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Delegations will find in annex the Annual report of the EU Agency for Fundamental Rights.

Fundamental Rights Report 2017

FRA EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

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

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

FRA's annual Fundamental Rights Report is based on the results of its own primary quantitative and qualitative research and on secondary desk research at national level conducted by FRA's multidisciplinary research network, FRANET.

Relevant data concerning international obligations in the area of human rights are offered online in a regularly updated format under fra.europa.eu/en/publications-and-resources/data-and-maps/int-obligations.

The EU Charter app is a fundamental rights 'one-stop-shop' for mobile devices, providing regularly updated information on an article-by-article basis on related EU and international law, case law that refers directly to one of the Charter Articles, and related FRA publications. Available at: fra.europa.eu/en/charterapp.

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Fundamental Rights Report 2017

Foreword

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

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

But daunting challenges remain, and recent developments underscore how quickly laboriously accomplished progress can be undone. Across the EU, the fundamental rights system is increasingly under attack – dismissed as political correctness gone awry, as benefitting only select individuals, or as hampering swift responses to urgent challenges. While civil society organisations and individuals have shown remarkable dedication in helping to protect fundamental rights and have played a very positive role, they make for easy scapegoats in such a hostile political environment.

This year's focus section, *'Between promise and delivery: 10 years of fundamental rights in the EU'*, further explores these challenges, providing a thorough review of the past decade's highlights and persisting shortfalls.

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

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

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

Frauke Lisa Seidensticker
Chairperson of the FRA Management Board

Michael O'Flaherty
Director

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

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10 YEARS OF STANDING UP FOR THE RIGHTS OF US ALL

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

The 10th anniversary of the European Union Agency for Fundamental Rights (FRA) offers an opportunity to reflect on some of the dynamics underpinning the major fundamental rights developments in the EU since 2007. Taken together, they seem to tell a story of twin impulses. On the institutional side, the EU has built tools to better promote and protect fundamental rights. Yet profound gaps in the implementation of fundamental rights persist on the ground and – in some areas – are deepening. Addressing this tension requires translating the law on the books into effective measures to fulfil rights in the daily lives of all people living in the EU. In addition to acknowledging that fundamental rights are a precondition for successful law- and policy-making, making the 'business case' for human rights, 'giving rights a face' and using social and economic rights more consistently will be beneficial. Without a firmly embedded fundamental rights culture that delivers concrete benefits, many people living in the EU will feel little sense of ownership of the Union's values.

Recent political, social and economic developments have shown that what was often regarded over the last decade as a natural development towards greater respect for fundamental rights can easily backslide. This regression can be partly blamed on the fact that where EU and national legislators have celebrated progress at a formal level, this has often not translated into improvements in people's lives. For too many, fundamental rights remain an abstract concept enshrined in law, rather than a series of effective and practical tools that can and do make a difference to their everyday lives. This is a disturbing truth, and one of which the EU Agency for Fundamental Rights is reminded forcefully in its interactions with the people whose rights are often violated as a matter of course, and whose perceptions and experiences figure in the agency's large-scale surveys and fieldwork projects.

A time of progress and crisis?

The year 2017 marks a double anniversary: 60 years since the creation of the European Community and 10 since the establishment of FRA. These anniversaries tell a story of the EU's evolution from an organisation focused mainly on economic cooperation to one in which respect for fundamental rights is a basic pillar of law and policy. They also reflect the fact that the EU is not just a union of states, but a union of people, granting rights to citizens and individuals.

At the same time, the past decade witnessed fundamental rights challenges that have not just persisted but in many areas – such as migration, asylum and data protection – have grown more pressing. In fact, despite the many pledges the EU and its Member States made over the last 10 years and more, the fundamental rights system itself is increasingly under attack.

The Treaty of Rome, signed in March 1957, primarily focused on economic integration. However, it did leave room for the later commitment to fundamental rights, with reference to an "accelerated raising of the standard of living", and the introduction of the principle of equal pay for women and men.[1] Thirty-five years later, the 1992 Treaty on European Union (Maastricht Treaty) included the first treaty provision to underline the importance of respect for fundamental rights, stating that the "Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms".[2]

The Charter of Fundamental Rights of the European Union (the Charter) was adopted later that decade,

paving the way for the EU to take a more outspoken stance on fundamental rights.[3] This found expression in FRA's creation in March 2007.[4] FRA is the EU's specialised independent body in this area, with a mandate that covers the full scope of rights laid out in the Charter. Its establishment demonstrated the EU's serious intent to make fundamental rights a guiding principle, which "would determine rather than simply limit the European legal system, and would move to the forefront of its institutions".[5] But the negotiation and framing of FRA's mandate reflected Member States' reticence to create a fully-fledged human rights institution at EU level equivalent to the national human rights institutions predicated on the Paris Principles.[6]

The double anniversary also underlines the necessity of reflecting – and taking action – on the striking gaps in the realisation of fundamental rights for everyone living in the EU. Delivering on the Member States' promise to use European integration as an instrument to promote and improve "economic and social progress",[7] "well-being"[8] and "living and working conditions"[9] for their people very much remains a work in progress.

This focus section reflects on the progress the EU has made over the last 10 years in establishing fundamental rights as the cornerstone of its identity. It explores the tangible impact of the fundamental rights framework by drawing on evidence and legal expertise provided by FRA over the first decade of its existence. The section concentrates on four areas: violence against women; poverty and discrimination; migration; and security. Perhaps most importantly, it sheds light on the gaps between legislation and policy on the one hand and the reality lived by people in the 28 Member States on the other, and suggests possible remedies. The focus section concludes by analysing what shortcomings need to be addressed to fill these gaps, and by looking ahead to the challenges and opportunities that may shape fundamental rights in the decade to come.

An EU fundamental rights culture emerges

Laying the legal foundations

Reflecting back over the past decade, a powerful story of a growing institutional commitment to fundamental rights emerges. Ten years ago, it was difficult to identify EU bodies or roles specifically tasked with protecting and promoting fundamental rights in general. The then still new offices of the European Data Protection Supervisor and the European Ombudsman were responsible for very specific segments of fundamental rights: data protection and maladministration, respectively. In contrast to the situation in many Member States, no institution at the EU level was responsible for fundamental rights as such. Moreover, in 2007, no member of the European Commission had a specific portfolio linked to fundamental rights.

Ten years later, the EU has created a fully functioning independent agency assisting not only EU institutions but also Member States in fulfilling fundamental rights obligations when implementing EU law. FRA acts as the EU's independent centre of excellence on fundamental rights. Representing a milestone in the EU's approach to human rights, it extended the scope of the previous EU Monitoring Centre on Racism and Xenophobia. This gave the EU its first expert body with authority to address the full breadth of the EU Charter of Fundamental Rights, including questions of racism and discrimination.[10] Around the same time, this horizontal approach was complemented by the creation of a targeted European Institute for Gender Equality (EIGE).[11] Both FRA and EIGE are advisory agencies; however: they cannot deal with individual rights violations and do not have to be consulted by the EU institutions.

Nevertheless, fundamental rights are far more visibly and prominently anchored within the core EU institutions. The First Vice President of the European Commission is tasked with watching over the implementation of the Charter, the EU's own bill of rights. In the Council, a working party responsible for Fundamental Rights, Citizens' Rights and Free Movement of Persons within the EU became permanent in late 2009. It supplements the Council Working Party on Human Rights, which deals with human rights in the EU's external policies. Since 2012, the Special Representative for Human Rights has represented the EU's commitment to human rights externally, in relations with third countries.

At the national level, fundamental rights policies are increasingly 'institutionalised'. National human rights institutions (NHRIs) have grown in number and status,[12] as have other relevant bodies, such as equality bodies, data protection authorities and ombudsperson institutions. The European Network of National Human Rights Institutions (ENNHRI) has a membership of 40 NHRIs from across the whole continent of Europe, including ombuds institutions, human rights commissions and institutes. Despite having a diversity of mandates and national contexts, they are committed to working together to promote and protect human rights. Ten years ago, 16 Member States had accredited NHRIs, of which 11 were institutions with A status, five with B status and one with C status. In 2017, 21 Member

States have accredited NHRIs, of which 17 have A status and six have B status.

Bringing fundamental rights more concretely into the EU treaties reinforced these institutional developments. When FRA was created in 2007, the EU still lacked a legally binding bill of rights to frame its actions and those of the Member States within the scope[13] of EU law. This changed in 2009, when the Lisbon Treaty entered into force and made the Charter legally binding. Underlining the political ramifications of this new status, the new European Commissioners when taking office in 2010 solemnly declared that they would uphold the Charter as well as the EU treaties. The EU also ratified the UN Convention on the Rights of Persons with Disabilities in 2010 – the first time the EU acceded to an international human rights convention. These developments provided further evidence of the EU's transformation into an organisation visibly based on and committed to fundamental rights.

Concrete evidence of the Charter's growing significance comes in the form of case law of the Court of Justice of the European Union (CJEU). Between 2010, the first year in which the Charter was legally binding, and 2014, the number of references to the Charter in CJEU decisions quadrupled, reflecting its increasing prominence as a legal point of reference at EU level. FRA tracks the use of the Charter at national level. Its annual Fundamental Rights Report and online tool 'Charterpedia' report that the Charter is also contributing to fundamental rights protection through Member States' legal systems. Its added value is not, however, yet fully exploited ▶ (see Chapter 1).

With threats to the rule of law emerging in various EU Member States in recent years, the EU is also engaging more in matters concerning the rule of law.[14] That involvement reflects the increasing emphasis on fundamental rights in a wider sense. In 2013, the European Commission launched its annual EU Justice Scoreboard, which provides comparable data on the functioning of the justice systems in the EU Member States.[15] The scoreboard aims to assist Member States in achieving more effective justice systems for citizens and businesses. In 2014, the Commission added a new framework for addressing systemic threats to the rule of law in Member States.[16] Both the Council of the EU[17] and the European Parliament have followed suit with their own initiatives for combating threats to the values listed in Article 2 of the Treaty on European Union (including respect for human rights, rule of law and democracy).

While FRA is not involved directly in the debate on the rule of law in the EU institutional system, there are obvious interdependencies between the rule of law and fundamental rights. This led FRA to call for a "more encompassing and substantial reading of the rule of law".[18] An opinion, requested by the European Parliament, elaborated on this position and proposed a comprehensive approach because the rights "as recognised in the Charter cover most of the values of Article 2 of the Treaty on European Union (TEU)".[19] In 2016, the European Parliament adopted a resolution advocating for an interinstitutional agreement on arrangements concerning monitoring and follow-up procedures on the situation of democracy, the rule of law and fundamental rights in the Member States and EU institutions.[20] There is, however, no political consensus in favour of such a coordinated approach to the shared values laid down in Article 2 of the TEU.[21]

Embedding fundamental rights obligations in legislative and policy processes

The Charter provides primary law guidance to the EU and Member States, without creating "any new power or task for the Union": they are explicitly obliged to "respect the rights, observe the principles and promote the application" of the Charter.[22] This emphasis on promoting as well as respecting EU values is also visible in the criteria for acceding to the EU stated in the Treaty of Lisbon. According to Article 49 of the TEU, any European state that respects the values referred to in Article 2 and is "committed to promoting them" may apply for EU membership.[23] This prompted questions of whether and how the EU should expand its treaty commitment to fundamental rights to its legislative and administrative branches by developing a fully fledged human rights policy.[24]

Elements of such a policy are visible in a series of major EU legislative developments.[25] Fundamental rights are at the core of the 2008 Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law;[26] the 2012 Victims' Rights Directive;[27] the 2016 data protection reform package;[28] and various directives adopted under the Criminal Procedure Roadmap between 2010 and 2016.[29] Another signal is greater awareness of the need to develop legislation based on in-depth knowledge of the fundamental rights situation on the ground.

An increasing focus on mainstreaming fundamental rights led the European Commission to promote a "culture of fundamental rights" from 2005 onwards.[30] As only fundamental rights-compliant legislation will survive a test before the CJEU, to be sustainable it must be developed with fundamental rights firmly in mind. One example of how the EU legislative process has become increasingly fundamental rights-oriented is impact assessments. In 2010, the European Commission reinforced the process of assessing the impact of new legislative proposals on fundamental rights;[31] a year later, the Council of the EU adopted its own 'Guidelines on methodological steps to be taken to

check fundamental rights compatibility in the Council's preparatory bodies'.[32] In 2012, the European Parliament followed suit and created a new Directorate for Impact Assessment and European Added Value, responsible for guaranteeing independent impact assessment. Finally, in 2016, the three institutions agreed to "carry out impact assessments in relation to their substantial amendments to the Commission's proposal".[33]

As a result, the EU legislator addressed fundamental rights in instruments involving a variety of policy areas, ranging from civil aviation to the revised regulation on the European Border and Coast Guard Agency (Frontex), which includes over 100 references to fundamental rights.[34] Although such references to fundamental rights on paper are not a guarantee of their protection on the ground, they can help to drive rights-compliant implementation. The European Ombudsman has, for example, looked into Frontex's compliance with fundamental rights obligations.[35]

The CJEU's increasingly active stance on fundamental rights supports these developments. The CJEU is the EU's ultimate arbiter of EU legislation's compliance with fundamental rights. Although the CJEU had ruled in numerous judgments over several decades that fundamental rights are part of EU law, it had seldom annulled EU legislation for infringing on fundamental rights. In recent years, however, the court has explicitly noted that compliance with fundamental rights must underpin EU legislation. It reminded the legislator of the need to strike a "proper balance between the various interests involved" and to show to both legal practitioners and beneficiaries of EU law how, "when adopting [legislation], the Council and the Commission took into consideration methods [...] causing less interference" in fundamental rights.[36] Most prominently, in 2014, the court invalidated the Data Retention Directive because it did not sufficiently guarantee "to effectively protect [...] personal data against the risk of abuse and against any unlawful access and use of that data".[37]

The focus on ensuring that EU legislation complies with fundamental rights is also reflected in calls for a greater role for FRA in informing the legislative process. In 2009, the European Council stressed that the EU institutions should "make full use of" FRA's expertise in devising the EU's actions in the area of freedom, security and justice. It invited them "to consult, where appropriate, with the Agency, in line with its mandate, on the development of policies and legislation with implications for fundamental rights, and to use it for the communication to citizens of human rights issues affecting them in their everyday life".[38] In its 2014 guidelines in the area of freedom, security and justice, the Council highlighted the relevance of mobilising the expertise of relevant EU agencies, including FRA.[39] This underlines the importance of sound evidence to inform legislators and policymakers.

One way FRA responded to this call is through legal opinions expressing its views on draft EU legislation "as far as [its] compatibility with fundamental rights [is] concerned".[40] Following requests from the EU institutions – most frequently the European Parliament but also the European Commission[41] and the Council[42] – FRA delivered 18 legal opinions relating to EU legislation between 2008 and 2016. Four of these opinions do not refer to a legislative proposal as such but comment on the implementation of existing EU legislation (such as the FRA opinion on the Equality Directives). Six of them were published in 2016 alone, commenting on the revisions to the Eurodac[43] and Dublin[44] regulations and the proposal to establish an EU list of safe countries of origin,[45] among others. Such legal opinions from an independent expert body can supplement internal impact assessments and legal scrutiny by the legal services of the EU institutions. Although FRA's legal expertise is not yet requested systematically or through a set structure during the preparation of EU legislation, the agency is increasingly invited to participate in hearings at the European Parliament and meetings of Council working groups. This shows that EU institutions acknowledge the added value of FRA's input when discussing measures that affect fundamental rights.

Further means of protecting and promoting fundamental rights

In addition to making the Charter legally binding, the Lisbon Treaty laid down explicit obligations for the EU to increase social inclusion and equality "in defining and implementing [all of its] policies and activities".[46] In so doing, it provided a solid foundation for including references to fundamental rights obligations across all areas and types of EU action, fostering a culture of fundamental rights. This is reflected in a more holistic approach incorporating coordinated strategies, EU funds and economic coordination, in addition to legislation, as ways to improve human rights outcomes.

The development of EU policies on Roma inclusion is a good example. In 2011, the European Commission issued a Communication on an EU framework for national Roma integration strategies (NRISs). The communication stresses that "Member States need to ensure that Roma are not discriminated against but treated like any other EU citizens with equal access to all fundamental rights as enshrined in the [...] Charter".[47] Member States established national contact points, developed national integration strategies and worked together with FRA

to establish indicators and monitoring tools to measure progress in Roma inclusion. In December 2013, the Council of the EU gave guidance on how to enhance the effectiveness of national Roma integration strategies and policies.[48] The Council recommendation retains a primary focus on rights, in particular equality.

At the same time, the Council Regulation governing the European Structural and Investment Funds (ESIF) set out ex ante conditions that must be met before funds can be disbursed. ESIF are the EU's major financial policy instrument for implementing the Europe 2020 strategy. Several of the conditions specifically relate to fundamental rights. In addition to a general requirement for the use of EU funds to comply with the Charter, they also require the existence of a national Roma integration strategy and administrative capacity to implement and apply the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD).[49] Further reflecting the new attention on fundamental rights compliance, in 2014 the European Ombudsman launched an own-initiative inquiry into respect for fundamental rights in the implementation of EU cohesion policy.[50] It resulted in eight recommendations to the European Commission on avoiding fundamental rights violations.[51] In parallel, the European Court of Auditors audited the Commission and four Member States to assess whether or not EU policy initiatives and financial support through the European Regional Development Fund and European Social Fund between 2007 and 2015 had contributed effectively to Roma integration. The findings resulted in eight recommendations.[52]

Moreover, new EU funding schemes provide funding that is specifically focused on projects relating to fundamental rights – something that was already a feature of the EU's relations with third countries.[53] Such funding schemes are another facet of the overall effort to align the EU's internal fundamental rights actions with those already in place in its external relations.

Social rights, an area of fundamental rights that has received relatively little attention in the past, is rapidly becoming a policy priority in the EU to address shortcomings and delays in the implementation of the EU 2020 strategy. This could have an impact on the EU's economic coordination and structural reform procedures, particularly the European Semester, and make the Economic and Monetary Union more 'rights oriented'. In 2016, the European Commission engaged in a public consultation on a Pillar of Social Rights intended to place more focus on equal opportunities in and access to the labour market, fair working conditions, and adequate and sustainable social protection.[54] The consultation yielded a record number of responses, with a European Commission press release of 23 January 2017 indicating there were more than 16,000 responses and that the ensuing conference attracted more than 600 participants, including all major social partner organisations.[55] As a result of this consultation on 26 April 2017, the European Commission presented the European Pillar of Social Rights.[56] This clearly points to a new dynamic in the strengthening of the EU's fundamental rights profile.

Increasing the visibility of fundamental rights in an EU context

Complementing these internal changes, the EU also took steps to make fundamental rights more visible in the EU as a whole. Back in 2007, an informed citizen might have been aware that the EU promotes gender equality and consumer rights, and is committed to fighting discrimination against citizens of other EU countries. However, there was little to give the EU a wider reputation as an important actor in fundamental rights protection.

The European Commission took steps to raise fundamental rights awareness among citizens as part of its 'Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union'.[57] For example, the Commission improved its e-Justice portal, which informs citizens where they can turn for assistance if fundamental rights are violated in their country.[58] It also launched an annual report on the application of the Charter, incorporating issues identified in the thousands of letters the European Commission receives annually from citizens.

For its part, FRA carries out large-scale surveys on people's experiences of the protection of their fundamental rights. They cover a range of issues, from violence against women to discrimination and criminal victimisation of people with minority ethnic backgrounds. These help draw attention to major fundamental rights issues in the EU. Moreover, work with relevant actors helps to raise awareness of and increase coordination on fundamental rights. Networks of government focal points (liaison officers in governments and parliaments), NHRIs, Member States and civil society organisations promote awareness of fundamental rights and offer increased opportunities to share experiences.

In addition, thousands of court practitioners, including judges, prosecutors and attorneys, and law enforcement officers benefit from practical handbooks developed by FRA in close cooperation with the European Court of Human Rights (ECtHR) and the Council of Europe.[59] These handbooks provide hands-on guidance on legal principles in the areas of non-discrimination, data

protection, asylum and immigration, children's rights, and access to justice. Published in all EU languages, almost 100,000 copies had been disseminated by the end of 2016, while around 340,000 had been downloaded by mid-2016. Producing practical tools for practitioners is one way in which FRA provides relevant advice on fundamental rights.

At the beginning of this millennium, academics questioned if the EU could be described as a human rights organisation.[60] The institutional and procedural developments described mean that today we can argue that fundamental rights are firmly embedded not just in law but in the legislative process and the development and implementation of EU policies. No longer confined to the EU's judiciary, fundamental rights are becoming part of the EU's administrative, policy and economic culture. However, there is no room for complacency.

Fundamental rights under pressure: experiences in four key areas

While the fundamental rights framework has been added to and improved over the past decade, serious shortfalls persist in many areas. This section briefly examines how rights-based law- and policy-making have affected the lives of people in the EU. It looks at four areas in which fundamental rights are particularly at stake: violence against women, the tension between protecting privacy and ensuring security, Roma's experiences with poverty and discrimination, and the situation of migrant children. In each area, FRA's work brings added value by providing evidence on serious and ongoing fundamental rights violations.

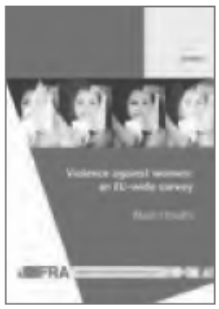
This section draws on different types of FRA evidence and on agency opinions examining actions at the EU level. It should be read alongside the respective chapters of this and previous Fundamental Rights Reports, which track key developments at national level. In addition, the materials stemming from the first Fundamental Rights Forum, which FRA organised in June 2016, also provide a wealth of further information, addressing different aspects of these thematic areas.[61]

Discrimination and fundamental rights: violence against women

> *"European governments, parliaments and judiciaries must become more sensitive towards women's rights and put an end to this unbearable injustice. Ensuring women's safety must be among Europe's top priorities."*
>
> *Council of Europe Commissioner for Human Rights, 'Fighting violence against women must become Europe's top priority', New Europe, 4 January 2016*

Violence against women is typically thought of as a human rights issue in the context of war and armed conflict. It is only relatively recently that gender-based violence – ranging from domestic violence to sexual harassment – has been viewed from a rights-based perspective and acknowledged as a particularly severe fundamental rights concern.[62]

Despite greater acknowledgement that violence against women involves serious and widespread fundamental rights violations, until recently, few comprehensive data on the extent of the problem were available. This prompted the European Parliament to call on FRA to collect "reliable, comparable statistics on all grounds of discrimination [...], including comparative data on violence against women within the EU" in 2009.[63] The Council of the EU reiterated this request in March 2010.[64] The agency responded by launching the first EU-wide survey to record women's experiences with violence, encompassing different types of physical, sexual and psychological violence experienced since the age of 15, as well as women's childhood experiences with violence (by an adult) before the age of 15. The survey included face-to-face interviews with 42,000 women in the 28 EU Member States. Based on a representative sample of women in the general population, it presents a comprehensive picture of women's experiences with violence.



The results of FRA's survey, published in 2014, are sobering.[65] The findings show that an estimated 13 million women in the EU had experienced physical violence in the 12-month period preceding the survey, and that an estimated 3.7 million women experienced sexual violence in the same period. Overall, one in three women (33 %) indicated that they had been a victim of physical and/or sexual violence at least once since the age of 15, and one in 20 women indicated that they had been raped. The survey also captured experiences of sexual harassment. Depending on the six or 11 examples of sexual harassment asked about in the survey, between 45 % and 55 % of women indicated that they had experienced at least one form of sexual harassment since the age of 15. Many women had experienced multiple incidents.

The survey also covers areas of abuse that have only recently been recognised, such as stalking and the psychological abuse that often accompanies violence. It reveals the extent to which social media and the internet are being used as new tools for abuse. For example, 11 % of women had received unwanted, offensive and sexually explicit emails or text messages,

as well as offensive and inappropriate advances on social networking sites.

The results also indicate the extent of underreporting of incidents of violence against women. Only 14 % of women reported the most serious incident of physical and/or sexual violence to the police in cases where the perpetrator was an intimate partner, according to the survey. This suggests that police statistics – to the extent that they record a victim's gender and relationship with the perpetrator – show only the 'tip of the iceberg' when it comes to women's experiences of violence.

The past decade shows that three elements are relevant to addressing violence against women:

- strengthening protection through mutually reinforcing legal standards;
- coordinated policy action;
- improving data collection.

In addition to an increasing focus on violence against women by the UN, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) entered into force in 2014. As the first binding and comprehensive European legal instrument on the issue, it is a significant milestone for sustained efforts to prevent violence against women, protect victims and bring offenders to justice. As of February 2017, all EU Member States have signed the convention and 11 have ratified it. On 11 May 2017, the Council adopted two decisions on the signing of the Council of Europe Convention (Istanbul Convention) on preventing and combating violence against women and domestic violence.[66]

Conversely, there is currently no equivalent legislation at the EU level that comprehensively addresses violence against women. Instead, protection against forms of violence that specifically target women (such as sexual abuse and sexual harassment at the workplace) or affect them disproportionally (such as domestic violence) is framed in terms of non-discrimination. The Gender Equality Directive (recast), for example, addresses specific forms of violence such as sexual harassment.[67]

Nevertheless, the increasing alignment of law at the European level to address violence against women is evident when looking across different legal instruments. For example, the Istanbul Convention emphasises women's right to be protected immediately against further victimisation if they are victims of violence by their domestic partners. This is in line with the right of victims under Article 18 of the Victims' Rights Directive to be protected against repeat victimisation. Recent EU law takes it up specifically in the form of the Directive on the European protection order[68] and the Regulation on mutual recognition of protection measures in civil matters.[69] In addition, the Victims' Rights Directive recognises that victims of gender-based violence, victims of sexual violence and victims of violence in a close relationship are vulnerable as a result of the nature or type of crime to which they have fallen victim.

Despite the lack of a general EU legal instrument on gender-based violence, the European Commission has increasingly recognised violence against women and gender-based violence among its policy priorities. The Commission's Roadmap for equality between women and men 2006–2010[70] and the Strategy for equality between women and men 2010–2015[71] both outlined key actions in the area of gender-based violence. Most recently, in December 2015 the Commission released its Strategic engagement for gender equality 2016–2019[72] as a follow up to the 2010 strategy. It presents a number of key actions, including EU ratification of the Istanbul Convention, continued enforcement of the Victims' Rights Directive, and awareness-raising activities and measures to eradicate female genital mutilation and human trafficking. In addition, the European Commission used the results of FRA's survey as a basis for developing further measures to combat violence against women, such as setting up funding opportunities for the Member States and civil society organisations.

> *"If I look back now, what I really needed at the time was professionals with the understanding and knowledge of all the dynamics of domestic violence."*
>
> *Catherine, victim of domestic violence in FRA video 'A decade of human rights protection: The EU Agency for Fundamental Rights turns 10'*

One area of particular focus is asylum. For example, in its 2010 strategy, the Commission set out to ensure that EU legislation in the area of asylum takes gender equality into account, and that the gender perspective is promoted in the work of the European Asylum Support Office and the European Refugee Fund. For its part, FRA looked at the specific experiences of and responses to violence against women in the context of its monthly reporting on the impact of the asylum situation in select Member States.[73] In addition to a thematic focus on violence against women, another monthly report examined the theme of trafficking, including with respect to gender.[74]

However, during the same period, other planned initiatives were withdrawn. Most notable is the EU-wide Strategy on combating violence against women, which was announced in the 2010 Strategy on equality between women and men.

In parallel to working on improving legal standards and policies, policymakers have noted the absence of comprehensive data on violence against women.

Such data can inform corresponding initiatives, such as improving support services for victims or training relevant professionals. In the absence of reliable administrative and criminal justice data, FRA's survey – the largest cross-country data set of its kind – serves as a model for several additional data collection efforts. Eurostat, the EU's statistical office, is piloting a survey on violence against women *and* men in select Member States. It will build on the experience, questionnaire and findings of FRA's survey. FRA is part of the expert group that will provide input to the development and roll-out of this survey. If successful, it will provide much-needed data in an area where official statistics are limited. Furthermore, the EU is financially supporting the Organization for Security and Co-operation in Europe's efforts to replicate FRA's survey – using the same questionnaire – in 10 non-EU European countries.

More broadly, in 2016 the agency's Management Board agreed that FRA should repeat its surveys on Jewish people in select Member States and on lesbian, gay, bisexual, transgender and intersex (LGBTI) persons across the EU. Both encompass experiences of hate-motivated violence that can be broken down by respondents' gender and other variables. Moreover, results from the second round of the agency's EU Minorities and Discrimination Survey (EU-MIDIS II) will be released in 2017. Its data on crime victimisation can be disaggregated with respect to gender and characteristics such as respondents' self-declared ethnicity or immigrant background.[75]

> *"To complement police records, comprehensive and in-depth surveys are necessary. The [FRA] survey paved the way in this field. It is now considered the gold standard, and we should be proud of this achievement. However, we cannot stop here (...). We need to repeat the [FRA] survey again, and we will make sure that such surveys are conducted at regular intervals to detect new trends and gaps."*
>
> *Commissioner Věra Jourova, speech to the European Parliament on 25 November 2014 – International Day for the Elimination of Violence against Women*

Looking ahead, regular assessments of the implementation of legal standards will constitute an important step in closing the gap between existing legal protections and women's actual experiences in the EU. From 2016, an independent expert body will contribute to monitoring the implementation of the Istanbul Convention through a country-by-country evaluation procedure.[76] This work should provide impetus for States parties to ensure full implementation of the convention by giving a better overview of gaps in the protection of victims and provision of services. The coming period will show whether or not the political climate in the EU is favourable to the EU's ratification of the Istanbul Convention. In parallel, the effectiveness of EU legislation to tackle issues such as cross-border protection of victims of violence (which should benefit women), as well as the Victims' Rights Directive, should be closely assessed to see the extent to which the law is applied in practice to assist women who are victims of violence. FRA provided the EU with comprehensive data on the extent of violence against women; Member States now have to address it appropriately.

Security and fundamental rights: implications for the use of personal data

> *"Respecting fundamental rights in planning and implementing internal security policies and action has to be seen as a means of ensuring proportionality, and as a tool for gaining citizens' trust and participation."*
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> *Council for the European Union (2014), Council conclusions on development of a renewed European Union Internal Security Strategy, Brussels, 4 December 2014, p. 7*

From the Madrid and London bombings of 2004 and 2005 to the numerous terrorist attacks of 2015 and 2016, the last 10 years have seen a rise in major terrorist acts around the EU. With new, often internet-based, technology playing an increasingly important role in both organising and preventing such acts of mass violence, possible tensions between security and firmly embedded EU rights to data protection and privacy moved to the fore. This tension was cast into sharp relief in 2013, when whistleblower Edward Snowden exposed mass surveillance practices by the United States and United Kingdom governments. Lifting the lid on large-scale, indiscriminate gathering and analysis of data under the auspices of national security and counter-terrorism, these revelations seemed to indicate a trade-off between ensuring security and protecting privacy rights.

Selected examples show how the perceived need to 'balance' the fundamental rights to data protection and privacy with security has been at the core of debates about the three major EU-level legislative issues in the area:[77]

- preparation and adoption of the 2016 data protection package;
- preparation and adoption of the 2016 Passenger Name Record (PNR) Directive;
- responses to the annulment of the 2006 Data Retention Directive.

The Snowden revelations marked a turning point in discussions on reform of the EU data protection law[78] by forcefully underlining the need for a strong legal framework reflecting new technological possibilities for mass surveillance. After four years of negotiation, in 2016 the EU adopted a package consisting of the General

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

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

Marking a clear step forward in the protection of fundamental rights, both the GDPR and Directive (EU) 2016/680 incorporate several of the privacy safeguards that FRA proposed in its 2012 legal opinion on the data protection reform package.[81] They include strengthening the right to an effective remedy and enabling organisations acting in the interests of individuals to lodge complaints. For example, both instruments provide for strong supervision by independent national data protection authorities (DPAs), who can receive complaints and award compensation to data subjects, as FRA's opinion suggested.

Similar privacy-based concerns accompanied the negotiation of the EU PNR Directive, which is viewed as a central plank of the EU's security agenda.[82] The directive entered into force in 2016 after almost a decade of discussion.[83] The adopted text includes a number of safeguards missing from the 2011 proposal,[84] which the European Parliament rejected in 2013 amid concerns about its proportionality and necessity, as well as its lack of data protection safeguards and transparency.[85]

Several of these safeguards build on suggestions that FRA made in its 2008 and 2011 legal opinions on the EU PNR data collection system. For example, the directive includes a clearer list of criminal offences that justify the use of PNR data by law enforcement authorities, and requires Member States to appoint dedicated data protection officers within the units responsible for processing PNR data at the national level.[86]

In addition to the collection and processing of personal data, recent terrorist attacks focused attention on data retention by telecommunication providers as a tool for protecting national security and addressing crime. There is currently no EU-wide legislation in this area.

The CJEU annulled the 2006 Data Retention Directive in 2014,[87] one of a series of judgments underlining the court's proactive stance on ensuring data protection.[88] While acknowledging that the directive pursued a legitimate aim in the fight against serious crime and in protecting national security, the court found that it provided insufficient safeguards to protect privacy and data protection rights.[89] This reflected major concerns that national courts had expressed. FRA's mapping showed that all constitutional courts that addressed the issue deemed national data retention regimes either partly or entirely unconstitutional.[90]

If the EU heeds Member States' call for "an EU-wide approach [...] to put an end to the fragmentation of the legal framework on data retention across the EU",[91] recent CJEU rulings give clear criteria for assessing how compatible any future data retention proposal will be with fundamental rights.[92] As FRA has emphasised, any new EU action would need to incorporate the safeguards that the CJEU identified and include strict proportionality checks and appropriate procedural safeguards to guarantee the essence of the rights to privacy and the protection of personal data.[93]

> *"Fundamental rights must be at the heart of the [European security] framework. [...] [G]reater security can only become real when rooted in the full respect of fundamental rights. [...] I am fully committed to the Charter [of Fundamental Rights of the EU]. Our actions must always be based on the rule of law, with appropriate safeguards and exceptions only when necessary, proportionate and legally justified."*
>
> ***Sir Julian King, European Commissioner for the Security Union (2016), 'Introductory remarks by Commissioner-designate Sir Julian King to the LIBE Committee', Strasbourg, 12 September 2016***

Realising these protections in practice will require the full and prompt implementation of the new legal framework. FRA's research has consistently highlighted gaps, so this will include steps to make individuals aware of their data protection rights and available remedies.[94] In addition, it demands particular focus on effective remedies and independent oversight, in line with recent CJEU case law.[95] This includes ensuring that supervisory authorities are fully independent, and can take action on their own initiative to protect the interests of data subjects proactively and effectively.[96] The wider role for DPAs also underlines the importance of ensuring they have adequate human and financial resources to carry out their supervisory and enforcement tasks.[97]

This vigilance will be essential in protecting against some of the fundamental rights risks that remain, particularly concerning PNR. The possibility to extend the system to intra-EU flights would significantly increase its scope, calling into question its compliance with the proportionality criteria set out by the CJEU.[98] Furthermore, PNR data, if inappropriately used to assess the risk posed by certain passengers, can amount to discriminatory profiling.

Two practical FRA tools give guidance on how Member States can embed fundamental rights as they incorporate the PNR Directive into national law. First, FRA's guidance on setting up domestic PNR systems addresses issues such as transparency towards passengers and transfer of PNR data.[99] Second, its Guide on discriminatory ethnic profiling – to be updated in 2018 to reflect technological developments – explains when profiling would be considered discriminatory and therefore unlawful.[100]

Examples of recent EU legislation show that privacy rights can be incorporated into security and counter-terrorism measures. Looking ahead, the next step is to reconceive the relationship between privacy and security so that they are viewed as mutually reinforcing. Rather than speaking of striking a balance between security concerns and the right to privacy and data protection, politicians can use data protection concerns to make security interventions more legitimate. They have already made strong commitments to promote a fundamental rights culture within the security union.[101] FRA's evidence can help to ensure that future actions in this area encapsulate this approach.[102]

Poverty and fundamental rights: the case of Roma

"The EU has made available to the Member States a range of legal, policy and financial instruments to address the situation of the Roma through different perspectives: non-discrimination, free movement of people or enlargement strategy. However, it is clear that the legal instruments in place are not sufficient to address the Roma issue alone. The economic and social marginalisation of Roma persists, which is neither acceptable nor sustainable in the EU of the 21st Century. [...] The economic integration of Roma will contribute to social cohesion and will improve respect for fundamental rights."

Viviane Reding, Vice-President of the European Commission, responsible for Justice, Fundamental Rights and Citizenship (2011), 'The EU Framework for national Roma Integration Strategies: Moving from good intentions to concrete action', 8 April 2011

In 2010, at the height of the economic and financial crisis, the EU adopted Europe 2020, its 10-year strategy for growth and jobs.[103] It set a target of reducing, by 2020, the number of people threatened by poverty or social exclusion by 20 million. Being unemployed and living in conditions of poverty and social exclusion are detrimental to the full enjoyment of rights, as FRA underlined in its 2013 focus on safeguarding fundamental rights in times of crisis.[104] This calls into question compliance with numerous Charter rights, including human dignity (Article 1); the freedom to choose an occupation and the right to engage in work (Article 15); non-discrimination (Article 21); social security and social assistance (Article 34); healthcare (Article 35); and freedom of movement ad of residence (Article 45).

"Roma have been – for some reason – chosen to be the scapegoat."

Kumar, Roma rights defender in FRA video 'A decade of human rights protection: The EU Agency for Fundamental Rights turns 10'

Roma are overrepresented among those affected by poverty or social exclusion. FRA's 2011 Roma survey found that at least 80 % of the Roma surveyed were at risk of poverty or social exclusion, compared with 24 % of all adults.[105] At the same time, about half of the Roma surveyed reported that they had experienced discrimination in the year preceding the survey because of their ethnic origin, while only around 40 % were aware of laws forbidding discrimination against members of ethnic minorities when applying for a job. Few of the EU's main large-scale surveys sufficiently cover ethnic minorities including Roma, so these data shed new light on the fundamental rights challenges faced by the EU's largest ethnic minority.[106]

Reflecting the urgency of the situation revealed by these and other data, different EU institutions put in place comprehensive legal and policy commitments specifically aimed at improving Roma socio-economic conditions. The EU adopted a Framework for NRISs in April 2011, marking an unprecedented commitment by EU Member States to promoting the inclusion of their Roma communities.

Progress on the ground, however, has been notably slower. FRA published data in 2016 – as part of EU-MIDIS II – suggesting that little progress has been achieved.[107] Overall, 80 % of Roma live below their country's at-risk-of-poverty threshold, one in three live in housing without tap water and one in 10 live in housing without electricity (see also Chapter 4). Furthermore, a quarter of all Roma and a third of Roma children live in a household that faced hunger at least once in the month preceding the survey. Roma also continue to face intolerable levels of discrimination when looking for work, at work, in education, in healthcare, when in contact with administrative bodies or even when entering a shop: 41 % felt discriminated against at least once in one of these areas of daily life in the past five years.

"First of all, Member States need to ensure that Roma are not discriminated against but treated like any other EU citizens with equal access to all fundamental rights as enshrined in the EU Charter of Fundamental Rights. In addition, action is needed to break the vicious cycle of poverty moving from one generation to the next."

Commission Communication 'An EU Framework for National Roma Integration Strategies up to 2020', 5 April 2011, COM(2011) 173 final

These results support the Commission's assessment in 2016 that, whereas the legal, policy and funding instruments put in place had resulted in better coordination and mainstreaming, they were unable to

"prevent further deterioration of the living conditions of Roma and widespread hostility of majority societies".[108] Among the actions proposed by the Commission to improve implementation of Roma inclusion measures, three emerge from FRA's research as particularly important:

- strengthening the monitoring and evaluation of Roma inclusion measures;
- empowering Roma and involving them in developing, implementing and monitoring integration measures at local level;
- reflecting age- and gender-specific vulnerabilities in efforts to tackle poverty and social exclusion.

The European Commission also highlighted these issues as particular challenges in 2010 and 2016.[109]

The importance of effective monitoring and evaluation of initiatives to improve the realisation of fundamental rights is a consistent theme of FRA's research, and is firmly embedded in Roma-related initiatives. Both the EU Framework on NRISs and the 2013 Council recommendation afford prominence to regularly monitoring progress. To support these efforts, FRA worked with the European Commission and Member States – through the Ad-Hoc Working Party on Roma integration indicators[110] – to develop and apply a two-pronged monitoring system on Roma integration. The first pillar consists of a framework of indicators for measuring progress against a range of fundamental rights, based on the UN's structure–process–outcome model.[111] Process indicators are particularly important for informing policymakers about possible gaps or deficits at the implementation level, so the second pillar is an information collection tool for generating data to apply these indicators. In 2016, this fed into Member States' first report on progress made in implementing the 2013 Council recommendation.

Nevertheless, weaknesses in monitoring processes persist. One challenge concerns linking measures to outcomes, which would enable policymakers to track the results of their efforts.[112] FRA's surveys go some way to plugging the gap in data on outcomes. It would give further insight into the impact of measures on the ground if other major European survey instruments, such as the Survey on Income and Living Conditions and the Labour Force Survey systematically included the possibility to disaggregate relevant data.

Moreover, fundamental rights-based monitoring tools may not be consistently applied across the full breadth of Roma integration measures. For example, although the introduction of ex ante conditions in the current ESIF regulation marks a significant step forward, there remains room for improvement in assessing their role in realising fundamental rights. In this regard, FRA's assistance to European Commission desk officers working with ESIF on human rights-based monitoring tools can help to enhance ESIF's role in tackling discrimination and reducing poverty and social exclusion.[113]

Effective monitoring is closely tied to the involvement of those concerned. One way to support full and meaningful participation is through empowerment. Both the European Commission and the Council of Europe have taken action to improve the civil and political participation of Roma citizens, as well as the capacity of Roma civil society. The European Commission supported pilot projects for shadow monitoring of NRISs, including information on the involvement of civil society,[114] while the Council of Europe helped to develop community action groups through which Roma citizens can contribute to decision-making processes at the local level.[115] Further evidence on the complex processes empowering local Roma communities will come through FRA's Local Engagement for Roma Inclusion project.[116] Bringing together local residents, including Roma, with other local stakeholders, the project investigates how they can best be involved in Roma integration actions.

FRA research also underlines the particularities of poverty and social exclusion experienced by women and children. FRA data show that, of the Roma who are at risk of poverty, 42 % are children under 18 years of age, while for non-Roma households the figure is around half of that (22 %).[117] Roma children also lag behind their non-Roma peers on all education indicators: for example, nearly a fifth (18 %) of Roma aged between six and 24 attend an educational level lower than that corresponding to their age. Similarly, data show poorer outcomes for women than for men. Roma women report lower employment rates than Roma men, for example: 16 % compared with 34 %. As many as 72 % of young Roma women surveyed are not employed, in education or training, compared with 55 % of young Roma men. These findings can help policymakers develop better-targeted responses to promote the social inclusion of Roma women and children more effectively.

As EU legal and policy provisions are increasingly framed by fundamental rights, measures tackling discrimination and combating anti-Gypsyism should become embedded not only in Roma integration strategies, but more broadly in the range of measures against poverty and social exclusion. In addition to existing national reform programmes and ESIF projects, further initiatives are expected to be developed under the new European Pillar of Social Rights. As Commissioner Thyssen underlined in her opening speech at the conference on the proposed pillar: "Europe has always placed importance on social

justice – as the core of its social market economy, so we need to tackle inequalities and poverty head on."[118]

Migration and fundamental rights: the situation of children

> *"We can build walls, we can build fences. But imagine for a second it were you, your child in your arms, the world you knew torn apart around you. There is no price you would not pay, there is no wall you would not climb, no sea you would not sail, no border you would not cross if it is war or the barbarism of the so-called Islamic State that you are fleeing. So it is high time to act to manage the refugee crisis. There is no alternative to this."*
>
> *Jean-Claude Junker, President of the European Commission (2015), State of the Union address 2015: time for honesty, unity and solidarity, Strasbourg, 9 September 2015*

Over one million refugees and migrants entered the EU through Greece and Italy in 2015. A further 360,000 people crossed the Mediterranean into the EU in 2016.[117] Of these, 26 % were children, many of them unaccompanied.[120] The total number of child asylum applicants increased from 61,195 in 2010 to 368,800 in 2015, a six-fold increase. Of these applications, 96,465 were submitted by unaccompanied children, which represents almost a ten-fold increase from 2010 (10,610 applications). 87.5 % of all children who arrived in Italy by sea in 2016 were unaccompanied.[121]

The situation illustrated in stark terms the potential for fundamental rights violations at all stages of the migration and asylum process. FRA highlighted some of the most pressing concerns in its *Fundamental Rights Report 2016*,[122] including limited legal possibilities for refugees to enter the EU; smuggling of migrants; the impact of asylum and border management policies on EU free movement rules; and preventing *refoulement*[123] – returning a refugee to a risk of persecution. Other issues, such as resettlement of migrants to other EU Member States, reuniting family members in different Member States, the implications of the so called EU-Turkey Statement adopted on 18 March 2016, and information systems in the area of asylum and migration,[124] are discussed in Chapter 5.

Reflecting the urgency of the crisis at the EU's borders, FRA supplemented its existing research in the area[125] with new activities, in particular the deployment of FRA experts to the Greek 'hotspots' between April and September 2016 to provide on-the-ground fundamental rights expertise to EU actors;[126] and the publication of regular overviews of migration-related fundamental rights concerns in Member States particularly affected by large migration movements.[125] Furthermore, four legal opinions, which the European Parliament requested, highlighted the fundamental rights impact of certain EU responses, namely a proposed EU common list of safe countries of origin,[128] the situation in the hotspots established in Greece and Italy,[129] and the effects on children of proposals to revise the Dublin[130] and Eurodac[131] regulations.

The situation calls into question compliance with numerous Charter rights, including the rights to asylum (Article 18), respect for private and family life (Article 7), an effective remedy (Article 47), integrity of the person (Article 3) and liberty (Article 6) as well as the prohibition of *refoulement* and collective expulsion (Article 19). Evidence collected through the agency's operational engagement and research underlines particular risks associated with children arriving in large numbers. They make it harder to fulfil Article 24 on the rights of the child in conjunction with the above rights.[132]

Around a third of asylum applications in the EU in both 2015 and 2016 were from children. A significant minority of these were unaccompanied – not accompanied by an adult responsible for them – or separated – accompanied by a relative other than their parents or guardian.[133] Efforts to implement the enhanced protection that international, EU and national law afford to unaccompanied and separated children have put asylum and child protection systems in many Member States under unprecedented strain.[134]

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

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

- preventing detention of unaccompanied children;
- ensuring guardianship for unaccompanied children; and
- preventing unaccompanied children from going missing from reception facilities.

FRA first highlighted challenges concerning missing children in the context of trafficking in 2009.[137] Two reports

from 2010 captured separated children's experiences of legal guardianship and detention, and presented a comparative overview of legal provisions concerning detention of separated children in return procedures.[138]

A first key fundamental rights risk is child detention. Although EU law strongly discourages the detention of all children for migration purposes,[139] FRA has collected evidence indicating that unaccompanied and separated children continue to be detained in some EU Member States.[140] This raises a number of fundamental rights issues, including insufficient individual assessment of the necessity of detention, limited assessment of the child's best interests prior to detention, and the type of facility and child-specific safeguards available.[141] Children held in the hotspots, in particular, lack meaningful age-appropriate activities and are at heightened risk of being placed together with adults not related to them due to a lack of dedicated facilities.[142] Children's experiences, collected by FRA before the current crisis, bear out these concerns. Separated children talked of bullying and aggression in detention, as well as confusion about why they were detained, given that they had not committed any crime.[143]

> *"[E]ven for a short period of time and in adequate material conditions, immigration detention is never in a child's best interests. [...] [D]etention is a disproportionate measure as the harm inflicted on children in the context of detention cannot be justified by immigration control requirements."*
>
> Council of Europe Commissioner for Human Rights (2016), 'Letter from the Council of Europe Commissioner for Human Rights, Nils Muižnieks, to the Secretary of State for Migration and Asylum of Belgium, Theo Francken, concerning the detention of migrant children', CommDH(2016)43, 19 December 2016

For those exceptional situations in which children are detained, Article 17 of the Return Directive and Articles 11 and 12 of the Reception Conditions Directive set out safeguards. These include ensuring that detention is for the shortest appropriate period of time and takes place in accommodation with appropriate personnel and with facilities that enable children to engage in recreational activities appropriate to their age.[144]

Evidence that the agency has collected over a decade powerfully underlines a second issue: the importance of effective and efficient guardianship systems for ensuring the rights of all children, in particular migrant and refugee children separated from their families. Throughout the arrival, asylum and immigration process, guardians play a critical role in ensuring the child's access to services, information and support, as well as safeguarding their best interests in legal and administrative procedures.[145] In practice, however, FRA's work illustrates persisting problems: significant delays in the appointment of guardians; difficulties identifying sufficient numbers of suitable guardians; the appointment of guardians who may have conflicts of interest; and guardians being responsible for large numbers of children.[146] Separated asylum-seeking children also often do not know if they have a guardian or who that person is, interviews in 2010 indicate.[147]

Proposed revisions to the Reception Conditions Directive were published in 2016 in response to the migrant and refugee crisis. They address several of these issues. Among other aspects, the proposal calls for the appointment of a guardian within five days of the application for international protection, vetting of guardians, and ensuring that guardians are not responsible for a disproportionate number of children.[148] The joint FRA–European Commission *Handbook on guardianship for children deprived of parental care* provides practical guidance on how Member States can apply these safeguards within their national guardianship systems.[149] For example, to avoid potential conflicts of interest, it cautions against appointing guardians who are also working for reception facilities. It also provides advice on the training of guardians and sets out core components of review and oversight mechanisms. This is in response to evidence that FRA collected showing that most Member States do not have in place provisions for filing complaints against guardians.[150] As part of its presence in the hotspots in 2016, FRA facilitated a workshop on reforming the Greek guardianship system that drew on promising practices in EU Member States.

> *"It is not good to close the way for refugees – because if they close the way, they will find a dangerous way and many people will die on the way."*
>
> 15-year-old female migrant in FRA video 'A decade of human rights protection: The EU Agency for Fundamental Rights turns 10'

Lack of registration, inadequate accommodation, fear or experience of detention, and ineffective guardianship can be factors in migrant children going missing. Although a lack of comprehensive data means there is little clarity on the numbers of missing unaccompanied children, evidence that FRA has collected gives some insight into why unaccompanied children go missing from reception facilities.[151] Many leave to meet parents or other family or friends living in another Member State. Others decide to travel alone because asylum procedures are lengthy and often have cumbersome administrative requirements, and because they do not trust authorities and they lack information. Inadequate reception conditions and detention practices are further push factors: evidence from FRA's monthly reporting in 2015 and 2016 suggests that children mainly go missing from transit and temporary first reception facilities that fail to meet child protection standards.[152]

These factors support introducing various possible measures to reduce the number of missing unaccompanied children,[153] estimated at over 10,000 in 2015.[154] First, they might be less inclined to leave in search of relatives if there were more opportunities for prompt family reunification – for example, a special scheme for the

transfer of unaccompanied children to Member States where there is the best chance of family reunification.[155] Second, ensuring children are given accurate information in an age-appropriate manner helps to build trust; promptly appointing a trained and qualified guardian can help to convey information and identify children at risk of disappearing. Lastly, reception and accommodation should be provided in more 'family-like' form, such as foster care, with the involvement of child protection authorities. In the hotspots established in Greece and Italy in 2015, providing adequate conditions includes having a qualified person responsible for child protection issues, as FRA's 2016 legal opinion proposed.[156]

These responses proposed by the agency are practical ways to ensure that the fundamental rights of children can be protected throughout the arrival and asylum process. More broadly, they underline the importance of ensuring that EU law and policy fully incorporate the needs of this especially vulnerable group of refugees and migrants. Upcoming EU-level initiatives provide an opportunity to reinforce and strengthen existing safeguards. For example, the proposal for a revised Dublin Regulation marks progress in certain areas, such as children's extended right to information.[157] Additional guarantees would further enhance protection – such as appointing a guardian and excluding unaccompanied children from accelerated procedures to ensure a genuine assessment of their best interests, as FRA argues in its opinion on the revised Dublin Regulation.[158]

What remains to be done

This focus section began by describing how the EU has developed and improved tools to respect, protect and promote fundamental rights, among them the FRA. But – as the four examples discussed above underscore – major obstacles to fulfilling the human rights of everyone living in the EU remain.

The discrepancy between fundamental rights structures and outcomes on the ground points to persisting gaps. Filling these gaps requires a renewed commitment to fundamental rights. This is even more needed as recent years have witnessed new challenges in the political landscape. Against this backdrop, FRA's role appears even more relevant than 10 years ago.

Gaps and deficiencies persist

The EU has taken significant steps towards becoming a fully fledged human rights actor. But this remarkable progress must be put in perspective. The past decade's strengthening of the formal fundamental rights architecture will only have achieved its aim when people in the EU actually feel that their fundamental rights are protected and fulfilled. Precisely here, though, we see two major shortcomings. One is the inconsistent application of fundamental rights legislation and policy around the EU. The other is the failure to communicate that human rights are for everyone and provide the best basis for societies to develop and flourish. It is this failure that at least partly explains the rise in support for populist groups in many places throughout Europe.

Four examples highlight these problems:

- Member States have not fully embedded a 'Charter culture' in their administrative, legislative and judicial procedures. The implementation of the 'law on the books' into lived realities continues to suffer shortcomings.
- The EU does not yet fully use the potential of all Charter rights (including socio-economic rights) and their guiding function across the EU's activities.
- The EU does not systematically request independent socio-legal advice (e.g. by FRA) when legislating. Moreover, the EU has not yet acceded to the European Convention on Human Rights (ECHR) and is therefore as such not subject to the jurisdiction of the European Court of Human Rights (ECtHR).
- A gap persists between the EU's internal fundamental rights policies and its external commitment to human rights.

The Charter is now part of EU primary law. As such, it guides and shapes both EU and national legislation, the latter when it falls within the scope of EU law. Since large parts of national legislation and policy are within so-called EU competence, the Charter provides fundamental rights standards for many aspects of Member States' activities. Nonetheless, the Charter plays only a peripheral role in national law- and policy-making, and in domestic jurisprudence.

The Charter can reach its full potential only if it is actively used by lawyers in national administrations and courts. However, references to the Charter at national level remain limited in quantity and superficial in quality (see Chapter 1). Whether scrutinising upcoming national legislation and policies or applying national norms to implement EU law, a detailed 'Charter compatibility check' should be standard practice – but currently is not.

In addition to the obligation to "respect the rights [and] observe the principles" of the Charter, Member States must also "promote the application thereof" (Article 51 of the Charter). Yet national policies to promote the use of the Charter in national public administrations and legal systems are lacking. Efforts to tackle this gap between statutory obligation and political reality would enhance the use of the Charter itself, and could also cement the wider role of fundamental rights as a central component of law- and policy-making processes.

At the EU level, explicit references to the Charter are far more frequent and assessments of Charter-related impacts have become standard. Nevertheless, potential to enhance the Charter's use remains. One clear example is the area of social and economic rights. Many of the instruments shaping the EU's economic governance do not assign a specific role to the Charter. This limits its role in some of the policy areas that are most relevant to people living in the EU.[159] For example, the Charter could be put to better use in the context of the European Semester and other instruments of economic and budgetary surveillance. In addition, the EU could take steps to address criticisms that it has not given sufficient weight to other relevant international standards, such as the Council of Europe's European Social Charter.[160] Actively engaging with the Turin process of reinforcing the norms set out in the European Social Charter would be one way to achieve this.

Moreover, EU institutions seem to have focused on avoiding violations of Charter rights, rather than on maximising its potential to enhance and guide the development of policies. Assessing the fundamental rights impact of potential EU legislation and policies has become standard in the European Commission. Proposals are checked against the Charter, a further sign of how it has instilled a new fundamental rights culture in EU institutions and processes. Nevertheless, fundamental rights impact assessments could be further improved across all EU institutions.[161] Involving FRA in the EU legislative process in a more structured manner would be an important contribution in this regard. For example, the European Commission took a more informal but nevertheless effective approach when creating the High Level Expert Group on Interoperability between large-scale information systems by the EU in the field of asylum, border control and immigration (see Chapter 5):[162] FRA was involved from the very beginning, providing expertise and advice throughout the process.

The EU's accession to the CRPD, and thus its acceptance of the CRPD Committee's external monitoring and review of its progress in implementing the convention, clearly signalled that the Union is willing to submit itself to external scrutiny of its human rights performance. This openness to guidance from non-EU sources creates greater scope for international human rights law to enhance the EU's human rights performance. Ratification of the Istanbul Convention, as proposed in March 2016, would extend this possibility to a new area.

The situation regarding the EU's accession to the European Convention on Human Rights (ECHR) is less encouraging. The CJEU's Opinion 2/13 could substantially delay the process.[163] This risks creating the impression that the EU is hesitant to agree to external judicial review by the ECtHR. Such external judicial control would be important given that the CJEU's jurisdiction is limited – it excludes the EU's common foreign and security policy – and individuals have only restricted access to the CJEU.[164] Furthermore, it would avoid the danger of creating the perception (at national and/or international level) that the protection of fundamental rights is subservient to the importance of retaining an autonomous legal order.

Lastly, imbalances persist between human rights policy coordination inside and outside the EU. While the EU has had a Strategic Framework and Action Plan on Human Rights and Democracy for its external relations since 2012,[165] a similar degree of coordination does not exist in the EU's internal sphere. The Council of the EU's rationale when adopting the current action plan in 2015 was that "complex crises and widespread violations and abuses of human rights and fundamental freedoms require ever more determined efforts by the EU".[166] That would seem to apply equally within the EU.

Just as in external relations, an internal action plan could enable to EU "to meet these challenges through more focused action, systematic and coordinated use of the instruments at its disposal, and enhanced impact of its policies and tools on the ground".[167] In 2014, FRA looked at what form such an internal strategic framework for fundamental rights could take. It identified a series of EU-level, national and general tools.[168] One recurrent theme mirrors another aspect highlighted by the Council for external relations: "put[ting] special emphasis on ownership by, and co-operation with, local institutions and mechanisms, including national human rights institutions, as well as civil society."[169] Again, these arguments used in the context of the EU's external relations very much also lend themselves for the call for developing an EU internal strategic framework for the protection and promotion of fundamental rights.

New challenges ahead: commitment and communication

Additional difficulties are emerging that will require innovative responses. Evidence collected by FRA suggests that the 'space' for civil society in public discourse and policymaking is being squeezed, both politically and financially. This was confirmed by a 2016 survey amongst 300 diverse associations and NGOs.[170] Yet it is during periods when fundamental rights are on the defensive that civil society organisations have special relevance. Civil society organisations can play an important role in generating ownership and fighting mis- and disinformation. To fulfil this task, however, they must be empowered and enabled to communicate fundamental rights in a narrative that people find convincing.

Another challenge relates to communicating rights. Those who are committed to human rights and to strengthening their protection in the EU must admit that we have failed to communicate the importance of human rights for all members of society and the importance of respectful and tolerant public and political debate. In

2013, FRA pointed out that the political environment in which human rights look to protect individuals was becoming increasingly difficult.[171] That still holds true. Elements of extremist ideology – particularly concerning attitudes to migration and Islam – have gained a foothold within some large political parties and seem to be gaining acceptance among the electorate. Anti-human rights rhetoric makes it easier to depict rights as 'political correctness' rather than legal obligations. Left unchecked, intolerant rhetoric in political discourse, disseminated through the media, could incite discrimination, hatred or violence, as a recent FRA paper shows.[172] This has wide societal implications far beyond the immediate interaction between offender and victim.[173]

Even where a fully fledged fundamental rights protection system exists, upholding fundamental rights is difficult in the face of repeated efforts to discredit them in parts of the political and public discourse. Looking ahead, the EU and its Member States will need to find effective ways to:

- address mistrust of public institutions and perceived threats deriving from phenomena such as immigration or globalisation;
- highlight the benefits of fundamental rights for everyone in the EU.

Successfully responding to challenges requires first understanding them. This necessitates analysing the motivation of those expressing disregard for human rights. Such rhetoric does not necessarily reflect rejection of the values enshrined in fundamental rights standards. A 2016 survey in the EU's nine largest Member States concludes that it is not values but fear of globalisation that is driving moves away from the political mainstream.[174] Attitudes to human rights are likely linked to levels of trust in the state, underlining the link between fundamental rights, on the one hand, and the rule of law and democracy, on the other. It is here that a 'mechanism on democracy, the rule of law and fundamental rights' could add value, especially if it is firmly anchored in national realities, institutions and processes.[175] Embedding fundamental rights in social realities should also help to better communicate the societal function and benefits of rights, and so make the 'business case' for human rights'.

Fundamental rights are sometimes perceived as focusing on minorities, rather than shared by all. This means that defenders of fundamental rights need to increase collective ownership of fundamental rights. With signs of decreasing support for fundamental rights within their constituencies, politicians might become less willing to support and enforce international human rights standards. The notion of fundamental rights as being 'rights for minorities' that are 'imposed' by the 'international community' contributes to a decreasing affinity for human rights within societies.

One point of departure is acknowledging that civil and political rights have so far had more prominence than social and economic rights. Social and economic rights have the potential to signal to individuals that the state provides them with legal entitlements just as it entitles a migrant to apply for asylum. The Charter is unique in combining, with equal status, civil and political and social and economic rights in a single document. The potential of the social and economic rights set out in the Charter has not, however, been fully exploited thus far. To increase understanding of how the EU protects human rights and renew faith in their overwhelming significance for both individual development and social cohesion, these less well-known rights enshrined in EU legislation should be given more weight.

Traditional human rights activities and tools may no longer suffice to address these challenges effectively. However, countering the perception of fundamental rights as a complicating factor or even a hurdle in responding to the urgent challenges facing everyone in the EU is essential if they are to live up to their promise as one of the values underpinning the EU and its 28 Member States.

Role of the Fundamental Rights Agency

By establishing FRA, the EU supplemented existing tools with an independent centre of fundamental rights expertise that can provide objective, comparable, relevant and reliable data and information as well as advice and guidance.[176] It also created an agency that contributes to raising awareness of fundamental rights, cooperates with public bodies responsible for human rights at the national level, engages with civil society and coordinates with international human rights organisations.

FRA's activities demonstrate that the best way to assess the effectiveness and efficiency of measures to promote and protect fundamental rights is through a combined focus on the outcomes of laws and policies. These outcomes can be measured through surveys and other forms of objective and comparable research that systematically collect data on the experiences of rights holders (individuals), and the specific actions and investments that duty bearers (states) undertake to implement their commitments. Having hands-on contact with and providing advice to practitioners provides opportunities to engage with practical realities rather than only with the relevant normative frameworks. The four policy areas examined above highlight the different forms of FRA's engagement with fundamental rights, particularly:

- large-scale surveys providing robust, detailed and comparable data that complement the results of major European statistical surveys;
- practical, on-the-spot guidance to support practitioners in the field; and

- legal opinions scrutinising legislative proposals and providing guidance on the development and implementation of rights-related legislation.

FRA's large-scale surveys assess the experiences and perceptions of individuals, and give unique insight into the outcome of EU policies on the ground. Looking ahead, the upcoming Fundamental Rights Survey will collect information on people's experiences with, and opinions on, fundamental rights issues in the EU. Taking a fundamental rights perspective on everyday issues such as access to justice, consumer rights and good administration, the survey will identify gaps in the realisation of rights and service provision across a broad range of areas.[177] Moreover, by applying the UN's structure–process–outcome indicator model, it is possible to measure progress, stagnation and regression, and improve policies in a more targeted way.[178]

FRA's decade of experience shows that rights-related developments are influenced by an overall political and practical context subject to sudden change. For example, the recent migration situation put Member States under unexpected levels of pressure. FRA provided hands-on assistance and expertise to relevant actors on the ground by engaging in the hotspots in Greece. By focusing on practical issues such as how to apply child protection safeguards in guardianship systems for unaccompanied children[179] and steps to reduce the risk of *refoulement* in external border management,[180] FRA provided practical guidance to national actors on how to address fundamental rights issues in migration management.

While independent expert institutions in many Member States systematically issue legal opinions and statements on legislative drafts on their own initiative, this is not the case for the EU. The Paris Principles on the status of national human rights institutions (NHRIs) require that such legal expertise can be delivered on NHRIs' own initiative.[181] This is the case for the sector-specific European Data Protection Supervisor but not for FRA, which has a horizontal role across all fundamental rights.[182] FRA, as the EU's human rights agency, cannot issue legal opinions on legislative drafts on its own initiative. FRA's mandate instead requires that the European Parliament, Council or Commission explicitly request a legal opinion when "it concerns" their proposals or positions in the course of the legislative process.[183] The EU institutions do not, however, consistently request such independent external fundamental rights scrutiny.

Building on robust and comparable socio-legal evidence collected systematically by FRA is central to the delivery of sustainable and human rights-compatible legislation and policies. Moreover, drawing on such independent evidence signals that the EU is open to independent advice and guidance. FRA's more systematic involvement in the development of EU legislation should therefore be considered should the agency's founding regulation be revised.[184]

The challenges highlighted in this report – migration, security, increasing digitalisation, social inequality and poverty – look set to remain. They are likely to unfold against a background of fragmentation in societies, fragmented information and an international environment whose legitimacy is questioned by some politicians and parts of the population.

As integral part of the international human rights system, FRA can play a vital role in efforts to reinvigorate the legitimacy of human rights. On the research side, the agency will need to enhance further the delivery of targeted outputs of immediate use to policymakers and lawmakers. At the same time, FRA will need to continue developing and implementing multi-annual programmes of research in areas where evidence gaps hamper progress in the full implementation and fulfilment of fundamental rights.

In terms of cooperation, FRA will further strengthen its ties with all parts of the international and regional human rights system,[185] and in particular with the Council of Europe,[186] UN system, OSCE, as well as EU institutions. This includes FRA's partners in European Parliament committees, European Commission General Directorates, and Council working groups that share inter-institutional responsibility for fundamental rights. At the same time, FRA will emphasise the importance of identifying further synergies within the European and global human rights community to enhance complementarity and multiply impact.

Equally important will be to further build on national human rights institutions[187] and, more generallly, communities of support at national levels, including through the unique composition of FRA's Management Board. Unlike other agencies' boards, the FRA Management Board is not composed of Member States' representatives but of "independent person[s] appointed by each Member State, having high level responsibilities in an independent national human rights institution or other public or private sector organisation".[188] Finally, FRA is in the process of revamping its engagement with civil society[189] and will use the tools available through its Fundamental Rights Platform to act as closely to the citizen and align with Article 15 (1) of the TFEU and the spirit of Article 11 of the TEU on openness and transparency.

In both its research and cooperation activities, the agency will consider the entire range of rights contained in the EU Charter of Fundamental Rights, while making full use of its mandate and focusing on the policy areas identified in its multi-annual framework.

Conclusions

In terms of fundamental rights performance, the last decade can seem one of divergent narratives. On the one hand, the EU has translated its long-standing commitment towards human rights beyond its borders into a set of internal policies to protect and promote fundamental rights within the 28 EU Member States. Two key milestones reflect this change:

- the entry into force of the EU Charter of Fundamental Rights; and
- the creation of the Fundamental Rights Agency.

Another key milestone would be the EU's accession to the ECHR, as required by the Lisbon Treaty.

On the other hand, implementation of fundamental rights on the ground remains a reason for great concern. This is exacerbated by a political environment in which parts of the electorate and their representatives increasingly appear to question not only certain rights but the very concept of a rights-based polity.

Bringing these two narratives together is an urgent call for action to close the gap between the fundamental rights framework in principle and fundamental rights outcomes in practice. It demands that all actors reinvigorate their commitment to ensure, together, that fundamental rights result in real changes in people's lives. Only renewed action in this spirit will allow us to look back in 2027 at a successful decade during which the EU and its Member States delivered on their shared values of "human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

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1 EU Charter of Fundamental Rights and its use by Member States

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

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

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

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

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

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

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

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

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

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

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

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

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

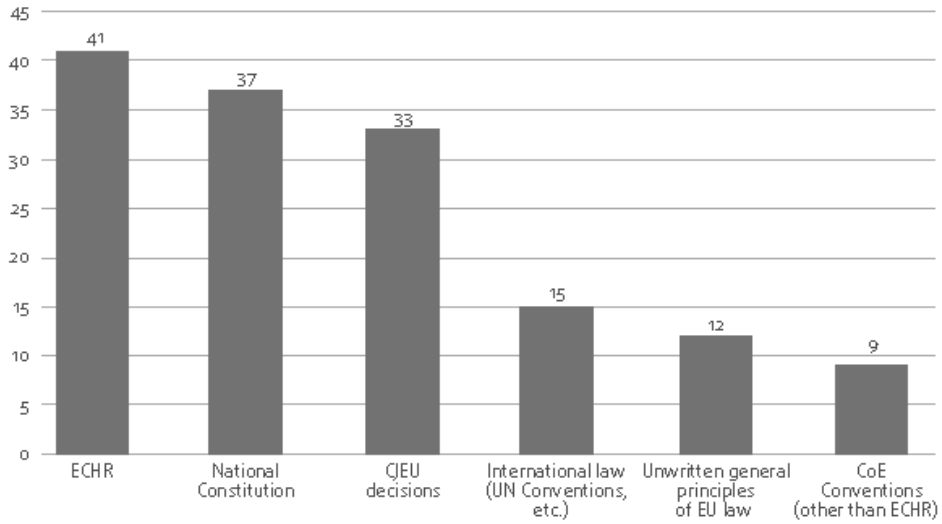
As in past years, an analysis of the court decisions issued in 2016 shows that the Charter is used in combination with other legal sources (see Figure 1.1). Likewise, just as in past years, the ECHR and national constitutional norms were the most prominent legal standards used besides the Charter. In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

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

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

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

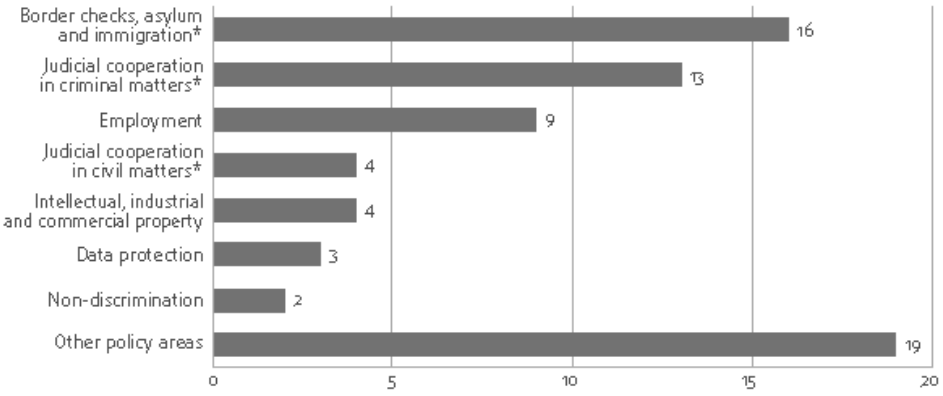
Figure 1.1: Number of references to other legal sources alongside the Charter in court decisions analysed, by legal source referred to



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

Source: *FRA, 2016*

Figure 1.2: Policy areas addressed in analysed court decisions

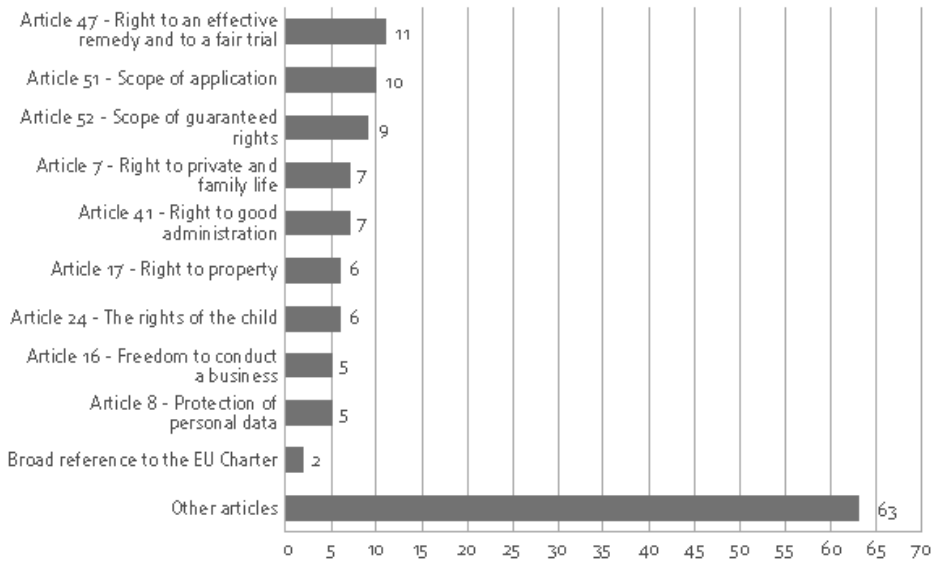


Notes: *Based on 70 court decisions analysed by FRA. These were issued in 27 EU Member States in 2016. Up to four decisions were reported per Member State; no decision was reported for Malta. The category 'Other policy areas' includes policy areas that were referred to in fewer than three analysed decisions.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

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

Source: *FRA, 2016*

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



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

Source: *FRA, 2016*

1.1.3. Referring cases to Luxembourg: divergence persists

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

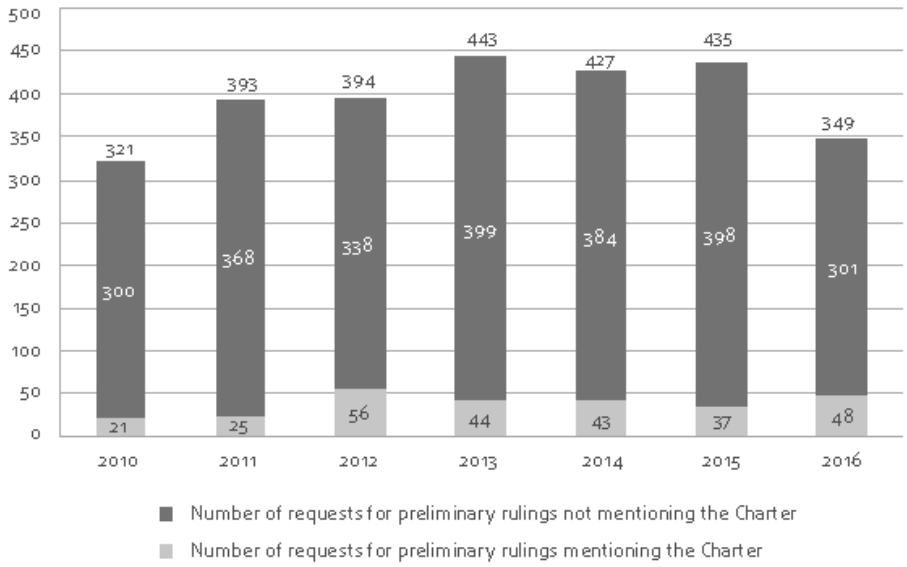
Just as in past years, in 2016, courts from almost all Member States sent requests to the CJEU for guidance in interpreting and applying EU law provisions. No such request was sent from courts in **Cyprus**. In recent years, on average, around one tenth of these requests have referred to the Charter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

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

1.1.4. Scope of the Charter: an often ignored question

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

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



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

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

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

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

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

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

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

> *"The determination and proclamation of affiliations of a person to state security bodies and the intelligence services of the Bulgarian National Army does not fall under any of the powers of the Union, determined by the TFEU. In this case the Bulgarian state and courts should not apply the provisions of the Charter, because EU law does not apply to those societal relations."*
>
> *Bulgaria, Supreme Administrative Court, Case No 8412/2015, 1 June 2016*

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

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

1.1.5. The Charter as legal standard for interpreting national law

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

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

> *"[He] refused to help his brother's acquaintances to Sweden but agreed to help a family with children. The principle of the best interest of the child has special protection under Article 24 of the EU Charter of Fundamental Rights, which should be considered applicable in cases concerning the rights of asylum seekers, which are covered by EU regulations [...] It is also noted that there is an mitigating circumstance under [...] the Penal Code for a crime that is prompted by strong human compassion."*
>
> *Sweden, Skåne and Blekinge Court of Appeal, Case B 7426-15, 5 December 2016*

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

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

> *"In this case we cannot ignore important commitments of the Czech Republic arising from EU law [...] The mentioned directive sets out [...] 'Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union. Preventing and combating trafficking in human beings is a priority for the Union and the Member States'."*
>
> *Czech Republic, Constitutional Court, Case II. ÚS 3436/14, 19 January 2016*

1.1.6. The Charter as legal standard for constitutional review

Previous Fundamental Rights Reports have shown that, in some legal systems, the Charter is used as a standard for constitutional review. This is most prominently the case in Austria where, since 2012, the Constitutional Court has developed case law establishing the EU Charter of Fundamental Rights as a standard under national constitutional law, thereby allowing the Constitutional Court to review national legislation against the Charter. Courts in **Austria** carried out such reviews in 2016. In a case concerning a Somali citizen who applied for international protection, the Federal Office for Immigration and Asylum denied the appellant asylum. Thereupon, the appellant submitted a complaint to the Federal Administrative Court, which rejected it without conducting a public hearing. According to the Constitutional Court, the Federal Administrative Court violated Article 47 (right to an effective remedy and a fair trial) by not conducting a public hearing.[39] In another case concerning a decision to return a migrant to his country of origin, the Constitutional Court for the first time recognised the direct applicability of the third paragraph of Article 47, which stipulates that legal aid "shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice".[40]

> *"Fundamentally, a contradiction between a general Austrian provision and Union law (only) leads to the non-applicability of the Austrian provision, which is to be acknowledged incidentally by all state organs [...], but not to its repeal (VfSlg 15.189/1998). In principle, the Constitutional Court has no competence to examine general Austrian legal provisions in light of European Union law, unless there is a violation of a right which is guaranteed by the Charter and which is similar in formulation and assertiveness to constitutionally guaranteed rights of the Austrian constitution."*
>
> *Austria, Constitutional Court, Case G447/2015, 9 March 2016, para. 3.25*

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

> *"The Charter of Fundamental Rights of the European Union, which provides in Article 49, para. 3, that 'penalties must not be disproportionate to the offence', has the same legal value as the Treaties according to Article 6 of the Treaty on European Union and is binding on both the judiciary and the legislature, according to Article 148 of the Constitution [...] In respect of this and keeping in mind that first of all we should offer priority to Community law, then to constitutional law and after that to criminal legislation, the Court establishes that even when applying a penalty the provisions of Article 49, para. 3, of the Charter of Fundamental Rights of the European Union and Article 53 of the Constitution establishing the principle of proportionality are imperative."*
>
> *Romania, Tribunalul Arad, decision of 25 January 2016*

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

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

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

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

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

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

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

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

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

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

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

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

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

> *"The Charter of Fundamental Rights of the European Union (the 'EU Charter') recognises the same values as the Constitution; however, the area in which it provides protection of rights beyond the Constitution is precisely the area of consumer legal relationships. In this respect, Article 38 of the Charter should be noted, according to which the states' policies shall ensure a high level of consumer protection. Given the wording of Article 7 of the Constitution, in light of the Lisbon Treaty, the Charter is part of the legal order of the Slovak Republic. The Charter obliges the Slovak Republic, as an EU Member State, to ensure a high level of consumer protection and the Court of Appeal considers that the provisions of Article 52 of the Consumer Protection Act are among the rules that lead to the fulfilment of Article 38 of the Charter."*
>
> ***Slovakia, Regional Court Prešov,** Case 17Co/286/2015, 28 June 2016*

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

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

> *"The Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties [...] and it appears from the Foreign Minister's answer [...] that the Charter does not imply legal obligations for individuals. It follows from the foregoing that the principles developed or established on the basis of TEU Article 6 (3) are not made directly applicable in Denmark pursuant to the Accession Act. Similarly, the provisions of the Charter, including the Charter's Article 21 on non-discrimination, are not made directly applicable in this country pursuant to the Accession Act".*
>
> ***Denmark, Supreme Court,** Case 15/2014, 6 December 2016*

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

1.2.1. Assessment of fundamental rights impact

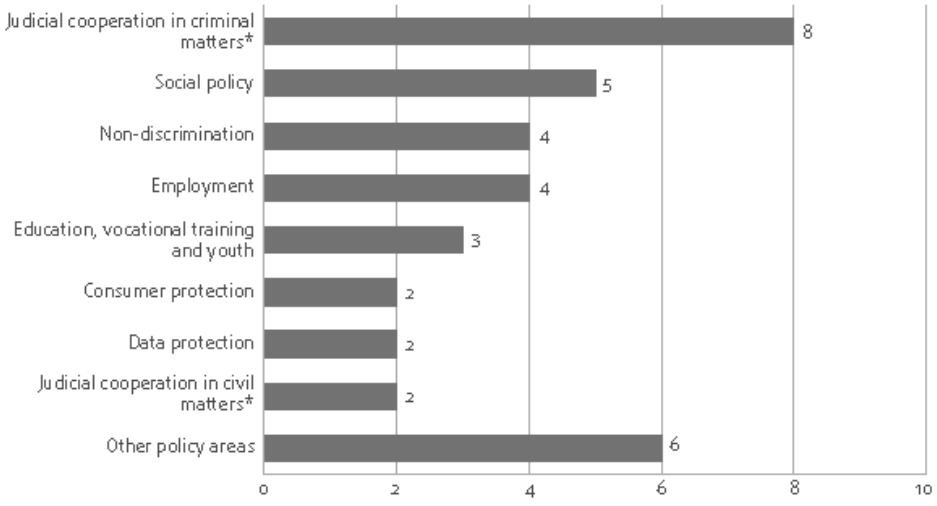
As noted in past Fundamental Rights Reports, Member States have procedures in place for assessing economic, environmental, social or other impacts of bills.[41] Many of these procedures explicitly take effects on fundamental rights into consideration. However, such procedures tend not to refer to EU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

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

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

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

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



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

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

Source: *FRA, 2016*

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

1.2.2. Assessment of fundamental rights compliance

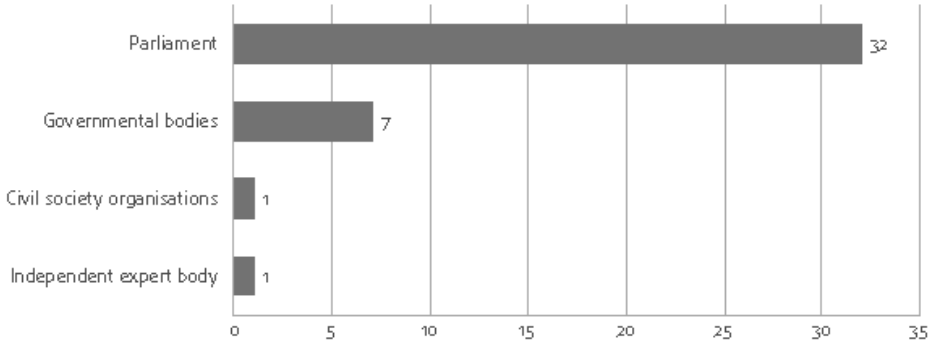
Whereas impact assessments are not necessarily a legal exercise, the legal scrutiny of a bill is a legal assessment. There is another difference: an impact assessment is typically carried out when a bill has not yet been fully defined, so that various legislative options can be compared. In contrast,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

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

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

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

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



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

Source: *FRA, 2016*

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

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

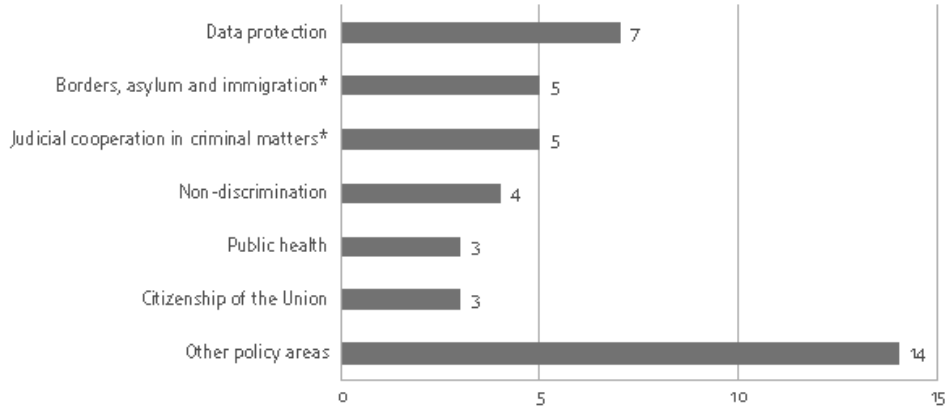
As in past years, amongst the examples reported for 2016, the area of data protection again appears to be the most prone to raising Charter concerns (Figure 1.7).

1.2.3. National legislation

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

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

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



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

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

Source: *FRA, 2016*

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

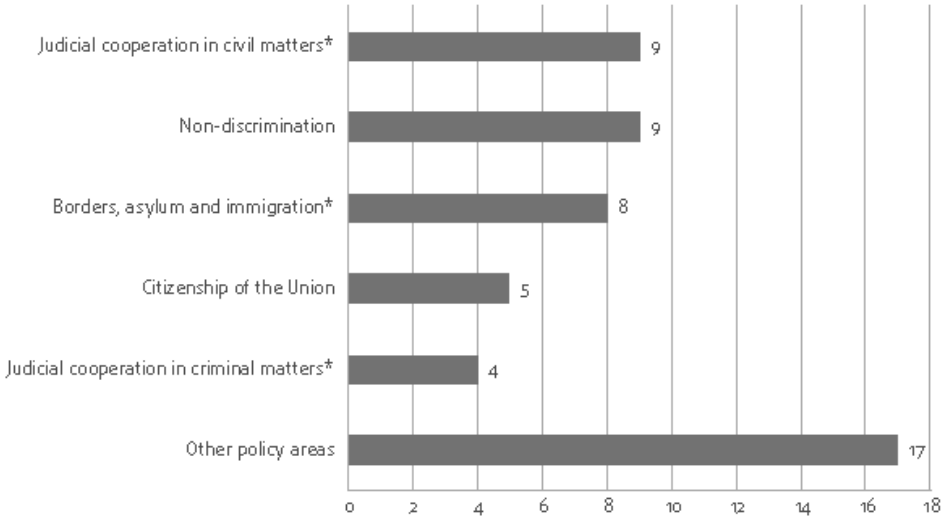
> *"The publication of sanctions and measures and of any public statement by the Board shall respect fundamental rights as laid down in the Charter of Fundamental Rights of the European Union, the Constitution of Malta and the Convention for the Protection of Human Rights and Fundamental Freedoms; in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

1.2.4. Parliamentary debates

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

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

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



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

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

Source: *FRA, 2016*

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

> *"If [the Government does not propose legislation] we will exercise our rights as Members of Parliament and will submit draft laws in the near future, all the more so because we would like to comply with Article 23 of the EU Charter [equality between women and men], which makes the Government's obligation unequivocal in this field."*
>
> ***Lajos Korozs, Member of Parliament, Hungary,*** *07.11.2016 session of the Hungarian Parliament;* ***see also*** *Proposal for Parliamentary Resolution no. H/11718 on narrowing the gap in wages between genders* ***(H/11718 határozati javaslat a nemek közötti bérszakadék mérsékléséről)***

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

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

> *"I am aware of Case C-258/13 regarding Article 47 of the European Union Charter of Fundamental Rights which was heard by the European Court of Justice. While there are no plans at present to introduce legal aid for the type of commercial enterprise referred to, the situation is kept under review in my Department."*
>
> ***Ireland, Deputy Frances Fitzgerald,*** *Written Answers Nos. 160–173,* ***12 July 2016***

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

> *"Ladies and gentlemen, in my opinion, and I would like to underline it once more, Article 18 of the Constitution does not make provision for same-sex marriages. [...] However, in the case of Polish citizens – and there are some of them – who want to enter a same-sex marriage abroad, e.g. in Spain, Belgium, the Netherlands, with their partner who comes from one of these countries, in my opinion and in accordance with the provisions of the Treaty on European Union, the Charter of Fundamental Rights and the freedom of movement as well as EU citizenship, the Polish state should not cause any problems or difficulties for these people to do so."*
>
> ***Poland, Commissioner for Human Rights,*** *Sejm Rzeczypospolitej Polskiej Kadencja VIII,* Sprawozdanie *Stenograficzne z 24.* posiedzenia Sejmu Rzeczypospolitej Polskiej w dniu 5 września 2016 ***(Sejm's term of office VIII, manuscript of 24th meeting on 5 September 2016)***

1.3. National policy measures and training: initiatives lacking

1.3.1. Policies referring to the Charter

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

Promising practice

Studying the use of the Charter at national level

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

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

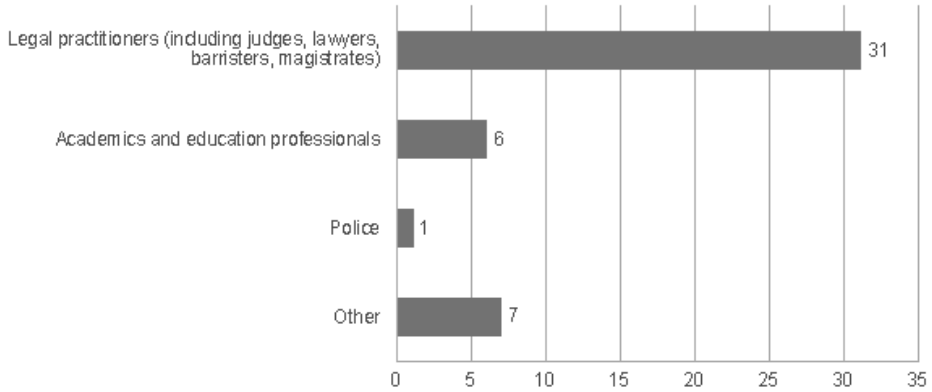
For more information, see Poland, Ministry of Foreign Affairs, Conference on application of EU Charter of Fundamental Rights by Polish courts, press statement, 26 September 2015

1.3.2. Training related to the Charter

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

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

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



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

Source: *FRA, 2016*

Promising practice

Improving legal practitioners' Charter knowledge

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

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

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

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

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

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

Promising practice

Innovative forms of Charter training for practitioners

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

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

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

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

FRA opinions

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

FRA opinion 1.1

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

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

FRA opinion 1.2

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

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

FRA opinion 1.3

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

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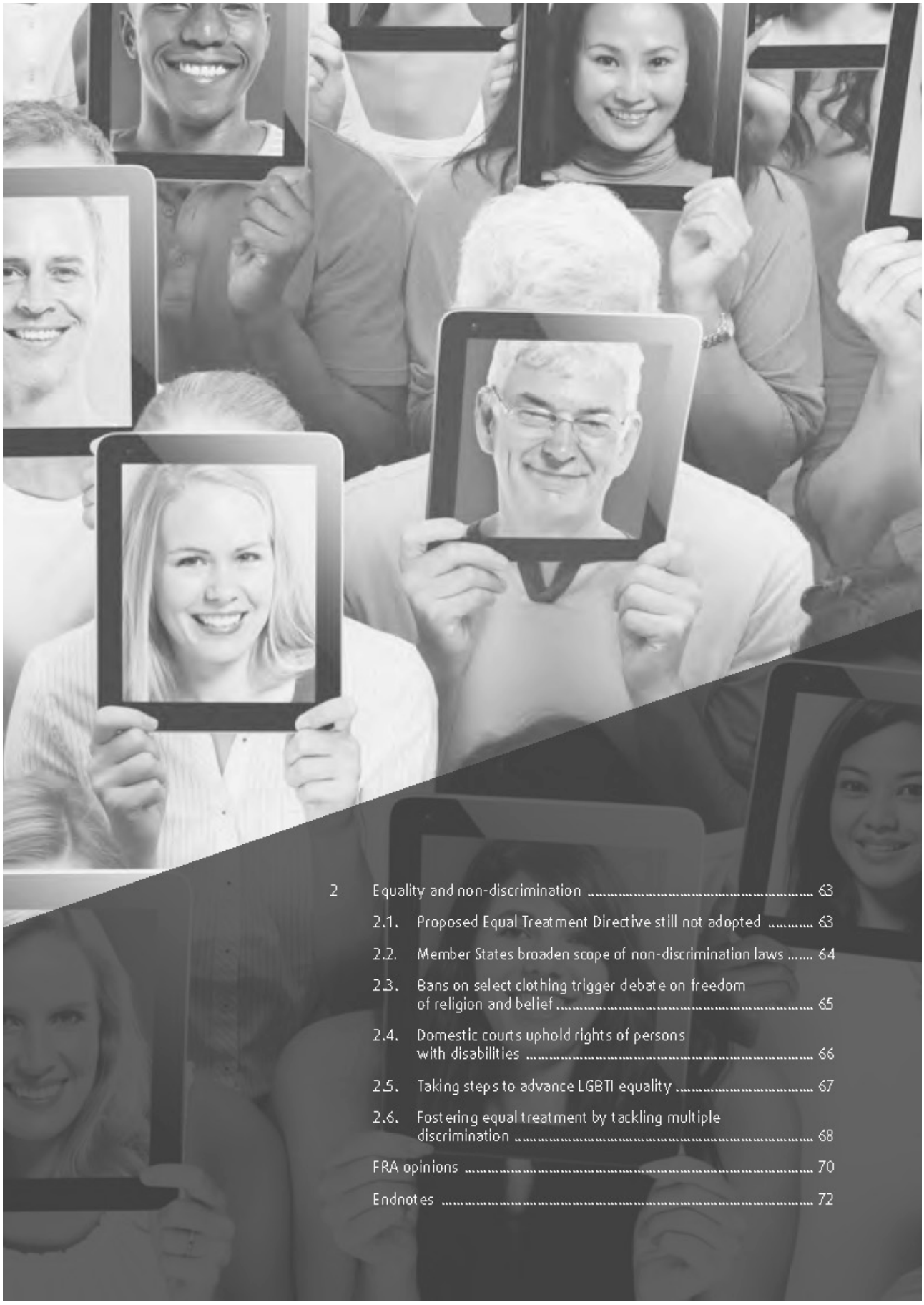

UN & CoE

January

February

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

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

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

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

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

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

March

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

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

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

28 April – UN CCPR publishes concluding observations on Sweden

April

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

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

May

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

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

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

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

June

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

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

25 July – UN CEDAW publishes concluding observations on France

July

15 August – UN CCPR publishes concluding observations on Denmark

August

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

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

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

September

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

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

October

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

22 November – UN CCPR publishes concluding observations on Slovakia

23 November – UN CCPR publishes concluding observations on Poland

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

November

December

EU

January

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

February

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

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

March

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

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

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

April

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

May

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

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

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

June

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

July

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

August

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

September

October

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

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

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

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

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

November

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

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

December

2 Equality and non-discrimination

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

2.1. Proposed Equal Treatment Directive still not adopted

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

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

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

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

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

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

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

2.2. Member States broaden scope of non-discrimination laws

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

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

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

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

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

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

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

Promising practice

Raising awareness of discrimination in the labour market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2.4. Domestic courts uphold rights of persons with disabilities

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

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

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

Promising practice

Facilitating persons with disabilities' participation in society

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

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

2.5. Taking steps to advance LGBTI equality

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

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

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

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

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

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

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

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

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

2.6. Fostering equal treatment by tackling multiple discrimination

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FRA opinions

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

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

FRA opinion 2.1

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

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

FRA opinion 2.2

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

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

FRA opinion 2.3

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

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

FRA opinion 2.4

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

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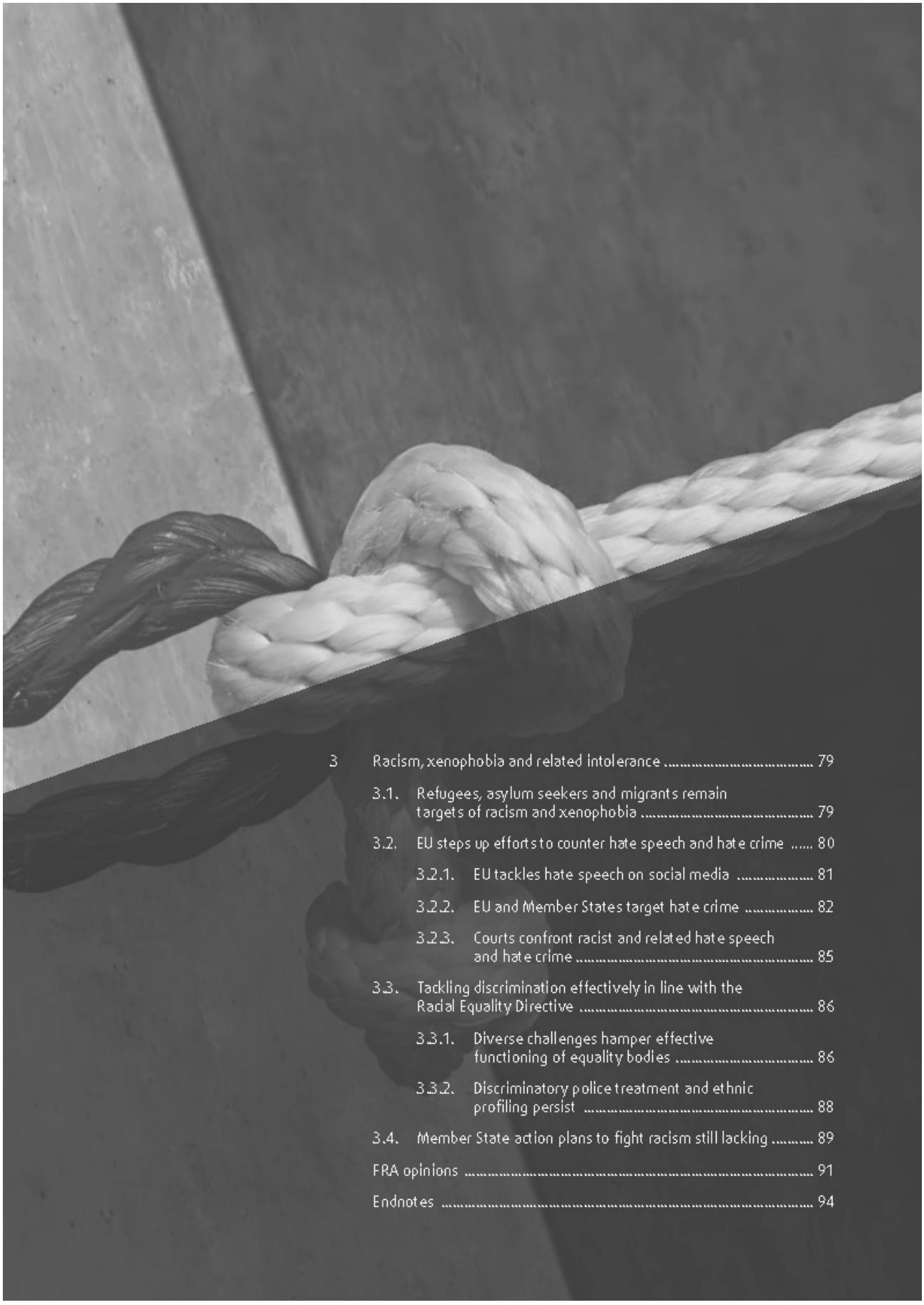

UN & CoE

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

January

February

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

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

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

March

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

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

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

April

May

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

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

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

24 June – PACE adopts a resolution on violence against migrants

June

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

July

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

August

September

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

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

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

October

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

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

November

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

December

EU

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

January

February

March

April

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

May

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

June

July

August

September

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

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

October

November

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

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

December