Directive on equal treatment of Roma children in education.

The year 2019 marked 10 years since the Council of the EU adopted Conclusions on the inclusion of Roma, prepared at the first meeting of the EU Platform for Roma Inclusion. The document contained 10 common basic principles on Roma inclusion. Principle 4 calls for all Roma inclusion policies to "insert the Roma in the mainstream of society (mainstream educational institutions, mainstream jobs, and mainstream housing)" and overcome "partially or entirely segregated education or housing" where it still exists. But ten years of efforts at EU, international, national and local levels appear to have resulted in little tangible change, as evidenced in FRA's surveys and reports and the European Commission's 2019 Report on the implementation of national Roma integration strategies. Many Roma continue to live segregated lives. They face hostility from non-Roma neighbours and mistrust local and national politics that fail to take effective steps to tackle anti-Gypsyism.

With the current EU framework for national Roma integration strategies ending in 2020, the European Commission in October 2019 launched an extensive consultation on the post-2020 initiative on Roma equality and inclusion. As this chapter once again underscores, future EU action needs to build on the important lessons learned over the past decade. It must also convince national, regional and local authorities across the EU to redouble their efforts to ensure respect for the fundamental rights of all Roma in the Union.

4.1. STRONG PLANS AND POLICIES, BUT WEAK IMPLEMENTATION AND LIMITED RESULTS

New policy initiatives in 2019 were limited, but Member States continued their efforts to improve Roma integration under existing policies following the Council Recommendation of 9 December 2013.

For example, **Croatia**[1] and **Greece**[2] adopted their Roma integration strategies and action plans. **Poland** is still revising its national Roma integration programme 2014–2020. **Serbia** faced delays in preparing its 2019–2020 Action Plan for the Implementation of its Strategy for Social Inclusion of Roma 2016–2025.[3]

In the **United Kingdom**, the Women and Equalities Committee of the House of Commons in March 2019 published a report on *Tackling inequalities faced by Gypsy, Roma and Traveller communities*. It recommends a range of measures that the UK government should take to improve their situation. For instance, it should urgently add "Gypsy, Irish Traveller and Roma" categories to the NHS data dictionary, and audit all local authorities to ensure that they have robust policies and procedures on children at risk of missing education. It also recommends engaging grassroots Gypsy, Roma and Traveller organisations in a wide-ranging campaign to explain the importance of collecting ethnically disaggregated data and to encourage self-disclosure.[4] In response, the UK Government announced in June 2019 that the Ministry of Housing, Communities and Local Government would lead development of a cross-government strategy to improve the lives of Gypsy, Roma and Traveller communities.[5]

There were two positive developments on statelessness and lack of official documents. **North Macedonia** prepared a draft Law on Persons not registered in the birth registry, which could affect many Roma. The draft law allows those without identification documents or birth certificates to register as citizens.[6] In addition, Article 46 of Greece's Law 4604/2019 allows stateless Roma with long historical presence in the country to apply for citizenship.[7]

Finland strengthened the implementation of its national policy on Roma at regional and local levels through the project Upscaling Roma Platform 2018–2019.[8] The project – supported by the European Commission under the Rights, Equality and Citizenship programme – helps establish cooperation networks involving Roma and public authorities, to draft specific Roma integration programmes for each region.

Germany reinforced its Roma inclusion efforts in March 2019 by establishing an Independent Commission on Anti-Gypsyism within its Human Rights Institute. This commission will compile information on manifestations of anti-Gypsyism in Germany and will draft recommendations on how to combat it at federal level by the spring of 2021. The Central Council of German Sinti and Roma praised the initiative.[9] Moreover, in 2019, the federal programme Living Democracy!, funded by the Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, entered its second phase. Nine of its projects will examine how to combat anti-Gypsyism and empower Sinti and Roma in rural areas.[10]

For more information on anti-discrimination, see **Chapter 2** on Equality and non-discrimination. Regarding hate crime, see **Chapter 3** on Racism, xenophobia and related intolerance.

FRA ACTIVITY

Focus on Roma women

In 2019, FRA published a report on Roma women based on data from FRA's second European Minority and Discrimination Survey (EU-MIDIS II) in nine EU Member States. The survey interviewed about 8,000 Roma women and men face to face in **Bulgaria**, **Croatia**, **Czechia**, **Greece**, **Hungary**, **Portugal**, **Romania**, **Slovakia** and **Spain**.

The report highlights where Roma women are particularly disadvantaged in comparison with both Roma men and the general population. For example, they leave school early and have a low level of participation in the labour market. That reflects the overall exclusion of Roma and the persistence of traditional roles. It also stresses some important differences between Member States.

Early, and in particular underage, marriage persists in some EU countries. It affects 17 % of Roma women and 10 % of Roma men and the analysis highlights the dire consequences. Roma women who marry and start a family at a very young age, while living in severely deprived material and housing conditions, are even more disadvantaged and at higher risk of exclusion and marginalisation. This practice is a serious violation of their fundamental rights and needs to be tackled urgently through specific, gender-sensitive measures.

For more information, see FRA (2019), ***Second European Union Minorities and Discrimination Survey: Roma women in nine EU Member States***.

4.2. SEGREGATION REMAINS A CHALLENGE

4.2.1. Education

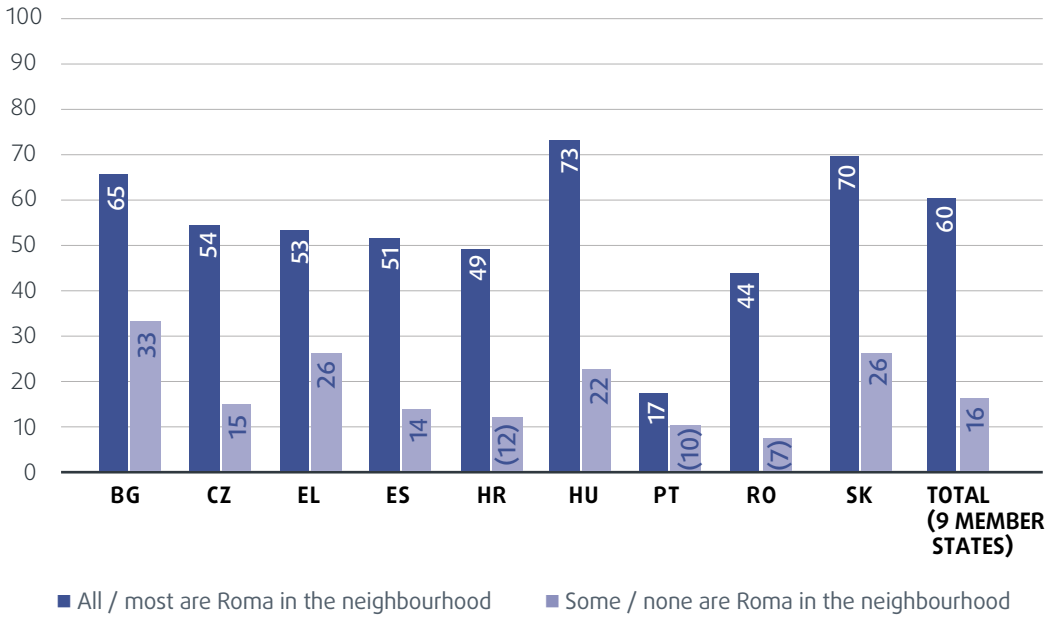
Segregating children and young people in schools and other educational settings on the basis of their ethnic background is a serious violation of fundamental rights. It prevents young people with a minority background, such as Roma, from receiving the same education as everyone else and perpetuates poverty and social exclusion.

Authorities often say that placing Roma children in separate schools or classes is to help their "special needs" or is the "unavoidable" outcome of housing concentration in Roma neighbourhoods or settlements. However, there are various ways to remedy the latter. For example, Roma students can be transported ("bussed") to non-segregated schools, or school districts can be redefined to include both predominantly Roma and majority-populated neighbourhoods.

Roma students can be segregated from others in different ways, ranging from placing them in separate schools to placing them in separate classes. Another form of segregation that can amount to discrimination concerns placing Roma children in so-called special needs schools.

Such practices affect Roma children and young people in the nine Member States that EU-MIDIS II covered. For example, the percentage of Roma children attending schools where "all or most of schoolmates are Roma" is more than three times as high in places with mainly Roma populations as in mixed neighbourhoods (Figure 4.1). The figure also shows that, on average, out of those Roma children living in neighbourhoods where only some or none are Roma, 16 % still attend a class where most or all children are of Roma origin. This proportion is much higher in Bulgaria, Greece and Slovakia.

FIGURE 4.1: PERCENTAGE OF ROMA CHILDREN, AGED 6–15, ATTENDING SCHOOLS WHERE "ALL OR MOST OF SCHOOLMATES ARE ROMA" AS REPORTED BY RESPONDENTS, HOUSEHOLD MEMBERS AGED 6–15 IN EDUCATION, BY NEIGHBOURHOOD AND EU MEMBER STATE[a,b,c,d]



Source: FRA, EU-MIDIS II, 2016

Notes:

a For a detailed description of the methodology, see FRA (2017), ***Second European Union Minorities and Discrimination survey: Technical report.***

b Out of all persons aged 6–15 years in Roma households who are in education (n = 6,518); weighted results.

c Survey question filled in by respondents for all children aged 6–15 years in education: "Now please think about the school [NAME] attends. How many of the schoolmates would you say are Roma: all of them, most of them, some or none of them?" Type of neighbourhood calculated based on survey question filled in by respondents: "In the neighbourhood where you live, how many of the residents would you say are of the same Roma background as you: all of the residents, most of them, some or none of them?"

d 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 in parentheses.

In 2019, non-governmental organisations (NGOs) continued reporting on school segregation. For example, in **Slovenia**, Roma continue to be overrepresented in special schools designed for children with mental disabilities, according to an Amnesty International report.[11] This is the case although the Slovenian strategy of education of Roma formally abolished school segregation in 2004[12] and Roma-only classes had already been abolished in 2003.[13]

In **Czechia**, a draft amendment to Ministerial Regulation No. 27/2016 on special needs education introduced in April 2019 would allow the so-called practical primary schools to open new classes especially for pupils with behaviour disorders, Amnesty International reported. This would potentially affect an estimated 2,300 Roma, who would end up being segregated.[14]

In reply, the Czech government says that the amendment has no negative impact on the education of Roma pupils.[15] However, it also acknowledges that, of all pupils diagnosed as having a "mild mental disability" (15,132), a staggering 29.1 % are Roma. They are educated under the Framework Educational Programme for primary education with adjusted learning outcomes – a programme with "the same level of quality", according to the government. Moreover, the government claims to have taken steps to ensure that pupils with "special educational needs" are accurately diagnosed. It provides opportunities to review the diagnosis in "revision centres" to ensure the fairness of the system. Meanwhile, the Czech government informed the European Commission that special schools are gradually wound down. Namely, of the total number of Roma pupils in elementary schools, 2.7 % are now educated according to the curriculum for mild mental disability (compared to 5.6 % during the previous school year). The government intends to end this programme for all pupils as of 1 September 2020.

The European Commission continued infringement proceedings concerning discrimination against Roma children in education in **Czechia**, **Hungary** and **Slovakia** in 2019.

On 10 October 2019, the Commission communicated its reasoned opinion to **Slovakia** in the context of infringement proceedings for non-compliance with the Race Equality Directive. It argues that, despite measures that Slovakia took after the Commission's formal notice in April 2015, a disproportionate percentage of Roma are still educated in special schools, classes for children with mental disabilities, separate Roma-only classes or Roma-only schools.[16] In this context, the Centre for Civil and Human Rights requested that school districts in Terňa be redrawn to prevent Roma school segregation, but a court in Prešov ruled against it. The school districts have been used to justify having children from a marginalised Roma settlement attend a separate afternoon shift within the same school as non-Roma children, who attend the morning shift. The centre's appeal is pending.[17]

As part of its measures to tackle segregation, in 2019 the Slovak Ministry of Education, Science, Research and Sport organised 60 two-day seminars for 1,211 teachers and school staff on desegregation. They led to the development of 117 desegregation plans for schools. The Slovak Ministry of Finance in partnership with the Ministry of Education issued a report mapping the segregation of Roma pupils. It finds that Roma pupils, especially those from marginalised communities, are seven to eight times more likely to repeat a school year – and eight times less likely to enter university.[18] For more information on the implementation of the Racial Equality Directive, see **Chapter 3** on Racism, xenophobia and related intolerance.

In **Romania**, the National Commission for Educational Desegregation and Inclusion approved, in November 2019, a methodology for monitoring school segregation based on specific indicators.[19] The relevant database is expected to be populated with data by the summer of 2020.

Hungary took a range of anti-segregation measures in 2019. These include establishing working groups in school districts to provide advice in educational matters.[20] The Federation of National Self-Governments can also delegate one member to this working group.

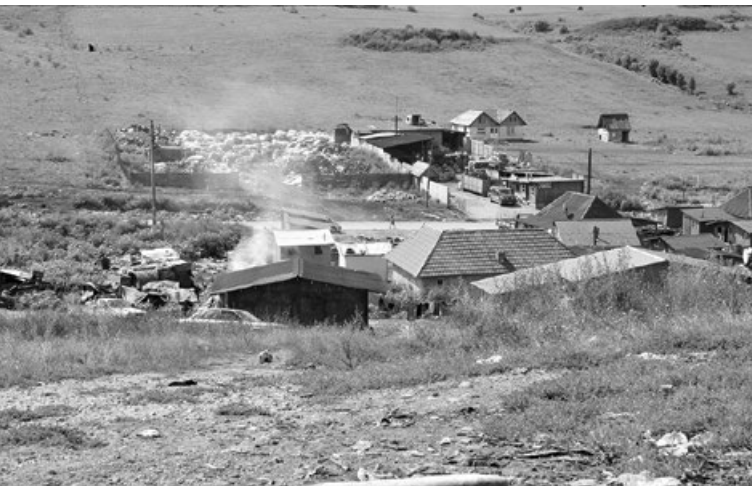
In February 2019, the Budapest Capital Regional Court of Appeal upheld a lower court decision that found the Ministry of Human Resources responsible for allowing the segregation of Roma pupils since 2003. The court upheld the first-instance court order for a fine of HUF 50 million (€ 149,817). However, it ordered the annulment of the part of the decision regarding using the fine for civil society monitoring activities on desegregation.[21] Following the court decision, schools referred to in the decision and schools with a high segregation index prepared desegregation action plans. The Educational Authority provides mentoring and supports the schools' staff in the implementation of desegregation measures, implemented within the ongoing EU co-funded project 'Supporting schools which are at risk of student drop-outs'.[22]

In **Belgium**, the equality body Unia issued its annual report for 2018 in 2019.[23] It emphasises that access to education remains difficult and urgent, and that young Roma are still overrepresented in special education.[24]

Croatia adopted its action plan (2019–2020) for the implementation of the national Roma inclusion strategy 2013–2020 on 29 August 2019. It calls for an expert assessment of Roma segregation in education and for measures to tackle it.[25] It is important to implement this swiftly: in the school year 2018/2019, there were 65 classes with only Roma pupils, an increase from the previous year.[26]

A range of measures and initiatives aiming to improve equitable participation continued in 2019. A number of countries updated the action plans for the implementation of their national Roma integration strategies (**Croatia**,[27] **Greece**,[28] **Lithuania**,[29] and **Slovakia**[30]). Some also implemented measures targeting specific aspects of segregation in education.

In **Bulgaria**, the Ministry of Education launched a national programme to support municipalities in their desegregation efforts. The programme will target explicitly children attending segregated educational institutions or who have dropped out of education.[31] **North Macedonia** adopted a new law on primary education, which explicitly prohibits discrimination, encourages interethnic integration and envisages educational mediators for Roma children from socially vulnerable families.[32] In **Poland**, the local authorities continue to fund Roma school assistants under the Roma integration Programme.[33] The Parliamentary Committee for National and Ethnic Minorities requested more funding for Roma mediators.[34]



Slovakia introduced compulsory pre-school education for all 5-year-old children as of September 2021. This initiative aims to increase the pre-school participation of Roma.[35] However, the National Association of Town and Municipalities questioned the capacity to cater to all children. It plans to challenge the law at the Constitutional Court, arguing that the state gave municipalities new obligations without providing sufficient funding.[36]

Cyprus implemented the EU-funded DRASE (*Δράσεις Σχολικής και Κοινωνικής Ένταξης* or School and Social Inclusion Activities) programme in 96 schools across the country in 2019. The programme is not specifically designed for or targeted at Roma, but tries to reduce early school leaving and improve school performance by supporting engagement of Roma parents in the education of their children.[37]

Croatia continued its scholarship scheme, increasing scholarships for secondary school from HRK 500 to HRK 700 (€ 67 and € 94, respectively) per pupil and for higher education from HRK 1,000 to HRK 1,300 (€ 134 and € 174, respectively). The scheme awards people HRK 1,500 (€ 202) for completing the three-year secondary education programme and HRK 3,000 (€ 403) for the four-year secondary education programme.[38] **Portugal** also introduced a scholarship scheme for secondary education Roma students, under its Choices programme.[39] In the **United Kingdom**, the Women and Equalities Committee report includes a number of specific recommendations on how to improve the education of Gypsy, Roma and Travellers.[40]

A number of countries faced challenges in providing adequate funding for efforts to promote Roma inclusion in education. In **Lithuania**, the Action plan for integration of Roma into Lithuanian society 2015–2020 (*Romų integracijos į Lietuvos visuomenę 2015–2020 metų veiksmų planas*) set out 18 measures. There was only enough funding to implement five in 2019.[41]

The **Netherlands** amended its financial support scheme for Sinti and Roma pupils. School boards can still request special funding as long as at least four pupils of Roma or Sinti background are visiting the school.[42]

PROMISING PRACTICE

Learning from communities on overcoming barriers to children's education

In the **United Kingdom**, the NGO Traveller Movement published *A good practice guide for improving outcomes for Gypsy, Roma and Traveller children in education.* It outlines good practices from Traveller Movement's 2016–2019 project, which aimed to support children from Gypsy, Roma and Traveller communities to enrol, attend and do well in school, and to provide a safe environment free from bullying and harassment.

The project involved Gypsy, Roma and Traveller community members at every stage, from its creation to implementation. The guide provides evidence of major barriers Gypsy and Traveller parents face in education. It helps schools establish a better understanding of Roma families and closer cooperation with them.

For more information, see Travellers Times (2019), '***Gypsy, Roma and Traveller education – Celebrating good practice***'.

4.2.2. Housing

In 2019, many Roma across Europe continued to live in segregated areas, often without access to public utilities, such as running potable water, electricity, sewage, public transport and paved roads. Moreover, when they settle on public or privately owned land without permission, they may face eviction. That could result in violations of their human rights if they are left homeless. The risk is particularly high if children are involved, because they are particularly vulnerable.

On average, 38 % of Roma live in households with no toilet, shower or bathroom inside the dwelling, FRA's 2016 survey found.[43]

In **Italy**, 450 Roma, including families with children, were evicted on 10 May 2019 from their informal encampment in Giugliano (Campania).[44] The local government, assisted by the police and army, carried out the eviction following an order of the judiciary for unsuitable health conditions of the camp.[45] On 16 May, Roma families with the support of the NGO 21 luglio and the European Roma Rights Centre filed for interim measures with the European Court of Human Rights (ECtHR). On 17 May, the court granted an interim measure, ordering the Italian government to provide temporary accommodation for the minors involved and their parents, without separating them.

After communication with the ECtHR, the Italian authorities committed to refraining from further evictions of these Roma families, who had moved to an industrial area. The ECtHR suspended the interim measures after the authorities made assurances that they would not evict the families.[46] Eventually, the government, in cooperation with local authorities and local social services, set up a task force to provide alternative accommodation to the families who are living in shelters and reception facilities in the municipal territory.[47]

In **Lithuania**, Roma houses that had been built illegally in the Kirtimai Roma settlement in Vilnius were demolished.[48] According to the local Roma Community Centre, there was no dialogue with those affected and they received no legal information.[49] They also claimed that the Vilnius Division of the State Territorial Planning and Construction Inspectorate and the Ministry of the Environment did not provide alternative housing. The Human Rights Committee of the Lithuanian Parliament intervened as a result. Subsequently the government asked the Vilnius Inspectorate to continue implementing the municipal Roma integration programme after 2019.[50]

In **Czechia**, the NGOs participating in the 'Roma Civil Monitor pilot project[51] claimed that 'housing benefit-free zones' are being misused to prevent relocation of Roma, as they exclude tenants from housing benefits. Introduced in 2017,[52] these allow municipalities to define housing areas where any new tenant will not be eligible for housing benefits.[53] A group of senators challenged this arrangement before the Constitutional Court in 2017, but the court has not yet issued a decision.

General courts and regional governments have intervened by assessing, and in some instances prohibiting, these practices, including in towns with significant Roma populations, such as Kladno[54] and Ústí nad Labem.[55] More than 90 municipalities have declared housing benefit-free zones. Some cover entire towns.[56]

In regard to Travellers, a court in the **Netherlands** recognised the special nature of caravan-based life. It rejected an application by a housing corporation to evict Travellers from a site in Waddinxveen and move them to special 'trailer homes'. It held that this would have conflicted with Articles 8 and 14 of the European Convention on Human Rights.[57]

In **Belgium**, the equality body Unia expressed concern about the large-scale police operation 'Strike' on 7 May, which took place in the framework of penal law investigations and arrests concerning an organised crime scheme. The police operation resulted in the seizure of caravans, leaving 90 families with children homeless.[58]

In the **United Kingdom**, the Planning policy for Traveller sites 2015 changed the definition of 'Gypsies and Travellers'. In September 2019, the Equality and Human Rights Commission published a report[59] assessing how this affects local authorities' planning for the provision of pitches in England. The revised definition does not include those who have ceased travelling permanently for any reason, including old age or disability. Applying the old definition, the total number of pitches necessary was 1,584 before 2015. After the change, that number dropped to 345. Gypsies and Travellers who no longer fall within the revised definition are required to have their needs assessed under policies within the National Planning Policy Framework, which expects authorities to assess the housing needs of different groups within the community.

In the past year, courts in the **United Kingdom** granted more injunctions upholding local councils' decisions to ban unauthorised camps on public land. Since local councils made the applications against persons unknown, cases were not defended.

One exception was in Bromley, where the London Gypsies and Travellers group was allowed to intervene and successfully challenged the ban on camping on public land. The group had registered 34 injunctions granted nationwide[60] and argued that their cumulative effect would leave communities pursuing their traditional nomadic life with nowhere to go except on private land. The court found that the injunction sought was not proportionate. However, the Borough of Bromley appealed the decision.[61]

The case is important, especially in view of the government's November 2019 consultation on a proposal to give the police more powers to "arrest and seize the property and vehicles of people who set up unauthorised caravan sites".[62] Leading Gypsy and Travellers' rights campaigners consider the proposal "inhumane".[63]

In **Bulgaria** and **Serbia**, courts ruled on cases related to the electricity supply of Roma houses.

In **Bulgaria**, the electricity company used to place the electricity meters at hard to reach places – a practice applied only to those living in neighbourhoods with a predominant Roma population. The Commission for Protection against Discrimination sanctioned the company for discrimination and the company filed an appeal. The Sofia City Administrative Court confirmed the equality body's decision and sanctioned the electricity company with a fine of BGN 250 (approximately € 125). It also instructed it to place the electricity meters in the Roma neighbourhood at the same height as in the other neighbourhoods, as well as to refrain, in the future, from treating its customers unequally.[64]

In **Serbia**, the Higher Court in Niš ordered the state-owned power company to restore the provision of electricity to an informal Roma settlement because of health risks and adverse effects on the education of children. The Roma community, with the support of the European Roma Rights Centre, claimed that their access to electricity was discriminatory because the company required collective payment for the entire community, charging all its members the highest rate, whereas it charged non-Roma households individually.[65]

4.2.3. Health and employment

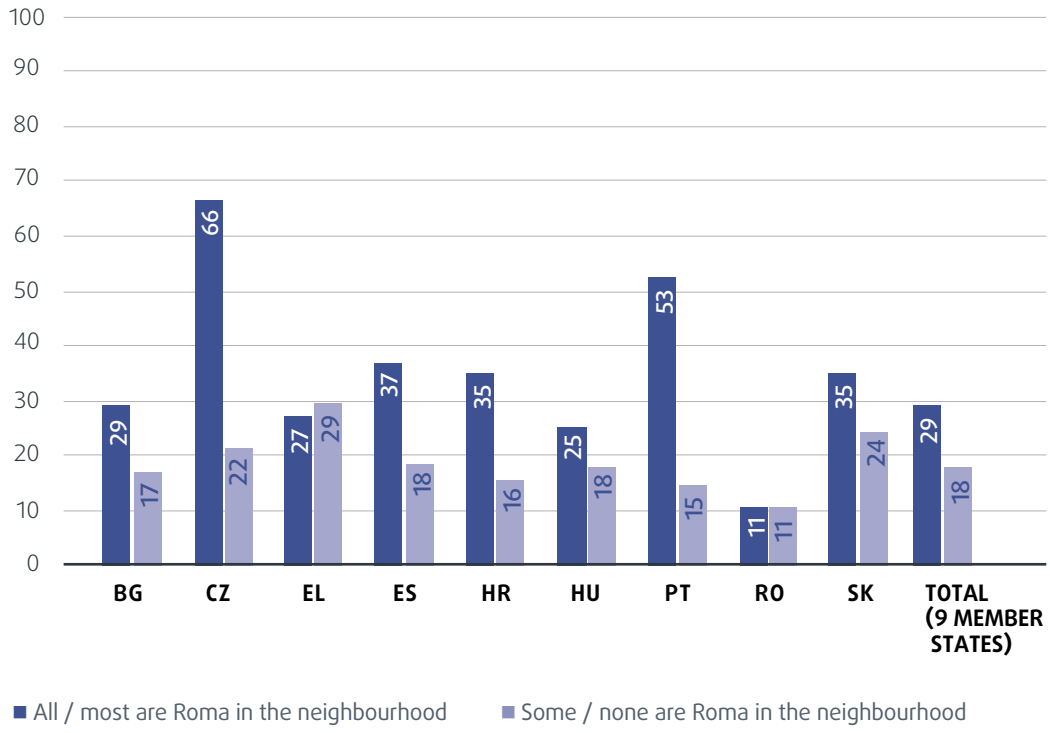
Unlike education and housing, where segregation is visible and easier to track, segregation in health and employment is more subtle and difficult to track. Cases of overt segregation in health facilities are rare.

In April 2019, the European Committee of Social Rights (ECSR) published its decision on the merits of the complaint *European Roma Rights Centre v. Bulgaria* (No. 151/2017). Roma women have less access to reproductive healthcare in public hospitals, specifically during pregnancy and childbirth. The ECSR held Bulgaria responsible. The initial complaint alleged that Roma women are routinely segregated in maternity wards, but the ECSR ultimately determined there was insufficient evidence that this is a systemic practice.[66]

Segregation in housing can also affect health. Bad-quality housing, lack of basic infrastructure, such as sewage and running water, and a polluted environment affect health and the quality of life. Segregated Roma neighbourhoods or settlements are often in areas with worse environmental risks than where the majority population lives (**see Box**). Information on differences in health status (e.g. morbidity or mortality rates) based on ethnic origin is limited and rarely publicly available. However, the living conditions in segregated housing are associated with increased risk of health hazards.

FRA's Roma surveys in 9 EU Member States show that Roma more often live in areas facing environmental problems such as pollution, grime, smoke, dust or polluted water than the general population.[67] In the majority of the nine countries, Roma living in segregated areas where most or all persons are of Roma background are more affected by environmental problems than in areas where only some or no Roma are living (Figure 4.2). Qualitative research and territorial mapping suggest that such segregated practices can amount to violations of fundamental rights.

FIGURE 4.2: PERCENTAGE OF PEOPLE LIVING IN HOUSEHOLDS WITH CERTAIN ENVIRONMENTAL PROBLEMS, HOUSEHOLD MEMBERS, BY TYPE OF NEIGHBOURHOOD, WEIGHTED[a,b,c]



Source: FRA, EU-MIDIS II, 2016

Notes:

a Out of all persons in Roma households (n = 33,370); weighted results.

b Survey question: "Does accommodation have any of the following problems: pollution, grime or other environmental problems in the local area such as: smoke, dust, unpleasant smells or polluted water"

c Type of neighbourhood calculated based on survey question filled in by respondents: "In the neighbourhood where you live, how many of the residents would you say are of the same Roma background as you: all of the residents, most of them, some or none of them."

Visualising the scope of environmental injustice against Roma communities

The recently released Environmental Justice Atlas displays how Roma communities on the outskirts of cities have come to live around abandoned industrial sites or landfills or other places being used as deposits of hazardous waste or discharges from industries and mine complexes. This type of housing segregation can lead to long-term health risks, including mercury or lead poisoning affecting children.

An interactive map shows the locations of Roma settlements in environmentally degraded areas and provides details for each case. It shows the magnitude of environmental problems facing entire Roma communities. The creators of the Atlas claim that this amounts to environmental racism.

*For more information, see **Environmental Justice Atlas**.*
On the evolution of the concept of environmental racism, see Holifield, R., Chakraborty, J., Walker, G. (eds.) (2018), The Routledge Handbook of Environmental Justice.

PROMISING PRACTICE

Bridge to business: promoting access to employment in the private sector

In 2019, Open Society Institute – **Bulgaria** completed the project Bridge to Business, funded by the EU Employment and Social Innovation programme 2014–2020 and implemented in cooperation with the Autonomia Foundation and the Central European University (**Hungary**). It aimed to improve the access of young Roma (18–35) to employment in the private sector and give them a chance of higher-quality jobs.

The Bulgarian component of the programme covered 121 young people with secondary or university education and 170 Roma high school students from different regions of the country. The programme provided the participants with career orientation, assistance in contacting employers, and tailored training and mentoring after they gained employment. Besides access to high-quality jobs for young Roma professionals, it aimed to prevent early school dropout by providing the high school students with positive role models and support from older peers.

The businesses also benefited. The programme both connected them with motivated young professionals, and aided the participating companies in developing and implementing internal procedures for promoting diversity and inclusion at the workplace.

For more information, see the Bridge to Business ***website****.*

Most measures to improve access to healthcare for Roma in 2019 used health mediators. For example, 22 Roma health mediators work in 10 municipalities in **North Macedonia**. Its national action plan for Roma health provides for a total of 30 health mediators by 2020.[68] **Slovakia** used funds from the European Social Fund for health mediation.[69] In **Sweden**, the NGO Roma Youth Association received funding from the Agency for Youth and Civil Society Issues to continue the project Young Roma Health Motivators in Halmstad.[70]

In **Hungary**, action on healthcare for Roma is part of a broad long-term social support programme for the 300 most disadvantaged settlements with a total combined population of 270,000, most of them of Roma origin. The 'Presence programme' complements the work of existing public services. The Interior Ministry's main partners are civil society and religious organisations, coordinated by the Commissioner of the Prime Minister. The programme started in the first 31 settlements in 2019.[71]

In **Bulgaria,** the Active Citizens Fund provides 25 scholarships to Roma students in medical courses. The aim is to support the development of qualified Roma health professionals so that they can work towards improving the health of Roma community and act as positive role models for their peers.[72] **Serbia** employs Roma health mediators; however, their recruitment is project based and their remuneration is much lower than the minimum wage in Serbia.[73] **North Macedonia** introduced a right to a guaranteed minimum allowance for poor households under specific criteria, and provides public health insurance if people cannot obtain it otherwise.[74]

Employment

Segregation in education and housing affects employment as well as health. For example, young Roma (aged 16–24) who live in segregated areas (with difficult or no access to public transport, as well as a negative reputation) have much poorer-quality employment than those living in unsegregated settings, FRA data from 2016 show. In non-segregated areas, 47 % of employed Roma have a permanent contract, compared with only 22 % in segregated ones.[75]

In 2019, the Roma organisation Fundación Secretariado Gitano published a comparative study on poverty and employment of Roma in **Spain** in 2018.[76] It finds low levels of participation of the Roma population in the labour market, marked by precariousness, weak protection and low quality of jobs. The study also highlights that Roma women are doubly disadvantaged, both as women and as Roma.

Meanwhile, **Finland** reported positive developments in Roma employment and entrepreneurship over the past 10 years. The Ministry of Economic Affairs and Employment (*työ- ja elikeinoministeriö/arbets- och näringsministeriet*) commissioned the study, which came out in November 2019.[77] However, unemployment remains higher among Roma than among the general population, it points out. Among other measures, it recommends that employment services recruit more Roma, to facilitate Roma access to the labour market.[78] However, Roma NGOs estimate that two thirds or more of Roma are unemployed, as quoted in the fifth monitoring cycle report of the European Commission against Racism and Intolerance.[79]

Efforts to improve Roma access to decent work continued. General measures aimed to improve equal access to mainstream employment. Small-scale initiatives specifically targeted Roma and were often in cooperation with civil society organisations. Most of these initiatives focus on training to improve opportunities in the labour market for Roma. Some target specifically women and/or young people.

In **Bulgaria**,[80] **Croatia**,[81] **Hungary**,[82] **Serbia**[83] and **Slovenia**,[84] Roma benefit from large-scale horizontal programmes by national employment agencies and other public entities for training, career orientation, developing job seeking skills, etc.

Some countries also reported actions specifically targeting Roma in 2019. For instance, in **Austria**, the Ministry of Labour, Social Affairs, Health and Consumer Protection supported media workshops as a part of the Romblog Digital Evolution project, providing media literacy and skills for Roma youth to improve their chances in the labour market.[85]

In **Bulgaria**, the municipality of Rakitovo started the project 'For a better life in the municipality of Rakitovo'. Lasting 18 months, the project will support economically inactive persons, especially Roma, to help them participate in the labour market.[86] The **Bulgarian** National Employment Agency implemented special workshops involving Roma mediators to improve the access of unemployed Roma to the labour market and motivate them to register with the labour offices.[87]

Serbia recognised Roma as job seekers who face specific challenges in the labour market and provides them with self-employment subsidies.[88]

In the **Netherlands**, the Ministry of Social Affairs and Employment coordinates actions for the social inclusion of Roma and Sinti. In early 2019, it decided for the first time to include among its labour market integration initiatives a pilot project for mediators supporting Roma and Sinti young people in secondary education and vocational training.[89]

North Macedonia has a revised operational plan for active programmes, employment measures and labour market services for 2019. It includes measures encouraging employers to hire Roma, supporting Roma entrepreneurship and improving skills.[90]

FRA ACTIVITY

Roma and Travellers Survey 2018–2019

In response to the need for data in EU Member States with relatively small numbers of Roma and Travellers, FRA designed and implemented in 2018/2019 a Roma and Travellers survey to collect comparable data in six Member States (**Belgium**, **France**, **Ireland**, **the Netherlands**, **Sweden** and **the United Kingdom**). It collected information on a wide range of aspects of social life. They include core socio-demographic indicators such as labour market participation and level of education, as well as housing and living standards, including access to public utilities and basic housing amenities.

Furthermore, respondents were interviewed on their experiences of discrimination in a variety of situations. These include in education, at work, when looking for work and housing, and accessing healthcare. The survey also looks at contacts with the police.

The survey was implemented in consultation with Roma communities and national organisations. The data will allow the monitoring of segregation in various areas of life. The fieldwork ended in June 2019 and first results will be available in 2020.

*See FRA's webpage on the **Roma and Travellers Survey 2018–2019**.*

4.3. DESEGREGATION MEASURES NEED RELIABLE DATA

Since the launch of the EU Framework for National Roma Integration Strategies in 2011,[91] the European Commission, in close cooperation with FRA, reports annually on progress in Roma integration. A range of problems with segregation in housing and in education appear from the data that FRA's surveys provide.

FRA surveys[92] are particularly important given the ongoing lack of relevant official disaggregated data. This makes it challenging to monitor the impact of Roma-targeted policies and measures, in particular on desegregation in housing and education.

The lack of official data also hampers reporting on the EU's progress on the Sustainable Development Goals (SDGs) of the global Agenda 2030.

Eurostat reviewed the EU's SDG indicator set in preparation for the 2019 edition of the EU's monitoring report on progress towards the SDGs. In January 2019, it published the outcome.[93] Given the lack of official data disaggregated by ethnic origin, the indicators used to report on SDG 10, 'Reduce inequality within and among countries', were not capturing the situation of Roma who are vulnerable to poverty and social exclusion and such data were not included in the 2019 edition of the EU's monitoring report.[94]

Ahead of the UN High Level Political Forum on Sustainable Development on the Agenda 2030 addressing the theme 'Empowering people and ensuring inclusiveness and equality', FRA devoted the first chapter of its annual fundamental rights report to the interrelationship between the human and fundamental rights framework and the SDGs. It focused on SDG 10, on reducing inequality, and SDG 16, on peace, justice and strong institutions. FRA recommended that "Member States should collect and disaggregate data relevant for the implementation of SDGs, particularly as regards vulnerable and hard-to-reach population groups, to ensure that no one is left behind" (Opinion 1.6).

The President of the UN Economic and Social Council highlighted that improving the capacity of national statistical systems to generate data and measure progress towards implementing the Goals "was identified as a prominent issue, in particular the need to produce disaggregated data to identify exactly who is being left behind and to inform effective action."[95] Moreover, the 2019 synthesis of voluntary national reviews noted that "limited evidence and data disaggregation clearly remain key challenges for many, if not all countries, developed and developing alike."[96]

National-level efforts towards that aim remain fragmented, however. Some national stakeholders are reluctant to acknowledge the need to collect data disaggregated by ethnicity. For example, in **Portugal**, the 2021 Census Working Group on Ethnic-Racial Issues recommended including a question on "ethnic and racial origin and/or belonging" in the 2021 Census. The National Institute of Statistics reportedly rejected this because the question was formulated in a complex way and there was a risk of institutionalising ethnic-racial categories.[97] On the other hand, some test novel methods for generating data on the situation of groups vulnerable to poverty, social exclusion and violation of rights (see Box).

PROMISING PRACTICE

Collecting data on the situation of groups at risk of poverty, exclusion and violation of rights

The National Statistical Institute of **Bulgaria** launched a project piloting novel methods for generating data on the situation of groups vulnerable to poverty, social exclusion and violation of rights. Implemented in partnership with FRA and with financial support from the EEA/ Norwegian Financial Mechanism, the project will conduct a large-scale (15,000 households) survey to generate representative data on the situation of Roma, children at risk, older people and people with disabilities.

The data will make it possible to calculate key indicators for informing and monitoring a number of key policy frameworks: the UN SDGs, poverty reduction, social inclusion, anti-discrimination or hate crime. It will construct a number of "vulnerability maps" to visualise the territorial distribution of key indicators and shed light on various aspects of segregation.

FRA opinions

The European Commission's *Guidance for Member States on the use of European Structural and Investment Funds in tackling educational and spatial segregation* requires that, in all housing and education operations, the desegregation principle should be considered as a first option. The note explicitly points out that construction of new educational facilities in spatially segregated neighbourhoods should be avoided.

There is little evidence of progress in tackling segregation in education since FRA's last survey in 2016. Roma students continue to be placed in separate classes or schools, in some cases segregated special schools, despite the existence of tool-kits, guides and manuals on educational desegregation that experts and civil society organisations have produced.

FRA OPINION 4.1

EU Member States should strengthen their efforts to eliminate school segregation, as required by the Racial Equality Directive, to prevent discrimination based on the grounds of racial or ethnic origin and fight anti-Gypsyism. In doing so, Member States could consider the use of different methods. For example, they could review the areas covered by school districts and transport Roma pupils to avoid their concentration in certain schools, while at the same providing necessary support to Roma students to improve their educational performance and promote their integration in mainstream classes.

Article 34 of the Charter specifically recognises and respects the right to social and housing assistance to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by EU law and national law to combat social exclusion and poverty. Moreover, international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights and the European Social Charter (Revised), require states to ensure housing of an adequate standard for everyone.

Despite that, many Roma continue to live in segregated settings, often in appalling conditions. When Roma live in houses or shacks without building permits, some local governments continue to evict them without respecting the safeguards under international human rights law, and leave them homeless.

Segregation on grounds of ethnic origin violates Article 21 of the EU Charter of Fundamental Rights on non-discrimination, as well as Article 3 on equal opportunities and Article 19 on housing of the European Pillar of Social Rights.

FRA OPINION 4.2

EU Member States should strengthen the housing components of their national Roma integration strategies or integrated sets of policy measures, in order to ensure that all Roma live in non-segregated housing of an adequate standard. In this regard, Member States could consider adapting their national reform programmes in the European Semester to include measures to address severe housing deprivation among Roma. Moreover, EU Member States should ensure that they use the European Structural and Investment Funds effectively to tackle housing segregation and improve access to adequate housing.

FRA OPINION 4.3

EU Member States should improve their data collection methodologies and tools used to monitor progress on Roma inclusion in order to be able to collect equality data in the key thematic areas covered by the 2013 Council Recommendation on effective Roma integration measures in the Member States. The data should allow effective monitoring of desegregation efforts at national and local levels fully in line with the regulations on personal data protection.

Measures addressing segregation should be based on data disaggregated by ethnic origin. Such data are currently lacking in most EU Member States. Some Member States are reluctant to collect or acknowledge the need to collect data disaggregated by ethnic origin. Such data will be necessary for monitoring the proposed enabling conditions applicable to ERDF, ESF+ and the Cohesion Fund. One of the fulfilment criteria for the enabling condition 4, "A more social Europe by implementing the European Pillar of Social Rights", requires specifically that National Roma Integration Strategies include measures to prevent and eliminate segregation.

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ASYLUM, VISAS, MIGRATION, BORDERS AND INTEGRATION

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UN & CoE

January

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In its report on Italy, Council of Europe (CoE) Group of Experts on Action against Trafficking in Human Beings expresses concern about the exclusion of asylum applicants from second-line reception facilities.

February

1

In *D.D. v. Spain* (No. 4/2016), UN Committee on the Rights of the Child establishes that removing an unaccompanied child from Spain to Morocco, without assessing the best interests of the child, violated Articles 3, 20 and 37 of the Convention on the Rights of the Child.

19

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) publishes report on ill-treatment and conditions in immigration detention in the Evros region and on the Greek islands.

28

- In *Khan v. France* (No. 12267/16), European Court of Human Rights (ECtHR) rules that France violated the prohibition of inhuman or degrading treatment (Article 3 of the European Convention on Human Rights, ECHR) for failing to provide housing to an unaccompanied child evicted from the informal camp in Calais.
- In *H.A. and Others v. Greece* (No. 19951/16), ECtHR finds that placing unaccompanied children under "protective custody" in police stations in Greece was unlawful under Article 5 (1) (f) of the ECHR (deprivation of liberty of foreigners); and the detention conditions represented degrading treatment in violation of Article 3 of the ECHR.

March

21

In *O.S.A. and Others v. Greece* (No. 39065/16), on the hotspot of Chios, ECtHR finds that Greece violated the detained applicants' right to challenge the lawfulness of their detention (Article 5 (4) of the ECHR), since remedies were practically inaccessible.

26

In *Haghilo v. Cyprus* (No. 47920/12), the ECtHR finds that the pre-removal detention for over 18 months in three Cypriot police stations constitutes degrading treatment prohibited by Article 3 of the ECHR and violates Article 5 (1) of the ECHR (deprivation of liberty of foreigners) as it was extended unlawfully.

April

11

CoE Special Representative of the Secretary General on Migration and Refugees releases an issue paper on human rights aspects of immigrant and refugee integration policies.

24

- CoE Committee of Ministers adopts a recommendation to assist young refugees in their transition to adulthood.
- CoE Special Representative on migration and refugees publishes report on a fact-finding mission to Bosnia and Herzegovina and to Croatia.

May

8

UN agencies set up the Start-Up Fund for Safe, Orderly and Regular Migration (Migration Multi-Partnership Trust Fund) to financially support the implementation of the Global Compact on Migration.

9

CPT publishes a monitoring report on a return flight from Germany to Afghanistan, calling for stronger safeguards for returnees.

23

In *ICJ and ECRE v. Greece* (No. 173/2018), European Committee on Social Rights orders immediate measures to protect migrant children's rights in Greece.

31

In *A.L. v. Spain* (No. 16/2017) and *J.A.B. v. Spain* (No. 22/2017), UN Committee on the Rights of the Child finds that Spain's age assessment procedure for unaccompanied children violated the UN Convention on the Rights of the Child.

UN & CoE

June

13

In *Sh.D. and Others v. Greece et al.* (No. 14165/16) concerning living conditions of five unaccompanied migrant children in Greece, ECtHR finds that conditions in the Idomeni camp were not suitable for children, and the protective custody of three applicants in police stations amounted to a deprivation of liberty in facilities not designed for unaccompanied children.

18

CoE Commissioner for Human Rights releases recommendations on saving migrants' life on the Mediterranean, which aim to help CoE member states reframe their search and rescue and disembarkation responses in line with human rights standards.

July

11

- UN Independent Expert publishes report summarising detailed findings of the global study on children deprived of liberty, including migration-related child detention.
- CPT publishes its report on the treatment and conditions in immigration detention centres in Bulgaria.

17

After his visit to Hungary, UN Special Rapporteur on human rights of migrants voices concerns over the asylum procedure and the transit zones, including the deprivation of liberty of asylum seekers and prison-like conditions.

18

In *T.I. and Others v. Greece* (No. 40311/10), ECtHR finds that Greece violated the prohibition of slavery and forced labour (Article 4 of the ECHR) with regard to three Russian nationals who were victims of human trafficking for the purpose of sexual exploitation.

September

3

UN Human Rights Committee publishes General Comment No. 36 on Article 6 of the ICCPR (right to life), which includes guidance on rescue at sea and the prohibition of *refoulement*.

12

CoE Commissioner for Human Rights issues a Human Rights Comment on protecting people on the move from human trafficking and exploitation.

30

CoE publishes a report with key messages from the joint CoE and EU conference 'Effective alternatives to the detention of migrants'.

October

3

CoE Parliamentary Assembly adopts a resolution calling for "a legal status for 'climate refugees'".

8

In *Szurovecz v. Hungary* (No. 15428/16), ECtHR finds that Hungary violated Article 10 of the ECHR (freedom of expression) by denying media access to a reception facility for asylum seekers.

16

CoE Committee of Ministers adopts a practical guide on alternatives to immigration detention providing practical guidance to member states.

24

In *Teitiota v. New Zealand* (No. 2728/2016), the UN Human Rights Committee finds that states must take into account climate change-induced harm when considering expulsion of protection seekers, since climate change might represent a serious threat to the right to life.

November

21

In *Ilias and Ahmed v. Hungary* (No. 47287/15), ECtHR finds a violation of Article 3 of the ECHR for not adequately assessing the risk of a return to Serbia from a Hungarian transit zone. The ECtHR found no violation as regards the living conditions in the transit zone, and ruled that the transit zone does not qualify as place of deprivation of liberty with regard to the circumstances of the case.

December

9

Office of the CoE Special Representative on migration and refugees publishes guidance on 'Promoting child-friendly approaches in the area of migration: Standards, guidance and current practices'.

11

CoE Committee of Ministers adopts recommendation to make guardianship for unaccompanied children in migration situations more effective.

17-18

First Global Refugee Forum, under the UN Global Compact on Refugees, focuses on translating international responsibility sharing into concrete action.

20

CoE Expert Council on NGO Law publishes study on 'Using criminal law to restrict the work of NGOs supporting refugees and other migrants in Council of Europe member states'.

EU

January

23

In *M.A., S.A. and A.Z.* (C-661/17), the Court of Justice of the European Union (CJEU) clarifies that giving notice of a Member State's intention to withdraw from the EU does not impact on the implementation of the Dublin Regulation (No. (EU) 604/2013) as long as the Member State concerned has not actually left the EU.

March

12

In *Tjebbes and Others* (C-221/17), CJEU holds that EU law does not preclude the loss of nationality, in the event of durable interruption of the genuine link between the person and the Member State, but the principle of proportionality requires an individual examination of the consequences under EU law of that loss.

13

In *E* (C-635/17), CJEU rules that an application for family reunification cannot be rejected because of lack of official documentary evidence; a case-by-base assessment, taking into account a number of factors, including the best interests of the child, is needed.

19

- In *Arib* (C-444/17), CJEU clarifies that the option not to apply the Return Directive (2008/115/EC) to persons apprehended just after irregularly crossing the border applies only to the EU's external borders and not to internal borders where checks had been reintroduced.
- In *Jawo* (C-163/17), on detention under the Dublin Regulation, CJEU clarifies that an asylum applicant who leaves his/her accommodation without notice meets the definition of absconding if the authorities informed him/her of the duty to give notice, unless the applicant can prove that he/she had a valid reason to leave the accommodation and did not have the intention to abscond.

April

17

EU adopts Regulation (EU) 2019/816 establishing the European Criminal Records Information System for Third-Country Nationals.

30

European Asylum Support Office (EASO) publishes legal analysis on detention of applicants for international protection in the context of the Common European Asylum System

May

14

In *M. and Others* (C-391/16, C-77/17, C-78/17), CJEU rules that third-country nationals (either not eligible for or excluded from international protection) cannot automatically be returned after committing crimes, if that would put them in serious danger in their countries of origin.

20

EU adopts regulations establishing a framework for interoperability between large-scale EU information technology systems in migration and security (Regulations (EU) 2019/817 and 2019/818).

21

European Border and Coast Guard Agency (Frontex) starts its first ever joint operation on the territory of a neighbouring non-EU country, in Albania, based on the status agreement between the EU and Albania.

23

In *Bilali* (C-720/17), CJEU rules that Member States must revoke subsidiary protection status if granted based on wrong facts, even when the error is on the part of the administrative authorities.

June

20

- EU adopts recast Regulation (EU) 2019/1240 on the European network of immigration liaison officers.
- EU adopts Regulation (EU) 2019/1157 strengthening the security of EU citizens' identity cards and of residence documents issued to EU citizens and their family members exercising the right of free movement.
- EU adopts amendments to the Visa Code to facilitate legitimate travel and to fight irregular migration (Regulation (EU) 2019/1155).

EU

July

29

— In *Torubarov* (C-556/17), CJEU rules that, to ensure the right to an effective remedy (Article 47 of the Charter), a first-instance court that finds an applicant eligible for international protection must have the right to modify and substitute the negative administrative asylum decision.

— In *Vethanayagam* (C-680/17), CJEU confirms that only the applicant who has been refused a visa has the right to appeal against such a negative decision; the person who acted as a proxy on his/her behalf does not. The court also clarifies that, in cases of visa representation agreements, the authorities of the representing Member State are also responsible for the appeals against such decisions.

September

26

Council decision (CFSP) 2019/1595 extends the mandate of Operation Sophia, the European Union Naval Force Mediterranean until 31 March 2020.

October

22

European Commission publishes a communication on the verification of the full application of the Schengen *acquis* by Croatia, inviting the Council to integrate Croatia into the Schengen area.

November

12

In *Haqbin* (C-233/18), CJEU rules on the sanctions applicable to asylum applicants, in this case an unaccompanied child, for serious breaches of the accommodation centre rules.

13

EU adopts a new regulation on the European Border and Coast Guard, further strengthening the powers of Frontex (Regulation (EU) 2019/1896).

December

12

In *E.P.* (C-380/18), the CJEU interprets the meaning of "threat to public policy" under the Schengen Borders Code (Regulation (EU) 2016/399), which does not explicitly require personal conduct of an individual to represent a threat; Member States should therefore have wide discretion in determining what constitutes a threat to public policy – similarly to the EU Visa Code (Regulation (EC) 810/2009).

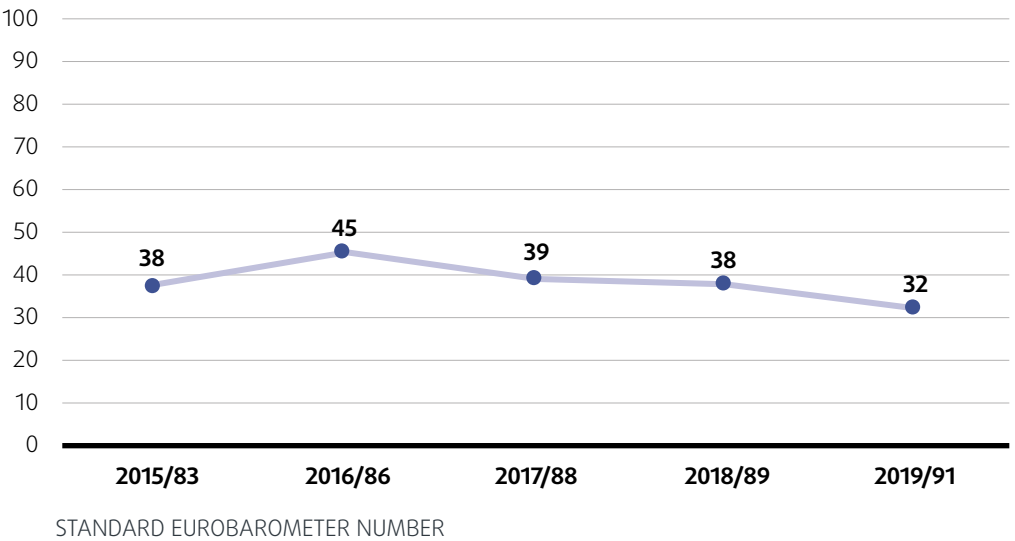
Respect for fundamental rights at borders remained one of the top human rights challenges in the EU. There were deaths at sea, threats against humanitarian rescue boats, and allegations of violence and informal pushbacks. In a handful of Member States, asylum applicants continued to face overcrowding and homelessness. The first five-year cycle of Schengen evaluations found fundamental rights gaps in return policies, but less so in border management. The EU adopted legislation providing the legal basis for making interoperable its large-scale information technology systems. The instruments that regulate these systems provide safeguards, but their effectiveness depends on how they are implemented. Meanwhile, immigration detention of children increased. Unaccompanied children who turn 18 still experienced gaps in right and services, undermining their social inclusion.

5.1. FUNDAMENTAL RIGHTS AT BORDERS

For five years in a row, EU citizens have viewed immigration as the main challenge the EU is facing.[1] It emerged as the top issue in 2015. In that year, over 1 million refugees and migrants reached Europe by sea in an unauthorised manner.[2] However, after a peak in 2016, the number of Europeans who see immigration as the top EU challenge declined (see Figure 5.1).

FIGURE 5.1: EUROPEANS WHO SEE IMMIGRATION AS THE MAIN EU CHALLENGE, 2015–2019 (%)

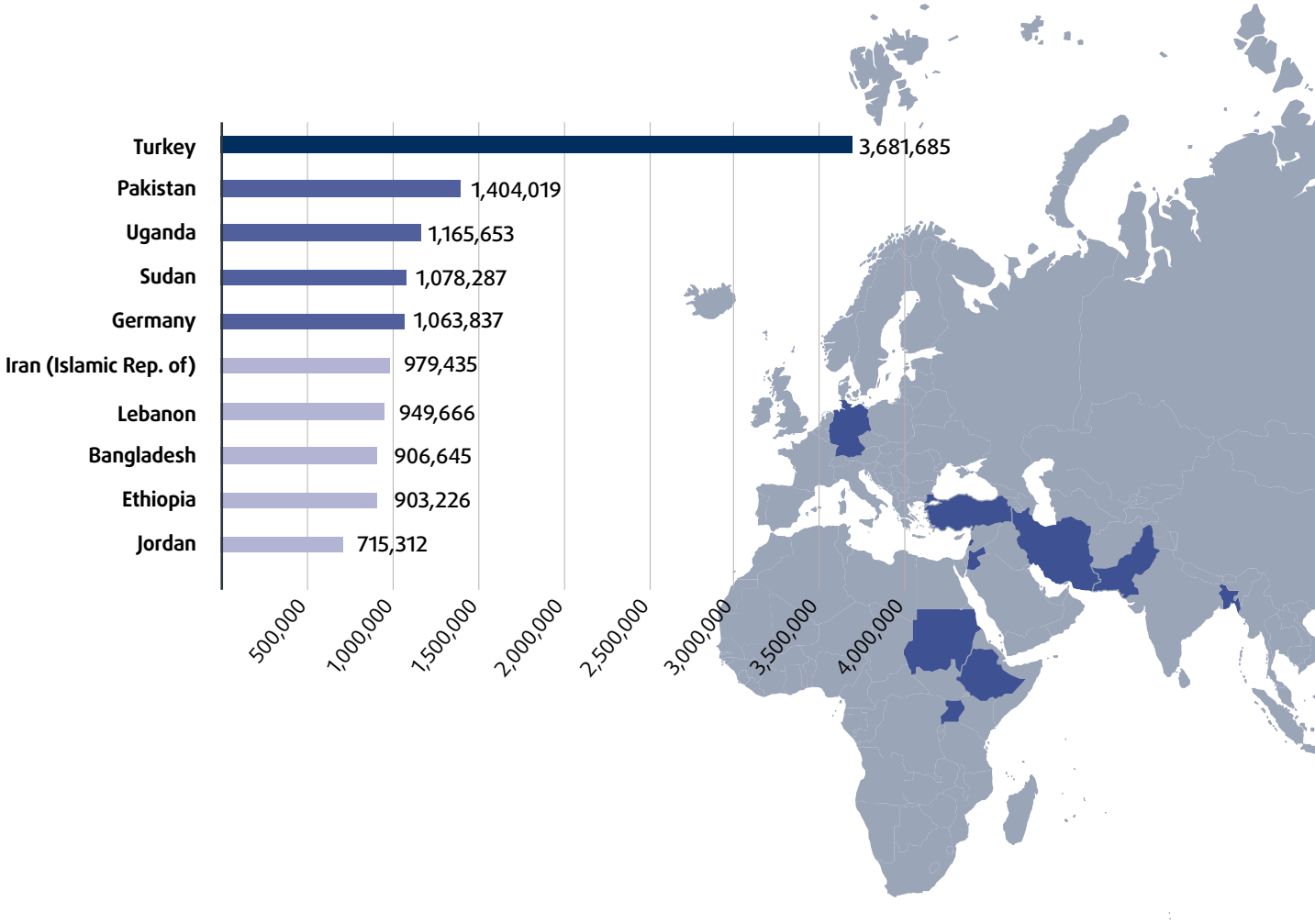
Note:
Responses to the question "What do you think are the two most important issues facing the EU at the moment?"



Source: Standard Eurobarometer from 2015 to 2019

However, globally, forced displacement continues to rise. At the end of 2018, there were over 70 million forcibly displaced persons worldwide, almost 26 million of them refugees, according to United Nations High Commissioner for Refugees (UNHCR) data. Four out of five refugees lived in countries neighbouring their country of origin. Only one EU Member State, Germany, features among the top 10 refugee-hosting countries. It hosts over 1 million refugees (see Figure 5.2).[3]

FIGURE 5.2: TOP TEN REFUGEE-HOSTING COUNTRIES IN THE WORLD, END 2018, BY NUMBER OF REFUGEES



*Source: UNHCR, 2019 [**Global trends 2018**, June 2019, Table 1]*

Note:
Asylum applicants pending a final decision not included.

PROMISING PRACTICE

Breaking down data by age and gender

In its **Risk analysis for 2019**, **Frontex** published 2018 data on new arrivals disaggregated by sex and age. Having such data allows the EU and its Member States to design gender- and age-sensitive responses.

In 2019, women accounted for 23 % of all recorded irregular entries across the external EU border. Nearly one in four of the detected migrants were registered as children, 5,059 as unaccompanied children. Most unaccompanied children were Afghans (more than one quarter), followed by Tunisians and Syrians.

Relevant publications are available on the Frontex ***website****.*

Note:

The following articles in the European Border and Coast Guard Regulation (EU) No. 2019/1896 provide for these tools: Art. 51 (pool of forced return monitors), Art. 80 (protection of fundamental rights and a fundamental rights strategy), Art. 108 (consultative forum), Art. 109 (fundamental rights officer), Art. 110 (fundamental rights monitors) and Art. 111 (complaints mechanism).

The EU remains only marginally affected by the presence and arrival of displaced people, according to data on irregular border crossings from the European Border and Coast Guard Agency (Frontex). In 2019, over 140,000 migrants were apprehended after crossing the EU's external land or sea border in an unauthorised manner. In comparison, 150,000 were apprehended in 2018 and over 200,000 people in 2017. The trend is clearly downwards.

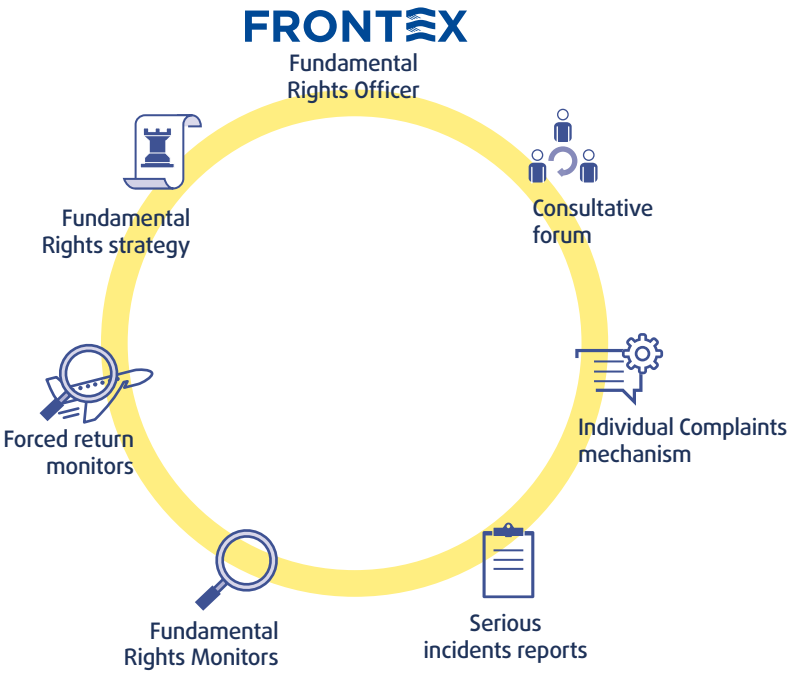
The two top nationalities are Afghans and Syrians. Over half of these people (some 75,500) arrived in Greece from Turkey.[4]

In contrast, the number of asylum applications lodged in the EU increased in 2019 by 13 % compared with 2018. This follows an increase in applications by visa-free applicants from Latin America who arrived regularly by air.[5]

5.1.1. More EU powers at borders bring new fundamental rights risks

In 2019, one of the most important developments affecting fundamental rights concerned border management. The European Border and Coast Guard Regulation, which entered into force in December 2019, created the EU's first uniformed service.[6] With 10,000 border and coast guard officers by 2027, Frontex's standing corps will assist national authorities with border control, migration management and returns. The EU's enhanced powers at borders also bring more responsibility for respecting and protecting fundamental rights. To deal with this challenge, the EU legislature equipped Frontex with various tools to protect fundamental rights (Figure 5.3).

FIGURE 5.3: KEY FRONTEX TOOLS TO PROTECT FUNDAMENTAL RIGHTS



Source: European Border and Coast Guard Regulation (EU) No. 2019/1896

Most of these safeguards already existed before 2019. Some are now stronger, such as the fundamental rights officer.

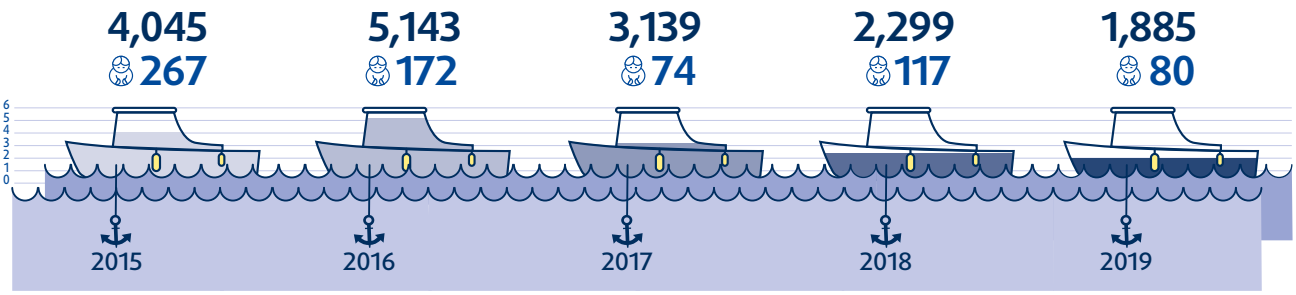
One important safeguard – the fundamental rights monitors – is new. According to Article 110 of the regulation, the monitors will assess the fundamental rights compliance of operational activities. They will mainly work in the field. Frontex must recruit at least 40 by the end of 2020.

Fundamental rights also feature prominently in the European Integrated Border Management Strategy adopted in March. The strategy guides border management at operational and technical levels. It highlights the need to refer vulnerable people, particularly children, and protect them; promotes protection-sensitive management of migration flows; draws attention to data protection; and requires continuous fundamental rights training of personnel.[7] Moreover, a new regulation adopted in June strengthens obligations for immigration liaison officers EU Member States have posted in third countries to undergo fundamental rights training.[8]

5.1.2. Fatalities at sea remain high

Some 1,866 people are estimated to have died or gone missing in 2019 while crossing the sea to reach Europe, around 60 % of them when attempting to leave Libya.[9] The deadliest incidents were in January, south of Lampedusa, with 117 victims' and on 25 July, off the Libyan shore, with 150 victims.[10] Although the number of fatalities at sea in 2019 was lower than in previous years (Figure 5.4), it still amounts, on average, to more than four victims per day or one victim every 4 hours and 42 minutes.

FIGURE 5.4: ESTIMATED FATALITIES AT SEA, 2016–2019



Source: International Organization for Migration, 2020

Note:
Number in black corresponds to the total. 👶 = children.

PROMISING PRACTICE

Enhancing the protection of stateless persons

The 2019 European Border and Coast Guard Regulation is the first EU migration law instrument to refer to the 1954 United Nations Convention relating to the Status of Stateless Persons. With Malta's accession in December 2019, 25 EU Member States are party to this core international instrument for the protection of stateless persons.

See European Border and Coast Guard Regulation (EU) No. 2019/1896, recital (20). For an overview of state parties to the convention, see ***United Nations Treaty Collection****.*

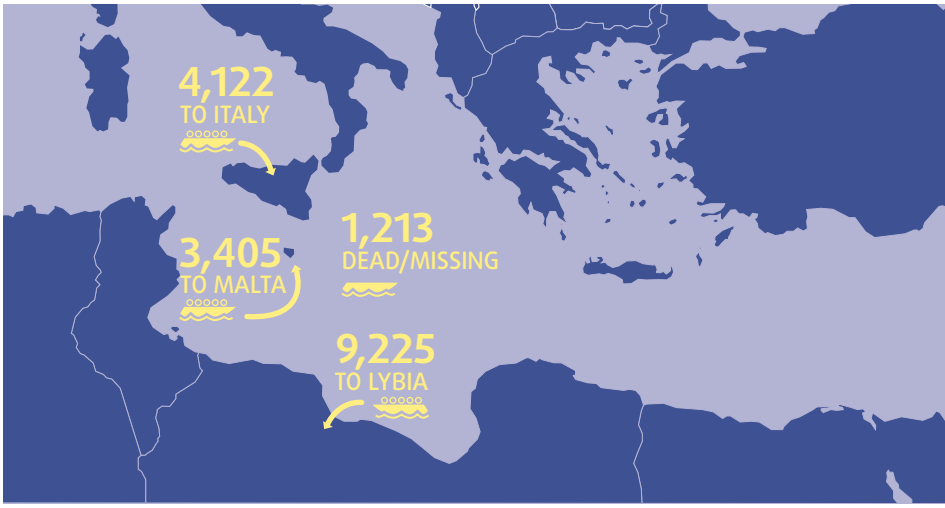
5.1.3. Difficulties in finding a safe port

In spite of political efforts, where to disembark migrants and refugees rescued at sea in the central Mediterranean remained an open question. The interior ministers of France, Germany, Italy and Malta adopted a declaration in Valletta, Malta, on 23 September, which led to a more efficient and structured relocation procedure for those disembarked. However, rescue boats continued to remain at sea for long times while awaiting a safe port (see Table 5.1).[11]

Meanwhile, the trend of returning more rescued people to Libya continued, even though the armed conflict intensified in 2019. An airstrike on a detention facility near Tripoli killed at least 44 migrants and refugees, including women and children, and injured more than 130 people.[12] For the second consecutive year, among the migrants who left Libya by sea, more rescued people landed in Libya than in Europe (Figure 5.5): some 4,100 reached **Italy**, some 3,400 reached **Malta**, and over 9,000 came to port in Libya, while 1,213 persons died or went missing.[13]

FIGURE 5.5: FATE OF MIGRANTS AND REFUGEES WHO DEPARTED FROM LIBYA BY SEA IN 2019

Note:
Small numbers brought to Tunisia are not included.



Sources: International Organization for Migration, 2020; Italian Ministry of the Interior, 2020

Delays in disembarkation risk the safety and physical integrity of rescued migrants and refugees. In 2019, there were 28 incidents where migrants and refugees had to remain at sea for more than a day until the authorities allowed their rescue ship to dock (Table 5.1). In total, this affected some 2,800 rescued migrants and refugees, including around 780 children. In eight cases, the migrants and refugees had to remain at sea for a week or more.

In total, there were twelve more cases in 2019 than in 2018, when FRA documented 16 such cases. In 2019, in 22 out of the 28 cases, **Italy** and **Malta** requested other EU Member States to relocate some of the rescued people as a gesture of solidarity. As outlined in Table 5.1, several Member States pledged to do so.

TABLE 5.1: VESSELS KEPT AT SEA FOR MORE THAN 24 HOURS WHILE WAITING FOR A SAFE PORT, 2019

Ship	Number of migrants		Days spent at sea[c]	Date and place of disembarkation	EU Member States that pledged to relocate some passengers
	Total[a]	Children[b]			
Sea-Watch 3 (NGO vessel, Germany)	47	15 UAC	11	31 January, Catania (Italy)	Bulgaria, France, Germany, Lithuania, Luxembourg, Malta, Portugal, Romania
Mare Jonio (NGO vessel, Italy)	49 + 1 evacuated	15 UAC	2	19 March, Lampedusa (Italy)	No relocation requested
Alan Kurdi (NGO vessel, Germany)	64	12	10	13 April, Malta	France, Germany, Luxembourg, Portugal
Sea-Watch 3 (NGO vessel, Germany)	47 + 20 evacuated	7 AC 7 UAC	4	19 May, Lampedusa (Italy)	No relocation requested
Sea-Watch 3 (NGO vessel, Germany)	53	4 UAC	16	29 June, Lampedusa (Italy)	Finland, France, Germany, Luxembourg, Portugal
Alex-Mediterranea (NGO vessel, Italy)	41 + 13 evacuated	4 AC 8 UAC	3	7 July, Lampedusa (Italy)	No relocation requested
Alan Kurdi (NGO vessel, Germany)	66	36 UAC	2	7 July, Malta	Finland, France, Germany, Ireland, Lithuania, Luxembourg, Portugal
Gregoretti (state vessel, Italy)	116 + 19 evacuated	3 AC 26 UAC	5	31 July, Augusta (Italy)	France, Germany, Ireland, Luxembourg, Portugal
Alan Kurdi (NGO vessel, Germany)	40	13 UAC	4	4 August, Malta	France, Germany, Ireland, Luxembourg, Portugal
Open Arms (NGO vessel, Spain)	163 (some of them evacuated)	4 AC 19 UAC	21	21 August, Lampedusa (Italy)	France, Luxembourg, Germany, Portugal, Spain
Ocean Viking (SOS Mediterranee and MSF)	356	98 UAC	14	23 August, Malta	France, Germany, Ireland, Luxembourg, Portugal, Romania
Eleonore (NGO Mission Lifeline, Germany)	104	30 UAC	8	2 September, Pozzallo (Italy)	France, Germany, Ireland, Luxembourg, Portugal
Mare Jonio (Mediterranea Saving Humans, Italy)	35 + 63 evacuated	20 AC 16 UAC	5	2 September, Lampedusa (Italy)	No relocation requested
Alan Kurdi (NGO vessel, Germany)	5 + 8 evacuated	8 UAC	10	10 September, Malta	France, Germany, Portugal
Ocean Viking (SOS Mediterranee and MSF)	85	1 AC 19 UAC	6	14 September, Lampedusa (Italy)	France, Germany, Luxembourg, Portugal
Ocean Viking (SOS Mediterranee and MSF)	182	10 AC 35 UAC	8	24 September, Messina (Italy)	France, Germany, Ireland, Luxembourg, Portugal
Ocean Viking (SOS Mediterranee and MSF)	176	6 AC 33 UAC	4	16 October, Taranto (Italy)	France, Germany, Ireland, Luxembourg, Portugal
Asso 29/Diciotti (commercial vessel and state vessel, Italy)	67	3 AC 21 UAC	2	22 October, Pozzallo (Italy)	No relocation requested
Ocean Viking (SOS Mediterranee and MSF)	104	10 AC 28 UAC	12	30 October, Pozzallo (Italy)	France, Germany, Ireland, Portugal

Ship	Number of migrants		Days spent at sea[c]	Date and place of disembarkation	EU Member States that pledged to relocate some passengers
	Total[a]	Children[b]			
Asso Trenta (state vessel, Italy)	151 +4 evacuated	4 AC 42 UAC	2	3 November, Pozzallo (Italy)	No relocation requested
Ocean Viking (SOS Mediterranee and MSF)	213 + 2 evacuated	8 AC 49 UAC	5	24 November, Messina (Italy)	France, Germany, Ireland, Malta, Portugal, Spain
Open Arms (NGO vessel, Spain)	62 + 11 evacuated	2 AC 27 UAC	5	26 November, Taranto (Italy)	France, Germany, Ireland, Malta, Portugal, Spain
Aita Mari (NGO vessel, Spain)	79	11 AC 10 UAC	5	26 November, Pozzallo (Italy)	France, Germany, Ireland, Malta, Portugal, Spain
Ocean Viking (SOS Mediterranee and MSF)	60	2 AC 22 UAC	6	4 December, Pozzallo (Italy)	France, Germany, Ireland, Portugal
Alan Kurdi (NGO vessel, Germany)	61 + 23 evacuated	8 AC 14 UAC	6	4 December, Messina (Italy)	France, Germany
Ocean Viking (SOS Mediterranee and MSF)	159 + 3 evacuated	1 AC 41 UAC	3	23 December, Taranto (Italy)	France, Germany, Ireland, Portugal
Alan Kurdi (NGO vessel, Germany)	32	12 AC	3	29 December, Pozzallo (Italy)	France, Germany, Ireland

Notes:

Migrants rescued in 2018 and disembarked in 2019 are not included. AC=accompanied children, UAC=unaccompanied children, MSF=Médecins Sans Frontières, NGO=non-governmental organisation.

a Medically evacuated persons listed separately; evacuation location may differ from port of disembarkation.

b The number of children is based on their declaration upon disembarkation and may later have been adjusted following their age assessment. For Malta, **Section 5.2.3** reports that the number of unaccompanied children confirmed after age assessment was significantly lower. Nevertheless, until age assessment is completed, persons who claim to be below 18 years of age must be treated as children.

c In case of multiple rescue operations, the table shows the number of days for those who stayed at sea the longest.

Source: FRA, 2020 [based on various sources, including NGO and media reports and interviews]

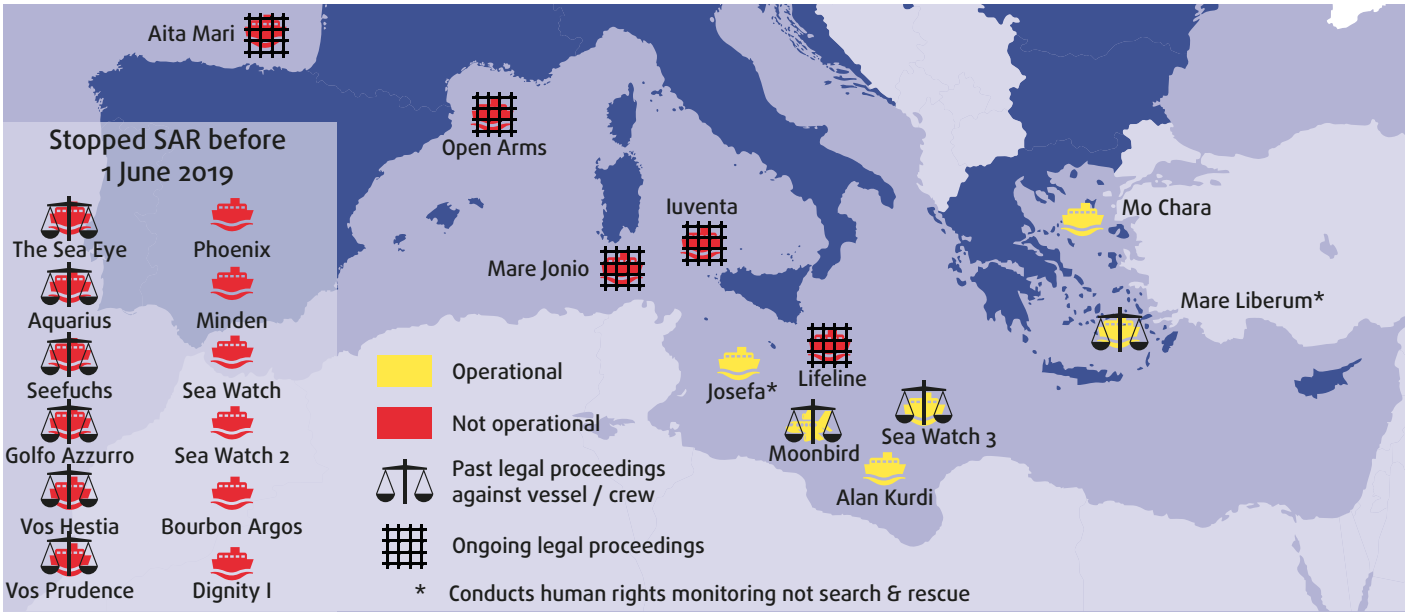
5.1.4. People helping migrants face problems

In past annual fundamental rights reports, FRA expressed serious concern about actions intimidating humanitarian workers and volunteers who support migrants in an irregular situation.[14] Such actions continued in 2019, particularly against non-governmental organisations (NGOs) or other private entities deploying rescue vessels at sea.

Criminal or administrative proceedings took place against NGO vessels (e.g. ship seizures or de-flagging) or against their crews. Only five NGO rescue vessels remained operational in June 2019, some with pending legal proceedings (see Figure 5.6), although the number of rescue vessels increased later in the year. Regardless of their outcome, the initiation of criminal proceedings and the prospect of facing sanctions has a chilling effect on the legitimate work of NGOs, a Council of Europe study noted.[15]

The most prominent incident involving humanitarian actors concerned the criminal proceedings against the German captain of the vessel *Sea-Watch 3*, Carola Rackete. She was denied permission to land and disembark some 40 migrants and refugees who had been on board for two weeks. On 29 June, she docked on the island of Lampedusa without permission. **Italy** initiated criminal proceedings for resistance to a military vessel, resisting arrest and facilitating irregular migration.[16]

FIGURE 5.6: NGO ASSETS INVOLVED IN SEARCH-AND-RESCUE OPERATIONS BETWEEN 2016 AND 1 JUNE 2019



Source: FRA, 2019 [based on various sources]

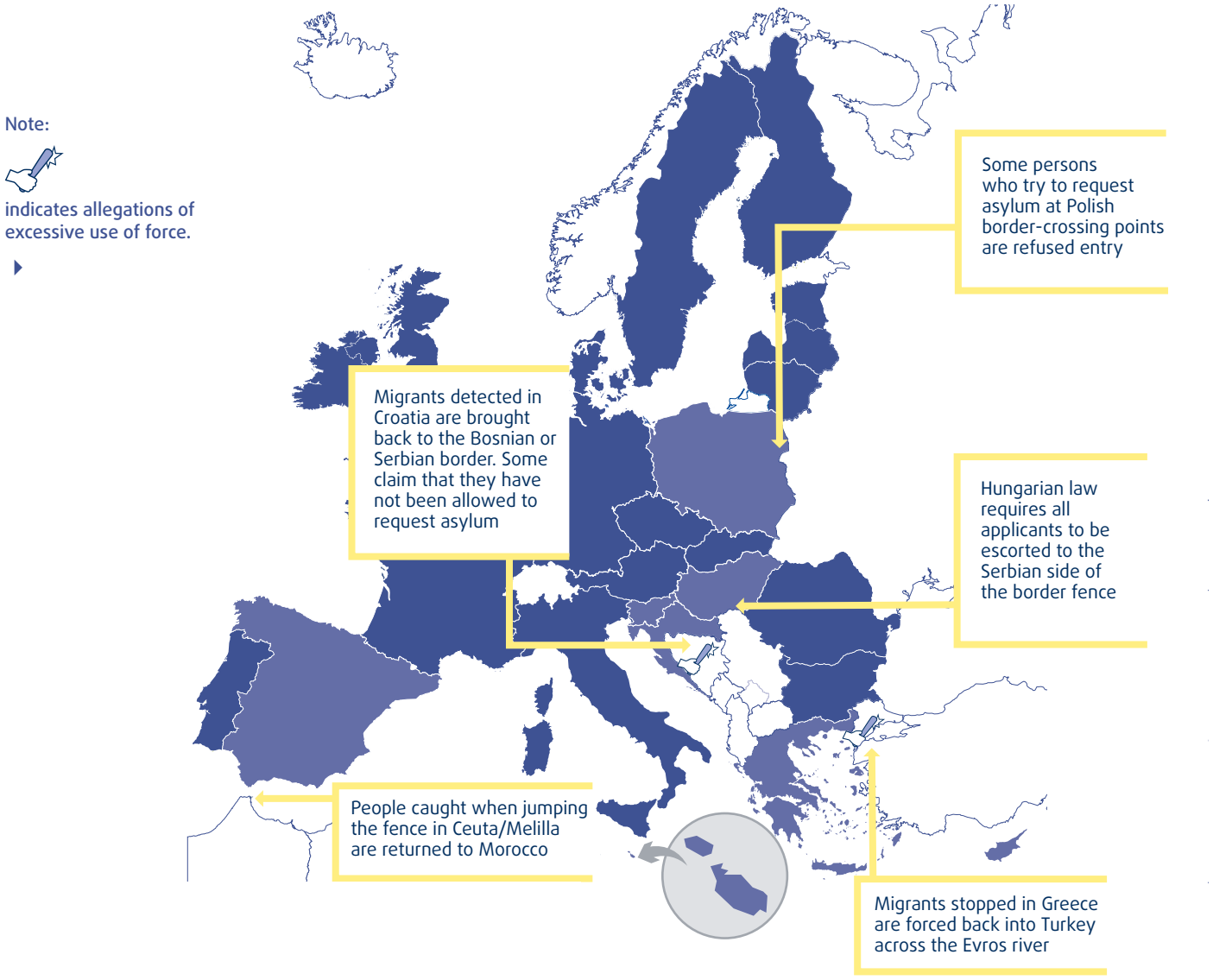
5.1.5. *Refoulement* allegations at land borders continue

International refugee and human rights law prohibits *refoulement*. That is the return of a person to a risk of persecution or to a risk of torture, inhuman or other degrading treatment or punishment. EU primary law reflects that prohibition in Article 78 (1) of the Treaty on the Functioning of the EU and in Articles 18 and 19 of the EU Charter of Fundamental Rights. The principle of non-*refoulement* also applies when authorities turn people back at the EU's external borders or on the high seas.[17]

To respect the principle, if authorities stop or apprehend people at external borders and there are indications that they may wish to make an application for international protection, the authorities must tell them how to do this.[18]

In 2018, international organisations, national human rights institutions and civil society organisations reported alleged violations at various sections of the EU's external border. Figure 5.7 shows the five Member States at whose land borders such allegations were most frequent.

FIGURE 5.7: ALLEGATIONS OF *REFOULEMENT* AT THE EU'S EXTERNAL LAND BORDERS



Source: FRA, 2020

Most allegations concerned the Croatian and Greek land borders. In these two Member States, pushbacks of apprehended migrants allegedly also involved excessive use of force.

Civil society organisations regularly reported incidents of violent pushbacks from **Croatia** to Bosnia and Herzegovina or Serbia,[19] a concern also raised by the Croatian Ombudswoman.[20] The then President of Croatia admitted the pushbacks and the use of some force,[21] after Swiss national television documented them.[22] The Croatian Ombudswoman received a complaint from an anonymous police officer, who denounced superiors' orders to push back refugees and migrants by force to Bosnia, and to take their money and mobile phones.[23]

This practice affects not only those stopped near the external border. Two Nigerian table tennis players found on the streets of Zagreb without documents were arrested and then transferred to the Bosnian border in December 2019.[24] In fact, if people caught entering **Slovenia** irregularly did not or could not apply for asylum, they were returned to Croatia without any procedural safeguards against indirect *refoulement* through Croatia, the Slovenian Ombudsman reported.[25]

UNHCR reported allegations of *refoulement* at the **Greek**–Turkish land border.[26] The German press documented a pushback operation in December 2019.[27]

Hungarian law continues to apply special rules to address mass migration, which require all asylum applicants to be escorted to the Serbian side of the border fence.[28] The ECtHR found that there was an insufficient basis for the Government's decision to establish a general presumption concerning **Serbia** as a safe third country and that **Hungary** failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision, before removing two asylum applicants to Serbia.[29]

Spanish law allows the "rejection at the border" of any third-country national detected jumping the fence in the enclaves of Ceuta and Melilla, provided this complies with international refugee law. However, automatic returns without prior individual procedures continued in 2019, although they affected fewer people than in 2018.[30]

In **Poland**, the Supreme Administrative Court reviewed at least four cases of individuals who were refused entry at the land border although they claimed to have requested asylum. It ruled that the border guards did not sufficiently investigate their cases before refusing entry.[31] Officials of the Commissioner for Human Rights visited the Terespol border-crossing point in September. They found that border guards did not always register asylum applications. There were persistent gaps in access to the asylum procedure, an NGO coalition declared.[32]

In some of these EU Member States, national preventive mechanisms under the Optional Protocol of the UN Convention Against Torture (NPMs) continue to play an important role in monitoring the situation at borders. Although national border police authorities usually cooperate with them, the **Croatian** NPM continues to be denied meaningful access to individual files stored electronically.[33]

5.1.6. Guardianship for unaccompanied children: serious gaps remain

Unaccompanied children are particularly vulnerable to rights violations. An effective guardianship system for unaccompanied children is a precondition for ensuring the child's best interests and general well-being, as the UN Convention on the Rights of the Child and Article 24 of the EU Charter for Fundamental Rights require. There has been significant progress in recent years in reforming some of the national guardianship systems.[34] Nonetheless, in practice, many unaccompanied children who arrived at the external land and sea borders in 2019 had no support from a guardian who could effectively promote their best interests. The following examples illustrate remaining gaps.

Greece adopted a new guardianship law and related ministerial decisions, but had not yet started to implement them by year-end.[35] A civil society guardianship project created to fill the gap had 43 guardians at year-end, while there were 5,300 unaccompanied children in the country.[36]

In **Croatia**, local social welfare centres exercise the role of guardians, but they do not have systematic training to do this adequately. The Centres for Social Care continued to appoint guardians with "family ties" to the unaccompanied child. This means appointing a guardian from the group of people with whom the child entered Croatia, rather than a professional with the relevant expertise. In 2019, this occurred for 12 children, compared to 48 children in 2018.[37]

Under **Hungarian** law, only children under 14 years of age receive a fully-fledged child guardian (*gyermekvédelmi gyám*). Under the special legal regime in the case of mass migration that continues to apply, children aged between 14 and 18 kept in the transit zones are excluded from the child protection legislation. They thus receive only temporary 'ad hoc guardians' (*ügygondnok*) to represent them in the asylum procedures.[38]

In **Malta**, reform of the guardianship system is pending.[39] The relocation of unaccompanied children was on hold until the Minister for Family and Children's Rights produced interim care orders for them. The orders assigned temporary guardianship to the Director of the Agency for the Welfare of Asylum Seekers for 21 days. The new guardianship law, once implemented, will ensure a separation between guardians and staff responsible for the reception of asylum applicants.

5.2. RECEPTION CONDITIONS AND CHILD DETENTION

5.2.1. Reception capacity improves, but not everywhere

In previous years, EU Member States faced serious difficulties in ensuring adequate reception capacities for asylum applicants. In 2019, some Member States made significant progress, but serious shortcomings remained in at least a handful of others, particularly at the EU's external borders.[40] The camps on the **Greek** islands in the eastern Aegean remained severely overcrowded. At the end of December, the five hotspots hosted over 38,000 people, which is more than six times their capacity.[41] That made it virtually impossible to provide even the most basic reception standards and severely limited the provision of basic services.

In Cyprus and Malta, asylum applications in 2019 almost doubled compared with 2018.[42] They were hardly prepared. In **Cyprus**, some 13,650 people applied for asylum in 2019.[43] In spite of measures taken, allowances were not sufficient to ensure a dignified standard of living to all asylum applicants.[44] **Malta** had prepared no new reception facilities in previous years. Increased arrivals led to overcrowding, riots and arbitrary detention. The authorities placed many new arrivals, including unaccompanied children, in the Safi barracks – the country's main immigration detention facility, which was used as an initial reception centre. It soon became overcrowded, with serious hygiene and other issues. The largest open reception centre, in Hal Far, hosted 1,200 people. In October, a riot there led to the temporary suspension of food distribution and the arrest of 107 people, including unaccompanied children.[45]

In **Spain**, every month in 2019, some 10,000 people applied for asylum.[46] There were only 9,100 places in first reception, where applicants stay for up to six months. That was far too few. As municipal or community-based emergency housing could not cope, some asylum applicants had to spend their nights on the streets.[47]

Reception capacity also remained far too little in **Belgium** and **France**. In **Belgium**, the vast majority of centres for asylum applicants reached or exceeded full capacity.[48] In **France**, in June, some 50 organisations supporting asylum applicants noted that only one person out of two benefits from a reception place. They called upon the authorities to address the severe shortage of places of accommodation.[49] The Ministry of Interior took some steps to provide access to accommodation to vulnerable people.[50] Earlier in the year, the ECtHR found that France had violated Article 3 of the ECHR by not offering accommodation to a 15-year-old unaccompanied child evicted near Calais.[51]

5.2.2. Gender-based violence against women remains underreported

Gender-based violence against women is violence that is directed against a woman because she is a woman or that affects women disproportionately.[52] Member States must take appropriate measures to prevent gender-based violence, including sexual assault and harassment within the relevant premises and accommodation centres, according to Article 18 (4) of the Reception Conditions Directive.[53] Many reception facilities across the EU still have much to do to prevent violence and protect victims adequately.[54]

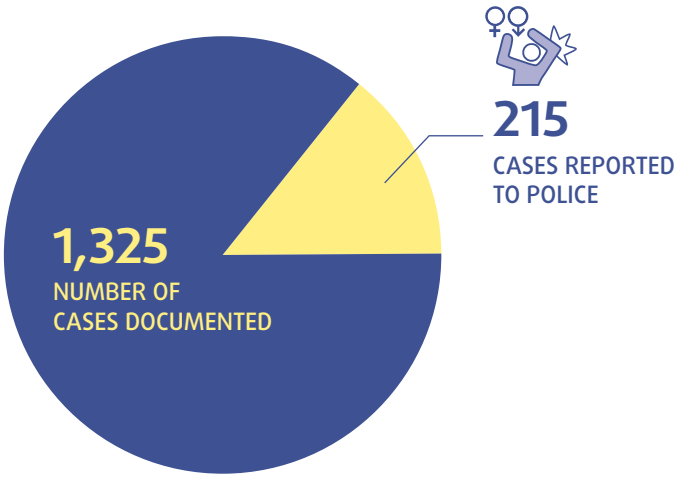
Many irregular migrant, asylum-seeking and refugee women experience a continuum of gender-based violence, research by the European Institute for Crime Prevention and Control (HEUNI) shows. HEUNI collected data over a 12-month period from over 4,200 women, through 600 weekly reports by 30 counsellors across six EU Member States (**Croatia**, **Cyprus**, **Germany**, **Greece**, **Finland** and **Italy**). Victims had suffered multiple forms of gender-based violence during their lifetime, in different locations and by a variety of perpetrators. After their arrival in Europe, their distressed mental and physical state exposed them to further abuse and secondary victimisation.

The asylum system and the criminal justice system fail to assist and protect victims of violence, as they concentrate on individual instances of violence, the report concludes. For example, asylum procedures focus on the events in the country of origin because they are relevant to determining refugee status. The protection systems fail to see the continuum of the risk of violence and do not respond to the victim's primary needs, which are often simply to be safe.

As Figure 5.8 shows, violence remains under-reported. In only 215 out of the 1,325 cases for which information is available were the experiences of violence reported to the police. If crimes are not reported, the criminal justice system leaves them unaccounted for and impunity for gender-based violence in the EU continues.[55]

FIGURE 5.8: UNDERREPORTING OF GENDER-BASED VIOLENCE: FINDINGS FROM HEUNI RESEARCH

Note:
The research identified 3,257 victims of gender-based violence. Information on whether or not they reported the incident is available for only 1,325 cases.



Source: FRA, 2020 [based on information provided by HEUNI]

5.2.3. Child detention increases

Although EU law does not prohibit immigration detention of children, the Charter and the case law of the ECtHR lay down stringent requirements. A child applying for asylum or who is in return procedures can be deprived of liberty only as an exceptional measure of last resort.[56] However, this also happens in cases that are not exceptional.

The main reason for holding immigrants is to prevent absconding, either upon arrival at the border or during asylum or return procedures. In November 2019, the EU's population of migrants in an irregular situation was between 2.9 million and 3.8 million people, half of them in Germany and the United Kingdom, the Pew Research Center estimated.[57] Some Member States tried to enhance the effectiveness of return policies by depriving more people of liberty, including children, particularly those who were with their parents.

The UN Global Study on Children Deprived of Liberty found no reliable statistics on the number of children in immigration detention.[58] Nevertheless, a comparison between 2018 and 2019 in those EU Member States that tend to detain children more often (**France**, **Greece**, **Malta**, **Poland** and **Slovenia**) suggests that child detention is increasing. **France** and **Slovenia** held most children for less than 48 hours before removing them or transferring them under the Dublin Regulation, but in **Greece** and **Malta** deprivation of liberty could last for months.[59]

More specifically, **Greece** holds a significant number of unaccompanied children in police cells and immigration detention facilities, as a discretionary measure to protect them pending transfer to a specialised accommodation facility. The ECtHR ruled that this practice contradicts the ECHR.[60] From August 2019 onwards, there were on average over 200 children in such police custody, compared with fewer than 100 children per month between September and December 2018.[61]

France does not allow immigration detention of unaccompanied children, but allows it for families as a last resort. In metropolitan France, in 2019, 276 children – corresponding to 113 families – were placed in detention on average for slightly less than two days.[62] The number increased from 2018, when 208 children (114 families) were detained.[63] It is, however, in the French overseas territory of Mayotte in the Indian Ocean that most children are held.

Immigration detention of children: eye on Mayotte

Mayotte, a territory to which the EU Return Directive applies, was the part of the EU that detained most children for immigration purposes in 2019: some 3,095 (corresponding to 2,241 families). This is more than double the 1,221 children held in the Administrative Retention Centre in Mayotte in 2018.

Most children are from the nearby Comoro islands and are usually removed within 18 hours. Most are held together with their families, but sometimes unaccompanied children are arbitrarily attached to accompanying adults and detained with them, civil society organisations working in Mayotte reported. In some instances, birth certificates documenting that the migrant is below 18 years of age were disregarded.

French nationals were also detained. On 6 January 2020, the Administrative Tribunal of Mayotte upheld, without further investigation, the detention of a mother and child although the child was born in Mayotte and the father was allegedly a French national.

Sources: France, Ministry of Interior, 2020 (for data on persons held); and CIMADE, 2020.

See also France, Défenseur des droits, Rapport, **Établir Mayotte dans ses droits***, 2020.*

PROMISING PRACTICE

Practical guide on alternatives to detention

Less intrusive alternatives to detention reduce the risk of excessive deprivation of liberty. In October 2019, the **Council of Europe** issued a practical guide for policymakers, legal professionals and other relevant persons on how to apply effectively alternatives to detention. It focuses on practical implementation of alternatives in national settings.

The guide covers:

- key human rights standards regarding the right to liberty, alternatives to immigration detention and the specific requirements linked to vulnerability, especially for children;
- the various types of alternatives, including family-based care arrangements for children;
- certain essential elements that render alternatives effective;
- specific steps to make alternatives to immigration detention effective in a particular national context.

See Council of Europe, Steering Committee for Human Rights (2019), ***Practical guidance on alternatives to immigration detention: Fostering effective results.***

Malta, in effect, returned to a policy of systematically detaining all those who arrived by sea, including children. In 2019, some 885 people who claimed to be children – including 80 girls – arrived in Malta irregularly by sea. Most of them – 775 – arrived unaccompanied. The Ministry for Home Affairs has indicated that only about 130 of those who claimed to be unaccompanied children were confirmed to be children after completion of age-assessment procedures.[64]

Virtually all of them were detained at least for a week, but some for months. In most cases, the authorities justified the deprivation of liberty on public health grounds under Article 13 of the 1908 Prevention of Disease Ordinance, which allows detention for up to 70 days.[65] They held many unaccompanied children in Safi together with unrelated adults. The court overturned six detention orders on appeal, but lawyers stopped challenging them, as the authorities did not offer any accommodation to the persons released.[66]

Poland detained some 132 children in 2019: 108 accompanied and 24 unaccompanied. This is almost half than in 2018, when 229 children were deprived of liberty: 210 accompanied and 19 unaccompanied. At the same time, the number of children given alternatives to detention increased from 605 in 2018 to 830 in 2019.[67]

In **Slovenia**, 245 unaccompanied and 66 accompanied children were detained at the Postojna Centre for Foreigners in 2018. With 318 children held in 2019 (287 unaccompanied and 31 accompanied children), the total number remained stable.[68]

5.3. ASSESSING FUNDAMENTAL RIGHTS COMPLIANCE THROUGH SCHENGEN EVALUATIONS

The Schengen *acquis* is the body of EU law enacted to compensate for the absence of controls at internal borders. It includes an evaluation mechanism to monitor its implementation.[69] Schengen evaluations exist alongside other tools, such as the European Commission's power to initiate an infringement procedure, to ensure that Member States apply EU law. The previous system was predominantly intergovernmental and based on peer review. Regulation 1053/2013 modified it, creating a more robust and uniform evaluation and monitoring mechanism that the European Commission coordinates.[70]

The Schengen evaluation and monitoring mechanism covers external borders (air, land and sea), visa policy, the Schengen Information System, data protection, police cooperation, and return and readmission. Every five years, teams of experts visit each Member State bound by the Schengen *acquis,* as well as Iceland, Liechtenstein, Norway and Switzerland, to evaluate them. In addition, unannounced evaluations take place.

Based on the findings, the Council of the European Union adopts recommendations to remedy any deficiencies and shortcomings identified in the national systems. It also highlights promising practices. The recommendations are public, but the evaluation reports with the findings remain restricted. This aids open discussion between the European Commission and individual Member States on improvements required.

However, it does not offer a full picture of the issues detected and how severe they are. That has led to criticism for lack of transparency.[71]

The Schengen *acquis* contains a range of fundamental rights safeguards. They are also part of the evaluation. Fundamental rights issues are particularly sensitive in the fields of return and border management. In these two areas, since the new evaluation system started in 2014, all EU Member States have received recommendations about protecting and respecting fundamental rights, regardless of their geographical position or degree of exposure to arrivals of migrants and refugees. Most issues raised are not specific to any Member State, but cross-cutting and long-term.

5.3.1. Schengen evaluations flag recurrent gaps in implementing return safeguards

The first five-year evaluation cycle ended in 2019. For the first time it also covered return and readmission procedures. The EU Return Directive is the cornerstone of the EU *acquis* on return. It contains a number of safeguards to ensure that its application complies with fundamental rights.[72] The recommendations adopted during this five-year period illustrate that the evaluations examine both the effectiveness of national return systems and the application of fundamental rights safeguards.

As Table 5.2 shows, more than half of the recommendations concerning fundamental rights relate to pre-removal detention. This shows that countries have still not implemented all detention-related safeguards, but also that the evaluation mechanism pays this issue a great deal of attention. Typically, findings include the insufficient use of alternatives to detention, deprivation of liberty in non-specialised facilities, such as prisons, and disrespect of procedural safeguards when ordering and reviewing detention decisions.

TABLE 5.2: SCHENGEN EVALUATIONS: RECOMMENDATIONS TO ENHANCE FUNDAMENTAL RIGHTS SAFEGUARDS IN RETURN AND READMISSION (2015–2019), 21 VISITS IN 19 MEMBER STATES

Fundamental rights issue	Number of findings, including *ad hoc* evaluations	Number of Member States with related findings
Return procedure, including procedural guarantees and legal and linguistic assistance	**58**	**17**
Detention	**81**	**18**
Forced return monitoring	**14**	**14**

Source: FRA, 2020 [based on sources listed in Annex at end of chapter]

Note:

The table does not include EU Member States not subject to regular evaluations (Bulgaria, Cyprus, Ireland, Romania and the United Kingdom); the five evaluations conducted in 2019, for which recommendations are not yet public (Czechia, Hungary, Poland, Slovakia and Slovenia); or the four Schengen associated countries. It includes three ad hoc evaluations.

For conditions of detention, the evaluations can draw upon a large body of international standards to interpret the general requirements of the return *acquis*.[73] This area gave rise to a particularly large number of recommendations, touching upon a range of issues. For example, equipment and living space, sanitary conditions, access to healthcare, leisure and recreational facilities were inadequate. A number of EU Member States were asked to make the regime less prison-like and allow more out-of-cell time, make better arrangements for family visits, or ensure that detainees have clear information about their rights.

The recommendations also illustrate the challenges encountered in providing appropriate conditions for the detention of families and unaccompanied children in those Member States that detain these vulnerable persons. One of the key challenges was to separate them from other detainees and guarantee an appropriate level of privacy. Other gaps were in the right to education and access to age-appropriate activities for children.

Nearly all EU Member States received recommendations to enhance procedural safeguards when returning people.

One of the underlying principles of the EU return *acquis* is to prefer voluntary departure to forced return. However, some Member States lacked a coherent approach to this. Some had no programme for assisted voluntary return, to support sustainable and dignified returns. Others needed to improve procedures for issuing return decisions and entry bans. For example, they should tailor the duration of an entry ban to the individual case, or ensure the right to be heard and the right to effective remedy through access to language or legal assistance.

Some EU Member States had to be reminded of the specific situation of unaccompanied children and the need to respect the requirements of EU law about effective guardianship systems and the best interests of the child.

On removal operations, most Member States also received recommendations concerning monitoring forced returns. They asked Member States to remedy such issues as insufficient guarantees of independence, limited frequency and scope of monitoring, and lack of public reporting. FRA reports regularly on this area on its website.[74]

5.3.2. Some issues at external border remain difficult to detect

The Schengen Borders Code[75] contains fewer explicit fundamental rights safeguards than the return *acquis*, and its guarantees apply across various areas and are general in nature. Recommendations delivered to Member States under the Schengen evaluation and monitoring mechanism mirrored this, as the headings in Table 5.3 show. Many recommendations relevant to fundamental rights are phrased in a general manner, without flagging the specific fundamental rights-related aspects of the shortcomings identified.

TABLE 5.3: SCHENGEN EVALUATIONS: RECOMMENDATIONS TO ENHANCE FUNDAMENTAL RIGHTS SAFEGUARDS IN MANAGING EXTERNAL BORDERS (2015–2019), 33 VISITS IN 21 MEMBER STATES

Fundamental rights issue	Number of findings, including *ad hoc* evaluations	Number of Member States with related findings
Human resources and training	**43**	**16**
Border check procedure, including procedural safeguards	**64**	**19**
Adequate material conditions	**34**	**12**

Source: FRA, 2020 [based on sources listed in Annex at end of chapter]

Note:
The table does not include EU Member States not subject to regular evaluations (Bulgaria, Cyprus, Ireland, Romania and the United Kingdom); the four evaluations conducted in 2019, for which recommendations are not yet public (Hungary, Poland, Slovakia and Slovenia); or the four Schengen associated countries. The table also includes 14 ad hoc evaluations (see Annex at end of chapter).

Recommendations related to human resources are an example of this approach. In most EU Member States, the evaluators identified a need to enhance training, in particular for the language skills of border guards. Communication between border guards and travellers is not only necessary for effective and smooth processing at the border; it also facilitates dignified treatment and respect of the rights to information and to an effective remedy. It also plays a crucial role in preventing *refoulement* or detecting cases of trafficking in human beings. Some Member States received recommendations that were more explicitly relevant to fundamental rights, particularly that they should enhance training on identifying and referring persons in need of international protection or victims of trafficking.

Despite the number of reported incidents of alleged *refoulement* and pushbacks in different EU Member States in recent years, there have been no recommendation relating to this issue. Most fundamental rights-related recommendations related to border checks and the need to improve the provision of information to passengers. Some travellers undergoing more thorough second-line checks did not receive information on the purpose of such checks, or interpretation was not available. In a number of cases, information for persons refused entry was insufficient, sometimes because the information was not available in the relevant foreign language.

The issue of adequate conditions in facilities at the border arose in about half of the EU Member States. One recurrent issue was the need to adjust the facilities and some procedures to better ensure respect of personal data and privacy during checks, such as by providing a dedicated room for second-line checks. Other recommended measures were to reduce waiting times, improve the infrastructure in waiting rooms and facilitate checks for specific categories of travellers, such as those with reduced mobility. In several Member States, the conditions in facilities for persons refused entry at the border were unsatisfactory. Finally, a few front-line Member States had too few trained staff and insufficient overall reception capacity to deal with large-scale arrivals.

5.4. EU IT SYSTEMS AND FUNDAMENTAL RIGHTS IN THE FIELD OF HOME AFFAIRS

5.4.1. Interoperability: implementing the safeguards

In the area of freedom, security and justice, the EU has set up three large-scale IT systems and adopted legislation for setting up three more. In 2019, it adopted the most recent system: the European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN), to share information on their past convictions.[76] The IT systems help to manage migration, asylum, borders and police cooperation and, ultimately, serve to strengthen EU internal security. The European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) and EU Member States are working to set up the new systems at central and national level. All the systems, except the European Travel Authorisation and Information System (ETIAS), process biometric data, as Table 5.4 shows.

Notes:
Geographical applicability of these systems varies. SIS also envisages the processing of photographs. In relation to sponsors, VIS processes only alphanumerical data. Italics means that the system will start (fully) functioning later; exact date to be determined by the European Commission. To find up-to-date information on the go-live dates, consult www.eulisa.europa.eu.

TABLE 5.4: LARGE-SCALE EU IT SYSTEMS IN THE FIELD OF FREEDOM, SECURITY AND JUSTICE

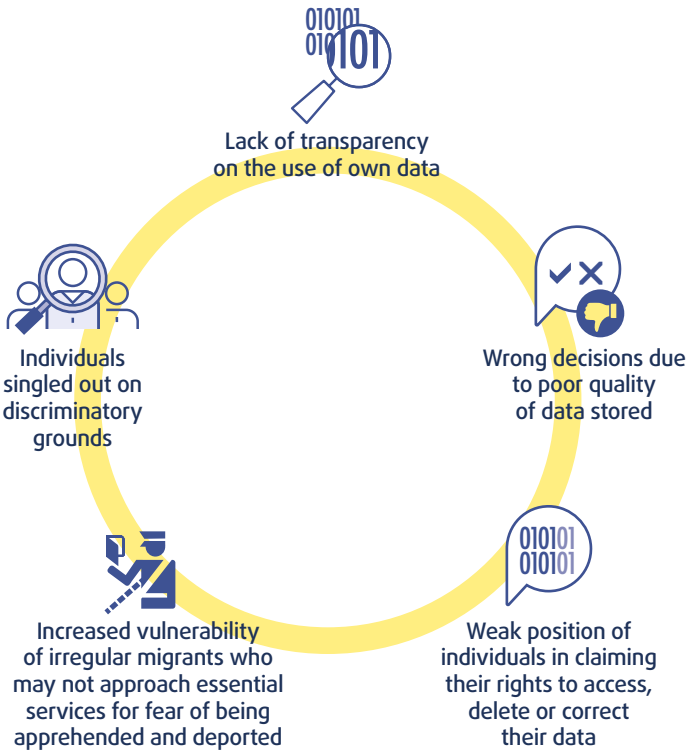
IT system	Main purpose	Persons covered	Biometric identifiers
European Dactyloscopy (**Eurodac**)	Determine the Member State responsible for examining an application for international protection Additional purpose: law enforcement	Applicants and beneficiaries of international protection Migrants who crossed the external borders irregularly	Fingerprints
Visa Information System (**VIS**)	Facilitate the exchange of data between Schengen Member States on short-stay visa applications Additional purpose: law enforcement	Visa applicants and sponsors	Fingerprints
Schengen Information System (**SIS – police**)	Law enforcement cooperation to provide security in the EU and Schengen Member States	Missing, vulnerable or wanted persons; stolen and lost objects for seizure or use as evidence in criminal proceedings	Fingerprints, palm prints, facial image, DNA profile
Schengen Information System (**SIS – border checks**)	Enter and process alerts for the purpose of refusing entry into or stay in the Schengen Member States	Migrants in an irregular situation	Fingerprints, palm prints, facial image
Schengen Information System (**SIS – return**)	Enter and process alerts for third-country nationals subject to a return decision	Migrants in an irregular situation	Fingerprints, palm prints, facial image
Entry–Exit System (**EES**)	Calculating and monitoring the duration of authorised stay in the Schengen area of third-country nationals and identifying over-stayers	Third-country national travellers coming for a short-term stay to the Schengen area	Facial image, fingerprints
European Travel Information and Authorisation System (**ETIAS**)	Pre-travel assessment if a visa-exempt third-country national poses a security, irregular migration or public health risk	Travellers coming from visa-exempt third countries	None
European Criminal Records Information System for Third-Country Nationals (**ECRIS-TCN**)	Share information on previous convictions of third-country nationals	Third-country nationals with a criminal record	Fingerprints, facial image

Source: FRA, 2020 [based on legal instruments hyperlinked in table]

In 2019, the EU also adopted the legal basis for making these IT systems interoperable.[77] Interoperability is the ability of separate IT systems to communicate and exchange data with each other. In future, authorised users will be able to make a single search for an individual across all the different IT systems and see the personal data they are authorised to access. It will also allow them to simultaneously query Europol and Interpol databases.[78] By using biometric data (fingerprints, and facial images later), interoperability aims to help authorities check the identities of individuals whose data are stored in one or more of the underlying IT systems. They can establish people's correct identities and detect people who fraudulently use different identities.

Interoperability may help protect fundamental rights, for example by tracing missing people, including children. However, it can also exacerbate some fundamental rights risks, as Figure 5.9 illustrates. As FRA has highlighted, there is little awareness of how the EU IT systems work and how people whose data are stored can seek redress in case something goes wrong.[79] As a consequence, the IT systems can be perceived as operating in the 'background': access to the data they contain – even one's own – might be cumbersome and it might be difficult for non-specialists to effectively challenge a decision, in case of mistakes.

FIGURE 5.9: KEY FUNDAMENTAL RIGHTS RISKS OF LARGE-SCALE EU IT SYSTEMS AND THEIR INTEROPERABILITY



Source: FRA, 2020

The legal instruments regulating the IT systems include safeguards to counter these risks. The interoperability regulations contain a general fundamental rights clause with safeguards on non-discrimination, human dignity, integrity, the right to respect for private life and protection of personal data. They require particular attention to the elderly, persons with disabilities and persons in need of international protection. The best interests of the child must be a primary consideration. However, the effectiveness of these safeguards depend on how they are put into practice.[80]

A particular challenge concerns the use of facial images. All large-scale EU IT-systems, except ETIAS, will process facial images once the necessary legal and technical steps are completed.[81] Facial recognition technology allows the automatic identification of an individual by matching two or more faces from digital images. It does this by detecting and measuring various facial features from the image and then comparing these features with those of other faces.[82]

Private businesses and public authorities have started testing or using facial recognition technology around the world, sparking an intense debate on its potential impact on fundamental rights.[83] The rules for the different IT systems contain safeguards for processing facial images,[84] but, as with interoperability, the effectiveness of these safeguards depends on how they are implemented in practice.

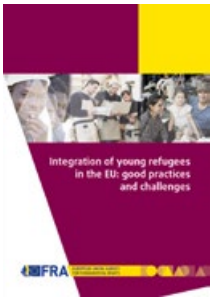
FRA ACTIVITY

Identifying young refugees' integration challenges

In November 2019, FRA published a report on the challenges of young people between the ages of 16 and 24 who fled armed conflict or persecution and arrived in the EU in 2015 and 2016. The report analyses policies' impact on their integration. It paints a multifaceted picture, with many good local initiatives and promising practices. It also shows major gaps and challenges, many of which remain unaddressed.

Measures taken in one policy field often affect how far individuals can enjoy their rights in other fields, it reveals. The report points to the need for better coordination between ministries and between levels of governance: national, regional and local.

A critical moment that requires much more attention is the transition from childhood to adulthood, when unaccompanied children turn 18. During such transitions, young adults experience gaps in rights and services, which risk undermining their pathway to social inclusion. Upon turning 18, they generally change housing and often also location, and experience a significant reduction in social support.



See FRA (2019), ***Integration of young refugees in the EU: Good practices and challenges****, November 2019.*

5.5. REFUGEE INTEGRATION: CHALLENGES FOR UNACCOMPANIED CHILDREN WHO REACH AGE OF MAJORITY

The integration of beneficiaries of international protection – refugees and subsidiary protection status holders – remains a challenge in the EU. To strengthen social inclusion policies, the European Commission announced a new Action Plan on Integration and Inclusion to ensure societies protect the most vulnerable.[85] This is particularly important because so many young people holding international protection status arrived in the EU in 2015–2016.

A core protection measure for unaccompanied children is guardians. Guardianship ceases when a child reaches majority, normally at 18 years of age. **Portugal** appears to be the only EU Member States that extends guardianship until 21 (and exceptionally until 25) years of age.[86] Elsewhere, in individual cases, the guardian may continue to support the child on a voluntary basis.

In principle, support measures cease when a child turns 18. To facilitate the transition to adulthood, before the child reaches majority, the responsible social services or the guardian may set up transitional support measures for after majority. For example, they can link up the child with specialised providers of social, psychological or legal assistance. Ideally, these measures should be part of a child's individual integration plan. That is the case in some EU Member States.[87]

Approximately half of the EU Member States have provisions to extend some measures – such as having an advisor or social services support – beyond majority.[88] The extension may be limited to children enrolled in an education programme, as for example in **Bulgaria**, **Estonia**, **Ireland** or **Slovakia**. These measures are often limited to asylum applicants and/or international protection beneficiaries. Only a few EU Member States, for example **Finland**, **Italy** and **Slovakia**, provide after-care measures to all young adults whatever their status.[89] Under Italian law, for example, a judge may place young adults under the supervision of local social services until they reach 21 years of age.[90]

Concerning housing, unaccompanied children who have reached the age of majority should be allowed to stay in the same place or area, if possible, EASO's guidance indicates. If they move to an adult reception facility, this should be carefully organised, with the involvement of the unaccompanied children themselves.[91]

Several EU Member States have some legal provisions that would allow authorities to extend the stay of unaccompanied children turning 18 in the same reception place or to transfer them to specialised reception arrangements.[92] In other cases, they may receive specific financial or other benefits. Some Member States may limit such options to asylum applicants and/or international protection beneficiaries. Sometimes, support is limited to those enrolled in education programmes.

In practice, only a few young people who were unaccompanied children benefit from such arrangements. When they turn 18, unaccompanied children generally transfer to adult reception facilities, as FRA findings show. These are typically much bigger than child facilities and entail a drop in the quality of reception conditions and support services. Young persons may have to share rooms with several other adults of different ages.

Housing experts in **Greece**, **Italy** and **Sweden** noted that some young asylum applicants refuse to move to the adult reception facility assigned to them, anticipating that reception arrangements for adults will not offer them sufficient protection and assistance. Thus, some become homeless upon turning 18.[93]

PROMISING PRACTICE

Extending child welfare support beyond 18 years of age

In **France**, the Young Adult Contract (*Contrat Jeune Majeur*) offers material, educational and psychological support to young adults up to 21 years of age who are facing difficulties. In Paris, concluding such contracts is quite common. However, experts FRA interviewed said that this is less so in the Bouches-du-Rhône (Provence-Alpes-Côte d'Azur) and Nord (Hauts-de-France) regions.

*Source: France, Code for social action and families (**Code de l'action sociale et des familles**), Articles L 112-3, L 221-1 and L 222-5.*

FRA opinions

Respecting fundamental rights at borders remains one of the top challenges in the EU. In 2019, allegations of violence and informal pushbacks persisted. Meanwhile, people died at sea while trying to reach the EU, and humanitarian rescue boats faced threats. Delays in disembarkation put at risk the safety and physical integrity of migrants and refugees rescued at sea. The EU's enhanced powers at borders bring more responsibility regarding fundamental rights. The EU legislature equipped Frontex with various internal tools to protect fundamental rights.

FRA OPINION 5.1

EU Member States should reinforce their preventive measures against any abusive behaviour by law-enforcement authorities. They should also effectively investigate all credible allegations of *refoulement* and violence by law-enforcement authorities at the borders, in particular those made by statutory national human rights bodies. They should cooperate with relevant international organisations and third countries to ensure safe, swift and predictable disembarkation for migrants and refugees rescued at sea, in a manner that complies with the principle of non-*refoulement*. The European Border and Coast Guard Agency should ensure the effective implementation of all fundamental rights provisions included in its new regulation.

While EU law does not prohibit the administrative detention of children in a migration context, there are strict requirements flowing from the Charter and the case law of the European Court of Human Rights (ECtHR). A child applying for asylum or who is in return procedures can be deprived of liberty only as an exceptional measure of last resort. In practice, however, immigration detention of children is often not an exceptional measure in the EU.

FRA OPINION 5.2

To promote the right of the child to protection and care under international and EU law, the EU and its Member States should develop credible and effective systems that would make it unnecessary to detain children for asylum or return purposes. This is the case regardless of whether the children are in the EU alone or with their families.

The Schengen evaluation and monitoring mechanism serves to monitor the implementation of the Schengen *acquis*, the body of EU law enacted to compensate for the absence of controls at internal borders. The first five-year cycle of Schengen evaluations identified gaps in the protection of fundamental rights in return policies, less so in border management.

FRA OPINION 5.3

In Schengen evaluations, the European Commission should put more focus on the fundamental rights safeguards included in the Schengen Borders Code, including adherence to the principle of non-***refoulement***.

FRA OPINION 5.4

The European Commission should make full use of the expertise of specialised human rights bodies and agencies at national and EU levels when operationalising large-scale IT systems and when assessing their impact on fundamental rights.

The EU and its Member States should build strong fundamental rights provisions into all technical specifications for the operation of large-scale IT systems and their interoperability, in particular as regards data protection and non-discrimination requirements. This is to ensure that the industry that provides such systems pays due attention to the need to comply with relevant international and EU legal provisions. Possible measures could include a binding requirement to involve data protection experts and human rights specialists in the teams that work on the development of the technology, in order to ensure fundamental rights compliance by design.

In the area of freedom, security and justice, the EU has set up three large-scale IT systems and has adopted legislation for setting up three more. Such IT systems help to manage migration, asylum, borders and police cooperation, and, ultimately, serve to strengthen internal security. The EU made its large-scale IT systems interoperable, and included relevant fundamental rights safeguards. However, the systems need to apply these safeguards in practice. Under the Interoperability Regulations, the Commission has to assess the impact of interoperability on fundamental rights and on the right to non-discrimination.

FRA OPINION 5.5

In the new Action Plan on Integration and Inclusion envisaged for 2020, the European Commission should underline the need to continue supporting unaccompanied children in their transition to adulthood. It should also encourage EU Member States to make full use of the possibilities offered by national law.

When unaccompanied children turn 18, they experience gaps in rights and services. This undermines their pathway to social inclusion. Many EU Member States have arrangements for targeted support for such persons even after they turn 18. However, in practice, very few children benefit from such support.

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Annex: Sources for Tables 5.2 and 5.3

The published Schengen evaluation recommendations are available at **www.consilium.europa.eu** under Document register. Please search them by using the INT number specified below.

TABLE 5.2: SCHENGEN EVALUATIONS: RECOMMENDATIONS TO ENHANCE FUNDAMENTAL RIGHTS SAFEGUARDS IN RETURN AND READMISSION (2015–2019), 19 EU MEMBER STATES

2015: Austria, **Doc. INT 2015/0231**; Belgium, **Doc. INT 2016/0016**; Germany, **Doc. INT 2016/0137**, Netherlands, **Doc. INT 2016/0178**.

2016: Croatia, **Doc. INT 2017/0067**; France, **Doc. INT 2017/0292**; France (ad hoc), **Doc. INT 2017/0022**; Germany (ad hoc), **Doc. INT 2017/0142**; Greece, **Doc. INT 2017/0023**; Italy, **Doc. INT 2016/0335**; Luxembourg, **Doc. INT 2016/0285**; Malta, **Doc. INT 2017/0118.**

2017: Denmark, **Doc. INT 2017/0302**; Hungary (ad hoc), **Doc. INT 2018/0157**; Portugal, **Doc. INT 2018/0048**; Spain, **Doc. INT 2018/0285**; Sweden, **Doc. INT 2018/0022.**

2018: Estonia, **Doc. INT 2019/0163**; Finland, **Doc. INT 2019/0111**; Latvia, **Doc. INT 2019/0086**; Lithuania, **Doc. INT 2019/0189**.

TABLE 5.3: SCHENGEN EVALUATIONS: RECOMMENDATIONS TO ENHANCE FUNDAMENTAL RIGHTS SAFEGUARDS IN THE MANAGEMENT OF EXTERNAL BORDERS (2015–2019), 21 EU MEMBER STATES

2015: Austria, **Doc. INT 2015/0192**; Belgium, **Doc. INT 2016/0026**; Germany, **Doc. INT 2016/0017**; Greece (ad hoc), **Doc. INT 2016/0035**; Hungary (ad hoc), **Doc. INT 2016/0138**; Netherlands **Doc. INT 2016/0227**; Poland (ad hoc), **Doc. INT 2016/0160**; Spain (ad hoc), **Doc. INT 2016/0226**; Sweden (ad hoc), **Doc. INT 2015/0311**.

2016: Croatia, **Doc. INT 2017/0037**; Estonia (ad hoc), **Doc. INT 2018/0029**; France, **Doc. INT 2018/0033**; Denmark (ad hoc), **Doc. INT 2016/0249**; Greece, **Doc. INT 2017/0008**; Italy, **Doc. INT 2017/0009**; Luxembourg, **Doc. INT 2016/0235**; Malta, **Doc. INT 2017/0117**; Spain (ad hoc), **Doc. INT 2016/0391**.

2017: Croatia (ad hoc), **Doc. INT 2018/0341**; Denmark, **Doc. INT 2017/0313**; Italy (ad hoc), **Doc. INT 2018/0215**; Netherlands (ad hoc), **Doc. INT 2018/0355**; Poland (ad hoc), **Doc. INT 2018/0253**; Portugal, **Doc. INT 2018/0054**; Spain, **Doc. INT 2018/0344**; Sweden, **Doc. INT 2018/0394**.

2018: Estonia, **Doc. INT 2019/0213**; Finland, **Doc. INT 8624/2019**; Greece (ad hoc), **Doc. INT 2019/0231**; Latvia, **Doc. INT 2018/0428**; Lithuania, **Doc. INT 2019/0198**.

2019: Czechia, **Doc. INT 2019/0250**; France (ad hoc), **Doc. INT 2020/0009**.

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84 See for example Arts. 32–33, read in conjunction with recitals (20), (22) and (54), of Regulation (EU) 2018/1861 of the European Parliament and of the Council of 28 November 2018 on the establishment, operation and use of the Schengen Information System (SIS) in the field of border checks, and amending the Convention implementing the Schengen Agreement, and amending and repealing Regulation (EC) No. 1987/2006.

85 European Commission (2020), ***2020 Commission work programme,*** Brussels, 29 January 2020, COM(2020) 37 final.

86 Portugal, Law 147/99 on the protection of children and young people at risk (***Lei nº 147/99 de proteção de crianças e jovens em perigo***), 1 September 1999, Art. 63 (2).

87 See, for example, Estonia, Social Welfare Act (***Sotsiaalhoolekande seadus***), 9 December 2015, Section 45; France, Code for social action and families (*Code de l'action sociale et des familles*), Art. L 221-1 and L 222-5; Ireland, Houses of the Oireachtas (2015), **Child Care Amendment Act 2015**.

88 Austria, Federal Child and Youth Welfare Act 2013 (***Bundesgesetz über die Grundsätze für Hilfen für Familien und Erziehungshilfen für Kinder und Jugendliche (Bundes-Kinder- und Jugendhilfegesetz 2013 – B-KJHG 2013)***), BGBl. I No. 69/2013, Section 29; Bulgaria, Child Protection Act (***Закон за закрила на детето***), 13 June 2000, Art. 29; Finland, Integration Act (***laki kotoutumisen edistämisestä/lag om främjande av integration, Act No. 1386/2010***), Section 27(2); France, Young Adult Contract, Code for social action and families (***Code de l'action sociale et des familles***), Arts. L 221-1 and L 222-5; Hungary, Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship (***1997. évi XXXI. törvény a gyermekek védelméről és a gyámügyi igazgatásról***), 8 May 1997, Art. 9 (1) k); Ireland, Houses of the Oireachtas, **Child Care Amendment Act 2015**, Section 5; Ireland, **Child Care Act 1991**, Section 45; Italy, Law No. 47 of 7 April 2017 (***Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati***), Art. 13, para. 2; Netherlands, Association of Netherlands Municipalities (*Vereniging van Nederlandse Gemeenten*) (2018), 'Foster care standard up to 21 years' (***'Pleegzorg standaard tot 21 jaar'***), news release, 5 June 2018; Poland, Act of 9 June 2011 on family support and foster care system (***Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej***), Arts. 140–153; Portugal, Law 147/99 on the protection of children and young people at risk (*Lei nº 147/99 de proteção de crianças e jovens em perigo*), 1 September 1999, Art. 63; Slovakia, Act No. 305/2005 Coll. on social and legal protection of children and social guardianship as amended (***Dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej***), Art. 2 points b) and c); Spain, Head of State (*Jefatura del Estado*), Organic Law 1/1996, 15 January, on the legal protection of minors, partial amendment of the Civil Code and the Civil Procedure Act (***Ley Orgánica 1/1996, de 15 de enero, de Protección Jurídica del Menor, de modificación parcial del Código Civil y de la Ley de Enjuiciamiento Civil***), 16 February 1996, Art. 22bis; United Kingdom, ***Children Act 1989***, 16 November 1989, Section 23C (for children who have received housing support by local authority before age 14 and are referred to as "former relevant child").

89 Finland, Section 27 (2) of the Integration Act (***laki kotoutumisen edistämisestä/lag om främjande av integration***, Act No. 1386/2010); Slovakia, Act No. 305/2005 Coll on social and legal protection of children and social guardianship as amended (***Dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej***), Art. 55, para. 2.

90 Italy, Law No. 47 of 7 April 2017 (***Disposizioni in materia di misure di protezione dei minori stranieri non accompagnati***), Art. 13, para. 2.

91 European Asylum Support Office (2018), ***New EASO guidance on reception conditions for unaccompanied children, p. 29***.

92 Bulgaria, Child Protection Act (***Закон за закрила на детето***), 13 June 2000, Art. 29; Czechia, Act No. 109/2002 on Institutional Education and Protective Care in School Facilities and on Preventive Educational Care in School Facilities and amendment to other Acts (***Zákon o výkonu ústavní výchovy nebo ochranné výchovy ve školských zařízeních a o preventivně výchovné péči ve školských zařízeních a o změně dalších zákonů***), Section 2, para. 6, 5 February 2002; Estonia, Social Welfare Act (***Sotsiaalhoolekande seadus***), Section 45[1]6, para. 9, December 2015; Germany, Social Code – Book VIII – Child and Youth Welfare (***Sozialgesetzbuch – Achtes Buch – Kinder- und Jugendhilfe***), Sections 33, 34 and 35, 26 June 1990; Hungary, Act XXXI of 1997 (***1997. évi XXXI. törvény a gyermekek védelméről és a gyámügyi igazgatásról***), Art. 53/A (1)–(2); Ireland, Houses of the Oireachtas (2015), **Child Care Amendment Act 2015**, Section 5; Italy, Circular of the Ministry of the Interior No 113 (***Circolare del Ministero dell'Interno***), 18 December 2018; Portugal, Law 147/99 on the protection of children and young people at risk (***Lei nº 147/99 de proteção de crianças e jovens em perigo***), Art. 63, 1 September 1999; Romania, Law No. 122/2006 on asylum in Romania (***Legea nr. 122 din 4 mai 2006 privind azilul în România***), 4 May 2006 and Emergency Ordinance No. 194/2002 on the status of foreigners in Romania (***Ordonanța de Urgență nr. 194 din 12 decembrie 2002 privind regimul străinilor în România***), 12 December 2002; Slovakia, Act No. 305/2005 Coll. on social and legal protection of children and social guardianship as amended (***Zákon č. 305/2005 Z.z. o sociálnoprávnej ochrane detí a o sociálnej kuratele v znení neskorších predpisov***), Art. 55, para. 2; Slovenia, Government of the Republic of Slovenia (*Vlada Republike Slovenije*), **Decision No. 21400-11/2018/5**, 20 December 2018; United Kingdom, **Children Act 1989**, Section 23C (4) (c), 16 November 1989.

93 FRA (2019), ***Integration of young refugees in the EU: Good practices and challenges,*** November 2019, p. 59.

INFORMATION SOCIETY, PRIVACY AND DATA PROTECTION

6

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UN & CoE

24 January

In *Catt v. UK* (No. 43514/15), the European Court of Human Rights (ECtHR) holds that retention of collected sensitive data, namely political opinions and affiliations with labour unions, for the police to prevent crime and disorder, should be subject to greater protection and scheduled reviews with appropriate safeguards, to prevent abuse and arbitrariness.

25 January

The Consultative Committee of the Council of Europe Convention for the Protection of Individuals with Regard to the Automatic Processing of Personal Data (Convention 108) publishes guidelines on artificial intelligence and data protection.

28 January

To mark Data Privacy Day 2019, United Nations Conference on Trade and Development (UNCTAD) publishes the Cyberlaw Tracker, a map that tracks data protection and privacy laws worldwide.

13 February

Committee of Ministers of the Council of Europe adopts its Declaration on the manipulative capabilities of algorithmic processes.

14 May

Council of Europe Commissioner for Human Rights adopts the recommendation *Unboxing artificial intelligence: 10 steps to protect human rights*.

27 August

In *Izmestyev v. Russia* (No. 74141/10), ECtHR holds that placing a detainee under permanent video surveillance constituted a serious interference with his private life and therefore fell within the scope of Article 8 of the ECHR. The court rules that the law lacked clarity with regard to the video surveillance of detainees serving a prison sentence and that, consequently, Article 8 was violated.

11 September

Committee of Ministers of the Council of Europe sets up an Ad Hoc Committee on Artificial Intelligence (CAHAI).

17 October

In *López Ribalda and others v. Spain* (joined applications No. 1874/13 and 8567/13), ECtHR's Grand Chamber further develops the criteria provided in *Barbolescu* (No. 61496/08) on the proportionality assessment of measures adopted by employers interfering with employees' right to privacy. The court finds that only an overriding requirement relating to the protection of public or private interests can justify the lack of prior information on surveillance measures, such as hidden cameras directed towards the checkout areas of a supermarket.

18 December

Croatia ratifies Protocol amending the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Modernised Convention 108).

EU

January

16

In *Deutsche Post AG v. Hauptzollamt Köln* (C-496/17), the Court of Justice of the European Union (CJEU) holds that the restriction of rights of a data subject requires analysis of essence impairment in terms of restriction of fundamental rights.

23

European Commission and Japan adopt mutual adequacy decisions, thereby creating the largest area of free and safe data flows globally. As a result, whenever personal data is transferred from the EU to Japan, a high level of protection comparable to the one under EU law will be ensured.

28

European Data Protection Board (EDPB) issues a report on the second annual review of the EU-US Privacy Shield, following the European Commission's report of 19 December 2018.

February

6

European Committee of the Regions issues an opinion on 'Artificial Intelligence for Europe'.

14

In *Sergejs Buivids v. Datu valsts inspekcija* (C-345/17), CJEU holds that video recording police officers carrying out procedural measures in a police station, and dissemination on social media, may constitute personal data processing solely for journalistic purposes.

April

8

— Independent High-Level Expert Group on Artificial Intelligence set up by the European Commission adopts the Ethics Guidelines for Trustworthy AI.
— European Commission releases a Communication on building trust in human-centric artificial intelligence.

June

4

EDPB adopts Guidelines 1/2019 on codes of conduct and monitoring bodies under Regulation 2016/679.

10

EDPB adopts Recommendation 01/2019 on the draft list of the European Data Protection Supervisor regarding the processing operations subject to the requirement of a data protection impact assessment (Article 39 (4) of Regulation (EU) 2018/1725).

14

European Commission and High Representative adopt a Joint Communication reporting on implementation of the Action Plan against Disinformation.

20

— EU adopts Directive (EU) 2019/1024 on open data and the re-use of public sector information.
— EU adopts Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services.
— EU adopts Directive (EU) 2019/1153 laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA.

26

High-Level Expert Group on Artificial Intelligence publishes the policy and investment recommendations for trustworthy artificial intelligence, emphasising the importance of lawful, ethical, robust and adequate protection of fundamental rights from adverse impacts.

July

24

European Commission publishes a communication to mark the first anniversary of the General Data Protection Regulation's (GDPR's) date of application, *Data protection rules as a trust-enabler in the EU and beyond – Taking stock*.

29

In Fashion ID (C-40/17), CJEU rules that the operator of a website that features a Facebook 'Like' button can be a controller jointly with Facebook in respect of the collection and transmission to Facebook of the personal data of visitors to its website.

September

24

In *Google v. CNIL* (C-507/17), CJEU holds that the territorial scope of the 'right to be forgotten' is limited and does not require search engines to remove results outside the EU.

October

1

CJEU rules in *Bundesverband der Verbraucherzentralen und Verbraucherverbände — Verbraucherzentrale Bundesverband eV v. Planet49 GmbH* (C-673/17) that storing cookies requires internet users' active consent and that a pre-ticked checkbox is therefore insufficient.

3

CJEU clarifies in *Eva Glawischnig-Piesczek v. Facebook Ireland Limited* (C-18/18) that EU law does not preclude a host provider such as Facebook from being ordered to remove comments identical and, in certain circumstances, equivalent to those previously declared to be illegal.

23

European Commission publishes its report on the third annual review of the functioning of the EU-U.S. Privacy Shield, welcoming the progress made on a number of issues and recommending steps to ensure the effective functioning of the framework.

December

6

Wojciech Wiewiórowski is appointed as new European Data Protection Supervisor. His mandate will run from 2019 to 2024.

The year 2019 was the first full year in which the General Data Protection Regulation (GDPR) applied. With a renewed and expanded mandate, data protection supervisory authorities led the enforcement process across the EU. They faced a heavy, and steadily increasing, workload. Civil society organisations specialised in data protection proved to be strong allies in implementing the GDPR. In parallel, the ever-increasing use of new technologies, such as artificial intelligence and facial recognition, continued to create fundamental rights challenges, including regarding privacy and data protection. As in previous years, the misuse of personal data and new technologies threatened both fundamental rights and democratic processes. Challenges with illegal online content and disinformation persisted, prompting national and international stakeholders to reconsider legal and technical avenues to tackle them effectively.

6.1. DATA PROTECTION AND ENFORCEMENT: IN SEARCH OF EXPERTISE AND RESOURCES

By the end of 2019, almost all Member States had incorporated both the GDPR and the Law Enforcement Directive (LED) into their national legislation. All Member States except for **Slovenia** have adopted national legislation implementing the GDPR. **Spain** is the only EU Member State that has not yet transposed the LED into its national legislation.[1]

However, effective implementation of the GDPR needs more than incorporating it into national law. It relies on strong and effective data protection actors, notably, data protection supervisory authorities. Potential violations can be intrinsically hidden, which can jeopardise enforcement of the GDPR. When personal data is processed by automated means, data subjects may not know whether their personal data has been processed in accordance with the GDPR. In these circumstances, the knowledge of data protection supervisory authorities, and of civil society organisations specialised in protecting individuals' fundamental rights in the digital world, is crucial.

6.1.1. Data protection supervisory authorities tackle mounting workload

In 2019, a special Eurobarometer analysed EU citizens' awareness and opinions of the GDPR and what they did about it. Most respondents knew not only that it existed, but also most of the rights it guaranteed.[2] Importantly, the public was significantly more aware of public authorities specialised in protecting personal data. In 2015, before the adoption of the GDPR, 37 % knew that they existed; in 2019, 57 % did.

The rising awareness of the GDPR affected the workload of data protection supervisory authorities (SAs). They are the enforcers of data protection at national level. Under the GDPR's new consistency and cooperation mechanism, these authorities are, according to the European Commission, "key drivers to the consistent applications of the new rules"[3] across all Member States.

In 2019, all SAs noticed high increases in the numbers of complaints, evaluations and investigations. SAs from **Denmark**,[4] **Finland**[5] and **Sweden**,[6] for instance, reported between 150 % and 300 % more initiated or processed cases.

In the **United Kingdom**, the Information Commissioner's Office described its work since the GDPR entered into force as "unprecedented".[7] More than 12,000 personal data breaches were reported in 2018–2019, compared with more than 3,000 in the previous period (2017–2018). Data protection complaints jumped from 21,019 to 41,661 in the same period. Total contacts with data protection officers reached 471,224 in 2018–2019, compared with 283,727 in 2017–2018.[8]

In **Germany**, the pressure on SAs grew not only because they received more complaints or questions, but also because of their increased mandate and additional tasks.[9] Indeed, SAs dedicated considerable resources to awareness-raising activities. Some SAs made providing enough support to data controllers and data protection officers their priority, ahead of launching investigations or imposing fines.

SAs spent considerable resources in 2019 on training data protection professionals. Notably, in countries such as **Bulgaria**, **Croatia**, **Italy**, **Poland** and **Spain**, the EU project T4DATA helped SAs and public bodies' data protection officers implement the GDPR.[10] Some Member States established cross-border cooperation. For instance, the **Greek** SA organised joint training for lawyers[11] and civil servants.[12] In addition to providing training and information material, some SAs developed IT tools to help data controllers meet their obligations, as in **Hungary**[13] and **Portugal**.[14]

While a majority of SAs saw their budget and human resources increased,[15] some noted that resources are still insufficient to cope with their updated mandate. In **Ireland**, for instance, staff increased from 80 in 2018 to 170 by the end of 2019, but the SA estimated it needed 200 more to fulfil its new mandate.[16] Furthermore, the **Irish** SA highlighted that its budget increase in 2019 was less than a third of what it requested so it could carry out its tasks effectively.[17] In **Slovakia**, the Office for Personal Data Protection highlighted in its annual report that the increase in human and financial resources was not sufficient for it to efficiently and sustainably fulfil its mandate.[18]

Workloads were also heavier because SAs had difficulties retaining expert staff, as some Member States highlighted. In **Sweden**, for instance, the Data Protection Authority reported that many employees left the authority for more attractive positions. As a result, by the end of 2018, 70 % of the authority's employees had worked there for 18 months or less.[19] The SA developed specific measures and requirement processes to cope with this situation.[20] Similarly, the **United Kingdom** granted the Information Commissioner's Office flexibility in how it pays its staff, to make sure it can recruit and retain highly qualified employees.[21]

6.1.2. Civil society organisations as key stakeholders in GDPR application

Individuals may mandate a "not-for-profit body, organisation or association" to represent them, according to Article 80 (1) of the GDPR. Pursuant to Article 80 (2), Member States may decide to allow such bodies to launch legal proceedings without a mandate from data subjects. Only four Member States have made this possibility law: **Belgium**, **France**, the **Netherlands** and **Poland**. Some Member States have enacted the possibility of collective actions in other national laws, mostly in consumer laws. That limits the scope of actions, as remedies are available only to consumers.[22]

In 2019, several civil society organisations (CSOs), active and specialised in data protection and privacy issues, used the possibilities under the GDPR to support its application and enforcement. To assess the impact of the GDPR on CSOs working on issues related to data protection, FRA collected information on the roles of nine of these organisations and the challenges they face.[23] Most of them highlighted that the GDPR is a strong tool to enforce data protection in the digital era. However, they also reported challenges that prevent them from fully using their capacity and expertise to support individuals' rights to data protection and privacy.

Six out of nine organisations strongly emphasized that the main barrier was that Member States had not incorporated Article 80 (2) into national law. Otherwise, they could flag data controllers that do not fully comply with the GDPR and, where necessary, take legal action. For example, the **Austrian** privacy watchdog NOYB has lodged several complaints with various SAs in different Member States on behalf of individuals. However, representing data subjects is time-consuming and can overburden CSOs with limited resources.

Individuals may decide to stop proceedings for several reasons, such as the fear of exposure or of revealing publicly sensitive private information. To cope, CSOs have used alternative solutions:

- Some CSOs relied on the private initiative from a staff member to lodge complaints. The Open Rights Group did this, for instance.[24]
- Other organisations, such as Privacy international and the Hungarian Civil Liberties Union,[25] have called on the SAs to use the investigative powers that Article 58 of the GDPR confers on them.[26]
- In other cases, CSOs decided to submit a complaint as an organisation without a mandate from an individual. This restricts their actions, as the organisation will not benefit from the same procedural rights as data subjects. For example, SAs will not have to respect specific deadlines to reply, the complainant cannot participate in the investigation, and the decision cannot be challenged.

Yet, the fact that Member States do not use the possibility offered in Article 80 (2) of the GDPR may carry long-term consequences: as individual complaints often result in individual solutions and remedies, they fail to address the systemic issues specific to unrestricted use of personal data by large corporations.

Five of the nine CSOs that FRA surveyed identified a second challenge. They lack adequate financial and human resources.[27] Procedures against big companies can be lengthy, risky, and onerous. CSOs need sufficient expert staff members to properly support individuals, conduct investigations and/or build complaints.

Scarcity of resources becomes even more of a problem in appeals against supervisory authorities' decisions. For most CSOs, the high costs of appeal procedures disrupt the equity between parties, giving a clear advantage to large corporations.

A third challenge is that an increasing number of complaints cross borders. The GDPR has created mechanisms to ease the procedures when complaints involve two or more Member States, but CSOs still have to cope with lengthy delays when complaints involve several SAs. Organisations such as NOYB in **Austria** or Bits of Freedom in the **Netherlands** flagged how such delays can have chilling effects on the data subjects' legitimate expectations of the efficiency of a non-judicial remedy. That ultimately risks undermining the whole procedure.

SAs are looking to increase their cooperation with CSOs that have expertise in data protection-related issues. For instance, the strategy horizon 2022 of **Bulgaria**'s SA lists, as one of its main strategic goals, cooperation through meetings and joint initiatives with CSOs.[28] In **Greece**, the SA met with the civil society organisation Homo Digitalis, and agreed to establish close cooperation in the future.[29] In **Latvia**, the Data State Inspectorate cooperated with the Latvian Association of Information and Communication Technologies (LIKTA) to develop guidance on the processing of personal data of natural persons for the information and communication technology areas.[30]

However, most SAs' awareness-raising activities mostly target other groups, such as public authorities or private companies, and are not adapted to CSOs.[31] Some notable exceptions are worth highlighting. For example, the **Slovenian** Information Commissioner issued a general opinion on the processing of members' personal data in line with the GDPR specifically for CSOs and associations, in response to increased number of inquiries from CSOs.[32]

FRA ACTIVITY

The General Data Protection Regulation – one year on

In 2019, FRA asked CSOs registered on its Fundamental Rights Platform how the new data protection rules have affected their daily work. Based on responses from over 100 CSOs engaged in a wide range of activities, FRA produced a focus paper that looks at how well these CSOs understand the EU data protection requirements. Among other findings, it showed CSOs' feedback about their interaction with SAs:

- Nearly half of the respondents (48 %) indicated that their SA did not provide any assistance or advice about the GDPR.
- Most respondents (72 %) did not have any direct contact with their national SA.
- The main reason that respondents contacted SAs was to seek clarity and advice on the GDPR's requirements.

See FRA (2019), ***The General Data Protection Regulation – One year on****, June 2019.*

6.2.
ALL EYES ON AI, BUT ITS IMPACT ON FUNDAMENTAL RIGHTS GETS LIMITED ATTENTION

The use of new technologies, such as artificial intelligence (AI) and facial recognition, is ever increasing. That means international organisations, such as the Council of Europe, as well as the EU and its Member States, need to find ways to support innovation while protecting fundamental rights.

The debate on such technologies focused initially on economic aspects and then on ethics, FRA highlighted in its Fundamental Rights Report 2019. There was less emphasis on fundamental rights.[33] However, one of the main concerns of EU citizens about AI is potential discrimination stemming from the misuse of these systems, the Eurobarometer results published in December 2019 show.[34]

In 2019, the overall approach throughout the year focused on the necessity of ethical and trustworthy initiatives on AI. The work of the European Commission's High Level Group on Artificial Intelligence (HLEG-AI) pursued a human-centric approach to AI, which means that fundamental rights and self-determination of individuals need to be safeguarded, including where AI is used.

6.2.1. In search of innovation in full respect of fundamental rights

The new European Commission is committed to proposing legislation for a coordinated EU approach on the human and ethical implications of AI.[35] Its Expert Group on Liability and New Technologies emphasised[36] the need to improve the laws that apply to emergent digital technologies. After a year of work, the HLEG-AI, in which FRA participates, released the *Ethics guidelines*.[37] According to these guidelines, AI systems should be lawful, ethical and robust in order to be considered trustworthy. The second phase of the project, the 'piloting process',[38] launched in June 2019. It invites companies using AI systems to test the feasibility and pertinence of the HLEG-AI guidelines.

The Committee of Ministers of the Council of Europe established the Ad Hoc Committee on Artificial Intelligence (CAHAI) in September 2019. It is to examine the feasibility of establishing potential legal frameworks for the development, design and application of AI, based on human rights, democracy and the rule of law.[39] Given the links between the EU Charter of Fundamental Rights and the European Convention on Human Rights, CAHAI and HLEG-AI are complementary to define the relevant fundamental rights safeguards.

In May 2019, the Organisation for Economic Co-operation and Development (OECD) announced the launch of an AI Policy Observatory. It aims to provide insights into public policies and ensure beneficial uses of trustworthy AI.[40] Simultaneously, the OECD Council on AI issued a recommendation on artificial intelligence, the first intergovernmental standard on AI.[41]

"We must ensure that [AI] deployment in products and services is undertaken in full respect of fundamental rights, and functions in a trustworthy manner (lawful, ethical and robust) across the Single Market."

Margrethe Vestager, then-Executive Vice-President-designate for a Europe fit for the Digital Age, '**Answers to the European Parliament questionnaire**', 8 October 2019

6.2.2. National policy initiatives and where fundamental rights challenges lie

As in 2018, in 2019 a great number of Member States adopted studies, reports or projects as a basis to develop national strategies for implementing AI. The most prominent areas affected by the imminent use of AI are linked with the public sector, notably transport, education, employment and law enforcement.

Member States' strategies focused on the socio-economic potential of employing AI. By the end of 2019, all Member States except for **Croatia**, **Cyprus** and **Slovenia** had developed their own AI strategies.

Potential issues of discrimination and privacy emerged in certain public sectors, such as employment, education, migration and welfare.

In **Denmark**, the Minister of Employment introduced a draft bill on active employment efforts. It presents a "digital clarification and dialogue tool" that job centres and unemployment funds can use.[42] Algorithms that the public administration uses have already raised some concerns, specifically a test analysis measuring an individual's risk of becoming long-term unemployed. The Danish Data Protection Agency stated that this tool complies with the relevant requirements of the GDPR, as it will only support decision-making by case handlers. However, the Danish supervisor also stated that it would be important to regularly evaluate the tool's use to ensure the continued relevance of the variables used and to ensure that using the tool continues to be relevant and justified.[43]

In **Finland**, the main purpose of draft government bill No. 18/2019 for an act on personal data legislation in the field of immigration administration is to modernise regulative frameworks and administrative processes.[44] It includes a section on automated decision-making on individual immigration cases, when making a decision would not require hearing the parties. This may raise issues related to privacy, discrimination, effective remedy and children's rights. During the legislative process, the Finnish Constitutional Law Committee highlighted in its opinion[45] that the section poses challenges to fundamental rights, and proposed dropping it. Meanwhile, the Government has presented other policy initiatives in which the use of AI can both enhance access to information and protect privacy (see box).

France deployed Parcoursup in 2018. This is a system to simplify access to higher education and help students gain admission. It processes the applications centrally using algorithms. This triggered debates about how to assess transparency and avoid discrimination in the decision-making process. In 2019, a new decree required higher education institutions using this platform to publish the general criteria they use in their selection procedures.[46]

FRA ACTIVITY

AI-related policy initiatives in the EU and Member States

FRA collected information on AI-related policy initiatives in EU Member States in 2016–2019. By the end of 2019, the collection included over 260 initiatives. It defined 'policy initiative' broadly to include a range of initiatives that could potentially contribute to policymaking and standard setting in the area of AI. They include legislation, soft law, guidelines and recommendations on the use of AI, or reports that include conclusions with policy relevance, at both national and international levels. FRA will continue updating this list in 2020.

*For more information, see FRA's webpage on **AI policy initiatives**.*

PROMISING PRACTICE

AI as a tool to safeguard fundamental rights

In **Finland**, the *Anoppi* project developed by the Ministry of Justice aims to implement two language technology-based AI tools "for automatic anonymization and content description of court decisions and other official decisions issued by authorities". This would improve the electronic availability of documents, and so facilitate making use of the right to access to information. At the same time, it would address issues of privacy and data protection.

For more information, see Finland, Ministry of Justice (Oikeusministeriö/ Justitieministeriet), ***Anoppi project***, OM042:00/2018 Development.

In the **Netherlands**, System Risk Indication (SyRI) is a state tool to create fraud risk alerts by processing and linking personal data of citizens on a large scale from public authorities. It is the subject of a lawsuit by a broad coalition of civil society organisations focused on privacy matters.[47] The outcome will address the lawfulness of a general interest measure that relies on AI technology, and its proportionality test against fundamental rights such as the rights to privacy and non-discrimination.

Particularly significant developments have also taken place in the context of law enforcement. Studies and reports are crucial to investigate the current and future impact of AI in this area.

French local and national authorities are increasingly interested in using facial recognition technology. In response, the SA *Commission nationale de l'informatique et des libertés* (CNIL) published a report to establish the ethical and legal framework within which to hold a debate on the advisability of using it.[48] In the **United Kingdom**, the Royal United Services Institute Centre for Data Ethics and Innovation commissioned a report on bias in police use of data analytics. It suggests that "there is an absence of consistent guidelines for the use of automation and algorithms, which may be leading to discrimination in police work".[49]

FRA ACTIVITY

Data quality and artificial intelligence – mitigating bias and error to protect fundamental rights

In June 2019, FRA published a focus paper on *Data quality and artificial intelligence – Mitigating bias and error to protect fundamental rights*. It underlines the importance of data quality for building algorithms and AI-related technologies. It also emphasises the potential fundamental rights challenges, including discrimination, when data sets used for AI systems turn out to be of low quality, incomplete or biased.

Algorithms in machine learning systems can only be as good as the data used to develop them. High-quality data are essential for high-quality algorithms. Discussions of AI often call for high-quality data but do not give any guidance or specify what this actually means. It is also often overlooked that the quality of a data set needs to be assessed in view of the purpose for which it will be used.

See FRA (2019), ***Data quality and artificial intelligence – Mitigating bias and error to protect fundamental rights****, June 2019.*

FRA ACTIVITY

Facial recognition technology on the rise: fundamental rights considerations in law enforcement

In November 2019, FRA published a focus paper on Facial recognition technology: fundamental rights considerations in the context of law enforcement. EU data protection legislation includes biometric data on the list of special categories of personal data – in this light, biometric data merits higher protection. Facial images are a form of biometric data if facial recognition software processes them. Biometric images are also quite easy to capture in public places.

Although the accuracy of matches is improving, the risk of errors remains real, particularly for certain minority groups. Moreover, people whose images are captured and processed might not know this is happening, so they cannot challenge possible misuses.

The paper outlines and analyses these and other fundamental rights challenges that public authorities trigger when they deploy live facial recognition technology for law enforcement. It also briefly presents steps to take to help avoid violating rights.

See FRA (2019), ***Facial recognition technology: fundamental rights considerations in the context of law enforcement****, November 2019.*

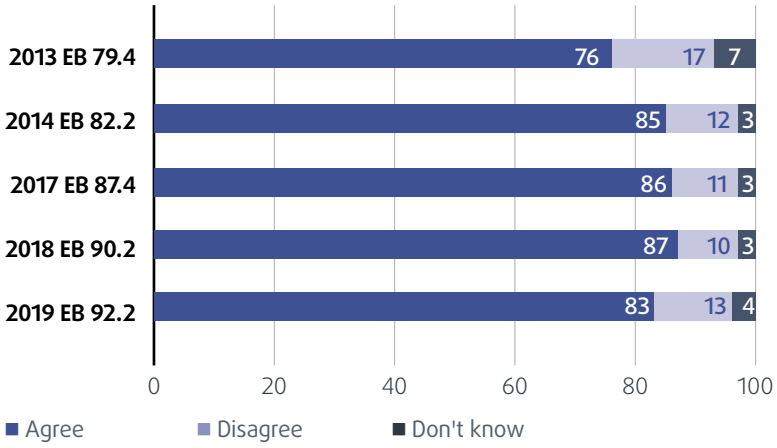
6.3. ADDRESSING THE POTENTIAL TO MISUSE TECHNOLOGY

In 2019, the harmful potential of information technology remained a concern and a focus of EU action. EU residents reported feeling increasingly vulnerable, particularly to content-related cybercrime. The use of disinformation to undermine democratic processes also loomed large, including in the 2019 European Parliament elections. Meanwhile, efforts to set rules for cross-border access to electronic evidence continued. Five years after the invalidation of the Data Retention Directive, a number of Member States had not yet clarified their national data-retention regimes.

6.3.1. EU citizens' concern about internet security grows

A consistently rising proportion of EU residents access the internet daily, a Eurobarometer survey on internet security shows. Smartphones are overtaking desktop computers as the most common way to access the internet.[50] However, EU residents also perceive an increasing risk of becoming a victim of cybercrime, the survey revealed (Figure 6.1). In 2019, the proportion of internet users who consider themselves able to protect themselves against cybercrime was slightly down, at 59 %, compared with 70 % in 2018.[51]

FIGURE 6.1: PERCEPTION OF AN INCREASING RISK OF BECOMING A VICTIM OF CYBERCRIME (%)



*Source: European Commission, 2020 [**Special Eurobarometer 499: Europeans' attitudes towards cyber security,** Brussels, p. 78]*

Over 8 out of 10 respondents expressed concerns about becoming a victim of cybercrime, which can encompass a wide range of crimes. Despite substantial efforts to ensure that rules are applied and rights upheld in cyberspace, all forms of cybercrimes and harmful online behaviours continue to increase, the Council of the EU noted in December 2019. That makes it necessary to protect victims of violations of their fundamental rights, economic losses, identity theft and damage to their reputation across borders.[52]

The European Commission defines illegal content online as any information that is not in compliance with Union law or the law of a Member State.[53] Preventing, investigating and deterring illegal content online require the service providers hosting the material to cooperate by voluntarily adhering to the principles in the Commission's Recommendation on measures to tackle effectively illegal content online.[54]

However, EU and national law may not generally oblige service providers to monitor information that they transmit or store, or actively to seek facts or circumstances indicating illegal activity.[55] In October 2019, the CJEU interpreted[56] – with regards to a specific instance of content judged as defamatory by a court – that this prohibition does not concern the monitoring obligations of host providers "in a specific case", e.g. a judicial order to prevent the dissemination of particular content that national legislation declares illegal. The illegality of the content is not in the combination of certain terms; it is in the message that the content conveys. Therefore, an injunction must be able to extend to information worded slightly differently, when it conveys essentially the same message.

The EU aims to go beyond voluntary cooperation of service providers. It plans to provide a mandatory legal framework to prevent particularly harmful content online, such as terrorist content.[57] In April 2019, the European Parliament adopted on first reading a resolution on the proposal for a regulation on preventing the dissemination of terrorist content online.[58] This resolution included most of the amendments to the proposal that FRA suggested in its opinion (see box).

PROMISING PRACTICE

A priority channel to tackle the dissemination of illegal content online

The **Spanish** Data Protection Supervisory Authority (*Agencia Española de Protección de Datos*) has introduced an online tool to prioritise complaints about the dissemination of sensitive data. It enhances access to an effective remedy, in particular for victims of gender-based violence, sexual abuse or assault or harassment, and members of particularly vulnerable groups: children, persons with disabilities or serious illness, or those at risk of social exclusion. It reduces victimisation through the early adoption of provisional measures that prevent further dissemination of illegal content online.

*For further information, see AEPD's '**Canal prioritario**'.*

FRA ACTIVITY

Opinion on proposed regulation on preventing the dissemination of terrorist content online

FRA's Opinion looks at the fundamental rights implications of the following aspects of the proposal:

- the definition of terrorist content, including its relation to terrorist offences, what constitutes public dissemination, and the need to protect certain forms of expression;
- the proposed mechanism of removal orders, including involving an independent judicial authority, the time limit for complying with removal orders, the issue of jurisdiction in cross-border cases, the practical availability of remedies for content providers, and the issue of retention of removed content;
- the proposed referral mechanism, including the responsibility for protecting fundamental rights online, and
- the issue of due diligence of hosting service providers and the right to judicial protection in the context of proactive measures.

*See FRA (2019), Opinion 2/2019, **Proposal for a Regulation on preventing the dissemination of terrorist content online and its fundamental rights implications: Opinion of the European Union Agency for Fundamental Rights**, 12 February 2019.*

6.3.2. Protecting European democracy against disinformation campaigns

Lawful content online can also be abused to distort information and to manipulate public debate in social networks. In 2019, the elections to the European Parliament were a crucial test of the Union's efforts to protect the integrity of democratic processes against disinformation using AI tools. The action plan against disinformation[59] and the elections package[60] contributed to exposing disinformation attempts and preserving the integrity of the elections to the European Parliament, while protecting freedom of expression, the European Commission reported in June.[61]

Some types of criminal offences, such as manipulation of elections, identity theft and crimes relating to AI, may not yet be clearly defined. Sanctions against such offences may also need defining. Minimum rules on defining these could be useful. In May 2019, the Council of the European Union concluded that it might be appropriate to examine if such rules are necessary and advisable.[62]

A significant proportion of these malicious acts of interference breach European data protection and privacy rules, the European Parliament pointed out. It called on the national data protection authorities to make full use of their powers to investigate data protection infringements and to impose deterrent sanctions and penalties.[63] Meanwhile, the European Data Protection Supervisor (EDPS) reprimanded the European Parliament twice. The EDPS found that it had committed violations in collecting personal data from over 329,000 people interested in the European election campaign activities, and in allowing the US company NationBuilder to process the data.[64]

In the Council of Europe, the Cybercrime Convention Committee (T-CY) delivered a guidance note on aspects of election interference using computer systems that the Budapest Convention on cybercrime covers.[65]

"Digital platforms are actors of progress for people, societies and economies. To preserve this progress, we need to ensure that they are not used to destabilise our democracies. We should develop a joint approach and common standards to tackle issues such as disinformation and online hate messages."

Ursula von der Leyen, (then Candidate for) President of the European Commission, ***A Union that strives for more: My agenda for Europe***, 6 July 2019

6.3.3. Updating the European rules for cyber investigations

In addition to cybercrime, the investigation and prosecution of traditional (offline) crime has become digital because the use of electronic information is pervasive in modern societies. Therefore, it is vital for law enforcement agencies to retain electronic information, including personal data, and then access it.

To meet new technological challenges, the Council of Europe and the EU are updating the rules on preserving and accessing electronic evidence. A key goal is to find new ways to make international mutual legal assistance more efficient while preserving fundamental rights, namely data protection and access to an effective remedy. However, some ways to enhance the speed of cross-border access to electronic evidence, such as direct cooperation between judicial authorities and private service providers, remain controversial.

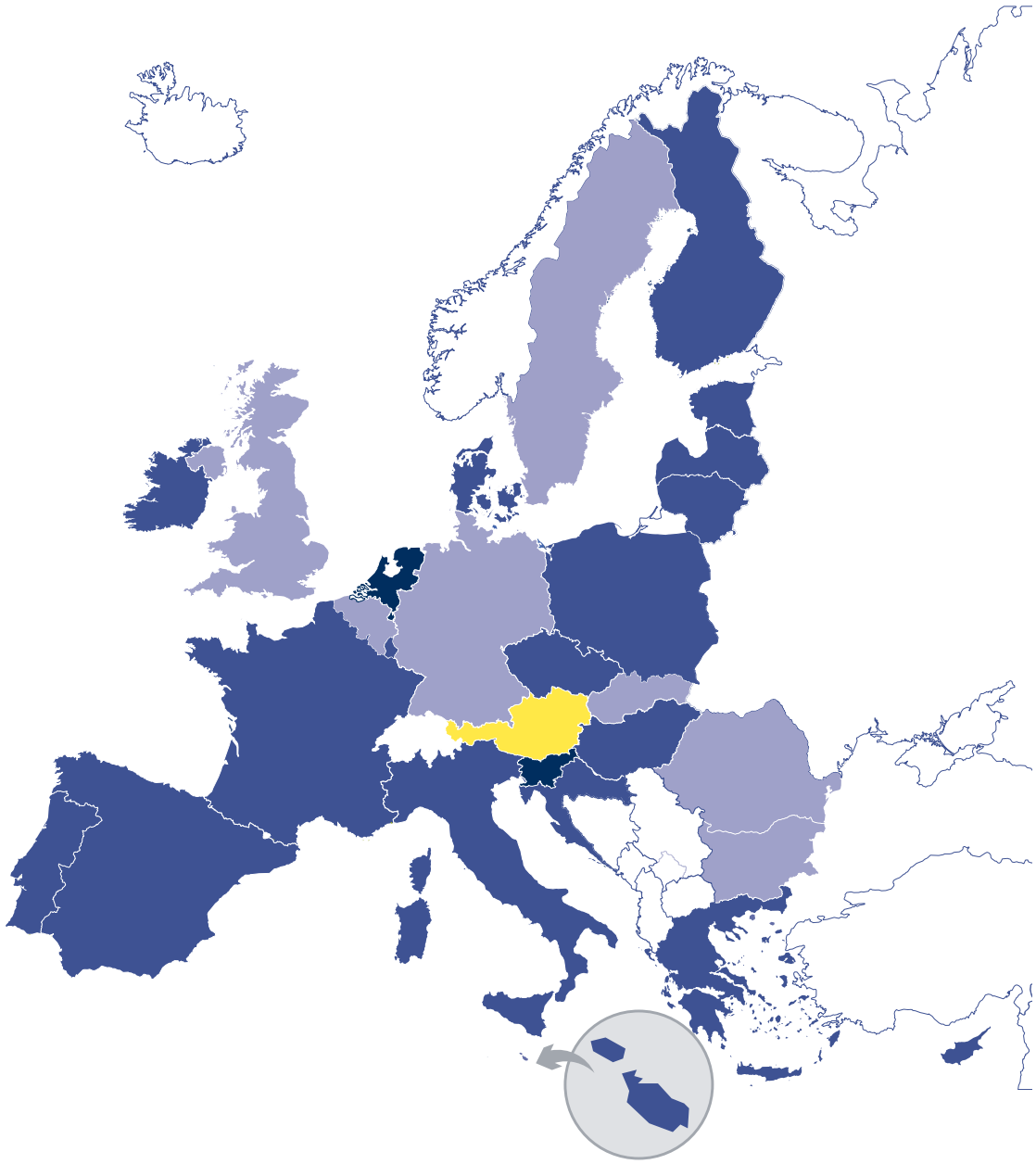
In June 2019, the Council of the European Union adopted the negotiating mandates on the Second Additional Protocol to the Council of Europe Convention of Cybercrime[66] and on the bilateral agreement between the EU and the USA on cross-border access to electronic evidence for judicial cooperation in criminal matters.[67] The negotiating directives of these new instruments[68] highlighted that the European Commission must ensure compatibility with the Union's internal rules on electronic evidence. However, the EU's co-legislators have divergent positions on the e-Evidence package.[69] Following the comments by academia[70] and data protection authorities,[71] the European Parliament's draft report[72] included 267 amendments to the proposal. They enhance the role of the authorities of the executing Member State (where service providers are established or represented) and/or the affected Member State (where the person resides whose data are sought).

6.3.4. Five years on: little progress on invalidated Data Retention Directive

Electronic information, including personal data, can be collected and used by law enforcement and/or intelligence services if service providers preserve it for their business purposes or under legal provisions on data retention. The CJEU invalidated the Data Retention Directive in 2014.[73] Yet there are limited efforts in Member States to review the national data retention rules under the requirements that the CJEU set out and further developed in the *Tele2 Sverige* case.

In *Tele2 Sverige*, the court precluded general data retention schemes that cover all subscribers and registered users, all means of electronic communication and all traffic data, and that provide for no differentiation, limitation or exception according to the objective pursued. On the other hand, it allowed targeted data retention regimes, provided that the retention of data is limited to what is strictly necessary, concerning the categories of data to be retained, the means of communication affected, the persons concerned and the retention period adopted.[74]

FIGURE 6.2: DATA RETENTION LEGAL FRAMEWORKS IN THE EU-28



- Data Retention Directive scheme
- No data retention regime (annulled/repealed by courts)
- Targeted data retention scheme
- Untargeted data retention with shorter periods

Source: FRA, 2019

Eighteen Member States have not updated their legal framework since the invalidation of the Data Retention Directive. Among them, **Denmark**, **Estonia**, **Finland**, **Ireland**, **Lithuania**, **Luxembourg** and the **Netherlands** have pending legislative reforms of the current data retention scheme, most of them on hold until the CJEU sheds new light on this issue in the **Belgian**,[75] **Estonian**,[76] **French**,[77] **German**[78] and **United Kingdom**'s[79] data retention cases. In these cases, national courts are seeking further clarification of the criteria that the *Tele2 Sverige* judgment laid down.

Those Member States that have updated their data retention framework have restricted their reforms to introducing shorter retention periods and/or the relevant requirements for lawful access to the data that service providers retain. They have kept a general data retention scheme. **Austria** is the only Member State with a targeted data retention scheme.

In June 2019, **Sweden**[80] adopted new data retention legislation. It provides for different retention periods depending on the intrusiveness of the data to be retained. For example, location data are retained for two months whereas other internet data that can identify the data subject are retained for six months.

Data retention constitutes an essential tool for law enforcement, judicial and other competent authorities to effectively investigate serious crime, as the Council of the EU highlighted in June 2019. It concluded that the future e-Privacy Regulation should keep open the legal possibility of schemes to retain data at EU and national levels in compliance with the Charter, as interpreted by the CJEU. It asked the European Commission to study possible solutions for retaining data, including a future legislative initiative.[81] Europol's digital evidence situation report 2019 supported this conclusion. Its findings identified short data retention periods as the main problem when contacting foreign-based online service providers.[82]

FRA opinions

FRA OPINION 6.1

EU Member States should ensure that national data protection supervisory authorities receive sufficient resources to allow them to carry out their mandates effectively. EU Member States should support independent and objective reviews of the national data protection supervisory authorities' workload to assess whether current budgets and human resources permit them to cope with their mandates and tasks.

Since the General Data Protection Regulation came into effect, the workload of data protection supervisory authorities has been unprecedented. The numbers of investigations and complaints have doubled in the majority of EU Member States. Contacts with public and private entities that process personal data have sometimes even tripled. In parallel, supervisory authorities had to organise awareness-raising and training activities, explaining data protection requirements to both individuals and data protection professionals.

Financial and human resources increased in 2019 for a number of data protection supervisory authorities, but several of these supervisors highlighted that they still do not suffice to cope with the workload. This could ultimately endanger the authorities' fulfilment of their mandate.

FRA OPINION 6.2

EU Member States should ensure adequate funding of qualified civil society organisations as key stakeholders in the application and enforcement of data protection rules. EU Member States are strongly encouraged to make use of the opening clause in Article 80 (2) of the GDPR in national laws, thereby allowing qualified civil society organisations to lodge complaints regarding data protection violations independently of a data subject's mandate.

The legal and technical expertise of qualified civil society organisations is essential to the application of the rights to data protection and to privacy. The right – established by Article 80 (1) of the GDPR – for data subjects to mandate a not-for-profit body, organisation or association to represent them is a welcomed step. However, few Member States have made use of Article 80 (2), which permits Member States to allow such bodies to launch legal proceedings without a mandate from data subjects.

Like that of supervisory authorities, civil society organisations' workload of investigations and complaints has considerably increased since the GDPR entered into force. However, they face additional challenges, because their resources are scarce. In addition, evidence of potential fundamental rights violations is difficult to obtain, given the technical complexity involved.

There is a race to innovate and develop Artificial Intelligence (AI) tools, and the EU is striving to lead this process. A number of EU Member States that employ AI in the security and socio-economic sectors have faced major challenges in making the technology transparent. Despite ongoing efforts to raise awareness of the ethical use of AI, Europeans remain unaware of the fundamental rights implications, such as to the right to privacy or non-discrimination, and how exactly the AI technology is being employed. For example, it is challenging to prove that discrimination has occurred when automated decision-making uses complex algorithms. Furthermore, profiling through automated data processing can potentially lead to social exclusion, which Member States consider as a major societal risk. A few judicial cases are already shaping and promoting changes to the policymaking and legislative processes. It is not well established how to safeguard fundamental rights and monitor compliance before actual violations occur.

FRA OPINION 6.3

The EU and national legislators should ensure that future and ongoing EU regulatory frameworks and preparatory legislative work address and promote transparent and thorough fundamental rights impact assessments, whenever AI technologies are employed. To complement this, the oversight of independent supervisory bodies is essential to guarantee accountability, trustworthiness and fairness.

FRA OPINION 6.4

EU Member States should review national rules on retention of data by service providers in order to align it with the requirements of the case law of the Court of Justice of the European Union.

Five years after the Court of Justice of the European Union (CJEU) invalidated the Data Retention Directive (2006/24/EC), there has been little progress at EU and Member State levels in terms of adapting existing rules to the requirements set out in the CJEU's jurisprudence. Most of the efforts by Member States focus on the requirements for law enforcement authorities to have lawful access to the data that service providers retain. However, with few exceptions, most Member States have kept a general data retention scheme that covers all subscribers and registered users, all means of electronic communication and all traffic data, and provides for no differentiation, limitation or exception depending on the objective. National courts are seeking further clarification from the CJEU of the criteria it laid down in previous cases, and a number of preliminary rulings about this are pending.

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78 CJEU, C-793/19***, Federal Republic of Germany v. SpaceNet AG,*** 29 October 2019, and C-794/19***, Federal Republic of Germany v. Telekom Deutschland GmbH,*** 29 October 2019.

79 CJEU, C-623/17, ***Privacy International***, 15 January 2020.

80 Sweden, Act on Electronic Communications (***Lag [2003:389] om elektronisk kommunikation)***, Chapter 6, Sections 16a and 16d; Act on Gathering of Data in Electronic Communications as Part of Intelligence Gathering by Law Enforcement Authorities (***Lag [2012:278] om inhämtning av uppgifter om elektronisk kommunikation i de brottsbekämpande myndigheternas underrättelseverksamhet***), Sections 2, 3, 4 and 5.

81 Council of the European Union, **Conclusions of the Council of the European Union on retention of data for the purpose of fighting crime**, 6 June 2019, Council document 10083/19.

82 Europol (2019), ***Sirius EU digital evidence situation report***, 20 December 2019, Section 5.3, 'Survey with judicial authorities', pp. 21–22.

RIGHTS OF THE CHILD

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UN & CoE

16 January

Commissioner for Human Rights of the Council of Europe sends a letter to the Convener of the Scottish Parliament's Equalities and Human Rights Committee. It reiterates her call to increase the age of criminal responsibility to 14 at least, but preferably higher, rather than to 12 as the Scottish Government proposes.

28 February

UN Committee on the Rights of the Child publishes its concluding observations on Belgium and Italy.

5 March

UN Committee on the Rights of the Child publishes its concluding observations on Czechia.

6 June

The Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Committee) adopts an Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children, finding that "sexting" does not amount to conduct related to "child pornography", when it is intended solely for the children's own private use.

26 June

UN Committee on the Rights of the Child publishes its concluding observations on Malta.

18 September

UN Committee on the Rights of the Child publishes General Comment No. 24 (2019) on children's rights in the child justice system.

15-18 October

Lanzarote Committee adopts a Declaration on protecting children in out-of-home care from sexual exploitation and sexual abuse, calling in particular to strengthen and support families before resorting to out-of-home care.

29 October

UN Committee on the Rights of Persons with Disabilities publishes concluding observations on Greece, referring to the rights of children with disabilities, among other topics.

13-14 November

Council of Europe holds a conference for a mid-term evaluation of its Children's Rights Strategy and to celebrate the 30th anniversary of the UN Convention on the Rights of the Child.

29 November

UN Committee on Economic, Social and Cultural Rights publishes views it adopted after examining communication (complaint) by an individual against Spain in a case regarding eviction and housing rights.

9 December

UN Committee on the Rights of the Child publishes its concluding observations on Portugal.

11 December

Committee of Ministers of the Council of Europe adopts a Declaration on addressing child poverty and a Recommendation on effective guardianship for unaccompanied and separated children in the context of migration.

EU

January 30

European Commission publishes its reflection paper *Towards a sustainable Europe by 2030* to inform the discussion about the future sustainability strategy for the EU. The future of children is among the points of focus of the reflection, particularly as regards poverty, inequality and the need to promote equal opportunities. A special focus is on high-quality education and early childhood education and care.

February 5

On Safer Internet Day, European Commission announces the creation of a new Expert Group on Safer Internet for Children.

April 4

European Parliament adopts its legislative resolution on the proposal for the establishment of the European Social Fund Plus (ESF+) for the programming period 2021–2024. It requests a targeted allocation of € 5.9 billion to support an EU Child Guarantee Scheme.

May 22

Council of the EU adopts Recommendation on high-quality early childhood education and care systems, also including an EU quality framework.

June 20

European Council agrees on a new strategic agenda for the EU for 2019–2024. It includes among EU priorities the building of a fair and social Europe and the implementation of the European Pillar of Social Rights, which provides for the protection of children from poverty.

June 25

European Council adopts Brussels IIa Recast Regulation, to protect children in cross-border disputes relating to parental responsibility and child abduction.

September 10

— Commissioner Dubravka Šuica (Democracy and Demography) is to lead the work on protecting children's rights and is entrusted with developing a comprehensive strategy on the rights of the child.

— Commissioner Nicolas Schmit (Jobs and Social Rights), is assigned to lead on developing an EU Child Guarantee as a tool to fight poverty and ensure children have access to basic services.

October 10

In a resolution on employment and social policies of the euro area (2019/2111(INI)), European Parliament calls on the European Commission to propose legislation for the implementation of an EU Child Guarantee to fight child poverty. It also calls for the fight against youth unemployment and long-term unemployment to be prioritised.

November 26

European Parliament adopts a resolution on children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child (2019/2876(RSP)).

Thirty years after the adoption of the UN Convention on the Rights of the Child, 2019 brought new policy developments at EU level. The new European Commission committed itself to adopting a new comprehensive strategy on children's rights. Its priorities included the establishment of an EU Child Guarantee. This is important because, despite a slight improvement, almost one in four children in Europe remained at risk of poverty or social exclusion. The risk is highest for children with migrant backgrounds or with less educated parents. By June 2019, Member States had to incorporate into national law the Procedural Safeguards Directive for children who are suspects or accused persons in criminal procedures. However, several Member States were still amending their national laws throughout the year. The European Commission initiated infringement procedures for lack of notification against seven Member States. The deadline to incorporate into national law the Audiovisual Media Services Directive, which aims to strengthen online safety, is in 2020. There was little progress in this regard. Meanwhile, although online sexual abuse was on the rise, the European Commission had to initiate infringement procedures against 23 Member States for failing to implement the Sexual Abuse Directive.

7.1. PRIORITISING THE FIGHT AGAINST CHILD POVERTY

Fighting child poverty is a priority in the EU. Following the call from the European Parliament,[1] the European Commission's President announced the adoption of an EU Child Guarantee to ensure that every child living in poverty, in particular children in vulnerable situations, has access to adequate nutrition, decent housing, and free healthcare, education and childcare.[2] At the same time, child poverty has gained more attention in the European Semester, the mechanism for monitoring and coordinating economic and social policies in the EU (see **Section 7.1.3**).

The EU 2020 strategy[3] aimed to have 20 million fewer people at risk of poverty or social exclusion (AROPE EU indicator)[4] in the EU-27 (without Croatia), using 2008 data as the baseline.[5] The latest Eurostat data are for 2018. They show that the AROPE has dropped by slightly less than 7 million people compared to 2008. Of these, fewer than 2.3 million were children (persons under 18).[6] Therefore, in 2018 poverty remained a grim reality for almost 23 million, or close to one out of four, children in the EU.

Persisting high rates of children at risk of poverty or social exclusion raise concerns under Article 24 of the EU Charter of Fundamental Rights. It provides that "[c]hildren shall have the right to such protection and care as is necessary for their well-being". The situation is also in striking contrast with the European Pillar of Social Rights, which states that "[c]hildren have the right to protection from poverty". Furthermore, it shows a failure to deliver on the global Agenda 2030 and the Sustainable Development Goals (SDG 1, Target 1.2), which include a major commitment to leave no one behind and to halve the proportion of all people, including children, living in poverty by 2030.[7] The situation also prompts concern with respect to a number of provisions under the European Social Charter of the Council of Europe,8 notably Article 30, which is the only provision under international human rights law that explicitly outlines a right to protection from poverty.

7.1.1. Overall EU poverty rates remain high, but national realities vary greatly

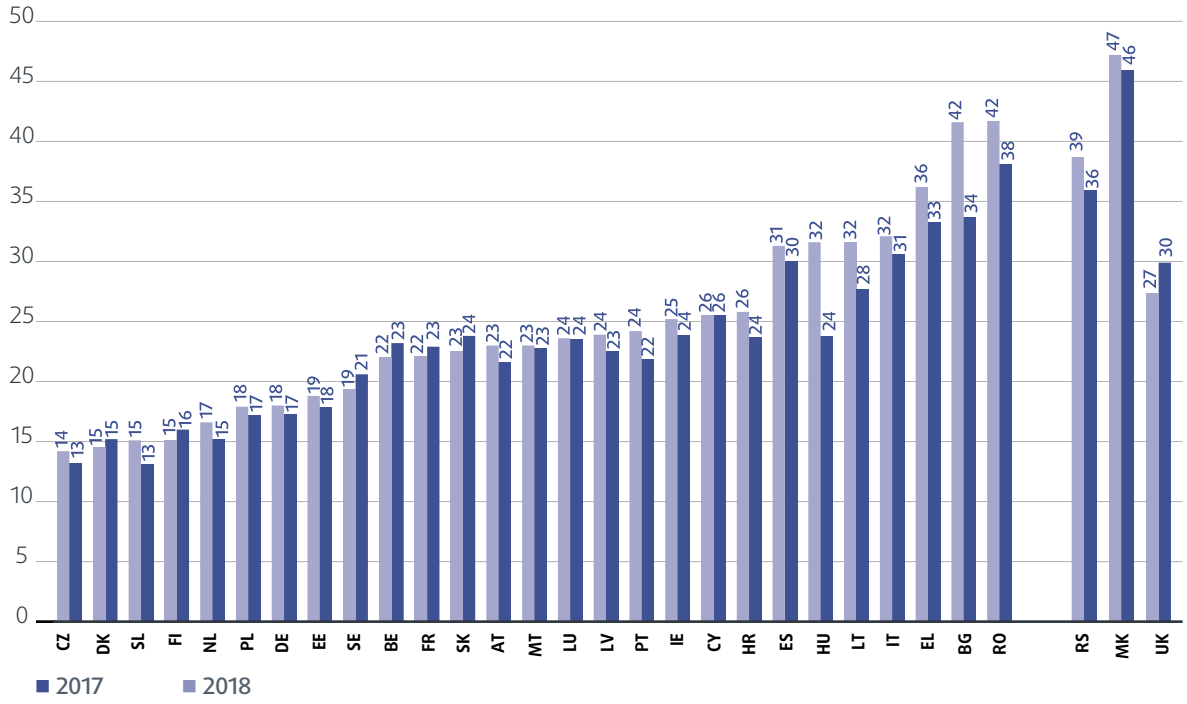
In 2018, the average percentage of children at risk of poverty or social exclusion in the EU-28 (including Croatia) continued to decrease to 24.3 %, compared with 24.9 % in 2017 and 26.4 % in 2016 (Figure 7.1).[9] However, the proportion of children at risk is 3 percentage points higher than that of adults (those aged 18 or above) (21.3 %).

Substantial differences between Member States persist. Encouragingly, in **Bulgaria** and **Hungary**, the AROPE rates for children dropped substantially in 2018, decreasing by around 8 percentage points. Overall, the number of countries with very high levels of children at risk of poverty or social exclusion decreased in 2018 compared to 2017. However, the rates remained above 30 % in **Romania** (38.1 %), **Bulgaria** (33.7 %), **Greece** (33.3 %) and **Italy** (30.6 %).

Notes:

Eurostat indicated a break in the time series in 2017 for the United Kingdom (UK), and preliminary results for Ireland and the UK for 2018.

FIGURE 7.1: CHILDREN AT RISK OF POVERTY OR SOCIAL EXCLUSION IN 2017 AND 2018, BY COUNTRY (%)



Source: FRA, 2020 [based on Eurostat, People at risk of poverty or social exclusion by age and sex [ilc_peps01] (population aged less than 18 years) [ilc_peps01], last update 11 March 2020]

Compared to 2017, AROPE rates increased in 2018 – slightly but perceptibly – in some Member States with generally low AROPE rates. In **Belgium**, **Denmark**, **Finland**, **France**, **Slovakia**, **Sweden** and the **United Kingdom**, data show an increase of 0.7 to 2.5 percentage points.

The risk of poverty (AROPE sub-indicator) in 2018 continued to be higher for certain groups of children, as FRA flagged in last year's fundamental rights report.[10] These include children with a migrant background, children with less educated parents, and children living in single-parent households, households with three or more children, or households with low work intensity.

In 2018, in the EU-28, children whose parents were born in a foreign country – regardless of whether these parents have citizenship of the reporting country – continued to have a higher risk of poverty than children with parents born in the country of reference (32.4 % and 17.0 %, respectively).[11] Children with parents with foreign citizenship are even worse off. In 2018 in the EU-28, 37.7 % of these children were at risk of poverty, compared with only 17.5 % of children whose parents have the citizenship of the country where they live. However, the rate for children whose parents have a foreign citizenship was 2.8 percentage points lower than in 2017.[12]

Parents' social backgrounds and household types also strongly affect child poverty in the EU-28. The lower the parents' education level, the higher the children's risk of poverty. In 2018, more than half (51.3 %) of children whose parents had completed at most lower secondary education (ISCED 0–2) were at risk of poverty. By comparison, this risk was 23.6 % for children whose parents had completed upper secondary education (ISCED 3–4) and 8.3 % for those whose parents had completed tertiary education (ISCED 5–8). However, the AROP sub-indicator for children with less educated parents was 1.6 percentage points lower than in 2017.[13]

Children in single-parent households remained very vulnerable in 2018. In the EU-28, 35.3 % of single-parent households were at risk of poverty, compared with 16.7 % of households with at least two adults and dependent children.[14] The situation remains unchanged compared to 2017. In 2018, 25.6 % of households with two adults and three or more children were at risk of poverty, compared with 14.8 % of households with two dependent children or 12.6 % with one.[15] However, the situation of families with three and more children improved by 1.2 percentage points compared to 2017.

"We have to care for the most vulnerable: our children. We have to fight poverty. [...] We need a Child Guarantee to help ensure that every child in Europe at risk of poverty and social exclusion has access to the most basic of rights like healthcare and education. It will empower them and it pays tremendously if we back them when they are young."

Ursula von der Leyen, (then Candidate for) President of the European Commission, ***Opening Statement in the European Parliament Plenary Session***, July 2019

7.1.2. The EU Child Guarantee gains momentum

The year 2019 saw a strong political commitment to fight child poverty expressed at the highest level in the EU. In particular, the EU is preparing to establish an EU Child Guarantee. The European Parliament proposed this in 2015.[16] The European Commission embraced it in 2019 and it gained considerable impetus.

In July 2019, Ursula von der Leyen made clear, in her opening statement to the European Parliament as a candidate for President of the new European Commission, that fighting child poverty would be among the Commission's priorities. She described the high number of children living in poverty as "our collective shame".[17]

The Vice-President for Democracy and Demography, Dubravka Šuica, is to prepare a new EU strategy on the rights of the child and to coordinate the work on the EU Child Guarantee. The Commissioner for Jobs and Social Rights, Nicolas Schmit, is leading the work on developing the Child Guarantee. The President's September 2019 mission letters to them reflect the priority the Commission gives to the fight against child poverty.[18]

New members of the European Commission reiterated relevant commitments during their hearings before the European Parliament.[19]

In April 2019, the European Parliament adopted the legislative resolution on its position regarding the Commission's proposal on the European Social Fund Plus (ESF+). The Parliament suggests a number of amendments to ensure that the ESF+ includes a dedicated priority or programme to support the EU Child Guarantee.[20] It proposes that the ESF+ regulation should contain a provision obliging Member States to allocate at least 5 % of their ESF+ resources (i.e. € 5.9 billion across the EU) to this objective. Civil society has supported this proposal, welcoming a possible allocation of a specific amount for the Child Guarantee.[21]

The European Commission services sped up their preparatory work to assess the feasibility of a future EU Child Guarantee. In September and October 2019, special fact-finding workshops took place. They brought together national authorities, experts and EU services, including FRA. The objective was to prepare the feasibility study, focusing on four specific groups of vulnerable children: children (i) in precarious family situations (for example, because of the economic fragility of the family, social factors leading family members to exclusion or the composition of the household), (ii) residing in institutions, (iii) with a migrant background and (iv) with disabilities.[22]

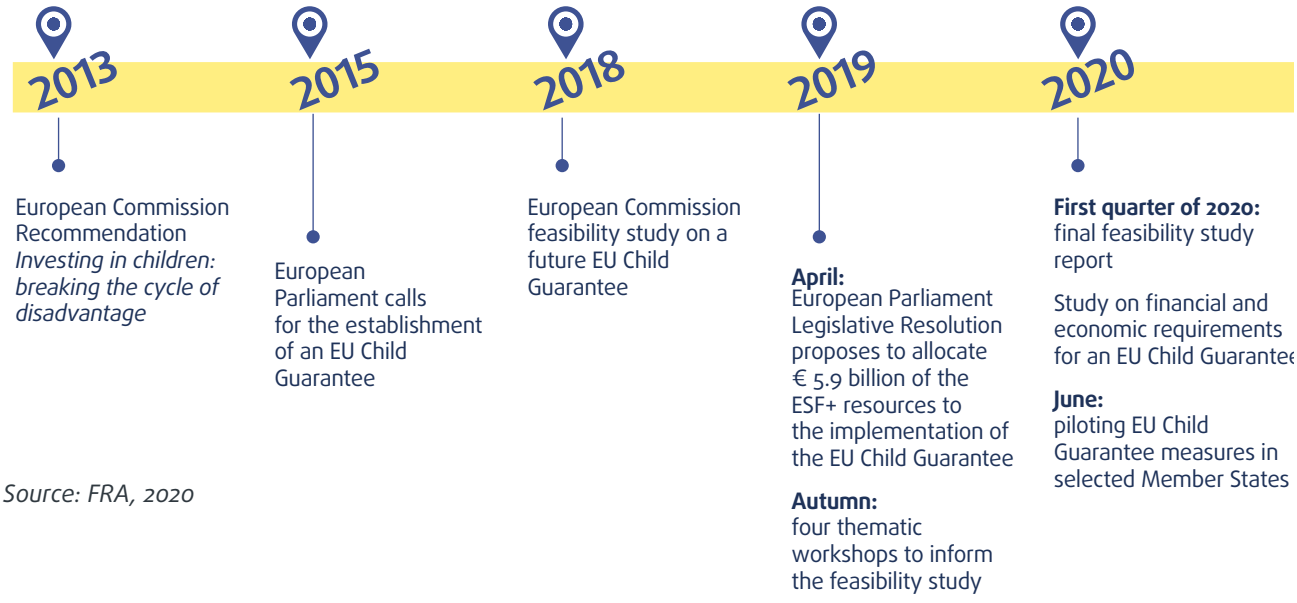
In August 2019, the European Commission started the second phase of its preparatory work. It aims to define the economic requirements and framework for an EU Child Guarantee that could go beyond the four categories mentioned above to cover all children at risk of poverty in the EU.[23] The preparatory work builds on its 2013 Recommendation *Investing in children: breaking the cycle of disadvantage*.[24]

Figure 7.2 shows the major steps towards establishing an EU Child Guarantee.

"The European Parliament [...] calls on the EU and its Member States to step up efforts to end child poverty by adopting a further Council recommendation on investing in children [...] and by setting targets in the EU's 2030 Agenda to reduce child poverty by half [...][and] calls on the Member States to support the establishment of a European Child Guarantee with appropriate resources."

European Parliament, ***Resolution on children's rights on the occasion of the 30th anniversary of the UN Convention on the Rights of the Child***, 26 November 2019

FIGURE 7.2: TOWARDS AN EU CHILD GUARANTEE: KEY MILESTONES



Source: FRA, 2020

PROMISING PRACTICE

Making children's rights visible in the state budget

In 2019, the Ministry of Demography, Family, Youth and Social Policy in **Croatia** published what all government bodies were expected to spend on children's rights in 2019 and planned to spend on them in 2020–2021. An annual report monitors what actually is spent, sorted by programmes and activities. This will help better evaluating progress, ensuring transparency and improving the budgetary framework.

*For more information, see Croatia, Ministry of Demography, Family, Youth and Social Policy (2019), "Children's budget" in Croatia (**Objavljen prvi „Dječji proračun"**).*

7.1.3. Child poverty gains more visibility in the European Semester

The European Semester paid more attention to issues related to child poverty in 2019 than in previous years.[25] Specific references to child poverty appeared in the recitals to the country-specific recommendations (CSRs) to seven Member States: **Germany**, **Greece**, **Italy**, **Lithuania**, **Poland**, **Romania** and **Spain**. However, no CSR targeted child poverty as such, although general CSRs on poverty, income support or improvements of the social safety net also affect child poverty. Such CSRs on more general issues that potentially have an impact on child poverty were addressed to **Bulgaria**, **Croatia**, **Estonia**, **Hungary**, **Latvia**, **Lithuania**, **Portugal**, **Romania** and **Spain**.

Early childhood education and childcare services can have an important impact on child poverty or social exclusion. CSRs identified the quality and adequacy of these services as an issue to consider in many EU Member States, but the aim was to foster women's participation in the labour market more than to address child poverty. The EU Council addressed CSRs on these services to **Austria**, **Cyprus**, **Czechia**, **Ireland**, **Italy**, **Poland** and **Slovakia**.

Moreover, the European Commission's country reports contained for the first time an annex with the key investment priorities for each Member State to address in designing its new EU-funded programmes for 2021–2027. The reports were published in February 2019 as part of the European Semester. The priorities concerned, in particular, programmes to be funded by the ESF+ and the European Regional and Development Fund.[26] This is in line with the European Commission's proposal to link allocations of EU funding with addressing challenges identified in the European Semester and the CSRs.[27]

Table 7.1 presents an overview of child-specific priority investment areas for each Member State. Early childhood education and care is a priority in 19 Member States. Education more generally, including prevention of early school leaving, is a priority in 21. On the other hand, social integration of children at risk of poverty or social exclusion, and the de-institutionalisation of children living in institutions, are priorities for fewer Member States (seven and six,[28] respectively).

Other priority investment areas in the country reports are also relevant to combating child poverty. They have, however, a broader scope, addressing all groups of the population and not specifically children.

TABLE 7.1: CHILD-SPECIFIC PRIORITY INVESTMENT AREAS IDENTIFIED IN EUROPEAN COMMISSION'S 2019 COUNTRY REPORTS

Policy area	Early childhood education and care	Education	Social integration of children at risk of poverty or social exclusion	De-institutionalisation of children
Member States	Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Spain	Austria, Belgium, Bulgaria, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Malta, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden	Germany, Greece, Ireland, Italy, Portugal, Romania, Spain	Bulgaria, Czechia, Greece, Poland, Romania, Slovakia

Source: FRA, 2020 [based on Annex D of each 2019 European Semester country report published by the European Commission]

7.2. CHILDREN AND JUSTICE

7.2.1. Incorporating the Procedural Safeguards Directive into national law: limited progress

The Procedural Safeguards Directive guarantees that, in juvenile justice proceedings, children have a right to be informed and heard in a child-friendly way, with legal aid and privacy protective measures.[29] Member States had to incorporate it into national law by 11 June 2019. However, around half of the Member States missed this deadline.

Most Member States reformed their criminal codes, criminal procedure codes or specialised juvenile justice codes in 2018 or 2019. The main areas of reform were creating or strengthening specialised courts or boards, creating mechanisms to ensure that the child receives information, regulating cases where the age is unknown, developing individual assessments, and training law-enforcement staff.

Only 13 Member States notified the European Commission that they had completed the transposition of the directive into national law by the deadline. In July 2019, the Commission opened infringement procedures (formal notice under Article 258 of the Treaty on the Functioning of the European Union) against **Bulgaria**, **Croatia**, **Cyprus**, **Czechia**, **Germany**, **Greece** and **Malta**.[30]

Several Member States were still amending national laws during 2019. For example, **Germany** adopted two new laws in December 2019.[31] These reforms strengthen the role of juvenile court assistance, lower the requirements for state-funded defense, and comprehensively regulate the information rights of the accused young person. **Croatia** also amended its Juvenile Courts Act, strengthening the guarantees during criminal proceedings against children suspected or accused of criminal offences.[32]

Czechia adopted in August 2019 a new act that increased the amount of information children, and their parents or guardians, receive during criminal proceedings.[33] It also changed the Act on Youth Court so that, if it is unclear if the person in question has reached 18 years of age, they are to be considered a child.[34]

The amendments include an investigation into the conditions of the child, based on which a report is to be written on their personal, family and social environment. The amendment clearly defines the time frame for the investigation, which includes input from the child's legal representatives or guardians.

In December 2019, the Estonian parliament amended the Penal Code. The amendments strengthen the right of the child to an individual assessment and to medical examination upon deprivation of liberty. His or her legal representative or the counsel as the right to participate in the criminal proceedings.[35]

The Procedural Safeguards Directive is legally binding on all EU Member States except **Denmark** and **Ireland**. Still, in **Denmark**, a new law on juvenile justice entered into force in January 2019, aimed at strengthening procedural rights of children.[36] Among other things, it establishes a Juvenile Delinquency Board. The board is competent to decide on targeted individual social measures for children and juveniles aged 10 to 17 who are suspected of (ages 10-14) or sentenced for (ages 15-17) serious criminal offences. The board hearings

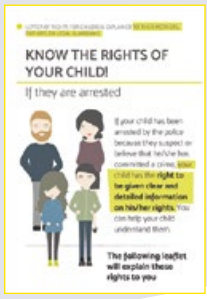
PROMISING PRACTICE

Using information leaflets to raise awareness of children's rights in criminal proceedings

Children and parents must receive information about the child's rights and general aspects of criminal proceedings (Articles 4 and 5 of Directive 2016/800). The EU-funded project Child-Friendly JT has helped organisations in several Member States to implement this right.

It has produced six leaflets, three for children and a further three aimed at their parents or legal guardians. These contain information on the rights of children who are suspected or accused in criminal proceedings. Each leaflet covers a different phase of the criminal process: arrest, trial and pre-trial detention. The leaflets are available in 27 languages.

*For more information, see Fundación Diagrama, '**Information leaflets: The rights of children in criminal proceedings**'.*



do not constitute or replace a criminal process and the board cannot impose criminal sanctions. Rather, in dialogue with the child or the juvenile and the custody holders and other resource persons, the board decides on social measures with the aim of preventing the child or the juvenile from following a criminal path.

7.2.2. Age of criminal responsibility

The Procedural Safeguards Directive does not regulate the minimum age for criminal responsibility. National law sets it. In 2019, **Scotland**[37] increased it from eight to 12 years.[38] The rest of the **United Kingdom** has the lowest age of criminal responsibility in the EU, at 10 years.

Most Member States have set 14 years as the age of criminal responsibility. A few Member States have set it at 15 years: **Czechia**, **Denmark**, **Finland**, **Poland** and **Sweden**.[39]

The CRC Committee encourages countries to raise the minimum age of criminal responsibility to at least 14 years,[40] replacing its previous recommendation of a minimum age of 12.[41] It focuses on children who are suspects or accused of having committed a crime. The committee explains that the new comment reflects the new international and regional standards, jurisprudence and evidence of effective practice, but also reflects concerns, such as systems with exceptions to the minimum age and of systems with two minimum ages and the persistent use of deprivation of liberty.

The general comment includes a number of core elements for a justice system that promotes a preventative approach, diversion and restorative measures and guarantees for a fair trial. It also covers a range of issues, such as recruitment of children by armed groups, including those designated as terrorist groups.

FRA ACTIVITY

Providing guidance on protecting children without parental care

FRA developed this guide in cooperation with the European Commission. It implements an action set forth in the 2017 Communication on stepping up EU action against trafficking in human beings, and builds on the 2018 EU Agencies Joint Statement. Amongst other things, the guidance recalls that one in four registered victims of trafficking in human beings in the EU is a child trafficked into and within the EU, and often within their own Member State. Girls are overwhelmingly targeted. Registered EU child victims are twice the number of non-EU child victims.

The guide targets professionals who may come into direct contact with children who are deprived of parental care and found in need of protection in an EU Member State other than their own, including child victims of trafficking, or who have been forced to commit a crime. The guide is now available in English. It will be translated into all EU languages in 2020.

See FRA (2019), ***Children deprived of parental care found in an EU Member State other than their own: A guide to enhance child protection focusing on victims of trafficking.***

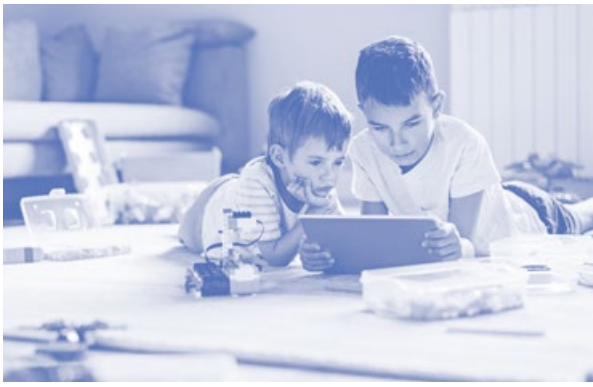
PROMISING PRACTICE

Using reprimand as a diversion measure for first-time offenders

In 2018, the Dutch police started a pilot activity in the district Twente, part of the Police Unit Eastern **Netherlands**. Children who commit their first minor offence, such as shoplifting, are not arrested, but instead face an official warning: a firm conversation with a police officer in the presence of their parents within seven days of the identification of the child. An official warning is used as a diversion measure. It prevents the initiation of judicial proceedings and does not generate criminal records for the child. In 2019, the police started extending it to all police units in the Netherlands.

For more information, see Netherlands, Police (2018), '***Betrapt! kind niet in de cel maar wat dan wel?***', *news release.*

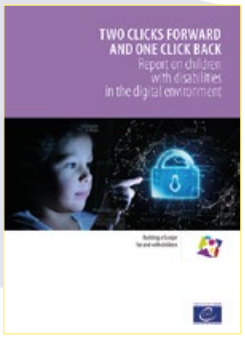
7.3. DIGITAL SPACE BRINGS OPPORTUNITIES AND RISKS FOR CHILDREN



Existing technologies, particularly the internet, have created a new layer in the persistent tension between children's participation and their protection. The internet brings great benefits for children: they can obtain information and interact with peers, acquire knowledge, improve their learning skills and develop their personality. But these benefits go hand in hand with diverse risks, including child sexual abuse imagery, bullying and data protection issues.

Children's increasing use of new technologies raises issues concerning several rights that the CRC guarantees. These include the rights to be safeguarded from abuse (Article 3); to privacy and data protection (Article 16); to access to information (Article 17); to education (Article 28); and to freedom of expression (Article 13).[42] Several related rights are also guaranteed in the EU Charter of Fundamental Rights, and relate to the digital environment. The cornerstone for children is Article 24, which recognises children's rights to protection and participation.[43] Children's rights to protection, privacy and freedom of expression online are also protected through Articles 3, 8 and 10 of the European Convention on Human Rights. For more information on data protection, see **Chapter 6** on Information society, privacy and data protection.

How do children with disabilities experience the digital environment?



For more information, see Council of Europe (2019), ***Two clicks forward and one click back: Report on children with disabilities in the digital environment****.*

The Council of Europe's consultative report, "Two clicks forward and one click back", seeks to bridge a research gap. It finds that these children face a "triple barrier" in the enjoyment of their rights. First, their status as children means that they are not always being heard and taken seriously. Second, their disability often leads to negative assumptions about their capacities and competence in online decision-making. Third, parents and other adults are often more protective of them than other children.

The report concludes with practical advice to stakeholders, including governments, the digital industry, school and healthcare services, on how to better uphold the rights of these children in the digital world.

7.3.1. The Audiovisual Media Services Directive: adapting to new realities

The European Union plays an important role in developing safe internet policies for children, guided by the European Strategy for a Better Internet for Children.[44] The amended Audiovisual Media Services Directive (AVMS Directive) is one of the latest steps to ensure the protection of children online. The Strategy on the Rights of the Child, which the new European Commission announced, is expected to cover child safety online, too.[45]

In 2019, the European Commission set up a new expert group on Safer Internet for Children.[46] It comprises representatives from EU Member States, Iceland and Norway. One particular aim is to help share best practices in implementing the AVMS Directive and in ensuring parental consent to access children's data that the General Data Protection Regulation covers.[47]

The amended AVMS Directive requires Member States to adopt measures to protect children from harmful content, not only on TV and through traditional communication media, but also on online video-sharing platforms such as YouTube, Instagram or TikTok. It entered into force in December 2018 and Member States need to incorporate it into national law no later than September 2020.[48] The AVMS Directive also regulates child data protection and prohibits providers from processing children's personal data for commercial purposes, such as "direct marketing, profiling and behaviourally targeted advertising" (Article 6a).

Member States continued to incorporate the AVMS Directive into national law during 2019. **Hungary** has already done so. Its amended legislation entered into force on 1 August 2019. It establishes detailed rules on the protection of children, including new powers for the media authority to enforce the use of age verification tools or similar technical measures.[49] Other Member States have started consultations on the directive or drafted legislative amendments, such as **Denmark**,[50] **Finland**,[51] **Ireland**,[52] **Latvia**,[53] the **Netherlands**,[54] **Spain**[55] and the **United Kingdom**.[56]

In **Ireland**, the public consultation highlighted the need for a clear definition of 'harmful content'. It should include child sex abuse, serious cyberbullying and material that promotes self-harm or encourages nutritional deprivation. Respondents also stated that, in addition to the right to be protected from harm, children have the same range of fundamental rights as adults, including freedom of expression and access to information.[57]

In the **United Kingdom**, the government proposal gives companies a new statutory duty of care. They must take more responsibility for the safety of their users, particularly children, and tackle harm arising from content or activity on their services. An independent regulator will be responsible for monitoring compliance of that duty and will prioritise action to tackle activity or content where children or other vulnerable users are at risk.[58]

7.3.2. Child sexual abuse online: countering a growing risk

Sexual abuse or exploitation takes place in the physical world, but the subsequent sharing of images and videos depicting this abuse significantly aggravates the impact of these crimes.[59] The amount of online child sexual abuse is staggering and continues to increase. An increasing number of respondents are concerned about experiencing or falling victim to child pornography, a special Eurobarometer survey on 'Europeans' attitudes towards cyber security' shows.[60] See Section 6.3 for further information on cybercrime.

Directive 2011/93 on combating sexual abuse and exploitation of children and child pornography[61] continues to be the key EU instrument in the field of online abuse. It includes several related provisions. These include the obligation to criminalise "knowingly obtaining access, by means of information and communication technology, to child abuse images" (Article 5 (1) and (3), and recital (18)), as well as online grooming (Article 6 and recital (19)). It also requires taking measures to enable investigative units to attempt to identify child victims of online abuse (Article 15 (4)), as well as measures against websites containing or disseminating child abuse material (Article 25 and recitals (46)–(47)).

The Council of Europe's Lanzarote Convention,[62] which has been adopted by all EU Member States except Ireland, contains comprehensive obligations to prevent, protect, prosecute and promote cooperation in relation to child sexual exploitation and sexual abuse, including where facilitated by information and communication technologies (ICTs).[63]

The European Commission already recognised the complexity of incorporating Directive 2011/93 into national law, and the delays in doing so, in its 2016 implementation report on the directive.[64] The directive is ambitious and comprehensive. It requires reforms of criminal and criminal procedure laws; the development of administrative measures; and the involvement of multiple bodies, such as national and regional authorities, civil society organisations and internet service providers. Three years later, in 2019, the Commission opened infringement procedures against 23 Member States, through letters of formal notice, for failing to implement EU rules. The only Member States bound by the directive[65] that have implemented it are **Cyprus**, the **Netherlands**, **Ireland** and the **United Kingdom**.[66]

PROMISING PRACTICE

Using artificial intelligence to detect online child grooming

A cross-industry team from Microsoft, The Meet Group, Roblox, Kik, Thorn and others launched a new grooming detection technique, "Project Artemis", by which online predators attempting to lure children for sexual purposes can be detected, address and reported.

The technique began development at a Hackathon co-hosted by Microsoft and the United Kingdom's Home Office in November 2018. It is applied to historical text-based chat conversations. It evaluates and "rates" conversation characteristics and assigns an overall probability rating. This rating can then be used as a determiner, set by individual companies implementing the technique, as to when a flagged conversation should be sent to human moderators for review.

Human moderators would then be capable of identifying imminent threats for referral to law enforcement, as well as incidents of suspected child sexual exploitation to NGOs, including the National Center for Missing and Exploited Children, ECPAT International, INHOPE and the Internet Watch Foundation. Licensing and adoption of the technique will be handled by Thorn.

*For more information, see United Kingdom, Home Office and Patel, P. (2020), '**New AI technique to block online child grooming launched**.*

Several Member States have adopted or proposed new legislation to strengthen the responses to online violence against children and child abuse. For example, some Member States have introduced a formal legal basis in their criminal codes to allow law-enforcement authorities to use decoy victims (police officers impersonating children).

In the **Netherlands**, a new code entered into force in June 2019. It gives a formal legal basis to the use of decoy victims.[67] It also amends the Dutch Criminal Code and the Dutch Code of Criminal Proceedings. The criminal offence of grooming covers soliciting children over the internet for sexual abuse. The code extends it to soliciting, for sexual purposes, any person impersonating a child.[68]

In August 2019, the **German** Federal Government tabled a new law to criminalise cyber-grooming.[69] The Federal Council stated that the proposed bill did not go far enough. It suggested criminalising all attempts at cyber-grooming, including attempts to contact a child, even if they are unsuccessful, for example, for technical reasons.[70] Moreover, the Federal Council proposed allowing covert investigators to upload fake child pornography to prove their credibility to alleged offenders. The Federal Government tabled an amended version of its initial bill in the Bundestag, which held an expert hearing in November 2019.[71]

The Council of Europe,[72] in cooperation with the Cybercrime Office, implemented a project entitled End0CSEA@Europe. OCSEA stands for online child sexual exploitation and abuse. Under the project, they published a report that identifies promising practices and common challenges that Council of Europe member states face.[73] It also brought out a comparative review of mechanisms for collective action to prevent and combat online child sexual exploitation and abuse.[74] In addition, it produced a child-friendly booklet for teenagers, which explores ways in which abuse can take place online and through modern technologies.[75]

7.3.3. Minimum age of consent in the context of the General Data Protection Regulation

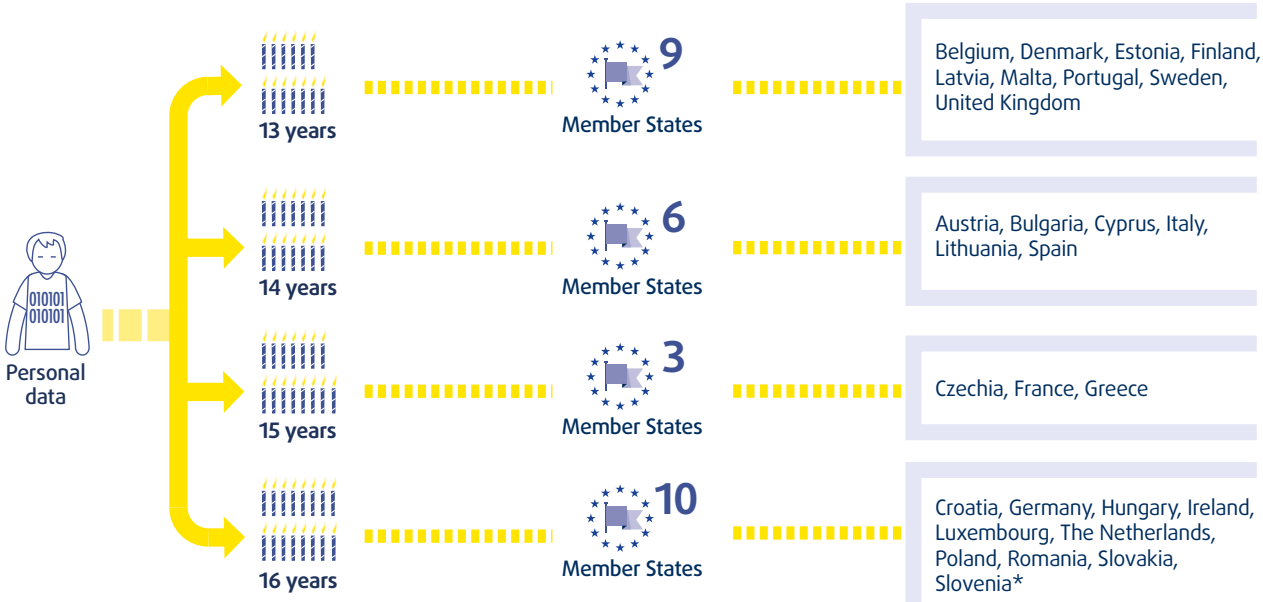
The General Data Protection Regulation (GDPR) became applicable in May 2018. It identifies children as "vulnerable natural persons" and underlines that processing children's data may result in risk "of varying likelihood and severity".[76] For an overview of the implementation of the GDPR, see Chapter 6.

All Member States have already amended their national data protection laws in line with EU rules, except **Slovenia**, which is still revising its national legislation. **Bulgaria**,[77] **Czechia**,[78] **Estonia**,[79] **Greece**[80] and **Portugal**[81] updated their national data protection laws during 2019. Supervisory authorities are now developing guidance or holding public consultations on the practical implementation of the GDPR for children. For example, the Information Commissioner's Office in the **United Kingdom** has submitted to the government a 'Kids Code', after an open consultation.[82] The code is a requirement of the UK Data Protection Act,[83] which was adopted in 2018.

The age of consent to processing of personal data is still a matter of intense debate. Article 8 of the GDPR specifies that processing a child's personal data in relation to information society services offered directly to the child is lawful only where the child is at least 16 years old. If the child is under 16, processing such data is only lawful with parental consent or authorisation. However, Member States may provide for a lower age at which children no longer need parental consent or authorisation, as long as this is not below 13 years.

Figure 7.3 gives an overview of the current state of play on implementing Article 8.[84] Most Member States have decided to deviate from the general rule of 16 years, lowering the age threshold to 13, 14 or 15 years.

FIGURE 7.3: MINIMUM AGE OF CONSENT TO PROCESSING OF PERSONAL DATA FOR IT SERVICES



*Source: FRA, 2020 [based on Better Internet for Kids, **'Status quo regarding the child's Article 8 GDPR age of consent for data processing across the EU'**, 20 December 2019]*

Note:
*Slovenia is applying the general rule of 16 years (as per Article 8 of the GDPR) until national law defines if further.

In June 2019, the European Commission took stock of the application of the GDPR one year on.[85] Its report suggests the need to further specify how the regulation applies to the age of consent by children for online services.

The European Commission has a Multistakeholder Expert Group on the GDPR application, comprising independent experts, non-governmental organisations, trade and business associations, and banks and financial institutions. It also expressed concerns about the application of parental consent requirements under the GDPR, when providing input to the one-year review. [86] It notes that data subjects often receive unclear information about who can consent, whether children or holders of parental responsibility. In the group's view, this may deny services to children and keep them away from the internet until they have attained a certain age, which is not the purpose of the GDPR.

Some digital platforms use different countries' laws to base data processing on other forms of authorisation than consent. That worries consumers' organisations working with children's welfare organisations. In particular, platforms sometimes choose as a legal basis the minimum age for entering a contract according to the applicable national law. Such practices circumvent the obligations under Article 8 of the GDPR, and will lead to a fragmentation across the EU that the GDPR did not intend, the organisations warn. In addition, further clarification is needed about age verification for processing children's data, the report suggests.[87] The Council of Europe has found that children are rarely consulted on data protection matters; and that they are not always aware of the extent to which their data were being used online.[88]

FRA opinions

FRA OPINION 7.1

The EU legislature should ensure that a future EU Child Guarantee is resourced adequately through EU funds and becomes a specific investment priority for the programming period 2021-2027. The EU institutions should consider adopting a recommendation for the EU Child Guarantee to provide the necessary guidance for its effective implementation. This should include a roadmap and concrete policy measures with reference to legal and policy commitments. The European Semester should review regular progress reports in respect to that recommendation and feed relevant information into its country-specific recommendations, especially as EU funds will be used to support implementation.

Almost one out of four children in the EU continue to live at risk of poverty or social exclusion. This raises concerns under Article 24 of the EU Charter of Fundamental Rights, which provides that "Children shall have the right to such protection and care as is necessary for their well-being", and the European Pillar of Social Rights, which lays down the right of children to be protected against poverty. In 2019, the European Parliament and the European Commission expressed a strong political commitment to fighting child poverty and establishing an EU Child Guarantee. To bring the guarantee into existence, this strong political commitment by all EU institutions, including the Council of the EU, and by the Member States, needs to continue.

The EU Child Guarantee is expected to ensure that every child living in poverty, particularly those in vulnerable situations, has access to adequate nutrition, decent housing, and free healthcare, education and early childhood education and care. This would contribute to delivering on the legal commitments of the EU and Member States in the area of the rights of the child. It would also help implement the major policy commitment of the 2030 Agenda for sustainable development to leave no one behind.

The European Parliament has underlined the importance of adequate funding at both EU and national levels to support a future Child Guarantee. It has proposed that Member States allocate at least € 5.9 billion of the European Social Fund Plus for the programming period 2021–2027 to support the Child Guarantee.

EU Member States had to incorporate the Procedural Safeguards Directive (2016/800/EU) into national law by 11 June 2019. The directive guarantees procedural safeguards for children who are suspects or accused persons in criminal proceedings. It includes the right of defence and the presumption of innocence, as established in Article 48 of the EU Charter of Fundamental Rights, and the best interests of the child as a primary consideration, as established in Article 24 of the Charter. Its preamble calls for considering the Council of Europe Guidelines on child-friendly justice.

However, by the deadline, only 13 Member States had notified complete incorporation. The European Commission initiated infringement procedures against seven Member States for lack of notification.

FRA OPINION 7.2

EU Member States should transpose the Procedural Safeguards Directive to ensure the effective application of procedural safeguards for children who are suspects or accused persons in criminal proceedings. They should facilitate its implementation by assisting legal practitioners involved in criminal proceedings through professional guidance and training. The European Commission could further support EU Member States – for example, through the provision of further legislative guidance and by facilitating the exchange of practical experiences among Member States. EU Member States and the European Commission should assess and consider children's own experiences of, and perspectives on, how effectively those procedural safeguards are put in place.

Article 24 of the EU Charter of Fundamental Rights proclaims the right of children to be protected and also to be heard. These rights are often at stake in the online world.

The GDPR specifies that, for children under 16, the holder of parental responsibility shall give consent or authorise the processing of their personal data in relation to information society services offered directly to children. However, Member States may provide for a lower age for consent, as long as this is not below 13 years. Member States have set different age limits, ranging from 13 to 16 years. The European Commission's Multistakeholder Expert Group on the application of the GDPR has noted that there is a lack of guidance regarding age limits for consent and age-verification tools.

The incorporation of the revised Audiovisual Media Services Directive (Directive (EU) 2018/1808) into national law, due in September 2020, saw little progress. The directive regulates children's access to all audiovisual media, including, for example, video-sharing platforms such as YouTube or Instagram. It also requires Member States to take appropriate measures against child pornography.

Meanwhile, child sexual abuse online has been on the rise. In 2019, the European Commission initiated infringement procedures against 23 EU Member States for failing to implement the Sexual Abuse Directive (2011/93/EU).

FRA OPINION 7.3

EU Member States, in cooperation with service providers and relevant civil society actors, should identify and develop appropriate measures to provide clear information on the GDPR's application to children to balance the duty to protect children with the need to provide children with access to the internet. To ensure children's protection, the European Commission should facilitate an agreement among Member States and service providers on standard age-verification tools.

FRA OPINION 7.4

EU Member States should initiate or continue the process of transposing the Audiovisual Media Services Directive. They should do so in close consultation with service providers and relevant civil society actors. They should also pay particular attention to addressing child sexual abuse online, especially the sharing of child pornography, as required by Article 28b of the directive.

EU Member States should make every effort towards the correct transposition of the Sexual Abuse Directive, and ensure legislation and adequate policy measures. These should aim to successfully prevent crimes of sexual abuse, protect the victims in an age-appropriate way, and prosecute the offenders for committing any form of sexual abuse via the internet.

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84 Better Internet for Kids (2019), '**Status quo regarding the child's Article 8 GDPR age of consent for data processing across the EU**', 20 December 2019.

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86 European Commission, Multistakeholder Expert Group to support the application of Regulation (EU) 2016/679 (2019), ***Contribution from the multistakeholder expert group to the stock-taking exercise of June 2019 on one year of GDPR application***, 13 June 2019.

87 *Ibid.*

88 CoE (2019), Conference report on *Redefining Power: Strengthening the rights of the child as the key to a future-proof Europe*, pp. 17-18.

ACCESS TO JUSTICE

8

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UN & CoE

March

6

Organization for Security and Co-operation in Europe (OSCE) publishes its findings from the survey on the well-being and safety of women, which it carried out in selected countries in south-eastern and eastern Europe.

19

Venice Commission publishes an opinion on the provisions of the Hungarian Law on administrative courts and the Law on the entry into force of the Law on administrative courts.

April

9

Parliamentary Assembly of the Council of Europe (CoE) adopts Resolution 2275 (2019) on promoting parliaments free of sexism and sexual harassment.

25

CoE's Consultative Council of European Judges issues an opinion, following a request by the Romanian Judges Forum Association, on the independence of the judiciary in Romania.

June

21

International Labour Organization adopts the Violence and Harassment Convention to tackle violence and harassment in the world of work. It obliges signatory states to adopt an inclusive, integrated and gender-responsive approach to prevent and eliminate violence and harassment in this context.

25

CoE's Group of States against Corruption (GRECO) issues its annual report. It expresses concern about the overall slow progress in implementing its recommendations about members of parliament, judges and prosecutors, and calls on states to address them without delay.

28

General Assembly of the UN adopts by consensus the resolution 'Enhancement of international cooperation to assist victims of terrorism' (A/73/305).

EU

February

13

European Parliament (EP) adopts a resolution on experiencing a backlash in women's rights and gender equality in the EU (2018/2684(RSP)).

27

European Commission publishes its annual European Semester Country Reports identifying challenges for the effective functioning of justice systems in 16 Member States.

March

13

European Commission 2019–23 Strategy and Action Plan on e-Justice published in the *Official Journal*.

28

EP issues a resolution on the situation of the rule of law and the fight against corruption in the EU, specifically in Malta and Slovakia.

April

3

European Commission issues a communication to the EP, the European Council and the Council on further strengthening the rule of law within the Union: state of play and possible next steps (COM/2019/163 final).

4

EP asks the Court of Justice of the European Union (CJEU) for an opinion to resolve the legal uncertainty regarding whether or not the proposals to accede to the Istanbul Convention and procedure are compatible with the Treaties (B8-0232/2019).

May

20

European Commission publishes the seventh edition of its EU Justice Scoreboard, which gives a comparative overview of the independence, quality and efficiency of justice systems in EU Member States.

June

24

CJEU rules that the Polish Law on the Supreme Court, which lowered the retirement age of judges of the Supreme Court, is contrary to EU law and breaches the principle of the irremovability of judges and thus that of judicial independence (C-619/18).

July

9

The Council adopts the 2019 country specific recommendations of the 2019 European Semester, which includes recommendations for seven Member States to improve the effectiveness of their justice systems, including strengthening judicial independence.

16

President-elect Ursula von der Leyen, in her opening statement to the EP, proposes to add violence against women to the list of EU crimes defined in the Treaty on the Functioning of the European Union and argues that the EU should accede to the Istanbul Convention.

17

European Commission issues its communication on strengthening the rule of law within the Union – a blueprint for action (COM/2019/343 final).

September

16

EP's Committee on Civil Liberties, Justice and Home Affairs (LIBE Committee) expands the mandate of its working group on rule of law issues, renaming it the Democracy, Rule of Law and Fundamental Rights Monitoring Group. The LIBE Committee will focus on threats to democracy, the rule of law and fundamental rights, as well as the fight against corruption within the EU, across all Member States.

October

10

European Commission refers Poland to the CJEU regarding the new disciplinary regime for Polish judges, requesting an expedited procedure (C-791/19).

22

European Commission issues reports on developments in Bulgaria and Romania under the Cooperation and Verification Mechanism, highlighting the state's responsibility to ensure the respect of the rule of law towards its people as well as towards the EU and its Member States.

November

5

CJEU considers the amendments to Poland's law on the organisation of ordinary courts, which lower the retirement age of ordinary court judges and prosecutors, while allowing the Minister of Justice to decide on the prolongation of their active service. The provisions also set different retirement ages depending on gender. The court finds them contrary to EU law, in particular Article 157 of the TFEU, along with the Employment Equality Directive (2006/54), and Article 19 (1) of the TEU (C-192/18).

19

- CJEU issues a preliminary ruling on questions relating to the independence of the newly created Disciplinary Chamber within the Polish Supreme Court, which has the power to discipline judges both for their conduct and for the content of their rulings (joined cases C-585/18, C-624/18 and C-625/18).
- Presidency of the Council of the EU issues conclusions on evaluation of the annual rule of law dialogue.

26

EP adopts a resolution on children's rights. It explicitly mentions their vulnerability to becoming victims of crime and calls on the Commission to support organisations such as WePROTECT Global Alliance, to ensure victims' rights effectively. The Parliament highlights a particular need to guarantee the rights of child victims of trafficking, as the European Commission reported that nearly one in four victims of trafficking in human beings registered in the EU are children, with girls being primarily targeted and trafficked for sexual exploitation.

28

EP adopts a non-legislative resolution calling on the Council to conclude the ratification of the Istanbul Convention (2019/2855(RSP)).

December

1

Helena Dalli becomes the EU's first Equality Commissioner. The Commission President asks her to add violence against women to the list of EU crimes under the TFEU.

3

Council of the EU adopts conclusions on victims' rights, which call on the European Commission to draw up an EU strategy for 2020–2024 on the future of victims' rights, to cover all victims of crime.

17

The newly established 'EU Centre of Expertise for Victims of Terrorism' is run by a consortium of victim support organisations led by Victim Support Europe on behalf of the Commission. The EU centre will offer guidance, expertise and support to national authorities and victim support organisations. In addition, the EU centre will assist EU Member States in ensuring effective transposition and practical application of EU rules on victims of terrorism.

EU institutions in 2019 pushed to improve victims' access to compensation and justice. The Council of the EU called for a new strategy on victims' rights. This both acknowledges that gaps in victim protection remain and signals Member States' commitment to enforcing victims' rights. The Council called on FRA and other EU agencies to support Member States in this effort. Some Member States continued to oppose the Istanbul Convention in 2019. This triggered a particularly strong response by the European Parliament. It asked the Court of Justice of the European Union to address various aspects of the appropriate legal basis for the EU to accede to the convention. Meanwhile, challenges to the independence of courts continued. They underlined the need for more effectively coordinated efforts to uphold the rule of law. The European Commission issued a blueprint for action, proposing the so-called 'rule of law cycle'.

8.1. EU PUSHES FOR ACTION ON VICTIMS' RIGHTS, CALLS FOR NEW FOUR-YEAR STRATEGY

On 22 February 2019, European Day for Victims of Crime, the then European Commissioner for Justice, Fundamental Rights and Citizenship, Věra Jourová, expressed "deep regret" that not all EU Member States had fully transposed the Victims' Rights Directive into national law. She called on Member States to "take action without further delay".[1] The year ended with the EU Council adopting conclusions on victims' rights. They highlighted that Member States need to improve victims' access to compensation and justice in practice. In its conclusions (adopted on 3 December 2019),[2] the Council asked the European Commission to draw up an EU strategy for victims' rights for 2020–2024 to guide Member States.

The Council's conclusions call on Member States to take a comprehensive and holistic approach to victims' rights. They should involve all those who are likely to come into contact with victims, and ensure that effective national compensation policies exist.[3] The conclusions invite the Commission to evaluate existing EU legislation on victims' rights. It should focus particularly on reviewing the current rules on compensation. The Council also calls on the Commission to invite FRA, the European Union Agency for Criminal Justice Cooperation (Eurojust), and the European Institute for Gender Equality (EIGE) to look at ways of improving cooperation and exchange of information between competent authorities concerning victims of violent crime in cross-border cases.[4]

"Becoming a victim of crime may seriously undermine an individual's sense of security. To be able to secure victims' rights better than before, we need to address them more comprehensively."

Anna-Maja Henriksson, Minister of Justice, Finland, ***Remarks at the Justice and Home Affairs Council meeting on the adoption of Council conclusions on victims of crime***, 3 December 2019

Although gaps remain, there were positive developments at national level in 2019. For example, almost half of the Member States either adopted or saw the entry into force of legislative measures to improve the implementation of the Victims' Rights Directive. Several set up generic victim support services for the first time. Others implemented measures to protect victims during proceedings and prevent secondary victimisation.

One key shortcoming in Member States is compensation to crime victims. Another is the lack of developments concerning the rights of victims to participate in proceedings.

The European Commission urged nine Member States (**Czechia**, **Estonia**, **Germany**, **Hungary**, **Italy**, **Malta**, **Poland**, **Portugal** and **Sweden**) to finish incorporating the Victims' Rights Directive into national law. It sent them letters of formal notice on 25 July 2019.[5] The Commission also sent Reasoned Opinions to thirteen other Member States, namely **Austria**, **Belgium**, **Bulgaria**, **Croatia**, **Cyprus**, **Finland**, **France**, **Greece**, **Latvia**, **Lithuania**, **Luxembourg**, **the Netherlands** and **Slovakia**.[6]

FRA ACTIVITY

Focusing on justice for victims of violent crime

In December 2019, the Council published conclusions on victims' rights. Specifically, the Council recognises "the significant work carried out by the European Union Agency for Fundamental Rights (FRA), especially in relation to research and surveys regarding the identification and elimination of shortcomings related to victims' rights, e.g. the set of four reports on justice for victims of violent crime published in April 2019. Based on the views presented in the aforementioned reports, the Council considers it evident that measures to improve victims' access to justice and to compensation are required."

The four FRA reports that the Council mentions focus on victims' rights as standards of criminal justice; proceedings; sanctions; and women as victims of partner violence. They are based on desk research and 230 face-to-face interviews with practitioners – including support services, the police, public prosecutors, judges and lawyers – and adult victims of violent offences in seven EU Member States: Austria, France, Germany, the Netherlands, Poland, Portugal and the United Kingdom.

The reports propose practical ways policymakers can help victims, such as ensuring more effective support, more protection during court proceedings, better compensation for victims, rehabilitating offenders, and judicial and police training to encourage understanding when dealing with victims.

In addition, in June 2019, FRA published its main comparative overview of severe labour exploitation. It documents the experiences of 237 migrant workers, and addresses aspects of labour exploitation that relate to violent crime and other forms of victimisation under the criminal law.

For more information, see Council of the European Union (2019), ***Draft Council conclusions on victims' rights****, 15 November 2019, p.2; FRA (2019),* ***Victims' rights as standards of criminal justice – Justice for victims of violent crime, Part I****; FRA (2019),* ***Proceedings that do justice – Justice for victims of violent crime, Part II****; FRA (2019),* ***Sanctions that do justice – Justice for victims of violent crime, Part III****; FRA (2019),* ***Women as victims of partner violence – Justice for victims of violent crime, Part IV;*** *FRA (2019),* ***Protecting migrant workers from exploitation in the EU: workers' perspective****.*

PROMISING PRACTICE

Round-the-clock crisis assistance for victims of crime

In 2019, the Social Insurance Board in Estonia began offering 24-hour crisis assistance for victims of crime by phone or using a web-based hotline. Victims are using the service; it receives 300–500 calls each month. The Social Insurance Board's primary cooperation partners for the crisis hotline are victim support officials, police officers, emergency services, local government officials, a child help hotline, women's shelters and a non-governmental organisation, it said in response to a request for information.

For more information, see Estonia, Social Insurance Board (Sotsiaalkindlustusamet), ***'116 006 - Victim Support Crisis Phone'.***

8.1.1. Member States strengthen generic victim support

Several Member States have yet to introduce generic victim support services, in other words services available to all victims of crime, although Article 8 of the Victims' Rights Directive obliges them to do so. FRA reported this in previous years.[7] This remains one of the key hurdles for certain Member States to surmount so they can effectively implement the directive and improve the situation for crime victims in their countries.

In 2019, **Romania**, **Slovakia** and **Slovenia** worked to make support services available to victims in general, not just to certain categories of victims. **Slovenia** amended its Social Assistance Act in 2019 to introduce professional support and counselling for all crime victims.[8] Centres for social work are to provide this support, and information and guidance that will enable victims to gain adequate psychological, social and financial remedies for the situation resulting from the crime. A total of 16 centres for social work, with 63 units, operate nationwide.[9]

Slovakia started a national project in 2018 to improve victims' access to support services and establish contact points for victims. Following on from that, in 2019 it established eight contact points for victims in different regions. Contact points provide specialised assistance, legal counselling, social and economic counselling, and psychological assistance to all victims of crime, not just specific categories of victims.[10]

It also established a group of experts in the provision of victim support services, to regularly evaluate project activities and discuss important topics related to victim support services.[11] Practical training took place for professionals who come into contact with victims, including social workers, employees of client centres, police officers and employees of municipal offices.[12] By the end of November, 253 people had turned to the contact points.[13]

Romania adopted an emergency ordinance on measures to ensure the protection of victims of crimes.[14] By the end of November 2019, it had established nine new victim support departments in the social assistance services of nine counties. These departments have the specific task of providing services to victims of crimes. At least three specialists work at each: a social worker, a legal adviser and a psychologist.[15]

8.1.2. Progress in preventing secondary victimisation

Secondary victimisation is when a victim's experience is made all the worse by not being respected and in control of their situation. The offender can cause it; so can the victim's participation in criminal proceedings. The Victims' Rights Directive calls attention to the high risk of secondary victimisation.[16]

To lower the risk, some Member States looked to improve victims' experience of court hearings in particular. For example, in March 2019, **Luxembourg** began an individual case-by-case approach to deciding on special protective measures in court hearings to assist victims of violence and prevent secondary victimisation.[17] For the first time, in a case of domestic violence, the first instance court for criminal matters decided on a special measure that allowed the victim to testify and answer judges' questions via video link in an adjacent room, to avoid contact with the offender.

The Judicial Council of **Lithuania** adopted a policy on security in courts in 2019.[18] It stipulates that newly constructed or reconstructed court buildings must have additional rooms. Currently, 10 courts out of 74 have separate entrances to hearing rooms for victims and spacious waiting rooms.[19] This infrastructure ensures that victims avoid contact with suspects, thus helping to prevent secondary victimisation.

8.1.3. Member States make progress on compensating victims

In March 2019, Joëlle Milquet, special adviser to then President Juncker, published a report on compensation for victims of crime.[20] It contained recommendations on how to tackle, in practice, problems with victims' protection, access to justice and compensation. Victim Support Europe and FRA both published reports in 2019 that provided evidence of such problems and contributed to the special adviser's report.

Victim Support Europe talked to experts and over 200 crime victims. They identified many issues that frustrate a victim's ability to access compensation.[21] For example, victims do not know about the right to compensation; police officers treat them disrespectfully and do not refer them to support services; or reporting deadlines and complex and lengthy procedures cause difficulty. The report concludes that EU Member States "currently operate a system where state compensation is regarded as a 'last resort', accessible only after all other sources of compensation have been exhausted."[22]

Member States must ensure that victims of violent crime receive effective compensation for the damage they suffered as a consequence of the offence, FRA's report highlights. The state has an obligation to provide for compensation where the offender does not have the financial means to do so. In several cases, the European Court of Human Rights has made it clear that, when human rights violations are severe, the victim's right to justice encompasses compensation for more than pecuniary losses. In principle, it also includes non-pecuniary losses, such as "pain, stress, anxiety and frustration".[23]

FRA reported last year that several Member States enhanced victims' rights to financial compensation in 2018. That included enlarging the scope of crimes for which, or the scope of persons to whom, compensation is available. This trend continued in 2019. Several Member States, as well as **Serbia** and **North Macedonia**, paved the way for victims of crime to access compensation more easily.

For example, new legislation in the **Netherlands** (amending the Act on Violent Offences Compensation Fund and the Dutch Civil Code) states more clearly that a payment from the fund does not affect the victim's right to compensation from third parties.[24]

Belgium introduced new legal measures on providing emergency assistance to victims of terrorism. It changed the structure of the Commission for Financial Assistance to Victims of Intentional Acts of Violence, by creating a specific division in charge of terrorist acts. That should help to speed up compensation for victims of terrorism in particular.[25]

Although the Victims' Rights Directive is not binding on **North Macedonia**, the Ministry of Justice published a draft law on the payment of monetary compensation to victims of criminal offences.[26] It takes into account the victims' needs, in particular the right to access to information and the right to compensation. In **Serbia**, the Supreme Court of Cassation drafted detailed guidelines for judges and prosecutors on improving jurisprudence on compensation of victims in criminal proceedings.[27]

FRA ACTIVITY

Focus on rights of detainees as victims

Victimisation of prisoners can take the form of violence from other prisoners. FRA interviewed staff of statutory bodies that monitor detention facilities for its 2019 report *Rights in practice: access to a lawyer and procedural rights in criminal and European Arrest Warrant proceedings*, and they highlighted the issue. Many incidents of violence between prisoners may go unreported, monitoring bodies in France, Greece and Romania suspect. Violent acts also occur at the hands of officials, such as police officers, in some Member States.

FRA also published a report and an online database in December 2019, looking at core aspects of detention conditions in EU Member States, including the protection of prisoners from violence.

For more information, see FRA (2019), ***Rights in practice: Access to a lawyer and procedural rights in criminal and European arrest warrant proceedings****; FRA (2019),* ***Criminal detention conditions in the European Union: Rules and reality****; FRA (2019),* ***Criminal detention database 2015–2019****.*

FRA ACTIVITY

Focus on women as victims of partner violence

In April 2019, FRA released Part IV of its *Justice for victims of violent crime* publication, focusing on women as victims of partner violence. Although based on a small number of interviews, the evidence indicates that women who are victims of partner violence lack effective protection. The main reasons are inadequate responsiveness of the police, shortcomings in the referral of victims to support services, an incomplete network of support organisations, and insufficient implementation of court protection orders. The report called for better institutional cooperation and legislation, and for the police to take seriously their responsibility to protect women against partner violence.

FRA's violence against women survey (published in 2014) supports the findings. It indicates that women significantly underreport partner violence, and gives reasons (see, for example, Chapter 3 or the main results in the survey report).

For more information, see FRA (2019), ***Women as victims of partner violence – Justice for victims of violent crime, Part IV****; FRA (2014),* ***Violence against women: An EU-wide survey. Main results.***

8.2. VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

On violence against women, implementing the Istanbul Convention dominated policy and legal developments at both EU and Member State levels in 2019.

Among other developments at EU level, EIGE published a report on risk assessment and management of intimate partner violence. It aims to help police officers act effectively against gender-based violence.[28]

Sustainable Development Goal 16, on access to justice for all and effective, accountable and inclusive institutions, includes Target 16.1, which calls on all governments to reduce all forms of violence. Target 5.2 calls for the elimination of all forms of violence against women.[29]

The Organization for Security and Co-operation in Europe (OSCE) led a survey on the well-being and safety of women. It covered seven OSCE participating States, including Serbia and North Macedonia, and Kosovo. It comprised interviews with 15,179 women. The OSCE study used the same questionnaire and methodology as FRA's violence against women survey. It added a focus on violence against women in armed conflict. It is the first comparable representative survey conducted in southeastern and eastern Europe. It is the first time in this region that women were asked systematically about their experiences of violence, including in armed conflict settings.

In 2019, the OSCE published its findings[30] and separate reports with a breakdown of the survey data for each country. For example, the results for **North Macedonia**[31] and **Serbia**,[32] which have not yet joined the EU, include the following. In **North Macedonia**, nearly half of all women (48 %) believe that domestic violence is a private matter, and three in 10 (28 %) believe that the victim often provokes it. Very few women have reported violence to the police or other services. Inhibiting factors include shame, financial reasons, lack of information, mistrust of services, fear, and lack of understanding of what counts as violence. Over their lifetime, 45 % of women have experienced intimate partner violence, including physical, sexual and psychological violence.

The OSCE's findings further show that, in **Serbia**, 45 % of women have experienced physical, sexual and/or psychological violence at the hands of their partners since the age of 15; 17 % have experienced specifically physical and/or sexual violence.[33] Six in 10 women (59 %) had not contacted the police or any another organisation after the most serious incident.[34] Assistance and support were not mainstreamed or accessible to all.[35] The survey identified the need to improve the collection of accurate data.[36]

Meanwhile, Member States continued to implement the provisions of the Istanbul Convention and take other legislative and policy measures to further combat violence against women. For example, **Germany** intends to criminalise the phenomenon known as upskirting, namely the covert taking of pictures or filming of parts of the body that are protected from sight – for example, genitals or bottoms or underwear covering these parts.[37] A similar bill became law in the **United Kingdom**, and one is currently pending in **Luxembourg**.[38]

Protection for victims of domestic violence remains weak in some Member States. For example, in **Poland**, the government proposed amendments to the Act on Combating Domestic Violence that would weaken the protection of victims. The definition of domestic violence would have included only recurring acts of violence.[39] After a wave of criticism, the government withdrew the law.

Hungary lacks the infrastructure to provide support to victims of domestic and partner violence, argues the VICATIS report, published in 2019. According to the report, "in reality there is practically no efficiently operating victim support service where the victims [of domestic violence] could turn to. For most victims [of domestic violence], there is no safe place in the system providing care."[40]

Several Member States published statistics in 2019 that revealed worrying attitudes to sexual violence. For example in **Italy**, 17.7 % of people considered it always or under certain circumstances acceptable that "a man usually control his partner's mobile phone and/or her activities on social media", the National Institute of Statistics (ISTAT) reported in November 2019. Widespread attitudes blame women for sexual violence, it found; 39.3 % of people interviewed claim that "a woman is able to avoid a sexual intercourse if she really does not want it".[41]

In **Portugal**, the non-governmental organisation União de Mulheres Alternativa e Resposta (UMAR) has been carrying out annual nationwide surveys since 2017. Its National Study on Dating Violence 2019 is based on a survey of 4,938 children and young adults (aged 11–20).[42] Strikingly, 58 % of the young people who date or have dated reported having suffered at least one type of violence from their current or former partner, and 67 % consider some of the violent behaviour acceptable. The study points out that specific types of violence are highly prevalent and regarded as legitimate. Examples are psychological violence, violence pursued through social media, and controlling a partner's clothing, interaction habits or other behaviours.

PROMISING PRACTICE

Hospital support for victims of sexual violence

In Finland, the government and university hospitals in several cities have partnered to create Seri support centres. These provide, free of charge, a multidisciplinary service, involving physicians, psychologists and social workers, for those who have experienced sexual violence, regardless of their sex or gender. That is in line with Article 25 of the Istanbul Convention.

The first centre opened in the Helsinki university hospital in 2017. Since then, over 1,000 people have sought help. Three new centres opened in 2019 at the university hospitals in Kuopio, Tampere and Turku, and another will open in Oulu in 2020.

Services include psychosocial support, guidance, medical care and a treatment follow-up plan. Centres are also equipped to retrieve and examine forensic medical samples. Victims can receive help in starting a legal process if they wish. A helpline for the centres is open 24 hours a day, seven days a week.

For more information, see, for example, the webpage of the ***Seri Support Centre*** *in Helsinki.*

8.2.1. Istanbul Convention: general developments

The Council of Europe's Committee of Ministers adopted the Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) in Istanbul in 2011. It entered into force in 2014.

Developments at EU level

The European Parliament was vocal in its support of the Istanbul Convention. A resolution in February 2019 condemned some Member States' opposition to the convention as a "rejection of the zero-tolerance norm for violence against women and gender-based violence".[43] In April, the Parliament asked the Court of Justice of the EU to issue an opinion to resolve legal uncertainty about the legal basis and the scope of the Union's accession to the convention.[44]

On 28 November, it adopted another resolution condemning the attempts in some Member States to revoke measures already taken to implement the convention. It called on the Council to urgently conclude the EU's ratification of the convention and urge all EU Member States to ratify it.[45] The resolution referred to FRA's 2014 violence against women survey. Among other issues, the data showed that one third of all women in Europe have experienced physical or sexual violence at least once since the age of 15.[46]

The November 2019 resolution also welcomed the commitment by the Commission's President-elect, Ursula von der Leyen, to do more to tackle gender-based violence. In her first speech before the European Parliament in July 2019, she proposed adding violence against women to the list of EU crimes defined in Article 83 of the Treaty on the Functioning of the European Union, and expressed her support for the EU acceding to the Istanbul Convention.[47]

Developments at Member State level

As of December 2019, the Istanbul Convention had been signed by all EU Member States, and ratified by 21 (see Table 8.1). The Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) oversees the implementation of the Istanbul Convention. It issued reports on **Finland**, **France**, **Italy**, **Portugal** and **Sweden** in 2019. GREVIO commended **Finland**'s work on bringing its legislation in line with the criminalisation of sexual violence on the basis of the absence of consent, as Article 36 of the convention stipulates. It noted that **France** and **Italy** had yet to make this change.[48]

In **Slovakia**, the government approved a parliament resolution in December 2019 to inform the Council of Europe that it intends not to ratify the Istanbul Convention.[49] The ratification process also stalled in **Bulgaria**,[50] **Czechia**,[51] **Hungary**,[52] **Latvia**[53] and **Lithuania**.[54]

TABLE 8.1: ISTANBUL CONVENTION: SIGNATURE, RATIFICATION AND ENTRY INTO FORCE IN EU MEMBER STATES, NORTH MACEDONIA AND SERBIA

Country	Signature	Ratification	Entry into force
Austria	11 May 2011	14 November 2013	1 August 2014
Belgium	11 September 2012	14 March 2016	1 July 2016
Bulgaria	21 April 2016		
Croatia	22 January 2013	12 June 2018	1 October 2018
Cyprus	16 June 2015	10 November 2017	1 March 2018
Czechia	2 May 2016		
Denmark	11 October 2013	23 April 2013	1 August 2014
Estonia	2 December 2014	26 October 2017	1 February 2018
Finland	11 May 2011	17 April 2015	1 August 2015
France	11 May 2011	4 July 2014	1 November 2014
Germany	11 May 2011	12 October 2017	1 February 2018
Greece	11 May 2011	18 June 2018	1 October 2018
Hungary	14 March 2014		
Ireland	5 November 2015	8 March 2019	1 November 2019
Italy	27 September 2012	10 September 2013	1 August 2014
Latvia	18 May 2016		
Lithuania	7 June 2013		
Luxembourg	11 May 2011	7 August 2018	1 December 2018
Malta	21 May 2012	29 July 2014	1 November 2014
Netherlands	14 November 2012	18 November 2015	1 March 2016
Poland	18 December 2012	27 April 2015	1 August 2015
Portugal	11 May 2011	5 February 2013	1 August 2014
Romania	27 June 2014	23 May 2016	1 September 2016
Slovakia	11 May 2011		
Slovenia	8 September 2011	5 February 2015	1 June 2015
Spain	11 May 2011	10 April 2014	1 August 2014
Sweden	11 May 2011	1 July 2014	1 November 2014
North Macedonia	8 July 2011	23 March 2018	1 July 2018
Serbia	4 April 2012	21 November 2013	1 August 2014
United Kingdom	8 June 2012		

*Source: FRA, 2020 [based on Council of Europe's **Chart of signatures and ratifications of Treaty 210**].*

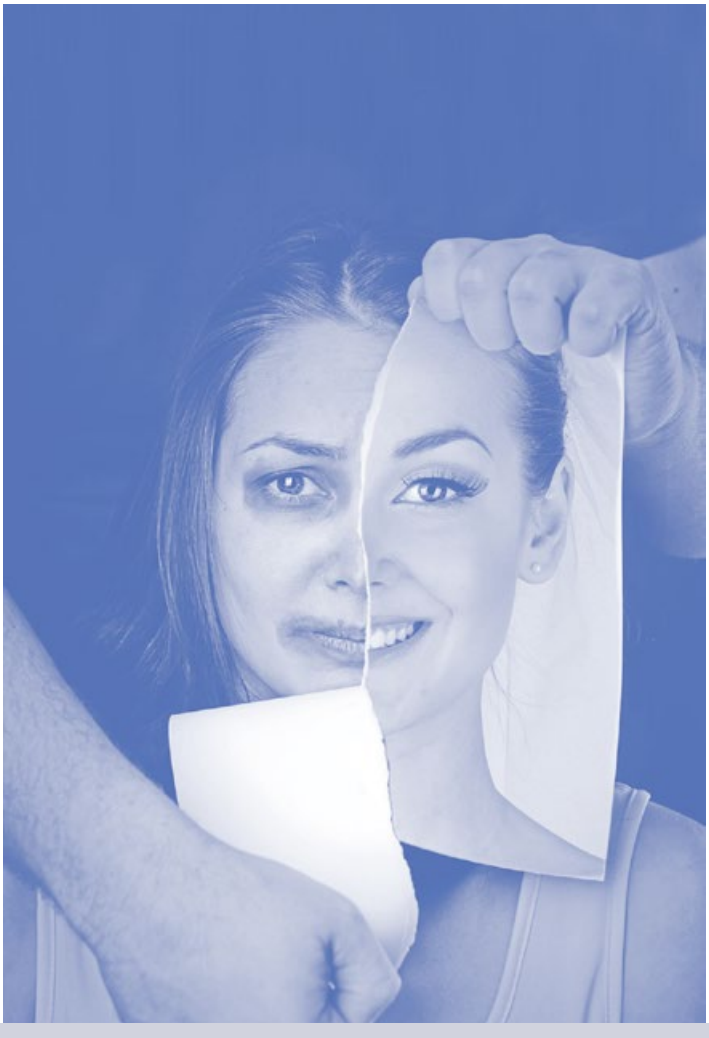
8.2.2. Member States align legal definitions of rape with Istanbul Convention

The Istanbul Convention comprehensively criminalises acts of sexual violence. Article 36 does not require the victim to express opposition for the act of sexual violence to be punishable; it suffices that the act was committed without the victim's consent. In 2019, several Member States aligned the definition of the criminalisation of rape with the Istanbul Convention requirements, which includes acts committed against former or current spouses or partners.

Greece reformed its legal framework on rape to bring it in line with Article 36 of the convention.[55] Similarly, **Portugal** amended its criminal code to align the crimes of sexual coercion, rape and sexual abuse of people interned with the convention.[56] **Croatia** also brought the definition of rape in line with the convention. Previously it required force or coercion. Now all non-consensual sexual intercourse or sexual activity is considered rape.[57]

In **Slovenia**, a judgment of the Higher Court in Koper initiated a public debate about the definition of rape.[58] A man had sexual intercourse with a family friend against her will after she had fallen asleep. The court upheld the defendant's appeal and changed the conviction from rape to sexual abuse of a defenceless person, stating that the perpetrator used force only after the victim had woken up. The judgment was handed down in 2017, but received media attention in January 2019. The resultant public criticism exposed the need to redefine rape in line with the Istanbul Convention.

Sweden's Supreme Court ruled on a rape case in 2019. That was its first judgment since legislative amendments brought the definition of rape in line with the convention in 2018.[59] The court had doubts about the perpetrator's criminal intent. Although he started having sexual intercourse with the woman, he eventually stopped when the woman "withdrew from him". She had earlier explicitly expressed her unwillingness to have sex. The court found the man guilty of "negligent rape". It ruled that he had been grossly negligent in not considering if the woman wanted to participate in sexual intercourse.



8.3. CONTINUING CHALLENGES TO THE INDEPENDENCE OF COURTS

A key element of access to justice is access to courts and, therefore, the independence of the judiciary.[60] Independent courts are essential for the right to effective judicial protection and the fundamental right to a fair trial and to an effective remedy, which Article 47 of the EU Charter of Fundamental Rights and Articles 6 and 13 of the European Convention on Human Rights provide.

These rights are key to protecting all the rights that individuals derive from EU law and safeguarding the values common to the Member States that Article 2 of the Treaty on European Union (TEU) sets out, notably the rule of law. In particular, an independent judiciary is a precondition for effectively upholding and enforcing EU law. That is the joint task of the Court of Justice of the European Union (CJEU) and national courts, under Article 19 of the TEU and Article 47 of the Charter.

The 2030 Agenda for Sustainable Development, under Target 16.3 of its Sustainable Development Goals, also calls on all countries to promote the rule of law at the national and international levels and to ensure equal access to justice for all.[61]

Large majorities consider all principles of the rule of law essential or important, including the existence of independent courts, a Eurobarometer survey from July 2019 shows.[62] Some 94 % of respondents find judicial independence essential or important, in contrast to only 4 % who consider it unimportant. Likewise, 94 % think that it is important or essential that court rulings be respected, and 91 % recognise the need for judicial review of public authorities' activities. Furthermore, 89 % see a need for a constitutional court to independently review laws that the legislature adopts, to make sure that they are constitutional.

Nevertheless, challenges to the independence of judiciaries continued to pose concerns in **Poland, Hungary** and **Malta** in 2019.

In relation to **Poland**, the European Commission repeatedly stated before the Council that its concerns, as raised in its reasoned proposal for a Council decision from 20 December 2017, remained unaddressed in 2019. On 10 December 2019, the Commission updated the Council as regards the situation of the rule of law in Poland in the context of the Article 7 (1) TEU procedure (preventive mechanism in case of a clear risk of a serious breach of the Union's values).[63] During it, the Council took stock of the situation, including the recent judgments of the CJEU concerning Polish rules on the retirement age of judges and public prosecutors, and the new Disciplinary Chamber of the Polish Supreme Court (see more details below).[64]

Members of the European Parliament (MEPs) condemned the lack of progress in ongoing processes during a follow-up debate between the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE), Commissioner Didier Reynders, and Finland's Minister for European Affairs, Tytti Tuppurainen, on behalf of the Council.[65]

"You can't be a member of the European Union if you don't have independent, impartial courts operating in accordance with fair trial rule, upholding union law."

Koen Lenaerts, President of the Court of Justice of the EU, cited in '***EU's top judge warns Poland over overhaul of judiciary***', Reuters, 9 January 2020

Meanwhile, the Council of Europe's Group of States against Corruption (GRECO) issued an assessment with respect to implementation of its earlier recommendations on corruption concerning members of parliament, judges and prosecutors on 16 December. In its report, it urged the Polish authorities to amend, as a matter of priority, the disciplinary procedures applicable to judges, to exclude any potential undue influence from the executive powers.[66]

The CJEU issued three landmark judgments concerning the independence of the judiciary in **Poland**. The first one (*Commission v. Poland,* C-619/18) was issued on 24 June 2019. It dealt with the Polish law lowering the retirement age of Supreme Court judges. The CJEU ruled that the law is contrary to EU law and breaches the principle that judges cannot be removed, and thus the principle of judicial independence.[67]

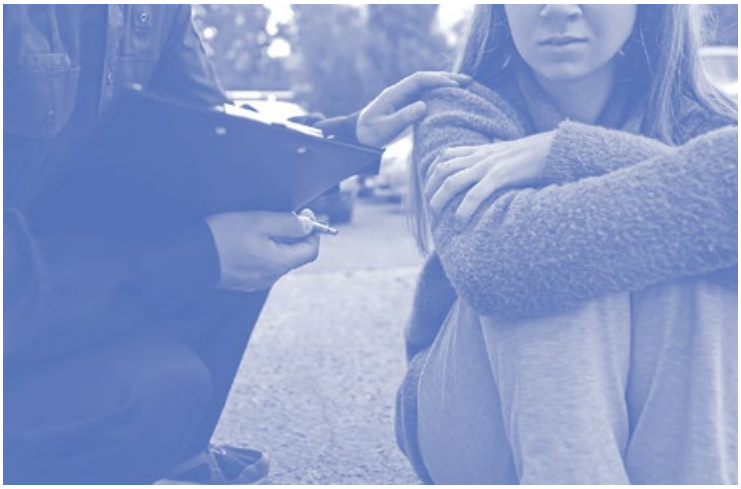
The second judgment was issued on 5 November 2019 (*Commission v. Poland,* C-192/18). The CJEU was asked to assess the amendments to the law on the organisation of ordinary courts, which lower the retirement age of ordinary court judges and prosecutors, and allow the Minister of Justice to decide on the prolongation of their active service. The provisions also set different retirement ages depending on gender. The CJEU deemed them contrary to EU law.[68]

Finally, the Polish Supreme Court submitted questions about the independence of the newly created Disciplinary Chamber within the Polish Supreme Court. This chamber has the power to discipline judges both for their conduct and for the content of their rulings. The President of the Republic appoints the chamber's judges on a proposal of the newly recomposed National Council of the Judiciary (*Krajowa Rada Sadownictwa – KRS*).

The CJEU issued its preliminary ruling on 19 November 2019 (*A. K. and Others v. Sąd Najwyższy, joined cases* C-585/18, C-624/18 and C-625/18).[69] It held that the requirement under Article 47 of the Charter and Article 19 (1) of the TEU that courts be independent forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial. It then noted that the referring court should examine the objective circumstances in which the Disciplinary Chamber was formed, its characteristics and the means by which its members have been appointed. It should assess whether there were factors capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of that Chamber to external factors, in particular, as to the direct or indirect influence of the legislature and the executive and its neutrality with respect to the interests before it.

The CJEU will further develop the issue in the upcoming judgment in the infringement proceedings case of *Commission v. Poland,* C-791/19, following the European Commission's decision of 10 October 2019 to refer the case to the CJEU.[70]

In 2019, the Council held two hearings on the situation in **Hungary**. These covered, among others, the issue of judicial independence, in follow up to the European Parliament's reasoned proposal from 2018, in accordance with Article 7 (1) of the TEU (see FRA's *Fundamental Rights Report 2019*[71] for more details on the reasoned proposal).[72] During a debate in the LIBE Committee with Commissioner Didier Reynders and Finland's Minister for European Affairs, Tytti Tuppurainen, on behalf of the Council, MEPs condemned the lack of progress in ongoing procedures and asked for a permanent EU-wide mechanism to ensure the rule of law.[73] The call to strengthen judicial independence was also made in the country-specific recommendations adopted by the Council in July 2019 in the context of the European Semester.[74]



In August 2019, GRECO published its report on preventing corruption of members of parliament, judges and prosecutors in **Hungary**.[75] It concluded, among others, that the country failed to implement its recommendations related to the independence of the judiciary, namely the powers of the President of the National Judicial Office both to intervene in the process of appointing and promoting candidates for judicial positions and to re-assign ordinary judges without their consent as well as the immunity of ordinary judges and public prosecutors to functional immunity.

LIBE set up a working group in June 2018 to monitor the rule of law and the fight against corruption within the EU, and to address specific situations, in particular concerning **Malta** and **Slovakia** (see FRA's *Fundamental Rights Report 2019* for more details). The working group continued its work in 2019, identifying some serious shortcomings in the rule of law. The Parliament's resolution of March 2019, summarising the conclusions of the working group, condemned the "continuous efforts of a growing number of EU member states' governments to weaken the rule of law, the separation of powers and the independence of the judiciary".[76]

In relation to Slovakia, the resolution acknowledged, among others, the progress made in the investigation into the murder of the journalist, Mr Kuciak, and his fiancée, Ms Kušnírová, and asked for the investigation to continue.

In relation to Malta, it pointed to many shortcomings in the rule of law that the Venice Commission identified (in December 2018 – see FRA's *Fundamental Rights Report 2019*). It urged the Maltese government and parliament to implement all of the Commission's recommendations without exception. The recommendation to "strengthen the independence of the judiciary, in particular the safeguards for judicial appointments and dismissals, and establish a separate prosecution service" was also included in the country-specific recommendations adopted by the Council in July 2019 in the context of the European Semester. [77]

EU institutions consider further actions to strengthen rule of law

In 2019, the European Commission opened a wide debate on how to reinforce the EU toolbox for enforcing the rule of law within Member States. It collected feedback and proposed several actions.[78] One suggestion was to deepen its monitoring of Member States' compliance with the rule of law through a Rule of Law Review Cycle. This would promote a rule of law culture within the EU and prevent the rule of law from backsliding in Member States. The cycle would cover all Member States and result in the adoption of an annual rule of law report on the situation.

The Commission acknowledged FRA's role in providing information of relevance to the rule of law for the future review cycle. It noted the agency's development of the EU Fundamental Rights Information System (EFRIS), which makes it easier to access relevant information and reports about the situation in the Member States.[79]

Under the Finnish Presidency, the Council evaluated its annual rule of law dialogues. While the discussion did not lead to reaching a consensus, on 19 November 2019, the Presidency published its own conclusions, which were supported or not objected to by 26 delegations. In its conclusions, it proposes to undertake a yearly stocktaking exercise on the state of play and key developments in the rule of law in the Member States and the EU as a whole.[80] This yearly exercise would be based on the European Commission's Annual Rule of Law Report.

National justice systems have a crucial role in upholding the rule of law. In 2019, the European Commission continued to support EU Member States' efforts to strengthen the efficiency, quality and independence of their national justice systems through its EU Justice Scoreboard.[81] The EU Justice Scoreboard contributes to the European Semester, which is the EU's core policy process for assessing progress in achieving the EU 2020 strategy. The scoreboard brings together data from various sources and helps identify justice-related issues that deserve particular attention.

The seventh edition of the EU Justice Scoreboard (2019) continues to develop its different indicators, focusing on judicial independence as a key element for upholding the rule of law in the Member States. One of the key challenges identified in the 2019 edition of the scoreboard relates to perceptions of judicial independence.[82] Possible political interference or pressure is the main reason for the perceived lack of independence of courts and judges. For some Member States' national prosecution services, management powers, such as evaluation, promotion and transfer of prosecutors, tend to cluster in the hands of a single authority, the scoreboard shows.

FRA ACTIVITY

Consulting civil society on challenges they face in their human rights work

The **Fundamental Rights Platform** is FRA's network for cooperation with civil society from across the EU. Every year the agency consults the civil society participants online about the challenges they face in their day-to-day work.

In previous years, many CSOs active in human rights felt that it has become harder to play their role in protecting and promoting human rights. In 2019, of those indicating that they work on the local and/or national level (147 organisations in total), 35 % (51 organisations) said they consider the conditions in their country 'bad' or 'very bad', and 30 % (45 organisations) consider them 'good' or 'very good'. At the same time, 46 % (67 organisations) think the situation for CSOs working on human rights in their country has 'deteriorated' or 'strongly deteriorated' during the last 12 months. Fewer than 10 % (13 organisations) think the situation has improved.

The situation is challenging. Of the 159 CSOs that answered the section on threats and attacks, employees or volunteers in 53 % (84 organisations) had experienced personal online threats, harassment or attacks, including hate speech, more than once in the previous 12 months. Across Member States, 18 % (29 organisations) indicated at least one physical attack on employees/volunteers, and 15 % (24 organisations) an attack on their office building. As many as 20 % (33 organisations) indicated at least one instance of administrative harassment (such as excessive reporting/accounting requirements) or legal attacks during the previous 12 months.

FRA previously reported criminalisation of civil society activities, notably of solidarity and humanitarian assistance. This remains a concern; 22 % (35 organisations) of the responding organisations were subject to at least one such attempt in the previous 12 months.

Organisations also reported challenges in access to funding, access to decision-making processes, and lack of adequate and meaningful consultations in law- and policymaking. FRA will publish more detailed findings from its annual consultation during 2020.

More information on the Fundamental Rights Platform is available on ***FRA's website***.

FRA opinions

Nearly half of the EU Member States adopted or saw the entry into force of legislation to better implement the Victims' Rights Directive (2012/29/EU) in 2019. However, there were no notable developments concerning the rights of victims to participate in proceedings.

Several Member States closed a big gap in guaranteeing victims' rights by providing victim support services to all categories of crime victims for the first time. Other Member States took steps to protect victims during proceedings and prevent secondary victimisation.

The EU Council adopted conclusions on victims' rights on 3 December 2019. These use, in part, evidence of FRA's 2019 reports on justice for victims of violent crime. The conclusions recognise that measures to improve victims' access to justice and to compensation are required. They also call on the European Commission to draw up an EU strategy for 2020-2024 on the future of victims' rights.

FRA OPINION 8.1

EU Member States are encouraged to continue their efforts to effectively implement victims' rights in practice. They should pay particular attention to introducing measures to ensure that victims can access compensation during criminal proceedings and that they receive adequate compensation as victims of violent crime for the damage they suffered because of the offence. EU Member States should also step up their efforts to ensure that victims have an appropriate role in relevant judicial proceedings.

Ireland ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) in 2019, bringing to 21 the total number of EU Member States that had ratified the convention by the end of 2019. Several Member States took measures to criminalise all non-consensual sexual acts as laid down in Article 36 of the Istanbul Convention, instead of limiting criminal offences such as rape to situations involving force or physical violence.

The EU strove to ensure the ratification of the convention by both the EU and all Member States, amid some Member States' vocal opposition to the convention despite having signed it.

FRA OPINION 8.2

The EU and all EU Member States that have not yet done so are encouraged to ratify the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). FRA encourages Member States to address gaps in national legislation concerning the protection of women who are victims of violence.

An independent judiciary is the cornerstone of the rule of law and of access to justice (see Article 19 of the TEU, Article 67 (4) of the TFEU and Article 47 of the EU Charter of Fundamental Rights). Challenges in the area of justice grew in several Member States, particularly regarding judicial independence. This prompted the European Commission to issue a blueprint for action to strengthen the rule of law. It proposed the 'rule of law cycle'. This will involve both the European Parliament and Council of the EU, and will apply to all EU Member States, focusing particularly on those countries where risks are identified.

FRA OPINION 8.3

The EU and its Member States are encouraged to further strengthen their efforts and collaboration to maintain and reinforce the independence of judiciaries, an essential component of the rule of law. The efforts concerning the new 'rule of law cycle' proposal could include improved guidance to EU Member States to recognise and tackle any possible rule of law issues. In addition, the EU Member States concerned should take prompt action to fully comply with the relevant judgments of the Court of Justice of the European Union and act on recommendations such as those the European Commission issues in its rule of law procedure.

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DEVELOPMENTS IN THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

9

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UN & CoE

January

1

Special Rapporteur on the rights of persons with disabilities issues her report to the United Nations Human Rights Council on 2018 activities and disability-specific forms of detention.

23

Parliamentary Assembly of the Council of Europe (PACE) adopts a resolution on a disability-inclusive workforce.

31

- In *Fernandes de Oliveira v. Portugal* (No. 78103/14), European Court of Human Rights (ECtHR) rules that there was no violation of the substantive aspect of Article 2 (right to life) of the European Convention on Human Rights (ECHR) in a patient's suicide after leaving the premises where he was hospitalised for mental health issues. The court does find that the length of domestic proceedings was excessive.
- In *Rooman v. Belgium* (No. 18052/11), ECtHR rules that there was a violation of Article 3 of the ECHR (prohibition of torture, inhuman or degrading treatment) where the applicant was detained in a mental health institution with no access to adequate treatment in his language. However, it finds no violation of Article 5 (1) (e) (Lawful arrest or detention – Persons of unsound mind).

May

13

The CRPD Committee publishes its concluding observations on the combined second and third periodic reports of Spain.

June

12

UN launches its UN Disability Inclusion Strategy (UNDIS) during the 12th Session of the annual Conference of States Parties to the UN Convention of Rights of Persons with Disabilities (COSP). To enable the UN to support implementation of the CRPD, the strategy includes a policy and accountability framework with benchmarks for assessing progress and accelerating disability inclusion.

25

In *Stoian v. Romania* (No. 289/14), regarding a potential violation of a child's access to education due to insufficient accessibility measures, the ECtHR finds that no such violation occurred.

26

PACE adopts a resolution on 'Ending coercion in mental health: the need for a human rights-based approach'. It urges Council of Europe member states to "immediately start to transition to the abolition of coercive practices in mental health settings".

July

17

Special Rapporteur for the rights of persons with disabilities issues her report on older persons with disabilities to the United Nations General Assembly.

September

10

In *Strand Lobben & Others v. Norway* (No. 37283/13), ECtHR rules on a child's planned adoption by the foster family they had been placed with after removal from the care of the mother, who had cognitive impairments. It finds that the adoption violated the mother's and her child's right to respect for private and family life (Article 8 of the ECHR).

October

29

CRPD Committee publishes its concluding observations on the initial report of Greece.

EU

January

11

EU becomes a party to the Marrakesh Treaty on improving the availability and cross-border exchanges of works in accessible formats for people with difficulties reading print.

March

14

Court of Justice of the European Union (CJEU) rules (C-372/18) that Article 3 of Regulation (EC) No. 883/2004 must be interpreted to mean that benefits such as the French personal independence and disability compensation allowances are social security contributions since there is no individual assessment of a recipient's personal needs, but eligibility is determined by legally defined, objective criteria. This means that those insured under the social security systems of other EU Member States are not liable to pay into these schemes.

20

European Economic and Social Committee (EESC) adopts an opinion on the political participation of persons with disabilities during the 2019 European Parliament elections.

April

4

European Ombudsman issues decision on "how the European Commission treats persons with disabilities under the Joint Sickness Insurance Scheme for EU staff". It holds as maladministration the European Commission's failure to take action following the Committee on the Convention on the Rights of Persons with Disabilities' (CRPD Committee) recommendation.

17

European Parliament and Council adopt Directive (EU) 2019/882 on the accessibility requirements for products and services (the European Accessibility Act) for the harmonisation of Member State laws, regulations and administrative provisions concerning accessibility requirements of products and services.

June

3

European Ombudsman issues its decision regarding "accessibility for visually impaired candidates of selection procedures to recruit EU civil servants, organised by the European Personnel Selection Office [EPSO]". It finds that EPSO's actions constituted maladministration. EPSO accepts two of the three recommendations given in March.

September

11

CJEU rules (C-397/18) that the concept of 'disability' relevant to Council Directive 2000/78/EC of 27 November 2000 applies only when long-term physical, mental or psychological impairments give rise to limitations that may hinder the person's equal, full and effective participation in their professional life. In these situations, dismissal from employment for 'objective reasons' following Article 2 (2) (b) (ii) of the Directive amounts to indirect discrimination on grounds of disability unless reasonable accommodation (as defined by Article 5) has been provided.

17

European Ombudsman issues its decision in case 417/2018/JN on "how the European Commission dealt with concerns raised about alleged human rights abuses in a social care institution that had received EU funding".

23

Web Accessibility Directive comes into effect, requiring all public sector websites created in the last 12 months to be accessible.

October

10

European Parliament adopts a resolution on employment and social policies in the euro area (A9-0016/2019), calling on the European Commission and Member States to increase their efforts to include groups such as persons with disabilities in the labour market.

17

European Ombudsman opens a case on the European Commission's failure "to ensure that the European Structural Investment Funds are spent by the Member States in line with the obligations stemming from the United Nations Convention on the Rights of Persons with Disabilities".

24

CJEU rules in case C-35/19 that tax exemption on disability allowances is on condition that a body of the Member State concerned pays those allowances. The exemption excludes allowances of the same nature paid by another Member State, even when the recipient resides in the Member State concerned.

November

26

European Parliament adopts a resolution (B9-0180/2019) on children's rights on the 30th anniversary of the UN Convention on the Rights of the Child. It calls on Member States and the Commission "to explicitly consider children as a priority when programming and implementing regional and cohesion policies such as the European disability strategy".

December

1

Helena Dalli assumes office as European Commissioner for Equality. Her mission letter states that she "will lead on the EU's implementation of the United Nations Convention on the Rights of Persons with Disability" and "work closely with the relevant Commissioners to ensure that our external policies also pursue this aim".

11

EESC adopts an opinion on shaping the EU agenda for disability rights 2020–2030. Published on the EESC's own initiative, the opinion includes recommendations to the Commission on key issues to address in a new European disability strategy.

A decade on from the November 2009 Council Decision on the conclusion, by the European Community, of the UN Convention on the Rights of Persons with Disabilities (CRPD), 2019 saw several major developments. These will shape the second decade of the convention's implementation by the EU and its Member States. The first ever designated European Commissioner for Equality, who is in charge of CRPD implementation, was appointed. The European Accessibility Act, which introduced common accessibility requirements for select products and services, was adopted. The European Parliament and the Council of the EU came to a preliminary agreement on language on disability and accessibility regarding the European Structural and Investment Funds. An evaluation of the 2010–2020 disability strategy began. It will feed into a future EU disability strategy. Meanwhile, Member States took steps to ensure inclusive education and equal employment for people with disabilities. A number of Member States also took action towards ensuring a built environment accessible to all. Changes to national electoral laws gave people with disabilities significantly more opportunities to participate in European elections, although accessibility remained a problem.

9.1. THE CRPD AND THE EU: CLOSING OLD CHAPTERS, OPENING NEW ONES

At EU level, 2019 saw a number of important developments. These included the adoption of the European Accessibility Act and the appointment of a new Disability Commissioner in charge of CRPD implementation. The EU also evaluated the 2010–2020 disability strategy and moved towards a new strategy. Another significant development was the agreement in principle between the Council of the European Union (the Council) and the European Parliament on including language on CRPD compliance in the regulation governing the use of EU funds, and using such funds to promote de-institutionalisation as well as accessibility.

9.1.1. European Accessibility Act: towards more coherence across the EU

An achievement that stands out in 2019 in the area of disability rights is that the European Parliament (13 March) and the Council (9 April) adopted the Commission proposal for a European Accessibility Act (EAA).[1] As the 2018 and 2019 *Fundamental Rights Reports* discussed in depth,[2] the EAA will allow the harmonisation of national laws, regulations and administrative provisions concerning accessibility requirements for products and services. It will cover:

- products: computers, tablets, laptops and operating systems; smart TVs; smartphones; payment terminals; some cash machines; ticketing machines and check-in machines as well as interactive self-service terminals; e-readers;
- services: answering to emergency communication via the EU emergency number (112); E-books; access to audio-visual media services, websites and electronic programming guides; telephony services; transport service websites, mobile device based services, ticketing, travel information, some self-service terminals (excluding those integrated into vehicles); consumer banking services; E-commerce.

Following a request from the European Commission, the European Committee for Standardisation published Design for All, a new standard "to help organisations align with a consistent approach to address accessibility for persons with disabilities".[3] These specify some requirements for organisations to "design, develop and provide products, goods and services that can be accessed, understood and used by the widest range of users including persons with disabilities".[4]

The European Disability Forum has argued that EAA coverage should extend further in future, to cover areas such as health services, education, transport, housing and household appliances.[5] The European Commission services note that the EAA was adopted on the legal basis of single market provisions in EU law. This legal basis requires a divergence of national legislation that creates barriers in the single market as it relates to accessibility issues – and the impact assessment did not always find such barriers.[6]

The initial focus in the coming years will probably be on implementing the EAA at the national level in the form of laws, regulations and administrative provisions. These ought to be in place by 28 June 2022, and must be in force by 28 June 2025.[7]

9.1.2. New Commissioner for Equality appointed

On 1 December, Helena Dalli (Malta) took up office as the new Commissioner for Equality. This underlines the new Commission's commitment to the rights of persons with disabilities. Her mission letter tasks her to "strengthen Europe's commitment to inclusion and equality in all of its senses, irrespective of sex, racial or ethnic origin, age, disability, sexual orientation or religious belief".[8] Specifically on disability, it states that she will "lead on the EU's implementation of the United Nations Convention on the Rights of Persons with Disability". She will also work on issues such as the fight against discrimination, a new European Gender Strategy, work-life balance, gender-based violence and the empowerment of women and girls.[9]

Members of the European Parliament (MEPs) "welcomed the President-elect's decision to appoint an Equality Commissioner for the first time".[10] A group of MEPs and non-governmental organisations (NGOs) also referred to her appointment as "a sign of clear progress".[11] At the same time, they also argued that, institutionally, the Commission's work on disability "needs to move to the Secretariat-General". They noted that CRPD implementation "touches upon many different Commission responsibilities and policies".[12]

9.1.3. Looking back to move forward: evaluation of 2010–2020 Disability Strategy and recommendations for a new strategy

The key EU policy instrument in the area of disability is the European Disability Strategy.[13] It expires at the end of 2020.

As part of its review process, the European Commission opened up a consultation, which it published in both standard and easy-to-read versions.[14] It aimed to assess if the European Disability Strategy was being implemented, if it led to suitable policies and measures, and how it influenced CRPD implementation. The consultation ran from 31 July to 13 November 2019 and had over 2,500 respondents. FRA participated in the EU-level stakeholder consultation.

Initial conclusions were presented at the annual European Day of Persons with Disabilities in December, which focused on the Disability Strategy. Participants felt that all or most of the strategy's goals had been met. Most also thought that the situation of people with disabilities had improved and that the strategy had contributed to this. Around three quarters of participants indicated that the current strategy's main pillars remained relevant for the future. The numbers were a little lower for promoting disability issues in the EU's external action; however, most still saw this as a relevant area.

Participants mentioned potential new areas of focus. These included accessibility of buildings and public services, ageing and disability, children with disabilities and their families, and independent living and inclusion in the community. Respondents felt that the strategy was internally coherent, but interinstitutional coordination mechanisms were limited, which hindered its implementation. These are, however, preliminary findings. The European Commission is expected to adopt the strategy's final evaluation report in the third quarter of 2020.

EU institutions have already begun developing their positions on the new strategy. During their debate with the new Equality Commissioner, MEPs stressed the importance of including a range of issues in the new strategy. These include ensuring the full involvement of persons with disabilities in the development of the new strategy and ensuring that all EU initiatives comply with the CRPD. MEPs also highlighted issues such as reducing poverty, de-institutionalisation and independent living, accessibility of transport and the built environment, and the need for more investment in inclusive education and access to the labour market.[15]

In its position on the strategy, the European Economic and Social Committee (EESC) noted areas of progress. It called on the Commission to adopt an ambitious new strategy to ensure the full and equal participation of people with disabilities and to lift remaining barriers.

Its recommendations focused on institutional change. It called for "disability focal points" within all the Commission's directorates-general, and within agencies and EU institutions. That echoed the CRPD Committee's 2015 recommendations to the EU. It also called for an interinstitutional disability mechanism, i.e. between the European Commission, the Parliament and the Council.[16]

9.1.4. Using EU funds to promote de-institutionalisation

The EU funds diverse projects that aim to improve economic growth and foster a sustainable environment through the various European Structural and Investment Funds (ESIF). FRA and civil society organisations have noted concerns that these funds are sometimes used inconsistently with the CRPD.[17] For example, they perpetuate the operation of large institutions that house people with disabilities, rather than supporting community living initiatives, or they do not include disabled persons' organisations (DPOs) in checking that the use of funds complies with the CRPD. FRA and civil society organisations have therefore called for the regulations governing these funds to include language on CRPD compliance.[18]

A September decision by the European Ombudsman echoed these concerns. A complainant alleged that the use of EU funds to refurbish a Hungarian institution for people with disabilities breached fundamental rights.[19] In a 2015 own-initiative inquiry, the Ombudsman had already stated that "[t]he Commission is obliged to respect the Charter in its entirety, in all its activities, including in the distribution and monitoring of ESI Funds."[20] In this case, the Ombudsman did not, in line with her mandate, look at the approach taken by the Hungarian authorities, but at the Commission's interpretation allowing funding of existing institutions. She noted that this interpretation was "at odds with that of the UN [CRPD] Committee".[21] She accepted that there was no legal basis for the Commission to ask for the return of these funds, but she noted that this should be addressed in future.

Negotiations on the proposed new regulations governing the ESIF for 2021–2027[22] continued throughout 2019. The Council and the Parliament reached a provisional common understanding on a new Common Provisions Regulation. This agreement covers a wide range of issues related to the funds' modalities and functioning, and also touches on CRPD compliance. It provides for monitoring committees, which will include DPOs and have a role in checking compliance, including against CRPD requirements.[23]

More broadly, the provisional text foresees that national frameworks will be necessary to ensure CRPD implementation. These should have:

— objectives with measurable goals, data collection and monitoring mechanisms;
— arrangements to ensure that the programmes' preparation and implementation properly reflect accessibility policy, legislation and standards;
— arrangements for reporting to the monitoring committee non-CRPD-compliant operations that the funds support, and complaints under the CPRD submitted in accordance with the arrangements for effective complaint examination.[24]

The Council and Parliament also reached a provisional agreement requiring that Member States have a national or regional strategic policy framework for social inclusion, poverty reduction and health, and that it include measures to shift from institutional to "family and community-based care".[25] The European Regional Fund/Cohesion Fund Regulation will include similar wording.[26] They did not reach agreement on the European Social Fund Plus.

Member States and the European Commission are to take appropriate steps to prevent any discrimination during the preparation, implementation, monitoring, reporting and evaluation of programmes. Accessibility for persons with disabilities must be a criterion in the selection of operations by managing authorities. The European Disability Forum welcomed both principles. It also positively noted the requirements to include civil society and NGOs in the partnership and multi-level governance process. In addition, it positively noted the strengthened horizontal enabling condition on the CRPD; such conditions are criteria that are considered a prerequisite for proper implementation.[27]

9.2. THE CRPD IN EU MEMBER STATES: PROGRESS CONTINUES BUT IMPLEMENTATION CHALLENGES PERSIST

European Parliament elections took place on 2019. So did significant electoral reform in the area of disability. It was also a year of progress in key areas, in particular in making new plans to improve access to the built environment. Challenges continued but there were also reforms in the areas of employment and inclusive education.

A key way to achieve progress was by clarifying CRPD obligations in national jurisprudence. The CRPD Committee also clarified the convention's scope in a decision on an individual case under the Optional Protocol (see **Section 9.2.3**). In 2019, the CRPD Committee continued to review Member States' progress in implementing the convention. It published concluding observations on **Estonia**, **France** and **Hungary**, and a list of issues concerning **Croatia**, while **Denmark** submitted its state report (see Table 9.1).

Notes:

Shaded cells indicate review processes scheduled for 2020; table does not include Member States without reviews in 2019 or 2020. Cells marked with * are documents not yet adopted since the March 2020 session of the CRPD Committee was postponed due to a lack of quorum.

TABLE 9.1: CRPD COMMITTEE REVIEWS IN 2019 AND 2020, BY EU MEMBER STATE

Member State	Date of submission of State Party's report (combined second and third periodic reports, unless stated)	Date of publication of list of issues (prior to reporting on combined second and third periodic reports, unless stated)	Date of publication of concluding observations
AT	17 October 2019	21 September 2018	
BE		5 April 2019	
CZ		29 April 2019	
DK	17 April 2020	30 April 2019	
EE	4 December 2015 (initial report)	11 April 2019	postponed*
EL	1 June 2015 (initial report)	11 April 2019	20 September 2019
ES	3 May 2018	12 April 2017	13 May 2019
FI	9 August 2019	9 August 2019	
FR	18 May 2016	27 September 2019	11 September 2020
HU	7 October 2019	12 April 2017	postponed*
HR	2021	3 April 2020	
LT	18 September 2020		
LV	1 April 2020		
SE	25 November 2019	12 October 2018	
SK	2020	27 September 2019	

Source: FRA, 2020 [based on data from the Office of the High Commissioner for Human Rights]

9.2.1. European elections highlight participation hurdles and prompt some reform

The CRPD (in Article 29) requires States Parties to guarantee persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others. This includes the right and opportunity for persons with disabilities to vote and stand for election. The main challenges to this right include legal restrictions on the voting rights of some persons with disabilities, particularly those with psychosocial or intellectual impairments; inaccessible and cumbersome administrative processes; and difficulties in accessing complaints mechanisms when persons with disabilities have faced problems in exercising their right to vote.[28]

The right to vote in European elections stems from Article 20 (2) (b) of the Treaty on the Functioning of the European Union, and Articles 39 and 40 of the EU Charter of Fundamental Rights. Although secondary legislation outlines some arrangements for how to exercise voting rights and stand for election,[29] Member States are largely free to design and apply their own procedural electoral laws as long as they respect general principles of EU law, including the CRPD and the Charter. The European Commission has encouraged the sharing of best practices on promotion of the exercise of electoral rights of underrepresented groups, including persons with disabilities.[30]

Electoral law has long needed reform to ensure the rights to vote and stand for election that the CRPD contains, FRA has found.[31] In the run-up to elections, the EESC published an opinion on the political participation of persons with disabilities during the 2019 European Elections, calling for the lifting of restrictions on participation.[32] It noted legal restrictions due to deprivation of legal capacity and to lack of accessible information on voting; technical barriers in access to polling stations; and a lack of alternatives to voting in a polling station. In 18 Member States, blind people cannot vote independently and need someone to vote on their behalf, it pointed out. NGOs made similar calls for reform.[33]

One of the main restrictions to the right to vote is the deprivation of legal capacity. Ahead of the elections, and following a request from the European Commission, FRA collected information on the situation of the political rights of persons with disabilities and published an analysis noting that two thirds of EU Member States restrict the right of persons deprived of legal capacity to vote. That potentially affects an estimated 264,000 people in the EU who are living under full guardianship, although not all of these people are necessarily deprived of the right to vote.[34]

Following a constitutional court ruling,[35] **Germany** removed certain restrictions on the right to vote in amendments to the Federal Elections Act.[36] People barred from voting under the Federal Elections Act, because they had a caretaker appointed or had been placed in a psychiatric hospital following a crime for which they had been found to lack criminal responsibility, had filed a constitutional complaint. The Federal Constitutional Court held that neither of these two grounds for excluding people with mental disabilities from federal elections was valid.

First, referring to the appointment of a caretaker left the exclusion to chance. Many people with the same need of support had not had a caretaker appointed if, for example, their families supported them. Second, people who are in psychiatric hospitals because they have committed crimes while lacking criminal responsibility do not necessarily lack the cognitive capabilities to vote. Thus, the court concluded that the challenged provisions violated both the principle of universal suffrage and the prohibition of discrimination on grounds of disability.

A **Polish** constitutional court judgment in April 2019 also restored the right to vote to people without legal capacity.[37] In **France**, a legislative amendment ahead of the elections recognised the right of persons with disabilities under guardianship to vote.[38]

People reported a range of practical difficulties in voting. That is another key barrier to the effective exercise of the right to vote, according to FRA's findings.[39] The Finnish Parliamentary Ombudsman found in a report on wheelchair accessibility that almost all polling stations it inspected presented some problem for wheelchair accessibility, either on the route to or inside the polling station. They also lacked accessible polling booths and/or visibility screens to protect wheelchair users' voting from public view.[40]

The **Netherlands** highlighted the importance of practical measures to implement legal reforms in practice. On 1 January 2019, an amendment of the country's Elections Act took effect, requiring that all polling stations be accessible to people with physical impairments.[41] The Netherlands Institute for Human Rights set up a hotline during the elections for the Dutch Provincial Councils and Water Boards of 20 March and the European Parliament elections of 23 May. Despite that legal requirement, it received 258 reports, by or on behalf of people with disabilities, about the (in)accessibility of elections. About nine out of ten described problems with physical access to polling stations, obtaining help at the polling station, usability of the current ballot paper, and preparing for voting.[42]

Ensuring full participation of people with disabilities in elections requires funding. While the **United Kingdom** was not included in the EESC opinion on the political participation of persons with disabilities, it passed legislation to exclude disability-related election expenses from candidates' spending limits.[43]

9.2.2. Access to the built environment: new requirements, more involvement of people with disabilities

A potential additional component to the European Disability Strategy is access to the built environment. The public consultation's results highlighted that topic, which is an integral part of the CRPD. The EAA contains provisions for Member States to decide on the adoption of EU requirements on this issue. Furthermore, the annexes to the Commission Recommendation[44] on building renovation and Recommendation[45] on building modernisation identifies renovation of buildings for energy efficiency reasons as an excellent occasion to enhance the accessibility of buildings. A number of states took actions to enhance CRPD compliance in this area.

FRA ACTIVITY

Focus on the right to vote of people deprived of legal capacity

Ahead of the European elections, FRA published a paper on restrictions to the right to vote as a result of deprivation of legal capacity. It starts by analysing relevant legal reforms in the 28 EU Member States since 2014, when the agency published its human rights indicators on the right to political participation for persons with disabilities. The second section briefly identifies some of the factors that helped drive these legislative changes. The paper also highlights some positive initiatives to promote and realise people with disabilities' right to participate fully and actively in the electoral process.

Overall, it finds that electoral reforms "demonstrate a clear trend towards reducing restrictions on the right to vote of people with disabilities deprived of legal capacity". However, in some cases, "the shift is from automatic loss of voting rights upon deprivation of capacity, to a situation where the right to vote is decided by a court on the basis of an individual assessment" and "[i]n others, the reforms do not cover all types of election".

For more information see FRA (2019), ***Who will (not) get to vote in the 2019 European Parliament elections? Developments in the right to vote of people deprived of legal capacity in EU Member States****, p. 3; FRA (2014),* ***The right to political participation for persons with disabilities: Human rights indicators****.*

PROMISING PRACTICE

'I Can/I Know' campaign: improving the accessibility of sports centres

In January 2019, the **Swedish** Paralympic Confederation and Swedish Paralympic Committee started a project called I Can/I Know *(Jag Kan/Jag Vet)*. It provides a list of which sports centres are accessible to people with specific types of disabilities and encourages young people with disabilities to take up sports. The project, in the municipalities of Malmö, Östersund and Eskilstuna, includes a mentoring programme for persons with disabilities. It aims to gather 25 good practice examples of accessibility solutions in sports centres, which can be used when renovating them or building new ones. It will publish the information it collects in an online manual.

For more information, see Vinnova (2018), ***Jag vet/Jag kan.***

A key component in giving everyone, including people with disabilities, access to the built environment is to ensure access to all buildings. This applies as much to constructing new buildings as to adapting existing ones. The **French** government decreed that all new buildings of more than two floors must have a lift, regardless of the number of apartments they contain.[46] However, it allows derogations or "pragmatic" solutions in particular cases.[47]

The **Lithuanian** Ministry for Social Security and Labour decided to adopt a new procedure that simplifies the rules for using state and municipal funding to adapt houses for people with disabilities. It allocated a budget of € 1.5 million in 2019 for such adaptions, allowing approximately 350 people to improve their living conditions.[48] Likewise, following the **Cypriot** Ombudsman's own-initiative report on the accessibility of beaches to people with disabilities, the Deputy Ministry of Tourism announced a funding scheme for municipalities and community councils to improve access and safety for beaches.[49] About 50 beaches already offer at least partially accessible facilities for people with wheelchairs or limited mobility.[50]

A key principle is 'universal design', which can be defined as "the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design".[51] **Luxembourg'**s parliament is discussing a bill on accessibility of public spaces, roads and collective housing buildings. It was introduced in 2018.[52] If it passes, the bill will broaden the scope of universal design to places open to the public, and introduce a specific definition of a person with disabilities, in alignment with the CRPD.[53] A new Roads and Buildings Decree in **Cyprus**, issued by the Minister of Internal Affairs, has improved people with disabilities' access to sanitary facilities in public buildings.[54]

Crucially, success in measures to improve access to the built environment depends on the full involvement of people with disabilities and their organisations. In **Latvia**, for example, the Cabinet of Ministers approved a Plan for the development of environmental accessibility for 2019–2021, reflecting the recommendations in the CRPD's concluding observations. Its goal is to ensure that all people with disabilities have access to public and local authorities and their services by 2030. The plan named DPOs as key partners in the assessment and quality control of its effort to develop and implement universal design principles.[55]

The **Estonian** government set up an accessibility task force to provide comprehensive policy recommendations to achieve full accessibility by 2035. The task force includes representatives of various ministries, DPOs, NGOs representing pensioners and children, the Chancellor of Justice, the Gender Equality and Equal Treatment Commissioner and city representatives as well as private sector associations in areas such as real estate and architecture. The task force's report is due in July 2021.

Jurisprudence is important in clarifying CRPD rights, including accessibility of the built environment. Two courts cited the CPRD explicitly in such cases.

The **Latvian** Supreme Court found in favour of an NGO representing a disabled applicant who pointed out that, although the refurbished buildings of the new Latvian Art Academy had wheelchair ramps, they were not independently accessible. The court referred to the CRPD and noted that access solutions for persons with disabilities should allow independent access as far as possible. It also stressed the need to consult with the representatives of persons with disabilities and examine their claims during the planning process.[56]

Another case was before a municipal court in **Croatia**. It centred on a person with disabilities who was unable to visit an important cultural exhibition because it lacked accessibility provisions. The court found that the defendants had violated national anti-discrimination legislation. It referred to the need for "reasonable accommodation" under Article 2 of the CRPD.[57]

9.2.3. Full participation in the labour market: a long way to go

The CRPD requires Member States to ensure "a labour market and work environment that is open, inclusive and accessible to persons with disabilities" (Article 27 (1) of the CRPD). Across the EU, the average employment rate for people with disabilities is 49.6 %, whereas the rate for people without disabilities is 70.5 %.[58] The Europe 2020 goal is a 75 % employment rate.[59] That requires significant efforts to raise the employment rates of a wide range of groups, including people with disabilities.

Challenges remain in achieving this, as the **Netherlands** Institute for Social Research's final evaluation of the country's Participation Act shows.[60] Since taking effect in January 2015, the Act had different effects on different target groups. The evaluation found that it had increased the employment rate of young people with disabilities and reduced their dependency on social assistance, but had actually reduced income in this group since they were no longer entitled to benefits. It had also failed to reduce such dependency for people on the waiting list for sheltered work. For the largest group, i.e. traditional welfare beneficiaries, the employment rate barely improved.

Governments announced a range of measures in 2019 to improve employment rates. One policy option is to increase subsidies for employers that hire people with disabilities, as an incentive, as the **Swedish** government did.[61] **Bulgaria** also chose to focus on incentivising employers. Its National Council for Persons with Disabilities approved a plan to provide employers with incentives to hire people with disabilities, including by improving accessibility, supporting entrepreneurship and increasing funding for the employment and training of persons with permanent disabilities.[62]

Assistance to both employers and employees is also a useful path forward. Recent amendments to **Luxembourg**'s labour code provide for individualised assistance to ensure full inclusion of persons with disabilities in the workplace at the joint request of the employee, employer and service provider.[63] Quotas are another method to achieve employment goals. For example, **Portugal** established a minimum employment quota for disabled people with an incapacity level equal to or higher than 60 %.[64]

Courts address duty to provide 'reasonable accommodation'

Judicial decisions issued throughout the year clarified the rights of individuals in the workplace context, particularly concerning the scope of the CRPD obligation to provide reasonable accommodation.

Ireland's Supreme Court referenced Article 27 of the CRPD in the case of a special needs assistant. She was dismissed after she acquired a disability that her employers considered made her unfit for work. The Supreme Court established that reasonable accommodation can include the redistribution of any task or duty provided it is not a disproportionate burden on the employer. It also set out an expectation that the relevant employee and other employees related to the role should participate in decisions about reasonable accommodation.[65]

In **Belgium**, several cases addressed issues of reasonable accommodation. In the first, the court found that a man with a long-term illness was wrongly denied incapacity benefits since he was not offered reasonable accommodation at his workplace.[66] The second concerned a woman who was dismissed after she asked for a position adapted to her capacity as a person with a disability.[67] In both cases, the labour courts found that the health insurance company and the employer, respectively, had discriminated against people with disabilities in failing to provide reasonable accommodation.

In the **United Kingdom**, however, the Employment Appeal Tribunal upheld a tribunal's finding that the CRPD had only indirect effect on UK law. The claimant was thus unable to rely on CRPD articles, including the Article 1 definition of disability in his claims of unfair dismissal and disability-based discrimination[68].

These examples again highlight the importance of decisions in individual cases in clarifying the CRPD's scope. A key way to ensure consistent interpretation of CRPD provisions is to ratify the Optional Protocol to the CRPD. It allows individuals to bring complaints to the CRPD Committee, and the committee to initiate confidential inquiries upon receipt of "reliable information indicating grave or systematic violations" of the convention (Article 6).

An example of clarification of CRPD obligations through the Optional Protocol came in April 2019. A **Spanish** policeman had been forcibly retired following a traffic accident. The CRPD Committee noted that not allowing him to transfer to a different position in the police force violated reasonable accommodation requirements under Article 5.[69]

By the end of 2019, however, six Member States (**Bulgaria**, **Czechia**, **Ireland**, the **Netherlands**, **Poland** and **Romania**) and the EU itself had still not ratified or acceded to the Optional Protocol.

9.2.4. Inclusive education: limited progress

The EU 2020 goals for education require "[a]t least 40 % of 30 to 34 year olds to have completed tertiary or equivalent education".[70] This also requires that more people with disabilities achieve this level of education. However, the duty to create an inclusive education system, which Article 24 of the CRPD establishes and the CRPD Committee underlined in its general comment 4 (2016),[71] continues to be a challenge. For example, **Slovakia** lacks reasonable accommodation to enable inclusive education for children with disabilities and displays many other instances of disability-based discrimination, to which its Commissioner for Persons with Disabilities drew attention in a report to the National Council.[72]

A range of different issues explain this lack of progress. One is that authorities allocate insufficient resources. For example, a report on the rights of the child by the Platform of Human Rights Organisations in **Malta** noted a lack of support and resources for schools.[73]

Another is the continued existence of separate systems for children with and without disabilities. In **Cyprus**, for example, the National Confederation of Disability Organisations, KYSOA, criticised an education bill for maintaining distinct units for children with disabilities and not guaranteeing that students with disabilities spend the majority of their school time in integrated classrooms.[74] The Ombudsman intervened at the request of parents of children with disabilities, and talks on inclusive education between DPOs, organisations representing the parents of children with disabilities, and the Ministry of Education are ongoing.

Similarly, the UN Committee on the Rights of the Child expressed its concern at the lack of progress in inclusive education in **Belgium**. It noted ongoing discrimination against children with disabilities in education and an increase in the number of children in special education in the French-speaking community.[75]

To address these and similar issues, several Member States moved towards inclusive education. A major reform in **Portugal** established a legal framework for inclusive education.[76] It defined the learning support centres' functions and responsibilities and granted schools more independence in implementing it. It includes parents and legal guardians in the multidisciplinary team that will be in charge of monitoring and evaluating learning and inclusion support.[77] In 2020, **Denmark** is also introducing the concept of the right to reasonable accommodation in early childhood education and care.[78]

Here too, jurisprudence provided some clarification of CRPD obligations.

An **Italian** Constitutional Court case dealt with a complaint by the Veneto authorities. They had argued that the fact that students with disabilities had their financing renewed on an annual basis made it difficult to protect such children's long-term educational needs. Although the court rejected this complaint, it did establish two important principles.

First, alongside the Italian Constitution (Article 38), Article 24 of the CRPD (right to education) applied to the case. Second, based on the CRPD, funding students with disabilities was not a matter of budgetary discretion. Instead, ensuring the right to education of those with disabilities was at the core of the state's fundamental rights obligations and it would therefore have to continue to provide the necessary funds, including for school transport and assistance.[79]

9.3. CRPD MONITORING FRAMEWORKS: MORE DPO INVOLVEMENT, MORE REGIONAL AND LOCAL ACTION

National monitoring frameworks[80] saw two key developments. One was in the participation of people with disabilities and their representative organisations. The other related to the importance of regional activities.

The CRPD Committee has noted that "the inclusion of organizations of persons with disabilities in the independent monitoring framework and the work thereof can take several forms, for example, through seats on the board of or advisory bodies to the independent monitoring frameworks".[81]

An example of significant DPO representation in a framework itself is the new Commission for the Monitoring of the Rights of Persons with Disabilities of **Lithuania**. Comprising a representative from the Office of Ombudsperson for Equality and four DPO representatives, it monitors CRPD implementation. It has the power to obtain information from relevant parties, employ relevant experts and form working groups, suggest investigations to the Ombudsperson, and provide opinions and comments on the compliance of existing and draft legislation with the CRPD. It started work in July.[82]

Other Member States have created advisory bodies to existing independent monitoring bodies. After ratifying the convention, **Ireland** established the Irish Human Rights and Equality Commission (IHREC) and the National Disability Authority as the monitoring framework under Article 33. To aid its work, in 2019, IHREC set up a Disability Advisory Committee of 11 members representing a broad range of lived experiences of disability.[83] The committee will provide advice and grassroots-level information to IHREC and will be directly involved in monitoring laws, policies and practices relevant to the implementation of the CRPD.

A similar body in **Croatia** is called the Expert Council of the Ombudsperson for Persons with Disabilities. It started work in January 2019.[84] **Estonia**'s Chancellor of Justice began work under Article 33 (2) of the convention and established an advisory board composed of people with disabilities and DPO representatives. The board will meet twice a year and can create special working groups as needed.

Regional, rather than national, governments, may have disability-related responsibilities in important areas such as health or education. Federal or decentralised states "should ensure that the central monitoring framework can properly discharge its functions at the federal, state/provincial, regional and local levels".[85] In **Germany**, for example, the Saarland became the second *Land* to create an independent CRPD monitoring body.[86] However, more centralised states may also find it useful to establish regional offices. In **Croatia**, the Ombudsperson for Persons with Disabilities opened a second regional office in Split, in addition to the office in Osijek.

The EU Framework for the UN Convention on the Rights of Persons with Disabilities (the Framework) adopted new operational provisions[87] and a new work plan[88] for 2019–2020. The new work plan contains three tiers of activities: individual activities of the Framework's members (such as the Ombudsman's inquiries into complaints); activities involving several members (such as maintaining the Framework's website); and activities involving all members (such as joint recommendations on the post-2020 European Disability Strategy).

The European Commission serves as the EU focal point under the CRPD. On 27 March, Framework members met with the Commission to discuss ongoing cooperation. They also participated in the May 2019 European Network of National Human Rights Institutions Working Group meeting, where they discussed EU cooperation on the next round of UN CRPD Committee reviews. Members also contributed to various conferences, such as the annual European Day of Persons with Disabilities, and started preparing for the Framework's contribution to the EU's new Disability Strategy and to the CRPD Committee's evaluation of the EU's implementation of the CRPD.

PROMISING PRACTICE

Advisory regional workshops on CRPD implementation

In January and February 2019, the **Croatian** Ministry for Demography, Youth and Social Policy organised five regional workshops for local and regional stakeholders in charge of CRPD implementation. The goal was to build their capacity to monitor the implementation of Croatia's national disability strategy and the CRPD. They also aimed to enhance cooperation and coordination among the responsible stakeholders at national and local levels. The workshops analysed the existing challenges and prepared local and regional bodies to report on implementation.

*For more information, see Ministry for Demography, Family, Youth and Social Policy, Persons with disabilities, '**Regional advisory workshops 2019**'.*

FRA opinions

The European Disability Strategy 2010–2020 achieved most of its aims and there is added value in having such a strategy, most participants in the 2019 evaluation of the strategy – conducted on behalf of the Commission – felt. They also highlighted concrete outcomes of the strategy, such as the European Accessibility Act. This shows the importance of having a policy document of this kind to guide action at the EU level.

FRA OPINION 9.1

The EU Disability Strategy for the post-2020 period should address all the recommendations arising from the concluding observations of the CRPD Committee adopted in 2015.

More specifically, the post-2020 EU Disability Strategy should ensure that:

— CRPD provisions are mainstreamed in all relevant areas of EU law, policies and programmes, including the use of new technologies;
— persons with disabilities, their representative organisations and relevant civil society organisations are appropriately engaged in the implementation and monitoring of the new strategy;
— properly coordinated disability focal points are designated in all EU institutions, bodies and agencies;
— relevant data collected by Member States are disaggregated in a way that allows monitoring the CRPD implementation.

The European Structural and Investment Funds (ESIF) play an important role in a wide range of policy areas, including supporting national efforts to achieve independent living. The provisional agreement between the European Parliament and the Council regarding the proposed regulations for the 2021–2027 funding period includes important fundamental rights guarantees, in particular as regards the proposed enabling conditions and a stronger role for monitoring committees. Civil society, including disabled persons' organisations and national human rights bodies, can play an important role in the effective monitoring of the use of the funds.

FRA OPINION 9.2

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 in the disbursement of European Structural and Investment Funds (ESIF). This will maximise the potential of EU funds to support independent living. In this regard, the EU should adopt the new enabling conditions establishing the effective implementation of the EU Charter of Fundamental Rights and the CRPD, as laid down in the Common Provisions Regulation proposed by the European Commission for the Multiannual Financial Framework 2021–2027. To enable effective monitoring of the funds and their outcomes, the EU and its Member States should take steps to include disabled persons' organisations and the statutory national human rights bodies in ESIF-monitoring committees. Allocating human resources and adequate funding to these organisations and bodies, and earmarking EU resources for that purpose, will bolster the efficiency of the proposed enabling conditions.

Six Member States and the EU have not ratified the Optional Protocol to the CRPD. It allows individuals to bring complaints to the CRPD Committee, and allows the committee to initiate confidential inquiries upon receipt of "reliable information indicating grave or systematic violations" of the convention (Article 6).

FRA OPINION 9.3

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 to achieve full and EU-wide ratification of its Optional Protocol. The EU should also consider taking rapid steps to accede to the Optional Protocol.

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FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

FRA's *Fundamental Rights Report 2020* reviews major developments in the field in 2019, identifying both achievements and areas of concern. It also presents FRA's opinions on these developments, including a synopsis of the evidence supporting these opinions.

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