

# FUNDAMENTAL RIGHTS REPORT — 2022

REPORT





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

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- 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 on international obligations in the area of human rights are available via FRA's European Union Fundamental Rights Information System (EFRIS) at: <https://fra.europa.eu/en/databases/efris/>.

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## Country abbreviations

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



# Foreword

The year 2021 has shown how the European Union is forged when confronted with crisis. What started as a global health crisis in 2020 morphed into a global social crisis affecting everyone in the EU in 2021. The Covid-19 pandemic has brought into sharp relief the social vulnerabilities people in the EU face in their daily lives.

Many people in the EU, especially those in precarious and vulnerable situations, faced reduced or no access to healthcare, education, childcare and employment. This has led to excess mortality, poverty, unemployment and social exclusion. Access to the internet became even more essential to uphold a so-called normal life. The pandemic has brought to the fore the widening of existing inequalities in the EU, particularly for those living at the margin of our societies.

To counter the pandemic's social impact, the EU responded with unprecedented financial support to Member States to address the social damage the pandemic caused. The Union's action and funding are, and will be, making a significant difference in safeguarding people's social rights. In particular, as the funding is linked to relevant legal obligations and political commitments by Member States.

This year's focus chapter, 'Social rights and equality in the light of the recovery from the Covid-19 pandemic', thus looks at how national recovery and resilience plans address the social vulnerabilities of their population. Yet it shows that only effective monitoring of the use of funds, involving statutory bodies with a human rights remit, will support governments in ensuring a rights-compliant recovery.

In light of the ongoing pandemic, the year 2021 brought both progress and setbacks in fundamental rights protection. The report's remaining chapters review the main developments, identifying both achievements and areas of concern, regarding: the EU Charter of Fundamental Rights; equality and non-discrimination; racism, xenophobia and related intolerance; Roma equality and inclusion; asylum, borders and migration; information society, privacy and data protection; rights of the child; access to justice; and the implementation of the Convention on the Rights of Persons with Disabilities. The report covers the 27 EU Member States as well as the Republic of Albania, the Republic of North Macedonia (hereafter North Macedonia) and the Republic of Serbia.

The *Fundamental Rights Report 2022* also presents FRA's opinions on the outlined developments. Separately available in all EU languages, these opinions recommend a range of evidence-based, timely and practical actions for consideration by EU bodies and national governments.

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

Special thanks go to the National Liaison Officers, whose input bolsters the accuracy of EU Member State information. In addition, we are grateful to the various institutions and mechanisms – such as those established by the Council of Europe – that consistently serve as valuable sources of information for this report.

**Elise Barbé**  
Chairperson of the FRA Management Board

**Michael O'Flaherty**  
Director

# SOCIAL RIGHTS AND EQUALITY IN THE LIGHT OF THE RECOVERY FROM THE COVID-19 PANDEMIC

# 1

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The Covid-19 pandemic has affected people's enjoyment of their social rights, albeit not to the same degree. Large sections of the population in the EU have faced excess mortality, an increased risk of poverty, restrictions on employment, lack of access to digital infrastructure, reduced access to healthcare, childcare, education and training, limitations on participation in society and tensions in their work-life balance.

The EU responded with swift action from the European Commission and several agencies, including the European Centre for Disease Prevention and Control, which provides a detailed weekly analysis of the epidemiological situation, and the European Medicines Agency, which assesses Covid-19 treatments and vaccines. Moreover, to address the social impact of the pandemic, € 723.8 billion was made available to Member States, through the Recovery and Resilience Facility. As a result, Member States put forward more than 850 measures to improve the realisation of social rights in the recovery from the pandemic.

The implementation of these measures needs to be systematically monitored for compliance with fundamental rights to ensure that they are used effectively and efficiently, and that they respect people's rights. Yet Member States do not generally involve statutory bodies with a human rights remit in monitoring the effectiveness of measures adopted in their recovery and resilience plans to promote social rights.

## 1.1. AN INCLUSIVE RECOVERY TO ADDRESS THE SOCIAL IMPACT OF THE PANDEMIC

The Covid-19 pandemic has brought into sharp relief the extent to which people in the EU must contend with social vulnerabilities in their daily lives, as detailed in Section 1.2.<sup>1</sup> What started as a global health crisis soon morphed into a global social crisis affecting everyone in the EU. At the time of writing, the world is battling the Omicron variant of Covid-19, and the EU and its Member States are continuing to adapt their responses to the prevailing circumstances.<sup>2</sup>

The pandemic has given a new impetus to the EU's commitment to social rights, which are rooted in the Union's legal order. Realising a 'social Europe' is also among the priorities of the EU institutions. This chapter starts by describing the EU's legal and political commitments to social rights, and then considers the social aspects of the Recovery and Resilience Facility. It then analyses the impact of the pandemic on



people's enjoyment of their social rights, before illustrating different types of measures that Member States will implement through the facility to foster an inclusive recovery from the Covid-19 pandemic.<sup>3</sup> The chapter concludes with an analysis of gaps in monitoring the fundamental rights compliance of the disbursement of EU funds in the context of the facility.

Owing to limitations on space, this chapter only considers how the Recovery and Resilience Facility takes account of social rights. For information on the broader impact of the pandemic on fundamental rights in 2021, see the thematic chapters of this report.

### **1.1.1. The EU's commitment to building a social Europe**

More than one third of people in the EU think that social inequalities are one of the main challenges for the EU,<sup>4</sup> with close to nine in 10 people saying that a social Europe is important to them personally, that is, "a Europe that is committed to equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion".<sup>5</sup>

The importance of social rights is also reflected in the EU's legal order. Although the Union is not party to the Council of Europe's European Social Charter, Article 151 of the Treaty on the Functioning of the European Union (TFEU) recognises social rights in outlining the Union's goals in the area of social policy. Article 3 of the Treaty on European Union identifies among the objectives of the EU the establishment of "a highly competitive social market economy, aiming at full employment and social progress", while Article 4 of the TFEU prescribes that social policy is a shared competence between the Union and its Member States.

Equally, Article 9 of the TFEU requires the Union's policies and activities to "take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health". In addition, Article 8 of the TFEU prescribes that, "In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women."

Many of the provisions in the **EU Charter of Fundamental Rights** have a strong social dimension. The title on freedoms includes a right to education (Article 14) and an entire title of the Charter is dedicated to equality, addressing equality between women and men (Article 23), the rights of the child (Article 24), the rights of older people (Article 25), integration of persons with disabilities (Article 26). Also, Title IV on solidarity provides for key social rights, namely the right to protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31), the right to social security and social assistance (Article 34) and the right of access to preventive health care and to benefit from medical treatment (Article 35).<sup>6</sup>

The EU is also party to the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which covers civil and political rights, as well as social and economic rights.

Building a social Europe is a political priority for the EU, as the Porto Social Commitment<sup>7</sup> and the Porto Declaration<sup>8</sup> of May 2021, among others, show.<sup>9</sup> Previously, in November 2017, the European Parliament, European Council and European Commission proclaimed the European Pillar of Social Rights at the Gothenburg Social Summit.<sup>10</sup> In March 2021, the European Commission adopted the European Pillar of Social Rights Action Plan, which sets out concrete steps to realising the pillar's 20 principles.<sup>11</sup>





Echoing the European Parliament's resolution of April 2020 on EU action to combat the pandemic and its consequences,<sup>12</sup> the Porto Social Commitment calls on all relevant actors to take on board the lessons learned from the pandemic and to join forces to "develop public policies that ... promote equal opportunities for all, particularly children at risk of poverty, the elderly, people with disabilities, people with a migration background, disadvantaged and minority groups and the homeless".<sup>13</sup>

The regulation establishing the Recovery and Resilience Facility reflects these legal and political commitments, and refers to the objective of implementing the European Pillar of Social Rights. The regulation includes references to fundamental rights. For example, Article 5 of the regulation requires compliance with environmental protection, provided for in Article 37 of the EU Charter of Fundamental Rights, by including the 'do no significant harm' axiom to ensure compliance with key principles of EU environmental policy.<sup>14</sup> Recital 12 of the regulation notes that "investments in digital technologies should respect the principle [of] personal data protection" (Article 8 of the Charter).

The Regulation (EU) 2021/241 also establishes the requirement for an explanation of how national plans contribute to the implementation of the European Pillar of Social Rights<sup>15</sup> and tasks the European Commission with assessing how the plans contribute to the implementation of the pillar.<sup>16</sup>

#### **1.1.2. The social dimension of the Recovery and Resilience Facility**

The EU made € 723.8 billion available to Member States through the Recovery and Resilience Facility, also to address the social damage the pandemic caused.<sup>17</sup> Each Member State had to submit a national recovery and resilience plan outlining the measures it would take through the facility. By the end of 2021, all Member States bar the Netherlands<sup>18</sup> had submitted their plans, and the European Commission had endorsed 22 of these by 15 December 2021.<sup>19</sup> The Netherlands expects to submit its recovery and resilience plan to the European Commission by 31 August 2022.

The Recovery and Resilience Facility rests on six policy pillars: the green transition; digital transformation; smart, sustainable and inclusive growth; social and territorial cohesion; health, economic, social and institutional resilience; and policies for the next generation. Any measure that Member

States propose in their resilience and recovery plans must contribute to two policy pillars, with one the primary pillar and the other the secondary pillar. Member States had to allocate at least 37 % of their expenditure to the green transition and 20 % to digital transformation, with no targets set for the other pillars.

By 15 December 2021, Member States had allocated slightly over 10 % of their total share of the funds of the facility to social and territorial cohesion as the primary pillar, and just under 45 % to social and territorial cohesion as the secondary pillar, the Recovery and Resilience Scoreboard shows.<sup>20</sup>

The European Commission identified 869 measures in the recovery and resilience plans (out of a total of 4,473) that pertained to the policy pillar of 'social and territorial cohesion'. The pillar is divided into seven policy areas,<sup>21</sup> for which Member States allocated different levels of funding: 65 % to the area of territorial infrastructure and services; 8 % to adult learning; 7 % to social housing and other social infrastructure; 7 % to social protection, including social services and the integration of vulnerable groups; 6 % to the development of rural and remote areas; 3 % to the modernisation of labour market institutions; and 3 % to (non-youth) employment support and job creation.

On the whole, and at the time of writing, Member States allocated 33 % of the total social expenditure<sup>22</sup> through the facility to investments and reforms in the areas of education and healthcare, followed by 32 % to health and long-term care, 20.4 % to employment and skills, and 14.6 % to social policies, according to the Recovery and Resilience Scoreboard.<sup>23</sup>

**"In order to cope with and recover from the Covid-19 pandemic, investment in social rights is necessary. States Parties to the European Social Charter must take all measures necessary, including through the redistribution of resources, to combat the virus and to secure the rights of their populations, including those of the most socially vulnerable groups."**

European Committee of Social Rights (2021), **Statement on Covid-19 and social rights**, p. 14.

## 1.2. THE IMPACT OF THE PANDEMIC ON SOCIAL RIGHTS

The Covid-19 pandemic has had a tremendous negative effect on people's enjoyment of social rights, affecting all areas of life.<sup>24</sup> The pandemic has exacerbated existing social vulnerabilities and inequalities, in particular for many of those in precarious working and living conditions.<sup>25</sup>

Despite significant public investment in countering the negative economic and social effects of the pandemic, an increasing proportion of people in the EU have experienced difficulties in making ends meet, particularly in 2021. At the same time, a growing number of people began feeling socially excluded during the course of the pandemic, with higher proportions among women and younger people, as Figures 1.1, 1.2 and 1.3 show.<sup>26</sup>

In addition, "employment rates and working hours decreased most for low-skilled and low-educated workers, workers in low-paid occupations, youth and workers in non-standard jobs, such as part-time, temporary and self-employed workers".<sup>27</sup> In this context, it can be noted that some of those who have difficulties in making ends meet and some of those who are unemployed tend to feel that people do not all enjoy the same human rights.<sup>28</sup>



For more detailed and extended analysis of the social impact of the pandemic, see European Commission (2021), **Employment and social developments in Europe 2021**, European Commission (2021), **Joint Employment Report 2021** and Council of the European Union (2022), **Joint Employment Report 2022**.

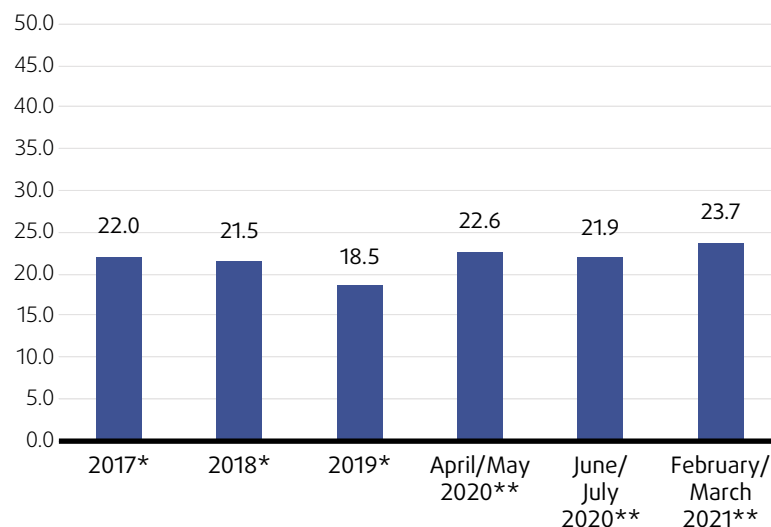
► Notes:

The data show those in the EU27 who responded 'with great difficulty' or 'with difficulty' when asked: 'A household may have different sources of income and more than one household member may contribute to it. Thinking of your household's total monthly income: is your household able to make ends meet?' Gender differences are not displayed, as information is based on household only.

\* Eurostat data.

\*\* Eurofound data. Fieldwork: Round 1, 9 April–1 May 2020; Round 2, 22 June–27 July 2020; Round 3, 15 February–30 March 2021. Sample size: Round 1, 86,457 (63,354 complete responses for the EU27); Round 2, 31,732 (24,123 complete responses for the EU27); Round 3, 62,518 (46,800 complete responses for the EU27).

**FIGURE 1.1: PERCENTAGE OF PEOPLE IN THE EU27 WHO SAID THAT THEY HAD DIFFICULTIES IN MAKING ENDS MEET BEFORE AND DURING THE PANDEMIC**



Sources: Eurofound (2020), *Living, working and Covid-19 dataset*; Eurostat (2017–2019), *Inability to make ends meet – EU-SILC survey [ilc\_mdso9]*, extracted on 26 January 2022

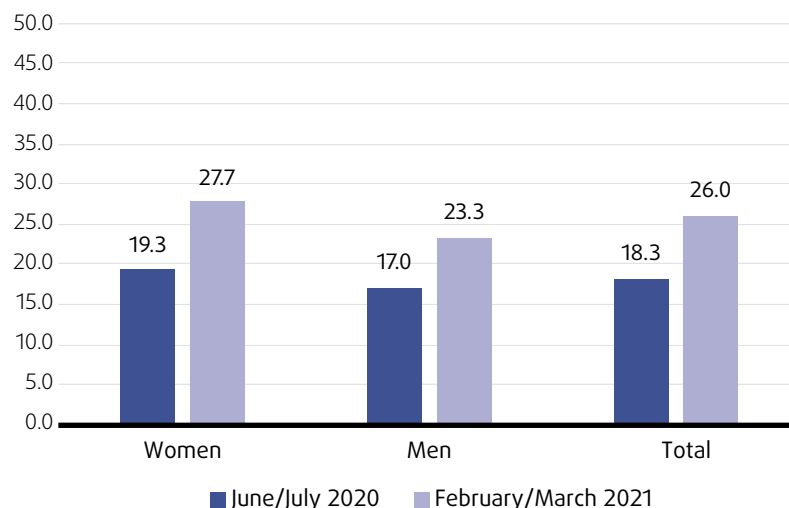
**FIGURE 1.2: PERCENTAGE OF PEOPLE IN THE EU27 WHO SAID THAT THEY FELT LEFT OUT OF SOCIETY IN THE EU27 IN 2020 AND IN 2021, BY SEX**

► Notes:

The data show those in the EU27 who responded 'strongly agree' or 'agree' when asked: 'To what extent do you agree or disagree with the following statements? I feel left out of society.'

Fieldwork: Round 1, data not collected; Round 2, 22 June–27 July 2020; Round 3, 15 February–30 March 2021.

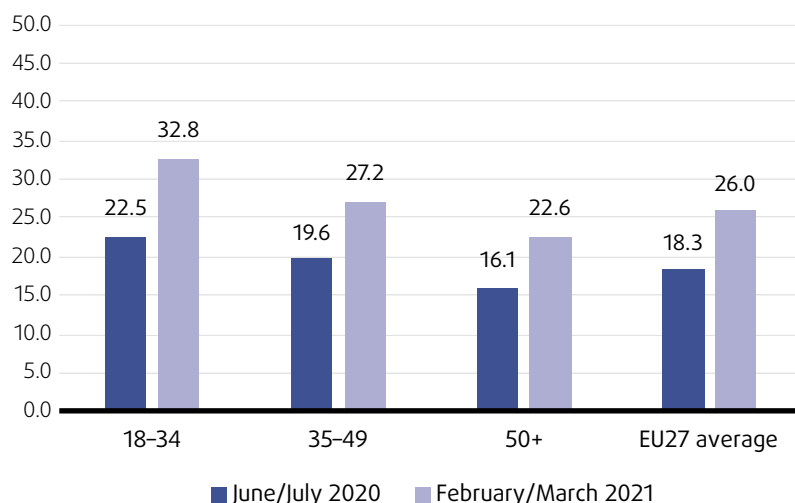
Sample size: Round 1, data not collected; Round 2, 31,732 (24,123 complete responses for the EU27); Round 3, 62,518 (46,800 complete responses for the EU27).



Source: Eurofound (2020), *Living, working and Covid-19 dataset*



**FIGURE 1.3: PERCENTAGE OF PEOPLE IN THE EU27 WHO SAID THAT THEY FELT LEFT OUT OF SOCIETY IN 2020 AND IN 2021, BY AGE GROUP**



Source: Eurofound (2020), *Living, working and Covid-19* dataset

◀ Notes:

The data show those in the EU27 who responded 'strongly agree' or 'agree' when asked: 'To what extent do you agree or disagree with the following statements? I feel left out of society.'

Fieldwork: Round 1, data not collected; Round 2, 22 June–27 July 2020; Round 3, 15 February–30 March 2021.

Sample size: Round 1, data not collected; Round 2, 31,732 (24,123 complete responses for the EU27); Round 3, 62,518 (46,800 complete responses for the EU27).

The negative impact of the pandemic affected various population groups differently.<sup>29</sup> For example, recurring nationwide lockdowns severely limited the rights of older people to lead a life of dignity and independence and to participate in social and cultural life, which Article 25 of the EU Charter of Fundamental Rights enshrines. In the worst days of the pandemic, many older people were sick or died alone, isolated from their relatives and friends in residential care settings for extended periods, owing to restrictions on interpersonal contact.<sup>30</sup>

The excess mortality rate was much higher for older people than for those in younger age groups in 2020 and 2021 compared to previous years, as official data on excess deaths that EuroMOMO compiled in cooperation with the European Centre for Disease Prevention and Control and the World Health Organization show.<sup>31</sup>

By the end of 2020, 368,005 more people over the age of 65 died than in the previous year, with the total number of excess deaths across all age groups amounting to 404,471. The figures for 2021 show 297,198 excess deaths among those over the age of 65, out of a total of 354,226 excess deaths. In other words, people over the age of 65 accounted for 90.98 % of all excess deaths in 2020, and 83.90 % of these in 2021.

The European Disability Forum highlights that "persons with disabilities have been more likely to be infected by Covid-19, develop serious illness or die, or find themselves isolated, impoverished, and facing increased hardship in the future".<sup>32</sup> Social distancing and school closures accentuated learning disabilities and prevented many people with disabilities from actively participating in the labour market.<sup>33</sup> The requirement to wear masks created challenges, notably for people with hearing impairments who could not lip read, and health complications for people with certain other disabilities.<sup>34</sup>

**"Existing inequalities are widening because of the disproportionate impact of the pandemic on vulnerable groups. Women, young people and those on the margins of society are consistently affected by job loss, poor work-life balance and financial insecurity. New findings show that difficulties in making ends meet increased significantly among those already in a precarious situation."**

Eurofound (2021), *Quality of life during Covid-19*.





## FRA ACTIVITY

### Ageing in digital societies

In 2030, around 24 % of the EU's population will be over the age of 65. This number will reach 30 % by 2070. From a fundamental rights perspective, it is vital that key online and offline services remain accessible to everyone.

In 2022, FRA has initiated a project on 'Ageing in digital societies: Enablers and barriers to older persons exercising their social rights' to identify how older people experience exercising their rights, in particular their social rights, in a digital environment. The evidence it collects will contribute to promoting a rights-based approach to ageing in digital societies, considering the multiple identities of older people – especially with regard to gender, disability and socio-economic background. The first findings are expected to be available in 2024.

For more information on how the digital divide affects older people, see FRA (2020), **Selected findings on age and digitalisation from FRA's Fundamental Rights Survey**.

Temporary limitations on the provision of social services (including in-home care and support services) for people in need led to family members or carers taking on additional caring responsibilities, sometimes at the expense of other aspects of their lives, in particular their work.<sup>35</sup> Different limitations were also imposed in different regions in some Member States.

The suspension of essential services, such as the provision of food or medical assistance, hit homeless people hard, and shelters were often overcrowded.<sup>36</sup> In addition, "job dismissals, evictions, closure of boarding houses and the arrival of people who had lost their jobs and homes abroad led to increased numbers of homeless people at a time when many shelters were closing or restricting access to comply with physical distancing rules".<sup>37</sup>

Increased digitalisation in the provision of goods and services revealed new forms of inequality between digital 'haves and have nots', with older people in isolation often unable to use online services during critical stages of the pandemic.<sup>38</sup> People with disabilities were similarly affected.<sup>39</sup>

The digital divide also became apparent in education, where the switch to distance learning coupled with an absence of social contact with peers affected children and young people in different ways,<sup>40</sup> including a negative impact on their mental health.<sup>41</sup> Distance learning proved to be a particular problem for children and young people from disadvantaged socio-economic backgrounds<sup>42</sup> and for pupils or students who attended educational institutions with limited access to the necessary technological tools, infrastructure or expertise in using such tools efficiently and effectively. The switch to distance learning also caused particular difficulties for children with disabilities and their families, with regard to both accessing learning platforms and the accessibility of the platforms.<sup>43</sup>

In addition, for many parents it was not possible to telework, and those who did were often not able to support their children in distance learning. The lack of parental support and difficulties in participating meaningfully in digital education compounded educational inequalities that pre-dated the pandemic.<sup>44</sup> For more information on the impact of the pandemic on the rights of children in 2021, see **Chapter 8** of this report.

With regard to work and business activities, workers in precarious employment situations – including many Roma and Travellers,<sup>45</sup> as well as platform workers<sup>46</sup> – were often initially ineligible for benefit and compensation schemes that Member States set up to address restrictions on employment resulting from the pandemic. Moreover, some forms of social protection were accessible only by those working in the formal labour market, which increased the vulnerability of those doing informal work.

The pandemic greatly affected the right to access preventive healthcare and to benefit from medical treatment, which Article 35 of the EU Charter of Fundamental Rights and Article 11 of the European Social Charter



enshrine.<sup>47</sup> The high number of Covid-19 patients who were hospitalised – not only in intensive care units – strained the capacity of healthcare systems across the EU to meet people’s health needs. It put enormous pressure on the mental and physical well-being of frontline healthcare staff.<sup>48</sup>

Concerning gender equality, the pandemic has had a disproportionate impact on women, including as regards the intensification of experiences of all types of violence against women and girls.<sup>49</sup> Concerning the labour market, women make up a larger proportion of the workforce in sectors that the pandemic hit hardest. Women also carry out more unpaid care work than men, which made them more financially vulnerable, at a time when many had to provide unpaid care for their families and relatives, including as a result of the suspension of formal care services. In addition, women were more likely to lose or leave their jobs to care for their children during the pandemic, which compounded gender inequality in the labour market.<sup>50</sup>

These findings highlight the need to build in gender considerations when designing and implementing recovery measures. That will contribute to upholding women’s rights, including their social rights.<sup>51</sup> This requires investing more in sectors predominantly occupied by women that proved to be vital during the pandemic, such as education, healthcare and social work, where working conditions and remuneration need significant improvement. It also requires promoting the involvement of men in unpaid care work.<sup>52</sup>

### 1.3. MEASURES ADDRESSING SOCIAL RIGHTS IN NATIONAL RECOVERY AND RESILIENCE PLANS

This section provides an overview of different types of measures that Member States included in their national recovery and resilience plans that address children and young people; people with disabilities; gender equality; social security and social care; healthcare and long-term care; and access to the labour market.

This overview draws on data FRA collected through its multidisciplinary researcher network (**Franet**) and through its own desktop research. The data collection focused on identifying up to three measures per country that pertain to articles 14, 23, 24, 25, 26, 30, 31, 34 and 35 of the EU Charter of Fundamental Rights. Franet focused on measures that target population groups in their countries whose social rights had been particularly affected by the pandemic and had to identify at least one measure that targeted children or young people.<sup>53</sup> Member States also informed FRA of some of the measures included in this section.

#### 1.3.1. Improving education for children and young people

Member States included measures in their national recovery and resilience plans to improve the quality of education and to overcome the negative effects of the pandemic on learning outcomes, including for children and young people from disadvantaged backgrounds.

For example, **Slovakia** will implement reforms to ensure the desegregation of Roma children in the educational system.<sup>54</sup> Pupils from socio-economically disadvantaged families in **Czechia** who could not attend remote classes during the



pandemic will receive additional tutoring so that they do not lag further behind their peers.<sup>55</sup> Primary school children from socially disadvantaged families in **Denmark** are set to receive lessons in smaller groups or be provided with an additional teacher in class, to alleviate the effects of the pandemic.<sup>56</sup> **Romania**<sup>57</sup> will develop its early childhood education system by investing in its infrastructure and enhancing the quality of services provided to children between the ages of zero and three, and to children from socio-economically disadvantaged groups. **Romania** will also set up day centres for vulnerable families, where children will benefit from educational and recreational activities and their parents from educational activities and counselling.<sup>58</sup>

National recovery and resilience plans include measures to modernise childcare and educational establishments. This includes building up their digital infrastructure and upgrading the digital skills of pupils and students (e.g. in **Belgium**,<sup>59</sup> **Germany**,<sup>60</sup> **Ireland**,<sup>61</sup> **Latvia**,<sup>62</sup> **Poland**,<sup>63</sup> **Romania**<sup>64</sup> and **Spain**<sup>65</sup>). Member States will also use the Recovery and Resilience Facility to renovate educational establishments or build new ones, and to increase their numbers of teaching and support staff (e.g. in **Bulgaria**,<sup>66</sup> **Croatia**,<sup>67</sup> **Czechia**,<sup>68</sup> **France**<sup>69</sup> and **Romania**<sup>70</sup>).

### 1.3.2. Improving the employment opportunities of different population groups, including young people

Member States fund measures through the Recovery and Resilience Facility to improve the employment opportunities of young people, particularly through apprenticeships, vocational training or improving their digital skills (e.g. in **Cyprus**,<sup>71</sup> **Finland**,<sup>72</sup> **Greece**,<sup>73</sup> **Ireland**<sup>74</sup> and **Romania**<sup>75</sup>). Other measures include financial incentives to encourage employers to recruit young people (e.g. in **Estonia**,<sup>76</sup> **Germany**,<sup>77</sup> **Slovenia**<sup>78</sup> and **Spain**<sup>79</sup>).

National recovery and resilience plans include labour market integration measures for people who face difficulties in accessing the job market more generally. For example, **Austria** will set up a service to support the reintegration of long-term unemployed recipients of social aid into the labour market.<sup>80</sup> **Sweden** will make vocational training available to people who did not complete upper secondary education and who have a limited knowledge of Swedish, to increase their chances in the labour market.<sup>81</sup> **Czechia** will develop its employment policy for people from disadvantaged socio-economic backgrounds and people in precarious working conditions, by promoting active labour market policies and supporting reskilling and upskilling, including as regards digital skills.<sup>82</sup> **Latvia** will develop upskilling initiatives, with a focus on digital skills for unemployed people, jobseekers and precarious workers.<sup>83</sup>

National recovery and resilience plans include measures to facilitate access to the labour market for people with disabilities, either through schemes supporting employers in recruiting them, or by enabling flexible working arrangements (e.g. in **Finland**,<sup>84</sup> **France**<sup>85</sup> and **Slovenia**<sup>86</sup>).

National recovery and resilience plans also include measures that seek to foster women's participation in the labour market by increasing the provision of early childhood education and childcare facilities, which will also benefit men with childcare responsibilities. For example, **Cyprus** will build new childcare centres to facilitate the participation and re-entering of



workers with caring responsibilities in the labour market.<sup>87</sup> The federal government in **Germany** will contribute to funding up to 90,000 additional childcare places to help meet increasing demand.<sup>88</sup>

Similarly, **Hungary**<sup>89</sup> and **Portugal**<sup>90</sup> will increase the number of places available in nurseries and promote access to affordable care for children, in an effort to mitigate gender inequalities in labour market participation. **Poland** would fund the provision of free childcare services for children up to three years of age in public facilities, while also investing in improving the professional skills of childcare workers.<sup>91</sup>

### 1.3.3. Reforming social security and social services

Some of the measures in the national recovery and resilience plans envisage reforms in social security and social services systems. They will enable Member States to respond better to the protection needs of persons in situations of vulnerability, including with regard to adequate provision of social benefits, minimum income, employment benefits and housing. Albania<sup>92</sup> and Serbia<sup>93</sup> have also implemented such measures.

For example, **Croatia** will consolidate different social benefits to reduce the administrative burden and simplify the procedure of applying for social benefits.<sup>94</sup> Similarly, **Lithuania** aims to introduce additional benefits for people with disabilities and older people, thereby improving the pension indexation mechanism.<sup>95</sup> **Malta** will assess its unemployment benefits system.<sup>96</sup>

**Greece** will initiate reforms to improve access to social benefits, optimise the social benefits system and enhance structures that provide social services.<sup>97</sup> **Slovenia** will amend its Housing Act, with a view to increasing the availability of public non-profit rental housing, which would offer protection for tenants at risk of social exclusion.<sup>98</sup>

### 1.3.4. Access to healthcare and long-term care

Measures included in national plans seek to improve the quality of and access to long-term care, social care and healthcare, whether at home or in residential care settings. For example, **Austria** will put in place a system of community nurses. They will act as contact people for the coordination of therapies and social services for people in need of care to enable them to continue living in their own homes.<sup>99</sup>

**Croatia** will improve the availability of integrated comprehensive care for older people by building dedicated centres where they can access social services.<sup>100</sup> **Portugal** will invest in improving residential structures and care in nursing homes and day centres for older people.<sup>101</sup> **Sweden** aims to improve the quality of care by providing financial compensation to employers who enable staff to study during working hours to qualify, for example, as care assistants or assistant nurses.<sup>102</sup>





In their national recovery and resilience plans, Member States also include measures that aim to improve access to healthcare more generally to address gaps that the pandemic has brought to light.<sup>103</sup> For example, **Finland** will implement measures to keep waiting times for basic and specialist healthcare within the legally prescribed limits, thereby enhancing access to healthcare and social services.<sup>104</sup>

Healthcare consultants in **Ireland** will be expected to dedicate more time to patients in public hospitals. This will help ensure more equal access to healthcare by reducing waiting times for consultations for patients in public hospitals.<sup>105</sup> **Lithuania** will reform the provision of long-term care services, including by setting up day-care centres and developing long-term care outpatient services across the country.<sup>106</sup> Owing to a growing need for medical doctors and in response to staff shortages during the pandemic, **Poland** will increase the university admissions limits for medical studies.<sup>107</sup>

Some of the measures in the recovery and resilience plans consist of funding technological advances to facilitate access to healthcare services, including through digitalisation, remote video consultations, telemedicine and modernising medical equipment (e.g. in **Denmark**,<sup>108</sup> **Estonia**,<sup>109</sup> **Luxembourg**,<sup>110</sup> **Malta**<sup>111</sup> and **Spain**<sup>112</sup>).

#### 1.3.5. Fostering social participation

Member States will implement measures through the Recovery and Resilience Facility to enable people with disabilities to participate more actively in social life by improving accessibility and mobility through technical and technological aids (e.g. in **Bulgaria**,<sup>113</sup> **Italy**,<sup>114</sup> **Latvia**<sup>115</sup> and **Malta**<sup>116</sup>).

Other measures include investing in social and integrated services for people with disabilities or older people to enable them to live independently (e.g. in **Bulgaria**,<sup>117</sup> **Cyprus**,<sup>118</sup> **Romania**<sup>119</sup> and **Slovakia**<sup>120</sup>). **Slovakia** will also invest in improving the digital skills of older people.<sup>121</sup>

Finally, national recovery and resilience plans contain measures to foster the social participation of disadvantaged pregnant women (**Austria**<sup>122</sup>), detainees (**Belgium**<sup>123</sup>) or homeless persons (**Italy**<sup>124</sup>). **Portugal** will implement measures to facilitate the social integration of disadvantaged people who live in the metropolitan areas of Lisbon and Porto.<sup>125</sup>

## 1.4. EFFICIENT MONITORING ESSENTIAL FOR A FUNDAMENTAL RIGHTS-COMPLIANT RECOVERY

The regulation establishing the Recovery and Resilience Facility requires that Member States make “arrangements for the effective monitoring and implementation” of their national plans. This includes “proposed milestones and targets, and the related indicators”.<sup>126</sup> The regulation also requires the European Commission to monitor the implementation of the facility.<sup>127</sup> For this purpose, the Commission has established dedicated audit and legal units, specific control and audit strategies and internal assessment procedures for both the recovery and resilience plans and subsequent payment requests.<sup>128</sup> For more information on the implementation of the Recovery and Resilience Facility one year after adoption, see European Commission (2022), *Report from the Commission to the European Parliament and the Council on the implementation of the Recovery and Resilience Facility*.

The governance of the facility differs from the framework that applies to other EU funds. The Common Provisions Regulation (CPR), which governs eight EU funds, explicitly requires compliance with the EU Charter of Fundamental Rights and the CRPD,<sup>129</sup> and sets out national arrangements for compliance.<sup>130</sup>

The CPR does not apply to the Recovery and Resilience Facility, and the regulation establishing the facility does not contain similar provisions.<sup>131</sup> Unlike the CPR, the regulation on the facility does not refer to any mechanism to monitor compliance with fundamental rights or to the consultation of national statutory bodies with a human rights or equality remit, that is, national human rights institutions, equality bodies or ombuds institutions.<sup>132</sup>

Although the European Parliament's Committee on Employment and Social Affairs and Committee on Regional Development suggested an explicit reference to the Charter and the CRPD in their opinions on the proposal for the Recovery and Resilience Facility,<sup>133</sup> the final text eventually did not retain this, except in recital 33. This recital sets out that "Recovery and resilience plans should not affect the right to conclude or enforce collective agreements or to take collective action in accordance with the Charter of Fundamental Rights of the European Union".

However, Member States need to have in place, within the limits of their procedural autonomy, relevant systems to ensure that expenditures related to activities implementing EU law are consistent with the Charter, even if the regulation establishing the facility does not explicitly require such systems.<sup>134</sup> Although the regulation establishing the facility does not regulate fundamental rights compliance checks as intensively as the CPR, it does include ways of preventing and dealing with potential violations of the Charter and the CRPD.



#### FRA ACTIVITY

## The fundamental rights compliance of EU funds

In 2021, FRA launched a new project aimed at establishing what the role of national bodies with a human rights remit, such as national human rights institutions and equality bodies, could be in ensuring compliance with EU funds. The project will involve conducting interviews with a range of interlocutors at national and EU levels to determine the critical success factors for the involvement of such bodies in each stage of the EU funding cycle. FRA intends to provide technical assistance to national bodies in this area and will publish an analytical report outlining potential roles for statutory human rights bodies in monitoring EU funds in 2023.

The European Pillar of Social Rights reflects a range of Charter obligations – referring to topics the Charter covers such as the right to healthcare, gender equality equal opportunities and the inclusion of people with disabilities – that can guide the European Commission in scrutinising national recovery and resilience plans for fundamental rights compliance.<sup>135</sup>

The European Network of National Human Rights Institutions (ENNHRI) points to the need for a rigorous human rights impact assessment of recovery measures. It should include consultations with vulnerable groups and could contribute to reducing discrimination and inequality.<sup>136</sup> ENNHRI and the Office of the United Nations High Commissioner for Human Rights (OHCHR) have published a checklist to assist National Human Rights Institutions (NHRIs) in applying a human rights-based approach to protecting workers, jobs and SMEs, including in the context of national recovery and resilience plans.<sup>137</sup>

FRA collected information to identify tools or mechanisms Member States intend to use to monitor the effectiveness of their national recovery and resilience plans in promoting social rights and equality. In particular, FRA focused on tools and mechanisms that involve national bodies with a human rights or equality remit, such as national human rights institutions, equality bodies, ombuds institutions, civil society organisations and organisations of people with disabilities.<sup>138</sup>

However, the monitoring provisions in these plans are limited to the requirements that the facility put in place. None of the national monitoring plans, except that of **Lithuania**, considers the involvement of national bodies with a human rights remit or a general fundamental rights monitoring mechanism, according to information that FRA collected.<sup>139</sup>

The vast majority of national plans leave the monitoring of implementation to the relevant ministries, such as ministries of finance, or refer, sometimes additionally, to independent national audit bodies. Although a review of every planned project under the facility would exceed the capacity of most human rights bodies, various options for their involvement could be considered, such as providing advice and guidance on fundamental rights-sensitive topics or training to government officials dealing with the evaluation and approval of project proposals as part of these plans.

Member States have put forward some measures in their national plans that raise concerns about their compatibility with the Charter and the CRPD. The European Expert Group on the transition from institutional to community-based care, for example, has expressed concerns that funds from the facility could be used to refurbish or construct institutions for people with disabilities rather than implement measures to ensure they can live in the community. That may not comply with the duty in Article 19 of the CRPD.<sup>140</sup>

## FRA opinions

### FRA OPINION 1.1

The EU and its Member States should promote the social rights of people in situations of vulnerability who were most affected by the pandemic through the disbursement of funds from the Recovery and Resilience Facility in line with all relevant legal obligations and political commitments. EU Member States should adjust the funded measures if they are not found to be sufficiently effective in addressing people's social vulnerabilities.

The EU's commitment to social rights is rooted in the Union's legal order, as Articles 4, 9 and 151 of the Treaty on the Functioning of the European Union and Article 3 of the Treaty on European Union show, as well as Title IV on solidarity of the EU Charter of Fundamental Rights.

In 2021, the EU and its Member States responded to the Covid-19 pandemic with a renewed commitment to realising a 'social Europe', as the Porto Social Summit and the European Pillar of Social Rights Action Plan demonstrated. The Regulation establishing the Recovery and Resilience Facility (2021/241) reflects the Union's legal and political commitments, and requires Member States to explain how their national recovery and resilience plans will contribute to implementing the European Pillar of Social Rights. The regulation also includes references to fundamental rights, for example as regards data protection, environmental protection and equality.

The EU made € 723.8 billion available to Member States through the facility, including to address the social damage the pandemic caused. Therefore, the facility marks the Union's commitment to building a fairer, inclusive and social Europe. It enabled Member States to put forward more than 850 measures that would lead to fostering social and territorial cohesion, and could contribute to realising social rights. These measures address a number of social vulnerabilities among a variety of population groups in the EU, including women, children and young people in situations of vulnerability; people with disabilities; older people; Roma people; and people in precarious working conditions.

Broadly speaking, Member States included measures in their national recovery and resilience plans to improve the quality of education, employment opportunities and labour market integration. Some of them specifically address children and young people. Other measures pertain to reforming social security and social systems, while others relate to improving access to healthcare and long-term care.



Public funds, including EU funds, play a key role in ensuring fundamental rights, including social rights, are protected. This is especially the case where relevant authorities ensure that they do not finance activities that are not compatible with fundamental rights. This requires effective monitoring of the use of funds, in practice.

The regulation establishing the facility envisages Member States reporting twice a year in the context of the European Semester on the progress made in achieving their recovery and resilience plans (Article 27). Yet the regulation does not contain safeguards for monitoring the fundamental rights compliance of expenditures, comparable to those of the Common Provisions Regulation, whether in relation to setting up national monitoring mechanisms or involving statutory national bodies with a human rights or equality remit in such mechanisms.

Some Member States put forward measures in their plans that may raise concerns about compatibility with the EU Charter of Fundamental Rights or the CRPD. For example, using facility funds to refurbish or build institutions for people with disabilities may not comply with Article 19 of the CRPD on living independently and being included in the community.



## FRA OPINION 1.2

The EU and its Member States should ensure that no funds from the Recovery and Resilience Facility are used in a manner that is incompatible with the EU Charter of Fundamental Rights or the Convention on the Rights of Persons with Disabilities (CRPD). The European Commission and EU Member States should put in place effective fundamental rights monitoring mechanisms in relation to the facility. The competent Member State authorities are encouraged to engage in systematic and meaningful consultations with their statutory human rights and equality bodies in this process. This could include seeking their advice on putting in place systems to ensure compliance with the EU Charter of Fundamental Rights and obligations stemming from the CRPD. EU Member States could also consider involving statutory human rights bodies in fundamental rights impact assessments of recovery measures.

## Endnotes

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- 16 *Recovery and Resilience Facility Regulation*, Article 19 (3) (c). See also *Recovery and Resilience Facility Regulation*, Annex V – 'Assessment guidelines', Section 2.3. For more information on the monitoring of the implementation of the European Pillar of Social Rights, see Eurostat (2022), '[European Pillar of Social Rights – Social scoreboard of indicators](#)'.
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- 56 *Nationalt initiativ for de mest udsatte børns trivsel og læring efter Covid-19* (National initiative for the most vulnerable children's well-being and learning after Covid-19); see National Board of Social Services (*Socialstyrelsen*) (2021), 'National initiative for the most vulnerable children's well-being and learning after Covid-19' ('*Nationalt initiativ for de mest udsatte børns trivsel og læring efter Covid-19*').
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- 63 Pending endorsement of Poland's national recovery and resilience plan by the European Commission: *Wyrównanie poziomu wyposażenia szkół w przenośne urządzenia multimedialne* (Equalisation of the equipment of schools in portable multimedia devices); see Polish Government (2021), *Krajowy Plan Odbudowy i Zwiększania Odporności*.
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- 65 *Plan de recuperación, transformación y resiliencia* (Recovery, transformation and resilience plan) (2021), Spanish Government.
- 66 Pending endorsement of Bulgaria's national recovery and resilience plan by the European Commission: *Модернизиране на образователните институции за по-привлекателна и качествена среда за учене и иновации* (Modernisation of educational institutions for a more attractive and quality environment for learning and innovation); see Министерски съвет (2021), *Национален план за възстановяване и устойчивост на Република България, Версия 1.4*.
- 67 *Izgradnja, dogradnja, rekonstrukcija i opremanje osnovnih škola za potrebe jednosmjenskog rada i cjelodnevne nastave* (Construction, upgrading, reconstruction and equipping of primary schools for single-shift and full-day teaching); see Government of the Republic of Croatia (2021), *Nacionalni plan oporavka i otpornosti 2021–2026*.
- 68 *Podpora škol* (Support of disadvantaged schools); see Republic of Czechia (2021), '*Národní plán obnovy k 13.9.2021*'.
- 69 *Revitalisation des internats d'excellence* (Renovation and creation of additional places in boarding schools for excellence); see French Government (2021), *Plan national de relance et de résilience*.
- 70 *Dezvoltarea unui sistem de servicii de educație timpurie unitar, incluziv și de calitate* și Actualizarea cadrului legislativ pentru a asigura standarde ecologice de proiectare, construcție și dotare în sistemul de învățământ preuniversitar (Unitary, inclusive and quality early-childhood education system and Updated regulatory framework to ensure environmentally-friendly design, construction and endowment standards in the pre-university education system), Government of Romania (2021), *Planul Național de Redresare și Reziliență*.
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- 72 *Nuorten monialaisen palvelun vahvistaminen* (Enhancing multiprofessional services for young people); see Finnish Government (2021), *Sustainable growth programme for Finland: Recovery and resilience plan*.
- 73 *Ενίσχυση των ψηφιακών δυνατοτήτων της εκπαίδευσης και εκσυγχρονισμός της επαγγελματικής εκπαίδευσης και κατάρτισης* (Enhancement of digital capabilities in education and modernisation of vocational education and training); see Greek Government (2021), *Ελλάδα 2.0 – Εθνικό Σχέδιο Ανάκαμψης και Ανθεκτικότητας*.
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- 80 Resilienz durch Reformen: Arbeitsmarkt: One-Stop-Shop für Erwerbsfähige und Ausbau der aktivierenden Hilfe (Resilience through reforms: Labour market – One-stop shop for people capable of working and expansion of activating assistance); see Ministry of Finance (Bundesministerium Finanzen) (2021), **Anhang zum Österreichischen Aufbau- und Resilienzplan 2020-2026**.
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- 83 Bezdarbnieku, darba meklētāju un bezdarba riskam pakļauto iedzīvotāju iesaiste darba tirgū (Participation in the labour market of unemployed people, jobseekers and people at risk of unemployment); see Government of Latvia (Ministru kabinets) (2021), **'Eiropas savienības atveseļošanas un noturības mehānisma plans'**.
- 84 Uuden osatyökykyisille työtä ja palveluja tarjoavan välityömarkkinatoimijan käynnistäminen (Launching a new intermediate labour market operator offering employment and services for people with partial work ability); see Finnish Government (2021), **Sustainable growth programme for Finland: Recovery and resilience plan**.
- 85 Aide à la mobilisation des employeurs pour l'embauche des travailleurs handicapés (Support to employers for hiring people with disabilities), French Government (Gouvernement français) (2021), **Plan national de relance et de résilience**.
- 86 Uvajanje prožnejših načinov dela, prilagojenih potrebam invalidov, v invalidskih podjetjih in zaposlitvenih centrih (Introducing more flexible working methods adapted to the needs of people with disabilities in enterprises employing people with disabilities and employment centres); see Office of the Government of the Republic of Slovenia for Development and European Cohesion Policy (Služba Vlade Republike Slovenije za razvoj in evropsko kohezijsko politiko) (2021), **Načrt za okrevanje in odpornost, Junij 2021**.
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- 88 Sondervermögen „Kinderbetreuungsausbau“ – Investitionsprogramm Kinderbetreuungsfinanzierung 2021 (Special Fund 'Childcare expansion' – Investment programme 'Financing Childcare 2021'); see Ministry of Finance (Bundesministerium der Finanzen) (n.d.), **Deutscher Aufbau- und Resilienzplan**.
- 89 Pending endorsement of Hungary's national recovery and resilience plan by the European Commission: Demográfia és köznevelés: Korai nevelés feltételeinek bővítése a társadalmi egyenlőtlenségek csökkentésére és a szülők foglalkoztatási esélyeinek növelésére – Kisgyermekkorai bölcsődei nevelési intézmények kapacitásfejlesztése (Demography and public education: Development of the capacity of the nursery care system – Improvement of the conditions of early care to reduce social inequalities and enhance the employment chances of parents); see Government of Hungary (Magyarország Kormánya) (n.d.), **'Magyarország Helyreállítási és Ellenállóképességi Terve'**. Demográfia és köznevelés: Köznevelés, oktatásfejlesztés (Demography and public education: Public education, development of education); see Government of Hungary (Magyarország Kormánya) (n.d.), **'Magyarország Helyreállítási és Ellenállóképességi Terve'**.
- 90 Nova geração de equipamentos e respostas sociais – Aumentar a resposta em creche (New generation of social facilities and social responses – Increase the response in childcare); see Ministry of Planning (Ministério do Planeamento) (2021), **Plano de Recuperação e Resiliência – Recuperar Portugal, Construindo o Futuro**.
- 91 Pending endorsement of Poland's national recovery and resilience plan by the European Commission: Wsparcie programów dofinansowania miejsc opieki nad dziećmi w wieku 0-3 lat w ramach programu MALUCH+ (Support for co-financing programmes for childcare facilities intended for children aged 0-3 as part of the MALUCH+ programme); see Polish Government (Ministerstwo Funduszy i Polityki Regionalnej) (2021), **Krajowy Plan Odbudowy i Zwiększania Odporności**.
- 92 Përcaktimin e procedurave, të dokumentacionit dhe të masës së përfitimit të ndihmës financiare për të punësuarit në subjektet e biznesit me të ardhura vjetore deri 14 milionë lekë, ndihmës ekonomike e të pagesës të së ardhurës nga papunësia gjatë periudhës së fatkeqësisë natyrore, të shpallur si pasoje e Covid-19 (On determining the procedures, documentation and the measure of obtaining financial assistance for employees in business entities with annual income up to ALL 14 million, economic assistance and payment of income from unemployment during the period of natural disaster, declared as a consequence of Covid-19); see Council of Ministers (Këshilli i Ministrave) (2020), Vendim nr.254, datë 27.3.2020 Për përcaktimin e procedurave, të dokumentacionit dhe të masës së përfitimit të ndihmës financiare si pasojë e Covid-19. Marrjen e masave për ofrimin e asistencës në banesë ndaj shtresave në nevojë, në kushtet e epidemisë së shkatëruar nga Covid-19 (On taking measures to provide housing assistance to vulnerable individuals, based on the conditions of the Covid-19 pandemic); see Council of Ministers (Këshilli i Ministrave) (2020), Fletore zyrtare No. 43/20.
- 93 Uredba o formiranju privremenog registra i načinu uplate jednokratne novčane pomoći svim punoletnim državljanima Republike Srbije u cilju smanjivanja negativnih efekata prouzrokovanih pandemijom bolesti Covid-19 izazvane virusom SARS-CoV-2 (Decree on the establishment of a temporary registry and the method of payment of one-time financial assistance to all adult citizens of the Republic of Serbia to reduce the negative effects caused by the Covid-19 pandemic), Republic of Serbia (2020), Službeni glasnik Republike Srbije, Nos. 60/20 and 65/2020.
- 94 Transparentnost i adekvatnost socijalnih naknada u sustavu socijalne zaštite (Transparency and adequacy of social benefits as part of the social protection system); see Vlada Republike Hrvatske (2021), **Nacionalni plan oporavka i otpornosti 2021-2026**.
- 95 Garantuota minimalių pajamų apsauga (Guaranteed minimum income protection); see Lietuvos Respublikos Vyriausybė (2021), **Ekonominis gaivinimo ir atsparumo didinimo planas „Naujos kartos Lietuva“**.
- 96 Reinforcing the resilience of the labour market; see European Commission (2021), **Annex to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Malta**.

- 97 Αύξηση της πρόσβασης σε αποτελεσματικές και χωρίς αποκλεισμούς κοινωνικές πολιτικές (Increase access to effective and inclusive social policies); see Greek Government (2021), **Ελλάδα 2.0 – Εθνικό Σχέδιο Ανάκαμψης και Ανθεκτικότητας**.
- 98 *Stanovanjska politika* (Housing policy); see Office of the Government of the Republic of Slovenia for Development and European Cohesion Policy (*Služba Vlade Republike Slovenije za razvoj in evropsko kohezijsko politiko*) (2021), **Načrt za okrevanje in odpornost, Junij 2021**.
- 99 *Reform zur Weiterentwicklung der Pflegevorsorge: Investition in die Umsetzung von Community Nursing* (Reform to further develop care provision: Investment for the implementation of community nursing); see Bundesministerium Finanzen (2021), **Anhang zum Österreichischen Aufbau- und Resilienzplan 2020–2026**.
- 100 *Izgradnja i opremanje centara za starije osobe (izvaninstitucijske i institucijske usluge)* (Construction and equipping of centres for the elderly (non-institutional and institutional services)); see Vlada Republike Hrvatske (2021), **Nacionalni plan oporavka i otpornosti 2021–2026**.
- 101 *Nova geração de equipamentos e respostas sociais – Requalificação e alargamento da rede de equipamentos e respostas sociais (população idosa)* (New generation of social facilities and social responses – Improvement and expansion of the network of social facilities and responses (elderly population)); see Ministry of Planning (*Ministério do Planeamento*) (2021), **Plano de Recuperação e Resiliência – Recuperar Portugal, Construindo o Futuro**.
- 102 *Reformera: Äldreomsorgslyftet* (Reform: Boosting the care sector for older people); see Ministry of Finance (*Finansdepartementet*) (2021), **Sveriges återhämtningsplan**.
- 103 See also document **SG/Inf(2020)24** “A Council of Europe contribution to support member states in addressing healthcare issues in the context of the present public health crisis and beyond” and the statement by the Council of Europe Committee on Bioethics on “**Covid-19 and vaccines: ensuring equitable access to vaccination during the current and future pandemics**”
- 104 *Edistetään hoitotakuun toteutumista (mukaan lukien mielenterveyspalvelut) sekä puretaan koronavirustilanteen aiheuttamaa sosiaali- ja terveydenhuollon hoito-, kuntoutus- ja palveluvelka* (Promoting compliance with the care guarantee (including in mental health services) and reducing the treatment, rehabilitation and service deficit in health and social services caused by the coronavirus pandemic); see Finnish Government (2021), **Sustainable growth programme for Finland: Recovery and resilience plan**.
- 105 *Sláintecare consultant contract*; see Government of Ireland (2021), **Ireland’s national recovery and resilience plan**.
- 106 *Ilgalaišs priežiūros paslaugų teikimo reforma* (Reform of the provision of long-term care services); see Government of Lithuania (*Lietuvos Respublikos Vyriausybė*) (2021), **Ekonomikos gaivinimo ir atsparumo didinimo planas „Naujos kartos Lietuva“**.
- 107 Pending endorsement of Poland’s national recovery and resilience plan by the European Commission: *Inwestycje związane z modernizacją i doposażeniem obiektów dydaktycznych w związku ze zwiększeniem limitów przyjęć na studia medyczne* (Investments related to the modernisation and retrofitting of teaching facilities in connection with increasing the admission limits for medical studies); see Polish Government (*Ministerstwo Funduszy i Polityki Regionalnej*) (2021), **Krajowy Plan Odbudowy i Zwiększania Odporności**.
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- 109 *Mitmeetstarbelise meditsiinikopteri võimekuse loomine* (Capacity building for a multipurpose medical helicopter); see Estonian Government (*Vabariigi Valitsus*) (2021), **Taaste- ja vastupidavuskava**.
- 110 *Solution de télé-médecine pour le suivi médical à distance de patients* (Telemedicine solution for the remote medical monitoring of patients); see Government of the Grand Duchy of Luxembourg (*Gouvernement du Grand-Duché de Luxembourg*) (2021), **Plan pour la reprise et la résilience du Grand-Duché de Luxembourg**. *Evolution de ‘MyGuichet’* (‘MyGuichet’ update); see Government of the Grand-Duchy of Luxembourg (*Gouvernement du Grand-Duché de Luxembourg*) (2021), **Plan pour la reprise et la résilience du Grand-Duché de Luxembourg**.
- 111 Establishment of a blood, tissue and cell centre; see European Commission (2021), **Annex to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Malta**.
- 112 **Plan de recuperación, transformación y resiliencia** (Recovery, transformation and resilience plan) (2021), Spanish Government.
- 113 Pending endorsement of Bulgaria’s national recovery and resilience plan by the European Commission: **Лична мобилност и достъпност за хората с трайни увреждания** (Personal mobility and accessibility for people with permanent disabilities); see Министерски съвет (2021), **Национален план за възстановяване и устойчивост на Република България, Версия 1.4**.
- 114 *Rimozione delle barriere fisiche e cognitive in musei, biblioteche e archivi per consentire un più ampio accesso e partecipazione* (Removal of physical and cognitive barriers in museums, libraries and archives to allow wider access and participation); see Italian Government (*Governo Italiano*) (2021), **Piano nazionale di ripresa e resilienza – #nextgenerationitalia**.
- 115 *Publisko pakalpojumu un nodarbinātības pieejamības veicināšanas pasākumi* (Measures to promote access to public services and employment); see Government of Latvia (*Ministru kabinets*) (2021), **‘Eiropas savienības atveseļošanas un noturības mehānisma plans’**.
- 116 Developing new education pathways towards inclusive and quality education; see European Commission, (2021), **‘Annex to the Proposal for a Council Implementing Decision on the approval of the assessment of the recovery and resilience plan for Malta’**.
- 117 Pending endorsement of Bulgaria’s national recovery and resilience plan by the European Commission: **Продължаваща подкрепа за деинституционализация на грижата за възрастните хора и хората с увреждания** (Continuing support for the deinstitutionalisation of the care for elderly people and people with disabilities); see Министерски съвет (2021), **Национален план за възстановяване и устойчивост на Република България, Версия 1.4**.
- 118 **Δημιουργία οικιστικών δομών για παιδιά, εφήβους με διαταραχές συμπεριφοράς, άτομα με αναπηρίες, και άτομα που χρειάζονται μακροχρόνια φροντίδα** (Establishment of home structures for children, adolescents with conduct disorders, and people with disabilities and people in need of long-term care); see Republic of Cyprus (2021), **Cyprus recovery and resilience plan 2021–2026**.
- 119 *Reforma sistemului de protecție a persoanelor adulte cu dizabilități și reabilitarea, renovarea și dezvoltarea infrastructurii sociale pentru persoanele cu dizabilități* (Reform of the protection system for adults with disabilities, and rehabilitation, renovation and development of social infrastructure for people with disabilities); see Government of Romania (*Guvernul României*) (2021), **Planul Național de Redresare și Reziliență**.
- 120 *Rozšírenie kapacít komunitnej sociálnej starostlivosti* (Increasing capacities of community social services); see Government of the Slovak Republic (*Vláda Slovenskej republiky*) (2021), **‘Plán obnovy a odolnosti Slovenskej republiky, Komponent 13 – Dlhodobá sociálno-zdravotná starostlivosť’**.

- 121 *Zlepšovanie digitálnych zručností seniorov a distribúcia Senior-tabletov* (Improving the digital skills of the elderly and distribution of tablets for older people); see Government of the Slovak Republic (*Vláda Slovenskej republiky*) (2021), '*Plán obnovy a odolnosti Slovenskej republiky, Komponent 17 – Digitálne Slovensko*'.
- 122 *Attraktivierung der Primärversorgung: Nationaler Roll-Out der „Frühen Hilfen“ für sozialbenachteiligte Schwangere, ihre Kleinkinder und Familien* (Making primary care more attractive: National roll-out of “early aid” for socially disadvantaged pregnant women, their young children and families); see Bundesministerium Finanzen (2021), *Anhang zum Österreichischen Aufbau- und Resilienzplan 2020–2026*.
- 123 *Plateforme digitale pour les détenus/Digitale platforms voor gevangenen* (Digital platform for detainees); see Federal Government (*Gouvernement fédéral/Federale regering*) (2021), *Plan National pour la Reprise et la Résilience – Belgique/Nationaal plan voor herstel en veerkracht – België*.
- 124 *Housing temporaneo e stazioni di posta* (Housing first and post stations); see Italian Government (*Governo Italiano*) (2021), *Piano nazionale di ripresa e resilienza – #nextgenerationitalia*.
- 125 *Operações Integradas em Comunidades Desfavorecidas nas Áreas Metropolitanas de Lisboa e do Porto* (Integrated operations in disadvantaged communities in the metropolitan areas of Lisbon and Porto); see Ministry of Planning (*Ministério do Planeamento*) (2021), *Plano de Recuperação e Resiliência – Recuperar Portugal, Construindo o Futuro*.
- 126 **Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility**, OJ 2021 L 57 (Recovery and Resilience Facility Regulation), Article 18 (4) (p).
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- 138 For more information on the importance of involving (organisations of) people with disabilities, see CRPD Committee (2018), *General comment No. 7 on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention*, 9 November 2018.
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# EU CHARTER OF FUNDAMENTAL RIGHTS

## 2

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The Council expressed its full commitment to the European Commission 'Strategy to strengthen the application of the Charter of Fundamental Rights in the EU'. The 10-year strategy and the Council conclusions put a major emphasis on the application of the Charter at national level, stressing the relevance of national actors.

At national level, courts, parliaments, governments and other bodies continue to use the Charter, which judgments, impact assessments and parliamentary debates mention, as evidence collected in 2021 shows. There are few examples of policy initiatives aiming to enhance training on the Charter. Yet, so far, national bodies do not appear to implement the Commission strategy and Council conclusions through coordinated, long-term planning. But, the appointment of Charter national focal points might indicate that progress may be more evident in 2022.

## 2.1. THE POLICY FRAMEWORK AT EU LEVEL



The Commission's strategy to strengthen the application of the EU Charter forms the framework for EU-level and national-level policy making with regard to the Charter. At the beginning of March 2021, the Council of the European Union received this key document positively. The Council adopted conclusions that invite the Member States to invest in the following areas:<sup>1</sup>

- **Charter training:** expansion of training activities with a focus on law enforcement and the judiciary;
- **awareness raising:** increased efforts to communicate the Charter to the general population, with particular consideration for certain groups;
- **national rules on law making:** ensuring that rules on law and policy making take the Charter into account;
- **exchange:** dialogue between national governments, using the e-justice platform, and among local administrations and cities, with regard to the Charter's application;
- **use of EU funds in a Charter-compliant manner:** smooth exchange of information and cooperation, involving national human rights institutions (NHRIs) as appropriate and using the expertise of FRA in this regard;
- **coordination:** Charter focal points to be responsible for the promotion and coordination of capacity building, exchange of information, awareness raising and linking different levels of government and civil society bodies as well as bodies with a human rights remit;
- **NHRIs:** strengthening independence, securing an enabling environment and adequate funding to unlock the potential of NHRIs and equality bodies as 'Charter agents';
- **civil society:** removing "any unnecessary, unlawful or arbitrary restrictions" (paragraph 32) on civil society space, acknowledging the need for sufficient and easily accessible funding, improving interaction and cooperation with civil society organisations (CSOs).

The Charter is binding on the Member States only when they are implementing EU law. However, it remains important to always take the Charter into account to foster a common legal, judicial and rule of law culture, the European Parliament stressed.<sup>2</sup>

At the end of the year, the European Commission published its annual report on the application of the Charter.<sup>3</sup> It came in a new format with a focus on a specific topic, as the 2020 strategy announced. In 2021 the topic was ‘protecting fundamental rights in the digital age’.

With regard to the report’s new thematic nature, the European Parliament expressed concern that focusing on a single pre-defined topic every year would not allow it to monitor and highlight serious violations of the Charter across all policy areas.<sup>4</sup>

The 2021 Commission report underlined once more the importance of national bodies. It referred to, among other things, a new EU funding scheme, the Citizens, Equality, Rights and Values (CERV) Programme, which offers new funding opportunities for national, regional and local authorities to promote a culture of values and strengthen awareness of the Charter.<sup>5</sup>

The report stressed that cities play an important role. It referred to FRA’s “framework for reinforcing rights locally”, which the agency presented at its Fundamental Rights Forum in October 2021. The framework includes tools that help mayors, local authorities and grassroots organisations to integrate human rights standards – including the Charter – into their work.

The Committee of the Regions, too, stressed the role of local and regional authorities in the implementation of the Charter.<sup>6</sup> The Council conclusions also highlighted that cities and local governments are important in promoting fundamental rights, and invited Member States to promote the sharing of experiences and best practices between local authorities, including networks of towns.<sup>7</sup>

The European Economic and Social Committee highlighted the role of civil society in implementing the Charter. The committee proposed that the “overall capacity of civil society organisations and human rights defenders to work within the Charter’s framework should be significantly strengthened”.<sup>8</sup> The Commission’s report reflects this. It announces dedicated funding to support rights defenders and CSOs.<sup>9</sup>

The CERV Programme has a budget of over € 733 million for 2022–2027 to protect and promote rights and values that the EU Treaties and the EU Charter enshrine. One of its calls for proposals that opened in 2021 aims to promote rights awareness by supporting local, regional and/or national CSOs.<sup>10</sup> Another call dedicates € 2 million to promoting “capacity building and awareness on the EU Charter of Fundamental Rights and activities on strategic litigation relating to democracy, the rule of law and fundamental rights breaches”.<sup>11</sup> Another call for proposals (CERV-2021-OG-FPA), which will open in 2022, aims to establish 4-year framework partnership agreements to support European networks, CSOs active at EU level and European think tanks in the areas of Union values.

As of 2021, the new European judicial training strategy 2021–2024 applied.<sup>12</sup> It invites training providers to include EU law and the Charter as well as ‘judgecraft’ as standard components of the initial judicial training offer for new practitioners. The strategy also announces that the European Commission will cooperate with the Council of Europe on training including on the EU Charter of Fundamental Rights.

## FRA ACTIVITY

### Investing in Charter-related capacity building at national level

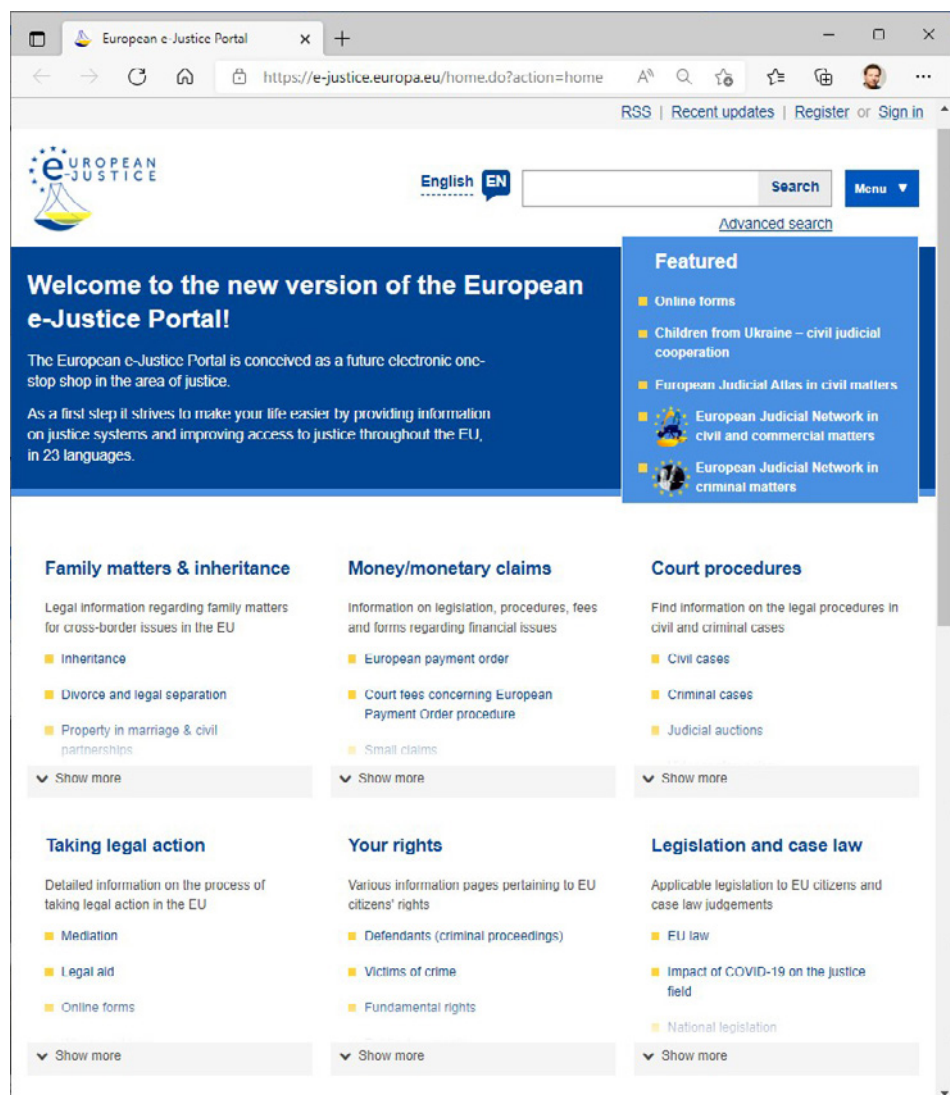
Throughout 2021, FRA organised and participated in events disseminating Charter expertise among relevant bodies.

For instance, from 20 to 22 October, FRA, the European Network of Equality Bodies and the European Network of National Human Rights Institutions jointly organised a virtual seminar for around 100 legal experts from equality bodies and NHRIs from across Europe. The seminar dealt with the Charter’s potential for national human rights bodies, the relevant case law of the Court of Justice of the European Union, the new EU Charter strategy, the Commission’s new funding programme for capacity building at national level, and the use of the Charter in equality law, strategic litigation and in tackling challenges to the rule of law. A FRA train-the-trainer module provided hands-on exercises on using (digital) interactive tools and case studies to deliver Charter workshops. The takeaways of the seminar are available at **‘The Charter: A roadmap to fundamental rights’**.

The various FRA tools are available online at **‘FRA Charter resources’**.

On average only about half of the population (53 %) are aware of the Charter, FRA's Fundamental Rights Survey showed.<sup>13</sup> Against this background, the Commission launched at the end of 2021 an awareness-raising campaign to inform people of their fundamental rights.<sup>14</sup> The campaign focuses on non-discrimination and equality, rights of the child, freedom of expression and information, and effective remedy and fair trial.

The Commission also launched a new version of the European e-Justice Portal. It contains information on the application of the Charter and where to get help.<sup>15</sup> The platform includes a 'fundamental rights interactive tool' developed by FRA to find the right national-level organisation that can help.



## 2.2. GOVERNMENTS AND OTHER NATIONAL ACTORS

As mentioned upfront, the Council of the European Union agreed on the role of governments in the application of the Charter. This section addresses four aspects in that regard. Member States agreed to establish focal points in their governmental structures in order to better coordinate Charter related activities. Secondly, the Council invited all Member States, who have not yet done so, to establish National Human Rights Institutions. In contrast to the focal points, these are located outside government structures and entirely independent from the government. Thirdly, the Council invited governments to heavily invest in training on the Charter. Fourthly, the conclusions underlined the role of civil society in the application of the Charter and the need for governments to coordinate with civil society actors in that regard.

### 2.2.1. Establishing focal points and exchanging promising practices

In its Charter strategy, the European Commission encouraged Member States “to appoint a Charter focal point to ease the flow of information and best practice on the Charter and coordinate capacity building efforts in the country. The focal point could also pass information to and from the EU institutions.” The strategy also mentions that Member States may decide for these focal points to contribute to a coherent implementation of the new Charter-related ‘enabling conditions’. These should facilitate transnational coordination in implementing the new Charter-conditionality as established by the Common Provision Regulation.

By the end of 2021, 18 Member States had informed the European Commission about the appointment of their Charter focal point. One Member State informed the Commission that for the time being no focal point will be nominated.

Most of the Charter focal points are part of a unit in the ministry of justice. However, in **Germany**, the focal point is within the European Affairs Department of the Foreign Office (Unit for EU Policy and Strategy) and in **Sweden**, the focal point is within the Division for Discrimination Issues, Human Rights and Child Rights Policy of the Ministry of Employment. In **Croatia**, **Czechia** and **Poland**, the Charter focal point is established at a more horizontal position, namely the Office for Human Rights and Rights of National Minorities at the Government of the Republic of Croatia, the Department of Human Rights and Protection of Minorities in the Office of the Government of the Czech Republic and the Chancellery of the Prime Minister in Poland. In **Bulgaria**, the Charter focal points are placed in the government’s judicial branch, that is at the Supreme Court of Cassation, Supreme Administrative Court and the Supreme Cassation Prosecution Office.

The Charter focal points so far appointed are civil servants, many of whom in a leading capacity as the examples of **Czechia**, **Denmark**, **Greece**, **Slovakia** and **Sweden** show. In some countries, several persons are assigned the role of Charter focal point, such as in **Bulgaria**, **Greece**, the **Netherlands** and **Portugal**. **Italy** nominated an academic expert who is linked to the ministry of justice.<sup>16</sup>

TABLE 2.1: 18 MEMBER STATES THAT HAVE APPOINTED THEIR CHARTER FOCAL POINT IN 2021

Judiciary	Horizontal position	Ministry of Justice	Ministry for Foreign Affairs	Ministry of Employment
Bulgaria	Poland (Chancellery of the Prime Minister)  Czechia (Office of the Government)  Croatia (Office for Human Rights and Rights of National Minorities at the Government of the Republic of Croatia)	Belgium	Germany	Sweden
		Denmark		
		Greece		
		Hungary		
		Italy		
		Latvia		
		Lithuania		
		Netherlands		
		Portugal		
		Romania		
		Slovakia		
		Spain		

These newly nominated Charter focal points are well placed to make sure that promising practices will be shared across borders. The Council's Charter conclusions recalled that, following the Council's invitation to the Commission, a dedicated page on the European e-Justice Portal was created. The Council urges all Member States to record their relevant good practices therein, including at local level.

Several Member States submitted in 2021 examples and information on the use of the Charter to the European e-Justice Portal. By the end of 2021, 14 Member States had done so – **Croatia, Germany, Greece, Finland, France, Italy, Latvia, Lithuania, the Netherlands, Portugal, Romania, Slovakia, Spain and Sweden.**<sup>17</sup>

With the support of the Charter focal points, the section '**Member State's best practices on the Charter**' on the European e-Justice portal could be regularly updated. It would allow stakeholders to get inspired on how to promote best the use and awareness of the Charter among the legislator, the administration, law enforcement bodies and the judiciary. The practices on the portal can also provide inspiration on how to inform people about their Charter rights and how governments may cooperate with different actors, such as civil society organisations, National Human Rights Institutions, equality bodies or academia to ensure that the Charter is applied proficiently. The e-Justice portal may also include best practices on how non-governmental initiatives promote the use and awareness of the Charter.

### 2.2.2. The role of independent bodies

The Council explicitly acknowledged that NHRIs are "key for the implementation of the Charter, given their broad and horizontal fundamental rights mandate and their proximity to citizens".<sup>18</sup> The Council encouraged Member States to ensure that such bodies regularly and substantially exchange views with the government and take part in reporting exercises. It called upon those Member States that have not yet established a fully independent NHRI to do so.

**Italy** made some progress towards the establishment of an NHRI in accordance with the Charter strategy and the Council conclusions. The permanent parliamentary commission on constitutional affairs discussed the draft law.<sup>19</sup>

**Malta** also saw progress in this regard. An NHRI is expected to replace the current National Commission for the Promotion of Equality for Men and Women, and take general responsibility for promoting and protecting human





rights.<sup>20</sup> The revised bill was before the Plenary Session for its second reading at the time of writing.

In **Sweden**, the parliament approved a bill on the establishment of an Institute for Human Rights allowing the Institute to become operation as of the beginning of 2022.<sup>21</sup>

Independent bodies with a human rights remit are important for enhancing the application of the Charter. For instance, in the **Netherlands**, the Council of State examines bills and can use the Charter as a relevant standard. In the context of an amendment to the Act on Public Health, the Council of State expressed various concerns about the right to liberty and security (Article 6 of the Charter), respect for private and family life (Article 7) and the protection of personal data (Article 8). The bill is related to Covid-19 and concerns the introduction of additional measures regarding the international movement of persons.<sup>22</sup>

In **Slovenia**, the Advocate of the Principle of Equality referred to the Charter in seven recommendations concerning different draft laws and regulations. For instance, it issued recommendations for improving a bill amending the Housing Act. The advocate addressed the Housing Act currently in force for not covering non-EU citizens who are long-term residents.<sup>23</sup> It says such a regime is contrary to Article 34 of the Charter in conjunction with Article 11 of the Long-Term Residence Directive (Council Directive 2003/109/EC). The parliament adopted amendments in May without addressing the advocate's recommendations.<sup>24</sup>

In **Luxembourg**, an anti-Covid-19 measure was a curfew starting at 23.00. The Consultative Commission on Human Rights issued an opinion on a bill that proposed to postpone the start to midnight. Invoking among other references Article 45 of the Charter (freedom of movement and of residence), the Human Rights Commission considered the curfew neither strictly necessary nor proportionate for improving public health.<sup>25</sup>

Various EU Member States asked NHRIs to participate in planning the use of EU funds and monitoring their spending. For instance, in **Finland**, the monitoring committee for the EU regional and structural policy programme consists of 28 members, and the NHRI, the Finnish Human Rights Centre, is a permanent expert member.<sup>26</sup> Similar developments took place in **Slovakia**, which established a framework for managing the cooperation and partnership between the administration and representatives of civil society regarding the use of the EU funds.<sup>27</sup> In **Cyprus**, the Commissioner For Administration and the Protection for Human Rights cooperates with the Managing Authority. All project proposals have to receive a compliance certificate from the Commissioner in order to be eligible for selection and receive co-financing by the EU Funds.

NHRIs have great potential to raise awareness of the Charter. For instance, in **Greece**, the National Commission for Human Rights has been explicitly recognized as the National Human Rights Institution in Greece by virtue of Law 4780/2021. Its core mandate includes the implementation of specific educational programs and activities that will focus, among others, on raising awareness of the Charter for Fundamental Rights.

Similarly, data protection authorities can play a role in raising awareness of relevant aspects of the Charter. For instance, in **Croatia**, the Personal Data Protection Agency published a guide to the rights of data subjects under the General Data Protection Regulation (Regulation (EU) 2016/679) and the Charter, to help citizens understand their rights as data subjects. It also covers mechanisms available for safe and confidential data processing.<sup>28</sup>

### **2.2.3. Training and capacity-building activities**

All relevant EU documents presented at the outset of this chapter identify the need for training. So did the public consultation that the European Commission carried out and FRA analysed in 2020.<sup>29</sup>

The new Common Provisions Regulation adopted in June 2021 adds a further dimension to this need. It sets out the rules for the EU budget 2021–2027 and establishes an ‘enabling condition’ requiring that effective mechanisms be in place for all programmes that EU funds finance, from inception to implementation, to ensure compliance with the Charter.<sup>30</sup> This requires that the national administration, and other bodies contributing to the implementation of this new condition, have appropriate capacities.

**Croatia** adopted a draft action plan in 2021. It includes the development and implementation of training on the effective application of the Charter for bodies involved in the management and control system for the implementation of EU funds.<sup>31</sup> In Bulgaria coordinated action towards judicial training on the Charter was established. Regular trainings on specific rights under the Charter are organised in face-to-face, online and blended formats, dealing with the application of the Charter and its interaction with the other human rights instruments. For instance, in cooperation with the Academy on European law (ERA) the Bulgarian National Institute of Justice hosted an international training on application of the Charter of the fundamental rights with a focus on the right of a fair trial.<sup>32</sup>

In **Romania**, the administration has prepared specific guidelines for applying the Charter when implementing European Structural and Investment Funds.<sup>33</sup> The guidelines aim to assist the public administration and beneficiaries at the planning and implementing stages. The relevant ministry considers that regular dialogue with the EU on the application of the Charter and institutional assistance in applying it are important.

**Spain** started a new training programme focused on the use of the Charter within the administration. The director-general of International Legal Cooperation and Human Rights of the Ministry of Justice highlighted the growing importance that the Charter is acquiring in the regulatory impact analysis report that must accompany the drafting of preliminary bills, decree-laws and royal regulations by each ministry.<sup>34</sup> The ministry intends to carry out the new programme in cooperation with FRA.

In **Greece**, the Supreme Court Prosecutor Office in collaboration with FRA has submitted relevant FRA training material and reports to all prosecutors for use. Moreover, the national school for judges plans to include specific courses on the Charter in its standard curriculum from 2022.<sup>35</sup>

Existing funding schemes were used for enhanced Charter training. For instance, in **Italy**, the Ministry of Justice earmarked a budget of € 2 million for 2021, and the same for 2022, for training projects in the field of international criminal law and human rights.<sup>36</sup> In **Hungary**, the President of the National Judicial Office adopted an education plan for 2022 that stipulates that the Charter must be part of the training curriculum for trainee judges and law clerks.<sup>37</sup>

EU-funded projects have the potential to bring together relevant actors, including representatives from ministries. For instance, in **Bulgaria** an online seminar on 'How to improve the implementation of the EU Charter of Fundamental Rights at the national level?' brought together the Bulgarian Human Rights Lawyers Foundation (organisers) with the Krastyu Tsonchev Centre for Lawyers Training, the Bulgarian Minister for Justice, the Ombudsman, a Constitutional Court judge and the President of the National Office for Legal Assistance.<sup>38</sup> The Bulgarian National Institute of Justice organized an e-learning course for experts at the management and control bodies of European Structural and Investment Funds (ESIF), the Ministry of Justice and the Judiciary (as beneficiaries in the course of implementation of ESIF funded projects), aimed at enhancement of their capacity to implement the Charter at national level in an efficient manner and in compliance with the uniform practice.<sup>39</sup>

The professional training organisations in **Croatia**,<sup>40</sup> **Italy**<sup>41</sup> and **Slovenia**<sup>42</sup> provided Charter-specific training.

#### 2.2.4. Engaging with civil society

As mentioned, the European Commission and the European Economic and Social Committee called for the involvement of civil society in the context of the Charter. The Council of the European Union also acknowledged that CSOs are often the first port of call for citizens seeking support and information with regard to their rights, and are thus at the forefront of protecting fundamental rights.

In its conclusions on the Charter, the Council invited Member States to improve their interaction and cooperation with CSOs, to better promote and protect the Charter rights. The Council considers it good practice if governments regularly meet with CSOs and involve them in preparing national action plans on fundamental rights and in reporting on the application of fundamental rights instruments. The Council also recommends establishing "structures bringing together representatives from civil society, rights defenders and public authorities".<sup>43</sup>





In **Latvia**, the Cabinet of Ministers introduced ‘Guidelines for the development of cohesive and active civic society for years 2021–2027’, which relate to the Charter in various ways.<sup>44</sup> The guidelines also aim to strengthen dialogue with civil society to ensure interaction with government and its representatives, contributing to respect for fundamental rights in line with **the Constitution** and the EU Charter.

**Austria** amended the rules of parliamentary procedure to extend public consultations on legislative acts. Under the amendment, each legislative initiative from the government, members of parliament, committees or people’s initiatives for parliamentary debate must go through an open consultation procedure.<sup>45</sup> This is an important reminder that the investment in public engagement with civil society should also extend to the parliamentary branch of government.

Private associations and CSOs can also play a role, ranging from large-scale activities to small initiatives. Estonia and Poland offer examples. In **Estonia**, the Estonian Association for European Law published a video-clip on the Charter in its series ‘EU law ABC’.<sup>46</sup>

In **Poland**, the ‘Tour of the Constitution’ (*Tour de Konstytucja*) distributed copies of the Constitution, but also of the Charter and other significant legal acts, during 130 meetings throughout Poland. The Congress of Civic Democratic Movements (*Fundacja Kongres Obywatelskich Ruchów Demokratycznych*), a platform for cooperation of pro-democracy associations, organisations and informal groups from all over Poland, organised the tour.

Academia also contributed to awareness of Charter-related legal issues by examining, for instance, aspects such as the application of the Charter at national level,<sup>47</sup> the rule of law,<sup>48</sup> freedom of religion<sup>49</sup> and tax law.<sup>50</sup>

## 2.3. IMPACT ASSESSMENTS AND PARLIAMENTARY DEBATES

### 2.3.1. Impact assessments and legal scrutiny

Most references to the Charter were in the area of freedom, security and justice, including policies on border checks, asylum and immigration (14 examples), FRA’s analysis of 49 impact assessments shows. The agency asked Franet to report two examples per country of the Charter playing a significant role in impact assessments and/or legal scrutiny.

Impact assessments are regularly carried out when governments propose bills. Explanatory memoranda or other preparatory documents sometimes explain that a national bill is tabled to bring a law in line with the Charter. This was the case in **Austria**, for instance, with legislation incorporating an EU directive in the area of competition law.<sup>51</sup>

**Estonia** introduced a bill amending the protected grounds in the law providing for the prohibition of inciting hatred and violence in the provision of media services. The explanatory memorandum referred to the grounds in Article 21 of the Charter.<sup>52</sup>

References to the Charter are more likely in bills incorporating EU legislation, but there are also examples of Charter references outside that context. For instance, in **Greece**, the impact assessment of the Law on conditions of transfer and secondment of judicial officers referred to the Charter in the context of

Articles 155 and 156. It emphasised that the social right of reconciling family and professional life has become a fundamental right, as Article 33 (2) of the Charter enshrines it.

An interesting example comes from **Finland**, where a government bill aims to incorporate in the Marriage Act the possibility of abrogating a marriage concluded by force.<sup>53</sup> The bill notes that recognising a foreign marriage falls within the national competence of EU Member States. However, if Finland does not recognise a marriage concluded in a foreign state as valid, this may interfere with the exercise of the right of EU citizens to move and reside freely within the territory of the Member States, as provided for in Article 45 of the Charter. Yet the bill concludes that such a restriction is justified, as it aims to protect children (the bill addresses marriages with minors) and is proportionate.

Explanatory memoranda or other preparatory documents sometimes explain that a bill is introduced in order to bring a law in line with the Charter. For instance, in **Romania** the explanatory memorandum of a bill aiming to eliminate disparities between maternity leave and paternity leave referred to Articles 23 and 33 of the Charter.<sup>54</sup> In **Hungary**, the explanatory memorandum a legislative proposal indicated that the bill was introduced in the National Assembly to implement a judgment of the CJEU in which the court held that the Hungarian law imposing obligations to register, declare and publish foreign donations to CSOs was in breach of Articles 7, 8 and 12 of the Charter (C-78/18).<sup>55</sup>

If an impact assessment or an explanatory memorandum of a government bill does not refer to the Charter, parliamentary debate might still mention it. For instance, that happened in **Germany** in the context of a bill facilitating the prosecution of suspects previously charged with murder but legally acquitted.<sup>56</sup>

In **Poland**, the Sejm adopted the 'Lex-TVN' Act amending the Act on the National Broadcasting Council. It restricts the terms for issuing licences to broadcasters owned by foreign capital. The chairman of the Polish People's Party argued during the parliamentary debate that the bill was inconsistent with the Charter.<sup>57</sup>

### 2.3.2. Other debates in national parliaments

In the context of discrimination, parliamentarians refer to the Charter relatively often: eight out of 44 parliamentary debates that FRA analysed concerned discrimination.<sup>58</sup> The Charter continues to be referred to in the context of constitutional amendments. In **Germany**, there was a parliamentary debate concerning a proposal to amend the Basic Law to explicitly enshrine child rights. A member of parliament criticised the proposal, saying that the protection lagged behind that of the Charter.<sup>59</sup> The bill was in the end not adopted.

In **Luxembourg**, the Charter was referred to in discussing whether or not to replace the term 'people with disabilities' with the term 'persons with special needs'. Moreover, the Charter and its Article 48 came up in discussion of whether or not to include a paragraph on the presumption of innocence in the revised constitutional text.<sup>60</sup>

Parliaments may also refer to the Charter when discussing acts by the administrations. For instance, in **Denmark**, members of parliament enquired about the legality of the conduct of a Danish maritime vessel in Greek waters in relation to Denmark's international obligations.<sup>61</sup> The ship had followed an order from Greek authorities to return 33 migrants/refugees to an inflatable boat for the purpose of pushing them back to Turkish waters. When referring to the international standards, the Minister for Immigration and Integration also mentioned Articles 2 and 3 and Article 19 (2) of the Charter.

Obviously, the Charter is also referred to in the context of European level initiatives as was the case in **Hungary** where the parliamentary advocate of the Hungarian Serb minority referred to Article 21 and 22 of the Charter in the context of the Minority Safepack Initiative.<sup>62</sup>

Other parliamentary debates referred to the fundamental rights situation in other EU Member States, using the Charter as a point of reference. For instance, in **Ireland**<sup>63</sup> and the **Netherlands**,<sup>64</sup> members of the government were asked in parliament about the situation of lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) persons in Hungary. The Dutch minister referred to a joint declaration of 17 EU Member States expressing serious worries about the amendments that the Hungarian parliament had adopted, which discriminate against LGBTIQ persons and violate the Charter. In **Belgium**, members of parliament drafted a resolution calling on the government to bring a case before the CJEU against the measures the government of Hungary had taken against LGBTIQ persons.<sup>65</sup>

Given the political nature of debates in national parliaments, the Charter may be referred to in contexts to which, legally speaking, the Charter does not apply but in which it is nevertheless politically expedient.

For instance, in **Cyprus**, Articles 11 (freedom of expression and information) and 13 (freedom of the arts and sciences) of the Charter were referred to in a debate concerning a teacher who faced prosecution because his paintings were seen as insulting the Orthodox church.<sup>66</sup> The president of the committee stated that the minister in question had launched the disciplinary proceedings on the instructions of the archbishop. The incident has also attracted the interest of the European Parliament, which has sent a letter to the minister.

In **Bulgaria**, a member of parliament referred to the Charter when advocating lifting the ban on campaigning in languages other than Bulgarian during elections.<sup>67</sup>

## 2.4. THE CHARTER BEFORE NATIONAL COURTS

### 2.4.1. Intensity of engagement with the (applicability of) the Charter

Just as in the past, the use of the Charter in court rooms varied from policy area to policy area. The figures differ from Member State to Member State and are not equally available in all legal systems.

In **Ireland**, the High Court, the Court of Appeal and the Supreme Court rendered 1,224 judgments in 2021, and 73 of them mentioned the Charter.<sup>68</sup> The Italian Constitutional Court referred to the Charter in 33 out of 263 decisions.<sup>69</sup> However, the Slovakian Supreme Court rendered 2,516 judgments in 2021, and none of them mentioned the Charter.<sup>70</sup>

Border checks, asylum and immigration are a policy area where national courts appeared to make use of the Charter often (14 out of the 56 cases analysed). This was followed by data protection (6 out of 56). Courts continued to use the Charter both at the initiative of the parties and on the motion of the judges themselves. In fact, in 20 of the 56 cases that FRA analysed for this report, the judges used the Charter without the parties referring to it beforehand.



Another continuing trend is that courts are more frequently addressing explicitly the question of whether or not the Charter applies.

For instance, in the **Netherlands**, the Council of State found the Charter applicable in a case concerning a decision of the managing director of the Tax and Customs Administration. The director had refused to accept a certain lawyer to represent his clients for a certain period because that lawyer had harassed and intimidated employees of the Tax and Customs Administration. The appellant claimed that the refusal to accept him as a representative was contrary to several Charter rights.<sup>71</sup>

The Council of State concluded that the Charter was indeed applicable to the case because the lawyer also served clients from other Member States. Thus, he was exercising his freedom to provide services in the common market. However, the refusal by the director did not violate the Charter.

Of course, courts may also conclude that the Charter is not applicable. This happened, for instance, in **Luxembourg** in a case concerning the criminal punishment of an urologist who was accused of having sexually harassed three female patients. The Court of Cassation concluded that the Charter did not apply because the case did not concern “any standard of European law, but only a provision of domestic law”.<sup>72</sup>

## PROMISING PRACTICE

### Providing an overview and quick access to case law using the Charter

In **Italy**, the Research Department of the Constitutional Court provides easy access to cases that deal with the Charter. It publishes a report on the application of the Charter of Fundamental Rights of the European Union in the jurisprudence of the Constitutional Court. The latest edition came out in June 2021 and includes close to 200 judgments delivered between 2002 and 2021.

*Source: Italy, submission to the e-Justice Portal. See also Corte Costituzionale (2021), **L'applicazione della Carta dei diritti fondamentali dell'Unione europea nella giurisprudenza della Corte costituzionale**.*

**“The Court of Justice also ruled that the Charter of Fundamental Rights of the European Union, like the European Convention on Human Rights, is a living instrument, which must be interpreted in the light of the conditions under which life is lived and the conceptions that prevail in democratic states today, so that account must be taken of the evolution of the values and attitudes in the Member States, both social and legislative.”**

Source: Belgium, Constitutional Court, **Case No. 117/202**, 30 September 2021.

#### **2.4.2. Constitutional review, review of legislation or administrative regulations**

The **German** Constitutional Court once again stressed the relevance of the Charter. In 2019 the court had established that, in areas fully harmonised by EU legislation, only the Charter and not the German Basic Law forms the relevant standard for national legislation.<sup>73</sup> In a 2021 case, the Court specifies how to determine whether a legal matter is fully determined by EU law with the consequence that the Charter applies. Moreover, it elaborates on the interdependency of the ECHR, the Charter and the constitutional traditions common to the Member States.<sup>74</sup>

Even where constitutional courts have not (yet) granted the Charter such an explicit and prominent role in constitutional review, the Charter is relevant when interpreting national law. For instance, in **Belgium**, the Constitutional Court had to assess whether or not the ban introduced in the Flanders region on slaughter without stunning violated the right to freedom of religion, as Muslim and Jewish claimants submitted. The court referred to the Charter and an earlier ruling of the Court of Justice of the European Union (CJEU) in case C-336/19, which found that Member States can impose a stunning method to promote animal welfare in ritual slaughter.<sup>75</sup>

Often the Charter is one of various sources, such as the European Court of Human Rights (ECHR), that constitutional courts examine when interpreting constitutional provisions in a constitutional review. In **Latvia**, a national legal provision required penalty points imposed on drivers of vehicles to be generally accessible to the public. The Constitutional Court examined whether or not it was compatible with Article 96 (right to protection of private life) of the Latvian Constitution interpreted in the light of the Charter, among other references.<sup>76</sup>

In **Hungary**, the Constitutional Court referred to the Charter in a case concerning an art therapist who had challenged Article 187 (1) (b) of the Criminal Code (the provision concerns persons who engage in medical practice, psychotherapy or unconventional healing and natural medicine methods without authorisation). The court used Article 49 of the Charter to back up the argument that clarity of legislation is an important element of the *nullum crimen, nulla poena sine lege* (no crime, no punishment without law) principle. In conclusion, the Constitutional Court called on the National Assembly to remedy the unconstitutional situation.<sup>77</sup>

In **Poland**, the Supreme Administrative Court examined whether or not Articles 6 and 14 (1) of the Gambling Act, limiting the possibility of establishing gambling businesses, are in conflict with Articles 15–17 of the Charter. With regard to Article 15, which concerns the right to choose an occupation and perform work, the court concluded that a legal person cannot be a beneficiary of this right. Regarding Article 16 of the Charter on the freedom to conduct a business and Article 17 on the right to property, the court underlined that these entitlements are not absolute. It stressed that the EU not only emphasises individual rights but also recognises the overall ‘order’ in which it guarantees the freedoms.<sup>78</sup>

General administrative acts can also be assessed against the Charter.

For instance, in **Bulgaria** the Charter formed part of the legal sources that led the Supreme Administrative Court to declare that an administrative court of first instance had rightfully repealed a regulation by the Municipal Council of Dve Mogili. The regulation provided a one-off financial incentive at the birth of a child if the parents had completed a certain level of education. The Supreme Administrative Court referred to Article 1 (dignity) and 24 (rights of





the child) of the Charter and to the Racial Equality Directive and underlined that “every child, regardless of who their parents are and the level of their education, should have an equal opportunity for financial assistance at birth, if such financial assistance is provided by local authorities.”<sup>79</sup>

In **Cyprus**, the Supreme Court held that the law incorporating the EU directive on privacy and electronic communications (Directive 58/2002) did not comply with the EU Charter.<sup>80</sup>

Courts also used the Charter when assessing governmental regulations prompted by coronavirus disease 2019 (Covid-19). For instance, in **Romania**, the Bucharest Court of Appeal suspended – for the two parties involved – the application of a governmental decision that prolonged the state of alert for 30 days. The court held that limitations imposed on non-vaccinated people were not appropriate or necessary and thus violated the Charter.<sup>81</sup>

In **France**, a nurse was suspended from his duties, including union duties, as he was not vaccinated against Covid-19. The Council of State ruled this suspension lawful, considering that this was not a violation of trade union rights that the Charter recognised.<sup>82</sup>

#### 2.4.3. Review of judicial and administrative decisions

Courts also invoke the Charter when reviewing decisions by lower courts or by administrative authorities. For instance, in **Austria**, in a case concerning an asylum seeker, the Constitutional Court stated that the Federal Administrative Court should have held an oral hearing. The Constitutional Court found that the decision challenged violated the applicant’s right to a hearing pursuant to Article 47 (2) of the Charter.<sup>83</sup>

In such cases the Charter may also have direct effects. For instance, still in **Austria**, the Supreme Administrative Court ruled that, while tax proceedings do not fall within the scope of application of Article 6 (1) ECHR, such proceedings must take into account the procedural guarantees resulting from Article 47 of the Charter, such as the right to legal aid. In the absence of specific national provisions implementing the procedural guarantees, the claim can be directly based on Article 47.<sup>84</sup>

In **Cyprus**, the Administrative Court of International Protection referred to the Reception Conditions Directive (Directive 2013/33/EU), Article 47 of the Charter and the case law of the CJEU to underline that it has the power not only to exercise effective review but also to replace a decision of the administrative authority that ordered a detention with its own decision.<sup>85</sup>

As in previous years, Article 3(2) of the Dublin Regulation led various courts to deal with Article 4 of the Charter (prohibition of torture and inhuman or degrading treatment or punishment). The question that typically arises here is if there are valid reasons to believe that there are systemic failures in the asylum procedure and in the reception conditions of the applicants in another EU Member State.<sup>86</sup>

In **Slovenia**, the Supreme Court stressed that “when considering the prohibition in Article 19 (2) of the Charter, the principle of *non-refoulement* must also be respected, including in implementing measures between Member States. This, in turn, imposes an obligation on a Member State not to remove an individual from its territory if there is a risk of conduct in the recipient country (EU Member State) amounting to a breach of Article 4 of the Charter.”<sup>87</sup>

**“Where it is argued before it that the independence of the courts of the issuing Member State is not guaranteed, it is up to the investigating chamber, firstly, to determine whether, in the light of substantiated allegations, there is any objective, reliable, precise and duly updated information tending to demonstrate the existence of a real risk of infringement of the fundamental right to a fair trial guaranteed by the second subparagraph of Article 47 of the Charter due to systemic or general failings in the independence of the judiciary of the issuing Member State and, secondly, to tangibly and precisely ascertain, in accordance with the above-mentioned case-law of the Court of Justice of the European Union, the extent to which such failings are likely to have an impact on the courts of that Member State having jurisdiction over the proceedings to which the wanted person will be subject”**

Source: France, Court of Cassation, **Case 20-87.140**.

In **Poland**, the Supreme Administrative Court found that it was necessary for the Refugee Council to consider whether or not transferring a person would result in a real and visible risk of subjecting her to inhuman and degrading treatment. This also includes considering if separation from a seriously ill brother in need constitutes inhuman treatment within the meaning of Article 4 of the Charter.<sup>88</sup>

Article 4 of the Charter also regularly features in the context of the implementation of a European arrest warrant if the judge in the executing state has doubts about the circumstances in the issuing state.<sup>89</sup>

For instance, in **France** the Court of Cassation had to decide the case of a woman who faced criminal prosecution in Poland. A district court in Poland had issued a European arrest warrant against her. The Investigation Chamber of the Rennes Court of Appeal authorised her handing over to the Polish judicial authorities, pursuant to the warrant.<sup>90</sup> The woman invoked the decisions of the CJEU in cases C-619/18 and C-192/18, and argued that the Polish district court had not offered sufficient guarantees of independence from the executive.

The Court of Cassation considered that the CJEU decision constituted an objective, reliable, precise and duly updated factor pointing to a real risk of infringing the right to a fair trial under Article 47 of the Charter. The risk resulted from systemic failings in the independence of the judiciary in Poland. It therefore quashed the decision of the Investigation Chamber of the Rennes Court of Appeal and referred the case back to that court.

In **Finland**, the Supreme Court stressed that the provisions of the Act (1286/2003) on Surrender Procedures between Finland and other EU Member States should be interpreted as far as possible in line with the CJEU’s interpretation of Article 4 of the Charter and the related human rights obligations.<sup>91</sup>

Courts may also refer to the Charter when reviewing the decisions of other bodies, such as professional organisations.

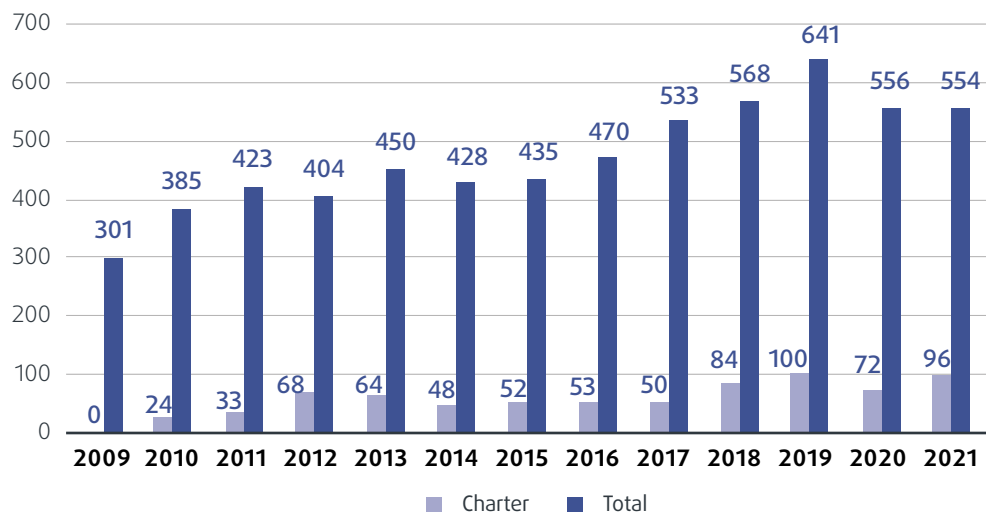
For instance, in **Sweden** the Supreme Court examined whether or not the case of a German lawyer had violated Article 47 of the Charter. The Swedish Bar Association’s board had granted the complainant registration as an EU lawyer but without an exemption from the prohibition on being registered in a second legal practice (in Germany). The Supreme Court concluded that Article 15 of the Charter did not provide the right to practise law in several companies, nor did Article 47 provide a right to appeal against the board’s decision.<sup>92</sup>

In **Lithuania**, the Supreme Administrative Court invoked Article 47 of the Charter when it annulled a decision by the Radio and Television Commission of Lithuania. The court argued that the complainant, a media alliance, was right in claiming that it was denied remedies and a hearing. The court referred extensively to the case law of the CJEU.<sup>93</sup>

#### 2.4.4. Requests for preliminary rulings

Requests for preliminary rulings are also relevant in cases where the Charter plays a role, as examples from **Ireland**,<sup>94</sup> **Latvia**<sup>95</sup> and **Sweden**<sup>96</sup> show. In 2021, 554 requests for preliminary rulings were submitted to the CJEU. Of these, 96 also referred to the Charter. This is in line with earlier years (see Figure 2.1).

**FIGURE 2.1: REQUESTS FOR PRELIMINARY RULINGS, 2010–2021, AND NUMBER THAT REFER TO THE CHARTER**



Source: Calculation based on data received from the CJEU.



## FRA opinions

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At the beginning of March 2021, the Council of the European Union adopted conclusions on strengthening the application of the EU Charter of Fundamental Rights (Charter). These conclusions have the potential to contribute to a better application of the Charter at national level and thereby to a better protection of fundamental rights in the EU Member States. The Council calls for more training, more awareness raising, better rules on law making, more exchange of experiences and practices with the application of the Charter, strict Charter conditions for EU funds, more coordination on Charter-related matters, stronger national human rights institutions (NHRIs) and more cooperation with civil society.

The Charter strategy of the European Commission also triggered reactions from the Committee of the Regions and the European Economic and Social Committee. They stressed the importance of involving regional and civic society actors, respectively. The European Parliament underlined the importance of monitoring the implementation of all Charter rights.

The regular collection of promising practices in applying the Charter has started with the revamped e-Justice Portal, which the European Commission provided. The nine Justice and Home Affairs agencies carried out the second annual Charter exchange, discussing various measures introduced to ensure and promote the application of the Charter within their respective mandates.

All these 2021 EU-level documents and developments are a good basis for further development.



### FRA OPINION 2.1

EU institutions should use their respective policy documents adopted in 2021 as benchmarks for their future efforts to ensure that the Charter is fully applied. Any review of the implementation of these policy documents necessitates data, information, and experiences of relevant national and local actors to be regularly collected.

For instance, the Council could use the main areas identified in its 2021 Charter-related conclusions as a framework of reference when commenting in future on the application of the Charter of Fundamental Rights. In the preparation of such annual follow-up conclusions on the Charter, the Council could consider organising an interactive and evidence-based exchange in the relevant Council working group to foster mutual learning, also engaging the national Charter focal points.

EU agencies and bodies could consider following the example of Justice and Home Affairs agencies and regularly assessing how they can further develop their contribution to implementing and promoting the Charter rights.





## FRA OPINION 2.2

EU Member States that have not yet established Charter focal points, as invited under the Charter strategy, should do so soon in order to foster coordinated and effective implementation of the Charter strategy.

EU Member States should consider implementing the Charter strategy of the European Commission and the conclusions of the Council of the European Union through a structured process based on concrete targets, milestones and timelines. This could take the form of a dedicated Charter action plan or making specific references to the Charter in existing action plans or strategies.

EU Member States should consider assessing the level of Charter expertise that they provide in professional training for future and practising judges, prosecutors and other legal professionals, in order to develop measures addressing possible shortcomings in this regard, drawing on the existing expertise of national and international training institutions and using tools available at international level, for instance those developed by FRA.

Much emphasis was put on the national layer of governance in 2021, as the Council conclusions show. This trend builds on the 2020 Charter strategy, in which the European Commission has invited the Member States to undertake concrete steps, for instance to establish focal points in the national administrations, to adapt procedures concerning impact assessments and legal scrutiny, to ensure that committees with sufficient Charter expertise monitor the management of EU funds, or to establish or strengthen NHRIs. It also invited Member States to expand Charter-related policy measures in the area of training, awareness raising, or the promotion of a supportive and safe environment for CSOs and rights defenders.

Delivering on all these dimensions requires a shift in the fundamental rights culture at national level. Fundamental rights practice remains focused on national constitutional law and the ECHR, as evidence from court cases, but also from fundamental rights reasoning applied in the context of law making, shows. This signals that the added value of the Charter is not yet sufficiently utilised and that the interaction between the Charter and national law and the Charter and the ECHR are not yet sufficiently part of standard training curricula.

Compounding this, there are only few visible efforts at national level to implement the Charter strategy in a structured process with concrete targets, milestones and timelines. The establishment of Charter focal points is an important first step in this direction, as they may steer or assist the process of implementing the Charter strategy. However, so far only half of the Member States have appointed their Charter focal points.

Turning to the local level of governance, it is worth recalling that the Charter “applies to regional or local bodies, and to public organisations, when they are implementing Union law” (see Explanations, Article 51, Official Journal of the European Union C 303/17 – 14.12.2007). Governments should share their experience and practice to enable mutual learning.

In 2021, the European Commission opened a section in the European e-Justice Portal where Member States can share best practices in the use and awareness of the Charter, including at local level. So far, however, they have not used the portal much for this purpose.

The European Commission’s Charter strategy uses the term ‘local’ 17 times. It not only calls for the sharing of best Charter practices at local level and promoting a supportive and safe environment for CSOs and rights defenders at local level, but also demands that Member States provide sufficient guidance at local level so that local authorities can comply with their Charter duties. The strategy also points to the potential of local bodies to raise awareness of people’s rights and of what people can do if their rights are breached.

The Council conclusions adopted in March 2021 also underline the role of regional and local administrations, including civil servants, “in mainstreaming the Charter and ensuring compliance with fundamental rights in policy-making, and in nurturing a fundamental rights culture across all levels of the executive”.

However, local administrations are not very aware of the Charter, according to FRA’s analysis of the data from the consultations that the European Commission carried out while preparing the Charter strategy. The potential of the local level for better protection and promotion of fundamental rights is beyond doubt. For instance, in 2021 FRA proposed a framework that aims to encourage more cities in the EU to become human rights cities, and to help develop a local culture of rights.



## FRA OPINION 2.3

EU Member States should discuss the new Charter strategy with local and regional authorities and explore how they could best contribute to promoting fundamental rights and the Charter.

Local and regional authorities should ensure that their instruments, procedures and policies refer to the Charter. Existing local practices should be communicated to the new national Charter focal points, to ensure that they can share such practices and experiences with other Member States, for instance through the European e-Justice Portal.

Cities could consider becoming ‘human rights cities’, stepping up fundamental rights considerations in their work, programmes and activities. The framework for reinforcing rights locally as proposed by FRA could be useful in this regard.

The Committee of the Regions could consider regularly providing a forum for the exchange of Charter-related experiences and promising practices.

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- 87 Slovenia, Supreme Court, **Case No. I UP 23/2021**, ECLI:SI:VSRS:2021:I.UP.23.2021, 9 April 2021.
- 88 Poland, Supreme Administrative Court, **Case II OSK 2114/20**, 22 June 2021.
- 89 See Czechia, Constitutional Court, **Case IV.ÚS 3524/20**, ECLI:CZ:US:2021:4.US.3524.20.1, 6 April 2021; Ireland, Supreme Court, **Case S:AP:IE:2021:000018**, 23 July 2021.
- 90 France, Court of Cassation, **Case No. 20-87.140**, 12 January 2021.
- 91 Finland, Supreme Court, **Case KK0:2021:24**, 16 April 2021.
- 92 Sweden, Supreme Court, **Case Ö 5910-20**, 11 June 2021.
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# EQUALITY AND NON-DISCRIMINATION

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## UN & CoE

14

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19

In *X and Y v. Romania* (Nos. 2145/16 and 20607/16), ECtHR rules that the refusal of national authorities to recognise the male identity of transgender persons in the absence of sex reassignment surgery violates the right to respect for private and family life under Article 8 of the ECHR.

January

4

The CoE Steering Committee on Anti-Discrimination, Diversity and Inclusion (CDADI) adopts an Implementation Review Report of Recommendation Cm/Rec(2015)1 of The Committee of Ministers to Member States on Intercultural Integration.

5

UN Committee on the Rights of the Child finds Finland in violation of the CRC for deporting a same-sex couple and their child to a country where the child risked discrimination and violence due to the parents' sexual orientation.

February

1

European Commission against Racism and Intolerance (ECRI) launches a factsheet focusing on the human rights of LGBTI persons, which summarises its recommendations to the Council of Europe's 47 member states since 2013.

24

The CoE European Committee of Social Rights published its conclusions in respect of 33 States parties to the European Social Charter on "employment, training and equal opportunities".

March

1

UN Human Rights Committee publishes its concluding observations on the seventh periodic report of Finland, which include its concerns about surgical procedures affecting intersex children, about the fact that consenting transgender children may be unable to access the procedure for legal gender recognition and about the lengthy procedure for legal gender recognition.

April

5

- The Secretary General of the Council of Europe publishes 2021 Annual Report: "State of Democracy, Human Rights and the Rule of Law: a democratic renewal for Europe". Chapter 7 of the report addressed anti-discrimination, diversity and inclusion.
- The Council of Europe Committee of Ministers adopts Guidelines on upholding equality and protecting against discrimination and hate during the Covid-19 and similar crises in the future.

May

1

In *Association ACCEPT and others v. Romania*, (No. 19237/16), ECtHR rules that the state's failure to ensure that an LGBT event proceeded peacefully without verbal abuse, and carry out effective investigation into homophobic motives of counterdemonstrators, violates the right to freedom of assembly and association and prohibition of discrimination under Article 11 and 14 of the ECHR.

14

The CoE Commissioner for Human Rights issues a statement urging Hungarian parliamentarians to reject draft amendments banning discussion about sexual and gender identity and diversity.

16

The Congress of Local and Regional Authorities of the Council of Europe adopted two resolutions: Resolution 470 (2021): Protecting LGBTI people in the in the context of rising anti-LGBTI hate speech and discrimination: The role of local and regional authorities and Resolution 471 (2021): The role of local authorities with regard to the situation and rights of LGBTI people in Poland.

June

June and July

United Nations Independent Expert on Sexual Orientation and Gender Identity publishes *Reports on Gender: The Law of Inclusion & Practices of Exclusion*.



## UN & CoE

July

2

Venice Commission in its Opinion raises concerns about Hungary's Ninth Amendment to the Constitution, which restricts legal gender recognition.

6

In *A.M. and others v. Russia* (No. 47220/19), ECtHR rules that restriction of the applicant's parental rights on gender identity grounds and deprivation of contact with her children violate the prohibition of discrimination taken in conjunction with the right to respect for private and family life under Articles 8 and 14 of the ECHR.

13

In *Fedotova and others v. Russia* (No. 40792/10, 30538/14, 43439/14), ECtHR finds that the lack of any opportunity for same-sex couples to have their relationships formally recognised created a conflict between the social reality of the applicants and the law, in violation of Article 8 (right to respect for private and family life) of the ECHR (case referred to the Grand Chamber).

August

16

The CoE Commissioner for Human Rights of the Council of Europe published a human rights comment "Pride v. indignity: political manipulation of homophobia and transphobia in Europe".

September

7

The CoE Department for the Execution of Judgments of the European Court of Human Rights issued a thematic factsheet focusing on the execution of the Court's judgments concerning the rights of LGBTI persons.

16

In *X v. Poland* (No. 20741/10), ECtHR finds that the applicant's sexual orientation and relationship with another woman had been consistently at the centre of deliberations at every stage of the judicial proceedings concerning refusal to grant her custody of her child after divorce, amounting to discrimination, in violation of Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the ECHR.

28

Parliamentary Assembly of the Council of Europe adopts Resolution 2395 on honour crimes, condemning them and their impact on LGBTI people.

November

16

In a decision in *S.-H. v. Poland* (Nos. 56846/15 and 56849/15), ECtHR rejected an application concerning twin brothers born through surrogacy in the United States to a same-sex couple residing in Israel. In the court's view, the fact that they could not obtain Polish (and consequently European) citizenship did not result in such a negative effect on the applicants' private life that it would attain the threshold of seriousness under Article 8 of the ECHR.

December

9

The CoE Commissioner for Human Rights of the Council of Europe published a report of the online roundtable with LGBTI human rights defenders from across Europe "Human rights of LGBTI people in Europe/ current threats to equal rights, challenges faced by defenders, and the way forward".

13

The Venice Commission published its opinion on the amendments introduced by Act LXXIX of 2021 enacted by the Hungarian Parliament on 15 June 2021 and entered into force on 8 July 2021.

14

In the case *Genderdoc-M and M.D. v. the Republic of Moldova* (No. 23914/15), the ECtHR found that the authorities failed to conduct an effective investigation into whether assault by private party was a hate crime motivated by homophobia, in violation of Article 3 (prohibition of torture) taken in conjunction with Article 14 (prohibition of discrimination) of the ECHR.

15

At its 87th plenary, ECRI established a working group to prepare its forthcoming General Policy Recommendation on LGBTI persons' rights.

16

In *Women's Initiatives Supporting Group and Others v. Georgia* (Nos. 73204/13 and 74959/13), the ECtHR found that the authorities had failed to protect the applicants' public rally from homophobic and transphobic acts of violence by counter-demonstrators, to conduct an effective investigation into the incident and to ensure that LGBTI rally proceeded peacefully. The Court found that there was evidence of official connivance in the acts of violence and underlying prejudice. It found violations of Articles 3 (prohibition of inhuman or degrading treatment) and 11 (freedom of association) in conjunction with Article 14 (prohibition of discrimination) of the ECHR.

20

European Parliament adopts a resolution on human rights and democracy in the world and the European Union's policy on the matter, calling to defend the human rights of and combat discrimination and stigmatisation against lesbian, gay, bi, transgender and intersex (LGBTI) persons, and decriminalise sexual relations between consenting same-sex partners.

21

European Parliament adopts a report on access to decent and affordable housing for all, which urges the European Commission to take steps to address lesbian, gay, bi, transgender, intersex and queer (LGBTIQ) homelessness, by means of data collection and initiatives in the LGBTIQ equality strategy 2020–2025.

January

3

European Commission adopts strategy for the rights of persons with disabilities 2021–2030.

4

European Commission launches European Pillar of Social Rights Action Plan.

8

European Parliament publishes a study on *Obstacles to the free movement of rainbow families in the EU*.

11

European Parliament adopts a resolution on declaring the EU an LGBTIQ Freedom Zone, calling for freedom to publicly show sexual orientation, gender identity, gender expression and sex characteristics without fear of intolerance, discrimination or persecution.

March

18

In *MK v. Autoridade Tributária e Aduaneira (C-388/19)*, Court of Justice of the European Union (CJEU) rules that the personal income tax code of Portugal is incompatible with EU law, as it restricts free movement of capital and entails unavoidable discriminatory effects between residents and non-residents.

19

European Commission adopts its report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Racial Equality Directive) and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (Employment Equality Directive).

24

European Commission adopts strategy on the rights of the child to help tackle poverty and social exclusion.

25

European Parliament adopts its annual reports on Albania, Kosovo, North Macedonia and Serbia with articles relating to LGBTI rights.

24

European Parliament passes a resolution on sexual and reproductive health and rights, noting that access to corresponding services as well as education and information is crucial for LGBTI people.

June

14

European Parliament adopts a resolution on LGBTIQ rights in the EU, calling on Member States to ensure the equal treatment of LGBTI people and their families when they exercise their rights to freedom of movement in the EU.

16

European Parliament adopts a resolution that calls on the EU to identify gender-based violence as a new area of crime.

21

European Commission organises a roundtable on equality data, examining the obstacles to the collection of equality data and on fostering the exchange of best practices.

30

September

9

European Commission presents an initiative to extend the list of 'EU crimes' to hate speech and hate crime.

14

In *C-490/20, V.M.A v. Stolichna obshtina, rayon 'Pancharevo'*, concerning recognition of the foreign birth certificate of a child of same-sex parents, CJEU rules that, when the parental relationship between the child and the parents is lawfully established by one Member State, both parents must be recognised by all Member States as having the right to accompany the child in exercising her right to move and reside freely within the EU, and Member States are obliged to issue the necessary documents to exercise this right (such as passport or identity card).

December

The 21st anniversary of the EU equality directives fell in 2021. It prompted stocktaking of the achievements and missed opportunities, and assessments of the implementation of the legislation, but most importantly reflections on the next steps to take. This year the chapter focuses on discrimination against LGBTI people and discrimination against EU citizens on the ground of their nationality.

Violation of the rights of LGBTI persons in some Member States, as well as an increase in related hate crime and hate speech incidents – which can reflect an actual increase in incidents as well as increased willingness to report them – prompted the reaction of several international institutions. In parallel, there has been a growing recognition of family rights for same-sex couples and homosexual parents in international and national jurisprudence.

There is some evidence that EU citizens experience discrimination on the ground of nationality in various areas of life, but data are scarcely collected on this subject.

In 2021, some of the measures to tackle the coronavirus disease 2019 (Covid-19) pandemic affected LGBTI people negatively, while EU citizens faced some problems when crossing EU borders, and in receiving or recording their vaccinations.



## PROMISING PRACTICE

### Equality data hub

Unia, Belgium's equality body, concluded that the absence of a central body coordinating equality data resulted in such data being dispersed and unstructured, and therefore not used enough for policy actions. It began a project on 'Improving equality data collection in Belgium', Co-financed by the Rights, Equality and Citizenship programme. That resulted in the creation of a data hub bringing together data on three groups of discrimination grounds: racial; religious or philosophical beliefs; and sexual orientation, gender identity and expression, and sex characteristics. The project was based on the Guidelines on improving the collection and use of equality data, which the EU's Subgroup on Equality Data, coordinated by FRA, published in 2018.

Sources: UNIA (2021), *Improving equality data collection in Belgium*; UNIA (n.d.), 'Data hub Equality Data';

Unia (2021), *Données sur l'(in)égalité & la discrimination en Belgique: résultats du projet « Improving equality data collection in Belgium »*

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

## 3.1. PROMOTING EQUALITY – 20 YEARS ON

The 21<sup>st</sup> anniversary of the EU equality directives called for a review of and reflection on the progress made in this area.

The European Commission (hereafter, the Commission) reported<sup>1</sup> on the application of the Racial<sup>2</sup> and Employment Equality<sup>3</sup> directives, in accordance with the periodic reporting obligation.<sup>4</sup> The report provided an analysis of the state of play on equality in Europe and the effectiveness of existing legislation.

In its report the Commission took into account the views of FRA expressed in the agency's opinion *Equality in the EU 20 years on from the initial implementation of the equality directives*.<sup>5</sup> The opinion presented evidence of experiences of discrimination on the grounds covered by the equality directives, drawing on data from FRA's surveys and other evidence it collected. People across the EU regularly experience discrimination on the grounds and in the areas of life listed in both directives, as evidence that FRA collects shows consistently. The opinion also provides evidence of experiences of discrimination beyond the scope of the directives, showing the importance of overcoming the stalemate in negotiations<sup>6</sup> on the 2008 Commission proposal for an Equal Treatment Directive (horizontal directive).<sup>7</sup>

Both the Commission's report and FRA's opinion dedicate separate sections to equality bodies, emphasising their crucial role in the implementation of the principle of equality. The Commission's report comes with a document that takes stock of the implementation of the Recommendation on standards for equality bodies, stressing the importance of their independence, and the need to provide them with adequate financial and human resources.<sup>8</sup> In 2021, international human rights-monitoring bodies also raised concerns in this regard, for example addressing Hungary,<sup>9</sup> Poland<sup>10</sup> and Spain.<sup>11</sup>

In this context, the Commission started to work on an initiative to strengthen equality bodies by setting binding minimum standards, building on its relevant recommendation of 2018, on general policy recommendation No. 2 of the European Commission against Racism and Intolerance (ECRI) and on the Paris principles applied to national human rights institutions.<sup>12</sup>

The Commission continued to work on improving the collection of reliable and comparable equality data. As announced in the Anti-Racism Action Plan, it organised the roundtable on equality data to examine obstacles to the collection of equality data and exchange of best practices.<sup>13</sup> See Chapters 4 and 10 for more details.<sup>14</sup> Moreover, in 2021, the Commission adopted the strategy for the rights of persons with disabilities 2021–2030.<sup>15</sup>

This chapter focuses on two issues: discrimination against LGBTI persons, and against EU citizens on grounds of nationality. The rights of LGBTI persons are not fully respected, as the Commission's report and FRA's opinion indicate, while the CJEU insists on the protection of rights derived from citizenship for LGBTI EU citizens in particular when exercising their free movement rights. The Covid-19 crisis revealed how much Europeans have come to rely on free movement for economic and personal reasons, as the Commission highlighted in its EU Citizenship Report 2020.<sup>16</sup> This makes monitoring of any discrimination on grounds of nationality particularly important.



## 3.2. RIGHTS OF LGBTI PERSONS – CHALLENGES PERSIST DESPITE PROGRESS IN SOME AREAS

### 3.2.1. Legal and policy developments relevant to LGBTI rights

Violations of LGBTI persons' fundamental rights in some Member States prompted reactions from several international institutions. At the same time there has been a growing recognition of family rights for same-sex couples and homosexual parents in international and national jurisprudence. Some Member States are seeking to address the increase of hate crime and hate speech.

*EU continues to implement its LGBTIQ strategy and some Member States are held accountable for violations of fundamental rights*

The Commission adopted the LGBTIQ equality strategy in 2020.<sup>17</sup> As the strategy announced, in 2021 the Commission set up an LGBTIQ equality subgroup under the **EU High Level Group on Non-discrimination, Equality and Diversity** to support and monitor progress on LGBTIQ rights in the Member States, including development of national action plans. This subgroup will develop a specific indicator framework for monitoring the implementation of actions under the strategy.

The mid-term review of the LGBTIQ equality strategy in 2023 will present the framework.



Several Member States adopted national action plans or strategies aimed at combating discrimination in general, or focused on gender equality and/or LGBTIQ persons. Those strategies, alone or in addition to general guidelines on equality, recognise the particular needs to protect the rights of LGBTIQ persons. They lay down specific measures, such as training legal and medical professionals, raising awareness in schools, protecting victims and strengthening LGBTIQ family rights (**Belgium**,<sup>18</sup> **Cyprus**,<sup>19</sup> **Czechia**,<sup>20</sup> **Denmark**,<sup>21</sup> **Germany**<sup>22</sup> and **Sweden**<sup>23</sup>). **Sweden's** action plan gives particular attention to young LGBTIQ people, acknowledging their vulnerability in the school environment. **Finland's** first national child strategy provides for the development of training materials on sexual orientation and gender diversity for professionals working with children and youth.<sup>24</sup>

In July, the Commission launched infringement procedures against **Hungary** and **Poland**.<sup>25</sup>

One of the two relevant infringement procedures against **Hungary** concerns the law prohibiting or limiting access to content that promotes or portrays "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for children under 18, and another procedure relates to a disclaimer imposed on a children's book with LGBTIQ content. The National Authority for Consumer Protection had obliged the publisher to indicate on the cover that the book depicts "behaviour deviating from traditional gender roles".<sup>26</sup> The Commission considered that the replies of Hungary did not address its concerns and that Hungary had failed to justify the restrictions imposed on the fundamental rights of non-discrimination and freedom of expression. In December, the Commission sent two reasoned opinions to Hungary, which



had two months to remedy the situations; Hungary sent detailed replies to the reasoned opinions in February 2022; the cases are still pending.

The Venice Commission also found recent developments in **Hungary** incompatible with human rights standards.<sup>27</sup> The UN Universal Periodic Review also expressed concerns in this regard.<sup>28</sup> The Council of Europe (CoE) Commissioner for Human Rights criticised **Hungary** for various measures that have a negative impact on civil society activists fighting for the rights of LGBTIQ people.<sup>29</sup>

In **Poland**, authorities failed to fully and appropriately respond to its inquiry regarding the nature and impact of the ‘LGBT-ideology free zones’ resolutions that several regions and municipalities adopted, the Commission considers. The Commission services further also engaged in this context in a dialogue with the Polish authorities concerning the amendments of the 2014-2020 Polish regional programmes, to which REACT-EU funds are being added. **REACT-EU** is an initiative that continues and extends the crisis response and crisis repair measures that the Coronavirus Response Investment Initiative and the Coronavirus Response Investment Initiative Plus delivered. As a result of this dialogue, all regions who had adopted such problematic resolutions, [the regions of Małopolskie, Świętokrzyskie, Podkarpackie, Lubelskie and Łódzkie] have taken the necessary corrective measures to ensure a clear commitment to non-discrimination on grounds of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.

Some EU countries have increasingly backslidden on the rights of LGBTIQ people. In 2021, the European Parliament adopted a resolution declaring the EU an ‘LGBTIQ Freedom Zone’.<sup>30</sup> In support, eight **Luxembourgish** municipalities joined the LGBTIQ freedom zones, committing to carry out public policies promoting and protecting the rights of LGBTIQ people.<sup>31</sup>

In turn, the Council of Europe Congress of Local and Regional Authorities called on Polish local authorities to withdraw all declarations and resolutions against “LGBT ideology”, as well as similar texts regardless of their title.<sup>32</sup>

**Romania** adopted a law banning in all educational establishments “activities aimed at spreading gender identity theory”. However, the **Romanian** Constitutional Court<sup>33</sup> stated that such laws are incompatible with international human rights standards and violate the right to access to education. The court found that the State failed to ensure, without discrimination and constraints, the possibility to study theories and ideas in accordance with the evolution of society.

In the **Netherlands**, on the other hand, a new Civic Education Act obliges primary and secondary education establishments to provide knowledge of and teach respect for diversity, including religion, beliefs, ethnic origin, gender, disability and sexual orientation, and the value of equal treatment.<sup>34</sup>

### **Rainbow families, the right to freedom of movement and cross-border recognition of parental rights**

There has been growing recognition of the family rights of same-sex couples and homosexual parents in international and national jurisprudence. However, mutual recognition of same-sex parenthood across the EU remains challenging in light of the discrepancies between legal frameworks of Member States. This situation seriously affects the exercise of fundamental rights related to EU citizenship, but also family rights and the rights of the child.

In March, the European Parliament published a study on Obstacles to the Free Movement of Rainbow Families in the EU.<sup>35</sup> The study shows that in many cases, when crossing a border, a couple legally recognised in one Member State is not recognised as such in others, and their child or children, instead of having two legal parents, will end up with only one or, in a few cases involving surrogacy, none.

The Parliament emphasised in a resolution<sup>36</sup> on the rights of LGBTIQ persons in the EU that rainbow families should have family reunification rights as any other family and should not be prevented to exercise their right of freedom of movement. The resolution urges all EU Member States to recognise the adults mentioned on a child's birth certificate as their legal parents and to ensure that children do not become stateless when their families move between Member States.

The Commission President in her State of the EU speech<sup>37</sup> said that "if you are [a] parent in one country, you are [a] parent in every country", recognising the need to ensure that parenthood established in one Member State should be recognised across the EU.

A new initiative by the Commission aims to ensure this right.<sup>38</sup> Conflict of laws rules (or private international law rules) determine which law to apply in



a case over which two or more contradictory laws seem to have jurisdiction. Member States' substantive and conflict of laws rules on parenthood differ, and the EU has no rules about it. As a result, families may face difficulties in having the parenthood of their children recognised when crossing borders within the EU, the Commission highlighted.<sup>39</sup>

Substantive law on parenthood is within the remit of Member States. However, the EU can adopt measures concerning family law with cross-border implications, pursuant to Article 81 (3) of the Treaty on the Functioning of the European Union (TFEU).

The **CJEU** also recognised<sup>40</sup> the family ties between same-sex parents and their child. The case concerned a child, born in Spain, with a Spanish birth certificate referring to two mothers as parents of the child. Neither mother is a Spanish citizen: one is Bulgarian, and the other is Gibraltar-born and prohibited by law from transferring British citizenship to her child.

The Bulgarian authorities refused to issue a birth certificate, which is necessary for a Bulgarian identity card, arguing that reference to two female parents was contrary to public policy. An ID or a passport being required to exercise the right of free movement, the child, an EU citizen, was deprived of this right. Without personal documents the child could not access education, healthcare, or social security in Spain or leave the country.

The CJEU stressed that, as the child has Bulgarian nationality by birth, and thus EU citizenship, Article 4(3) of Directive 2004/38/EC requires the Bulgarian authorities to issue an identity card to the child, even without a new birth certificate. The court also noted that, even if the child is not recognised as a Bulgarian national and thus cannot derive free movement rights from EU law, she should nonetheless be considered a 'direct descendant' of one parent, V. M. A., who is an EU citizen and thus the child's 'family member' for the purposes of EU free movement law. In this way, the CJEU clarified that the term 'direct descendant' within the meaning of Article 2 (2) (c) of Directive 2004/38/EC includes all children of EU citizens, including their joint children with another person of the same sex (paras 67–68).

The court also explained that, since the Spanish authorities lawfully established the parental relationship between the child and her parents, all Member States must recognise both parents as having the right to accompany the child in exercising her right to move and reside freely within the EU. A refusal of this right can amount to an obstacle to free movement under Article 21 TFEU. The court concluded that it would be contrary to Articles 7 (the right to respect for family life) and 24 (the rights of the child) of the Charter if the child were deprived of her relationship with one of her parents when exercising her right to free movement, or for her exercise of that right to be made impossible or excessively difficult in practice because her parents are of the same sex.

Similar cases against **Poland** are pending before the CJEU. One case is registered as C-2/21, *Rzecznik Praw Obywatelskich*, and was suspended pending judgment in the Bulgarian case. It concerns the child of a Polish woman, married to an Irish woman, who reside together in Spain. Again, the Spanish authorities issued a birth certificate designating the two women as the mothers of the child. The referring court asks CJEU if the Polish administrative authorities can refuse to transcribe this birth certificate on the grounds that Polish law does not accept parenthood of same-sex couples, and that the birth certificate designates persons of the same sex as parents. The transcription is necessary for the child to obtain a Polish identity document.

Another case, concerning refusal to recognise the birth certificate of a child born in the United Kingdom to two mothers, is also pending before the ECtHR.<sup>41</sup>

In several Member States, courts or legislators also decided to acknowledge family rights for same-sex partners.

The **Estonian** Supreme Court<sup>42</sup> repealed the Aliens Act insofar as it precluded issuing a temporary residence permit to an alien for settling in Estonia with a registered same-sex partner who is not an Estonian citizen but has Estonian residency. The Supreme Court reiterated that the right to family life includes the right of same-sex partners to live in Estonia as a family. It found that the same rights as apply to opposite-sex couples in residence permit cases should be extended to same-sex couples, not only when one of the partners is a citizen of Estonia, but also if they are a foreign national, or a stateless person with Estonian residency.<sup>43</sup> In 2019, the Supreme Court granted this right to same-sex couples where one partner is an Estonian citizen.

In **Germany**, the Higher Regional Court of Celle<sup>44</sup> considered it unconstitutional that, if two women are in a same-sex marriage before the birth of a child, the same-sex partner of a mother cannot obtain the rights and obligations of the second parent by law with the birth of the child, but at most through adoption (while the law considers the man who is married to the mother as the father of a child). The case has been referred to the Federal Constitutional Court.

In **Latvia**, a state fee for the inheritance of immovable property is much higher for persons other than a spouse or direct relative. The Constitutional Court<sup>45</sup> ruled that provision incompatible with the Constitution insofar as it applies to the estate-leaver's surviving same-sex partner. Although the same state fee applies to all unmarried partners, same-sex partners still do not have the possibility of recognising their relationship in law.<sup>46</sup> The court noted that the state is obliged to protect every family, including same-sex couples. A ruling of 2020 already obliged the state to adopt a legal framework to recognise same-sex couples. Consequently, the court noted that the economic and social protection of a family must be consistent with this new legal framework of family relationships, when it enters into force.

A legal gap in **Italy** prevents the adequate protection of children born to same-sex couples through medically assisted procreation (MAP). The Constitutional Court encouraged the legislator to fill it promptly.<sup>47</sup> In this case, the biological mother denied her consent for the intentional mother to pursue adoption, after their relationship ended. An intentional parent is a person, who decides to resort to assisted reproduction to become a parent, as distinct from biological/genetic parents. The court observed that children born through MAP to two women are disadvantaged in comparison with other children and the protection of their rights is compromised, solely because of the sexual orientation of persons who carried out MAP, because they cannot be recognised as the child of the other intentional parent.

In contrast, the **Czech** Constitutional Court<sup>48</sup> ruled against recognising foreign adoptions by same-sex couples. The court dismissed the arguments that the Czech law prevents the acknowledgement of 'factual and legal reality' and the protection of family life. Instead, it asserted that Czech law can set its own national rules on adoption in line with its international obligations, which do not impose to recognize foreign adoption by same sex couples, concluding that the rejection of recognising adoption does not constitute a violation of one's right to family life.



These examples show the urgent need for appropriate legislation to address legal uncertainty across the EU regarding the situation of LGBTI parents and their children.

### **Rights of transgender and intersex persons**

The ECtHR, and some national courts, confirmed the right to legal gender recognition, and under certain conditions, the rights of transgender persons to self-determination, including as non-binary. The ECtHR ruled in *X and Y v. Romania*<sup>49</sup> that refusal to legally recognise the applicants' gender reassignment in the absence of sex reassignment surgery amounted to unjustified interference with their right to respect for private life.

In **Poland**, the Supreme Administrative Court acknowledged that a Polish citizen is entitled to a new passport reflecting gender reassignment carried out abroad.<sup>50</sup>

In the **Netherlands**, the Amsterdam District Court<sup>51</sup> granted the request of a person born as a woman to have a non-binary gender indication on their birth certificate. The request was granted on the basis of the General Equal Treatment Act, which prohibits discrimination against transgender and intersex people, while civil law does not expressly provide for a possibility to enter non-binary identification in the birth certificate.

**Germany** adopted a new law<sup>52</sup> on the protection of children from sex-changing surgical interventions.<sup>53</sup>

The UN Human Rights Committee has expressed concern that irreversible and invasive medical interventions continue to be performed on intersex people in **Finland**.<sup>54</sup> The Finnish government has announced measures to discontinue medically non-essential genital surgery on young children.<sup>55</sup> While noting the ongoing process to amend the Trans Act in **Finland**, the committee also expressed concern about the lengthy procedure for legal gender recognition and the requirements to be sterilised and diagnosed with 'transsexualism', which is defined as a mental disorder.<sup>56</sup>





## Hate crime and hate speech

The increase in the scale of hate speech and hate crime, in particular through electronic communication and social media, is a concern in many Member States, according to the Study supporting a Commission initiative to extend the list of EU crimes in Article 83(1) TFEU to hate speech and hate crime.<sup>57</sup> The Commission's initiative<sup>58</sup> highlighted the need to ensure a robust EU-level criminal law response to hate speech and hate crime on all grounds, including sexual orientation. The supporting study set out a detailed mapping of the legal frameworks in all Member States to combat hate speech and hate crime. It also analysed and summarised information, data and views gathered through the Commission consultation.

The Parliamentary Assembly of the Council of Europe has been working on a report and draft resolution on efforts to mischaracterise the fight for LGBTI rights as 'gender ideology'.<sup>59</sup> The Assembly's Committee on Equality and Non-Discrimination noted a marked increase in hate speech and hate crime targeting LGBTI people and organisations across Europe. In August 2021, the CoE Commissioner for Human Rights alerted about a negative trend in several European countries of politicians manipulating LGBTI-phobia for political gain, thus entrenching existing prejudices and hate.<sup>60</sup> The Commissioner also noted in a report about the situation of LGBTI human rights defenders a rise in hate speech, online harassment, and doxing against them, as well as several incidents of attacks against offices of LGBTI NGOs and of violent disruptions of community events.<sup>61</sup>

In 2021, the Council of Europe Committee of Ministers assigned a mandate to a new committee of experts to draw up a draft Recommendation on combating hate crime including its investigation and support for victims.<sup>62</sup> The draft Recommendation, finalised in December, is based on a comprehensive approach to addressing hate speech including in the on-line environment, and is pending before the Committee of Ministers for examination and adoption.

In this context, **France** adopted a law<sup>63</sup> extending the grounds for administrative dissolution of associations or groups, if they contribute to disseminating hatred or violence against a person or group of people on account of their origin, perceived race or religion. The grounds now also cover sex, sexual orientation or gender identity.<sup>64</sup> The **Danish** Parliament amended the law on non-discrimination and the Criminal Code, including prohibition of hate crime and hate speech, to include explicitly sexual orientation, gender identity, gender expression and sex characteristics<sup>65</sup> in the list of aggravating circumstances.

Hate speech can have a particularly detrimental effect when spread by a person representing a profession enjoying a high level of public trust. In **Luxembourg**, the courts<sup>66</sup> sentenced a physician disseminating racist and transphobic hate speech through social media. The Court of Appeal dropped the prison sentence pronounced by the first instance court, but increased the fine. It noted that the physician was "a person of reputable social status" and that "the scale and the significant impact of incitement to hatred on social networks leaves no room for doubt as to the seriousness of the offences committed".



#### PROMISING PRACTICE

### Making older LGBT+ people visible in the healthcare system

LGBT Ireland offers a programme called 'LGBT champions: Inclusion, visibility and equality in bolder people's care'. It aims to train health and social care workers to create change in the healthcare system, making older LGBT+ people visible, safe and assured that they will be accepted even at the most vulnerable time of their life.

Source: LGBT Ireland (2021), 'LGBT+ Champions Programme'

While violent attacks against LGBTI persons persist in many Member States, still very few victims report such crimes, FRA evidence shows.<sup>67</sup> Proceedings in such cases can be quite long, and punishments vary greatly between Member States. In *Sabalić v. Croatia*,<sup>68</sup> the ECtHR found a violation of Article 3 (prohibition of inhuman or degrading treatment) in conjunction with Article 14 (prohibition of discrimination) of the ECHR. It stressed that instituting ineffective proceedings for minor offences in a case of violent homophobic attack was contrary to the authorities' duty to combat impunity for hate crime.

In recognition of LGBTI hate crime, the **Danish** government has adopted a multi-year agreement on how the police, the prosecution service and the Danish courts should treat hate crime and hate speech cases related to LGBTI+ persons.<sup>69</sup> This initiative also envisages new information material and training for police and prosecutors.

Lack of witness support may also discourage victims from reporting incidents. A case in **Belgium** illustrates the importance of witnesses in hate crime cases.

The Correctional Court of Liège<sup>70</sup> sentenced a man who violently attacked a gay couple. The victims themselves were in shock and did not remember the homophobic nature of the attack. The perpetrator denied the hate motive of his acts, and claimed he was drunk. The court, however, upheld the homophobic reason thanks to the testimony of a witness, who reported that the man had made homophobic statements before assaulting the victims, not provoked by any behaviour or remarks on the part of the victims.

For more information on hate crime, see Chapter 4.

#### 3.2.2. Experiences of discrimination against LGBTI people

Several Member States show positive developments regarding the rights of LGBTI persons and attitudes towards LGBTI equality, according to research and survey findings. At the same time, discrimination against LGBTI persons can also be observed in some Member States.

Several EU countries conducted large-scale surveys representative of the general population on LGBTI issues. In **Finland**, 11 % of 2,326 respondents indicated they would be uncomfortable with an LGB neighbour, 26 % would find it uncomfortable if a family member had an LGB spouse and 39 % would be uncomfortable with a family member marrying a trans person.<sup>71</sup> In **Hungary**, 59 % of 1,000 respondents support marriage equality, 69 % agree with the statement that same-sex couples can be good parents and 66 % consider that students should hear about sexual minorities as part of their school curriculum.<sup>72</sup> In **Italy**, the majority of the 1,000 respondents support marriage equality (63%) and adoption by same-sex couples (59%).<sup>73</sup>

In **Lithuania**, only 8 % of 529 respondents agree that the legal definition of family should include same-sex relationships.<sup>74</sup> In **Slovenia**, 39 % of 1,007 respondents consider sexual orientation the most common ground for discrimination in their country, and 24 % see homosexuals as being most at risk of discrimination.<sup>75</sup> In **Bulgaria**, 41 % of the 1,013 respondents would vote for a party supporting the rights of LGBTI people, while 38 % would disagree if the political party they support took a pro-LGBTI stance.<sup>76</sup>

In **Belgium**, 68 % of 2,115 LGBTIQ+ and asexual people had been exposed to sexual violence in the previous 12 months, and 24 % of them had experienced rape or attempted rape.<sup>77</sup>

In the **Netherlands**, the largest ever study among bisexual persons had 2,934 respondents.<sup>78</sup> They face various forms of prejudice. Sexual (14.5 %) and gender minority (2.7 %) adolescents are more often victimised by school staff, feel unsafe to report victimisation and receive less support than other students, a survey of 29,879 high school students' school-based experiences showed.<sup>79</sup>

Assessing the extent and nature of discrimination against LGBTIQ people can use a broad set of equality data sources besides surveys representative of the general population.<sup>80</sup> For instance, in **Germany** online survey results showed that in the German film industry LGBTI respondents are not open about their sexual orientation (around 40 %) and/or gender identity (34 %), fearing negative consequences for their careers.<sup>81</sup>

Concern about the lack of data on discrimination against intersex people came up in **Belgian**<sup>82</sup> and **Irish**<sup>83</sup> reports. Forced medical treatment of intersex children is a serious problem according to national NGOs in **Bulgaria**<sup>84</sup> and in **Luxembourg**.<sup>85</sup>

### 3.2.3. Impact of Covid-19 measures on LGBTI persons

Several EU Member States introduced measures in response to the Covid-19 pandemic that could affect LGBTI persons. The Council of Europe Commissioner for Human Rights noted that in many states LGBTI NGOs were not involved in national consultations on the Covid-19 response and that human rights safeguards for LGBTI people were either shelved or delayed.<sup>86</sup>

In the absence of explicit regulation of same-sex partnerships, same-sex partners of Bulgarian nationals travelling to **Bulgaria** could not benefit from the rules excluding family members from entry restrictions. An LGBT youth organisation launched a petition calling for legislative amendments recognising the rights of same-sex couples.<sup>87</sup>

In **Romania**, LGBTI civil society organisations appealed against a fine for staging an event during the pandemic with more than the legal limit of 500 participants.<sup>88</sup> It argued that religious processions without a limit on the number of participants were allowed.

In **Spain**, a Basque Government report<sup>89</sup> pointed out that confinement at home with hostile family members was potentially a problem for LGBTI people.

Increased economic insecurity resulting from reduced income or job loss, and housing insecurity, forced people to return to families who did not welcome them, according to a **Slovenian** study on the situation of transgender persons during the pandemic.<sup>90</sup>

The **Swedish** government also acknowledged that the ongoing pandemic has worsened the situation of women, children and LGBTIQ people, who suffered more domestic violence and oppression.<sup>91</sup>

## PROMISING PRACTICE

### Census data on sexual orientation

In **Malta**, the Census of Population and Housing 2021 collected, for the first time, data about sexual orientation that can serve research and policymaking.

Sources: Malta, '**Census 2021**'; Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC), **Fifth opinion on Malta**, 18 February 2021

## PROMISING PRACTICE

### Increasing teachers' knowledge of LGBTI topics

In **Bulgaria**, the Bilitis Foundation 'School's out' project aims to improve the school environment for LGBTI students by increasing teachers' knowledge of LGBTI topics and their ability to address bullying. The main objective is to advance an evidence-based approach for guiding schools to create an LGBTI-inclusive environment by applying the 'Inclusive school cycle' programme.

Source: Bilitis Foundation, '**School's Out**', 2021



### 3.3. DISCRIMINATION AGAINST EU CITIZENS BASED ON THEIR NATIONALITY

Article 18 of the TFEU and Article 21 (2) of the Charter of Fundamental Rights prohibit, within the scope of application of the Treaties, any discrimination on grounds of nationality. This prohibition has a direct horizontal and vertical effect, which means any individual can invoke it against private or public entities before national courts. Vertical direct effect applies to relations between individuals and the country. This means that individuals can invoke a provision of EU law in relation to the state. Horizontal direct effect applies to relations between individuals. This means that an individual can invoke a provision of EU law in relation to another individual.

In contrast to other grounds, discrimination on the grounds of nationality has always been forbidden by the EU treaties (as well as discrimination on the basis of sex in the context of employment). The prohibition of discrimination on grounds of nationality is the cornerstone of European integration: any citizen of the Union lawfully resident in a Member State of which he or she is not a national can rely on the prohibition of discrimination on grounds of nationality in all situations which fall within the scope of EU law. Such discrimination may be direct in the sense that a difference in treatment is directly related to nationality, or indirect where the treatment depends, for example, on the country of residence. The matter has been brought before the Court on multiple occasions.<sup>92</sup>

The Free Movement Directive<sup>93</sup> confirms the fundamental commitment to the principle of equal treatment of EU nationals. The Free Movement of Workers Enforcement Directive<sup>94</sup> provides for setting up bodies to promote equal treatment and to support EU workers and their families, in wording similar to that in the equal treatment directives. The CJEU also used the concept of EU citizenship to enlarge the scope of non-discrimination on the grounds of nationality beyond workers.

#### **3.3.1. Discriminatory legislation and rules persist and are not sufficiently addressed**

EU citizens and their family members still experience discrimination on the ground of nationality, FRA evidence confirms.<sup>95</sup> Cases of discrimination against EU citizens that FRA collects vary considerably. They relate to taxation, the right to exercise a profession, and access to goods and services, including health services.

Given the various fields where such discrimination may occur, it is often difficult to recognise and identify laws or practices that amount to discrimination on grounds of nationality, as FRA's research in this area confirms. Consequently, they are not always reported to relevant authorities or adequately addressed.

In *MK v. Autoridade Tributária e Aduaneira*,<sup>96</sup> the CJEU confirmed its previous case law and held that the optional Portuguese regime for taxing non-residents' capital gains from immovable property was discriminatory and contrary to the free movement of capital under Article 63 of the TFEU, since non-residents were taxed less favourably than residents.

Non-Maltese EU and Maltese citizens are not treated equally in terms of the entitlement documents they have to present to public healthcare providers before receiving treatment, the Commission noted<sup>97</sup> with regard to a petition to the European Parliament.<sup>98</sup> All other EU citizens are asked to produce pay-slips as proof of social security, while Maltese citizens are only asked to present identity cards.

The **Finnish** Court of Appeal<sup>99</sup> confirmed discrimination on the basis of nationality in the case of a child born in France, who was entered into the population register on the basis of an international birth certificate. The mother was Finnish and the father was French. They were not married.

The authorities entered the mother's motherhood and custody into the population registry on the basis of the international birth certificate without delay, but demanded additional documents from the father to ensure the reliability of the information. The court found that the same foreign document cannot be deemed reliable in relation to a Finnish citizen and unreliable in relation to a foreign citizen, in this case an EU citizen.

The **Danish** Institute for Human Rights published a report raising awareness of the unequal treatment of young people's access to citizenship depending on whether or not they are Nordic, i.e. from Finland, Iceland, Norway or Sweden. Nordic young people born and/or raised in Denmark can obtain Danish citizenship by declaration. They therefore have much easier access to Danish citizenship than non-Nordic young people in the same situation. The institute recommended that the rules should be the same for all young people in the same situation.<sup>100</sup>

Residence is often a prerequisite to access services. The notion of residence and criteria for it are a recurring issue in several Member States. **Lithuania** has amended the Law on the Legal Status of Aliens.<sup>101</sup> That has made it easier for legally resident foreigners to declare their place of residence.<sup>102</sup> According to new provisions, a foreigner may choose when to declare residence in Lithuania: in the Migration Department when applying for a residence permit; or in the 'eldership', the smallest administrative division of Lithuania, after collecting a residence permit.<sup>103</sup>

In **Ireland**, a long-standing provision on habitual residence has a potential discriminatory effect on EU citizens.<sup>104</sup> To access social benefits, individuals must be residents and prove that their centre of vital interest is in Ireland. Irish law does not define habitual residence, and the Department of Social Protection decides at its own discretion. Returning Irish citizens are not automatically exempt from habitual residence requirements, but in practice it is easier for them to fulfil its conditions.

In in-depth interviews with 23 public servants involved in habitual residence decisions, most participants felt that there was too much discretion in applying the habitual residence condition.<sup>105</sup> Most disallowed cases were appealed against, leading to uncertainty, delays and backlogs of cases.

In **Italy**, 'citizenship income' is an emergency welfare provision.<sup>106</sup> Eligibility depends on proving 10 years of regular residency in Italy, of which the last two must be continuous. The residency requirement discriminates against foreigners, including EU citizens, the Scientific Committee for the Evaluation of the Citizenship Income observed in its 2021 report.<sup>107</sup> Although requiring a minimum duration of residency is reasonable, a threshold of 10 years is inappropriate and could exclude families and individuals in severe hardship.

In **Czechia**, the Public Defender of Rights investigated alleged discrimination against EU citizens in access to public libraries and discriminatory rules regarding online and offline registration at libraries for EU citizens.<sup>108</sup> They have to submit proof of permanent residence in Czechia and be at least 18 years old, compared with a minimum age of 15 for Czech citizens (younger children have to be registered by their parents).



As regards access to occupation, the Commission called on **Greece** to remove the requirement of Greek nationality to access managerial positions in public service.<sup>109</sup> The relevant legislation breached EU rules on the freedom of movement for workers and on the prohibition of discrimination based on nationality between workers in the EU.



On the other hand, **Luxembourg** transposed Directive 98/5/EC, which facilitates the profession of lawyer, into national law.<sup>110</sup> It adopted a law that allows lawyers who are EU citizens and received their qualification in another Member State to practise law in Luxembourg. Lawyers with a non-EU nationality can only register for the list of lawyers on a reciprocal basis.<sup>111</sup>

**Portugal's** new law<sup>112</sup> specifies that legislative provisions limiting access to or the exercise of professional activities may not be discriminatory, directly or indirectly, in particular on grounds of nationality or place of residence.

Some Member States adopted other measures to improve equality among EU citizens. For example, **Italy**<sup>113</sup> added nationality to the prohibited discrimination grounds, including with regard to access to housing, and social and fiscal advantages. **Finland** extended eligibility for infectious disease allowance to compensate for loss of income<sup>114</sup> to workers who are European Economic Area citizens even if they are not covered by the Finnish health insurance system. Until now that system has been available only to persons covered by the Finnish National Health Insurance scheme.

### 3.3.2. Discrimination against EU citizens based on their nationality

The extent of discrimination against EU citizens based on their nationality is hard to assess but there is some evidence that it persists across the EU.

In **Germany**, EU citizens experience difficulties in enforcing entitlements to social benefits.<sup>115</sup> Job centres sometimes refuse social benefit requests because the claimants lack language skills, a recent study found. Authorities can be too demanding when it comes to submitting documents: during some application procedures EU citizens had to provide additional documents not required of German citizens.<sup>116</sup>

In **Greece**, there were complaints about the rejection of applications for a childbirth allowance of € 2,000 by EU citizens whose partners and/or the other parents of their children were Greek citizens.<sup>117</sup> In these cases the restrictive interpretation of a beneficial law provision may lead to the indirect exclusion of beneficiaries due to their citizenship.

In **Ireland**, EU citizens receive on average lower wages than Irish nationals.<sup>118</sup> Eastern Europeans experience the largest earnings disadvantage at work.<sup>119</sup>

In the **Netherlands**, real estate agents and intermediaries often discriminate against persons with Polish or Moroccan names, according to the findings of the first national study on discrimination in the Dutch housing market.<sup>120</sup> Prospective tenants with Polish- or Moroccan-sounding names were invited for viewings significantly less often than persons with Dutch-sounding names, discrimination testing based on 3,166 cases found.

### 3.3.3. Measures to contain the Covid-19 pandemic affecting EU citizens

In some cases, measures that EU Member States – such as **Cyprus**, **Czechia**, **Italy** and **Slovakia** – introduced in response to the Covid-19 pandemic, including vaccination plans, discriminated against EU citizens.<sup>121</sup>

In **Czechia**, those without Czech public health insurance and those not registered in the Czech public health insurance system, including EU citizens, were not eligible to register for vaccination until June 2021. After the Public Defender of Rights communicated with the Ministry of Health, EU citizens became eligible for registration.<sup>122</sup>

In **Cyprus**, until July 2021 the procedure for booking vaccination appointments disadvantaged those not registered in the national health system, including EU citizens.<sup>123</sup> They could only arrange their appointment by phone and were only offered one vaccine option, AstraZeneca.<sup>124</sup>

At the beginning of the Covid-19 vaccination roll-out, it was difficult for EU citizens in **Slovakia** to access the vaccine. That was because it was unclear who was eligible for vaccination.<sup>125</sup> While EU citizens had no difficulties registering for vaccination, as the online system recognised EU health insurance, vaccination centres often turned EU citizens away because the staff did not accept their EU health insurance.<sup>126</sup> In April 2021, in response, the Health Ministry amended the legislation on health insurance<sup>127</sup> and issued an instruction regarding EU citizens' access to vaccination, which standardised the process.



In **Italy**, the National Antidiscrimination Office (UNAR) issued an opinion<sup>128</sup> after receiving several reports that the Covid-19 vaccination campaign excluded foreign nationals, including EU citizens, who had no regular residence permit and/or tax identification number. This practice can constitute institutional discrimination by denying access to essential healthcare provision and the 'green pass', i.e. Italy's domestic version of the EU Digital Covid Certificate, necessary for work and social activities, according to UNAR.

Following an outbreak of Covid-19 among agriculture workers in May 2021 in southern **Portugal**, national and local authorities inspected their living and working conditions. They detected unhealthy and overcrowded housing conditions, as well as severe working conditions. Many of these migrant workers were EU nationals from eastern Europe, particularly Bulgaria and Romania.<sup>129</sup>

**Slovenia** made a one-off solidarity allowance of € 500 for children born to parents with permanent residence in Slovenia who were born during the Covid-19 pandemic.<sup>130</sup> The Advocate of the Principle of Equality found it to be discriminatory. The advocate established that parents of new-borns with temporary residence who currently reside in Slovenia, including EU citizens, should also be able to benefit from this provision.<sup>131</sup>

## FRA opinions

This year the chapter focuses on discrimination against LGBTI people and discrimination against EU citizens on the ground of their nationality.

### FRA OPINION 3.1

In respect of the planned legislative initiative on the recognition of parenthood and related measures, the European Commission should provide Member States with the relevant framework and further guidance to ensure mutual recognition of parenthood for same-sex couples.

EU Member States should implement the measures included in the EU LGBTIQ equality strategy by developing national action plans and strategies, and by reinforcing legal protection for LGBTIQ people against violence and hate speech.

In 2021 there was growing recognition of the family rights of same-sex couples and homosexual parents in international and national jurisprudence and legislation. However, mutual recognition of same-sex parenthood between Member States is still difficult in the light of discrepancies between EU countries in the scope of legal recognition of same-sex couples and their family rights (as regards adoption, surrogacy or assisted reproduction). This creates legal uncertainty and interferes not only with the right to free movement but also with the right to family life, when recognition of family ties between parents and children, legally established in another country, is refused.

The European Commission recognised that differences in Member States' rules on parenthood, and the lack of EU conflict rules in this regard, may cause families difficulties in crossing borders within the EU. It considers a legislative initiative on cross-border recognition of parenthood between the EU Member States. The proposal would lay down common conflict of laws rules and common provisions on the recognition of judgments on parenthood. While substantive law on parenthood is within the remit of Member States' law, the EU can adopt

measures concerning family law with cross-border implications pursuant to Article 81(3) of the Treaty on the Functioning of the European Union (TFEU).

Cross-border recognition of parenthood is particularly difficult for same-sex parents, owing to differences in Member States' legal frameworks. That interferes with the right to respect for family life and the rights of the child, as well as the child's rights derived from EU citizenship.

The CJEU recognised the family ties between same-sex parents and their child in *V.M.A. v. Stolichna obshtina*. It recalled that Member States can only derogate from their obligations under EU free movement law if they do not breach fundamental rights under the Charter of Fundamental Rights (Charter). The court concluded that it would be contrary to Articles 7 (the right to respect for family life) and 24 (the rights of the child) of the Charter if the child were deprived of her relationship with one of her parents when exercising her right to free movement, or if her exercise of that right were impossible or excessively difficult in practice because her parents are of the same sex. The court emphasised that the obligation to recognise the parent-child relationship in the context of free movement does not undermine national identity and competences.

Furthermore, measures to contain the pandemic, including lockdowns and entry restrictions to Member States, disproportionately affected partners and children of LGBTIQ people, as well as young LGBTIQ persons in several Member States. They prompted increases in domestic violence, hate speech and hate crimes, and limited access to psychological assistance and healthcare.



In this context, the EU LGBTIQ equality strategy gains significance. It sets out targeted actions around four main pillars: tackling discrimination, ensuring safety, building inclusive societies and leading the call for LGBTIQ equality. As the strategy announced, in 2021 the Commission set up an LGBTIQ equality subgroup under the **EU High Level Group on Non-discrimination, Equality and Diversity** to support and monitor progress in the Member States on LGBTIQ rights, including development of national action plans.

Several Member States adopted national action plans aimed at combating discrimination in general, which included LGBTIQ rights. Others developed action plans specifically aimed at LGBTIQ equality. These action plans, which the 2015–2019 List of Actions to Advance LGBTI Equality already advocated, are necessary to recognise the particular needs of LGBTIQ persons for the protection of their rights and to introduce specific measures.

Discrimination against EU citizens on the ground of nationality may create barriers to free movement even if it does not directly relate to the implementation of free movement legislation.

Both Article 18 of the TFEU and Article 21(2) of the Charter provide that, within the scope of EU law, any discrimination on grounds of nationality shall be prohibited. This prohibition has direct effect, horizontal and vertical. This means that under certain conditions individuals can invoke it against both private entities and state authority.

Article 24 (1) of the Free Movement Directive (2004/38/EC) confirms the fundamental commitment to the principle of equal treatment of EU nationals, expressed in the Treaties: “all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence” Article 4 of the Free Movement of Workers Enforcement Directive (2014/54/EU) obliges the Member States to designate bodies for the promotion, analysis, monitoring and support of equal treatment of Union workers and members of their families without discrimination on grounds of nationality but also without any unjustified restrictions or obstacles to their right to free movement.

EU citizens and their family members still experience discrimination on the ground of nationality in various fields, including taxation, the right to exercise a profession, and access to goods and services, including health services or social benefits, according to evidence from FRA’s research in 2021. During the Covid-19 pandemic, certain measures, including the deployment of vaccination plans or travel restrictions, had negative effects on EU citizens from other Member States. While discrimination on grounds of nationality does not appear to be widespread compared with other grounds of discrimination, there are insufficient data about it. Neither is there adequate awareness of when such discrimination occurs, although EU citizenship is one of the pillars of EU integration, as the CJEU has reiterated on several occasions and the Commission’s three-yearly citizenship reports highlight.



## FRA OPINION 3.2

EU Member States should ensure that no legislation and administrative practices lead to discrimination against EU citizens, and in certain contexts their family members, based on nationality, within the scope of EU law. Regular collection of data and experiences will provide useful input in this regard.

The European Commission should strengthen the assistance provided to Member States for exchanging information and raising awareness with regard to preventing discrimination against EU citizens on the ground of nationality.



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# RACISM, XENOPHOBIA AND RELATED INTOLERANCE

## 4

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- In *Bahar and Gutman v. Bulgaria* (No. 29335/13), European Court of Human Rights rules that comments by a far-right politician violated Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination) of the European Convention on Human Rights.
- In *Budinova and Chaprazov v. Bulgaria* (No. 12567/13), European Court of Human Rights rules that a local court's decision to protect freedom of speech failed to recognise the hate of speech in comments by a far-right politician and concludes that these violated Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination) of the European Convention on Human Rights.

23

February

Council of Europe's European Commission against Racism and Intolerance (ECRI) publishes conclusions on the implementation of priority recommendations in respect of Spain.

18

ECRI publishes its 2020 annual report.

19

CoE Commissioner for Human Rights publishes report of a round table with Human Rights Defenders on combating racism and racial discrimination of people of African descent in Europe.

24

March

CoE Commissioner for Human Rights publishes a memorandum on combating racism and violence against women in Portugal.

18

ECRI publishes conclusions on the implementation of priority recommendations in respect of Croatia, Malta and Portugal.

21

May

United Nations Committee on the Elimination of Racial Discrimination publishes its concluding observations on the combined 20th to 22nd periodic reports of Belgium.

26

August

Committee on the Elimination of Racial Discrimination publishes its concluding observations on the combined 22nd to 24th periodic reports of the Netherlands.

14

September

ECRI publishes its revised General Policy Recommendation No. 9 on preventing and combating Antisemitism, taking into account new trends and contemporary forms of antisemitism.

5

October

ECRI publishes conclusions on the implementation of priority recommendations in respect of Latvia.

8

December

ECRI adopts an opinion on the concept of 'racialisation'.

February

18

European Commission opens infringement proceedings against Belgium, Bulgaria, Finland, Poland and Sweden, as their national laws do not fully or accurately transpose EU rules on combating racism and xenophobia by means of criminal law.

March

1

EU High Level Group on combating racism, xenophobia and other forms of intolerance endorses key guiding principles on encouraging the reporting of hate crime.

19

- European Commission adopts its report on the application of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive) and 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).
- European Commission holds the first ever European Anti-Racism Summit.

May

11

Secretary General of the Council of Europe publishes its 2021 Annual Report ("State of Democracy, Human Rights and the Rule of Law: a democratic renewal for Europe") - Chapter 7 addresses anti-discrimination, diversity and inclusion.

17

European Commission appoints its first ever anti-racism coordinator.

June

9

European Commission opens infringement proceedings against Greece, Lithuania and the Netherlands, as their national laws do not fully or accurately transpose EU rules on combating racism and xenophobia by means of criminal law.

September

30

EU High Level Group on Non-Discrimination, Equality and Diversity endorses a guidance note on equality data based on racial or ethnic origin.

October

5

European Commission adopts the first ever EU Strategy on combating antisemitism and fostering Jewish life.

December

2

European Commission opens infringement proceedings against Germany, Hungary and Luxembourg, as their national laws do not fully or accurately transpose EU rules on combating racism and xenophobia by means of criminal law.

9

The European Commission adopts a Communication inviting the Council of the European Union to adopt a decision that would enable, in a second stage, the criminalisation at EU level of other forms of hate speech and hate crime beyond the Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law.

16

EU High Level Group on Non-Discrimination, Equality and Diversity and EU High Level Group on combating racism, xenophobia and other forms of intolerance endorse common guiding principles for national action plans against racism.

Racist hate crimes and hate speech persisted across the EU in 2021. Migrants and ethnic minorities, including Roma, Jews, Muslims and Asians, continued to be blamed for the coronavirus disease 2019 (Covid-19) pandemic.

The European Commission took decisive steps to implement existing EU law by initiating infringement procedures against 11 EU Member States for not fully and correctly transposing the Framework Decision on Racism and Xenophobia into national law. It also called on Member States to better implement the provisions of the Racial Equality Directive.

Reflecting EU-wide commitments to combat racism, Member States adopted national action plans against racism and continued to strengthen measures to address data gaps and develop structures and processes for the effective reporting of racist incidents.

“Last year, people around the globe took to the streets to protest racial injustice. They recognized racism for what it is. A vicious global pandemic. Dangerous. Abhorrent. Ugly. And everywhere.”

Antonio Guterres, United Nations Secretary-General, 2021



## 4.1. WIDESPREAD MANIFESTATIONS OF RACISM AND A PRONOUNCED INCREASE IN RACIST HATE SPEECH

Racist hate crimes persisted in the EU in 2021. Following 2020's trends, online hate speech continued to rise, with the Covid-19 pandemic exacerbating the issue.

### 4.1.1. Hate crimes

This chapter analyses the most recent official and unofficial data that were published or made publicly available in 2021, and provides further insights into developments that occurred in 2020.

In the first six months of 2021, **Austria** officially recorded a total of 443 xenophobic/racist, antisemitic, anti-Muslim and other related incidents, an increase of about a third compared with 2020.<sup>1</sup> **Denmark** reported a 12 % increase in registered hate crimes, and many incidents were linked to the Covid-19 pandemic.<sup>2</sup> In some countries there is a delay in the publishing of official crime statistics and therefore these could only be included in this year's report.

For 2020, the police in **Finland** pointed to a 5 % decrease in hate crimes in 2020 compared with 2019.<sup>3</sup> The Office for Democratic Institutions and Human Rights' hate crime report also attests to the high prevalence of racist and xenophobic crimes and antisemitic crimes, constituting together 65 % of all hate incidents states reported in 2020.<sup>4</sup> Official data in **Spain** also reflect this, pointing to a rise in hate crime by 9 % from 2019 to 2021. State representatives also expressed concerns regarding a 57 % raise in antigypsyism incidents between 2019 and 2020.<sup>5</sup>

Human rights bodies and civil society organisations also reported on persistent bias-motivated victimisation experiences, as reports published in 2021 show. In **Belgium**, the national equality body highlighted a 50 % increase in racist incidents in 2020.<sup>6</sup> The annual report of the **French** national human rights institution pointed to an increase in anti-Asian and anti-Muslim racism.<sup>7</sup>



**Ireland's** civil society data reflected the highest number of racist incidents since 2013, with 51 racist assaults recorded in 2020.<sup>8</sup> Civil society data from **Austria** noted 3,039 racist incidents in 2020, 1,089 more than in 2019.<sup>9</sup> The number of anti-Muslim incidents reported unofficially increased by 33.4%.<sup>10</sup>

Victims continued to avoid reporting incidents to law enforcement. Fewer than half (43%) of the incidents reported to the **Irish** Network Against Racism were also reported to police.<sup>11</sup> In **Spain**, only one out of 10 victims of hate crime reported the incident, a survey found.<sup>12</sup> Respondents' main reasons for not reporting were not believing that the police would take them seriously, lack of trust in the police, fear of retaliation and lack of awareness.

A survey among migrants in **Slovakia** revealed similar results. It noted the barriers asylum seekers and refugees face in reporting incidents,<sup>13</sup> which are similar to those that FRA surveys identified.<sup>14</sup>

Violent hate crimes persisted in 2021. For example, in the south of **Spain**, a Moroccan man was killed, and in a separate incident two people with a migrant background were stabbed, in alleged racist crimes that civil society condemned.<sup>15</sup> In **Malta**, the police were investigating an allegedly racially driven attack against a Somali man, who was beaten and thrown into the sea, the media reported.<sup>16</sup>

## Racism in the police

In **Czechia**, the death of a 46-year-old Roma man as a result of police violence\* was recorded and the footage went viral, gaining both national and international attention.\*\* The Czech Deputy Public Defender of Rights launched an investigation. It found errors both in the police response during the incident and in the investigation that followed.\*\*\*

In **Greece**, a Roma man was shot during a police car chase. The media discussed the incident extensively. An internal investigation concluded within five days of the incident, after which the relevant minister announced a range of measures

reforming the structure and standard operating procedures of the rapid response police unit, including police training.\*\*\*\* Ellan Passe, the Greek federation of Roma organisations, expressed its outrage and asked for a thorough and swift investigation.\*\*\*\*\*

\* *Czechia, Public Defender of Rights (2021), Investigation report 4022/2021/VOP (Zpráva o šetření 4022/2021/VOP).*

\*\* *Council of Europe (2021), 'Czech Republic: Council of Europe calls for urgent independent investigation into Romani man's death – Statement by the Spokesperson of the Secretary-General', press release, 23 June 2021.*

\*\*\* *Romea.cz (2021), 'Czech Deputy Public Defender of Rights finds police officers made significant errors in the controversial arrest of Stanislav Tomáš', 13 December 2021.*

\*\*\*\* *Greece (2021), 'Takis Theodorikakos: Reforms in the Greek Police' (Τάκης Θεοδωρικάκος: Μεταρρυθμίσεις στην Ελληνική Αστυνομία), 1 November 2021.*

\*\*\*\*\* *Greece, Ellan Passe (2021), '10 open and ruthless questions about the assassination of the 18-year old Roma in Perama' ('10 ανοιχτές και αδιάσφακτες ερωτήσεις για τη δολοφονία του 18χρονου Ρομά στο Πέραμα'), 24 October 2021.*



## PROMISING PRACTICE

### Online platform facilitates reporting of hate crime

The Office of the Equal Opportunities Ombudsperson in Lithuania launched the online platform *Nepyka.lt*,\* which provides information on hate crime for victims and experts and directs them to sites where hate crime can be reported.

\* Lithuania, Office of the Equal Opportunities Ombudsperson (2021), '2021 as the year of confronting hate speech and bias-motivated crimes', 31 December 2021.

### Protocol for Combating Illegal Hate Speech Online

The Ministry of Inclusion, Social Security and Migration in Spain launched a Protocol\*\* for combatting illegal hate speech online. The initiative aims at strengthening the cooperation and collaboration among institutional actors, civil society and data hosting service companies to prevent, eliminate and combat illegal hate speech online.

\*\*Spain, Spanish Observatory on Racism and Xenophobia (2021), 'Protocol for combatting illegal hate speech online' (*Protocolo para Combatir el Discurso de odio en línea*), 18 March 2021



#### 4.1.2. Hate speech

Hate speech continued to rise. Incidents manifested particularly online, but also in the media and in political discourse.

Migrants and ethnic minorities remained the main targets of hate speech, including linked to the Covid-19 pandemic, as reports published in 2021 reflecting the situation in 2020 show. The **Belgian** equality body reported that Covid-19-related hate speech targeted Muslims and black people,<sup>17</sup> and Asians.<sup>18</sup> In **Spain**, Covid-19-driven hate speech in the media and in political discourse was mainly against Roma.<sup>19</sup> Antisemitic incidents were reported in **Serbia** in relation to Covid-19.<sup>20</sup>

Besides incidents linked to the pandemic, reports that equality bodies and public bodies published in 2021 in **Albania**,<sup>21</sup> **Cyprus**,<sup>22</sup> **Slovakia**<sup>23</sup> and **Spain**<sup>24</sup> highlighted an increase in online hate speech. So did data that civil society organisations in **Austria** and **Ireland**<sup>25</sup> published in 2021. Incidents of racism on the internet doubled in 2020 compared with 2019, according to the **Austrian** non-governmental organisation ZARA.<sup>26</sup> Of over 62,864 tweets about foreigners/migrants, 30,884 were derogatory hate speech, the **Italian** non-governmental organisation Observatory on Rights claimed in a review.<sup>27</sup>

In **Belgium**, the equality body reported on hate speech in the media in its 2020 report.<sup>28</sup> In **Slovenia** the equality body found violations of the anti-discrimination law in 2021.<sup>29</sup> In **Spain**, Cyber Crime Prosecutors, in coordination with the Hate Crime Prosecutors, intervened in 80 proceedings for online hate speech in 2020.<sup>30</sup>

In **Cyprus**, following a racist incident against a black football player, the Commissioner for Administration and the Protection of Human Rights recalled the responsibility of the State to apply preventive and combative measures in football and in sports and to protect victims of such incidents.<sup>31</sup>

In 2021, politicians used their platforms and election campaigns to fuel intolerance, also highlighted by the Council of Europe.<sup>32</sup> In **Bulgaria**, instances of hate speech, mainly anti-Semitic, occurred during election campaigns.<sup>33</sup>

Politicians also utilised the pandemic to spread xenophobic statements. For example, the president of a political party in **Belgium** blamed the Muslim community "for the increase in Covid-19 cases in Antwerp".<sup>34</sup> **Spanish** politicians targeted Roma as "responsible for spreading the virus".<sup>35</sup>

#### 4.1.3. Racism and racial discrimination

Ethnic minorities and migrants continue to face racism and discrimination at individual, institutional and structural levels across the EU, as complaints data and a variety of survey findings show. Research provides evidence of racial and ethnic discrimination by public authorities and discriminatory racial profiling by law enforcement.

In its 2021 report, the European Commission against Racism and Intolerance (ECRI) reiterated its 2020 statement on racist police abuse, including racial profiling and systemic racism. It called on Council of Europe Member States to address the “systemic nature of racism [taking] a holistic and intersectional approach”.<sup>36</sup> With respect to combating racism and racial discrimination against people of African descent, the Council of Europe Commissioner for Human Rights called on Member States to “acknowledge and address any structural, institutional and intersectional dimensions of Afrophobia”.<sup>37</sup>

Equality bodies’ data published in 2021 in **Belgium**,<sup>38</sup> **Croatia**,<sup>39</sup> **Denmark**,<sup>40</sup> **Ireland**,<sup>41</sup> **Lithuania**,<sup>42</sup> **Portugal**<sup>43</sup> and **Spain**<sup>44</sup> show an increase in complaints and cases of discrimination on the grounds of race and ethnicity in 2020. In **Germany**, complaints to the Federal Anti-Discrimination Agency increased in 2020 by 78 %, and one third of the 6,383 cases were related to racial discrimination.<sup>45</sup> In the **Netherlands**, 52 % of the 9,757 cases that anti-discrimination agencies reported in 2020 involved discrimination on the ground of ethnicity.<sup>46</sup>

##### *Discrimination in employment*

Survey findings and discrimination testing revealed widespread discrimination affecting ethnic minorities and migrants in employment.

In **Germany**, people with a migrant background were on average 50 % more likely to lose their job as a result of the Covid-19 pandemic than non-migrants working in the same sector and occupation, a representative survey with 19,000 respondents showed.<sup>47</sup> In the first online survey with 4,098 respondents on black people’s experiences of discrimination in **Germany**, eight out of 10 reported discrimination at work in the two years preceding the survey.<sup>48</sup>

In a discrimination-testing study carried out in Antwerp in **Belgium**, researchers sent out 2,880 job applications in response to 1,440 job advertisements. Candidates with a ‘non-Flemish-sounding’ name had 17 % less chance of receiving a positive response to their job application than those with a ‘Flemish-sounding’ name, the results showed.<sup>49</sup>

##### *Discrimination in education*

Research findings across the EU provide evidence of discrimination against ethnic minorities and migrants in education. More than a third (35 %) of staff from minority ethnic groups have been subject to racial and/or ethnic



#### PROMISING PRACTICE

### Code of conduct for political parties addressing hate speech

In **Albania**, ahead of the 2021 national elections, political parties adopted a code of conduct that the Alliance against Hate Speech developed in cooperation with the Central Election Commission. All political parties running in the election were consulted and pledged to run an ethical anti-hate-speech and anti-discrimination political campaign.

*Source: Albania, ‘Kodi i Sjelljes së Partive Politike në Shqipëri’, 12 April 2021.*

#### PROMISING PRACTICE

### Combating discrimination and harassment

The Finnish government, in cooperation with the Non-Discrimination Ombudsman, civil society and the city of Helsinki, developed a project aimed at combating ethnic discrimination and harassment. FRA’s survey results informed project activities. They focused on, among other things, increasing awareness of social biases that lead to structural discrimination, managing diversity, and promoting equality and non-discrimination in the workplace.

For more information, see Finland, Ministry of Justice (2021), ‘All in for equality’.

discrimination on campus or online in the course of their work, compared with 16 % of 'white other' respondents and 3 % of 'white Irish' respondents, according to a survey that the Higher Education Authority in **Ireland** conducted with 3,323 respondents.<sup>50</sup> Discrimination testing in **Denmark** showed that 25 % of parents with a 'Danish-sounding' name received a positive response to moving their kids to the schools tested, compared with 15 % of parents with a 'Muslim-sounding' name.<sup>51</sup> In the **Netherlands**, discrimination testing showed that students with a migrant background have less chance than students without a migrant background of getting an internship at a secondary vocational education institution.<sup>52</sup>

#### *Discrimination in housing and healthcare*

Survey findings in Finland provide evidence of health-related impact of Covid-19 as well as experiences of discrimination, while a survey in the Netherlands examined the situation related to rental housing. The study in **Finland** compared persons with a migrant background with the general population in terms of the impact of the Covid-19 pandemic on health and wellbeing. Up to 30 % of people with migrant background was concerned about ending up discriminated against due to having Covid-19, compared with 7 % of people in the general population.<sup>53</sup> In the **Netherlands**, discrimination testing in the rental housing market showed that those with a 'Polish-sounding' or 'Moroccan-sounding' male name are invited to view accommodation for rent less often than people with a 'Dutch-sounding' name.<sup>54</sup>

#### *Institutional racism by public authorities and law enforcement*

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) bounds the parties to the Convention "not to permit public authorities or public institutions, national or local, to promote or incite racial discrimination".<sup>55</sup> Human rights bodies' reports show that institutional discrimination and racism persist against ethnic minorities and Roma.<sup>56</sup>

In **Sweden**, racism occurs throughout public institutions, a study based on a literature review of 523 scientific articles, books, book chapters and reports published between January 2016 and May 2021 indicated.<sup>57</sup> In **Germany**, the Independent Commission on Antigypsyism (*Unabhängige Kommission Antiziganismus*) issued a major report on antigypsyism that the German Parliament requested, which includes reference to institutional racism by public and local authorities against the Sinti and Roma.<sup>58</sup> The **Irish** Human Rights and Equality Commission, in its submission to the Anti-Racism Committee for the development of a national action plan against racism, highlighted the persistence of institutional racism and a culture of discrimination against Travellers, which give rise to increasingly urgent concerns.<sup>59</sup>

Regarding institutional racism within law enforcement specifically, equality bodies raised concern about discriminatory profiling practices. In **Belgium**, the equality body opened 99 cases in 2020 relating to discriminatory police conduct based on "racial criteria".<sup>60</sup> The special report of the National Mechanism for the Investigation of Arbitrary Incidents for 2020, which the **Greek** Ombudsman published, noted that "it has not been widely understood that policing based on the characteristics of a person belonging to a social group or minority (racial profiling) is both prohibited, as discriminatory and ineffective".<sup>61</sup>

Similarly, in the **Netherlands**, a study that the Police Academy commissioned concluded that the "framework on proactive policing", which aims to prevent ethnic profiling by the police, is barely known to police officers.<sup>62</sup>



## 4.2. IMPLEMENTING THE LEGAL FRAMEWORK AGAINST RACISM, XENOPHOBIA, ANTISEMITISM AND RELATED INTOLERANCE

Action to combat racism, xenophobia, antisemitism and related intolerance at EU level rests on an established legal framework dating back more than two decades. This includes the Racial Equality Directive and the framework decision on combating racism and xenophobia.<sup>63</sup> To support the effective implementation of the legal protection, in 2021 the EU took steps towards a more holistic approach to addressing racism and xenophobia and delivered on actions set out in 2020.

### 4.2.1. EU policy developments: laying the groundwork for delivering on the EU's anti-racism commitments

Following the adoption of the EU Anti-racism Action Plan in 2020,<sup>64</sup> in 2021, the European Commission held the first Anti-Racism Summit and appointed a coordinator for anti-racism.<sup>65</sup> Moreover, the Commission adopted common guiding principles for national action plans against racism.<sup>66</sup> These principles aim to support and guide Member States' efforts in establishing national policy frameworks on combating racism (see Section 4.3.1 for information on national developments).

Furthermore, in 2021, the EU adopted its first ever Strategy on Combating Antisemitism and Fostering Jewish Life. The strategy sets out a series of concrete measures centred around three pillars: preventing all forms of antisemitism; protecting and fostering Jewish life; and promoting research, education and Holocaust remembrance.<sup>67</sup>

Another notable development at EU level was the Commission's Communication<sup>68</sup> inviting the Council to extend the list of areas of crime listed in Article 83(1) of the Treaty on the Functioning of the European Union to include hate speech and hate crime as EU crimes. The Council has to adopt a decision unanimously, with the European Parliament's consent. Then the co-legislators will have the legal basis for adopting "minimum rules on the definition of criminal offences and sanctions for hate speech and hate crime" at EU level, going beyond racist and xenophobic hate speech and hate crime,<sup>69</sup> and enabling "an effective and comprehensive criminal law approach to these phenomena".<sup>70</sup>

### 4.2.2. Racial Equality Directive

Twenty-one years after the adoption of the Racial Equality Directive,<sup>71</sup> Member States still need to step up their efforts to enforce its provisions properly, reports by the European Commission and international monitoring bodies maintain.

The European Commission found little progress in the fight against discrimination since its last evaluation in 2014. It stressed that people of ethnic or migrant backgrounds continue to experience high rates of discrimination in the EU.<sup>72</sup> It raised concerns about continued under-reporting of ethnic discrimination and called for better data to inform the implementation and evaluation of equality legislation.

Infringement proceedings concerning discrimination against Roma children in education in **Czechia**,<sup>73</sup> **Hungary**<sup>74</sup> and **Slovakia**<sup>75</sup> are ongoing.

The Committee on the Elimination of Racial Discrimination expressed concerns about gaps in national legal provisions and the implementation of anti-discrimination legislation in **Belgium** and in the **Netherlands**.<sup>76</sup> It called

### FRA ACTIVITY

## FRA opinion on the implementation of the equality directives

FRA's opinion presents evidence of discrimination on the grounds and in the areas of life that the racial and employment equality directives cover. It shows that the prevalence of discrimination on the grounds of racial or ethnic origin remains consistently high, both over time and across different population groups in the Member States.

See FRA (2021), *Equality in the EU 20 years on from the initial implementation of the equality directives*, Luxembourg, Publications Office of the European Union (Publications Office).





on **Belgian** authorities to amend anti-discrimination legislation, declaring organisations that incite racial discrimination illegal.<sup>77</sup>

**Denmark** adopted legislation to reduce the share of people of 'non-Western' origin in all social housing to less than 30 % within 10 years.<sup>78</sup> There were three pending court cases in 2021 on the impact of the social housing legislation, claiming that it is discriminatory.<sup>79</sup>

#### **4.2.3. Framework Decision on combating Racism and Xenophobia**

The Council Framework Decision on combating Racism and Xenophobia defines a common criminal law approach to racist and xenophobic hate speech and hate crimes.<sup>80</sup> However, 13 years after its adoption, almost half of EU Member States have not yet fully and correctly incorporated its provisions into national law.

In 2021, the European Commission initiated infringement procedures against 11 Member States, **Belgium, Bulgaria, Finland, Germany, Greece, Hungary, Lithuania, Luxembourg, the Netherlands, Poland** and **Sweden**, calling on them to fully and correctly transpose the provisions of the framework decision.<sup>81</sup> Infringement proceedings against **Estonia** and **Romania** initiated in 2020 remained open in 2021.<sup>82</sup>

The **Belgian, Bulgarian** and **Hungarian** legal frameworks do not ensure that racist and xenophobic motivations are considered an aggravating factor in all crimes, the European Commission noted. **Luxembourg** does not ensure that such motivation can be considered by the courts when deciding on the penalties. In **Finland**, criminal offences with racist or xenophobic motivations can only be investigated and prosecuted if the victim makes an allegation or charge.

The European Commission noted that **Bulgaria, Finland, Germany, Hungary, Lithuania, the Netherlands, Poland, and Sweden** have failed to correctly transpose the criminalisation of specific forms of hate speech that incite violence or hatred. It namely noted that those Member States have failed to

criminalise the public condoning, denial or gross trivialisation of international crimes and the Holocaust. In particular, it noted that **Lithuania** criminalises the conduct of condoning, denial, and gross trivialisation of international crimes and the Holocaust only when public order is disrupted and that the Lithuanian legal framework criminalises those conducts with regard to the Holocaust only when perpetrated in the territory of Lithuania or against Lithuanian citizens. For **Poland** it noted that the legal system restricts the criminalisation of the denial and condoning of international crimes and the Holocaust only to cases where such crimes were committed against Polish citizens. The Commission found that the **Hungarian** legal framework has failed to criminalise the public condoning, denial or gross trivialisation of international crimes, while the **German** legal system has failed to criminalise the public denial or gross trivialisation of these crimes.<sup>83</sup>

As a follow up to the infringement proceedings initiated by the European Commission, there were developments in a number of Member States in strengthening their national legal frameworks addressing hate crime and hate speech.

The government of **Lithuania** introduced amendments to the Criminal Code to criminalise hate crime and hate speech on the grounds of ethnic origin and colour, among others.<sup>84</sup> The Seimas of the Republic of Lithuania has to approve them.

The **Dutch** House of Representatives initiated a draft bill introducing a general penalty enhancement provision in the Criminal Code, increasing penalties by one third for criminal offences with a discriminatory motive on various grounds, including race and religion.<sup>85</sup> **Denmark** amended its criminal code to protect minorities who have been exposed partly or wholly to crimes incited by hatred.<sup>86</sup> In **Ireland**, the Department of Justice published the General Scheme of the Hate Crime Bill 2021.<sup>87</sup> The Irish equality body emphasised that enacting the bill be a priority.<sup>88</sup>

Beyond the provisions of the framework decision, new laws coming into force in **Austria**<sup>89</sup> and **Germany** addressed online hate speech.<sup>90</sup> **France** adopted a law that requires online platforms to inform judicial and administrative authorities of actions to address illegal hate speech.<sup>91</sup> **Luxembourg** adopted legislation that introduced the explicit prohibition of incitement to violence, hatred and terrorism in the audiovisual media.<sup>92</sup> Member States also reported challenges and issues of proportionality in combating hate speech online while balancing risks to fundamental rights and freedoms, such as freedom of expression. For more information see Chapter 7.

#### 4.2.4. Courts address hate speech and hate crime

In 2021, several decisions of the European Court of Human Rights (ECtHR) and domestic courts reinforced the fight against hate speech and hate crime. Courts reasserted the importance of setting limits on freedom of expression to punish hate speech and incitement to hatred. Notably, in a number of Member States, courts convicted political and public figures of using racist hate speech. In 2021, there were also cases regarding hate crimes.

In *Budinova and Chaprazov v. Bulgaria*<sup>93</sup> and *Behar and Gutman v. Bulgaria*<sup>94</sup> the ECtHR found violations of Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination). In the first case, the defendant – the leader of a right-wing party – referred to Roma as “ruffians, rapists and killers” in his TV show. In the second case, the same politician used hate speech against Jews in his book.

## Fight against extremism

In France, a presidential decree ordered the dissolution of an association, concluding that it promoted an ideology inciting hatred and violence against Muslims.\* In March 2021 the German Federal Office for the Protection of the Constitution classified the party Alternative for Germany as a "case of suspicion" of right-wing extremism.\*\* The party filed a complaint against this classification with the Administrative Court of Cologne.

\* *France, Decree of 3 March 2021 on dissolving an association, 4 March 2021.*

\*\* *Germany, Administrative Court of Cologne (Verwaltungsgericht Köln), Verwaltungsgericht Köln untersagt Verfassungsschutz per Hängebeschluss vorerst Einstufung der AfD als „Verdachtsfall“, press release, 5 March 2021; Germany, Administrative Court Cologne (Verwaltungsgericht Köln), Verwaltungsgericht Köln wird vor der Bundestagswahl nicht über Eilanträge der AfD gegen den Verfassungsschutz entscheiden, press release, 8 July 2021.*

Domestic courts also dealt with hate speech cases. The case against a **Dutch** party representative reported in last year's fundamental rights report came before the Supreme Court.<sup>95</sup> Stressing that politicians have a special responsibility to avoid statements insulting racial or ethnic groups, the Supreme Court clarified that hate speech directed against a group owing to its race is illegal under the Dutch Criminal Code.

In **Portugal**, during a public electoral debate a politician referred to a black person as a "bandit", stating that he would never be the president of "drug traffickers".<sup>96</sup> The court concluded that the right to the moral and physical integrity of people, among other rights, limits the right of freedom of expression.

Prosecuting hate speech cases can be challenging. In **Denmark** three defendants were prosecuted for hate speech, as they distributed spray cans labelled "asylum spray".<sup>97</sup> Although the sprayed comments were deemed degrading, in 2021 the Supreme Court found that non-Western migrants and asylum seekers could not be defined as a group based

on a certain race, colour, religion, national or ethnic origin, and thus the case could not be charged as hate speech.

Courts reached important decisions on hate crime in 2021. In **Italy**,<sup>98</sup> the individual responsible for shooting six migrants in 2018 was sentenced to 12 years in prison. The aggravating circumstance of racial hatred was confirmed, and the victims and civil parties were compensated.

In **Belgium**,<sup>99</sup> members of a far-right group violently assaulted a Polish man. While the accused denied racial motivation and the case was appealed, the Court of Appeal upheld the decision with the aggravating circumstance of a hate motive on the basis of nationality.

The Attorney General in **Cyprus**<sup>100</sup> appealed against a 2019 case that had failed to recognise a crime against a Russian resident as racially motivated. The Supreme Court acknowledged the hate crime aggravating factor and increased the sanctions. That became the first ever decision to incorporate the framework decision.

## 4.3. MEMBER STATES' EFFORTS ON NATIONAL STRATEGIES, ADDRESSING DATA GAPS AND ENCOURAGING REPORTING

### 4.3.1. National action plans and strategies

Following the EU Anti-racism Action Plan's call for action at national level,<sup>101</sup> in 2021 **Malta**<sup>102</sup> and **Portugal**<sup>103</sup> adopted anti-racism action plans for the first time. In addition, **Finland** adopted its first national anti-racism action plan since 2001.<sup>104</sup> (see Table 4.1). All reported applying a participatory approach during the design phase. For instance, the **Finnish** Ministry of Justice, in preparation for the action plan, consulted regional advisory boards on ethnic relations and Roma affairs and the Sámi Parliament, and held hearings with civil society organisations (CSOs), students and academia.<sup>105</sup>

The above plans also set out national monitoring frameworks. For example, in **Malta**, an interministerial committee and an anti-racism platform will monitor the implementation of the strategy. In **Portugal**, the General Secretariat of the Presidency of the Council of Ministers acts as a coordinating entity that a network of focal points supports.

National anti-racism action plans are in development in **Belgium** and **Ireland**.<sup>106</sup> In **France**, the National Plan Against Racism and Anti-Semitism expired in 2020 and a new action plan is in development.<sup>107</sup>

Some EU countries, such as **Croatia**<sup>108</sup> and **Poland**,<sup>109</sup> are currently designing broader non-discrimination policies, which are expected to include measures to combat racism.

Reflecting different national contexts and country specificities, the scope and target groups of anti-racist policies differ. For example, in 2021, **Austria**,<sup>110</sup> **Estonia**<sup>111</sup> and **Romania**<sup>112</sup> adopted antisemitism strategies. Also in 2021, the new **Czech** Strategy for the Equality, Inclusion and Participation of Roma 2021–2030 included measures on antigypsyism as one of its core objectives for the first time<sup>113</sup> (see Chapter 5).

In **Czechia**<sup>114</sup> and **Slovakia**,<sup>115</sup> racism is addressed in national strategies on combating extremism. In **Spain**, a dedicated instrument for combating hate crime is in force.<sup>116</sup>

Some countries reported that they were in the process of developing a strategy or action plan in 2020, but have yet to complete the process (see Table 4.1). A number of countries' national action plans and strategies expired in 2020.<sup>117</sup>

### FRA ACTIVITY

## FRA's annual overview of antisemitic incidents recorded in the EU

The first ever EU Strategy on Combating Antisemitism and Fostering Jewish Life was adopted in 2021. It encourages Member States to develop national strategies on combating antisemitism, or include measures in their national action plans to combat racism.

FRA's annual overview of antisemitic incidents recorded in the EU\* highlights that by November 2021 13 EU Member States had established national strategies or action plans against antisemitism and a further six countries were in the process of developing similar instruments.

\* FRA (2021), **Antisemitism – Overview of antisemitic incidents recorded in the European Union 2010–2020**, Luxembourg, Publications Office, pp. 82–89.



**TABLE 4.1: EU MEMBER STATES' OR CANDIDATE COUNTRIES' ACTION PLANS AND STRATEGIES AGAINST RACISM, XENOPHOBIA AND ETHNIC DISCRIMINATION, 2021**

Country code	Period covered	Name of the strategy or action plan in English
AT	2018 onwards	<b>The Austrian strategy for the prevention and countering of violent extremism and de-radicalisation</b>
	In development	National action plan to combat racism and discrimination
BE	In development	<b>National action plan against racism</b>
CZ	2021–2026	<b>Concept on the fight against extremism and prejudicial hatred</b>
DE	2016 onwards	<b>Federal government strategy to prevent extremism and promote democracy</b>
	2017 onwards	<b>National action plan to fight racism</b>
EL	2020–2023	<b>National action plan against racism and intolerance</b>
	2019–2021	<b>National action plan on integration</b>
ES	2011 onwards	<b>National comprehensive strategy against racism, racial discrimination, xenophobia and related intolerance</b>
	2019–2021	<b>Action plan to combat hate crimes</b>
	2021–2027	Strategic Framework for Citizenship and Inclusion against Xenophobia and Racism (2021–2027)
FI	2021–2023	<b>An equal Finland: Government action plan for combating racism and promoting good relations between population groups</b>
	2017–2022	<b>National plan for combating discrimination</b>
HR	2022–2027	National plan for protection and promotion of human rights and combating discrimination 2022–2027
	2022–2024	Anti-discrimination action plan 2022–2024
HU	2021–2030	<b>National Social Inclusion Strategy 2030</b>
IE	2019–2021	<b>Diversity &amp; integration strategy 2019–2021</b>
	In development	<b>Action Plan Against Racism for Ireland</b>
IT	2020–2021	<b>National integration plan for persons entitled to international protection</b>
LT	2021–2023	<b>Action plan for promotion of non-discrimination</b>
MK	In development	Action plan for implementation of ECRI 2016 recommendations for North Macedonia
MT	2021–2023	<b>Anti-Racism Strategy 2021–2023</b>
NL	2016 onwards	<b>National anti-discrimination action programme/Annual follow-up reports on the basis of a cabinet-wide approach to discrimination and racism</b>
	2018–2021	<b>Action plan for labour market discrimination</b>
PL	In development	National equality plan for 2021–2030
PT	2021–2025	<b>National action plan against racism and discrimination 2021–2025 – Portugal against racism</b>
RO	In development	National strategy on preventing and combating antisemitism, xenophobia, radicalisation and incitement to hate speech
RS	In development	Strategy against discrimination
SE	2016 onwards	<b>National plan to combat racism, similar forms of hostility and hate crime</b>
SI	2019–2023	<b>Resolution on the national programme for the prevention and suppression of crime 2019–2023</b>
SK	2020–2024	<b>Strategy on combating extremism for years 2020–2024</b>

Note: Information based on input from Franet and checked by FRA's national liaison officers (December 2021).

Source: FRA (2021)



Member States also reported other efforts in their fight against racism and related intolerance. For example, the **Netherlands** appointed for the first time a national coordinator against discrimination and racism<sup>118</sup> and a national coordinator on antisemitism.<sup>119</sup> **Sweden** established the Sámi Truth and Reconciliation Commission to examine public policies against the indigenous Sámi people<sup>120</sup> and their consequences.<sup>121</sup>

#### 4.3.2. Efforts towards addressing data gaps

Reliable equality data are a precondition for evidence-based policymaking. Developments in 2021 show efforts towards mainstreaming data on racial or ethnic origin into national data collection activities across the EU, but also reveal remaining gaps.

Several Member States developed central points of access to equality data, including data on racism. For instance, in **Belgium**, a data hub provides a centralised platform for data on racism and experiences of racial discrimination,<sup>122</sup> among other things. The **German** Centre for Integration and Migration Research launched a national discrimination and racism monitor.<sup>123</sup>

In 2021, there were a number of developments in collecting data on racial and ethnic origin in national population censuses. The statistical office in **Belgium** announced that it would start publishing statistics on the racial and ethnic diversity of the population.<sup>124</sup> In **Malta**, the 2021 national census included questions on racial origin and religion for the first time.<sup>125</sup>

Several Member States launched surveys collecting data on experiences of racism and bias-motivated crimes. The **Austrian** Ministry of the Interior and the Institute for the Sociology of Law and Criminology carried out a hate crime victimisation survey on unreported cases.<sup>126</sup> In **Portugal**, the national statistical office introduced a pilot survey focusing on discrimination experiences,<sup>127</sup> after refusing to include questions on ethnic or racial origin in the 2021 census.<sup>128</sup> **Luxembourg** launched a national survey on racism, opinions on immigration and perceptions of ethnic and racial discrimination.<sup>129</sup> **Spain** commissioned a survey on the experiences of “African and Afro-descendant people”.<sup>130</sup> In the **Netherlands**, the Second Chamber of the States General requested a large-scale investigation into Asian discrimination in the Netherlands.<sup>131</sup>

Despite this array of efforts to fill data gaps, the lack of comprehensive, disaggregated data remains a challenge across the EU. For example, **Ireland’s** Independent Anti-Racism Committee highlighted the importance of “ethnic equality monitoring across all public services [...] for successful implementation of the [National Action Plan against Racism]”.<sup>132</sup> In **France**, the Defender of Rights recommended the establishment of an observatory of discrimination.<sup>133</sup> The **Greek** National Human Rights Commission reiterated its concern about the persisting absence of data disaggregated by race and ethnicity.<sup>134</sup>

#### 4.3.3. Encouraging hate crime reporting

Evidence that FRA collected, and other research, show a persistently high level of under-reporting both of experiences of discrimination and of bias-motivated crime. Under-reporting undermines the victims’ right to support and protection and constitutes a failure to ensure access to justice for all on an equal footing. It also hinders national authorities from investigating and punishing hate crime.<sup>135</sup>

Across the EU, national authorities continued efforts to create enabling structures and processes for more effective hate crime reporting. In 2021, such measures included outreach to groups at risk of hate crime victimisation, capacity building in law enforcement and steps towards enhanced cooperation.

#### FRA ACTIVITY

### EU practical guidance on improving the collection of data disaggregated by racial or ethnic origin

To improve the availability of equality data disaggregated by racial or ethnic origin, the EU Subgroup on Equality Data, which FRA coordinates, developed practical guidance on producing comprehensive, reliable, comparable and regular data at national level. The guidance provides instructions for a more standardised approach to collecting and using equality data.

For more information, see European Commission (2021), **Guidance note on the collection and use of equality data based on racial or ethnic origin**, Luxembourg, Publications Office.

## FRA ACTIVITY

# Key guiding principles on encouraging the reporting of hate crime

FRA's 2021 report on the role of law enforcement in encouraging hate crime reporting provided the foundation for the development of the key guiding principles on encouraging the reporting of hate crime, which the EU's High Level Group on combating racism, xenophobia and other forms of intolerance adopted. This is the fourth set of key guiding principles the group has adopted, complementing principles on (i) improving the recording of hate crime; (ii) ensuring justice, protection and support for victims; and (iii) hate crime training.

For more information, see EU High Level Group on combating racism, xenophobia and other forms of intolerance (2021), *Key guiding principles on encouraging reporting of hate crime*, Luxembourg, Publications Office; FRA (2021), *Encouraging hate crime reporting – The role of law enforcement and other authorities*, Luxembourg, Publications Office.

## Outreach to groups at risk of hate crime victimisation and awareness-raising campaigns

A number of Member States developed material to reach out to groups at risk of hate crime victimisation and raise awareness of their rights and available support. **Austria**<sup>136</sup> and **Greece**<sup>137</sup> published a factsheet and a guide, respectively, on hate crime legislation and available support in different languages.

**Belgium**<sup>138</sup> and **Finland**<sup>139</sup> implemented online and media awareness-raising campaigns. In **Portugal**<sup>140</sup> the parliament adopted a motion calling on the government to develop a national anti-racism campaign. In **Luxembourg**, the parliament requested more efforts to fight hate speech on social media.<sup>141</sup> In **Cyprus**, the Commissioner for Administration and the Protection of Human Rights launched an online campaign regarding hate speech and freedom of expression.<sup>142</sup>

CSOs in **Slovakia** published videos raising awareness of rights and providing information about the available support for migrants.<sup>143</sup> The **Dutch** organisation 'Asian Raisins' conducted self-empowering campaigns and created a platform for reporting incidents of anti-Asian racism.<sup>144</sup>

## Enhancing specialisation in the police

Specialised police units and trained hate crime officers can enhance the effectiveness of efforts to combat hate crime. In **Spain**, in addition to the central hate crime unit,<sup>145</sup> specialisation on hate crime is expanded also at regional and local level.<sup>146</sup> In 2021, **Romania** set up a specialized unit for the investigation of hate crimes, within the national police (currently composed of three police officers). At the territorial level, the Romanian Police appointed a total of 48 specialised police officers tasked with the criminal investigation of hate crime.<sup>147</sup>



Training activities on fighting hate crime were reported in, among others, **Finland**,<sup>148</sup> **Greece**<sup>149</sup> and **Lithuania**.<sup>150</sup>

#### *Providing guidance*

Several Member States reported developing guidance and building institutional capacity in law enforcement by translating legal obligations into practical steps. In **Croatia**, a new protocol on the procedure for hate crime cases sets out obligations regarding improved recording and monitoring of hate crime.<sup>151</sup> **Spain** adopted guidelines on improving the prosecution of hate crimes, a guide on strengthening the protection of victims of disability hate crimes<sup>152</sup> and a protocol for combating illegal hate speech online.<sup>153</sup>

#### *Institutionalising cooperation*

Several countries took steps towards creating a framework for delivery on commitments to combat racism and hate crime by creating dedicated working groups. In **Latvia**, the Ministry of the Interior established a working group tasked with assessing obstacles in the identification and investigation of hate crimes.<sup>154</sup> The working group consists of representatives of the office of the minister, state police, State Police College, Information Centre of the Ministry of the Interior and State Security Service.

In **Portugal**, a newly created working group for the prevention and combating of racism and discrimination is developing recommendations for public policies on combating racism.<sup>155</sup> Furthermore, the **Slovenian** State Prosecutor-General ordered the transformation of the working group on hate speech into a working group on hate crime, extending its mandate to all crimes committed with a bias motive.<sup>156</sup> Lastly, **Croatia**<sup>157</sup> and **Spain**<sup>158</sup> created working groups to address antigypsyism. **Estonia** set up a working group on antisemitism.<sup>159</sup>

## FRA opinions

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The Framework Decision on Racism and Xenophobia (2008/913/JHA) sets out a common criminal law approach for forms of racism and xenophobia that amount to hate speech and hate crime. In 2021, the European Commission initiated infringement procedures against 11 Member States that had not fully and correctly incorporated the framework decision into national law. The European Court of Human Rights (ECtHR) and national supreme courts set limits on relying on freedom of speech to justify hate speech and incitement to hatred.

Racism continued to pose serious challenges across the EU in 2021. Racist hate crime and hate speech incidents persisted, as official and unofficial reports show. Moreover, international and national human rights bodies raised concerns during the pandemic about the growing rate of hate speech online, and often by the media or politicians, targeting migrants and ethnic minorities.

Article 21 of the EU Charter of Fundamental Rights prohibits any discrimination on the grounds of ethnic origin or race. Similarly, the Racial Equality Directive (2000/43/EC) prohibits any discrimination on grounds of ethnic or racial origin in access to education; employment; services, including housing; and social protection, including healthcare.

Twenty-one years after the adoption of the Racial Equality Directive, a number of Member States still do not implement the directive's provisions fully, as reports of the European Commission and of international human rights monitoring bodies show.

The Commission continued infringement procedures against three Member States that discriminated against Roma children in education. In 2021, ethnic minorities, including migrants, continued to experience discrimination and institutional racism across different areas of life, survey and discrimination testing findings reveal. Discriminatory profiling based on ethnicity persists in the EU, as monitoring bodies' reports attest.



### FRA OPINION 4.1

EU Member States should fully and correctly transpose and apply the provisions of the Council Framework Decision on combating Racism and Xenophobia. This includes Member States taking measures to ensure that a racist or xenophobic motive is considered an aggravating circumstance, or, alternatively, the courts taking such a motive into consideration in determining the penalties.



### FRA OPINION 4.2

EU Member States should significantly improve the effectiveness of their measures and institutional arrangements for applying fully the provisions of the Racial Equality Directive, in particular as regards the effective, proportionate and dissuasive sanctions in case of breaches of the obligations as required by the Racial Equality Directive. This can contribute to reducing the barriers ethnic minorities and migrants face when they try to access education, employment, goods and services – including housing – and social protection.



### FRA OPINION 4.3

EU Member States are encouraged to develop dedicated national action plans or strategies to fight racism, racial discrimination, antisemitism, xenophobia and related intolerance. National efforts should be informed and guided by the common guiding principles for national action plans against racism and guarantee participation and cooperation with relevant partners and CSOs. Member States should ensure that, when developing, implementing and monitoring national action plans against racism, all actions are informed by and based on reliable equality data.

In 2021, the EU started laying the groundwork for delivering on commitments made in the EU's first anti-racism action plan. Notably, the EU High Level Group on combating racism, xenophobia and other forms of intolerance adopted common guiding principles for national action plans against racism.

National developments underpin wider EU efforts. Some Member States adopted national anti-racism action plans for the first time in 2021. Reflecting different national contexts, others included anti-racism measures in broader non-discrimination policies, or developed strategies addressing specific forms and manifestations of racism, such as strategies against antisemitism.

Despite some positive developments addressing data gaps at national level, overall there is a lack of data on experiences of racism and discrimination based on racial or ethnic origin across the EU. A paucity of reliable and comprehensive data hinders the effective design, implementation and monitoring of anti-racism action plans and prevents the EU and Member States from effectively monitoring the state of equality.



### FRA OPINION 4.4

EU Member States are invited to apply the key guiding principles on encouraging reporting, which can also serve as an evaluative framework for identifying national actions towards designing and implementing a victim-centred approach to reporting hate crime. Member States should continue their efforts in creating structures that facilitate reporting, such as setting up third-party reporting services as well as building the capacity of law enforcement officials to identify and record potential hate crimes. They should also enhance cooperation with CSOs and victim support organisations and engage in tailored outreach measures to reach those at risk of hate crime victimisation.

Findings from national and FRA data continuously show significant levels of under-reporting of experiences of discrimination and bias-motivated violence. Under-reporting undermines victims' rights to find support and protection, and results in a failure to ensure access to justice for all on an equal footing. It compromises efforts of national authorities in investigating and punishing hate crime.

In 2021, the EU High Level Group on combating racism, xenophobia and other forms of intolerance adopted key guiding principles on encouraging the reporting of hate crime. The principles are victim centred and aim to provide a framework that can guide national efforts towards removing barriers to reporting, and putting in place enabling structures and processes that support the effective reporting of hate crimes. A number of Member States reported dedicated efforts towards effective reporting systems such as targeted outreach to groups at risk of hate crime victimisation; capacity building within law enforcement; and steps towards enhanced cooperation.



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# ROMA EQUALITY AND INCLUSION

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14

January

In *Vig v. Hungary*, European Court of Human Rights (ECtHR) finds a violation of Article 8 (right to private and family life) in the case of a Roma man who was stopped for an identity check and searched, because domestic law did not protect against arbitrary interference.

16

23

February

In *Budinova and Chaprazov v. Bulgaria*, ECtHR finds that anti-Roma statements by a politician in Bulgaria are a violation of Article 8 (right to private and family life) in conjunction with Article 14 (prohibition of discrimination).

European Commission against Racism and Intolerance (ECRI) publishes its conclusions on the implementation of the recommendations regarding Spain subject to interim follow-up.

18

19

24

March

ECRI publishes its 2020 annual report.

ECRI, FRA and Organization for Security and Co-operation in Europe Office for Democratic Institutions and Human Rights publish a joint statement on the occasion of the International Day for the Elimination of Racial Discrimination.

Council of Europe Commissioner for Human Rights published a memorandum in which she called on the Portuguese authorities to, among others, address more resolutely the increasing level of racism in the country. Noting with appreciation the steps taken to combat discrimination against Roma, the Commissioner recommends enhancing such efforts, especially to tackle antigypsyism, which remains pervasive in Portuguese society and present in the public discourse of some politicians.

European Committee of Social Rights publishes its findings 2020 on the follow-up to decisions in the collective complaints procedure with respect to Belgium, Bulgaria, Finland, France, Ireland, Italy, Greece and Portugal (several collective complaints relating to Roma rights).

3

18

May

United Nations Committee on the Elimination of Racial Discrimination publishes its findings in Belgium.

ECRI publishes conclusions on Croatia, Liechtenstein, Malta and Portugal.

## UN & CoE

June

24

ECtHR issues its judgment in *Memedov v. North Macedonia*, finding a violation of Article 14 (protection from discrimination) in conjunction with Article 3 (prohibition of torture) of the European Convention on Human Rights on account of the authorities' failure to investigate the applicant's allegations of racially motivated police brutality.

July

16

Council of Europe Commissioner for Human Rights publishes her letter addressed to the Senate of the Czech Republic expressing her support for the adoption of the *Proposal for a law for a one-off financial compensation for victims of unlawful sterilisation*, which provides an opportunity to allow victims, many of whom are of Roma origin, to experience a measure of justice and to move forward.

19

CoE Commissioner for Human Rights publishes her exchange of letters with the Prime Minister and the Justice Minister of the Slovak Republic, concerning the need to set up a mechanism to ensure prompt and effective access to reparations for victims of forced or coercive sterilisation, many of whom are of Roma origin.

November

16

United Nations Committee on the Elimination of Racial Discrimination publishes its concluding observations on the combined 22nd to 24th periodic reports of the Netherlands.

December

8

ECRI adopts its opinion on the concept of 'racialisation'.

17

The European Social Charter Secretariat registered a new collective complaint (Federation of National Organizations Working with the Homeless (FEANTSA) v. Belgium No. 203/2021) concerning Belgium on the difficult housing situation of Roma, Travellers and migrant workers' families.



# EU

5

European Committee of the Regions publishes its opinion (CDR 5625/2020) on the EU Roma strategic framework for equality, inclusion and participation, calling for future legislation to ensure local political participation of Roma.

18

European Commission opens infringement proceedings against Belgium, Bulgaria, Finland, Poland and Sweden, as their national laws do not fully or accurately incorporate EU rules on combating racism and xenophobia through criminal law.

19

EU Recovery and Resilience Facility enters into force until 2026 to finance reforms and investments in Member States to mitigate the consequences of the pandemic.

22

European Network of Equality Bodies holds a roundtable on the implementation of the EU Roma strategic framework for equality, inclusion and participation, focusing on the role of equality bodies.

February

4

European Commission publishes the European Pillar of Social Rights action plan with the target of reducing the number of people at risk of poverty or social exclusion by at least 15 million by 2030.

12

Council of the European Union adopts its recommendation on Roma equality, inclusion and participation.

19

- European Commission adopts its report on the application of Council Directive 2000/43/EC implementing the principle of equal treatment between people irrespective of racial or ethnic origin ('the Racial Equality Directive') and of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation ('the Employment Equality Directive'). It stresses that Roma are among the groups that discrimination most affects, an issue specific to the Racial Equality Directive.
- European Commission organises the first EU Anti-racism Summit at the occasion of the International Day for the Elimination of Racial Discrimination. This Summit, co-hosted by the Portuguese Presidency of the Council of the European Union and the ARDI Intergroup of the European Parliament addressed the implementation of the European Anti-Racism Action Plan at various levels with the involvement of EU Institutions, Member States, civil society and equality bodies.

24

European Commission launches the EU Strategy on the Rights of the Child 2021–2024, which aims to improve the socio-economic inclusion, health, education and protection of children.

March

9

European Commission opens infringement proceedings against Greece, Lithuania and the Netherlands as their national laws do not fully or accurately incorporate EU rules on combating racism and xenophobia through criminal law.

24

European Parliament and Council of the European Union adopt the Common Provisions Regulation for the 2021–2027 EU funding period, with a specific objective of the European Social Fund Plus being to promote the socio-economic integration of marginalised communities, such as Roma.

June

September

•

Deadline for EU Member States to submit their national Roma strategic frameworks (2021–2030) to the European Commission.

2

December

European Commission opens infringement proceedings against Germany, Hungary and Luxembourg as their national laws do not fully or accurately incorporate EU rules on combating racism and xenophobia through criminal law.

In 2021, the Council of the European Union adopted its recommendation on Roma equality, inclusion and participation. It calls on EU Member States to adopt national Roma strategic frameworks and to make every effort to achieve the objectives and targets of the new EU Roma strategic framework by 2030. The EU and Member States developed several initiatives to involve Roma and Travellers in preparing the strategies, and consulted relevant stakeholders, such as equality bodies and national human rights institutions.

The EU mainstreamed Roma inclusion in several policy and legislative files. However, most Member States have not mainstreamed Roma inclusion in their main national strategies and measures on major policy areas, such as employment, education, health and housing.

In 2021, the fundamental rights of Roma and Travellers are still not fully respected. Antigypsyism, discrimination, poverty and social exclusion, as well as hate crime and hate speech, continue to affect a disproportionate number of Roma and Travellers across the EU. Measures to tackle the coronavirus disease 2019 (Covid-19) pandemic compounded these problems.

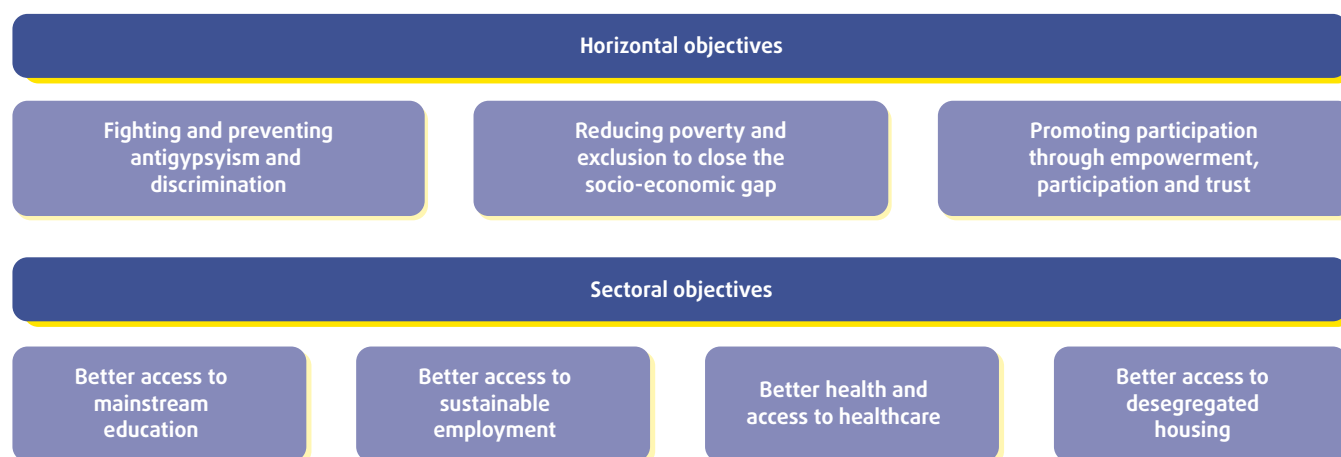


## 5.1. IMPLEMENTING THE NEW EU ROMA STRATEGIC FRAMEWORK

On 12 March 2021, the Council of the European Union adopted its recommendation on Roma equality, inclusion and participation. This called on Member States to adopt national Roma strategic frameworks and to communicate these to the European Commission, preferably by September 2021.<sup>1</sup> The recommendation follows the new EU Roma Strategic Framework for Equality, Inclusion and Participation until 2030, which the Commission launched in October 2020.<sup>2</sup>

Only 11 Member States, as well as **Albania**, **North Macedonia** and **Serbia**, submitted their revised national strategies before the end of 2021. **Finland**, **Portugal** and **Sweden** plan to align their ongoing strategies with the new EU strategic framework. **Austria** will update its national strategy in 2023.

**FIGURE 5.1: HORIZONTAL AND SECTORAL OBJECTIVES OF THE EU ROMA STRATEGIC FRAMEWORK FOR EQUALITY, INCLUSION AND PARTICIPATION**



### 5.1.1. Preparing national strategic frameworks

The Council recommendation<sup>3</sup> asks Member States to involve equality bodies, civil society organisations and local and regional stakeholders in the design, implementation, monitoring and review of national strategic frameworks to implement the EU Roma strategic framework. The EU Roma strategic framework also encourages Member States to make full and optimal use of the Union's funds. The new strategies should put a stronger focus on diversity and the specific situations of vulnerable groups among Roma.

National Roma platforms are an important tool to support the participation of Roma civil society and other relevant stakeholders. The European Commission supports these platforms financially. In 2020–2021, 11 Member States received EU grants to support national Roma platforms (see Table 5.1).<sup>4</sup>

Member States have increasingly involved Roma civil society organisations and other relevant stakeholders in preparing their national strategic frameworks. However, they consulted equality bodies and national human rights institutions less frequently in preparing the new strategic frameworks (see Table 5.1).

## National platforms to boost Roma participation

Learning from the previous decade of Roma policies and measures, the participation and involvement of Roma civil society was recognised as a key factor for the successful implementation of the EU Roma strategic framework.

The European Commission launched a new call for proposals that would provide funding for national Roma platforms in December 2021. It was restricted to the national Roma contact points for Roma equality, inclusion and participation. The dedicated EU grants aim to increase the representation of Roma people in national Roma platforms. They focus on youth and women and ask platforms to nominate a Roma representative who will ensure the link between the national and the European Roma platform.

**Source:** European Commission (2021), **Call for proposals limited/restricted to national Roma contact points for Roma equality, inclusion and participation**, CERV-2022-NRCP, 22 November 2021



**TABLE 5.1: COUNTRIES WITH NATIONAL ROMA PLATFORMS; INVOLVEMENT OF CIVIL SOCIETY ORGANISATIONS, EQUALITY BODIES AND NATIONAL HUMAN RIGHTS INSTITUTIONS IN REVISING THE NATIONAL STRATEGIC FRAMEWORK; AND EVALUATION OF PREVIOUS STRATEGIES**

Country code	EU-funded national Roma platform in 2020–2021	Bodies consulted		Evaluation of the previous strategy
		Civil society organisations	National human rights institutions/equality bodies	
AL	n/a	✓	✓	✓
AT	✓	✓	✓	Ongoing
BE	X	✓	✓	X
BG	✓	✓	X	✓
CY	X	X	X	X
CZ	X	✓	✓	Ongoing
DE	X	✓	✓	X
DK	X	X	X	X
EE	✓	✓	X	X
EL	✓	✓	✓	✓
ES	X	✓	✓	✓
FI	X	✓	X	Ongoing
FR	X	✓	✓	n/a
HR	X	✓	✓	✓
HU	✓	✓	✓ <sup>b</sup>	✓
IE	X	X	X	X
IT	X <sup>a</sup>	✓	✓	✓
LT	✓	✓	✓	X
LU	X	n/a	n/a	n/a
LV	✓	✓	✓	X
MK	n/a	✓	X	✓
MT	X	n/a	n/a	n/a
NL	X	✓	X	X
PL	X	✓	X	✓
PT	✓	✓	X	Ongoing
RO	✓	✓	✓	✓
RS	n/a	✓	✓	X
SE	X	✓	✓	✓
SI	✓	✓	✓	✓
SK	✓	✓	✓	✓

Sources: The European Commission provided information on the national platforms. It does not include nationally funded Roma representation structures. The Directorate-General for Justice and Consumers provided information on strategies (European Commission, 'Roma inclusion by EU country'), which Franet complemented.

▲ Notes:

Albania, North Macedonia and Serbia are not eligible for EU funding for national Roma platforms. Luxembourg has no specific strategy on Roma but includes them in its general integration policies. Malta does not have a Roma population.

n/a = not applicable.

a Italy has not taken up the EU grant but established a national Roma platform using national funds.

b In Hungary the Commissioner for Fundamental Rights serves as an NHRI. The Deputy Commissioner was consulted in its function as a permanent member of the Roma Coordination Council. Since 1 January 2021, the tasks of the national equality body also belong to the Commissioner for Fundamental Rights.





### 5.1.2. Mainstreaming Roma inclusion

The EU Roma strategic framework is embedded in the wider EU policy areas of equality, non-discrimination, social rights, racism and child rights.

The European Pillar of Social Rights action plan has set ambitious targets to reach by 2030. The number of people at risk of poverty or social exclusion should be reduced by at least 15 million by 2030. At least 5 million of them should be children.<sup>5</sup> More than 80 % of children living in Roma or Traveller families are at risk of poverty, in comparison with 20 % of the general population, FRA data show.<sup>6</sup>

The EU anti-racism action plan for 2020–2025 called upon all Member States to step up action to tackle racism, including antigypsyism, and develop national action plans targeting racism and racial discrimination by the end of 2021.<sup>7</sup>

The European Child Guarantee was adopted through a Council Recommendation on 14 June 2021. It aims to prevent and combat social exclusion by guaranteeing access of children to early childhood education and care, education, healthcare, nutrition and housing.<sup>8</sup> Member States must identify children in need and design integrated measures in their national action plans by March 2022. The action plans should have a specific focus on children with a migrant background or of minority ethnic origin, particularly Roma.

### 5.1.3. EU funds to support Roma inclusion

The EU Recovery and Resilience Facility was set up in 2021, making € 723.8 billion available. Its aim is to mitigate the economic and social impact of the Covid-19 pandemic. Most Member States' national recovery and resilience plans (16 out of 27) do not mention Roma. Among the 11 Member States that explicitly mention Roma, five refer to them as part of a broader category (e.g. "individuals from disadvantaged socio-economic backgrounds" followed by a list of groups including Roma) and only six countries – **Bulgaria, Czechia, Greece, Hungary, Romania** and **Slovakia** – explicitly refer to Roma as a vulnerable group.<sup>9</sup>

On 24 June 2021, the European Parliament and the Council of the European Union adopted the Common Provisions Regulation for the 2021–2027 funding period.<sup>10</sup> Article 15 of Chapter II introduces the term ‘enabling condition’. It defined this as “a prerequisite condition for the effective and efficient implementation of the specific objectives”.

The regulation establishes a range of horizontal and thematic conditions. The effective application and implementation of the Charter of Fundamental Rights is a horizontal condition. Measures on Roma inclusion are a thematic condition for the specific objective of the European Social Fund Plus: “Promoting the socio-economic integration of marginalised communities such as Roma people”.<sup>11</sup> Member States submitted their partnership agreements alongside their lists of planned programmes using the EU funds to the Commission in 2021 for its review.

#### 5.1.4. Monitoring and data collection

The Council of the European Union recommendation on Roma equality, inclusion and participation asks Member States to develop national targets in addition to those set by the EU Roma strategic framework, and to monitor the implementation of their national strategic framework.

## Roma Working Party

FRA continued to support Member States to more efficiently monitor Roma inclusion through the Roma Working Party, which brings together Member State representatives and the European Commission. The mandate of the Roma Working Party was extended by two years (2021–2022). It aims to support EU Member States to develop indicators and foster mutual learning on the reporting of measures, efforts and results related to reaching EU and/or national targets on Roma equality, inclusion and participation. Three Roma Working Party meetings took place in 2021.

In parallel, FRA started a dialogue with Roma civil society organisations through its Fundamental Rights Platform.

*Sources:* FRA (2021), ‘**Civil society organisations discuss monitoring Roma equality**’ and ‘**National Roma contact points to meet during Roma Working Party**’

Several countries have adopted the relevant portfolio of EU indicators<sup>12</sup> in their national strategies and/or amended it to use national indicators to monitor implementation. **Albania, Greece, North Macedonia and Slovakia** plan to use the full set of EU indicators. **Croatia, Hungary, Poland, Romania and Spain** plan to make partial use of the EU indicators in their national data collections.<sup>13</sup>

**TABLE 5.2: OBJECTIVES, HEADLINE INDICATORS AND TARGETS OF THE EU STRATEGIC FRAMEWORK FOR ROMA EQUALITY, INCLUSION AND PARTICIPATION**

Objective	Headline indicator <sup>a</sup>	Target
Fight and prevent antigypsyism and discrimination	1) Share of people who felt discriminated against because of being Roma in any of the areas covered in the survey in the past 12 months	Cut the proportion of Roma with discrimination experience (in the 12 months preceding the survey) by at least half, to 13 %
	2) Share of the general population who feel uncomfortable having Roma as their neighbours	Decrease the proportion of the general population who feel uncomfortable having Roma neighbours by at least one third, to 30 %
Reduce poverty and social exclusion	3) At-risk-of-poverty rate (below 60 % of median equivalised income after social transfers)	Cut the poverty gap between Roma and the general population by at least half, ensuring that the majority of Roma escape poverty
	3.1) Children aged < 18 years at risk of poverty	Cut the poverty gap between Roma and the general population by at least half, ensuring that the majority of Roma children escape poverty
	4) Share of people living in a household in severe material deprivation (cannot afford 4 out of 9 items, e.g. food, inviting friends, etc.)	
	4.1) Children aged < 18 years living in severe material deprivation	
Promote participation by means of empowerment and building cooperation and trust in public institutions	5) Share of people who felt discriminated against (in any area) in the past 12 months and reported the last incident of discrimination as due to being Roma	Double the proportion of Roma who file a report when they experience discrimination, to 30 %
	Capacitate and engage NGOs in EU-wide coordinated Roma civil society monitoring	Minimum number 90 NGOs
	Ensure participation of Roma NGOs as full members in national monitoring committees for all programmes addressing needs of Roma communities	
	6) Active citizenship and participation indicator	Encourage participation of Roma in political life (as voters/candidates) at local, regional, national and EU levels (in Member States with significant Roma population)
Increase effective equal access to quality inclusive mainstream education	7) Share of children aged 3 years to the age of starting compulsory primary education who attend early childhood education and care	Cut the gap between Roma and the general population in participation in early childhood education and care by at least half and have at least 70 % of Roma children in early childhood education
	8) Share of people aged 20–24 years who have completed at least upper secondary education	Reduce the gap between Roma and the general population completing at least upper secondary education by at least one third and ensure that the majority of Roma youth complete upper secondary education
	9) Share of children aged 6–15 years who attend schools where “all or most schoolmates are Roma” according to the respondents (selected countries only)	Work towards eliminating segregation by cutting the proportion of Roma children attending segregated primary schools (in Member States with significant Roma populations) by at least half, to 20 %
Increase effective equal access to quality and sustainable employment	10) Share of people aged 20–64 years who self-declared their main activity status as ‘paid work’ (including full time, part time, ad hoc jobs, self-employment and occasional work or work in the past four weeks)	Cut the employment gap by at least half and have at least 60 % of Roma in paid work
	11) Share of young people aged 15–29 years* whose current main activity is ‘neither in employment, education or training’ (NEET)	Cut the gap in the NEET rate by at least half and have less than 30 % of Roma in NEET
	12) Gender employment gap: difference in the paid work rate between women and men aged 20–64 years	Cut the gender employment gap for Roma by at least half and have at least 45 % of Roma women in paid work

Objective	Headline indicator <sup>a</sup>	Target
Improve Roma health and increase effective equal access to quality healthcare services	13) Difference in life expectancy at birth (general population versus Roma)	Cut the life expectancy gap by at least half, to five years
	14) Share of people who have restricted access to health and social services	
Increase effective equal access to adequate desegregated housing and essential services	15) Share of people living in housing deprivation (in an apartment that is too dark or has a leaking roof, damp walls or floors or does not have a bath/shower or indoor toilet)	Reduce the gap in housing deprivation by at least one third and have the majority of Roma not facing housing deprivation
	16) Share of people living in a household that does not have the minimum number of rooms according to Eurostat's definition of overcrowding	Cut the gap in overcrowding by at least half and have the majority of Roma no longer living in overcrowded households
	17) Share of people living in a household without tap water inside the dwelling (selected countries only)	Ensure that at least 95 % of Roma have access to tap water

Source: European Commission (2020), **EU Roma Strategic Framework for Equality, Inclusion and Participation for 2020–2030**, COM(2020) 620 final, Brussels, 7 October 2020

▲ Notes:

a Headline indicators are numbered when linked to the portfolio of indicators.

Member States such as **Bulgaria, Czechia, Finland, Hungary and Slovakia** increasingly collect data on Roma inclusion. However, many other EU countries continue to avoid collecting data disaggregated by ethnic origin. **Austria** launched an evaluation study of its previous strategy in 2021; it included a survey of Roma.<sup>14</sup>

Vast majority of EU Member States conducted their censuses in 2021. These typically take place every 10 years, to count and collect important data on population and housing stock.<sup>15</sup> Only a few countries include a question on ethnic origin to be able to disaggregate results.

## FRA ACTIVITY

### FRA Roma survey 2021 in 10 countries

In 2021, FRA conducted its regular Roma survey in 10 countries: **Croatia, Czechia, Greece, Hungary, Italy, North Macedonia, Portugal, Romania, Serbia and Spain**. The survey collected information from 8,461 respondents aged 16 years or older who self-identified as Roma. It provides data for headline and secondary indicators for monitoring progress within the EU Roma strategic framework. The first results will be available in autumn 2022.

FRA also provided support to national data collections on Roma in Bulgaria\*, Czechia\*\* and Slovakia\*\*\*.

Sources: FRA (2020), 'Roma Survey 2020'; \* National Statistical Institute, 'Project: Novel approaches to generating data on hard-to-reach populations at risk of violation of their rights'; \*\* Research Institute for Labour and Social Affairs, 'Creating a system for quantitative data collection to evaluate the situation of Roma in Czech society'; \*\*\* Office of the Plenipotentiary of the Government of the Slovak Republic for the Roma Communities (2021), 'Recent EU SILC\_MRK confirmed large gap in living conditions between Roma communities and majority population' ('Aj posledné zisťovanie EU SILC\_MRK potvrdilo značný rozdiel medzi životnými podmienkami obyvateľov rómskych komún a majority')

When collecting data on racial or ethnic origin, multiple identities and self-identification are core human rights principles. The EU Subgroup on Equality Data, which FRA coordinates, developed practical guidance on improving the collection of data disaggregated by racial or ethnic origin, including Roma and Travellers (see also Chapter 4 of this report).<sup>16</sup>

Until 2021, only **Hungary** included questions on self-identification of ethnicity in its census, allowing for multiple answers.<sup>17</sup> **Czechia** and **Slovakia** adopted this approach in 2021.<sup>18</sup>

In **Greece**, the Hellenic Statistical Authority introduced a separate individual questionnaire for those living in non-standard housing, including Roma settlements.<sup>19</sup> It also introduced a questionnaire<sup>20</sup> that records only the number of those living in non-standard housing, including Roma settlements.<sup>21</sup> This is a positive step that will provide additional data to inform the new national Roma integration strategy. However,

it provides data only on people living in segregated Roma settlements. In late 2021 the Greek National Roma Consultation Platform (NRCP) collected also information on non-segregated Roma through an online survey involving all municipalities in Greece. Collecting data on a broad range of Roma population is in line with the recommendations of the EU Subgroup on Equality Data.<sup>22</sup>

The results of the FRA Roma and Travellers Survey 2019 were presented in **France** on 7 July 2021. The French equality body (*Défenseur des droits*) coordinated this event in close cooperation with Traveller (*Gens du voyage*) communities and the French Interministerial Delegation for Housing and Access to Housing (*Délégation interministérielle à l'hébergement et à l'accès au logement*, DIHAL).<sup>23</sup> FRA developed a country brief together with the Travellers and the equality body.<sup>24</sup>

The Commission launched the EU-wide Roma Civil Monitoring 2021–2025<sup>25</sup> initiative to support the involvement of Roma civil society in the monitoring and evaluation of Roma equality and inclusion strategies. This selected consortium of Roma and pro-Roma civil society organisations launched a call for national coordinators of the Roma Civil Monitor 2021–2025 in 2021.<sup>26</sup>

## 5.2. CHALLENGES AND WAYS FORWARD IN THE MEMBER STATES

The Covid-19 pandemic posed particular challenges for implementing the EU Roma strategic framework also in 2021.<sup>27</sup> Most European countries tried to reduce the number of lockdowns and keep schools open in 2021. Nevertheless, many Roma and Travellers continue to face fundamental rights challenges across the seven objectives of the EU Roma strategic framework. The following sections are structured according to the three horizontal and four sectoral objectives of this framework (see Figure 5.1).

### 5.2.1. Fighting and preventing antigypsyism and discrimination

**Romania** was the first EU Member State to adopt a law on antigypsyism, on 4 January 2021.<sup>28</sup> In **Spain**, the Commission on Social Rights and Comprehensive Disability Policies approved the establishment of a subcommittee that will develop a state pact to tackle antigypsyism and support the inclusion of Roma people.<sup>29</sup> **Portugal** adopted its first national plan to combat racism and discrimination (2021–2025), which explicitly addresses Roma and is linked to the 2013–2022 national strategy for the integration of Roma communities.<sup>30</sup> In the **Netherlands**, national anti-discrimination policies explicitly include antigypsyism for the first time; they use the working definition of antigypsyism that the International Holocaust Remembrance Alliance provided in 2020.<sup>31</sup> The National Coordinator on Discrimination and Racism was appointed in 2021 and within its office one staff member dedicated to countering antigypsyism.<sup>32</sup>

In **Greece**, the 'ROM' initiative created the first Roma Human Rights Advocacy and Defence Observatory. It collects, processes and forwards complaints by Roma, to address the under-reporting of discrimination against Roma.<sup>33</sup>

In **Spain**, in a case concerning anti-Roma hate speech, the court held the accused responsible for publishing a series of online messages dehumanising Roma and calling for the extermination of the Roma community.<sup>34</sup>

In **Romania**, the National Council for Combating Discrimination issued a politician and former prime minister with a fine of RON 2,000 (about € 400) for discriminatory statements against Roma on television.<sup>35</sup>

## PROMISING PRACTICE

### Combating racism and antigypsyism in Germany

The government adopted the recommendations of two major reports in 2021 regarding antigypsyism. The report of the Cabinet Committee for the fight against racism and right-wing extremism includes a catalogue of measures, for instance establishing an information centre to record anti-Roma incidents. The report of the Independent Commission on Antigypsyism, set up in 2019, is a milestone in the systematic analysis of measures to combat antigypsyism. It sets six central priorities: creating the position of a national coordinator against antigypsyism; creating a permanent federal commission; official recognition of the National Socialist genocide against Sinti and Roma; a commission to investigate the injustices committed against Sinti and Roma; recognising Roma refugees as a group particularly in need of protection; and implementing and consolidating participation structures.

*Sources: National Discrimination and Racism Monitor website; German Federal Ministry of the Interior and Community (Bundesministerium des Innern, für Bau und Heimat) (2021), Report of the Independent Commission on Antigypsyism (Perspektivwechsel. Nachholende Gerechtigkeit. Partizipation. Bericht der Unabhängigen Kommission Antiziganismus), Berlin, Federal Ministry of the Interior and Community; and German Federal Government (Bundesregierung) (n.d.), Final report of the Cabinet Committee for the fight against racism and right-wing extremism (Abschlussbericht des Kabinettsausschusses zur Bekämpfung von Rechtsextremismus und Rassismus)*



In **Austria**, the human rights non-governmental organisation (NGO) SOS Mitmensch criticised the obstructions of a proceeding on a complaint it filed in 2020 against a local politician for a video containing hate speech against Roma and Sinti.<sup>36</sup>

In **Italy**, the Court of Cassation ruled against the town of Civitanova Marche, which tried to prevent a Roma family from settling there. The court argued that preventing the family from settling in the area amounted to discrimination because of their Roma origin.<sup>37</sup>

In **Italy**, four defendants were accused of having set fire to an informal Roma encampment in the outskirts of Turin in 2011. In March 2021, the Court of Cassation sentenced them to two to four years' imprisonment for racial hatred.<sup>38</sup>

#### *Multiple and intersectional discrimination*

The Council of the European Union recommendation on Roma equality, inclusion and participation asks Member States to step up their efforts to fight multiple and structural discrimination against Roma, particularly against

Roma women; young Roma; Roma children; lesbian, gay, bisexual, transgender and intersex Roma; elderly Roma; Roma with disabilities; stateless Roma; and Roma who are EU mobile citizens.

A recent report of the Council of Europe recognises that Roma and Traveller women and girls are among the most vulnerable groups facing intersectional challenges and multi-dimensional discrimination. It identifies key challenges and develops a model for a Roma and Traveller Women's Empowerment Roadmap.<sup>39</sup>

In **Czechia** there is no specific body to monitor intersectional discrimination, a recently published study about lesbian, gay, bisexual, transgender, intersex and queer Roma showed. It gave the example of the 2019 report of the Czech Ombudsman, which no longer applies the notion of multiple and intersectional discrimination.<sup>40</sup>

In **Spain**, the NGO Roma Secretariat Foundation supported a Roma widow's application to the European Court of Human Rights (ECtHR). The authorities did not recognise her right to a widow's pension, because her traditional marriage was not registered. The claimant argued that this is intersectional discrimination, because she was discriminated against not only because of her ethnic origin, but also because she is a woman.<sup>41</sup>

#### *Police stops and violence against Roma*

In its 2021 fundamental rights report, FRA called on EU Member States to adopt the necessary measures to prevent and eradicate discriminatory attitudes among police officers. Law enforcement authorities should issue specific, practical and ready-to-use guidance to tackle discriminatory ethnic profiling by police officers. Standard operating procedures and codes of conduct should include this guidance, and it should be systematically communicated to frontline officers.<sup>42</sup>





In 2021, FRA published an analysis of its Roma surveys (2016 and 2019) and its Fundamental Rights Survey (2019). Ethnic or racial profiling by the police against people perceived as being Roma or Travellers was widespread when the surveys took place, it indicates.<sup>43</sup> It also shows that the level of trust in the police was notably lower among those who believed that they were stopped due to ethnic profiling than among those who did not perceive the police stop as ethnic profiling.<sup>44</sup>

A high-profile case about police violence against Roma in 2021 concerned a 46-year-old Roma man in **Czechia**. He died on 19 June 2021, shortly after a police intervention in his home town of Teplice.<sup>45</sup> The Czech Deputy Public Defender of Rights launched an investigation. It found errors both in the police response during the incident and in the investigation that followed.<sup>46</sup>

On 23 October 2021, another serious incident took place: a 20-year-old Roma man was lethally shot in **Greece** during a police chase. This led to widespread protests by Roma and civil society organisations. After a rapid internal investigation, seven police officers were arrested and charged with very serious offences and major police reforms were announced. The case is still pending judicial investigation.<sup>47</sup> The Greek National Commission of Human Rights (GNCHR) closely monitors the specific situation of Roma people in Greece and highlights the importance of proper, initial and periodic training and retraining of law enforcement officers on human rights.<sup>48</sup>

The 2021 fundamental rights report contained information about a police raid in **Belgium** targeting two groups of Travellers living in unofficial sites in Charleroi. The raid made the Traveller families homeless. They were not offered any alternative housing, social aid or Covid-19 emergency support. On behalf of the Travellers, the European Roma Rights Centre filed a complaint with the European Committee of Social Rights, which was declared admissible on 29 June 2021.<sup>49</sup>

## PROMISING PRACTICE

### Police to enhance preventive work with Roma

As part of **Finland's** Strategy on Preventive Police Work 2019–2023, it published a document on collaboration between the police and the Roma population, in November 2021. Police training will use it as teaching material. The Roma community suggested it during a roundtable discussion that the Minister of the Interior led in 2020.

Source: Vanhanen, S. (2021), 'The police and Roma – Equality and cooperation questions' ('Poliisi ja romanit – yhdenvertaisuuden ja yhteistyön kysymyksiä'), *Police University of Applied Sciences Reviews*, No. 18.

**"Roma culture and history must be in our schools and our public debate [...] We must talk about the contribution of Roma to European culture."**

Ursula von der Leyen, President of the European Commission<sup>59</sup>

In **Finland**, the Non-Discrimination Ombudsman issued a statement concerning the Helsinki Police Department's prevention and information collection operation named KURI1. It was directed at Roma in 2013–2015 and partly directed at them in 2016 and 2017.<sup>50</sup> The National Police Board concluded that the practice did not amount to discrimination based on ethnic grounds.<sup>51</sup> The Non-Discrimination Ombudsman found that assessment to be deficient.<sup>52</sup>

The ECtHR issued its final judgment against **Hungary** in the case of a Roma man whom the police stopped for an identity check and searched. The court found a violation of Article 8 (respect for private life). The court was of the view that the domestic law did not provide adequate safeguards to offer the individual acceptable protection against arbitrary interference.<sup>53</sup>

In September 2020, the ECtHR ruled against **Slovakia** in a case of police violence against two Roma during a raid.<sup>54</sup> Six other victims of the raid had been charged with making false accusations against members of the police. After the ruling, courts in Slovakia stopped criminal proceedings against five of these victims; one is ongoing.<sup>55</sup> In June 2021, the Government of Slovakia publicly apologised for the police raid.<sup>56</sup>

#### 5.2.2. Reducing poverty and exclusion

Poverty can lead to discrimination, as a **Hungarian** case shows. The Supreme Court rendered a final and enforceable judgment in a strategic litigation case. It challenged the practice of removing children from their families and placing them in state child protection care, which often happens to Roma families living in poverty. The court accepted the argument that the removal of children from the family violated the right to family life, including denying the right to breastfeed a newborn baby.<sup>57</sup>

Also in **Hungary**, there has been a practice of removing children from families for financial reasons in Nógrád County. On 4 October 2021, Budapest Metropolitan Court found that it violated the right to equal treatment on grounds of socio-economic status, poverty and ethnicity. The majority of the children concerned were Roma. The court found the Ministry of Human Capacities liable and asked the ministry to collect anonymous data on the ethnicity of children in state care to allow the assessment of equal treatment.<sup>58</sup> The Ministry has appealed against the court judgment, the appeal proceedings are in progress.

#### 5.2.3. Promoting participation through empowerment, cooperation and trust

Data on the active participation of Roma in all areas of life are still scarce. Roma participation in civil society often relies on EU and international funding. One example is the EU-funded national Roma platforms (see Table 5.2). A recent report of the Council of Europe shows in a comparative perspective that Roma and Traveller women are confronted with intersectional challenges and multi-dimensional discrimination.

## FRA ACTIVITY

# FRA technical assistance to promote inclusion and to combat discrimination and poverty in Greece

FRA provides advice and expertise in a large-scale Roma inclusion programme in **Greece**. It uses EEA and Norway Grant funding and lasts until 2024. The programme consists of several subprojects, which complement the national strategy for Roma inclusion.

The main project set up a task force at national level and four more at regional

level to improve the coordination of Roma inclusion measures. These measures promote inclusion and fight poverty, discrimination and prejudice across different administrative levels, including municipal level, in several areas, including education, employment, housing, health and law enforcement. Staff recruited for the task forces include Roma, and particular efforts

are being made to ensure that the task forces actively engage with Roma communities in their daily work.

*Source: EEA Grants 2014–2021, ‘Roma inclusion and empowerment’*

In **Czechia**, an EEA and Norway Grant funded positions for Roma advisors in municipal offices, Roma platforms and councils to support Roma civil society to tackle inclusion-related issues in 2021.<sup>60</sup>

**Portugal** implemented educational activities promoting the active participation and empowerment of Roma women.<sup>61</sup> In September, the eighth Roma Political School took place. Its main objective was to raise awareness and stimulate the political participation of Roma people.<sup>62</sup>

A Roma cultural festival in **Croatia**<sup>63</sup> and educational materials on Roma people to be used in primary education in **Spain**<sup>64</sup> are other examples of efforts to increase Roma participation and empowerment. In **Austria**, the first student association of young Roma and Sinti, providing a social and political platform, was launched.<sup>65</sup>

### 5.2.4. Access to education

Fewer specific concerns or examples of measures related to the pandemic were reported in 2021 than in 2020. However, segregation in education and early school leaving continue to be major barriers to Roma inclusion and participation.

The European Commission continued infringement proceedings concerning discrimination against Roma children in education in **Czechia**,<sup>66</sup> **Hungary**<sup>67</sup> and **Slovakia**<sup>68</sup> as part of its close monitoring of the implementation of the Racial Equality Directive.

The Deputy Commissioner for the Rights of Nationalities Living in **Hungary** issued a resolution regarding the education of Roma children in Gyöngyöspata. The resolution states that addressing the continued segregation in school is the responsibility of the school administration,<sup>69</sup> and should also be addressed through general developments in social and educational policy.<sup>70</sup> As a result, segregated local school for only Roma fails to meet basic quality standards and violates the right of pupils to equal treatment.<sup>71</sup>

## PROMISING PRACTICE

# Neighbourhood stewards

In **Belgium**, ‘neighbourhood stewards’ are deployed in cities with a strong Roma presence, especially Ghent, Sint-Niklaas, Antwerp and Brussels. They form a bridge between the Roma population, the city administration and social services. The neighbourhood stewards work closely with a number of schools with a large Roma population. Individual cities provide an annual subsidy for this initiative.

*Sources: Flemish Government, ‘Neighbourhood stewards’ (‘Buurtstewards’) and ‘Project calls’ (‘Projectoproepen’)*





In 2021, several court decisions addressed the discrimination of Roma children in education.

The **Bulgarian** Supreme Administrative Court found a school principal guilty of discrimination for not enrolling Roma pupils.<sup>72</sup> In **Slovakia**, a first instance court ruled that it is illegal to educate Roma children in special classes for intellectually disabled children is illegal.<sup>73</sup> In **Portugal**, the Court of Appeal found that residential care, a measure applied to address school absenteeism, was disproportionate in the case of two Roma children. A measure of support for parents that promoted increased school involvement was considered more appropriate.<sup>74</sup>

The European Commission against Racism and Intolerance published its conclusions on the implementation of its 2018 recommendations. It called on **Spain** to undertake additional measures to avoid school segregation and early school leaving of Roma students. It found that no funding was allocated in this area and noted the lack of statistical data to assess the impact of government policies.<sup>75</sup>

National Roma strategies and programmes continued to have a strong focus on promoting access to education in 2021. In **Portugal**, two programmes were developed to provide university and upper secondary scholarships. In addition, a set of training, mentoring and monitoring measures for young scholarship holders and their families was developed.<sup>76</sup>

The University of Alcalá was the first university in **Spain** to teach a transversal course on Roma language and culture<sup>77</sup> and to launch a Roma library.<sup>78</sup> This was in close cooperation with the Institute of Gypsy Culture.

According to the Ministry of Culture **Estonia** tripled the funds allocated to the Roma mentoring service in 2021,<sup>79</sup> as Roma families started moving back to Estonia from the United Kingdom because of Brexit.<sup>80</sup> The **Netherlands** provided additional funding for each Roma or Sinti pupil in 2021. The scheme no longer explicitly mentions Traveller pupils, thanks to their significant educational progress.<sup>81</sup>

Progress was also reported in **Bulgaria**, where a survey showed that the share of Roma with tertiary education increased from 0.4 % in 2011 to 2.6 % in 2019.<sup>82</sup>

In **Italy**, the National Project for the Inclusion and Integration of Roma Children (2017–2020) was completed. This provided training for teachers on teaching methods, stereotypes and the culture and history of the Roma population.<sup>83</sup>



In **Slovakia**, the State Pedagogical Institute prepared educational materials and trained 45 employees in order to implement measures concerning the Romani language and culture in the school curriculum.<sup>84</sup>

The **Irish** Parliament passed the Traveller Culture and History in Education Bill 2018 on 1 July 2021. It can now proceed to its final stages of approval. It amends the Education Act 1988 to include Traveller culture and history as an obligatory part of the curriculum in primary and secondary schools. The bill is the first significant legislative initiative since the recognition of Travellers' ethnic minority status in 2017.<sup>85</sup>

In **Greece** the Law 4763/21-12-2020 (Government Gazette 254 A') "National system of vocational education, training and lifelong learning" reframing also Second Chance Schools mandate and operation, Article 69, paragraph 4 foresees that each second chance school may operate preparation classes for those interested to participate in the examinations so as to obtaining a primary school diploma.<sup>86</sup> This provision has particular importance for Roma early school leavers as a measure to reengage them in education.

#### 5.2.5. Access to employment

The number of Roma inclusion measures in employment is significantly smaller than in other areas. No new data regarding the impact of Covid-19 were reported in 2021.

In **Portugal**, an intercultural mediator's project supports the integration of immigrant and Roma communities in the labour market.<sup>87</sup> In **Poland**, vocational counselling of young Roma aims to improve their employment opportunities, empower them and close the gender gap.<sup>88</sup> A project in **North Macedonia** aims to formalise the working arrangements of Roma recycling collectors.<sup>89</sup>

#### 5.2.6. Health and access to healthcare

Disproportionate measures and restrictions affecting Roma communities were reported during the first wave of the pandemic.<sup>90</sup> Marginalised Roma and Travellers are among those whom Covid-19 measures most affect and are particularly vulnerable to the virus because of lack of access to sanitation and clean water.<sup>91</sup> Relevant evidence was published in **Bulgaria**,<sup>92</sup> **Hungary**<sup>93</sup> and **Slovakia**.<sup>94</sup>



The Public Defender of Rights in **Slovakia** had already challenged the quarantine of marginalised Roma settlements to prevent the spread of Covid-19 in 2020.<sup>95</sup> She argued that the measure was discriminatory lacks justification and clearly defined duration.<sup>96</sup> Despite this and warnings of the General Prosecutor, 45 Roma communities were again placed in quarantine between December 2020 and March 2021.<sup>97</sup>

Several national projects and civil society initiatives tried to improve the situation of Roma and Traveller communities during the pandemic and facilitate access to health services.

In **Hungary**, the Roma self-government and civil society launched a campaign to persuade and assist Roma and non-Roma living in the most disadvantaged locations to register for Covid-19 vaccination.<sup>98</sup>

In **Czechia**, educational materials were developed to increase awareness of health, diseases and accessible cures among Roma living in socially excluded localities.<sup>99</sup>

In **Austria**, the AmberMed facility offers cost-free and low-threshold accessible healthcare to people in vulnerable situations who do not have access to the mainstream healthcare system. It has gained the trust of Roma, who frequently use its services, including counselling in various languages and Covid-19 vaccinations.<sup>100</sup>

In **Bulgaria**, a maternal and child health improvement project has brought together 11 non-profit organisations for better coordination of awareness raising among communities about the importance of early childhood development.<sup>101</sup>

An EU-funded project in **Italy** – Promotion of Strategies and Instruments for the Equal Access to Healthcare of Roma People – provides training opportunities to professionals working for local healthcare services, contributing to the local implementation of the national Roma integration strategy.<sup>102</sup>

In **Slovakia**, the Ministry of Health, the Healthy Regions Initiative and the Rescue Health Service, in cooperation with the non-profit organisation Odysseus, launched a pilot project to improve vaccination rates among hard-to-reach groups, including also Roma communities in marginalised settings.<sup>103</sup> Similar activity was conducted also in **Greece**.

Recent reports point to the continuing prevalence of institutional racism and discrimination against Roma women in access to public health. In May 2021, the Public Defender of Rights in **Slovakia** published the results of a survey on women's rights during childbirth. They point to serious violations, including the segregation and ill-treatment of Roma women in maternity hospitals.<sup>104</sup>

In 2021, **Czechia** and **Slovakia** took responsibility for the unlawful sterilisation of Roma women in the past. The Slovak Government apologised.<sup>105</sup> The Czech Parliament passed a bill allowing for the financial compensation of women who were unlawfully sterilised from 1 July 1966 to 31 March 2012 in a healthcare facility against their will or without proper consent.<sup>106</sup>

### 5.2.7. Access to housing

Lack of access to adequate and affordable housing, and evictions, affecting many Roma and Travellers, persisted in 2021. In **France**, the consortium of NGOs - Observatory of Evictions from Informal Living Places expressed concern about the increase in evictions (regardless the origin of evicted people). From 1 November 2020 to 31 October 2021, 1,330 evictions were recorded, compared with 1,079 in the same period a year earlier. No alternative housing solution was offered in 91 % of eviction cases.<sup>107</sup>

In a case from 2006 on the forced eviction and relocation of Roma families in the town of Vsetín, **Czechia**, the Olomouc High Court reduced the amount of compensation that the first instance court awarded, but ordered the town of Vsetín to cover the considerable costs of the trial.<sup>108</sup> One of the parties appealed and the case continues at the Highest Court.

In **Lithuania**, six court proceedings are pending in the Vilnius Regional Administrative Court. All of them concern rejections of applications for rent subsidies by former residents of the Vilnius Roma Kirtimai settlement.<sup>109</sup> The Vilnius local government announced that it will no longer accept applications for rent subsidies from residents of the former Vilnius Roma Kirtimai settlement and removed the measure from the Vilnius Roma Integration Programme 2020–2023.<sup>110</sup>

In **Hungary**, human rights organisations called attention to the fate of 80 Roma who faced the risk of eviction and homelessness resulting from the implementation of an EU-funded project on urban development and property renovation.<sup>111</sup>

In **Ireland**, a report by the Ombudsman for Children's Office criticised the local authority for failing to consider the best interests of children living in a local authority site and for failing to meet their obligations in relation to the Traveller Accommodation Programme.<sup>112</sup>

In **Italy**, the NGO Associazione 21 Luglio published its annual report. It contained detailed information and data on housing and the impact of Covid-19 on Roma and Sinti.<sup>113</sup>

In **Poland**, the media reported clashes between Roma and non-Roma in the city of Mielec.<sup>114</sup> In Maszkowice, the small Roma community continues to live in inadequate housing conditions, despite the efforts of the local administration, according to the Polish Ombudsman.<sup>115</sup>

In **Portugal**, NGOs criticised precarious housing conditions have persisted for a large part of the Roma community in Portugal<sup>116</sup> despite the implementation of the national strategy for the integration of Roma communities (2013–2022).

In **Spain**, the Council for the Elimination of Racial or Ethnic Discrimination published a recommendation on housing in substandard conditions of habitability, in where roma people, and other ethnic groups in Spain or migrants, live.<sup>117</sup>

Several projects were implemented to improve the housing situation and to tackle discrimination in the housing sector across the EU.

#### FRA ACTIVITY

### EEA and Norway grants to support Roma housing

The FRA-supported Roma inclusion programme, funded by the EEA and Norway Grants, introduced social rental housing in Katerini, **Greece**. The programme includes a range of additional support actions for and with the local Roma community, ranging from educational support to women's empowerment to primary healthcare. The actions are designed with the participation of several national and grassroots NGOs, which are expected to implement them starting in 2022. The community of Roma in Katerini, who now live in makeshift huts, will be moved to a new housing complex with community structures, public utilities and access to public transport in early 2023.

Sources: *EEA Grants 2014–2021, 'Roma inclusion and empowerment', and Roma branch – Community centre in Katerini Facebook page*

In **Sweden**, the project The Right to Housing Is Key aims to reduce segregation and the risk of discrimination against Roma in the housing market of Malmö by producing informational materials on housing discrimination, how Roma can claim their rights and how to foster dialogue between Roma and authorities.<sup>118</sup>

In **Serbia**, an EU-funded project supports vulnerable groups, primarily Roma, by providing adequate housing and complementary services in employment, welfare, education and healthcare. It also supports capacity building for institutions and public authorities.<sup>119</sup>

The **French** Ministry of Housing's DIHAL published its first slum clearance progress report in 2021. It states that there were still 439 'slums', mostly precarious settlements of makeshift huts that lack access to water and basic sanitation. They are inhabited by EU citizens who are mostly from Bulgaria and Romania, often presumed to be Roma. Since 2018, only 5 of the 23 departments that received funding from the DIHAL have created slum clearance policies; 34 sites were cleared after social needs assessments were carried out and support to access employment and housing was provided. In addition, 30 school mediators to support Roma pupils were deployed in 14 departments.<sup>120</sup>



## FRA opinions

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On 12 March 2021, the Council of the European Union adopted its recommendation on Roma equality, inclusion and participation, calling on Member States to adopt national Roma strategic frameworks by September 2021. Only 11 Member States submitted their revised national strategies before the end of 2021.

The EU encourages Member States to include Roma and Travellers in all policy and legal files that are deemed to support and protect vulnerable groups. The new EU Roma strategic framework sets seven objectives and related targets to be achieved by 2030. It focuses on fighting antigypsyism and discrimination and on promoting the full participation and inclusion of Roma, through a combination of mainstream and targeted policies.

### FRA OPINION 5.1

EU Member States should prioritise the implementation of their national Roma strategic frameworks. These should include concrete and measurable targets to ensure efficient monitoring and data collections. Member States should consider promising practices in other EU countries and make use of the guidance that FRA and the Roma Working Party provided. Member States should promote capacity building of Roma civil society organisations and systematically invite them to participate in the design, implementation and monitoring of Roma inclusion measures.

Most Member States submitted their strategies late, and often without taking previous strategies into account or conducting evaluations of the previous strategies. There were increased efforts to consult with civil society and equality bodies, but there is little evidence of meaningful participation of Roma and Travellers in the design and implementation of the new strategies. Only 11 Member States had set up a national Roma platform to involve civil society more effectively in 2021.



Article 21 of the EU Charter of Fundamental Rights prohibits any discrimination because of ethnic or social origin or membership of a national minority. Since 2000, EU law (Racial Equality Directive, 2000/43/EC) has promoted equal treatment and prohibited direct and indirect discrimination.

In its 2021 Fundamental Rights Report, FRA called on EU Member States to adopt the necessary measures to prevent and eradicate discriminatory attitudes among police officers. It also called on law enforcement authorities to issue specific, practical and ready-to-use guidance to tackle discriminatory ethnic profiling by police officers. This guidance should be included in standard operating procedures and codes of conduct and should be systematically communicated to frontline officers.

Ethnic or racial profiling by the police against people perceived as being Roma or Travellers is still widespread, and negative experiences of the police undermine trust in public authorities, FRA research published in 2021 shows. In 2021, two lethal incidents involving Roma men and police authorities were reported in two Member States. The report of the European Commission to the European Parliament on the implementation of the Racial Equality Directive asks Member States to publish data on complaints received by the police, inspectorates and judiciary.



## FRA OPINION 5.2

Member States should consider measures to tackle discriminatory attitudes against Roma and Travellers in law enforcement. Such measures could include training for law enforcement and justice professionals, drawing on guidance developed by FRA and training initiatives by the EU Agency for Law Enforcement Training and FRA, as well as Organization for Security and Co-operation in Europe and Office for Democratic Institutions and Human Rights training initiatives. Member States should ensure that cases of police violence involving Roma are swiftly investigated by independent bodies and should assist victims in reporting any police misconduct.

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# ASYLUM, BORDERS, VISAS, MIGRATION, AND INTEGRATION

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## UN & CoE

14

In *E.K. v. Greece* (No. 73700/13), European Court of Human Rights (ECtHR) rules that an individual's detention at the border with Turkey violated Article 5 (4) of the European Convention on Human Rights (ECHR) (right to liberty and security), as the applicant had not benefited from a sufficiently thorough assessment of the lawfulness of his detention

22

United Nations (UN) special rapporteurs call on states to ensure that migrants are included in national coronavirus disease 2019 vaccination programmes.

27

In *A.S., D.I. O.I. and G.D. v. Italy* (No. 3042/2017), UN Human Rights Committee finds that Italy violated the applicants' right to life (Article 6) and right to an effective remedy (Article 2) owing to the authorities' failure to respond promptly to a distress call from a sinking vessel.

January

4

In *R.H.M. v. Denmark* (No. 83/2019), UN Committee on the Rights of the Child holds that Denmark failed to consider the best interests of the child when assessing the alleged risk of the applicant's daughter being subjected to female genital mutilation if removed to Somalia.

February

9

- In *Hassine v. Romania* (No. 36328/13), ECtHR finds that an expulsion on national security grounds that does not observe procedural safeguards violates Article 1 of Protocol No. 7 (procedural safeguards relating to the expulsion of aliens) of the ECHR.
- Council of Europe (CoE) Commissioner for Human Rights publishes a report providing measures for states to take urgently, to ensure the protection of the human rights of people in distress at sea.

10

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) publishes a report on Malta.

11

In *Feilazoo v. Malta* (No. 6865/19), ECtHR rules that inadequate pre-removal detention conditions, including excessive isolation and the unnecessary placement of new arrivals in coronavirus disease 2019 quarantine, violated Article 3 (prohibition of ill treatment) of the ECHR.

March

15

In *K.I. v. France* (No. 5560/19), ECtHR finds that the removal to Russia of Chechen refugees whose status was revoked on grounds of terrorism would constitute a violation of Article 3 of the ECHR.

22

In *B.B. v. Sweden* (No. 3069/2015), UN Human Rights Committee finds that the person's removal to Afghanistan, where he faced death threats from his father, would violate Article 6 (right to life) and Article 7 (prohibition of torture) of the International Covenant on Civil and Political Rights.

April

5

CoE adopts new Action Plan on protecting vulnerable persons in the context of migration and asylum in Europe (2021-2025).

12

UN Special Rapporteur on the human rights of migrants publishes a report on current pushback practices and trends.

18

UN High Commissioner for Refugees publishes guidance on working with lesbian, gay, bisexual, transgender, intersex and queer people in forced displacement and guidelines for determining the best interests of asylum-seeking and refugee children.

May

29

In *Monir Lotfy v. Cyprus* (No. 37139/13), ECtHR finds that the applicant's pre-removal detention was unlawful and in breach of Article 5 (right to liberty) of the ECHR, given that, after the Supreme Court ordered his release, he was later redetained without justification.

June

# UN & CoE

July

8

- In *Shahzad v. Hungary* (No. 12625/17), ECtHR concludes that the applicant's removal to Serbia amounted to collective expulsion in breach of Article 4 of Protocol No. 4, as the authorities had not ascertained his individual situation.
- *D.A. and others v. Poland* (No. 51246/17) concerns the pushbacks at the Polish-Belarusian border. ECtHR rules that the lack of review of the asylum applications violated Article 3 (prohibition of ill treatment) of the ECHR and that they were subject to collective expulsion in breach of Article 4 of Protocol No. 4.

9

In *M.A. v. Denmark* (No. 6697/18), ECtHR finds that the lack of an individualised assessment of a Syrian national application for family reunification and the three years' waiting time to be reunited with his wife violated Article 8 (right to respect for private and family life) of the ECHR.

12

In *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece* (No. 173/2018), European Committee of Social Rights finds Greece to be in violation of the European Social Charter concerning the provision of housing, accommodation, healthcare, and specific forms of protection of migrant children.

22

*M.D. and A.D. v. France* (No. 57035/18) concerns the detention of a mother and her four-month-old daughter pending their transfer to Italy. The ECtHR rules that the conditions of detention and its length violated Article 3 (prohibition of torture) and Article 5 (right to liberty) of the ECHR.

August

25

CoE Commissioner for Human Rights publishes a statement urging Poland to take immediate action to protect the human rights of people stranded at its border with Belarus.

September

14

In *Abdi v. Denmark* (No. 41643/19), ECtHR rules that expelling a Somali national following his conviction for possessing a firearm violated Article 8 (right to respect for private and family life) of the ECHR because the Danish courts failed to consider that he did not have a significant criminal past and had strong ties to Denmark.

24

UN Committee on Migrant Workers adopts General Comment No. 5 on migrants' rights to liberty, freedom from arbitrary detention and their connection with other human rights.

October

6

Several UN special rapporteurs call on Belarus and Poland to work together to prevent more migrants from dying at their border.

11

In *Z.H. v. Sweden* (No. 58/2019), UN Committee on the Rights of Persons with Disabilities rules that the removal to Afghanistan of a person whose condition was assessed as life-threatening because of their risk of suicide due to death threats in that country would violate Article 15 (freedom from ill-treatment) of the CRPD.

21

CoE Commissioner for Human Rights publishes a statement urging states to take a stand against pushbacks at borders and to oppose attempts to legalise this illegal practice.

November

10

CoE Group of Experts on Action against Trafficking in Human Beings publishes its evaluation report on Malta, urging the authorities to proactively identify victims of human trafficking among asylum applicants.

18

UN Special Rapporteur on the situation of human rights defenders urges judicial authorities in Greece not to criminalise the work of migrant rescuers in the Mediterranean.

19

CoE Commissioner for Human Rights calls for immediate access for international and national human rights actors and the media at Poland's border with Belarus, following her mission to that area.

December

3

CPT publishes a report on its visit to Croatia, with numerous allegations of ill-treatment of migrants by Croatian law enforcement.

7

In *Savran v. Denmark* (No. 57467/15), ECtHR finds that Article 3 (prohibition of ill-treatment) of the ECHR was not violated. It upholds the *Paposhvili v. Belgium* (No. 41738/10) threshold test and its applicability to removal of mentally ill people, while maintaining that the expulsion violated the applicant's right to private and family life (Article 8) as a "settled migrant".

17

UN Special Rapporteur on the human rights of migrants and the UN Committee on Migrant Workers urge states to put an end to immigration detention, by adopting alternative measures.



13

In *Bundesrepublik Deutschland v. X.T.* (C-507/19), Court of Justice of the European Union (CJEU) rules that, to determine if protection from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) has ceased, it is necessary to take into account all the areas where the UNRWA operates that a person can actually reach and remain in safely.

14

In *K.S. and Others* (C-385/19 and C-322/19), CJEU rules that the Reception Conditions Directive precludes national legislation banning a Dublin transferee from accessing the labour market.

20

January

In *Secretary of State for the Home Department v. O.A.* (C-255/19), CJEU concludes that the requirements applicable to the cessation of refugee status must be the same as those that arise in relation to the granting of that status.

24

February

In *M and Others* (C-673/19), CJEU clarifies that the Return Directive does not prevent a Member State from placing a third-country national residing irregularly on its territory in detention, pending their transfer to the Member State where they hold refugee status, when they have refused to comply with the order to return to that other Member State.

1

March

European Border and Coast Guard Agency (Frontex) Management Board Working Group on Fundamental Rights and Legal and Operational Aspects of Operations publishes a report examining alleged incidents of pushbacks in the Aegean Sea.

12

European Commission adopts implementing regulation on the situational pictures of the European Border Surveillance System (Eurosir) (Regulation (EU) 2021/581).

14

European Commission presents the EU Strategy on Combatting Trafficking in Human Beings.

15

*H.A. v. État belge* (C-194/19) concerns a rejected asylum applicant who tried to annul his transfer decision to Spain by requesting Belgium to examine his asylum application together with his brother's application. His action was dismissed on the ground that his brother had arrived after the transfer decision was adopted. The CJEU rules that national courts must consider the circumstances arising subsequent to a Dublin transfer decision.

27

April

European Commission presents the EU Strategy on Voluntary Return and Reintegration.

2

European Commission presents its renewed Schengen Strategy.

10

June

In *L.H.* (C-921/19), CJEU rules that, in subsequent asylum applications, any new document provided may not be automatically considered not to constitute a "new element or finding".

1

European Commission appointed its new Anti-trafficking Coordinator.

7

- EU adopts a regulation reforming the Visa Information System (Regulation (EU) 2021/1134) and subsequent amendments to access other EU information technology systems for the purposes of the Visa Information System (Regulation (EU) 2021/1133).
- EU adopts new regulations establishing the Asylum, Migration and Integration Fund (Regulation (EU) 2021/1147) and the Border Management and Visa Instrument (Regulation (EU) 2021/1148).

15

July

European Commission refers Hungary to the CJEU for unlawfully restricting access to the asylum procedure, in breach of the Asylum Procedures Directive, interpreted in light of Article 18 of the EU Charter of Fundamental Rights.

August

27

Frontex Fundamental Rights Officer publishes first annual report.

September

9

*X.Y. (C-18/20)* concerns an Iraqi national who lodged a subsequent asylum application on the ground that he was gay. The CJEU concludes that the on-merits examination of a subsequent asylum claim that is based on elements that already existed may be carried out by reopening the procedure relating to the first application.

29

European Commission puts forward a renewed EU action plan against migrant smuggling (2021–2025), publishes an annual report on migration and asylum, and presents a communication on the application of the Employers Sanctions Directive.

October

20

- EU adopts a directive on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment (Directive (EU) 2021/1883).
- Frontex Consultative Forum on Fundamental Rights publishes eighth annual report.

28

In *ASGI and Others (C-462/20)*, CJEU rules that a family card for obtaining discounts, which the Italian authorities established, is contrary to the Qualification Directive if it excludes beneficiaries of international protection.

November

12

European Commission refers Hungary to the CJEU, requesting it to order the payment of financial penalties for Hungary's failure to comply with a ruling finding infringements of the EU asylum and return *acquis* (C-808/18).

16

In *European Commission v. Hungary (C-821/19)*, CJEU finds that Hungary infringed EU law by criminalising the actions of any person who provides assistance to individuals lodging an asylum application in its territory.

December

1

European Commission tables a proposal for provisional emergency measures in the area of asylum and returns for Latvia, Lithuania and Poland.

14

European Commission tables proposals on addressing situations of 'instrumentalising' migrants and asylum seekers and amending the Schengen Borders Code (Regulation (EU) 2016/399).

15

EU adopts a regulation establishing a European Union Agency for Asylum (Regulation (EU) 2021/2303).

21

European Commission adopts a model status agreement and model working arrangement for cooperation in border management between the European Border and Coast Guard Agency and non-EU countries.

Respect for fundamental rights at external borders remained one of the top human rights challenges in the EU. Allegations of pushbacks and violence at the border continued. So did deaths at sea and on land, and delays in finding a safe port for migrants rescued at sea. Asylum and return-related detention persisted, including as part of enhanced containment policies at borders. The EU worked on operationalising new large-scale information technology (IT) systems that include fundamental rights safeguards that are expected to be effectively implemented.

## 6.1. FUNDAMENTAL RIGHTS AT BORDERS

The global figures of forced displacement continued to rise. There were more than 84 million forcibly displaced people worldwide by mid-2021, some 26.6 million of them refugees, according to the United Nations High Commissioner for Refugees (UNHCR).<sup>1</sup> Some 73 % of them lived in countries neighbouring their country of origin, while developing countries hosted 85 % of the people forcibly displaced across borders. **Germany** hosts the largest number of refugees in the EU.<sup>2</sup>



The EU saw an increased number of irregular border crossings by sea and land in 2021, including at the eastern border with Belarus. Some 197,700 people<sup>3</sup> – including 16,600 women and 21,600 children – crossed the EU's external borders without authorisation, according to the European Border and Coast Guard Agency (Frontex).<sup>4</sup> This is 57 % and 36 % more than in 2020 and 2019, respectively.

In 2021, the humanitarian situation at the borders of Belarus with three EU countries, **Poland, Lithuania and Latvia**, became critical, as Belarus reportedly facilitated the arrival and transfer to the border of several thousand migrants for political reasons, with serious implications

for fundamental rights.<sup>5</sup> Approximately 8,000, 4,000 and 28,000 migrants had been prevented from entering Lithuania, Latvia and Poland, respectively, by the end of 2021.<sup>6</sup> Around 8,000 asylum seekers crossed into these three Member States last year, according to UNCHR.<sup>7</sup>

In contrast, the number of asylum applications to the 27 EU Member States, Norway and Switzerland rose by a third (33 %) compared with 2020, from 461,300 in 2020 to 617,800 in 2021.<sup>8</sup> The three top nationalities were Syrian,

Afghan and Iraqi. Most applications were lodged in Germany, France, and Greece. The year saw the highest number of asylum-seeking unaccompanied children since 2015.<sup>9</sup>

#### 6.1.1. Deaths and disappearances at borders remain high

An estimated 2,048 migrants died or went missing in 2021 while crossing the Mediterranean Sea to reach EU Member States, according to data from the International Organization for Migration (IOM).<sup>10</sup> The number of deaths and disappearances of migrants was particularly high along the central Mediterranean route (1,553), and especially in July.<sup>11</sup> At least 44 fatalities were recorded in the Channel (*la Manche*) in 2021.<sup>12</sup> At least 1,176 people died or disappeared on the western Africa or Atlantic route on their way to the Canary Islands.<sup>13</sup>

Figure 6.1 illustrates the deaths at sea on journeys to and from the EU over the past five years.

The deadliest incident occurred off the Libyan coast in April, when some 130 migrants drowned in a shipwreck.<sup>14</sup> Some 134 migrants and refugees also died at Europe's external and internal land borders, most of them along the western Balkan route. The most common causes of death were drowning; harsh environmental conditions or lack of adequate shelter, food and water; vehicle accidents; and violence.<sup>15</sup>

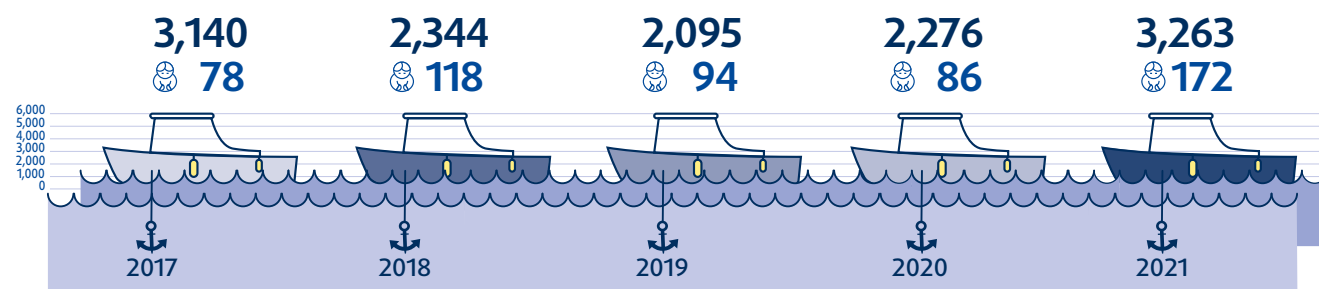
#### 6.1.2. Difficulties in disembarking at a safe port

Delays in the disembarkation of rescued people risk their safety and physical integrity. In 28 instances, vessels with rescued people had to remain at sea for more than a day waiting to be assigned a safe port.<sup>16</sup> This is an increase on previous years: the European Union Agency for Fundamental Rights (FRA) documented 22 such incidents in 2020, 28 in 2019 and 16 in 2018. In total, delays in disembarkation affected some 9,590 rescued migrants and refugees, including 2,546 children. In nine cases, rescued people waited for a week or more.

The Libyan Coast Guard picked up many people rescued in the central Mediterranean and brought them back to Libya. This number increased to 32,425 in 2021,<sup>17</sup> compared with 11,891 in 2020<sup>18</sup> and 9,225 in 2019.<sup>19</sup> Italy renewed its agreement with Libya.<sup>20</sup> Malta put into operation its agreement of May 2020 with Libya.



FIGURE 6.1: ESTIMATED FATALITIES AT SEA, 2017-2021



Source: European Union Agency for Fundamental Rights (FRA) (2022), based on information from IOM (2021)

#### FRA ACTIVITY

## Restating European standards on legal remedies, complaints mechanisms and effective investigations at borders

FRA, together with the Council of Europe, published a note on the human rights standards flowing from both the European Convention on Human Rights and EU law that apply to effective remedies for human rights violations at borders.

See FRA and Council of Europe (2021), *European standards on legal remedies, complaints mechanisms and effective investigations at borders*.

A commercial ship registered in Gibraltar and owned by a Dutch company handed over 170 migrants rescued in international waters to the Libyan Coast Guard.<sup>21</sup> As the political situation in Libya deteriorated, IOM and UNHCR reiterated their call for states to refrain from returning to Libya any people rescued at sea.<sup>22</sup>

### 6.1.3. Unpacking pushbacks: *refoulement* and other rights violations at borders

Allegations of pushbacks at land and sea borders, often accompanied by allegations of ill-treatment or excessive use of force by border guards and security forces, were on the rise in 2021 and concerned an increasing number of EU countries. UNHCR, for example, uses the non-legal term 'push-back'<sup>23</sup> when a person is apprehended after an irregular border crossing and summarily returned to a neighbouring country without assessing their individual circumstances on a case-by-case basis. Such actions can violate a range of fundamental rights, including the right to life, the prohibition of *refoulement* and collective expulsions, the prohibition of torture and inhuman or degrading treatment or punishment, the right to property, and respect for private and family life.

Most allegations of pushback incidents concerned the external land borders of **Croatia**,<sup>24</sup> **Greece**,<sup>25</sup> **Hungary**<sup>26</sup> and **Poland**.<sup>27</sup>

As in 2020,<sup>28</sup> the office of the **Croatian** Ombudsperson continued to receive complaints about pushbacks at the external borders and the ill-treatment of migrants and refugees by the police.<sup>29</sup> The European Court of Human Rights (ECtHR) judged a case concerning the collective expulsion of an Afghan family resulting in the death of a six-year-old girl. It found, among other things, violations of the prohibition of collective expulsions, of the right to life, of the prohibition of inhuman and degrading treatment, and of the right to liberty and security.<sup>30</sup>

Allegations concerning the use of force and pushbacks persisted in the Aegean Sea and along the Evros River in **Greece**. The testimonies share a consistent pattern of excessive use of force and confiscation of property, as a report of the Greek Ombudsperson regarding incidents in the Evros region concluded.<sup>31</sup>

United Nations working groups and special rapporteurs brought to the national authorities' attention allegations of pushbacks of migrants from **Cyprus** to Lebanon and Turkey and of the unreasonable use of force involved in some of these pushback operations.<sup>32</sup>

In **Hungary**, despite the December 2020 ruling of the Court of Justice of the European Union (CJEU),<sup>33</sup> the police continued to escort all apprehended migrants back to the outer side of the fence at the southern border (71,470 people by year's end).<sup>34</sup> In this judgment, the CJEU ruled that Hungary had failed to fulfil its obligations under EU law in respect of ensuring effective access to asylum, by unlawfully detaining asylum seekers in the transit zones and returning third-country nationals without observing the guarantees in the Return Directive.<sup>35</sup> The European Commission referred Hungary back to the CJEU for failing to implement the judgment.<sup>36</sup>

**Poland** enacted new legislation allowing summary returns of people apprehended at the external borders who have entered in an unauthorised manner, without an individual examination in most of the cases.<sup>37</sup> Similar practices have been formalised in **Lithuania**.<sup>38</sup>



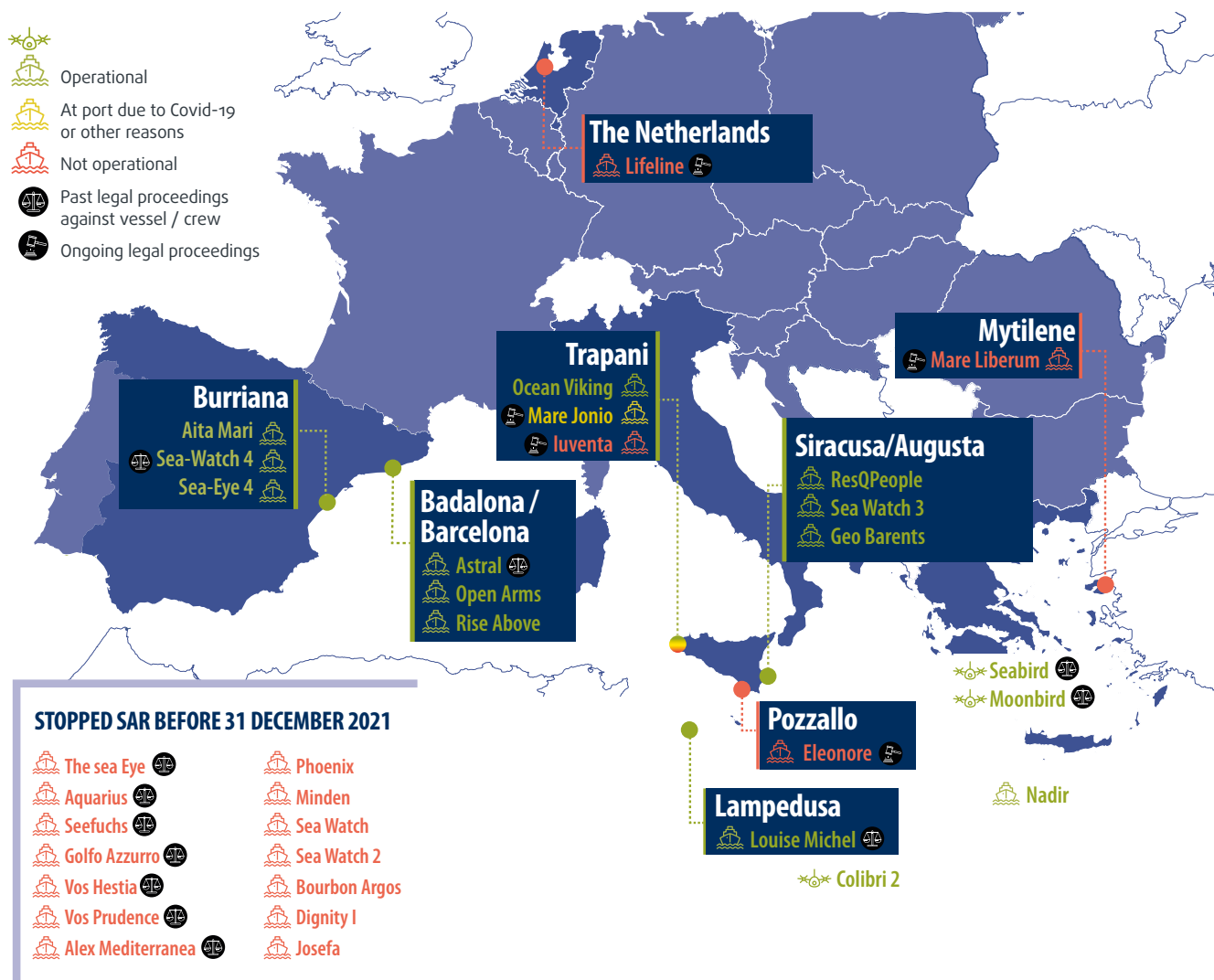


#### 6.1.4. Measures affecting providers of humanitarian assistance to migrants and refugees

Measures that hampered civil society organisations' humanitarian action continued<sup>39</sup> in 2021, particularly affecting non-governmental organisation-deployed search and rescue vessels. Many of these were blocked at ports.

By the end of 2021, civil society organisations operated 12 vessels in the Mediterranean, of which eight performed search and rescue operations. Five vessels were blocked at ports pending legal proceedings, while one vessel was docked for other technical reasons (see Figure 6.2).

**FIGURE 6.2: NON-GOVERNMENTAL ORGANISATION ASSETS INVOLVED IN SEARCH AND RESCUE OPERATIONS IN THE MEDITERRANEAN SEA BETWEEN 2016 AND 31 DECEMBER 2021**



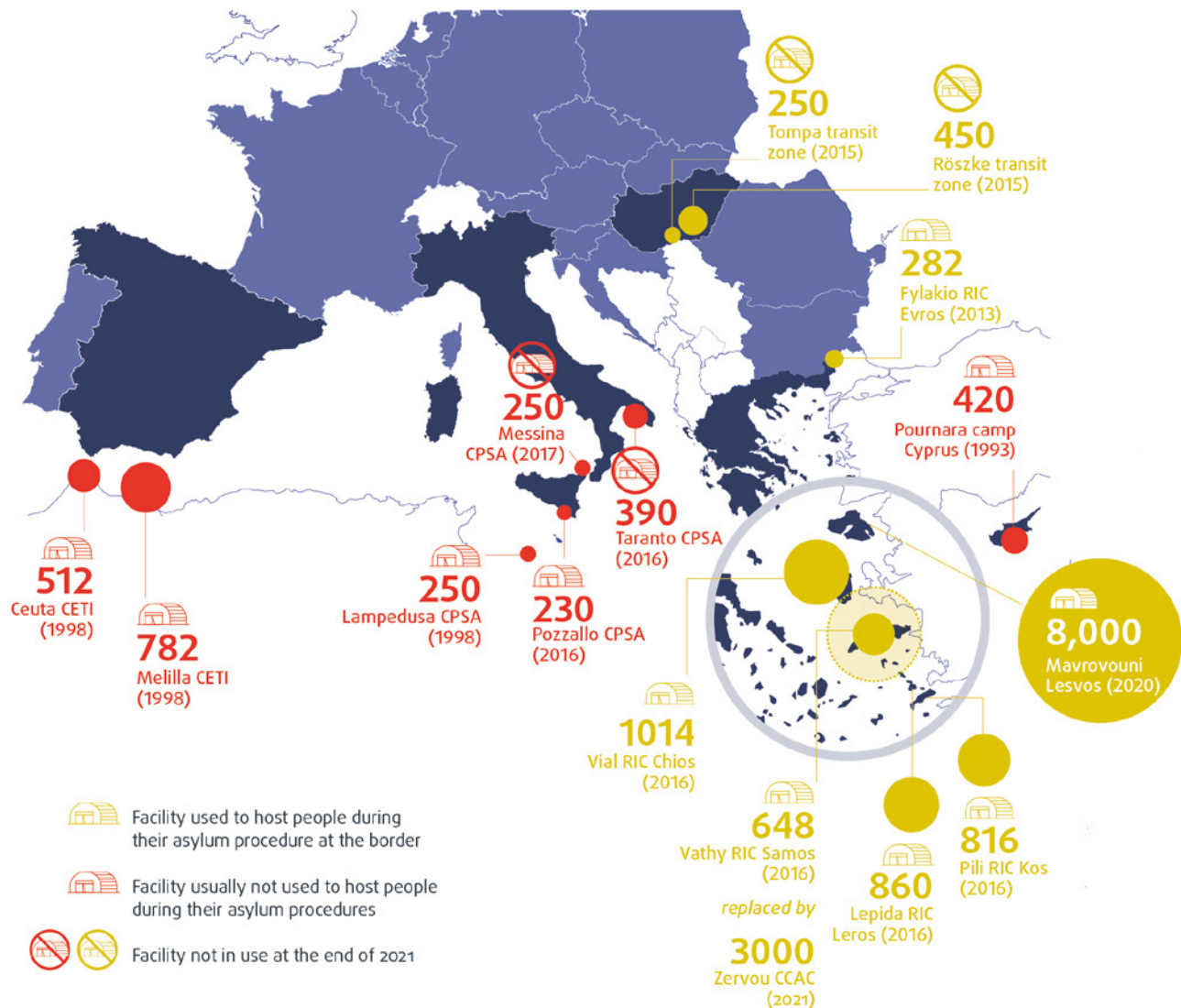
Source: FRA (2022), based on various sources available in the public domain

In the renewed EU Action Plan against migrant smuggling (2021–2025), the European Commission reiterated its call to Member States to exempt humanitarian assistance from criminal sanctions. The Commission will also step up the monitoring of the implementation of the EU Facilitation Directive<sup>40</sup> to avoid this risk.<sup>41</sup> In **Italy**, the Court of Cassation confirmed the first instance judgment acquitting the migrants who had forced the commercial vessel *Vos Thalassa* to change route and head to Sicily instead of Libya.<sup>42</sup>

#### 6.1.5. Initial-reception facilities at borders

Under EU law, Member States must provide a dignified standard of living, as stipulated in the Reception Conditions Directive, from the moment asylum applicants express their intention to seek international protection.<sup>43</sup> The treatment of people in return procedures must also comply with the Return Directive. The Council of Europe’s Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) standards guide the planning and design of immigration detention facilities.<sup>44</sup>

**FIGURE 6.3: INITIAL-RECEPTION FACILITIES AT OR NEAR THE EXTERNAL BORDERS OF THE EU, DECEMBER 2021**



Source: FRA (2022)

#### ▲ Notes:

CETI (Centro de estancia temporal para inmigrantes) = migrant temporary stay centre

CCAC = Closed Controlled Access Centre

CPSA (Centro primo soccorso e assistenza) = first aid and assistance centre

RIC = reception and identification centre

Figure does not include holding facilities used for the initial stay of less than 72 hours, such as those near the border in Bulgaria or Croatia, and the CATE centres (centros de atención temporal de extranjeros) in Spain.

There are significant challenges in ensuring adequate reception standards in facilities at borders, especially in remote areas where it is difficult to adjust reception capacities to the increased number of arrivals and to provide all the services required, as evidence FRA has collected shows. Figure 6.3 portrays the initial-reception facilities situated at or near the EU's external borders.

**Greece** adopted a general regulation on the operation of the multipurpose reception and identification centres on the Aegean islands.<sup>45</sup> The first multipurpose reception and identification centres opened in Samos, Kos and Leros between September and November 2021. The entry and exit is regulated. In contrast to previous years, they operated within their capacities at the end of 2021.

In Lesbos, many asylum applicants are still hosted in tents, without indoor cooling or heating equipment, in a temporary facility set up after the fires in Moria in September 2020.<sup>46</sup> With a few exceptions, none of the children attend public school.<sup>47</sup>

In **Lithuania**, new arrivals entering via Belarus were initially held in tent camps and abandoned public buildings in border areas, amounting to deprivation of liberty. Inadequate material reception conditions and lack of procedures for assessing vulnerabilities were some of the main fundamental rights concerns in these facilities.<sup>48</sup>

Following the surge in arrivals in the first months of the year, reception conditions and psychological or legal assistance were inadequate on the Canary Islands (**Spain**).<sup>49</sup> Reports of poor reception conditions in the first reception facilities also emerged about Pournara (**Cyprus**),<sup>50</sup> the island of Pantelleria (**Italy**)<sup>51</sup> and **France's** overseas department of Mayotte.<sup>52</sup>

#### 6.1.6. Independent border monitoring mechanisms and effective investigations

Independent monitoring at borders entails collecting, verifying and analysing information to determine if the procedures comply with EU and international law. Under EU law, Article 110 (6) of the European Border and Coast Guard Regulation,<sup>53</sup> Frontex was required to recruit at least 40 fundamental rights monitors by 5 December 2020. However, by the end of 2021 only half of the monitors were in place.<sup>54</sup>

Very few EU countries have dedicated border monitoring mechanisms on fundamental rights compliance. At the request of the European Commission,<sup>55</sup> FRA started developing guidance for EU Member States on setting up national independent mechanisms to monitor their compliance with fundamental rights at the borders.

In **Croatia**, the Ministry of the Interior piloted the establishment of an independent national border monitoring mechanism.<sup>56</sup> FRA participates in its external Advisory Board, providing recommendations on how to enhance the independence and the functioning of the mechanism.

In some Member States, national preventive mechanisms under the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment continued to play an important role in monitoring the situation at the borders, although some still faced problems in accessing all relevant documentation.<sup>57</sup>

The Council of Europe Commissioner for Human Rights urged authorities in **Cyprus**<sup>58</sup> and **Greece**<sup>59</sup> to ensure that independent and effective investigations into allegations of pushbacks are carried out. In **Greece**, the Public Prosecutor of the Supreme Court ordered an investigation into complaints of pushbacks and

#### FRA ACTIVITY

### Guidance for fundamental rights-compliant initial-reception facilities at borders

A note by FRA entitled *Initial-reception facilities at external borders: Fundamental rights issues to consider* outlines how to ensure a dignified stay for non-EU nationals who are apprehended or intercepted crossing external EU borders irregularly. It identifies 12 points for protection-sensitive and fundamental rights-compliant planning and design of initial reception facilities at these borders.

See FRA (2021), *Initial-reception facilities at external borders: Fundamental rights issues to consider*



unlawful expulsions lodged after March 2020. The 147 alleged incidents concern more than 7,000 individuals.<sup>60</sup> The National Transparency Authority was also tasked with conducting investigations into alleged incidents of push-backs.<sup>61</sup>

The Juvenile Chamber of the Ceuta Public Prosecutor's Office in **Spain** opened investigations on "hot returns" of unaccompanied children in the Spanish exclave of Ceuta.<sup>62</sup>

## 6.2. ASYLUM AND RETURN POLICIES IN TRANSITION

While negotiations on the legislative proposals under the Pact on Migration and Asylum were still ongoing, some EU Member States adjusted their laws, policies and practices. In doing so, they stepped up their efforts to curb irregular migration, including secondary movements.



### 6.2.1. Continuous focus on curbing irregular migration

One way to curb irregular migration is to tackle the illegal employment of migrants in an irregular situation. In September, the European Commission published a report on the practical application of the Employers Sanctions Directive.<sup>63</sup>

Member States have generally incorporated the provisions of the directive on sanctions into national legislation, the report notes, although the approaches chosen vary significantly. It also highlights the scattered and incomplete evidence on the prosecutions opened against employers and the sanctions applied. In addition, there is

a lack of complete and reliable data and information on the application of the complaints mechanisms and their outcomes, the report notes. This makes it difficult to assess conclusively whether or not the directive had an impact on deterring and reducing illegal employment and whether or not criminal sanctions in the Member States are effective, proportionate and dissuasive.

The EU's efforts to curb irregular migration include increasing effective returns and fully implementing readmission agreements and arrangements with third countries.<sup>64</sup> Several Member States adopted increasingly restrictive legislative and policy measures to prevent migrants in an irregular situation from reaching their external borders. However, such measures can also stop asylum seekers from entering the EU to apply for international protection. **Greece** launched an information campaign, which the EU Asylum, Migration and Integration Fund co-financed, to prevent irregular migration flows.<sup>65</sup>

At the end of 2021, the European Commission tabled additional legislative proposals in response to the situation at the external border in Belarus and to reinforce Member States' border surveillance measures, helping prevent and discourage irregular border crossings.<sup>66</sup>

### 6.2.2. Challenges to rights-compliant asylum systems

In 2021, reports pointing to difficulties in accessing and processing asylum procedures emerged in most EU Member States. For instance, **Latvia**,<sup>67</sup> **Lithuania**<sup>68</sup> and **Poland**<sup>69</sup> accepted applications for international protection only at official border crossing points, or diplomatic missions abroad (see

also Section 6.1.3). With regard to these three EU Member States, the ECtHR suggested almost 50 interim measures concerning around 200 people.<sup>70</sup> In some cases, the ECtHR applied Rule 39 for a set amount of time, and in others it ordered the measure in question to remain in force until further notice.

In **Germany**, more than 120,000 asylum appeals were pending before courts, and will take several years to process.<sup>71</sup> Other concerns include the lack of information on the possibility of lodging an asylum application in reception facilities, for instance in **Italy**<sup>72</sup> and **Malta**;<sup>73</sup> the use of accelerated procedures for third countries that are unsafe (**Romania**);<sup>74</sup> and major obstacles in reuniting families of beneficiaries of international protection in **Croatia**<sup>75</sup> and **Denmark**.<sup>76</sup> A court in **Denmark** ruled that the statutory requirement of three years' waiting time for family reunification was in breach of the applicant's right to respect for family life under Article 8 of the European Convention on Human Rights.

Some national measures aimed to externalise the in-merit examination of international protection claims. For instance, **Greece** designated Turkey as a safe third country for asylum applicants from Afghanistan, Bangladesh, Pakistan, Somalia and Syria, affecting most asylum applicants in the country.<sup>77</sup> This prompted criticism from UNHCR and civil society organisations.<sup>78</sup> As readmissions to Turkey have not taken place since March 2020, people whose applications are found inadmissible, based on the 'safe third country' concept, remain in limbo, with no access to protection.<sup>79</sup>

Legislative changes in **Denmark** allow the processing of asylum applications to non-EU countries to be outsourced. They have not led to any concrete bilateral agreements with third countries, and many aspects of the scheme remain unclear.<sup>80</sup> Also in **Denmark**, the Court of Impeachment convicted a former minister for immigration for having unlawfully instructed authorities to separate asylum-seeking couples, one of whom was under the age of 18 years.<sup>81</sup>

Data protection issues also emerged. In **Slovenia**, amendments to the International Protection Act require legal counsellors to disclose personal information.<sup>82</sup> Meanwhile, in **Germany**, the new law for expanding the central register of foreign nationals (*Ausländerzentralregister*) of the Federal Office of Administration<sup>83</sup> bears data protection risks for asylum applicants and refugees, as the database combines a large set of personal data from various areas of life making them accessible to numerous authorities.<sup>84</sup>

### 6.2.3. Cessation and revocation of international protection status

Some Member States increasingly resorted to cessation<sup>85</sup> and revocation,<sup>86</sup> shifting the international protection status towards temporary rather than permanent residence permits.<sup>87</sup> At national level, there is no systematic distinction between the two procedures resulting in withdrawals of international protection,<sup>88</sup> which bring abrupt changes in the lives of refugees, including the risk of return to country of origin or former residence.<sup>89</sup>

Most withdrawals of refugee status occurred in **Germany** (3,690) and **Sweden** (1,349). The main reasons included lasting change of circumstances in the country of origin, the beneficiary's renunciation of their protection status, misrepresentation or fraud during the asylum procedure, and serious threat posed to public order or national security.

### 6.2.4. Preventing unauthorised onward movements within the EU

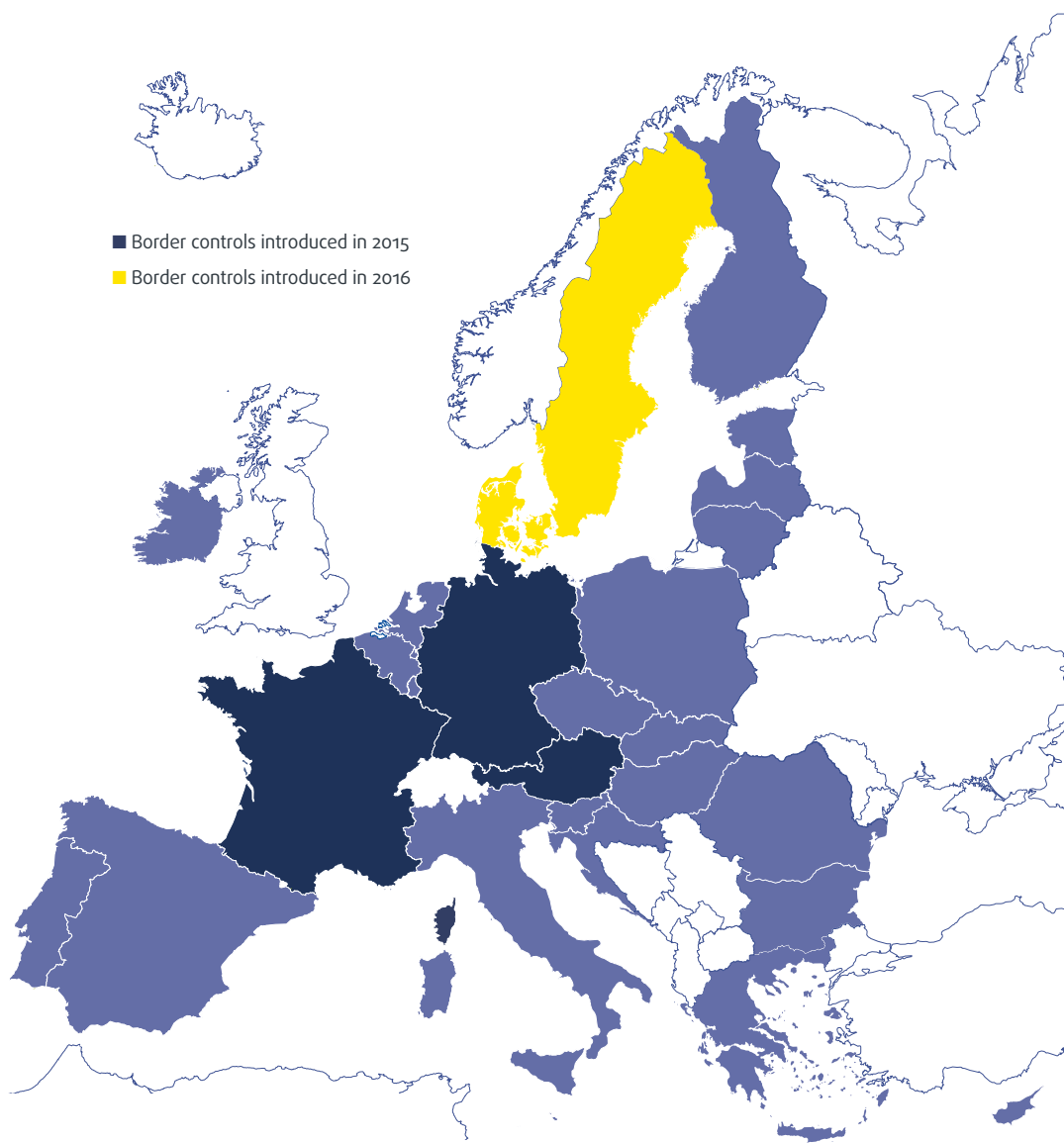
The conclusions of the European Council meeting of 21 and 22 October 2021 highlighted the need for sustained efforts to reduce unauthorised onward movements of asylum applicants and migrants in an irregular situation from one EU Member State to another.<sup>90</sup>



Five EU Member States – **Austria, Denmark, France, Germany** and **Sweden** – along with **Norway** maintained temporary border controls at some sections of the internal borders within the Schengen area, as Figure 6.4 shows.<sup>91</sup> They were originally put in place owing to migration crises in 2015 and 2016 (except for France). The Schengen Borders Code allows for a maximum duration of two years of reintroduced border controls in exceptional circumstances.<sup>92</sup> The interpretation of this rule is subject to pending cases before the CJEU.<sup>93</sup>

Such checks on people crossing internal borders may negatively affect the exercise of several fundamental rights that the EU Charter of Fundamental Rights protects, including freedom to conduct a business (Article 16), the right to respect for private and family life (Article 7) and the freedom of movement of EU citizens within the common area (Article 45).

**FIGURE 6.4: BORDER CONTROLS WITHIN THE SCHENGEN AREA ON 31 DECEMBER 2021**



Source: European Commission (2022)

In 2021, some southern EU Member States and those along the Balkan route increasingly employed intra-EU readmission agreements to pass people back to the neighbouring Member States after apprehending them for crossing an internal EU border irregularly. For migrants in an irregular situation, the Return Directive permits this on the basis of readmission agreements concluded before 2009. The European Commission recommends the use of readmission agreements in such cases.<sup>94</sup> For asylum applicants, an eventual transfer to another EU Member State must respect the procedures and safeguards of the Dublin Regulation.<sup>95</sup>

Allegations of pushbacks between **France** and **Italy**,<sup>96</sup> **France** and **Spain**,<sup>97</sup> **Slovenia** and **Croatia**,<sup>98</sup> and **Austria** and **Slovenia**<sup>99</sup> persisted. Some domestic courts reaffirmed the duty to respect the right to asylum and the principle of non-*refoulement* in intra-EU situations. The Supreme Court of **Slovenia** upheld an earlier ruling of the Administrative Court establishing, in a retrial, that the authorities violated the prohibition of collective expulsion, the prohibition of *refoulement* and the right to asylum when removing a person to Croatia.<sup>100</sup> The Constitutional Court of **Croatia** ruled that Serbia could not be deemed a safe third country, in the case of an Afghan family whose asylum applications were rejected on that basis.<sup>101</sup>

**Slovenia** also tightened domestic rules to restrict the free movement of asylum applicants.<sup>102</sup> **Austria** deployed extra assets such as helicopters, thermal imaging cameras and drones, as well as staff, at the land border with **Hungary**.<sup>103</sup> Over 40,000 smuggled people were apprehended in Austria in 2021,<sup>104</sup> 20,000 of them coming from Hungary, according to the Austrian Federal Ministry of the Interior.<sup>105</sup>

To address secondary movements more effectively, the European Commission's proposal amending the Schengen Borders Code also introduced a new procedure allowing for the immediate transfer of apprehended irregular migrants to neighbouring Member States.<sup>106</sup> Such an amendment risks authorising violations of the principle of non-*refoulement*.

#### 6.2.5. Pre-removal and asylum detention

Deprivation of liberty must respect the safeguards established in international and European law to prevent unlawful and arbitrary detention. The five key conditions immigration detention must fulfil to comply with fundamental rights are summarised in Figure 6.5.<sup>107</sup>

**FIGURE 6.5: FIVE CONDITIONS UNDER WHICH DEPRIVATION OF LIBERTY IS CONSIDERED UNLAWFUL AND ARBITRARY**



Source: FRA (2022)



## PROMISING PRACTICE

### Ensuring unhindered access for civil society to detention centres

The Administrative Tribunal of Palermo confirmed that detention facilities should be accessible to civil society organisations, in a case that the Association for Juridical Studies on Immigration brought after the Ministry of the Interior and the Prefecture of Agrigento denied it access to the Lampedusa hotspot.

Source: Tribunale Amministrativo Regionale per la Sicilia, **Decision No. 02473/20121 Reg. Proc. Coll.**, 24 August 2021

## FRA ACTIVITY

### Comparative report on legal aid for returnees deprived of liberty

This report outlines the extent to which legal aid is available to those held in pre-removal detention in the 27 EU Member States, and in North Macedonia and Serbia, during procedures related to their return. These involve decisions on return, on detention pending removal, on the removal itself and on bans on entry. The report also examines when people are entitled to free legal aid and how this aid is funded, as well as who provides representation and various factors that limit the scope of legal aid.

See FRA (2021), **Legal aid for returnees deprived of liberty**, Luxembourg, Publications Office.

Widespread use of immigration detention persisted in most EU Member States, and in **North Macedonia** and **Serbia**, according to evidence FRA collected. Prolonged detention periods, inadequate conditions of detention, allegations of ill-treatment by guards and not separating vulnerable people continue to be the pressing fundamental rights concerns.<sup>108</sup> For instance, **Greece** continued not to assess individually the necessity and proportionality of deprivation of liberty, to make limited use of alternatives to detention and to provide no public legal aid for asylum seekers in detention.<sup>109</sup> A report by the National Guarantor for the Rights of Persons Detained or Deprived of Liberty raised similar concerns in **Italy**.<sup>110</sup>

Some EU Member States increased their detention capacities by creating new pre-removal detention centres (**Poland**)<sup>111</sup> or closed reception facilities for asylum applicants during fast-track asylum procedures (**Cyprus**).<sup>112</sup> In **Malta**, owing to a lack of sufficient spaces in open centres, many asylum applicants were placed in detention, the CPT noted.<sup>113</sup>

#### 6.2.6. Forced return monitoring

Pursuant to Article 8 (6) of the Return Directive, Member States must provide for an effective forced return monitoring system.



Since 2018, FRA has published an annual overview on forced return monitoring systems in EU Member States.<sup>114</sup> Although all EU Member States have a system in place to monitor forced returns, in some establishing a monitoring mechanism appears to be a challenge.

In **Germany** and **Sweden**, the authority that carries out forced returns is also responsible for monitoring them. That raises concerns about effectiveness and independence.<sup>115</sup> In **Bulgaria, Croatia, Cyprus, Czechia, Estonia, Lithuania** and **Portugal**, monitoring predominantly covers the pre-return phase and not in-flight and post-return phases. Monitoring gaps also occur owing to a lack of sustainable financing in **Bulgaria, Italy** and **Lithuania**.

Under Article 51 of the European Border and Coast Guard Regulation,<sup>116</sup> Frontex also set up a pool of forced return monitors, which helps reduce the risk of fundamental rights violations. By the end of 2021, the pool included 56 monitors, all affiliated with the national entity in charge of forced return

monitoring and formally appointed to the Frontex-governed pool.<sup>117</sup> The pool, coordinated by Frontex Fundamental Rights Officer since the year end, monitored some 58 % of all Frontex-coordinated forced return operations by charter flights – 100 % of collecting return operations, 81 % of joint return operations and 38 % of national return operations were monitored – according to information from Frontex in 2021.<sup>118</sup>

The EU-funded project 'Forced Return Monitoring (FREM)' produced a set of practical tools and provided a platform for the monitors to exchange experiences and lessons learned. As the above figures show, not all Frontex-coordinated return operations are monitored, despite the requirement under Article 50 (5) of the European Border and Coast Guard Regulation.<sup>119</sup>

#### **6.2.7. New EU funds promoting the application of EU migration and asylum law**

Migration and border management is one of the seven priority areas in the EU's multiannual financial framework for 2021–2027.<sup>120</sup> The new framework reinforced the Asylum, Migration and Integration Fund and the Border Management and Visa Instrument.<sup>121</sup>

The Asylum, Migration and Integration Fund is intended to support measures in the field of asylum, legal migration and integration, return and reintegration, as well as solidarity with the EU Member States that the arrival of asylum seekers affect most. The Border Management and Visa Instrument is intended to ensure effective European integrated border management, thereby contributing to a high level of internal security in the EU while facilitating legitimate travel. It will also support the setting up and running of large-scale EU IT systems.

All actions funded under the new EU instruments must be implemented in full compliance with the EU Charter of Fundamental Rights. For the first time, the knowledge and expertise of relevant EU agencies, including FRA, the European Union Asylum Agency and Frontex, have to be considered when developing Member States' programmes.<sup>122</sup>

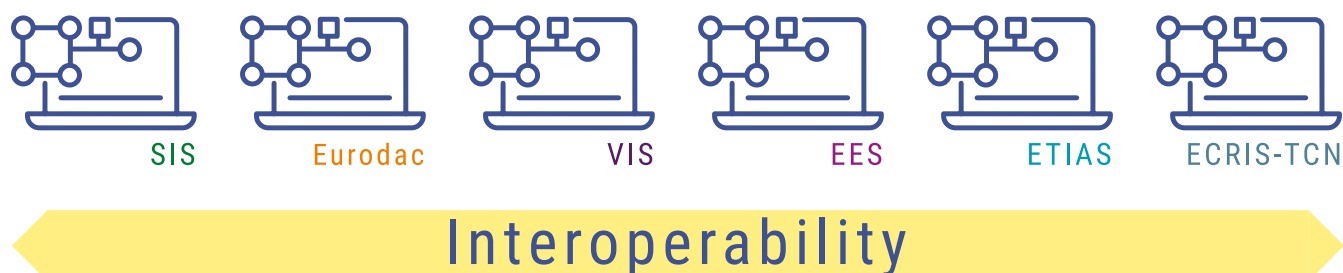
### **6.3. IMPLEMENTING INTEROPERABLE LARGE-SCALE EU INFORMATION TECHNOLOGY SYSTEMS**

The EU made progress in implementing the large-scale EU IT systems in the area of freedom, security and justice. Three large-scale databases are currently operational: the European Asylum Dactyloscopy Database (Eurodac), the Visa Information System (VIS) and the Schengen Information System (SIS). Three more are in development: the Entry/Exit System (EES) is planned to start operating at the end of September 2022; the European Travel Information and Authorisation System (ETIAS) and the European Criminal Records Information System – Third Country Nationals (ECRIS-TCN) are scheduled to start operating in May 2023.<sup>123</sup>

Their 'interoperability' is under way. That means authorised users will be able to search and see data stored on individuals across these systems, depending on their access rights laid down in EU law. Figure 6.6 shows the databases and their interoperability.

In December 2021, the European Commission tabled a proposal revamping the Prüm Regulation (Prüm II). It seeks to link the Prüm framework for law enforcement information exchange with the interoperability of the EU large-scale IT systems.<sup>124</sup>

FIGURE 6.6: SCHEMATIC LANDSCAPE OF LARGE-SCALE EU IT SYSTEMS



Source: FRA (2022)

## FRA ACTIVITY

### FRA joins the VIS Fundamental Rights Guidance Board

The revised VIS Regulation establishes a role for FRA in the VIS Fundamental Rights Guidance Board. The board will help ensure that the screening of VIS applications according to specific risk indicators respect fundamental rights. FRA also participates in the Fundamental Rights Guidance Board for the European Travel Information and Authorisation System (ETIAS).

Sources: Article 9 (1) of the **Regulation (EU) 2021/1134** reforming the Visa Information System and Article 10 of **Regulation (EU) 2018/1240** establishing a European Travel Information and Authorisation System (ETIAS)

Once operational, these IT systems will record, for a specific period of time, the personal data of nearly every non-EU national in the Schengen area and beyond, including asylum applicants, regular and irregular migrants, visa applicants and applicants for residence permits.<sup>125</sup> Earlier FRA reports pointed out opportunities for and risks to fundamental rights that these systems and their interoperability pose.<sup>126</sup>

#### 6.3.1. Implementing legislation and fundamental rights safeguards

The European Commission worked on implementing the legislation necessary for operationalising the IT systems. It adopted 64 implementing and delegated acts by the end of 2021<sup>127</sup> out of the 74 required to operate the databases.<sup>128</sup> Operating these IT systems has notable fundamental rights implications. For example, ETIAS will screen future non-EU national visa-free travellers using an algorithm to detect whether or not they pose a risk to irregular migration, security and public health, as part of their travel authorisation.<sup>129</sup>

A delegated act will further define the risks related to security and irregular immigration or a high epidemic risk.<sup>130</sup> It is currently in the scrutiny phase and not yet in force.

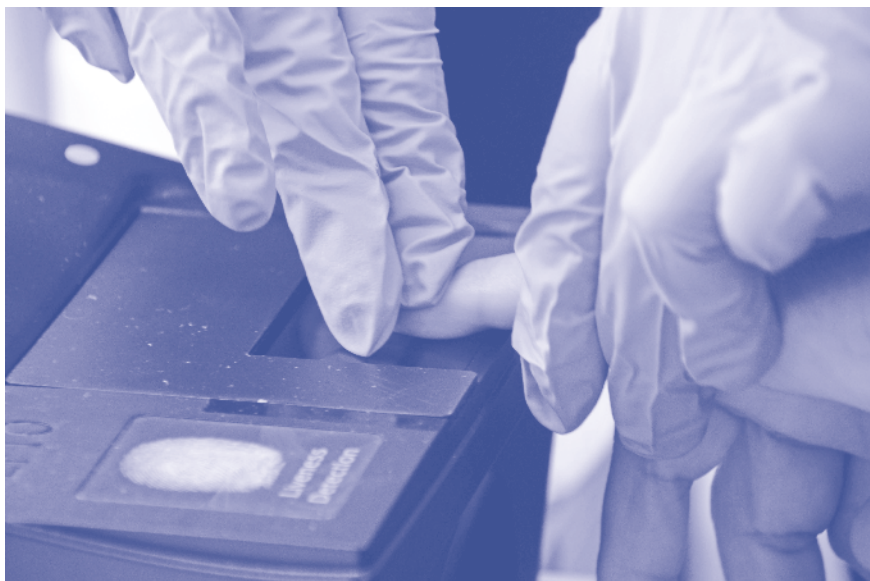
The ETIAS Regulation provides for safeguards, including on non-discrimination.<sup>131</sup> It states that the risk indicators used for the assessment must be targeted and proportionate and should not lead to discrimination based on protected grounds. Nonetheless, risks of indirect discrimination could increase in the ETIAS automated risk assessment, as FRA has previously outlined.<sup>132</sup> The ETIAS automated risk assessment may lead to indirect discrimination through the combination of the personal data about a person, which could reveal personal characteristics related to protected grounds. Hence, relevant guarantees should be duly considered when developing the screening algorithm and the related risk indicators.

The reform of Eurodac progressed in 2021,<sup>133</sup> and the review of the VIS was completed,<sup>134</sup> expanding its scope to long-term visa and residence permit holders, introducing biometric matches with facial images and reducing the fingerprinting age of children to six years. VIS also envisages automated risk assessments of visa applicants to support authorities in their decisions on visa applications.<sup>135</sup>



### 6.3.2. Exercising data subjects' rights

EU legislation setting up large-scale IT systems lays down fundamental rights safeguards with regard to the right to information as well as the right of access to, and correction and deletion of, one's own stored data.<sup>136</sup> Some systems envisage the running of dedicated websites or public information campaigns, or provision of child-friendly information and leaflets to enhance awareness of those rights, as Table 6.1 illustrates.<sup>137</sup> For example, a web portal will inform non-EU nationals how to access their own data, as part of the interoperability framework.<sup>138</sup> However, not all Member States have put in place specific procedures and there are still few specialised lawyers.



Only a few national court cases dealt with data subjects' rights in the context of large-scale EU IT systems in 2021. In the **Netherlands**, the Council of State ruled in favour of an applicant whose request to access his personal data stored in the national police database and the SIS was denied.<sup>139</sup>

In **Poland**, a Ukrainian national complained about the alleged insufficient collection of evidence and the incorrect analysis of collected material that resulted in the storage of his personal data in the SIS and the national registry of unwanted foreigners. The Voivodship Administrative Court in Warsaw upheld the applicant's complaint, underlining the authorities' obligation to exhaustively collect and assess evidence before entering personal data in the SIS and in the corresponding national database.<sup>140</sup>

**TABLE 6.1: RIGHT TO INFORMATION: SAFEGUARDS IN THE LARGE-SCALE EU IT SYSTEMS AND THEIR INTEROPERABILITY**

	Eurodac	ETIAS	VIS	EES	Police	SIS II Return	Borders	ECRIS-TCN	Interoperability
Legal provision on the right to information	Yes	Yes	Yes	Yes	n/a	Yes	Yes	Yes	Yes
Information leaflet	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Public information campaigns	No	Yes	No	Yes	Yes	Yes	Yes	No	No
Web service/web portal	No	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes
Child-friendly information	Yes	No	Yes	No	No	No	No	No	No

Source: FRA (2022), based on existing legal instruments

▲ n/a, not applicable; SIS II, second generation Schengen Information System.

Note: In the context of interoperability, travellers whose identity is linked with another person's identity via a white or red link, are individually notified except for exceptional circumstances.

#### FRA ACTIVITY

## Supporting fundamental rights training on the new generation of large-scale EU IT systems and their interoperability

FRA is actively involved in providing fundamental rights training in capacity-building activities of EU agencies, including CEPOL, eu-LISA and Frontex, in the area of large-scale IT systems. By the end of 2021, FRA had provided fundamental rights training modules at around 10 different training events, focusing on the fundamental rights impact of the use of such systems.

### 6.3.3. Training on fundamental rights

Fundamental rights training for authorised staff is a legal obligation under most legal instruments of the large-scale IT systems.<sup>141</sup> At EU level, the European Union Agency for Law Enforcement Training (CEPOL),<sup>142</sup> the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA)<sup>143</sup> and Frontex<sup>144</sup> organised training activities to boost competent authorities' knowledge of the technical and business use aspects and implications of the use of the systems, as the following FRA activity box illustrates. Work on the practical handbooks for the EES, ETIAS and implementing interoperability has also advanced.<sup>145</sup> The European Commission updated the Supplementary Information Request at the National Entries (SIRENE) Manual on the use of the SIS.<sup>146</sup>

## FRA opinions

### FRA OPINION 6.1

Member States should consider establishing effective and independent national border monitoring mechanisms, along with available complaint mechanisms, independently of the outcome of the negotiations on the proposed EU rules under the Pact on Migration and Asylum. Member States should ensure that allegations of pushbacks and ill-treatment are investigated by the competent authorities promptly and effectively.

Article 78 (1) of the TFEU and Articles 18 and 19 of the EU Charter of Fundamental Rights (Charter) prohibit *refoulement* – meaning the return of an individual to a risk of persecution or serious harm – and collective expulsion. Article 4 of the Charter prohibits torture and other forms of ill-treatment. That is an absolute obligation, not allowing for exceptions or derogations.

Respecting fundamental rights at borders remained a major challenge in the EU in 2021, with multiple reports of alleged pushbacks and police violence. Meanwhile, 3,402 people died at sea and land borders while trying to reach the EU, and humanitarian rescue boats faced threats and difficulties in finding a safe port. Rescued migrants and refugees were left waiting at sea for days or longer, which put at risk their safety and physical integrity.

### FRA OPINION 6.2

Member States should in each individual case assess the possibility of using alternatives to detention. When resorting to detention as a measure of last resort, Member States must respect all safeguards required by the Charter and the European Convention on Human Rights. For those detained pending their return, access to free legal aid should be made available in practice to enable people in return proceedings to exercise their right to an effective judicial remedy under Article 47 of the Charter and to access justice in general.

While Article 6 of the Charter, Article 8 (2) of the revised Reception Conditions Directive (2013/33/EU), Article 15 (1) of the Return Directive (2008/115/EC) and Article 28 (2) of the Dublin Regulation require Member States to examine in each individual case the viability of measures less coercive than detention, in practice alternatives to detention are rarely used owing to fears of absconding.

Fundamental rights safeguards in the context of detention continued to be undermined in 2021 by prolonged detention periods, inadequate detention conditions, alleged ill-treatment by guards, lack of an individual assessment of the necessity and proportionality of the deprivation of liberty, and lack of separation of vulnerable people. In addition, some Member States restrict access to free legal aid.

Article 8 (2) of the Charter, as well as EU data protection law, provides for the right of access, correction and deletion of one's own stored data. Regulations setting up interoperable large-scale EU databases in the area of freedom, security and justice equally guarantee this right. The operation and interoperability of the EU's large-scale information systems, which collect a range of personal data, has important fundamental rights implications, as FRA noted in its past research.

Training for authorised staff is a legal obligation under most of the legal instruments governing large-scale IT systems and their interoperability. At EU level, CEPOL, eu-LISA and Frontex organised training activities in 2021 to boost competent authorities' knowledge of the technical and business use aspects and implications of the use of the systems. FRA contributes to such training with fundamental rights input.



### FRA OPINION 6.3

The EU and Member States should intensify efforts to raise awareness of the rights of and available remedies for persons whose data are stored in the databases of the EU's large-scale information systems, together with putting in place effective oversight mechanisms. Member States should ensure that all staff involved receive mandatory fundamental rights training.

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# INFORMATION SOCIETY, PRIVACY AND DATA PROTECTION

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## UN & CoE

20

Committee of Ministers of the Council of Europe (CoE) calls upon all Parties to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, commonly known as Convention 108, to ratify its amending Protocol.

25

Special Rapporteur on the right to privacy presents a report to the General Assembly of the United Nations highlighting the effects of coronavirus disease 2019 (Covid-19) upon the privacy of children.

28

- CoE adopts a new set of guidelines on how to use facial recognition technologies in the public and private sectors. The guidelines call for stricter rules but also recognise the use of facial recognition technologies by law enforcement agents in some contexts.
- The CoE Commissioner for Human Rights stressed the role of Convention 108 in addressing current data protection challenges, including cross-border exchange of data by national security services.

January

17

Committee of Ministers of the CoE adopted a declaration on the risks of computer-assisted or artificial-intelligence-enabled decision making in the field of the social safety net.

March

28

Committee of Ministers of the CoE adopts a declaration on the need to protect children's privacy in the digital environment, including the right to informational self-determination and the protection of personal data and communications.

April

4

two parallel statements, Committee of Bioethics of the CoE and the Consultative Committee of Convention 108 calls for careful deliberation on the human rights and fundamental freedoms challenges raised by the 'vaccine pass' and similar documents, for both medical and non-medical purposes.

21

CoE Steering Committee on Media and Information Society (CDMSI) at its 19th plenary meeting adopts a Guidance Note on Content Moderation.

25

European Court of Human Rights holds in *Big Brother Watch and Others v. the United Kingdom* (Nos. 58170/13, 62322/14 and 24969/15) and *Centrum För Rättvisa v. Sweden* (No. 35252/08) that national regimes for bulk interception of communications do not, in themselves, violate the Convention for the Protection of Human Rights and Fundamental Freedoms. Such regimes should, nonetheless, be subject to both *ex ante* independent authorisation and *ex post facto* review.

May

11

The Conference of CoE Ministers responsible for Media and Information Society adopts a Final Declaration, a Resolution on freedom of expression and digital technologies, a Resolution on the safety of journalists, a Resolution on the changing media and information environment and a Resolution on the impacts of the Covid-19 pandemic on freedom of expression.

22

Parliamentary Assembly of the CoE adopts a resolution (2383) calling on the EU Member States to ensure that any Covid-19 pass system fully complies with Convention 108.

June

## UN & CoE

July

20

In *Akgün v. Turkey* (No. 19699/18), European Court of Human Rights holds that the active use of an encrypted messaging application designed for the public is not, in itself, sufficient to establish reasonable suspicion that the user is a member of a terrorist organisation.

23

Special Rapporteur on the right to privacy of the UN publishes a report on the promotion and protection of human rights (A/76/220). It includes a set of recommendations aimed at ensuring the right of every person to enjoy the right to privacy during public health crises.

August

12

12 August – UN human rights experts call on all states to impose a moratorium on the sale and transfer of surveillance technology, at least until there are regulations that guarantee its use in compliance with international human rights standards.

September

13

13 September – Office of the UN High Commissioner for Human Rights publishes a report on the right to privacy in the digital age. It stresses the need for a moratorium on the sale and use of artificial intelligence systems until adequate safeguards are in place.

October

28

UN Office on Drugs and Crime and Security Council Counter-Terrorism Committee Executive Directorate publish general practices that international service providers developed in responding to requests for data submitted by foreign criminal justice authorities (Data Disclosure Framework).

November

3

CoE Committee of Ministers adopted a recommendation on the protection of individuals with regard to automatic processing of personal data in the context of profiling, updating a previous recommendation of 2010.

17

CoE Committee of Ministers approves the Second Additional Protocol to the Budapest Convention on Cybercrime, which outlines new rules improving international cooperation and access to electronic evidence.

24

Committee of Convention 108 adopts Guidelines on the Protection of Individuals with regard to the Processing of Personal Data by and for Political Campaigns, with the aim of providing advice on how to reconcile political communication with the electorate with privacy rights of voters.

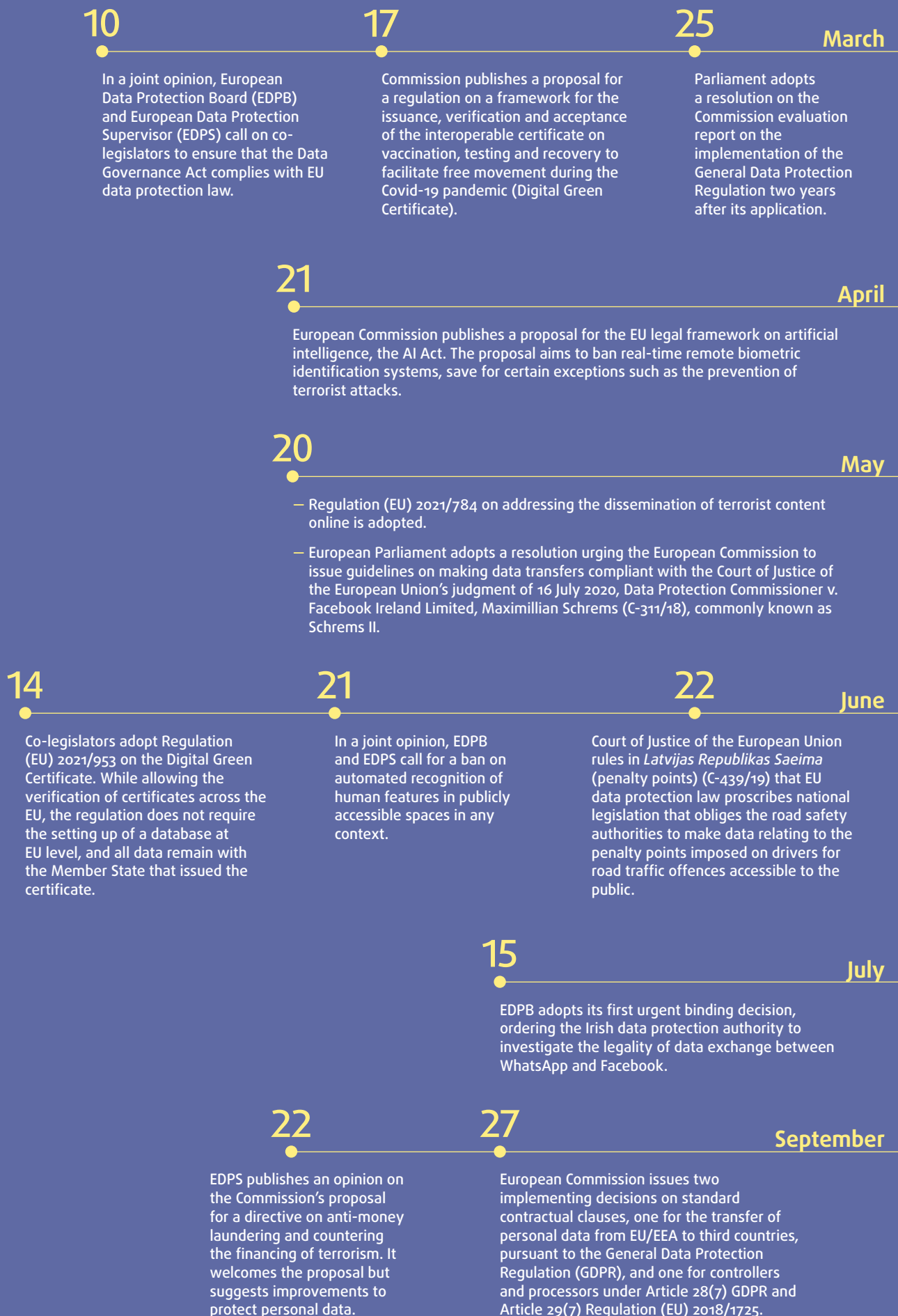
25

Members of the UN Educational, Scientific, and Cultural Organization adopt a first ever global agreement on the ethics of artificial intelligence. It includes explicit bans on the use of systems for social scoring and on mass surveillance, and guidance to ensure that digital transformations is environmentally sustainable.

December

3

CoE Steering Committee on Media and Information Society (CDMSI) adopts Guidance note on the prioritisation of public interest content online.



# EU

October

1

Council of the EU agrees on a position on the Commission's proposal for a Data Governance Act and issues a mandate to the EU Presidency to start trilogue negotiations.

6

European Parliament votes in favour of a resolution banning the use of facial recognition technology by law enforcement agencies in public spaces.

19

EDPB adopts guidelines on restrictions of data subject rights under Article 23 of the General Data Protection Regulation (restrictions serving the general public interest) following public consultation

28

European Parliament's Committee on Industry, Research and Energy endorses the European Commissions' proposal, presented in 2020, to revise the Directive on Security of Network and Information Systems.

November

10

General Court of the European Union dismisses Google's legal action against the decision of the European Commission finding that Google abused its dominant position favouring its own shopping comparison over rivals and imposing record fines on the tech company.

December

17

Commission adopts the 2021 annual report on the application of the Charter "Protecting Fundamental Rights in the Digital Age".



In 2021, legislative and policy initiatives addressing new technology focused on managing the risks that the increased digitalisation of every aspect of life has created. Key files relating to artificial intelligence (AI) and online content moderation were in the spotlight. Emergency situations relating to the management of the pandemic tested data protection principles in practice; so did the development of security-related measures.

The draft AI regulation published in April 2021 provided a first attempt to regulate the AI industry while introducing fundamental rights safeguards. EU institutions and Member States were working towards an agreement on the scope and limits of the acceptable use of AI. In parallel, the rights to data protection and privacy had to be constantly reaffirmed concerning measures meant to protect individuals, both with respect to the pandemic and against criminal activities. That followed a pattern that FRA's fundamental rights reports have identified each year since 2014.

## **7.1.**

### **THE MANY CHALLENGES OF REGULATING AI FROM A FUNDAMENTAL RIGHTS PERSPECTIVE**

In 2021, decision makers and civil society kept debating the many fundamental rights challenges that the use of digital data raises. The European Commission introduced multiple ground-breaking proposals in 2020 and 2021. While most stakeholders welcomed the proposal for a draft regulation on artificial intelligence, they also identified several shortcomings that may jeopardise the effective protection of fundamental rights.

#### **7.1.1. The race to regulate AI has started, yet fundamental rights remain an Achilles heel**

In April 2021, the European Commission presented the highly anticipated draft Artificial Intelligence Act.<sup>1</sup> The proposal contains different sets of rules based on a risk-based approach, with different levels of risk: AI systems that pose an unacceptable risk and are banned; high-risk AI systems, which need to be in conformity with specific requirements; AI systems which can be subject to certain transparency obligations; and minimal-risk AI systems, which are not subject to specific obligations.

In June 2021, the European Data Protection Supervisor (EDPS) and the European Data Protection Board (EDPB) published a joint opinion on the proposal.<sup>2</sup> While recognising that the proposal responds to a pressing need to regulate AI systems, both institutions highlighted important shortcomings and invited the legislators to address them.

Most notably, they suggested an extension of the ban to four additional types of AI systems: social scoring performed by private companies; AI used for automated recognition of human features in publicly accessible spaces; AI systems using biometrics to categorise individuals into clusters; and AI systems used to infer emotions of natural persons. The EDPB and the EDPS recalled the crucial role of oversight bodies, and invited the EU legislators to clarify their tasks and mandate, and to ensure their full autonomy and independence. Finally, the opinion identified several areas where the proposal should further clarify data protection

principles, for example in relation to regulatory sandboxes, the certification system and codes of conduct. Article 53 of the draft AI Act defines regulatory sandboxes as “a controlled environment that facilitates the development, testing and validation of innovative AI systems for a limited time before their placement on the market or putting into service pursuant to a specific plan”.

The European Economic and Social Committee released an opinion in September 2021.<sup>3</sup> It identifies similar shortcomings. In addition, it recommended that EU legislators further clarify the terminology and definitions, and expand the scope of the ban on social scoring.

Both the Council of Europe (CoE) and United Nations (UN) bodies intensified their work on AI in 2021. In December 2021, during its sixth plenary meeting, the CoE’s Ad hoc Committee on Artificial Intelligence adopted its final deliverable on ‘Possible elements of a legal framework on artificial intelligence, based on the CoE’s standards on human rights, democracy and the rule of law’.<sup>4</sup> This document contains an outline of the elements that could guide future negotiations on legally binding and non-binding instruments to ensure that AI systems comply with human rights, democracy and the rule of law.

AI systems can affect many human rights, not only data protection and privacy, as a report that the UN Human Rights Office published in September 2021 demonstrated.<sup>5</sup> AI systems may also have serious negative impacts on people’s right to health, education, freedom of movement, freedom of peaceful assembly and association, and freedom of expression, it argues, referring to their use for fraud detection or recruitment purposes, among others. Echoing concerns that European bodies, including FRA, have raised,<sup>6</sup> the report also emphasised the importance of conducting human rights impact assessments before deploying any AI system, and ensuring that AI systems are regularly monitored.

**“We cannot afford to continue playing catch-up regarding AI – allowing its use with limited or no boundaries or oversight, and dealing with the almost inevitable human rights consequences after the fact. The power of AI to serve people is undeniable, but so is AI’s ability to feed human rights violations at an enormous scale with virtually no visibility. Action is needed now to put human rights guardrails on the use of AI, for the good of all of us.”**

Michelle Bachelet, **UN High Commissioner for Human Rights**,  
15 September 2021



In November 2021, the UN Educational, Scientific, and Cultural Organization adopted its *Recommendation on the ethics of artificial intelligence*, the first global standard-setting instrument on the ethics of artificial intelligence.<sup>7</sup>

#### **7.1.2. National AI initiatives: taking fundamental rights seriously**

EU Member States continued to adopt AI-related initiatives. Several launched national and local initiatives aimed at promoting the use of AI systems, mainly in four areas: public administration (**Croatia**,<sup>8</sup> **Denmark**,<sup>9</sup> **Finland**<sup>10</sup> and **Portugal**<sup>11</sup>) public safety (**Estonia**<sup>12</sup>), agriculture and cultural heritage (**Lithuania**<sup>13</sup>), and business and industry (**Croatia**,<sup>14</sup> **Luxembourg**<sup>15</sup> and **Spain**<sup>16</sup>).

Almost all EU Member States either had adopted or were in the process of adopting national AI strategies by the end of 2021. **Austria**,<sup>17</sup> **Ireland**,<sup>18</sup> **Italy**<sup>19</sup> and **Slovenia**<sup>20</sup> released their official strategies in 2021.

National strategies published in 2021 also recognised the importance of fundamental rights for reliable and trustworthy use of AI, but, following the trend FRA already noted in the last two Fundamental Rights Reports, did not always include a specific in-depth analysis of the impact of AI technology on fundamental rights. For instance, **Italy**<sup>21</sup> limits itself to mentioning the framework put forward by the 2019 EU *Ethics guidelines for trustworthy AI*. **Austria**,<sup>22</sup> **Ireland**<sup>23</sup> and **Slovenia**<sup>24</sup> point to the need to protect fundamental rights, and they include some steps and measures to make sure of enforcing them. The strategies also refer to the importance of a permanent social dialogue and support for interdisciplinary research to monitor the developing impact of AI technology.

The Commission put forward the draft AI Act in 2021. It received particular attention at national level.

The legislative bodies of several Member States (including **Czechia**,<sup>25</sup> **Germany**,<sup>26</sup> the **Netherlands**,<sup>27</sup> **Poland**<sup>28</sup> and **Portugal**<sup>29</sup>) favoured the proposal, while also raising some concerns. In **Poland**, the senate questioned the exception allowing the use of real-time facial recognition in public spaces for law enforcement without prior judicial approval. The **German** federal Council warned against over-regulation of low-risk AI systems and discussed the possibility of extending the prohibition on scoring systems to the private sector. The **Czech** senate pointed out the threat to democracy that evaluating and classifying persons and groups by scoring systems in both the public and private sectors presented.

Public authorities, civil society and academic experts were also concerned about the potential fundamental rights interferences and lack of effective enforcing mechanisms in the AI regulation proposal. In **Sweden**,<sup>30</sup> in a consultation procedure that the government initiated, more than 100 stakeholders from the public and private sectors published their opinions. In **Croatia**,<sup>31</sup> the Ombudswoman, who chairs the Executive Board of the European Network of Equality Bodies, proposed making equality bodies part of the national supervisory mechanism in order to address any discrimination in the use of AI. In **Denmark**,<sup>32</sup> the national human rights institution (NHRI) suggested introducing a public register of all public authorities that make use of AI, to increase transparency.

These proposals addressed some of the fundamental rights challenges emerging from the use of AI technology in both public and private sectors, which academic experts have also raised.<sup>33</sup>

### 7.1.3. Civil society calls for more stringent AI regulation

In November 2021, more than 120 civil society organisations (CSOs) published a joint statement urging European institutions and Member States to ensure that the proposed AI regulation is in line with the protection of fundamental rights.<sup>34</sup> Among other proposals, they called for the flexible and context-dependent risk categorisation of AI systems or the inclusion of an obligation on users to register deployments of high-risk AI systems. In particular, CSOs and independent public authorities<sup>35</sup> called for a full ban on social scoring systems, the use of remote biometric identification in public spaces, and AI technology that is capable of interfering with people's emotions.

Oversight was also one of the main topics of contention after the publication of the AI regulation proposal. Numerous CSOs pointed out the need to ensure that national oversight bodies responsible for supervising the deployment of AI systems have sufficient financial resources and fundamental rights expertise, and that mechanisms allowing individuals and collectives to file complaints are in place. These oversight bodies could trigger investigations into suspected infringements, or into the quality and accuracy of fundamental rights impact assessments that developers of AI systems carry out. The regulation should also include a specific whistleblower mechanism to protect workers who challenge automated decisions, according to other CSOs.<sup>36</sup>



Another concern that CSOs and independent public authorities raised regards the scope of impact assessments. In their joint statement, for example, the EDPB and EDPS considered that high-risk AI systems already in place at the time of the enactment of the AI Act should be subject to conformity reassessments “whenever a change occurs which may affect the compliance” instead of when “significant changes” in design and intended purpose occur, as the Commission’s proposal states.<sup>37</sup> On the assumption that developers are not well placed to comprehensively assess the impact of high-risk AI systems once they are in use, CSOs called for the introduction of an obligation on both providers and developers of high-risk AI systems to carry out the assessment.<sup>38</sup> They considered that a meaningful impact assessment identifies how the system can infringe fundamental rights, considering the specific use context, both before and after AI systems are deployed, but should also address means to prevent or mitigate these risks. CSOs and independent public authorities also pointed out the need to clearly identify the categories of individuals and groups whose fundamental rights are more likely to be affected, in particular vulnerable people and marginalised groups. Some CSOs considered that the impact on the environment and sustainability (e.g. resource consumption and greenhouse gas emissions of AI systems) and broader public interests should also be included.<sup>39</sup>

## 7.2. THE CHALLENGES OF REGULATING DIGITAL SERVICES FROM A FUNDAMENTAL RIGHTS PERSPECTIVE

The challenges in adequately addressing the need for appropriate regulation of digital platforms have already been under debate at the EU and national level for several years. The revelations of the Facebook whistle-blower Frances Haugen highlighted the urgent need for a functioning legal framework to protect the rights of digital platforms' users. She argued that EU lawmakers have a "once-in-a-generation opportunity" to develop a "global gold standard" with the Digital Services Act (DSA) proposal.<sup>40</sup> Nevertheless, several EU bodies and other actors pointed out the shortcomings of the current proposal as regards fundamental rights protection.

### 7.2.1. Draft Digital Services Act: a welcome first step that needs stronger fundamental rights safeguards

The European Commission proposed the DSA<sup>41</sup> in December 2020. Its principles remained a key topic on the EU agenda in 2021.

The DSA would apply to all digital services that connect consumers to goods, services or content. Its objective is to improve the mechanisms for removing illegal online content and for effectively protecting users' fundamental rights online. The proposal also aims to strengthen the oversight of online platforms, in particular those that reach more than 45 million users in the EU, which are known as very large online platforms.

Eight committees of the European Parliament provided opinions. They were the committees on the Internal Market and Consumer Protection (IMCO), on Civil Liberties, Justice and Home Affairs, on Legal Affairs, on Industry, Research and Energy, on Economic and Monetary Affairs, on Transport and Tourism, on Culture and Education, and on Women's Rights and Gender Equality.

On 20 October, the Committee on the Internal Market and Consumer Protection (IMCO), the leading committee, proposed a record number of 2,297 amendments.<sup>42</sup> They emphasised, notably, the need to clarify the liability regime and the notice and takedown mechanism, and the need to establish stricter rules on advertising and recommender systems. Article 2 of the draft DSA defines 'recommender system' as "a fully or partially automated system used by an online platform to suggest in its online interface specific information to recipients of the service, including as a result of a search initiated by the recipient or otherwise determining the relative order or prominence of information displayed".

IMCO took into account the recommendations that the committees on Civil Liberties, Justice and Home Affairs, on Legal Affairs and on Industry, Research and Energy, the associated committees, proposed, and the opinions that the other committees published. It adopted its final report on 13 December 2021.<sup>43</sup> The Council of the European Union published its position in November 2021. It called for a broader scope, which would include search engines; for additional obligations for online marketplaces and search engines; and for stricter rules for very large online platforms.<sup>44</sup>





The main EU bodies dedicated to protecting the right to privacy and the right to personal data protection are the EDPS and the EDPB. They published in-depth analyses of the proposal, highlighting a number of shortcomings that need to be addressed to ensure that the proposal aligns fully with fundamental rights.

In February 2021, the EDPS published an opinion welcoming the general objective of the DSA proposal to promote a transparent and safe online environment, but insisting on the need to implement further requirements. The EDPS called for a prohibition on profiling for purposes of content moderation, a “phase-out leading to a prohibition of targeted advertising on the basis of pervasive tracking”, and additional measures to further promote transparency and user control in relation to recommender systems.<sup>45</sup>

In November 2021, the EDPB published a statement on the Digital Services Package and Data Strategy (including the DSA). It called for amendments to the current proposals in order to avoid serious impacts on individuals’ fundamental rights and freedoms. The EDPB insisted that “without further amendments, the proposals will negatively impact the fundamental rights and freedoms of individuals and lead to significant legal uncertainty that would undermine both the existing and future legal framework. As such, the proposals may fail to create the conditions for innovation and economic growth envisaged by the proposals themselves.”<sup>46</sup>

Furthermore, a representative of the UN Human Rights Office spoke at a press briefing in July 2021. She highlighted that, while the DSA has some very positive elements, “some contradictory signals remain including the risk that over-broad liability will be imposed on companies for user-generated content, and that there will be limited judicial oversight.”<sup>47</sup>

### **7.2.2. Global bodies tackle online platform regulation**

The regulation of digital services was also one of the key topics discussed at global level in 2021. At the CoE, three committees of experts debated the key challenges of regulating digital content. They proposed guidance and recommendations.

In May 2021, the Steering Committee for Media and Information Society (CDMSI) adopted a guidance note on content moderation. It highlighted, with regard to oversight, the “best practices towards effective legal and procedural frameworks for self-regulatory and co-regulatory mechanisms of content moderation”.<sup>48</sup>

In September 2021, the Committee of Experts on Freedom of Expression and Digital Technologies (MSI-DIG) published a draft recommendation on the impacts of digital technologies on freedom of expression. It sets out guidelines for States parties to address challenges linked to transparency, accountability and redress, to raise rights holders’ awareness, and to promote and protect independent research in the area of digital technologies.<sup>49</sup> Finally, in October 2021, the Expert Committee on Combating Hate Speech (ADI/MSI-DIS) adopted the final version of the draft recommendation on combating hate speech and its draft explanatory memorandum.<sup>50</sup> Both draft recommendations have significant overlaps with the European Commission’s proposal for a DSA.

At the UN, the Special Rapporteur on minority issues released a report in March 2021 on hate speech, social media and minorities. It highlighted the persistent, and increasing, recurrence of hate speech online: “The dark side of social media is now impossible to ignore, as they have become a breeding ground and propaganda vehicle for dangerous tropes, conspiracy theories, misinformation, disinformation, racism and scapegoating of minorities.”<sup>51</sup> On this basis, the Special Rapporteur called for states and social media platforms to adopt a number of recommendations to effectively call online racism to a halt.

The UN’s Human Rights Committee welcomed the efforts of some states to address online hate speech, but also criticised the negative effects of national regulation on other human rights, most notably on freedom of expression. In November 2021, in its *Concluding observations on the seventh periodic report of Germany*, the committee raised concerns over the chilling effect that the Network Enforcement Act (NetzDG) could have on online expression. It invited Germany to “consider revising the Act to provide for judicial oversight and access to redress in cases where the nature of online material is disputed.”<sup>52</sup>



### 7.2.3. Member States balancing the need to regulate online content moderation with the duty to protect fundamental rights

Several countries attempted to combat online hate speech (see also Chapter 4) and illegal content in 2021. Some Member States communicated their positions on the DSA and stated that they would not regulate prior to a final decision on it at EU level. They included **Finland**,<sup>53</sup> **Poland**<sup>54</sup> and **Slovakia**.<sup>55</sup>

The **Finnish** government clearly stated its support for the objectives of the proposed act, but recommended further clarifications to safeguard proportionality and reduce the risks to fundamental rights and freedoms.<sup>56</sup> The Constitutional Law Committee of the Finnish Parliament also emphasised the complex question of defining ‘illegal content’. It called for the development of a clear and precise definition in Article 2 (g),<sup>57</sup> to avoid harmful interferences with freedom of expression.<sup>58</sup>

At the same time, several Member States tabled new bills, adopted new acts, or developed policies, aimed at combating hate speech (such as **Austria**,<sup>59</sup> **Finland**,<sup>60</sup> **France**,<sup>61</sup> **Germany**,<sup>62</sup> **Poland**<sup>63</sup> and **Spain**<sup>64</sup>) or at regulating illegal online content (such as **Denmark**,<sup>65</sup> **Germany**,<sup>66</sup> **Ireland**<sup>67</sup> and **Malta**<sup>68</sup>). In most of these Member States, NHRIs raised concerns about the proposals concerning the protection of fundamental rights.<sup>69</sup> As for the DSA, while steps towards better regulation of digital services are welcome, most concerns focused on the absence of a clear definition of ‘hate speech’, on the necessity to ensure the proportionality of national measures to tackle illegal content online, and on the need for effective oversight mechanisms.

**France** integrated legal provisions for regulating online hate speech into a general act on “strengthening the respect for the principles of the Republic”.<sup>70</sup> The bill incorporates a number of obligations for digital platforms, very similar in content to the provisions in the ‘Loi Avia’ of 2020 that the French Constitutional Council censured.<sup>71</sup> Among other provisions, the bill classifies as an offence “endangering the life of others by disseminating information relating to private, family or professional life”. The French National Advisory Commission on Human Rights expressed reservations about this new offence. In particular, it pointed to the vague terms, which may result in a broad interpretation contrary to the principle of the legality of offences and penalties, and to respect for freedom of expression and the right to information.<sup>72</sup>

In **Poland**, the Commissioner for Human Rights criticised the absence of clear definitions of ‘illegal content’ and ‘hate speech’, and raised concerns over the risk of restricting freedom of expression through arbitrary interference by the proposed Freedom of Speech Council, which could impose heavy penalties on service providers.<sup>73</sup>

In **Ireland**, the primary purpose of the Online Safety and Media Regulation Bill is to incorporate the revised Audiovisual Media Services Directive into national law. CSOs and the Irish Data Protection Commissioner criticised its wide scope. Both the Irish Council for Civil Liberties<sup>74</sup> and Digital Rights Ireland<sup>75</sup> expressed concern about the bill’s wide scope and unclear definitions. The Data Protection Commission noted that “the Bill, in its current form, expressly excludes material that violates data protection or privacy law from being within the regulatory scope of the Media Commission, thus constituting a regulatory lacuna.”<sup>76</sup>

### 7.2.4. Civil society continues to voice concerns about the harm that unbalanced online content moderation could cause

CSOs that specialise in data protection, privacy and rights in the digital sphere participated actively throughout 2021 in debates about national and European attempts to regulate digital content.

#### PROMISING PRACTICE

### Reporting illegal online content on a safe and anonymous line

In Portugal, the Safe Internet Centre, which the Portuguese Association for Victim Support supports, developed the Safer Internet Line as a safe way of reporting illegal online content related to the sexual abuse of minors or content that promotes racism and violence. The initiative provides anonymous and confidential telephone or online support, produces analyses and publishes results that help raise awareness of safer internet use. It reports serious incidents to the competent authorities when it considers a situation dangerous.

See Centro Internet Segura, ‘**Sobre a LIS**’

**“The proposed Digital Services Act (DSA) offers an unparalleled opportunity to reinvigorate transparency and openness, and return agency and control over information to internet users. If done right, the DSA can address some of today’s most pressing challenges and help better protect fundamental rights online. However, if done wrong, it can endanger freedom of expression and have a devastating effect for vulnerable communities.”**

Access Now et al. (2021), ‘*Open letter to Members of the European Parliament: Negotiations in the EP need to comply with fundamental rights*’, 29 September 2021

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Ten CSOs addressed an open letter to IMCO in June 2021, urging MEPs to uphold fundamental rights in the DSA.<sup>77</sup> In September 2021, in another open letter, 14 CSOs called on the European Parliament to ensure that the DSA complies with fundamental rights.<sup>78</sup> These open letters included some key recommendations, insisting on the importance of providing exemptions from intermediary liability, to protect freedom of expression; of protecting users’ right to communicate free of monitoring and censorship; and of avoiding inflexible and short deadlines for content removals, which could only lead to the use of upload filters.

“Upload filters are automated decision-making tools created for content recognition and blocking. They block content according to an algorithm. However, they lack the understanding of linguistic or cultural differences and are unable to assess the context of expressions accurately. They are poorly trained and there are several cases where videos were blocked for undue reasons.”<sup>79</sup> That practice is not compatible with fundamental rights.

Access to and analysis of data on the operation of digital platforms and how it can affect fundamental rights are crucial to moderate online content effectively without endangering the protection of users’ rights, as FRA has highlighted in its research on the use of AI and its impact on fundamental rights.<sup>80</sup> Yet some large digital platforms have prevented efforts to document and understand how to identify and address hate speech or illegal content without affecting other fundamental rights. For example, they have denied access to data.

Facebook shut down an AlgorithmWatch project that monitored Instagram.<sup>81</sup> In response, CSOs addressed an open letter, signed by 36 organisations and 6,126 individuals, to the European Parliament, to emphasise the importance of protecting public interest research in the proposed DSA.<sup>82</sup>

A joint report by the CSOs Access Now, European Digital Rights and the Civil Liberties Union for Europe on the disinformation debate highlighted the crucial role of the DSA in ensuring effective protection of fundamental rights. It called on the EU co-legislators to “Complement the protection for human rights online afforded under the GDPR [General Data Protection Regulation] through the DSA and ePrivacy Regulation”, among other tasks.<sup>83</sup>

### **7.3.**

## **PROTECTION OF PERSONAL DATA AND PRIVACY IN EMERGENCY SITUATIONS**

Emergency and crisis situations continued to challenge the robustness and flexibility of the rights to data protection and privacy. The coronavirus disease 2019 (Covid-19) pandemic continued to affect the influence of the digital sphere in all areas of life: people worked online, studied online, connected online, shopped online, etc. The ability to move from physical to online social interaction was of great benefit to many, but also created opportunities for cybercriminals. National and EU regulators stepped up their efforts to address cybercrime, putting the effective protection of personal data and of private life to a real stress test.



## Eurobarometer survey and FRA research: freedom of expression, privacy and non-discrimination online

An overwhelming majority of EU citizens (81 %) think that the internet and digital tools will play an important role in the future, according to a special 2021 Eurobarometer survey on digital rights and principles.\* Moreover, a large majority (82 %) consider it useful for the European Commission to define and promote a common European vision on European digital rights and principles, to ensure a successful digital transformation.



However, more than half (56 %) of the respondents expressed concern about cyberattacks and cybercrime, such as theft or abuse of personal data, malicious software or phishing. FRA had noted that trend in 2020 in its relevant report on the Fundamental Rights Survey.\*\*

In addition, more than half (53 %) also worry about the safety and well-being of children online. Nearly half (46 %) worry about the use of personal data and information by companies or public administrations. These data confirm FRA's finding that 41 % of respondents to the Fundamental Rights Survey do not want to share personal data with private companies.\*\*\*

Most respondents consider that the EU protects their rights in the online environment well. Still a significant number (almost 40 %) are not aware that rights, such as freedom of expression, privacy or non-discrimination, should also be respected online. A large majority of EU citizens consider it useful to know more about these rights.

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### Sources:

\* European Commission (2021), **'Special Eurobarometer 518: Digital rights and principles'**, Brussels, September–October 2021

\*\* FRA (2020), **Your rights matter: Security concerns and experiences**, Luxembourg, Publications Office, 2020

\*\*\* FRA (2020), **Your rights matter: data protection and privacy**, Brussels, 2020



### 7.3.1. Digital anti-pandemic measures and the rights to privacy and the protection of personal data

In June 2021, the European Parliament and the Council of the EU adopted the EU Digital Covid Certificate Regulation.<sup>84</sup> It consists of a common framework for the issuance, verification and acceptance of interoperable certificates for Covid-19 vaccination, test or recovery certificates to facilitate free movement during the Covid-19 pandemic.

To fight the spread of the virus, several Member States also developed rules conditioning access to certain activities on individuals' vaccination

status, recovery status, or Covid-19 test status, to be controlled through by means of Covid-19 certificates. To avoid that persons travelling to another Member State are required to obtain an additional national Covid-19 certificate, Member States may use the EU Digital Covid Certificate for domestic purposes, but need to provide for a legal basis to that effect in national law. The domestic use of the EU Digital Covid Certificate thus remains a national decision, and is not mandated by the EU.

This certificate is unquestionably useful. Nonetheless, there is some concern about its potential negative impact on fundamental rights, as FRA highlighted in its seventh Covid-19 bulletin (see FRA activity box).<sup>85</sup> The EDPS and the EDPB highlighted specific challenges to the rights to data protection and privacy in a joint opinion.<sup>86</sup>

At the CoE, both the Committee on Convention 108 and the Committee on Bioethics issued statements<sup>87</sup> on the development of vaccine attestations and certifications. The CoE also developed guidance on human rights standards for Member States to follow when rolling out Covid-19 certificates.<sup>88</sup>



## FRA ACTIVITY

### FRA highlights cross-cutting fundamental rights challenges for Covid-19 certificates

In May 2021, FRA's seventh Covid-19 bulletin highlighted how Covid-19 may affect fundamental rights. It recommended that EU and Member States implement key safeguards in four core areas:

1. with regard to **necessity and proportionality**, the use and purpose of EU Covid-19 certificates should be limited to the current Covid-19 pandemic;
2. with regard to **non-discrimination and equality**, everyone should have equitable and free access to vaccines, testing and proof of recovery, and the risk of discrimination between vaccinated/immunised persons and those who have not been vaccinated should be mitigated;
3. with regard to **data protection**, any processing of sensitive data requires a particularly high level of protection, and citizens should be able to exercise their rights under the GDPR;
4. with regard to **effective and independent oversight**, it is important to consult with independent national human rights bodies.

Source: FRA, *Coronavirus pandemic in the EU – Fundamental rights implications: Vaccine rollout and equality of access in the EU, May 2021*

Data protection authorities (DPAs) in most Member States scrutinised national schemes to develop Covid-19 passes.

In some countries, including **Cyprus**,<sup>89</sup> **Denmark**<sup>90</sup> and **North Macedonia**,<sup>91</sup> the national DPAs assessed the legal bills to introduce the Covid-19 certificates as proportionate and necessary. To ensure that **Denmark's** vaccination status app complied with fundamental rights, a specific advisory board monitored its development. The board included representatives of the Data Ethics Council and the Cybersecurity Council.<sup>92</sup>

In most Member States, though, DPAs raised concerns, which in some cases, led Member States to amend the legal basis implementing the roll-out of certifications to better protect the processing of sensitive health data. This was the case in **Belgium**,<sup>93</sup> **Bulgaria**,<sup>94</sup> **Czechia**,<sup>95</sup> **France**,<sup>96</sup> **Greece**,<sup>97</sup> **Hungary**,<sup>98</sup> **Italy**,<sup>99</sup> **Latvia**,<sup>100</sup> **Luxembourg**,<sup>101</sup> the **Netherlands**,<sup>102</sup> **Poland**,<sup>103</sup> **Portugal**,<sup>104</sup> **Slovenia**<sup>105</sup> and **Spain**.<sup>106</sup>

DPAs insisted that vaccination-related data are health data, i.e. a special category of personal data subject to stricter protection. They reiterated that such information may be required only if an individual voluntarily agrees to submit it, and that consent should meet the conditions that the GDPR lists.

NHRIs also raised concerns about Covid-19 passports. In **France**, the *Défenseur des droits* stressed, among other points, that this measure had not been subject to substantive debate and therefore lacked democratic legitimacy. She also raised concerns about the overlap between the lowest rate of vaccinations and groups in the population suffering from poverty, from the 'digital divide' or from lack of access to public services. She highlighted that the new measures would be likely to negatively affect vulnerable population groups.<sup>107</sup>

Finally, in some Member States, such as **Austria**<sup>108</sup> and **France**,<sup>109</sup> CSOs also played a crucial and active role in raising awareness of the fundamental rights issues that the digitalisation of vaccine certificates may raise.

Rolling out Covid-19 vaccine certificates for domestic purposes was not the only pandemic-related measure that raised serious concerns about data protection and privacy. Several measures in employment and education to tackle the pandemic interfered with the rights to data protection and privacy, as FRA's previous Fundamental Rights Report highlighted. In **Estonia**,<sup>110</sup> **Hungary**<sup>111</sup> and **Italy**,<sup>112</sup> issues arose about processing Covid-19-related data in the workplace. In **Cyprus**,<sup>113</sup> **Greece**,<sup>114</sup> **Hungary**,<sup>115</sup> **Italy**<sup>116</sup> and **Portugal**,<sup>117</sup> the processing of personal data by education institutions, for instance when monitoring students during remote exams, raised concerns.

### 7.3.2. Security and surveillance legislation and fundamental rights concerns within Member States

Measures related to monitoring the health status of individuals during the pandemic were not the only areas to test respect for data protection and privacy rights. The year also witnessed growing interest in the development of bills and the adoption of new legislative texts intended to legitimise the use of novel, often high-tech, surveillance tools for security purposes. The European Parliament acknowledged this trend. It adopted a resolution in October 2021 demanding stronger fundamental rights safeguards on the use of AI technologies by law enforcement.<sup>118</sup>

Specifically in regard to surveillance, the Grand Chamber of the ECtHR judged a landmark case in May 2021. It reaffirmed that, while bulk interception of communication is not in itself illegal, such surveillance should carry "end-to-

## PROMISING PRACTICE

### Increased cooperation between data protection authority and national labour inspectorate over Covid-19 measures

In April 2021, the Italian DPA signed a protocol with the national labour inspectorate. The protocol, valid for two years, aims to establish a strategic cooperation between the two institutions. That is necessary to address the new challenges from the impact of new technologies. For example, smart working and technological devices are being used more extensively on the work environment to tackle the Covid-19 pandemic.

Smart working is "a modern mode of work characterized by a high level of working time and space flexibility, together with the use of technology tools. [...] The flexibility of smart working includes many aspects. The first element is the place of work. Employees do not need to be present in the office, but they can decide where they perform the tasks. [...] Another important aspect is the working time. The employee can organize the working day and is not obliged to respect the rigid nine-to-five schedule. Very often the staff is not bounded by any hours limit; what matters is the final result delivered within a deadline."\*

The two institutions agreed to cooperate in order to coordinate shared decisions and approaches to these issues, to organise periodic meetings, and to organise information campaigns and training activities.

\* European Commission, *Electronic Platform for Adult Learning in Europe (2020)*, 'Smart working', 1 April 2020

See Italy, *Garante, Protocollo d'intesa tra il Garante per la protezione dei dati personali e INL*

**“Fundamental rights are unconditional. For the first time ever, we are calling for a moratorium on the deployment of facial recognition systems for law enforcement purposes, as the technology has proven to be ineffective and often leads to discriminatory results. We are clearly opposed to predictive policing based on the use of AI as well as any processing of biometric data that leads to mass surveillance.”**

Petar Vitanov, MEP, rapporteur of the European Parliament resolution of 6 October 2021 on artificial intelligence in criminal law and its use by the police and judicial authorities in criminal matters

end safeguards”. This means that “an assessment should be made at each stage of the process of the necessity and proportionality of the measures being taken; that bulk interception should be subject to independent authorisation at the outset, when the object and scope of the operation were being defined; and that the operation should be subject to supervision and independent ex post facto review.”<sup>119</sup>

**France**,<sup>120</sup> **Portugal**<sup>121</sup> and **Slovenia**<sup>122</sup> introduced new bills to enable the use of drones for surveillance. Several Member States proposed or adopted new laws or legislative amendments to counter-terrorism laws, to facilitate the surveillance, exchange, collection and/or processing of personal information. These raised serious concerns among DPAs, NHRIs and CSOs alike. This was the case, for example in **Austria**,<sup>123</sup> **Czechia**,<sup>124</sup> **France**,<sup>125</sup> **Germany**,<sup>126</sup> **Greece**,<sup>127</sup> **Ireland**,<sup>128</sup> the **Netherlands**,<sup>129</sup> **Portugal**,<sup>130</sup> **Slovenia**,<sup>131</sup> **Spain**<sup>132</sup> and **Sweden**.<sup>133</sup>

In **France**, a new law intended to prolong the use of algorithms for the detection of terrorist threats. The DPA,<sup>134</sup> the NHRI,<sup>135</sup> academics<sup>136</sup> and CSOs<sup>137</sup> strongly criticised it. They all pointed to the opacity of ‘black boxes’ and the continuation of a mass surveillance tool that could have a chilling effect on the exercise of the freedom of expression and information. In July 2021, the Constitutional Council removed several provisions of the law related to administrative control and surveillance.<sup>138</sup>

Law enforcement authorities increasingly use facial recognition technologies, despite their many fundamental rights challenges consistently raised in previous years.<sup>139</sup> That alarmed DPAs, NHRIs and CSOs alike in 2021.





CSOs filed five complaints against Clearview AI, in Austria, France, Greece and Italy. The complainants included Noyb.eu, Privacy International, Hermes Center and Homo Digitalis.<sup>140</sup>

Clearview is a company that collects images and offers facial recognition technology primarily to law enforcement authorities worldwide. The Austrian CSO NOYB clarifies that “The company uses an automated image scraper, a tool that searches the web and collects any images that it detects as containing human faces. Along with these images, the scraper also collects metadata associated with these images, such as the image or webpage title, geolocation, and source link. Both the facial images and any accompanying metadata are stored on Clearview’s servers indefinitely.”<sup>141</sup>

A coalition of CSOs across the EU launched simultaneous campaigns in several Member States to demand that local and national authorities acknowledge the serious fundamental rights violations that facial recognition technologies cause, and ban their use. In **Czechia, Germany, Greece, Italy, the Netherlands and Serbia**, several CSOs led related awareness-raising initiatives.<sup>142</sup> In total, 65 CSOs have asked the EU and national governments to outlaw the use of biometric data in mass surveillance.

In **Finland**<sup>143</sup> and in **France**,<sup>144</sup> the national DPAs found that the use of the Clearview AI software was in breach of several provisions of either the GDPR or the Act implements EU’s Data Protection Directive for Police and Criminal Justice Authorities. In November 2021, the new **German** coalition government called for a Europe-wide ban of public facial recognition and other biometric surveillance tools. The agreement between the Social Democrats, the Greens and the liberal Free Democrats states that biometric recognition technologies should not be used in public spaces.<sup>145</sup> Furthermore, in January 2021, the CoE adopted a new set of guidelines on how to use facial recognition technologies in public and private sectors, calling for stricter rules while recognising the use of facial recognition technologies by law enforcement in some contexts; and in September 2021, the UN High Commissioner for Human Rights called for a moratorium on the sale and use of artificial intelligence systems that pose a serious risk to human rights, including facial recognition.<sup>146</sup>

### 7.3.3. Wide access to and retention of data for security purposes raise fundamental rights concerns

Security measures beyond surveillance raised concern about their compliance with fundamental rights, most notably the protection of personal data and private life. Some Member States aimed to legitimise data retention or expand its scope: **Bulgaria**,<sup>147</sup> **Denmark**,<sup>148</sup> **Estonia**,<sup>149</sup> **Germany**,<sup>150</sup> **Lithuania**,<sup>151</sup> the **Netherlands** and **Romania**.<sup>152</sup>

In **Denmark**, the Ministry of Justice introduced a draft bill<sup>153</sup> to make the Danish law compliant with the CJEU rulings. However, the Danish NHRI criticised the bill for potentially not respecting EU case law. The draft bill would still allow the Danish Government to impose excessive data retention on telecommunications providers, it considered.

The law stipulates that data retention will be permitted if the Centre for Terror Analysis considers it necessary in its annual threat assessment. However, it has concluded every year since 2014 that there is a constant and extensive terrorist threat to Denmark.<sup>154</sup> The NHRI therefore argued that this provision of the draft law will not provide effective data protection.<sup>155</sup>

In **Germany**, the Federal Parliament adopted the Telecommunication Modernisation Act on 22 April 2021. It retains existing data retention provisions, despite a parliamentary proposal to repeal them.<sup>156</sup>

In **France**, the Council of State ignored the 2020 CJEU rulings<sup>157</sup> related to data retention. It stated that the general retention of metadata, even outside exceptional periods of security emergency, may be authorised. CSOs described the decision as “disconcerting”.<sup>158</sup>

In two Member States (**Cyprus**<sup>159</sup> and **Czechia**<sup>160</sup>), actions were taken to bring national data retention into compliance with the October 2020 CJEU rulings.

The e-evidence proposals<sup>161</sup> are still stalled at EU level. In the meantime, some Member States, such as **Ireland**, introduced new legislation to strengthen the fight against cybercrime. In **Ireland**, Part 4 of the General Scheme of the draft Garda Síochána (Police) Powers Bill<sup>162</sup> proposes to widen all search warrants to include digital evidence. This provision of the bill raised concerns, as it could require any person to provide their passwords or decryption keys.<sup>163</sup>

In November 2021, the Committee of Ministers of the CoE adopted the Second Additional Protocol to the Budapest Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence. It elaborates standards for cooperation and exchange of information between governments and service providers for fighting cybercrime.<sup>164</sup> It provides a legal basis for disclosing electronic evidence and cooperation between criminal justice authorities. It reinforces the protection of society and individuals against cybercrime in line with human rights standards, including with regard to the protection of personal data.



## FRA opinions

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### FRA OPINION 7.1

The EU legislator should ensure that the future AI Act fully respects fundamental rights by taking into account, as appropriate, shortcomings identified by the EDPB/EDPS, civil society and others. Notably, the EU legislator should ensure that the scope of use cases in the different risk categories is clear and that sufficient guidance and protection – with respect to fundamental rights compliance – is offered in relation to diverse practical contexts. The reliance on self-assessment, although a welcome first step, should be underpinned with effective oversight by independent bodies that are sufficiently resourced and possess the necessary fundamental rights expertise.

In 2021, experts and civil society, at both EU and national levels, commented extensively on the inclusion of adequate fundamental rights safeguards in the draft EU Act on Artificial Intelligence (AI). It continues to go through several iterations that variously address different fundamental rights concerns.

The draft proposal contains encouraging fundamental rights references, but the European Data Protection Board (EDPB) and European Data Protection Supervisor (EDPS), national human rights institutions, civil society organisations (CSOs) and academics, among others, have identified common concerns. Examples include the category of prohibited AI applications and the potential need to include additional AI systems, such as private social scoring; the high reliance on companies' self-assessment of high-risk AI use cases; and the need to strengthen oversight mechanisms and bodies tasked with this work.

The proliferation of illegal content online, including hate speech, is a threat to fundamental rights. In this context, proposals to regulate digital services at the EU and national levels constitute a promising trend. Yet, as several stakeholders (the EDPS, EDPB, national human rights institutions, data protection authorities and CSOs) have highlighted, regulating content and services provided online also poses challenges to the protection of fundamental rights, such as the rights to privacy and data protection, the rights to freedom of expression and information, and the right to non-discrimination (Articles 7, 8, 11 and 21 of the EU Charter of Fundamental Rights).

Both national legal initiatives and the draft Digital Services Act have prompted varying opinions and criticism. Assessing them brings to light certain common concerns. These include the need to ensure that measures to moderate online content are proportional, and the importance of ensuring effective oversight mechanisms.

In addition, research is crucial to understand how online content can be moderated without endangering the protection of users' rights. That requires access to data on the functioning of digital platforms, with respect to their impact on fundamental rights. Yet some large platforms prevented external experts from CSOs from conducting fundamental rights-related research in 2021, by denying them access to their data.

Protecting citizens from threats of various natures – including the pandemic, illegal content online and cybercrime – is well-intentioned. However, with that objective, EU institutions and Member States have adopted or are considering legislation that may interfere with fundamental rights, most notably with the rights to privacy and data protection (Articles 7 and 8 of the Charter).

Developing the Covid-19 certificates posed data protection challenges, which data protection institutions and CSOs in most Member States highlighted. Despite the recent ECtHR case law on mass surveillance, and the CJEU case law on data retention, Member States have continued to table legislative proposals aimed at reinforcing surveillance and data retention, without incorporating sufficient fundamental rights safeguards. While protecting individuals' health and security are legitimate aims, experts have pointed out the need to conduct appropriate necessity and proportionality tests to make sure that no measure will result in violations of the rights to privacy and data protection or other fundamental rights.



## FRA OPINION 7.2

EU institutions and Member States regulating digital services should ensure that both over- and under-removal of content are prevented and that moderation practices are not disproportionate, so as not to interfere with the rights to freedom of expression, freedom of information and non-discrimination. In view of the importance of evidence-based oversight for effective and fundamental rights-compliant moderation of online content, EU institutions and the Member States should ensure that the relevant legal framework allows academic and civil society experts to legally access data and conduct research.



## FRA OPINION 7.3

EU institutions and Member States should ensure that any new legal initiatives proposed to foster individuals' security, be it in an emergency context or not, respect fundamental rights. Notably, legal measures adopted to combat the Covid-19 pandemic or foster security against national threats should ensure that appropriate safeguards are implemented to protect the rights to data protection and privacy. Such measures should be prescribed by law, necessary and proportionate in a democratic society. Independent oversight mechanisms should ensure that these measures are regularly scrutinised. Individuals should be able to complain about such measures and have access to effective remedies.

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# RIGHTS OF THE CHILD

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26

January

In *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece* (No. 173/2018), European Committee of Social Rights (ECSR) of the Council of Europe (CoE) finds a violation of the rights of unaccompanied and accompanied children on the Greek islands to shelter and adequate housing (Article 31 (2) of the EU Charter of Fundamental Rights), social and economic protection (Article 17 (1)), and protection against social and moral danger (Article 7 (10)) because of exposure to risks of abuse, violence, sexual exploitation and trafficking.

2

In *X and others v. Bulgaria* (No. 22457/16), European Court of Human Rights (ECtHR) finds that the Bulgarian authorities' investigations into allegations of sexual abuse in an orphanage were not effective for the purpose of Article 3 of the European Convention on Human Rights (ECHR) (prohibition of torture, and inhuman and degrading treatment).

4

In its views adopted on *A.B. v. Finland*, United Nations (UN) Committee on the Rights of the Child notes that Finland violated the applicant's rights under Articles 3 (best interests of the child), 19 (right to protection) and 22 (rights of asylum-seeking children) of the Convention on the Rights of the Child (CRC) by failing to adequately take the best interests of the child as a primary consideration when assessing the applicant's asylum request based on his mothers' sexual orientation and to protect him against a real risk of irreparable harm in returning him.

9

In *N.C. v. Turkey* (No. 40591/11), ECtHR finds that the failure to protect the personal integrity of a vulnerable child in the course of excessively long criminal proceedings relating to sexual abuse resulted in violations of Articles 3 (effective investigation) and 8 (right to respect for private and family life).

24

February

UN Committee on the Rights of the Child notes in *C.O.C. v. Spain* that Spain violated the applicant's rights under Articles 3 (best interests of the child), 8 (right of the child to preserve his or her identity), 12 (right to be heard) and 20 (1) (right to special protection and assistance) of the CRC and Article 6 of the Optional Protocol to the CRC (failure to adopt the interim measure) while assessing the age of an unaccompanied child.

2

March

- IUN Committee on the Rights of the Child adopts General Comment No. 25 on children's rights in relation to the digital environment.
- In *R.R. and Others v. Hungary* (No. 36037/17), ECtHR finds that the failure to secure basic subsistence for the applicants (a family with three children) and their de facto detention without making a proceeding available to challenge its lawfulness violated Articles 3 (prohibition of degrading treatment), 5 (1) and 5 (4) (right to liberty and security) of the ECHR.

22

In *F.O. v. Croatia* (No. 29555/13), ECtHR states that the inadequate response of domestic authorities to a high school teacher verbally abusing a student violated Article 8 (1) of the ECHR (right to respect for private and family life).

28

April

CoE's Committee of Ministers adopts a Declaration on the need to protect children's privacy in the digital environment.

5

Council of Europe adopts the Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021–2025), including protecting child migrants.

31

May

UN Committee on the Rights of the Child finds in *H.M. v. Spain* that denial of enrolment into school for two years despite the official verification of the applicant's son's actual residence violated Article 2 (right to non-discrimination), Article 3 (1) (best interests of the child) and Article 28 (right to education) of the CRC, and Article 6 of the Optional Protocol to the CRC (failure to adopt interim measures).



## UN & CoE

June

15

In *Y.S. and O.S. v. Russia* (No. 17665/17), ECtHR finds that insufficiently assessing the existence of a “grave risk” of returning an abducted child (in the terms of the Hague Convention) to a conflict zone violates Article 8 (1) of the ECHR (right to respect for private and family life).

21

UN Committee on the Rights of the Child publishes its concluding observations on Luxembourg.

22

In *R.B. v. Estonia* (No. 22597/16), ECtHR finds the failure to advise a four-year-old child of her duty to tell the truth and her right not to testify against her father, leading to the exclusion of her testimony and the father’s acquittal of sexual abuse, violated Articles 3 (prohibition of torture, and inhuman or degrading treatment) and 8 (right to respect for private and family life) of the CRC.

August

17

UN Committee on the Rights of the Child finds in *R.Y.S. v. Spain* that the state violated Articles 3 (best interests of the child), 8 (right to identity), 12 (right to be heard), 16 (right to privacy and dignity), 20 (1) (right to special protection and assistance), 22 (rights of asylum-seeking children), 27 (right to adequate living) and 39 (right to access rehabilitation services) of the CRC during the age assessment process of an unaccompanied asylum-seeking child.

September

27

UN Committee on the Rights of the Child publishes its concluding observations on Poland.

October

20

Council of Europe’s Committee of Ministers adopts a recommendation on measures to protect children against radicalisation for the purpose of terrorism.

22

UN Committee on the Rights of the Child publishes its concluding observations on Czechia.

November

18

In *M.H. and others v. Croatia*, the ECtHR finds a violation of Article 2 (1) (right to life), Article 3 (prohibition of torture, inhuman and degrading treatment) and Article 5 (1) (right to liberty and security) of the European Convention on Human Rights and Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens). The case involved the detention and collective expulsion of an Afghan family outside the official border crossing, resulting in the death of a six-year-old girl.

December

10

Council of Europe’s Steering Committee for Human Rights publishes its guide on family-based care for unaccompanied and separated children.

14

In *TQ v. Staatssecretaris van Justitie en Veiligheid* (C-441/19), Court of Justice of the European Union (CJEU) holds that Article 6 (1) of the Return Directive read in conjunction with Article 5 (a) of that directive and Article 24 (2) of the EU Charter of Fundamental Rights require Member States to be satisfied that there are adequate reception facilities available for the child in the state of return before issuing a return decision.

27

European Economic and Social Committee adopts an opinion on the new Pact on Migration and Asylum.

January

26

Council of the European Union adopts the Resolution on a strategic framework for European cooperation in education and training towards the European Education Area and beyond (2021–2030).

March

4

European Commission launches the European Pillar of Social Rights Action Plan.

11

— In *M.A. v. État belge* (C-112/20), CJEU holds that Article 5 of the Return Directive requires Member States to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even when the person whom that decision addresses is not a child but their parent.

— European Parliament adopts its resolution on children's rights in view of the EU Strategy on the Rights of the Child.

March

21

European Migration Network publishes the 2019 report on the state of implementation of the European Commission's Communication on the protection of children in migration.

24

— European Commission adopts the EU Strategy on the Rights of the Child 2021–2024, which aims to empower children and to improve the child-friendliness of justice systems, the socio-economic inclusion, health, education and the protection of children from violence and in the digital environment.

— European Commission presents a proposal for a Council Recommendation establishing a European Child Guarantee

March

14

European Commission adopts a new EU Strategy on Combating Trafficking in Human Beings (2021–2025) focusing on protecting, supporting and empowering victims, with a specific focus on women and children.

April

14

Council of the European Union adopts the recommendation establishing a European Child Guarantee, aimed at breaking the intergenerational cycle of poverty and social exclusion and reducing the socio-economic impact of the pandemic by guaranteeing access to key services for children in need.

June

July

30

European Parliament and Council of the European Union adopt Regulation (EU) 2021/1232 on a temporary derogation from certain provisions of Directive 2002/58/EC as regards the use of technologies by providers of number-independent interpersonal communication services for the processing of personal and other data for the purpose of combating online child sexual abuse.

September

9

In *SE v. Germany*, CJEU rules that, if an asylum seeker has entered the territory of the host Member State in which his unmarried minor child is present and intends to benefit from the subsidiary protection status of his child, the relevant date for assessing whether or not the beneficiary of that protection is a 'minor' is the date on which the parent lodged his application for asylum.

November

9

In *LW v. Bundesrepublik Deutschland*, CJEU finds that Article 3 and Article 23 (2) of Directive 2011/95/EU do not preclude a Member State from granting refugee status under more favourable national provisions to the minor child of a third-country national who has been recognised as having that status, as a derived right and to maintain family unity.

December

14

In *V.M.A. v Stoliczna obshtina, rayon "Pancharevo"*, CJEU finds that in the case of a child, who is a Union citizen and whose birth certificate, issued by the competent authorities of the host Member State, designates as that child's parents two persons of the same sex, the Member State of which that child is a national is obliged to issue to that child an identity card or a passport without requiring a birth certificate to be drawn up beforehand by its national authorities, and to recognise, as is any other Member State, the document from the host Member State that permits that child to exercise, with each of those two persons, the child's right to move and reside freely within the territory of the Member States.

In 2021, the coronavirus disease 2019 (Covid-19) pandemic continued to pose challenges to children's rights. In March 2021, the European Commission adopted for the first time an EU Strategy on the Rights of the Child on six thematic areas, including: children's socio-economic inclusion, health and education; promoting children's participation; and combating violence against children. The European Child Guarantee, another important milestone addressing child poverty and social exclusion, complements the strategy.

The number of asylum-seeking children increased substantially, while the volatile situation at the borders posed serious challenges. The detention of child migrants continued in several Member States, including in cases where the person's age was not yet determined. The challenges in implementing the directive on procedural safeguards continued in several Member States, while international monitoring bodies raised concerns about the detention conditions of children in conflict with the law.

## 8.1. PROTECTING CHILDREN DURING THE COVID-19 PANDEMIC

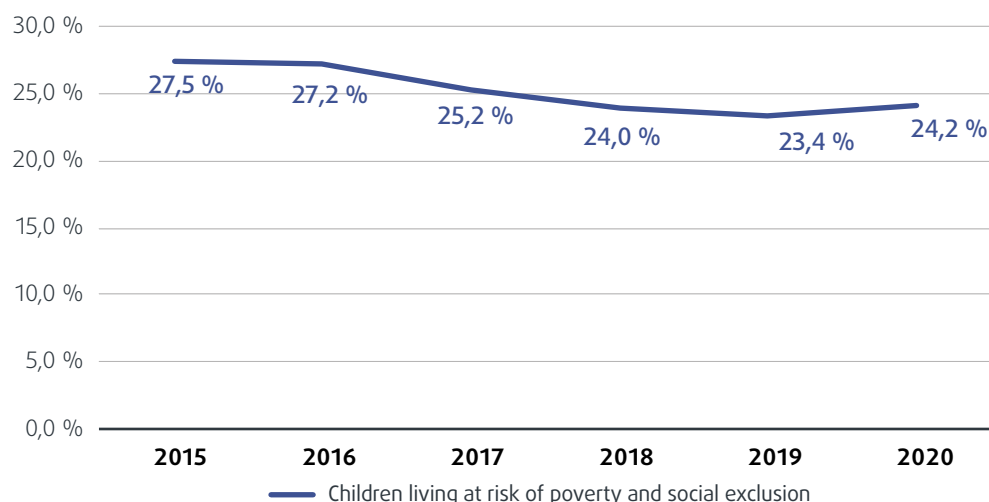
Before the Covid-19 pandemic, many children in Europe already lived at risk of poverty and social exclusion. The pandemic jeopardised even further the respect of several fundamental rights of children, whom the EU Charter of Fundamental Rights protects. These include the right to education (Article 14) and the right to protection and care as is necessary for their well-being (Article 24).



The pandemic continued to exacerbate economic and social vulnerabilities and placed a high burden on children in need and children at risk of poverty and social exclusion. These include children living in households at risk of poverty, experiencing severe material and social deprivation, and with very low work intensity.

The trend of decreasing poverty in Europe had already changed before the pandemic. The share of children living at risk of poverty and social exclusion in the EU27 increased from 23.4 % in 2019 to 24.2 % in 2020, as Figure 8.1 shows.<sup>1</sup> For more information on the impact of the pandemic on social and economic vulnerabilities, see Chapter 1.

**FIGURE 8.1: PERCENTAGE OF CHILDREN (YOUNGER THAN 18 YEARS OLD) LIVING AT RISK OF POVERTY AND SOCIAL EXCLUSION, EU27**



Source: European Union Agency for Fundamental Rights (FRA) (2022), based on Eurostat (2021), 'Data browser – People at risk of poverty and social exclusion by age and sex', 8 December 2021

The closure of entire economic sectors and the resulting loss of income had a huge impact on working parents. To compensate, Member States implemented a range of measures, such as direct one-time payments and other forms of financial assistance, to support families and strengthen their social protection systems.

#### 8.1.1. A step forwards: the European Child Guarantee

The Council of the EU adopted the European Child Guarantee<sup>2</sup> in June 2021. The guarantee aims to ensure that children at risk of poverty and social exclusion have effective, equal and free access to key services such as healthcare, good-quality education (including early childhood education), adequate housing and effective access to healthy nutrition. In addition, it provides guidance and ways for Member States to support children in need. It complements the EU Strategy on the Rights of the Child<sup>3</sup> and the European Pillar of Social Rights Action Plan.<sup>4</sup>

Civil society organisations welcomed the adoption of the guarantee<sup>5</sup> as a historic step towards protecting the rights of children growing up in poverty and social exclusion in the EU.<sup>6</sup> The objectives of the guarantee are to prevent and combat intergenerational social exclusion by holding Member States accountable, to identify country-specific indicators for children at risk of poverty and social exclusion, to establish mechanisms to monitor and report their development, and to guarantee the effective access of children in need of key services.<sup>7</sup>

Member States should take into account the specific needs of children from disadvantaged backgrounds, such as those living in precarious family situations, in alternative care, with a disability or on the street, belonging to an ethnic minority group or with a migrant background.

By March 2022, EU Member States had to prepare and submit to the Commission their national action plans, with sufficient resources allocated, covering the period until 2030, appoint National Child guarantee Coordinators and identify indicators to monitor developments. Member States in which the rate of children at risk of poverty and social exclusion is above the EU average must spend at least 5 % of their allocated funds from the European

**"Sadly, millions of children in the world, including 18 million in the EU, still live in poverty or social exclusion. Many more are at risk, as children continue to be the first to suffer from the socio-economic impact of the Covid-19 pandemic."**

European Commission (2021), **World Children's Day: Joint Statement by the European Commission and the High Representative**, 19 November 2021.

#### PROMISING PRACTICE

### Piloting the European Child Guarantee

In the preparation of the European Child Guarantee, the European Commission cooperated with the UNICEF and seven Member States (Bulgaria, Croatia, Germany, Greece, Italy, Lithuania and Spain) through pilot programmes to provide recommendations for the successful implementation of the guarantee.

For more information, see Krastev, I. (2021), **'Identifying and supporting the most vulnerable children through outreach services'**, 9 November 2021.



Social Fund Plus on fighting child poverty and social exclusion.<sup>8</sup> In this regard, Member States should dedicate adequate resources and make optimal use of national and EU funds.<sup>9</sup>

#### **8.1.2. Well-being, education and social protection measures in EU Member States**

The Covid-19 pandemic continued to have a massive impact on the health of children, and on their education, social and psychological well-being.

While, resulting from the suspected lower vulnerability of children to the Coronavirus, the focus of Covid-19 prevention and health protection measures (e.g. vaccinations) continued to be placed on older age groups. Health protection measures such as vaccination campaign started to include children and young people in late 2021.<sup>10</sup>

In 2021, the pandemic continued to force almost all Member States to restrict the right of every child to have effective and free access to quality education (Article 14 read in conjunction with Article 24 EU Charter of Fundamental Rights) by alternating between school closures, hybrid learning and classes with restrictive health measures. Children living in poor or overcrowded housing without the necessary information technology equipment, and children in vulnerable situations, such as those with disabilities and those living in institutions, could not always enjoy their right to education.<sup>11</sup>



In some Member States, lockdowns had strong adverse effects on children's mental and physical well-being and rights.<sup>12</sup> The Commissioner for Human Rights of the Council of Europe noted the lack of consideration of children's rights in Covid-19 measures. It drew the **German** government's attention to recent recommendations on schooling during the pandemic from the European Technical Advisory Group of the WHO Regional Office for Europe. The recommendations state that school closures should be considered only as a measure of last resort.<sup>13</sup>

To tackle the risk of educational disadvantages and guarantee equal and effective access to education, Member States applied a range of measures, including extended leave for caregivers and online information technology tools. These include distributing technological equipment and free internet access, broadcasting education on public radio and television, and guaranteeing access to schools for vulnerable children, as Table 8.1 shows.

**TABLE 8.1: SELECTED EXAMPLES OF DIGITAL EDUCATION INITIATIVES**

Country	Measure	Target group
AT	<b>Strategic provision</b> of technical equipment (laptops and tablets) to schools for digital education	Pupils of the fifth and sixth grades (staggered extension to all school grades)
ES	<b>‘Educational Spot at Home’</b> – supplying reliable and good-quality equipment to students to facilitate digital education face to face at the educational institution, and at home	Students in vulnerable situations
HR	<b>‘Croatia for Children’</b> – financial support programme providing, among other things, school supplies; personal computers/laptops for online education; furniture; clothing, footwear and toiletries; extracurricular activities; and student accommodation	Families with one child or more in education
IE	<b>Updated guidance on continuity of schooling: Supporting pupils at risk of educational disadvantage – For post-primary schools</b> – distributing digital devices and using alternative methods of communication (post, email and/or text)	Pupils at risk of educational disadvantage
MT	<b>Developing a user-friendly website</b> , recording lessons, providing easy access to distance learning resources and lessons, providing free internet access and a computer, laptop or tablet to students	Children in need
RS	<b>‘Bridging digital divide in Serbia for the most vulnerable children’</b> – developing the national distance learning platform, creating a digital resource bank and using learning management systems nationwide, and distributing laptops and tablets	Schools and the most vulnerable children

Source: FRA (2022)

Despite efforts to guarantee access to good-quality education during Covid-19, the pandemic revealed inequalities in the education system, particularly for vulnerable children, civil society organisations highlighted. The European Network of Young Advisors, part of the European Network of Ombudspersons for Children, noted the need to extend training for educators on remote teaching and on the appropriate handling of children’s mental and physical challenges.<sup>14</sup>

Besides the difficulties in accessing good-quality education, the Covid-19 pandemic has also affected children’s mental health and well-being, according to a UNICEF report. It claims that the pandemic “has put the mental health and well-being of an entire generation at risk”.<sup>15</sup> The report called on EU institutions to lay down “foundations for more resilient national health and social protection systems, while centring the recovery on the new generation’s well-being with a focus on making mental health services accessible to all who need them”.

## PROMISING PRACTICE

### “Caring for Children” Programme - Romania

In 2021, Romania launched the *Out of Care for Children Programme*, which is a programme of the Romanian Government dedicated to the psychological wellbeing and safety of children in the context of the Covid-19 pandemic. Children identified with Covid-19 related psycho-emotional distress will receive psychological guidance and psychotherapy, while specialists in the field will be provided with training sessions on relevant topics. The Programme also includes the development of a prevention and intervention mechanism to address physical, sexual and emotional violence against children within the family, the community, at institutional level and online.

For more information, see **Government Ordinance np. 105 of 23 September 2021** and **Romanian National Government press release “Caring for children” Programme**.

## PROMISING PRACTICE

### “Support of primary and secondary general education school units by psychologists and Social Workers” - Greece

According to a Ministerial Decision in Greece, a team of psychologists and social workers in each school needs to provide psychosocial support, information and counselling to empower students, teachers and parents to develop the skills needed to effectively handle critical and unpredictable situations, such as the Covid-19 pandemic. The Ministerial Decision requires the team to create a weekly schedule and three action plans in each school during the school calendar. The Decision ask school heads to assess and evaluate results and propose actions for improvement.

For more information, see **Ministerial Decision 140001/ΓΔ4/2021**, 5 November 2021

The pandemic and the restrictive measures Member States have taken have had a significant, but as yet unmeasurable, impact on the mental well-being of children, the European Parliament highlighted.<sup>16</sup> At the European Commission’s conference on the mental health impact of the pandemic in May 2021, several stakeholders highlighted that the impact of the pandemic on the mental health, particularly for children, will have long-term consequences and recommended an increase in mental health support.<sup>17</sup>



#### 8.1.3. Protecting children from violence

The pandemic has left children at increased risk of physical, psychological and sexual violence, and neglect at home. Several Member States, such as **Austria**,<sup>18</sup> and **Sweden**,<sup>19</sup> have reported an increase in violence, mainly reported through hotlines.

School closures and home schooling, as well as online classes and the general digitalisation of education, resulted in increased screen time for children and young people and increased the time they spent in the digital and online environments. This can make children more vulnerable to any form of exploitation and abuse, as EUROPOL highlights.<sup>20</sup>

In its General Comment No. 25 on children’s rights in the digital environment, the United Nations (UN) Committee on the Rights of the Child highlights the crucial role of the digital environment as a platform for development, information and participation. At the same time, the committee emphasises the risk of abuse, including cyberaggression and online child sexual exploitation and abuse. It stresses the need for adequate measures to accommodate children safely in the digital environment.<sup>21</sup>

The EU, following up on its strategy to combat sexual abuse,<sup>22</sup> adopted Regulation (EU) 2011/1232 on a temporary derogation from certain provisions of the Privacy Directive<sup>23</sup> to combat online child sexual abuse. The regulation allows providers of interpersonal communication services to continue using specific technologies and their current activities as necessary to detect and report child sexual abuse online and remove child sexual abuse material on their services, pending the adoption of the announced long-term legislation. In the debate triggered in the context of the temporary derogation, the Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Committee) presented an independent experts' report "Respecting human rights and the rule of law when using automated technology to detect online child sexual exploitation and abuse (OCSEA)"<sup>24</sup>.

Infringement procedures<sup>25</sup> initiated in 2019 against 21 Member States for non-compliance with Directive 2011/93/EU on combating child sexual abuse<sup>26</sup> remain open.

### National developments

In 2021, Member States implemented new measures or strengthened existing programmes to address physical and sexual violence against children. These range from helplines, awareness-raising and social support initiatives to increased support for victims and amendments to their legislation on child protection. For more information on legal developments in the area of victims of crimes, see Chapter 9.

For example, **Spain** adopted a new law to combat violence against children and adolescents through education, early detection, assistance and victim support.<sup>27</sup> The new law provides new offences related to the distribution or public dissemination through the internet, telephone or any other communication technology of content that promotes, encourage or incites suicide and self-harm among children. **Latvia** amended its children's rights law to recognise child neglect as a form of violence.<sup>28</sup> **France** adopted a child protection bill and a new law on the protection of children from sexual crimes and offences, which introduces new offences and eradicates the question of consent in cases involving children under the age of 15, and under the age of 18 in cases of incest.<sup>29</sup> Germany has adopted a law to better protect children from sexual abuse, providing changes to procedural law in child custody cases, increasing penalties, laying down qualification requirements for family judges and guardians ad litem for children involved in care proceedings.<sup>30</sup> With the introduction of another law, the distribution and possession of so-called guides for the sexual abuse of children have been criminalized.<sup>31</sup>

**Slovenia** adopted a new law marking an important step towards establishing a pilot house for children according to the Nordic Barnahus model.<sup>32</sup> Similarly, **Hungary** amended the Criminal Proceedings Act,<sup>33</sup> aiming to introduce a Barnahus model.<sup>34</sup> The Barnahus model is an internationally recognised good practice bringing together, under one roof, law enforcement, criminal justice professionals, child protection services, and medical and mental health workers to cooperate to assess the situations of children and decide on appropriate follow-up actions.

**Hungary** adopted a controversial law for the protection of children.<sup>35</sup> Several EU institutions,<sup>36</sup> and international and civil society organisations,<sup>37</sup> criticised this legislation. The law restricts the rights of lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) people by prohibiting the "propagation or portrayal of divergence from self-identity corresponding to sex at birth, sex change or homosexuality"<sup>38</sup> to people under the age of 18, to protect children from negative influence on their "physical, mental, or moral development".<sup>39</sup>



## PROMISING PRACTICE

### “What’s up with Jaron?”

The German Federal Government’s Independent Commissioner for Issues of Sexual Child Abuse provides a digital course that trains teachers and school employees to detect children and young people who have endured sexual violence and to provide them with support at an early stage.

For more information, see Independent Representative for Child Sexual Abuse (*Unabhängiger Beauftragter für Fragen des sexuellen Kindesmissbrauchs*) (n.d.), ‘What’s up with Jaron?’ (*‘Was ist los mit Jaron?’*).

The European Commission launched infringement proceedings against **Hungary** related to the equal treatment and protection of the fundamental rights of LGBTQI people.<sup>40</sup> Similarly, the Venice Commission considered that the new legislation is not compatible with the European Convention on Human Rights and international human rights standards, and that it fuels a hostile and stigmatising atmosphere against LGBTQI people.<sup>41</sup>

## 8.2. A LONG WAY TO GO FOR THE PROTECTION OF MIGRANT AND ASYLUM-SEEKING CHILDREN

Migrant and asylum-seeking children continued to face challenges in 2021, both while attempting to reach Europe and after their arrival. Many died or sustained injuries on the way or were stranded at borders in dreadful conditions. Asylum-seeking and migrant children are entitled to protection both under EU law and under the Convention on the Rights of the Child (CRC).<sup>42</sup> The CRC, which all EU Member States and neighbouring countries have ratified, remains applicable to all children regardless of their legal status or nationality.

The EU Strategy on the Rights of the Child,<sup>43</sup> adopted in March 2021, refers to the progress achieved in implementing the 2017 communication on the protection of children in migration<sup>44</sup> and proposes several additional measures. These include strengthening guardianship systems for unaccompanied children, developing alternatives to the detention of migrant children, and using the Asylum, Migration and Integration Fund for transnational and innovative projects to protect children in migration.





### 8.2.1. Protection of children in migration: significant gaps remain

The number of children applying for asylum increased. In 2021, in the EU27 almost 167,000 children applied for asylum, whereas in 2020 the number of children applying for asylum was just below 130,000. In 2021, the highest numbers of applications were submitted in Germany (73,245), France (25,750) and Austria (11,460).<sup>45</sup>

In 2021, unaccompanied children submitted 24,430<sup>46</sup> applications for asylum, closed to double the amount in 2020 (13,550 applications). The Member States with most applications were Austria, Germany and Bulgaria.<sup>47</sup>

The situation at the EU's external borders remained challenging in 2021. Arrivals in the Mediterranean countries continued, with almost 123,300 arriving by land or sea during 2021, a considerable increase from 95,700 in 2020.<sup>48</sup> An estimated 3,130 people died at sea in 2021.<sup>49</sup>

Children represent around 16 % of arrivals in the Mediterranean countries and **Bulgaria**, according to the latest disaggregation by age. In some countries, such as **Greece** and **Bulgaria**, the proportion of children among arrivals is higher, at 42 % and 32 %, respectively.<sup>50</sup>

Allegations of pushbacks persisted in 2021, involving at eight seven EU Member States<sup>51</sup> and affecting children with families and unaccompanied children.

Challenges also emerged at the borders of **Belarus** with **Latvia**, **Lithuania** and **Poland**. The Belarus security forces escorted many third-country nationals to the border, but they were prevented from entering the EU. They therefore remained in limbo in appalling conditions. See Chapter 6 on Asylum and Migration for more information on the European Commission's proposal for temporary emergency measures at the borders with Belarus.

International organisations,<sup>52</sup> civil society<sup>53</sup> and the Council of Europe<sup>54</sup> condemned the human rights violations at the borders, which also affected children. Civil society reports include many stories of unaccompanied children and families who suffered or witnessed atrocities, especially along the Balkans route: children say that they have been robbed, beaten, forced to undress themselves, detained and subjected to violence.<sup>55</sup>

The report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on **Croatia** refers to numerous credible allegations of Croatian police officers' physical ill-treatment of migrants, including of women and children.<sup>56</sup>

In *M.H. and others v. Croatia*, the European Court of Human Rights found that Croatia had violated several articles of the European Convention on Human Rights. These were Article 2 (right to life), Article 3 (prohibition of torture, inhuman and degrading treatment in relation to children), Article 5 (1) (right to liberty and security) and Article 34 (right to individual applications), and Article 4 of Protocol 4 (prohibition of collective expulsion of aliens).<sup>57</sup> The case concerned a six-year-old Afghan girl who was hit by a train and died after being pushed back from the Croatian border to Serbia together with her mother and five siblings.

In **Slovenia**, unaccompanied children were exempted from controversial amendments to the Foreigners Act, which allows people entering Slovenia irregularly to be escorted back to the country they arrived from.<sup>58</sup> The amendments also require guardians to give the Ministry of the Interior personal information about unaccompanied children they represent (applicant's

## PROMISING PRACTICE

# Voluntary relocation of unaccompanied children and vulnerable families

Several Member States continued to show solidarity and relocated children and other vulnerable groups during 2021. Since the beginning of the voluntary scheme in 2020 and until October 2021, 1,047 unaccompanied children, 937 children asylum applicants and 960 child beneficiaries of international protection have been relocated from Greece to other Member States. The main destinations were **Germany** and **France**, followed by **Portugal**, **Belgium**, **Finland** and **Italy**.

For more information, see [the website of the United Nations High Commissioner for Refugees \(UNHCR\)](#).

For guidance from the European Union Agency for Fundamental Rights on the relocation of unaccompanied children, see [FRA's website](#).

*"I have personally listened to the appalling accounts of extreme suffering from desperate people – among whom many families, children and elderly – who spent weeks or even months in squalid and extreme conditions in the cold and wet woods due to these pushbacks."*

Dunja Mijatović, Commissioner for Human Rights, Council of Europe, in Council of Europe (2021), 'Commissioner calls for immediate access of international and national human rights actors and media to Poland's border with Belarus to end human suffering and violations of human rights', press release, 19 November 2021.

identity documents, applicant's actual age, the known grounds on which the applicant is not eligible for refugee or subsidiary protection status).<sup>59</sup>

### 8.2.2. Poor reception conditions and use of migrant detention

Once a child with their family or an unaccompanied child reaches the EU and applies for asylum, they are entitled to protection and procedural guarantees in accordance with the Reception Conditions Directive.<sup>60</sup>

Nevertheless, asylum-seeking children continued to face challenges, including lack of adequate accommodation, and difficulties in accessing education or health and legal services. A number were detained during the asylum procedure or pending removal,<sup>61</sup> with negative consequences for their mental health, as reports about self-harm and suicide attempts show.<sup>62</sup>

The Committee on the Rights of the Child (CRC Committee) has also referred to these challenges in its concluding observations adopted in 2021 for **Czechia**,<sup>63</sup> **Luxembourg**<sup>64</sup> and **Poland**.<sup>65</sup> See Table 8.2.

**TABLE 8.2: CRC COMMITTEE'S 2021 CONCLUDING OBSERVATIONS IN RELATION TO RECEPTION CONDITIONS FOR CHILDREN IN SITUATIONS OF MIGRATION IN CZECHIA, LUXEMBOURG AND POLAND**

Member State	Committee concerns
CZ	<p>The age determination method used is unreliable.</p> <hr/> <p>Migrant children, in particular those above 15 years of age and pending age assessment results, and children under 15 years of age with their families pending transfers under the Dublin III Regulation, are detained.</p> <hr/> <p>Migrant children lack access to public health insurance, and private insurance excludes newborn and/or seriously ill children whose parents are neither permanent residents nor asylum seekers. This results in a significant debt burden on migrant families and children.</p> <hr/> <p>Children have insufficient access to secondary and post-secondary education.</p> <hr/> <p>Insufficient support is available to enable migrant children to integrate into mainstream school.</p>
LU	<p>Legislation on immigration and asylum allows the detention of children under certain conditions and in certain circumstances.</p> <hr/> <p>The maximum length of detention for families with children was extended from three to seven days.</p> <hr/> <p>Article 20 (4) of the asylum law allows the use of medical tests, including bone tests, which have been found to be unreliable for assessing the age of asylum-seeking people.</p> <hr/> <p>There appears to be no system in place to provide adequate care for unaccompanied children who do not apply for international protection.</p> <hr/> <p>Unaccompanied children change accommodation once or twice, sometimes being placed together with adults, before being accommodated in a specialised reception centre for unaccompanied children, sometimes without the prior consent of the child.</p>
Member State	Committee recommendations
PL	<p>Ensure that asylum-seeking children, refugee children, children in situations of migration and families with children are not placed in guarded detention centres.</p> <hr/> <p>Ensure that all children in situations of migration, including undocumented and separated children, receive appropriate protection; are informed of their rights in a language that they understand; have access to education and healthcare, including psychosocial support; and receive interpretation and free legal aid.</p> <hr/> <p>Develop comprehensive referral, case management and guardianship frameworks for unaccompanied and separated children.</p>

Source: FRA (2021), based on CRC Committee concluding observations

The Ombudsperson in **Spain** reported on poor reception conditions for children, especially in the Canary Islands, due to the presence of around 2,500 unaccompanied children.<sup>66</sup> He submitted four recommendations to the government, including the suggestion of allowing non-governmental organisations (NGOs) and other civil society organisations to be assigned as guardians.<sup>67</sup>

The Spanish authorities adopted a decree amending the existing Foreigners Regulation to promote the integration of unaccompanied children and facilitate their transition to adulthood.<sup>68</sup> The reform allows the issuance of work permits for unaccompanied children from the age of 16, extends the length of their residence permits, and grants work permits for young adults between the ages of 18 and 23 who were under the guardianship of state authorities and were left in an irregular situation after reaching majority.

In **France**, the Public Defender of Rights highlighted persistent shortcomings in the care system for unaccompanied children and in the national system for the distribution of unaccompanied children, particularly in the department of Bouches-du-Rhône.<sup>69</sup>

The Ombudsperson for Children in **Ireland** investigated the safety and welfare of children in reception centres for families. The report points to the lack of vetting and training of staff working in the facilities, lack of interpretation services, absence of complaints mechanisms and lack of oversight mechanisms for the International Protection Accommodation Service, the governmental body responsible for contracting these accommodation services.<sup>70</sup>

In 2021, there were reports about the detention of migrant children, unaccompanied or with their families, in several Member States.<sup>71</sup>

The UN,<sup>72</sup> the Council of Europe Commissioner for Human Rights,<sup>73</sup> the Cypriot Commissioner for Administration and the Protection of Human Rights<sup>74</sup> and the Cypriot Commissioner for Children's Rights<sup>75</sup> raised the issue of inadequate reception conditions and the detention of children in **Cyprus**. Asylum applicants can leave the Pournara reception centre only after completing the registration procedure. That can take between 45 and 60 days for adults and from 60 days to 4 months for unaccompanied children, according to the Cyprus Refugee Council.<sup>76</sup>

The CPT denounced the detention conditions of children in its report following a visit to **Malta**.<sup>77</sup> The committee considered that the cumulative effect of detaining migrants in severely overcrowded conditions for prolonged periods with no access to outdoor exercise and a lack of activities, most acutely affecting families with young children, may amount to inhuman and degrading treatment contrary to Article 3 of the European Convention on Human Rights. The CPT called on the Maltese authorities to transfer vulnerable people to suitable open reception facilities and to end the holding of unaccompanied children in detention centres. Maltese authorities have denied some of the allegations and provided information on how they are addressing some of the challenges.<sup>78</sup>



## PROMISING PRACTICE

### Tracing and protection mechanism for unaccompanied children in precarious conditions

The Special Secretary for the Protection of Unaccompanied Minors in **Greece** and UNHCR have launched a mechanism to rapidly identify unaccompanied children who are homeless or living in insecure conditions and transfer them to secure accommodation. The mechanism includes a 24/7 hotline in six languages, and access to emergency accommodation, material and psychological support, interpretation, representation during registration procedures and educational activities.

This measure follows up the legislative abolition of protective custody. The IOM and several NGOs that operate field mobile units, day centres, information desks and case management teams have supported it.

For more information, see UNHCR (2021), '**Greece launches national tracing and protection mechanism for unaccompanied children in precarious conditions**', press release, 6 April 2021.

The UN Subcommittee on Prevention of Torture raised concerns about the detention of migrant children, especially unaccompanied children, following a visit to **Bulgaria** in October 2021.<sup>79</sup>

**Greece** banned placing unaccompanied children in 'protective custody' in 2020. However, but some unaccompanied children were still being detained in early 2021 pending their placement in specialised facilities.<sup>80</sup> Their placement was delayed owing to procedural issues and postponed medical tests. The Council of Europe Commissioner for Human Rights raised concerns about the apparent intention of operating these new facilities as closed centres, as detention had harmful effects on the mental health of migrants, especially on children, who often experience detention as shocking, and even traumatising.<sup>81</sup> With regard to asylum applicants these centres implement vigilant entry-exit procedures and require strict reporting obligations from applicants, while they are free to leave the centre within these frames.<sup>82</sup>

People claiming to be children may also be detained while waiting for age assessments.

For example, in **Malta**, the CPT denounced the detention of unaccompanied children pending age assessments together with adults unknown to them. It reported on immediate measures the Maltese authorities took to accommodate people claiming to be children in a separate dormitory.<sup>83</sup> In 2021, 248 people claiming to be children arrived, 205 alleged unaccompanied asylum-seeking children and 43 accompanied children, according to the information available to UNHCR. All those arriving by sea, including those who claimed to be children, were detained when they arrived in Malta.

In **Belgium**, several children were detained to determine their age, reports claim. Owing to delays in the age assessments resulting from compulsory Covid-19 quarantine, two were recognised as children after 20 days in closed detention centres.<sup>84</sup>

## PROMISING PRACTICE

### An independent commission to assess the situation of migrant and asylum-seeking children

In **Austria**, the Federal Ministry of Justice established a commission on the best interests of the child, formed of five independent experts. The commission's mandate is to document and analyse the legal situation and the practical implementation of relevant international, European and domestic provisions concerning the protection of the best interests of the child in the area of asylum and aliens law.

For more information, see [the Ministry of Justice's web page](#)

## 8.3.

### CHILDREN IN CONFLICT WITH THE LAW: RECENT DEVELOPMENTS

#### 8.3.1. Incorporating the Procedural Safeguards Directive into national law

The Procedural Safeguards Directive,<sup>85</sup> adopted in 2016, provides procedural safeguards for children who are suspects or accused people in criminal proceedings. The transposition deadline ended in June 2019. Although most Member States adopted new legislation or amended existing laws in previous years, at the end of 2021 infringement procedures that began in 2019 were still open against **Bulgaria**,<sup>86</sup> **Croatia**,<sup>87</sup> **Cyprus**,<sup>88</sup> **Czechia**,<sup>89</sup> **Germany**,<sup>90</sup> **Greece**<sup>91</sup> and **Malta**.<sup>92</sup> However, in most cases Member States had already notified the European Commission that they had completed the directive's incorporation into national law.

During 2021, several Member States adopted amendments to the criminal legislation related to children in conflict with the law.

In April, **Cyprus** adopted the Law on setting up a criminal justice system that is friendly to children in conflict with the law.<sup>93</sup> The law regulates the treatment of children without criminal responsibility, that is, children aged under 14, and people who have reached majority but committed an offence when they were still aged under 18. The law provides for special juvenile courts, already established through Juvenile courts in each district, alternative sentences and various councils aimed at supporting children and their parents and preventing reoffending.

A new Juvenile Criminal Justice Code came into effect in September 2021 in **France**.<sup>94</sup> The Code regroups all juvenile justice related provisions. It aims to simplify and accelerate trials and quicker referral of children to educational measures. It introduces a three-step procedure: the judgment is made in two stages (guilt hearing and sentencing hearing), separated with a period of educational probation, during 6 to 9 months. The introduction of a "single personality file" for each child allows the exchange of information between the different entities involved.

In **Czechia**, Act No. 220/2021 Coll. came into force. It explicitly extends the powers of the Probation and Mediation Service in proceedings involving children under the age of 15. These include preparing a report on the child's circumstances for the court. It also strengthens the child's right to participate in court proceedings.<sup>95</sup>

The **Slovenian** Act Amending the Criminal Procedure Act<sup>96</sup> includes an explicit provision that children have the right to a lawyer in pre-trial proceedings, the right to be informed in an understandable manner and the right to be accompanied by a parent or guardian in the proceedings. The act, which entered into force in January 2021, also requires the training of the professionals involved.

The **Swedish** parliament adopted an act with special provisions on young offenders.<sup>97</sup> They allow a child under arrest to remain in police custody only if absolutely necessary, and allow a child suspect to be detained for a continuous period of no longer than three months. The Ombudsperson for Children criticised the time limit of three months, arguing that it should instead be set at 30 days, in accordance with the guidance of the CRC.<sup>98</sup>

**Austria**,<sup>99</sup> **Luxembourg**<sup>100</sup> and **Poland**<sup>101</sup> were still in the process of drafting or amending laws on juvenile justice at the end of 2021.



### 8.3.2. Detention of children in conflict with the law

The Procedural Safeguards Directive establishes that Member States should ensure that deprivation of liberty of a child at any stage of the proceedings is limited to the shortest time possible and used only as measure of last resort (Article 10). They should ensure that alternative measures are available (Article 11). Article 12 elaborates on the specific treatment of children deprived of liberty, concerning health, physical and mental development, education and regular exercise of their right to family life, among other things.

In 2021, several international monitoring bodies raised concerns about the conditions of children in conflict with the law who are deprived of liberty. For example, the CRC Committee criticised **Luxembourg** for not establishing a minimum age for the deprivation of liberty of children. Currently, there is no time limit for detaining children in prison-like conditions, and the law permits children to be detained in adult penitentiary centres. Moreover, solitary confinement is used frequently for repeated absconding, both for children in socio-educational boarding schools and for children in security units.<sup>102</sup>

The committee also raised concerns about the deprivation of liberty of children under the minimum age of criminal responsibility in **Poland**, in particular as regards the lack of clarity between the notions of 'deprivation of liberty' and 'limitation of liberty' and concerning the number of children detained in juvenile shelters for extensive periods before and during correctional proceedings.<sup>103</sup>

The CPT published a report in 2021 on its 2020 visit to **Finland**. It criticised the conditions of deprivation of liberty of children in state-run educational institutions.<sup>104</sup> Reasons for their placement in these institutions, based on the decision of municipal social services, are usually related to drug addiction, conduct disorders, school or home absconding, suicidal or self-destructive tendencies, and/or criminal behaviour.

The CPT also reported some allegations of excessive use of force on juveniles by the police and in a juvenile detention centre in **Spain**.<sup>105</sup> The CPT had a positive impression of the material conditions and regime of activities but noted with concern the use of restraints on juveniles, and mechanical fixation on beds for extended periods to forcibly inject them with medication. The CPT recommended ending the solitary confinement of juveniles for up to seven days for disciplinary purposes.

The **French** Controller-General of Places for the Deprivation of Liberty published a report on the fundamental rights of juveniles in detention. It assesses in detailed the situation in the different penitentiary centres.<sup>106</sup> The report makes 36 recommendations. These cover issues such as child-friendly notifications when a child is referred to a psychiatric centre; separating children from adults in mental health hospitals; ensuring privacy in bathrooms in penitentiary centres; and necessary training for staff.



## FRA opinions



### FRA OPINION 8.1

The European Commission could consider providing targeted support and guidance to Member States for the implementation of the European Child Guarantee and the EU Strategy on the Rights of the Child. This could include facilitating the exchange of good practices on implementation and monitoring.

Member States should ensure that their national action plans implementing the European Child Guarantee and the EU Strategy on the Rights of the Child are sufficiently resourced and address the most vulnerable children, especially with regard to the impact of the Covid-19 pandemic.

The European Commission and Member States should continue to assess the pandemic's impact on children's mental health and establish measures to prevent further negative consequences.

The Covid-19 pandemic continued to affect a range of children's rights that the EU Charter for Fundamental Rights (Charter) protects, such as the right to education (Article 14) and to the protection and care necessary for their well-being (Article 24). The share of children living at risk of poverty and social exclusion in the EU27 increased from 22.2 % in 2019 to 24.2 % in 2020, according to the latest Eurostat statistics.

In 2021, the Council of the European Union adopted the European Child Guarantee, a scheme to prevent and combat child poverty and ensure access to basic services for all children, including those in vulnerable groups. Many stakeholders and civil society welcomed the guarantee. Member States will need to transform it into national action plans in during 2022.

The European Commission adopted the first-ever EU Strategy on the Rights of the Child. It defines a number of measures in areas that the Covid-19 pandemic also affected.

Member States continued in 2021 to provide financial assistance, as well as social protection and special educational measures, to minimise the negative consequences of the Covid-19 pandemic. The pandemic's impact on children's mental health raised concerns, although its extent is not yet fully known.



### FRA OPINION 8.2

EU Member States should ensure that appropriate reception conditions are provided to children travelling with families, as well as unaccompanied children. The European Commission should support Member States in the development of alternatives to detention, as one of the measures established in the EU Strategy on the Rights of the Child.

The number of children and unaccompanied children applying for asylum in 2021 increased substantially raising from less than 130,000 in 2020 to almost 167,000 in 2021. Migrant children are entitled to protection under the UN Convention of the Rights of the Child, the European Convention on Human Rights, the Charter and EU legislation, such as the Reception Conditions Directive. However, migrant children experienced often alarming conditions in some Member States and at the borders of the EU.

Pushbacks and the use of violence in at least seven EU Member States have also affected children travelling with their families and unaccompanied children. UN organisations, civil society and the Council of Europe have strongly condemned this situation.

The detention of children with their families and unaccompanied children continues in several Member states, including during age assessments. The detention of children should only be used as an exceptional measure of last resort, according to EU law. The EU Strategy on the Rights of the Child, adopted in March 2021, proposes several measures, including developing alternatives to detaining migrant children.

Article 48 of the Charter provides important safeguards for the presumption of innocence and the right of defence. Article 24 of the Charter requires that primary consideration is given to the best interests of the child.

The Procedural Safeguards Directive for children who are suspects or accused persons in criminal proceedings (2016/800/EU) establishes a number of limitations to the deprivation of liberty of a child in conflict with the law, and lays down minimum conditions for their treatment, such as access to healthcare, physical and mental development, education and regular exercise, and their right to family life. The Charter prohibits any form of torture or inhuman or degrading treatment or punishment (Article 4). Several international monitoring bodies, however, highlighted the inappropriate treatment of children deprived of liberty in some Member States in 2021.

Legal reforms to incorporate the Procedural Safeguards Directive into national law, due in June 2019, continued in 2021. The infringement procedures initiated in 2019 against seven Member States remained open. Several Member States began amending their criminal justice laws in 2021, with a strong focus on alternatives to detention and the establishment of specialised juvenile courts.



### FRA OPINION 8.3

EU Member States should consider using alternatives to detention for children who are suspects or accused persons in their efforts to implement the EU directive on procedural safeguards and other international and national law. Allegations of inadequate conditions or treatment of children deprived of liberty should be fully investigated and redressed. Member States should ensure that professionals who engage with children in the criminal justice system participate in training on the rights of children in contact with the law and of children deprived of liberty.

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# ACCESS TO JUSTICE – VICTIMS’ RIGHTS AND JUDICIAL INDEPENDENCE

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## UN & CoE

7

Opening of the Kyoto Congress – the 14th UN Congress on Crime Prevention and Criminal Justice.

31

Adoption of Guidelines of the Committee of Ministers of the Council of Europe on the efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law

March

19

Council of Europe European Committee on Legal Co-operation (CDCJ) publishes its Study on the feasibility of a new, binding or non-binding, European legal instrument on the profession of lawyer: possible added-value and effectiveness

April

20

Council of Europe publishes GREVIO General Recommendation No. 1 on the digital dimension of violence against women.

October

5

The Consultative Council of European Judges (CCJE) adopts the **CCJE Opinion No. 24 (2021 on the evolution of the Councils for the Judiciary and their role in independent and impartial judicial systems**

26

The Consultative Council of European Prosecutors (CCPE) adopts the **CCPE Opinion No. 16 (2021) on the implications of the decisions of international courts and treaty bodies as regards the practical independence of prosecutors**

November

January

1

EU/Euratom rule-of-law conditionality mechanism enters into force.

18

European Commission publishes the *EU handbook on victims of terrorism*, which the EU Centre of Expertise for Victims of Terrorism produced.

February

8

European Commission launches an open public consultation in support of the upcoming proposal for a directive on combating violence against women and domestic violence.

23

Victims' Rights Platform holds its first plenary meeting. Seven ad-hoc meetings are convened in 2021 to discuss horizontal issues relevant for victims' rights. The second plenary meeting takes place in December.

May

6

Within the framework of the Victims' Rights Platform the European Commission organises a consultation of NGOs on gender-based violence.

10

The Commission's public consultation on combating violence against women and domestic violence ends.

June and July

Targeted consultations of Member States, international organisations and workshops for social partners in support of the upcoming proposal for a directive on combating violence against women and domestic violence.

July

8-9

The European Commission conducts a mutual learning webinar with Member States on the costs of gender-based violence against women.

19

Public consultation period starts as part of the Commission's initiative to evaluate the impact of the Victims' Rights Directive.

20

European Commission publishes its 2021 Rule of Law Report, including 27 country chapters. It presents positive and negative developments across the Member States in four key areas for the rule of law: the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances.

October

6

The Court of Justice (Grand Chamber) issues its **Opinion 1/19** regarding the procedure and the legal basis for the EU's accession to the Council of Europe Istanbul Convention.

25

Public consultation period on the Commission's initiative to evaluate the Victims' Rights Directive ends.

November

18

The European Commission sends administrative letters to Poland and Hungary requesting information relevant to an assessment in accordance with the Rule of Law Conditionality Regulation.

December

2

Advocate General Campos Sánchez-Bordona issues his opinion in joint cases C-156/21 and C-157/21, holding that the Court of Justice should dismiss the actions that Hungary and Poland brought for annulment of the rule of law conditionality mechanism.



**This chapter focuses on two broad themes: victims' rights with respect to specific categories of victim, and the independence of the judiciary. The latter is particularly important as regards the rule of law.**

**The EU strengthened victims' rights further in 2021. In the framework of the Victims' Rights Platform, the European Commission continued to discuss how the Victims' Rights Directive relates to different categories of victims. Member States adopted new legal and/or policy measures to reinforce the generic rights of all victims of crime, and in particular of women as victims of gender-based violence.**

**Meanwhile, concerns deepened regarding respect for the rule of law, in particular the independence of the judiciary. Deficits persisted in several EU Member States. The mechanism for making the distribution of EU funds conditional entered into force, so measures to punish violations of the rule of law are gradually taking shape.**

At EU level, activities concerning victims' rights focused on implementing measures that the Commission's EU Strategy on Victims' Rights (2020-2025) envisages.<sup>1</sup> The Victims' Rights Coordinator led them, under the umbrella of the Victims' Rights Platform (on the strategy, the platform and the coordinator, see also last year's report, Chapter 9). Experts convened in ad-hoc meetings of the Victims' Rights Platform did most of the work. They focused on specific categories of victims, such as victims of hate crime, victims of terrorism, women as victims of gender-based violence, victims living with disabilities and victims rendered vulnerable by irregular residence status.



In implementing the victims' rights strategy, the European Commission evaluated the Victims' Rights Directive in 2021 to assess how far it has achieved its objectives and how Member States have implemented and applied it. The strategy envisages that "the Commission will continue to assess EU instruments and their possible shortcomings and, where necessary, come forward with legislative proposals by 2022 to further strengthen victims' rights". In July, the Commission launched a consultation<sup>2</sup> open to all stakeholders and citizens to gather their views on the Victims' Rights Directive and its impact on victims' lives since Member States applied it after 16 November 2015.

Efforts to ensure full respect for the rule of law in the EU continued. The rule of law conditionality mechanism entered into force on 1 January 2021.<sup>3</sup> It makes access to EU funds dependent on respecting the rule of law. Article 2 of the regulation defines the concept of 'the rule of law' as a Union value that Article 2 of the Treaty on European Union enshrines, interrelated with the other values in the same article of the treaty.

On 2 December 2021, Advocate General Campos Sánchez-Bordona issued his opinion in cases C-156/21, *Hungary v. European Parliament and Council of the European Union*, and C-157/21, *Republic of Poland v. European Parliament and Council of the European Union*. The claimants challenged the legal basis of the regulation and its compliance with primary EU law. The advocate general held that the Court of Justice of the European Union (CJEU) should dismiss the actions for annulment that Hungary and Poland brought against the conditionality mechanism.

The CJEU continues to examine requests to annul the conditionality mechanism, and cases concerning respect for the rule of law, in particular as regards the independence of the judiciary in the EU Member States.

## 9.1.

### MEMBER STATES IMPROVE VICTIM SUPPORT AND THEIR PROTECTION FROM SECONDARY VICTIMISATION

#### 9.1.1. Support organisations: victims' rights and states' obligations

In 2021, Member States took steps to guarantee all victims of crime the right to adequate support services, under Articles 8 and 9 of the Victims' Rights Directive<sup>4</sup> in conjunction with Articles 20, 22, and 25 of the Istanbul Convention. To fulfil this right, governments must adopt regulatory and organisational measures with a view to:

- engaging existing organisations;
- encouraging and facilitating the establishment of additional organisations where needed;
- setting and monitoring compliance with binding performance standards;
- overall, working towards the consistency and completeness of the network of generic and specialised support organisations in a Member State.



## PROMISING PRACTICE

Women who survive gender-based violence can suffer secondary victimisation from the criminal justice system. **Italy's** 'Never Again' project aims to tackle that problem.

The project uses e-learning platforms, webinars and in-person training sessions to train professionals who work for judicial institutions and law enforcement institutions, as well as lawyers and journalists. The courses aim to deconstruct prejudices and gender stereotypes that reinforce victim blaming. Its other activities include awareness-raising campaigns against secondary victimisation; multimedia products, such as videos, infographics and e-books; and theatre projects on the issues.

A promising practice exists in **France** and **Romania**, according to FRA's analysis of its research findings. Those countries have registers of accredited victim support organisations, which the courts administer. That makes it easier for the police to understand which organisations are available and can be trusted to deliver support services that meet defined standards.<sup>5</sup>

Similarly, **Lithuania** adopted the Law on Support to Victims of Crime in January.<sup>6</sup> The main objective was to define the conditions for establishing a system of generic victim support organisations. Organisations that fulfil specific requirements can apply for accreditation as victim support organisations for a renewable period of three years.<sup>7</sup> The accreditation procedure and detailed rules on providing accredited assistance to victims of crime received approval in April,<sup>8</sup> and the rights and obligations of support organisations in July.<sup>9</sup>

This accreditation is important, as it allows organisations providing assistance services to access state funding. In 2021, EUR 500 000 was available from the state budget, and the plan is to allocate EUR 1 million a year.<sup>10</sup> In September, 25 organisations were accredited as generic victim support organisations in Lithuania.<sup>11</sup> Most of them were already providing specialised victim support services to victims of domestic violence or human trafficking.

In **Austria**, the Federal Ministry of Justice presented the draft of a victim support regulation in March.<sup>12</sup>

Since 2000, the Federal Ministry of Justice has entrusted experienced organisations with providing psychosocial and legal procedural assistance. According to current practice, funded victim support organisations usually specialise in one of the following three victim groups: children and adolescents; women as victims of male violence and trafficking in women; and victims of 'situational' violence that does not occur in a relationship or institution. The draft regulation recommends replacing this classification with a special focus on vulnerable victims and a special right to protection for them. That would bring the conceptual framework of the provision of victim support services closer to the categories of the Victims' Rights Directive.

The **German** Federal Ministry for Family Affairs, Senior Citizens, Women and Youth published a position paper entitled 'Securing protection and counselling in cases of violence – A joint statement towards federal legal regulation'.<sup>13</sup> It aims to ensure that victims of violence have access to support organisations regardless of income.

### 9.1.2. Some progress in victim compensation

A number of Member States worked to render state compensation more effective, in line with the Commission's EU Strategy on Victims' Rights (2020–2025)<sup>14</sup> and the Compensation Directive,<sup>15</sup> which requires Member States to ensure fair and appropriate state compensation for victims of violent crimes.

In the **Netherlands**, the Senate passed a bill to extend the rights of the victim in the Criminal Code and the Code of Criminal Procedure. It includes extending the advance payment scheme for victims and for surviving dependants.<sup>16</sup>

In **Slovakia**, the amendment to the Act on Victims of Crime<sup>17</sup> introduces a right to compensation for the victim at the beginning of criminal proceedings, and not at the end as before. In **Hungary**, the rules on compensation have been significantly modified, the most important change being that the means test has been abolished, so that victims can apply for compensation regardless of their economic situation. In addition, the time limit for making a claim has been increased (from 3 months to 1 year), the rules for calculating the amount of compensation have been simplified and it is now possible to provide a preliminary estimate of the amount of the damage caused by the crime.<sup>18</sup>

In **Austria**, legislation came into force on 1 January 2021 to improve the fight against hate speech on the internet. Among other things, it provides for higher amounts of compensation for violations of 'personality rights' by the media.<sup>19</sup> A commentary on the new law refers to the notion of personality rights as "a type of IP [intellectual property] right that comprise comprehensive immaterial interests such as the right to one's own name, picture, honour or reputation. The key provision regarding the protection of personality rights is section 16 of the Civil Code, which stipulates the respect of human dignity in general."<sup>20</sup>

In **Czechia**, the Constitutional Court found that awarding insufficient compensation to a rape victim could violate their fundamental rights.<sup>21</sup> In the case in question, the High Court awarded excessively low compensation for non-pecuniary damage caused by rape and referred the claimant a trans woman with Asperger's syndrome – to civil proceedings for the rest of her claim. The Constitutional Court ruled that this violated the complainant's fundamental right to the inviolability of the person and her privacy under Article 7 (1) of the Czech Bill of Rights.

The available data show a varied picture across the EU as regards victims' compensation. For instance, in **Greece**, the Authority for Compensation received six applications in 2020 and 2021, according to the Ministry of Justice. One was rejected and the remaining five were still pending at the end of 2021.<sup>22</sup> In **Bulgaria**, 34 applicants received compensation in 2019. The total amount paid was some € 80,000.<sup>23</sup>

In comparison, in **Austria**, 921 persons received state compensation and some € 4.7 million was awarded in 2020.<sup>24</sup> In **Denmark**, in the same year, 3,119 persons filed (new) claims and some € 39.8 million was awarded.<sup>25</sup>

## 9.2. WOMEN AS VICTIMS OF GENDER-BASED VIOLENCE

### 9.2.1. Istanbul Convention

The Istanbul Convention serves as a benchmark and provides guidance to governments. In some Member States in central and eastern Europe,<sup>26</sup> people raised concerns about the concept of 'gender', often claiming that gender is not a social but a biological or natural category and that the notion of gender based on stereotype is an ideology that threatens traditional values.<sup>27</sup> In **Bulgaria** the Constitutional court was ceased by 75 deputies asking the Court to rule on the constitutionality of the Convention. The Court held that the Convention's concept of 'gender' as a social construct could relativize the biologically determined borderline between the two sexes and found the Convention not to be in conformity with the constitution; three dissenting opinions were delivered.<sup>28</sup>

To date, 21 EU Member States have ratified the convention: **Austria, Belgium, Croatia, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovenia, Spain and Sweden.**<sup>29</sup> The European Union and six Member States (**Bulgaria, Czechia, Hungary, Latvia, Lithuania and Slovakia**) have signed but not ratified it.

On 6 October 2021, the CJEU (Grand Chamber) issued its Opinion 1/19<sup>30</sup> on the EU's accession to the Istanbul Convention. The court identified the appropriate legal basis for the accession. It also concluded that the EU Treaties do not prohibit the Council from waiting for the 'common accord' of the Member States before deciding on the EU's accession.

However, the court does not consider that a 'common accord' is a prerequisite for the EU's accession to the convention, which is determined by qualified majority. A qualified majority on the Council is free at any time to end the debate and make a decision. Should the Council continue to block the EU's accession, the European Commission, according to its Gender Equality Strategy, is prepared to suggest the appropriate secondary law instruments to fill the gap. The Commission's work programme for 2021 (initiative No. 39) included this,<sup>31</sup> but it made no such legislative proposal by the end of 2021.

### 9.2.2. Istanbul Convention guides national developments

The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) published a comparative mid-term horizontal review in May. Member States have used the Istanbul Convention to drive legislative and policy developments concerning violence against women and how Member States prevent and combat such violence, it found.<sup>32</sup>



In **Cyprus**, in the context of the ratification of the Istanbul Convention the Law on the Prevention and Combating of Violence against Women and Domestic Violence was enacted in May 2021.<sup>33</sup> In addition, legislation on the protection from harassment and stalking of 2021<sup>34</sup> aims to comply with the implementation of Article 34 of the Istanbul Convention. It defines various types of gender-based violence and regulates the prevention and repression of gender-based violence, protection against it, and the provision of care and support to victims. Article 34 provides that Member States will take the necessary legislative or other measures to criminalise intentional and repeated threatening behaviour directed at another person.<sup>35</sup> The new law criminalises psychological violence in the form of coercion, pressure, demeaning comments, insults and threats, dissemination of pornographic or other sexual content without the woman's consent, and material deprivation as gender-based violence.<sup>36</sup>

In **North Macedonia**, the government adopted a proposal to bring the Criminal Code in line with the Istanbul Convention, in July.<sup>37</sup> The amendments include aligning the definition of gender-based violence with Article 36 of the convention, by introducing lack of consent as an incrimination criterion; criminalising stalking, sexual harassment, forced marriage and genital mutilation; and providing more severe punishment for what are known as honour crimes. The law is currently going through parliament.



## PROMISING PRACTICE

In **Luxembourg**, the Bright Sky app enables you to assess the safety of a relationship by helping you spot signs of violence, locates support centres and teaches about different types of abuse, free of charge. Additional special features have been added specifically for victims, and more features are planned for 2022. Luxembourg is the latest country to launch this app, which is already live in Czechia, Ireland, Italy, Romania, Portugal, South Africa and the United Kingdom.

*\*United Kingdom, Hestia, 'Bright Sky app'.*

### 9.2.3. Enhancing and monitoring compliance with emergency barring orders

Articles 50 and 52 of the Istanbul Convention require the immediate and reliable protection of victims. In particular, the police should issue emergency barring orders to force the offender to leave the victim's home immediately without the victim asking or even consenting. Several Member States have taken steps to improve the police response in cases of domestic partner violence accordingly.

However, in some Member States (including **Bulgaria, France, Ireland, Italy, Malta and Spain**) emergency barring orders still do not exist, in legislation or in practice. That means that it is often the victim rather than the abuser who has to leave their home. In some cases, when emergency barring orders are issued, little is done to ensure that the violent offenders comply. Sometimes the police treat calls concerning domestic abuse as 'family matters' or suggest that the victim 'contributed' to or provoked an attack, FRA evidence shows.<sup>38</sup>

The **Austrian** legal system already provided for emergency barring orders. The introduction of practical initiatives in 2021 enhanced it. As of 1 September 2021, mandatory prevention counselling was implemented.

The Protection from Violence Act 2019 had introduced this practice in law.<sup>39</sup> Offenders who have been issued with an emergency barring order must participate in a six-hour violence prevention counselling session at a counselling centre for violence prevention. The offender has five days to contact such a centre to make an appointment for counselling. Non-compliance may result in an administrative fine of up to € 2,500, or € 5,000 for repeat offences, or a substitute custodial sentence of up to six weeks.

### 9.2.4. Emergency barring orders and women's shelters

Shelters for abused women complement but cannot replace emergency barring orders. Victims of intimate partner violence may prefer to leave their homes at first but may also want to return there later. Hence, their homes should be available to them as safe places. In addition, women's shelters, which are often operated by private organisations, are not the responsibility of the state, and cannot act with the authority and assertiveness of a law enforcement agency.

Furthermore, a victim's escape to a women's shelter does not force the perpetrator to take responsibility for his violence. On the contrary, it could imply that the victim has done something wrong and hence must bear the burden of measures to ensure their safety. This speaks against policies that rely on shelters to protect women from repeat victimisation by their partners.

For example, in **Malta**, the Ministry for Social Accommodation extended its Private Rent Housing Benefit Scheme in 2021 to domestic violence survivors<sup>40</sup> to enable women suffering from domestic abuse to leave their homes. In addition, it amended the Victims of Crime Act.<sup>41</sup> The amendment provides for access to appropriate accommodation or shelters for victims in need of a safe place, as a result of an imminent risk, and to prevent secondary or repeat victimisation. At the same time, GREVIO has criticised Malta for not yet having established the legal basis for an EBO - in line with Articles 50 and 52 of the Istanbul Convention.<sup>42</sup> In this situation, there is a risk that in practice women will be advised to go to a women's shelter, not in addition to, but instead of an EBO; and in cases where the victim is not ready to stand up to the perpetrator at the time of police intervention, the victim will remain unprotected.

### 9.2.5. Covid-19 implications on violence against women



Coronavirus disease 2019 (Covid-19) contributed significantly to increasing violence against women. At the same time, access to justice across some Member States became more difficult, leaving women particularly vulnerable to violence.<sup>43</sup> The estimated costs of gender-based physical violence and cyberviolence reach at least € 340 billion per year in the EU, according to the study of the European Parliamentary Research Service. This cost includes the impact of such violence on physical and mental health, reduced quality of life and lost economic output.<sup>44</sup>

For example, in **Belgium**, the number of victims admitted to the three centres specialised in the reception of victims of sexual violence (*Centres de prise en charge des violences sexuelles*)<sup>45</sup> decreased during the first lockdown (March and April 2020), research published in February 2021 shows. That was a decrease of 50 % compared with the same period in 2018 and 2019. After lockdown, that number increased again to the pre-lockdown average. The authors of the study concluded that lockdown was an obstacle to the provision of support services for victims.

In **Czechia**, the Government Committee for the Prevention of Domestic Violence and Violence against Women presented data in March on the impact of the Covid-19 pandemic on people at risk of domestic and gender-based violence. Intervention centres conducted quantitative research with 375 participants between March and August 2020 and with 196 participants between November 2020 and January 2021.

Researchers from the Faculty of Humanities of Charles University and the Institute of Sociology of the Czech Academy of Sciences conducted a qualitative study on domestic violence during the pandemic.<sup>46</sup> They concluded that the lockdown increased domestic violence and at the same time obstructed victims from seeking help. For example, victims could not phone the relevant non-governmental organisations, as the perpetrator's presence in the home meant that they were under the perpetrator's physical surveillance.

A promising practice to address these problems appeared to be using social media (messaging apps), which replaced phone calls. The authors, however, emphasised that potential victims may not have access to the necessary devices, such as smartphones.

### 9.3. RULE OF LAW AND INDEPENDENCE OF THE JUDICIARY – PERSISTING CONCERNS

The World Justice Project is an independent, non-profit organization. Its Rule of Law Index is a composite measure that combines data from a general population survey with expert assessments for 139 countries. The index for 2021<sup>47</sup> placed **Poland, Bulgaria** and **Hungary** at the bottom of rankings for the indicators 'Constraints on government powers', 'Open government' and 'Fundamental rights' among the 31 countries forming the 'region' of the EU, the European Free Trade Association and North America. **Hungary** was in last place for the factors 'Constraints on government powers', 'Open government', 'Fundamental rights', 'Regulatory enforcement' and 'Civil justice'. **Bulgaria** was in last place for 'Absence of corruption' and 'Criminal justice'.

In March 2021, the V-Dem Institute at the University of Gothenburg (Sweden) published a report entitled *Autocratization turns viral: Democracy report 2021*.<sup>48</sup> It included **Poland, Hungary** and **Serbia** among the 10 countries worldwide that became more autocratic from 2010 to 2020. This index downgraded **Hungary's** status from an 'electoral democracy' to an 'electoral autocracy'.<sup>49</sup>

The Council of Europe continued to provide guidance concerning the relevant standards of an independent judiciary, including by several pertinent judgements of the ECtHR<sup>50</sup> and by the Annual Report of the Secretary General of the Council of Europe on the "State of Democracy, Human Rights and the Rule of Law: a democratic renewal for Europe".<sup>51</sup>

At EU level, in 2021 the European Commission followed up on its initial report on the rule of law situation in the European Union. The first report, issued in 2020, defined indicators relevant to assessing the situation in EU Member States. These include:

- the independence and effectiveness of justice systems;
- an effective anti-corruption framework;
- strong civil society organisations defending the rule of law;
- media pluralism and freedom, and safeguards against political pressure on and interference with the media.

The Commission's 2021 report on the rule of law situation in the European Union identifies the judiciary, the fight against corruption, media pluralism and freedom, and other institutional control mechanisms as the "four pillars" of the



rule of law. It underlines the existence of effective judicial review to ensure compliance with EU law as a core element of the rule of law. The report also highlights independence, quality and efficiency as essential parameters of an effective judicial system guaranteeing the effectiveness of the rights set out in EU law, including, prominently, the EU Charter of Fundamental Rights.<sup>52</sup>

With regard to the general public's perception of judicial independence, the report observes that "in **Austria, Finland, Germany, Luxembourg** and the **Netherlands**, the level of perceived judicial independence remains very high (above 75 %), while in **Croatia, Poland** and **Slovakia**, the level of perceived judicial independence remains very low (below 30 %)". It notes that the "important role of the Councils for the Judiciary in safeguarding judicial independence is increasingly recognised".<sup>53</sup> Overall, judicial independence remains an area of concern in some Member States, the report concludes. In addition, while reservations regarding the independence of the judiciary vary in intensity and scope, serious structural concerns exist in a few Member States and have deepened, including in **Hungary** and **Poland**.<sup>54</sup>

The EU rule of law conditionality mechanism,<sup>55</sup> adopted in 2020, entered into force on 1 January 2021. The mechanism establishes a general regime of conditionality to protect the EU budget in the event of breaches of the principles of the rule of law in the Member States relating to implementing the EU budget. It provides, among other things, that, at the request of the Commission, the Council of the European Union may adopt measures such as suspending payments from the EU budget or suspending the approval of one or more programmes that the budget finances.

According to Article 2 of the Regulation on a general regime of conditionality for the protection of the Union budget,<sup>56</sup> the concept of "the rule of law" as an EU value enshrined in Article 2 of the Treaty on European Union – and related to the other values listed in the same article – includes the principles of:

- legality, implying a transparent, accountable, democratic and pluralistic law-making process;
- legal certainty;
- prohibition of arbitrariness of the executive powers;
- effective judicial protection, including access to justice, by independent and impartial courts, including as regards fundamental rights;
- separation of powers;
- non-discrimination and equality before the law.

In March 2021, **Hungary** and **Poland** applied to the CJEU to annul the conditionality regulation. The Court dismissed these applications. In the Court's judgments passed on 16 February 2022, the Court pointed out that Member States' compliance with the common values on which the European Union is founded and which define the very identity of the European Union as a legal order – including the rule of law – is a precondition of the mutual trust between MS and hence of the enjoyment of all the rights deriving from the Treaties. Therefore, the EU must be able to defend those values, within the limits of its powers.<sup>57</sup>





In July 2021, the CJEU ruled that the disciplinary regime applicable to **Polish** judges is not compatible with EU law.<sup>58</sup> In particular, the court found that the Disciplinary Chamber established in the reform of the Polish Supreme Court does not provide all the guarantees of impartiality and independence. The court also pointed out that the disciplinary regime in force at the time could lead to political control of the judiciary. In addition, the fact that national judges could have disciplinary proceedings brought against them for lodging requests for preliminary rulings with the CJEU could jeopardise the uniformity of interpretation of EU law.

In November 2021, the Commission sent administrative letters to **Hungary** and **Poland** requesting information relevant to the application of the conditionality mechanism. The countries had two months to respond.<sup>59</sup>

In another case the Commission brought against **Poland**, the CJEU ordered a series of interim measures involving the suspension of proceedings pending before the Disciplinary Chamber of the Supreme Court.<sup>60</sup> Poland did not comply with the measures. Therefore, in October, the CJEU ordered it to pay a periodic penalty of € 1,000,000 per day, until it complied with the initial interim order or until the final judgment in the case was delivered.<sup>61</sup>

A **Hungarian** judge also raised the question of disciplinary proceedings against judges before the CJEU. The judge initially requested a preliminary ruling from the CJEU in a criminal case. Following this request, the Hungarian Supreme Court brought disciplinary proceedings against the referring judge, reasoning that the request for a preliminary ruling concerns irrelevant issues.

The referring judge then made a supplementary request for a preliminary ruling, asking the CJEU to examine if starting these disciplinary proceedings was compatible with EU law. The CJEU Grand Chamber held that a national supreme court is precluded from declaring that a request for a preliminary ruling that a lower court submits is unlawful on the ground that the questions referred are not necessary to resolve the dispute in the main proceedings.

Furthermore, the CJEU observed that relevant provisions of primary EU law (Article 267 of the Treaty on the Functioning of the European Union) preclude launching disciplinary proceedings on the ground that a national judge made a reference for a preliminary ruling. This is because it could deter national courts from making such references, jeopardising the uniform application of EU law.<sup>62</sup>

## FRA Opinions

### FRA OPINION 9.1

In accordance with the Victims' Rights Directive, EU Member States should ensure that all victims of crime – irrespective of the type of crime – have access to an organisation that provides support services. The provision of victim support services should be underpinned by quality standards, for example in a process of certification or accreditation that ensures that the support services provided meet defined performance standards.

Articles 8 and 9 of the Victims' Rights Directive grants every victim of crime the right to appropriate support services. Accordingly, Member States' criminal justice systems are under an obligation to ensure that sufficient support services are available that meet defined performance standards.

The network of existing support organisations in many Member States is still piecemeal and incomplete, and the police often have difficulty in assessing which support organisations are available and most appropriate for individual victims, evidence from FRA research in 2021 suggests. For example, this situation results in some Member States having extensive coverage for victims of human trafficking or women as victims of domestic or sexual violence, whereas other victims, such as victims of racist, homophobic or situational violence, such as property crime, have limited victim support provision.

In addition, very few Member States have a register of accredited victim support services, according to FRA's research covering 2021. Such a register would make it easier for the police and criminal justice authorities to decide which services can be called on to provide victim support that meets certain standards.

### FRA OPINION 9.2

EU Member States should establish a solid legal basis for emergency barring orders issued by the police without requiring the consent or an application of the victim, in accordance with the Istanbul Convention. In addition, Member States should ensure that such barring orders are actually issued by the law enforcement authorities in all appropriate cases, that compliance with these orders by the offender is strictly monitored and that non-compliance is resolutely sanctioned.

In accordance with Articles 50 and 52 of the Istanbul Convention, Member States that have ratified the convention are required to ensure that the police are able and willing to provide immediate and reliable protection to victims by issuing emergency barring orders.

However, some Member States still do not have emergency barring orders in their legal systems, while in others the police are reluctant to use them, according to FRA data generated in 2021. In still others, emergency orders are issued but little is done to ensure that violent offenders comply with them reliably.

An independent judiciary is the cornerstone of the rule of law and of access to justice (Article 19 of the Treaty on European Union, Article 67 (4) of the Treaty on the Functioning of the European Union and Article 47 of the EU Charter of Fundamental Rights). Not only external actors, such as the government or the media, but also internal mechanisms of a rigid judicial administration that puts pressure on prosecutors or judges can threaten this independence, as 2021 judgments of the CJEU in cases concerning courts in Poland and Hungary recalled.

This danger is particularly associated with measures of disciplinary control. If such measures are used at all against judges and public prosecutors, strict care must be taken to ensure that they do not interfere with the exercise of judicial functions.



### **FRA OPINION 9.3**

EU Member States need to ensure that their judiciaries remain independent and impartial in order to guarantee that EU law relevant cases are decided in line with the rule of law and fundamental rights, including Article 47 of the Charter. In particular, EU Member States should make sure that judges and prosecutors are not threatened with disciplinary proceedings because of the manner in which they perform their judicial functions.

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# DEVELOPMENTS IN THE IMPLEMENTATION OF THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

# 10

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2

February

In *Strøbye and Rosenlind v. Denmark* (25802/18 and 27338/18), European Court of Human Rights (ECtHR) upholds voting restrictions for people with cognitive disabilities.

1

24

March

In a statement, Committee on the Rights of Persons with Disabilities (CRPD Committee) and United Nations (UN) Special Rapporteur on the Rights of Persons with Disabilities urge the ECtHR to rethink its approach to voting restrictions for people with cognitive disabilities as contained in the *Strøbye and Rosenlind v. Denmark* judgment.

Council of Europe's European Committee of Social Rights (ECSR) published its conclusions 2020 on employment, training and equal opportunities including on Article 15 of the European Social Charter (Right of persons with disabilities to independence, social integration and participation in the life of the community). The ECSR found several States Parties to be in violation of Article 15 on the ground that mainstream education and training for children with disabilities were not effectively guaranteed; that persons with disabilities are not guaranteed effective and equal access to employment; that they are not effectively protected against discrimination in employment; that the remedies in case of discrimination are not effective; that persons with disabilities are not guaranteed reasonable accommodation, etc.

7

29

April

Council of Europe Commissioner for Human Rights publishes a comment advocating a reform of mental health services as an urgent need and a human rights imperative.

Council of Europe and European Parliament adopt a new regulation on rail passenger rights, Regulation (EU) 2021/782, strengthening the rights of people with disabilities to equal treatment during rail journeys.

5

28

May

CRPD Committee issues its concluding observations on Estonia's initial report.

UN experts, including the CRPD Committee and the UN Special Rapporteur on the Rights of Persons with Disabilities, issue a statement calling upon the Council of Europe to withdraw the draft additional protocol to the Oviedo Convention concerning the protection of human rights and dignity of people with mental disorders regarding involuntary placement and involuntary treatment "based on coercion, which is incompatible with contemporary human rights principles and standards".

15-17

28

June

Conference of the State Parties to the CRPD holds its 14th session.

Council of Europe Commissioner for Human Rights publishes her written observations submitted to the ECtHR pertaining to the case of *Eugeniu CLIPEA and Virginia IAPARA v. the Republic of Moldova* (No. 39468/17), which relates to the alleged ill-treatment of people with psychosocial disabilities at a psychiatric hospital. The commissioner condemns the traditional coercive and institutionalisation approach to disability.

## UN & CoE

July

19

UN Special Rapporteur on the Rights of Persons with Disabilities issues his report on the protection of the rights of people with disabilities in the context of armed conflict.

September

14

CRPD Committee adopts its draft General Comment No. 8 on Article 27 of the CRPD, and an annotated outline of its Guidelines on Deinstitutionalization of Persons with Disabilities, Including in Emergency Situations.

15

ECtHR rejects the first request for an advisory opinion that the Council of Europe's Committee on Bioethics submitted under Article 29 of the Oviedo Convention, on the grounds that the questions do not fall within the court's competence.

October

4

CRPD Committee issues its concluding observations on France's initial report.

26

In *Toplak and Mark v. Slovenia* (34591/19 and 42545/19), ECtHR finds that the lack of voting machines does not discriminate against disabled voters who are allowed to be assisted by a person of their choice, under their legal right to secrecy of voting.

November

30

Council of Europe's Committee on Social Affairs, Health and Sustainable Development adopts a preliminary draft report on de-institutionalising people with disabilities.

December

7

In *Savran v. Denmark* (No. 57467/15), ECtHR upholds the applicability of the *Paposhvili v. Belgium* threshold test to determine a violation of Article 3 of the European Convention on Human Rights following the removal of mentally ill people to their country of origin. The court rules that not considering the applicant's lack of criminal culpability on account of mental illness is a failure to balance the interests at stake and a breach of Article 8 of the European Convention on Human Rights.



26

January

In *VL v. Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie* (C16/19), Grand Chamber of the Court of Justice of the European Union (CJEU) holds that giving disability benefits to a group of workers who had submitted their disability certificates after a certain date but not giving those benefits to a group of workers who had handed in those certificates before that date may constitute both direct and indirect discrimination under the Employment Equality Directive.

3

February

European Ombudsman opens a strategic inquiry into the role of the European Commission in ensuring that Member States use EU funds with a view to promoting independent living for people with disabilities and older people, and transitioning away from residential care institutions.

3

10

March

European Commission publishes the Strategy for the Rights of Persons with Disabilities 2021–2030.

European Parliament adopts a resolution (2020/2086(INI)) on the implementation of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation in the light of the Convention on the Rights of Persons with Disabilities (CRPD).

21

30

May

In *Validity and Center for Independent Living v. Commission* (C-622/20), CJEU dismisses the Validity and Center for Independent Living appeal regarding funds used for a housing structure for people with disabilities, on the grounds that the appellants were not entitled to bring the action.

European Commission publishes its final report on a study assessing the implementation of the pilot action on the EU Disability Card and associated benefits, which confirms the added value of the card, and the efficiency, effectiveness and relevance of the pilot project.

14

June

Employment, Social Policy, Health and Consumer Affairs Council adopts conclusions on the Strategy for the Rights of Persons with Disabilities 2021–2030, in which the Council of the European Union endorses the strategy.

July

15

In *Tartu Vangla* (C795/19), CJEU finds that Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation that imposes an absolute bar to the continued employment of a prison officer whose auditory acuity does not meet the minimum standards of sound perception that that legislation prescribes, without allowing it to be ascertained whether that officer is capable of fulfilling the duties where appropriate after the adoption of reasonable accommodation measures.

August

4

European Parliament adopts a report on the rights of people with disabilities, which assesses the current rights situation of people with disabilities after the CRPD had been in effect in the EU for a decade.

October

7

European Parliament adopts a resolution (2020/2209(INI)) on the lessons learned on the protection of persons with disabilities through petitions.

21

In *TC and UB v. Komisia za zashtita ot diskriminatsia and VA* (C824/19), CJEU finds that provisions of the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, read in the light of the Charter of Fundamental Rights of the European Union and the CRPD, must be interpreted as precluding totally depriving a blind person of any possibility of performing the duties of a juror in criminal proceedings.

27

In *WM v. Commission* (T411/18), CJEU rules that granting 25 % extra time for an applicant to sit a test for an EU position based on their disabilities (dyspraxia and attention deficit disorder) was not arbitrary or manifestly inadequate.

December

2

A study on the EU's implementation of the 2015 concluding observations of the CRPD Committee, which the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs commissioned at the request of the Petitions Committee, is published.

3

European Commission awards the 2022 Access City Award to Luxembourg City.

10

European Commission publishes its evaluation of the implementation and the impacts of Regulation (EC) No. 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air. It concludes that it has improved awareness and implementation of rights of passengers with reduced mobility, but that further improvements are needed to facilitate the exercise of their rights.

The European Commission launched the new EU disability strategy for 2021–2030. The Common Provisions Regulation was formally adopted, introducing strict criteria to ensure EU funding complies with the Convention on the Rights of Persons with Disabilities (CRPD). Rail passenger rights for people with disabilities were strengthened. A European Parliament report on lessons learned from petitions regarding rights of people with disabilities shed light on areas of improvement for both the Union and the Member States.

The coronavirus disease 2019 (Covid-19) pandemic resulted in higher death and sickness rates among people with disabilities. Reports of ill-treatment prompted increased calls for urgent de-institutionalisation. A European Committee of Social Rights decision on segregated education for children with disabilities highlighted the need for fully inclusive education in primary and secondary education.

Member States took the next steps towards implementing the new European Accessibility Act. CRPD implementation beyond the scope of current EU directives remained uneven. All Member States now have a national CRPD monitoring body.



## 10.1. THE CRPD AND THE EU: NEW STRATEGY AND MEASURES TO STRENGTHEN DISABILITY RIGHTS

### 10.1.1. Launch of new disability strategy

The EU launched its new disability strategy in March 2021,<sup>1</sup> with several new flagship initiatives. Among them is the creation of a new European resource centre on accessibility, AccessibleEU, in 2022. It “will bring together national authorities responsible for implementing and enforcing accessibility rules with experts and professionals from all areas of accessibility, to share good practices across sectors, to inspire policy development at national and EU level, as well as to develop tools and standards aiming to facilitate implementation of EU law”.<sup>2</sup>

The strategy also contains Commission commitments to launch seven flagship initiatives: a European resource centre AccessibleEU; plans for all EU Member States to recognise the European Disability Card; new guidance for de-institutionalisation; and a new, specific framework for social services of excellence for people with disabilities. The Commission also intends to present a package to improve labour market outcomes for people with disabilities. The Commission established in 2021 a Disability Platform bringing together national CRPD focal points, disability organisations and the Commission. Other planned initiatives for instance include a guide for good electoral practice addressing participation of persons with disabilities in the electoral process. The strategy will also be accompanied by a monitoring framework with disability indicators and a strategy for data collection, in accordance with the timeline set in the instrument. The Fundamental Rights Agency is invited to examine the situation of persons with disabilities living in institutions in relation to violence, abuse and torture. The Strategy also includes calls for Member States, as parties to the UN CRPD, in order to progress with its implementation.

### New EU disability strategy 2021–2030

The objective of the strategy is to:

*“progress towards ensuring that all persons with disabilities in Europe, regardless of their sex, racial or ethnic origin, religion or belief, age or sexual orientation:*

- *enjoy their human rights*
- *have equal opportunities, equal access to participate in society and economy*
- *are able to decide where, how and with whom they live*
- *move freely in the EU regardless of their support needs*
- *and no longer experience discrimination”.*

Source: European Commission (2010), ‘**Union of equality: Strategy for the Rights of Persons with Disabilities 2021–2030**’



## FRA ACTIVITY

# Fundamental rights compliance of EU funds

In 2021, FRA launched a new project to explore how national bodies with a human rights remit, such as national human rights institutions and equality bodies, ensure compliance with EU funds. The project will interview a range of interlocutors at national and EU levels, to determine the critical success factors for the involvement of such bodies at each stage of the EU funding cycle. FRA could provide technical assistance to national bodies in this area. In 2023 it will publish an analytical report outlining potential roles for statutory human rights bodies in the monitoring of EU funds.

The project will focus on both the Charter of Fundamental Rights of the European Union and the CRPD. It will also look at the potential role of monitoring bodies designated under Article 33 (2) of the CRPD in the EU funding cycle.

Overall, disability non-governmental organisations (NGOs) welcomed the strategy. They also suggested improvements.<sup>3</sup> They praised the focus on inclusivity<sup>4</sup> and intersectionality,<sup>5</sup> the human rights-based approach following the United Nations CRPD,<sup>6</sup> and all the developments striving to make up for the previous strategy's shortcomings.

The European Disability Forum (EDF) called the strategy a "clear step forward" and commended the Commission's consultative approach.<sup>7</sup> The European Blind Union spoke of a "sound and comprehensive framework of action for the incoming decade".<sup>8</sup>

Nevertheless, there were calls for the approach and legislative proposals to be more ambitious.<sup>9</sup> NGOs are less confident about the implementation of the strategy.<sup>10</sup> They point to the failure to broach some topics and to define some terms.<sup>11</sup> Moreover, the EDF and the International Disability and Development Consortium criticised Section 6 of the strategy, relating to the EU's external action.<sup>12</sup>

Other EU strategies also included disability considerations. For example, the Commission introduced disability issues into the European Pillar of Social Rights Social Scoreboard. The Social Scoreboard measures progress on the European Pillar of Social Rights<sup>13</sup> as part of the policy coordination framework in the context of the European Semester. Synergies are also ensured with other equality strategies adopted to combat discrimination in all its forms. The Commission also intends to mainstream disability into relevant future EU policies.

## 10.1.2. New Common Provisions Regulation links EU funding to CRPD compliance

The Common Provisions Regulation contains rules applicable to eight EU funds: the European Regional Development Fund; the European Social Fund Plus; the Cohesion Fund; the Just Transition Fund; the European Maritime, Fisheries and Aquaculture Fund; the Asylum, Migration and Integration Fund; the Internal Security Fund; and the Instrument for Financial Support for Border Management and Visa Policy. It explicitly links funding to CRPD compliance.

The regulation requires Member States to create arrangements to ensure that accessibility policy, legislation and standards are properly reflected in the preparation and implementation of programmes<sup>14</sup>. It also requires involvement of organisations of people with disabilities throughout the funding cycle, and implementation and application of the CRPD as an 'enabling condition' for the use of EU funds.<sup>15</sup> Article 2 of the regulation defines an 'enabling condition' as a prerequisite for the effective and efficient implementation of the specific objectives.

The Common Provisions Regulation also defines the role of "bodies responsible for promoting [...] rights of persons with disabilities". They include national monitoring bodies, as per Article 33 (2) of the CRPD.<sup>16</sup> This significantly strengthens the CRPD-related provisions in the regulation compared with the provisions of the previous funding cycle.<sup>17</sup>

Disability NGOs welcomed the Common Provisions Regulation, especially the procedure for managing authorities to select operations (Article 67),<sup>18</sup> the applicable horizontal principles (Article 6a and recital 5),<sup>19</sup> and partnership and multilevel governance (Article 6).<sup>20</sup> However, the EDF expressed some disappointment regarding the pre-financing rates (Article 84). This is because civil society had lobbied for an increase in pre-financing rates to allow smaller organisations to use EU funds with lower financial risks.<sup>21</sup>





### 10.1.3. Rail passenger rights strengthened for people with disabilities

The EU legislator adopted new and stronger rail passenger rights.<sup>22</sup> The new Regulation introduces a general non-discrimination clause on disability.

Travelling spontaneously in an independent manner will remain a challenge for many people with disabilities, despite the calls of some NGOs to create a “turn-up-and-go” system in all EU railway stations.<sup>23</sup> However, pre-notification time to obtain assistance for travel was cut in half, from 48 hours to 24 hours. In addition, information must be provided in an accessible format when services are disrupted, and staff should be trained in accessibility.

The regulation introduces liability for lost or destroyed mobility equipment. The **Austrian** branch of the European Consumer Centres Network noted that the new regulation brings “some improvement for people with disabilities and reduced mobility”.<sup>24</sup>

### 10.1.4. European Parliament outlines lessons learned, and notes need for stronger policies

The European Parliament adopted a resolution that its Petitions Committee initiated on 7 October 2021. It lays out the lessons learned from a range of petitions related to the topic of disability over the last eight years. It calls for Member States to fully implement applicable EU law. It also calls for EU institutions themselves to take action, including removing barriers to accessibility in EU buildings and providing more easy-to-read, sign language and braille translations.<sup>25</sup>

The new EU disability strategy has outlined one way forward towards greater implementation inside the Union. It calls for EU institutions, bodies and agencies to set up disability coordinators.<sup>26</sup> This would be a step towards better internal awareness of the need to implement the CRPD across the spectrum of EU activities.

Article 33 (2) of the CRPD requires States Parties to set up a framework to promote, protect and monitor CRPD implementation. As a party to the CRPD, the EU set out a framework for matters of EU compliance with the CRPD in 2013. For more information, see the [CRPD framework web page](#). The European Ombudsman also developed, in consultation with the EU framework, an indicative list of best practices for accommodating the needs of people with disabilities during emergencies.

The European Ombudsman’s list of best practices in the area of disability during emergencies can serve to improve the disability component of responses to current and future emergency situations.<sup>27</sup>

## PROMISING PRACTICE

# European Ombudsman publishes list of best practices in the area of disability during emergencies

The European Ombudsman identified the following best practices to accommodate the needs of EU staff members with disabilities during emergencies.

- *“Use accessible formats, such as sign language and easy-to-read text, to communicate to staff members with disabilities relevant information about ongoing emergency situations, in particular, applicable public health measures.*
- *Where possible, make available a dedicated support phone line and email contact for staff members with disabilities or their carers to report issues and request assistance.*
- *Ensure that any safety measures that are implemented, for example in the workplace, take into account the needs of persons with disabilities.*
- *Make available special health protection and disease prevention tools adapted to the needs of staff members with disabilities, for example transparent masks for sign language users.*
- *Put in place adequate facilities for remote working for staff members with disabilities, in particular those at higher risk of infection or complication.*
- *Make available to staff members with disabilities the same facilities for remote working that they would have access to in the office, for example personal assistance during working hours.*
- *Make available adapted IT equipment, assistive technology and suitable furniture for staff members with disabilities who are working remotely. Examples include special webcams and microphones, online communication tools and remote conference platforms that are fully compatible with sign language interpretation and live captioning.*
- *Assist staff members with disabilities in bringing equipment from the regular workplace to their home, if this will assist them in carrying out their functions.*
- *Where staff members with disabilities have an essential or humanitarian reason for being in a country other than their place of assignment, consider putting in place a mechanism for authorising such arrangements, where appropriate.*
- *See if it is possible, in the course of the emergency situation, to authorise special leave for staff members who are carers of persons with disabilities and consider*



*providing more flexible provisions for part-time work for those individuals.*

- *Adjust the working methods of essential departments of the EU administration (such as the medical services or the IT departments/units) to the needs of staff members with disabilities arising from the emergency circumstances.*
- *Maintain ongoing and meaningful consultations with staff members with disabilities (or their representative organisations) about their special needs.*
- *Create ‘community support networks’, which aim to provide support outside work and alleviate possible psychological distress of staff members with disabilities during the emergency.*
- *Launch targeted awareness-raising campaigns (for managers and/or for staff members with disabilities) on ‘reasonable accommodation’ in the event of a health emergency.*
- *Provide training for managers to explain reasonable accommodation possibilities for staff members with disabilities.*
- *Overall, seek to ensure that any response to an emergency situation is compliant with the obligations enshrined in the United Nation Convention on the Rights of Persons with Disabilities.”*

Source: European Ombudsman (2021), ‘How the European Commission has accommodated the needs of staff members with disabilities in the context of the Covid-19 emergency’, case SI/2/2020/MMO, 29 June 2021

## 10.2. STEPS TAKEN TO IMPLEMENT THE CRPD AT NATIONAL LEVEL

The pandemic continued to cause significant loss of life in institutions for people with disabilities. In addition, there were reports of difficulties in distance learning for children with disabilities. The European Committee of Social Rights, in a landmark decision concerning Belgium, reiterated the need to integrate children with disabilities in schools. Despite the adoption of EU legislation on accessibility in recent years, challenges still remain, including in areas outside the scope of current EU regulations, such as education.

### 10.2.1. De-institutionalisation: need recognised, but progress uneven

As last year's fundamental rights report noted, the Covid-19 pandemic, and the associated greater risk of viral transmission in indoor closed spaces,<sup>28</sup> has given greater urgency to efforts to promote de-institutionalisation. The results of the pandemic have been devastating for people with disabilities, particularly those in institutions.

In **Lithuania**, for example, there were more than 5,000 cases of Covid-19 among residents of social care institutions, and 392 residents had died with Covid-19 as a main cause of death, by October 2021.<sup>29</sup> In **Romanian** residential institutions for adults with disabilities, between 1 January 2021 and 14 June 2021, 720 residents were infected, of whom 25 died.<sup>30</sup> An expert report in **Luxembourg** identified a wide range of infection clusters across different care institutions, noting unclear guidance and instructions and a lack of planning as causes.<sup>31</sup>



More generally, the **Swedish** National Board of Health and Welfare reported that the Covid-19 death rate for people with disabilities who receive support according to the Swedish Act Concerning Support and Service for Persons with Certain Functional Impairments<sup>32</sup> was double that of the general population. Among possible causes, it pointed out that people with some disabilities are more vulnerable and can have difficulties communicating symptoms.<sup>33</sup>

For issues related to children in institutions, please see Chapter 8 on the rights of the child.

Action to protect the health of residents is clearly necessary but should remain proportionate. In a decision, the **Finnish** Deputy Parliamentary, noting the government's duty to ensure residents' health and safety, stressed that it is important that restrictions on such rights and on the services they are entitled to should be legal and proportional. That requires a continuous and individualised assessment.<sup>34</sup>

People with disabilities are generally at higher risk of ill-treatment in institutional settings. Evidence of that continues to accumulate. The Committee on the Rights of Persons with Disabilities noted that in its 2017 general comment on independent living.<sup>35</sup>

Cases of physical ill-treatment, seclusion, the use of mechanical restraints, poor hygiene and staff shortages in institutions in **Bulgaria** featured in a November report of the Council of Europe's Committee for the Prevention of Torture and

## PROMISING PRACTICE

# Finland launches pilot project on personal budgeting

In 2020 and 2021, the Finnish Institute for Health and Welfare and the Ministry of Social Affairs and Health ran a pilot project to develop a Finnish model for personal budgeting for people with disabilities and to prepare a proposal for subsequent legislation on this topic. Personal budgeting is defined as a way of organising individually tailored assistance and support, in which the person is at the centre of planning, selecting and arranging the help, support and services they need. The objective of the project was to strengthen the self-determination, inclusion and freedom of choice of people with disabilities in planning support, to ensure that assistance and support are available flexibly in different life situations and meet individual needs. It consisted of nine regionally implemented projects and joint development work at national level. It assessed the strengths, weaknesses, opportunities and challenges of personal budgeting for people with disabilities in comparison with other forms of organising services, and sought to develop national principles and procedures and a jointly accepted definition of personal budgeting.

Source: Finnish Institute for Health and Welfare and the Ministry of Social Affairs and Health (2021), 'Pilot project on personal budgeting for persons with disabilities 2020–2021' ('*Vammaisten henkilöiden henkilökohtaisen budjetoinnin kokeiluhanke 2020–2021*').

Inhuman or Degrading Treatment or Punishment. It also pointed to a lack of de-institutionalisation and integration of service users in the community.<sup>36</sup>

**Denmark** introduced new rules on the use of coercion in psychiatric treatment in response to the European Court of Human Rights judgment in *Aggerholm v. Denmark*.<sup>37</sup> The case concerned the use of belt restraints for nearly 23 hours. The court found a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (torture, inhuman and degrading treatment or punishment).<sup>38</sup>

NGOs also documented cases of severe neglect and lack of healthcare provision for women and children with disabilities in **Serbia**, including forced abortions and forced administration of contraceptives.<sup>39</sup>

A new law was approved in **Spain**, which reforms civil and procedural legislation for the support of people with disabilities in the exercise of their legal capacity.<sup>40</sup>

Member States continue to include de-institutionalisation plans in their CRPD action plans. **Greece**,<sup>41</sup> **Poland**<sup>42</sup> and **Slovakia**<sup>43</sup> adopted new plans to this effect in 2021. However, despite all the powerful reasons to speed up de-institutionalisation, progress remains slow.

**Portugal's** de-institutionalisation is insufficient its CRPD monitoring mechanism reported. It noted a continued lack of adequate support, appropriate legislation and adequate funding. That resulted in total isolation of residents in institutions for people with disabilities during the pandemic.<sup>44</sup>

Although people with disabilities in **Denmark** have some say in where they live outside institutions, they still have little freedom of choice, especially when they want to move to a different municipality, the Danish Institute for Human Rights reported in June.<sup>45</sup> This lack of choice of adequate housing was also a challenge according to an NGO report from the **Netherlands**.<sup>46</sup>

### 10.2.2. Education: social rights committee decision highlights state obligation to integrate children with disabilities

Children with intellectual disabilities do not enjoy an effective right to inclusive education in the French Community in **Belgium**, the European Committee of Social Rights found. That violates the European Social Charter.<sup>47</sup> This comes three years after a similar finding about the Flemish Community.<sup>48</sup> This decision clarifies what constitutes a violation of the CRPD, as Unia, the national CRPD monitoring body, noted.<sup>49</sup>

In **Cyprus**, the government introduced a bill aiming to achieve inclusive education. Although some welcomed the text, notably the Cypriot Commissioner for Children's Rights,<sup>50</sup> organisations of parents of children with disabilities criticised it for using overly vague language and not fundamentally changing the existing system. They called for reconsideration and more fundamental reform. An Intervention was submitted by the Commissioner for Administration and the Protection of Human Rights (Ombudsman), regarding distance education of children attending to Special Units of Primary Education Schools.<sup>51</sup>

In **Czechia**, a decree proposal to partially remove personal assistants provided to primary and secondary school students with disabilities was not approved. However, the final adopted version still contains funding changes that move the power to make decisions about support from a specialised pedagogical-psychological advisory centre to headteachers.<sup>52</sup>





In **North Macedonia**, many children with disabilities are not in the educational system at all, as they are perceived as incapable of learning, a recent study notes.<sup>53</sup> Although a national law requires the provision of personal assistants to children with disabilities, a recent United Nations Development Programme study questions whether personal assistants provided under the law understand their obligations towards students and others.<sup>54</sup> The decision comes amid the Covid-19 pandemic, which has proven very challenging for children with disabilities and their parents.

A report on the impact of the pandemic on children and young people with disabilities in **Sweden** highlighted extensive difficulties for some students with disabilities with distance learning and a significant risk of educational backlog.<sup>55</sup>

However, there were some encouraging developments on the right to education. More than 400,000 children with disabilities were enrolled in mainstream schools in **France** during the first half of the 2021 school year.<sup>56</sup>

The **Romanian** National Council for Combating Discrimination found that the state has an obligation to adopt special measures regarding high-school admissions for people with special educational needs/disabilities. It therefore ordered the Ministry of National Education to establish places specifically available to people with disabilities.<sup>57</sup>

In **Italy**, the 2021 budget made additional funds available for teacher training and the purchase of individual digital devices for people with disabilities.<sup>58</sup> An Italian Ministry of Education, Universities and Research decree made it mandatory for teachers to receive training on how to deal with the needs of students with disabilities.<sup>59</sup>

In **Lithuania**, the Minister for Education, Science and Sport set out an action plan to implement the 2020 Law on Education. This law comes into force on 1 September 2024.<sup>60</sup> It enables children with disabilities to attend a general education school in their place of residence and bars schools from refusing to admit them; it will enter into force in 2024.<sup>61</sup>



## PROMISING PRACTICE

# 'Inclusive professionals' conduct education and training on inclusion

Since 2017, the Drachensee Foundation and the Christian-Albrecht University of Kiel have run the Institute for Inclusive Education. Its funding comes from the Ministry of Education, Science and Culture of the **German** federal state of Schleswig-Holstein, among others. The institute enables people with disabilities who have no academic backgrounds to gain teaching qualifications on issues of inclusion and disability rights.

They are known as inclusive professionals. They use their experience and expertise to teach and conduct research on social work, pedagogy and other disciplines in the disability and health sector. Inclusive professionals offer education and training to universities, public administrations, associations and companies.

*Source:* Institute for Inclusive Education (Institut für Inklusive Bildung) website

In July, the **Croatian** Ministry of Science and Education published guidelines on working with students with disabilities.<sup>62</sup> The guidelines outline instructions on identifying students with disabilities; on the processes of assessing their educational needs; on planning, implementing and evaluating the learning and teaching processes of students with disabilities; on the roles of different participants in the educational process; and on appropriate forms of support for students.

### 10.2.3. Accessibility: next steps taken to implement the European Accessibility Act, but other challenges remain

Union law requires Member States to place or provide in the market certain accessible products and services in several different areas.



First, the Web Accessibility Directive requires that public bodies' websites and mobile applications be accessible. It was due to be fully implemented in 2021.<sup>63</sup> The issue of accessibility digitalisation and disability is gaining greater prominence during the Covid-19 pandemic, with many more services, both general and specifically for people with disabilities, being provided online.

Key players involved in crisis communication lacked processes to produce accessible information at the beginning of the Covid-19 pandemic, the **Swedish** Agency for Accessible Media pointed out in January 2021. It added that it has been difficult to obtain individual help to obtain and understand information during the pandemic.<sup>64</sup> In addition, efforts to promote digital participation are committed but fragmented; the time has come for the next step to ensure universal participation, the **Swedish** Post and Telecom Authority noted.<sup>65</sup>

The **Portuguese** Observatory of Web Accessibility gave an overall accessibility score of 6.3 out of 10 to Portuguese public administration websites and mobile applications. It classified 20 such websites or mobile applications as fully compliant, 10 as partially compliant and 8 as non-compliant.<sup>66</sup>

**Greece** lacks standards for web accessibility of public and private information and communication services, the Ombudsman noted in his annual report.<sup>67</sup> The Commission will report on compliance with Directive (EU) 2016/2102 in 2022.<sup>68</sup>



Second, the European Accessibility Act requires Member States to adopt the necessary legal measures to comply with its provisions by 28 June 2022 and apply them by 28 June 2025.<sup>69</sup> This act requires Member States to ensure that public items and services such as computers, automatic teller machines, ticketing and check-in machines, transport-related services, banking services and e-books are accessible to everyone. A number of Member States have taken the first steps in implementing it.

In **Greece**, a working group of all relevant ministries has already drafted an implementing law.<sup>70</sup>

In **Germany**, the Bundestag passed the Accessibility Strengthening Act<sup>71</sup> on 20 May 2021, setting out that service terminals and automatic teller machines must be fully accessible within the next 15 years, thereby extending for some aspects the 2025 deadline set by the European Accessibility Act.

The Ministry of Social Affairs of **Estonia** drafted an implementing law,<sup>72</sup> which passed through the first round of consultations.

In **Slovenia**, the Ministry of Labour, Family, Social Affairs and Equal Opportunities formed an interministerial working group that has completed the drafting of an Access to Products and Services for Persons with Disabilities Act, transposing the Directive into Slovenian legislation. This working group included representatives of line ministries which have to ensure access to products and services. The Act defines the requirements for accessibility to products and individual services, accessibility control bodies and sanctions in the event of failure to ensure accessibility. The major hurdle was the appointment of supervisory bodies for electronic communication services and e-book. The draft was sent into public discussion for a month, after which it will go to interdepartmental ministerial discussion for fourteen days and then to the Government for adoption.<sup>73</sup>

In **Sweden**, in May 2021, a public inquiry proposed a single act with ordinances regulating various procedures, and regulations issued by the appropriate governmental authorities.<sup>74</sup>



## PROMISING PRACTICE

### Swedish Disability Rights Federation sets up disability rights bureau

In May, the Swedish Disability Rights Federation started setting up a disability rights bureau. The bureau is funded by the Swedish Inheritance Fund. It is intended to enable people with disabilities above 18 years old and their relatives who need to speak to someone who can explain applicable rights and identify the responsible authorities and the steps they need to take to claim their rights. It was set up after a 2019 pilot report showed a high demand for legal advice when resources were shrinking, and very few individuals could personally afford legal advice.

*Source: Swedish Disability Rights Federation (2021), 'Disability rights bureau' ('Funktionsrättsbyrå')*

Much work remains to be done in areas outside the scope of the Web Accessibility Directive and the European Accessibility Act.

Many hurdles affect the right of people with disabilities to vote in **Belgium**, its CRPD monitoring framework noted. They include inaccessible polling stations, too few designated parking spaces and poorly accessible public transport. It urged better awareness raising, provision of information in understandable language and the option of advance digital or postal voting, or organising mobile polling stations.<sup>75</sup>

In **Cyprus**, the Commissioner for Administration and the Protection of Human Rights (Ombudsman) launched an Awareness Campaign regarding "Equal Participation of Persons with Disabilities in Elections". Specifically, an Own Initiative Report was submitted about the civil rights of persons with disabilities and their equal participation in elections. An information leaflet was also prepared and published with information about the rights of persons with disabilities before and during election procedures. The Report and the leaflet were sent to all implicated public authorities, to the representative organizations of persons with disabilities and to the political parties. The information leaflet has been prepared in audio format as well.<sup>76</sup>

People with disabilities are unable to travel spontaneously and independently with five out of six public transport companies in **Denmark**, the Institute for Human Rights reported. It pointed out that Copenhagen is the only European capital where drivers are prohibited from helping passengers to board a bus, and called for improvements on the accessibility of public transport.

Disability is the second most common ground for discrimination complaints in **Sweden**, the Equality Ombudsman reported. Such complaints included inadequate accessibility, which was reported most frequently in education (44 %), followed by goods and services (21 %), and working life (11 %).<sup>77</sup>

In **North Macedonia**, the coalition 'All for fair trials' reported that half of the courts they researched did not have adequate access to their premises and services for people with disabilities. This included conditions for independent and unimpeded movement through the facilities, the possibility of properly adjusting the notifications and ways of obtaining information, and a systematised and organised approach to working with clients with disabilities.<sup>78</sup>

Efforts to improve this situation are under way in a number of Member States. Several national action plans adopted in 2021 contained references to accessibility. For example, the **Belgian** action plan seeks to improve the accessibility of public buildings, as well as digital accessibility, and access to polling stations and rail travel. However, the Superior National Council of Persons with Disabilities pointed out that some of the proposals were limited to vague commitments that lacked planning and procedures for their implementation.<sup>79</sup>

In **Greece**, construction work began in September 2021 to improve the physical accessibility of the forensic service of Athens and the first instance courts of Livadeia, Corinth and Lasithi.<sup>80</sup> That was as part of the implementation of the new Greek national action plan.

### 10.3. EU CRPD MONITORING FRAMEWORK: SYSTEM COMPLETE, BUT RESOURCES REMAIN A CHALLENGE

The European Parliament now chairs the EU CRPD framework, which engaged in its annual exchange with the Commission and started its preparations for input into the list of issues. This list forms part of the review of the EU's implementation of the CRPD. The Committee on the Rights of Persons with Disabilities is expected to carry out the review in 2022. Members engaged in a wide range of activities in relation to EU legislation and policy. For more information, see the [website of the EU framework for the United Nations CRPD](#).

FRA, as a member of the framework, continued to engage in activities focused on building the capacity of national monitoring bodies.

**Sweden** was the last remaining Member State without a CRPD monitoring body. In June 2021, it set up an Institute for Human Rights (*Institut för mänskliga rättigheter*).<sup>81</sup> According to its founding act, the institute, which came into effect in January 2022, is to perform the functions of an independent national mechanism in accordance with Article 33 (2) of the CRPD. An overview table of all CRPD bodies is available on the [website of the EU CRPD framework](#). The institute will decide how best to fulfil its tasks,<sup>82</sup> and will not deal with individual cases.<sup>83</sup>

The new independent monitoring framework in **North Macedonian** was launched in April. It operates as a strategic partnership between the Ombudsman, as the national human rights institution, organisations of people with disabilities and civil society.

In **Croatia**, the Rijeka regional office of the Ombudswoman for Persons with Disabilities officially started operating on 15 July 2021.<sup>84</sup> It will cover the areas of Primorje-Gorski Kotar, Istria, Lika-Senj and Karlovac counties, where more than 55,000 people with disabilities, including children with disabilities, reside.

The **Lithuanian** monitoring body, the Commission for the Monitoring of the Rights of Persons with Disabilities, continued to report funding problems. It asked the parliament's Committee on Human Rights for more secretarial and legal support.<sup>85</sup>

The **Luxembourg** NHRI (the Consultative Commission on Human Rights) recommended setting up an independent mechanism to monitor and analyse the situation of older people or people with disabilities living in care facilities. The government accepted the recommendation but did not provide the necessary resources, the European Network of National Human Rights Institutions reported.<sup>86</sup>

Issues related to appointments to the new **Portuguese** monitoring body have been resolved. However, it still lacks staff and office space.

#### FRA ACTIVITY

### Capacity-building activities

On 9 September, FRA, together with the Public Defender of Rights and the Office of the Government of **Czechia**, co-hosted a seminar on developing human rights indicators for monitoring the implementation of the CRPD. The seminar explored how administrative authorities, the ombudsman, academic institutions and civil society can work together to develop indicators and use them effectively. The Public Defender of Rights presented several specific indicators at the meeting.

Source: FRA (European Union Agency for Fundamental Rights) (2021), 'Seminar explores monitoring CRPD implementation', 9 September 2021

#### PROMISING PRACTICE

### Ireland sets up a disability participation and consultation network

In 2021, the Disability Participation and Consultation Network conducted its first activity, which was to comment on Ireland's draft report on the implementation of the CRPD. The Disability Participation and Consultation Network was set up with funding from the Department of Children, Equality, Disability, Integration and Youth to ensure that people with disabilities are actively engaged and directly consulted in the development of legislation and policies. The network operates on a three-tier basis and includes representatives of four grant-funded members along with Inclusion Ireland and over 100 other members, individuals and disability organisations.

Source: Irish Department of Children, Equality, Disability, Integration and Youth (2021), 'Launch of Disability Participation and Consultation Network'

## FRA opinions

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Article 19 of the CRPD and the EU disability strategy 2021–2030 require the de-institutionalisation of people with disabilities. The roll-out of the disability strategy will increase the need to complete the process of de-institutionalisation in the EU. This process will be assisted by guidance from the Commission to Member States regarding improvements in independent living and inclusion in the community, scheduled for publication in 2023.

The new Common Provisions Regulation (2021/1060), adopted in 2021, lays down the conditions and procedures for eight EU funds. It explicitly links funding to CRPD compliance. The regulation requires Member States to create arrangements to ensure that accessibility policy, legislation and standards are properly reflected in the preparation and implementation of programmes. It also requires involvement of organisations of people with disabilities throughout the funding cycle, and implementation and application of the CRPD as an ‘enabling condition’ for the use of EU funds.

The Common Provisions Regulation, therefore, is an important means to ensure that EU funds are not used to solidify or otherwise extend institutionalised forms of living (for instance by co-funding the renovation of such institutions). It seeks to ensure that the funds instead contribute to the process of de-institutionalisation (for instance by co-funding new structures and services allowing for supported forms of living in the community).

The Covid-19 pandemic has underlined the urgent need for de-institutionalisation. People with disabilities are at greater physical risk as a result of the pandemic. They also face great risks to their mental well-being, especially when they are in institutionalised settings, because of their higher risk of social isolation.



### FRA OPINION 10.1

The EU and its Member States should urgently accelerate their efforts towards de-institutionalisation, including through the appropriate use and monitoring of EU funds to ensure that people with disabilities can live independently and be included in the community. This becomes particularly important to prevent further violations of the rights of people with disabilities in future pandemics or other emergencies with similar effects.





## FRA OPINION 10.2

EU Member States should ensure that they allocate sufficient human and financial resources to the bodies they designate as Article 33 (2) monitoring bodies. They should seek close partnerships with these bodies in the design, monitoring and implementation of relevant policies and EU funds. They should also ensure these bodies are fully resourced to fulfil their tasks effectively and efficiently, especially in the EU policy and funding cycles.

Article 33 (2) of the CRPD requires all EU Member States to set up an independent monitoring body. All EU Member States and the Union have now done so, marking 2021 as the year when this key milestone in CRPD monitoring was fully achieved.

However, as reported here and in previous editions of the Fundamental Rights Report, challenges remain for the operation of these bodies, including insufficient funding, facilities and human resources. At the same time, the pandemic has reminded us of the need to raise awareness of the rights of people with disabilities, which is a core function of such bodies. Finally, the role that the new Common Provisions Regulation envisages for national bodies, including monitoring the CRPD compliance of the various stages of EU funds, will require additional resources for these bodies.



## FRA OPINION 10.3

EU Member States should speed up their implementation of the Web Accessibility Directive and European Accessibility Act, and should aim to ensure accessibility in areas not yet harmonised by EU legislation, so that people with disabilities can participate fully in all aspects of life and have access, on an equal basis with others, to facilities and services open or provided to the public.

Article 9 of the CRPD requires States Parties to the convention to ensure that people with disabilities have access, on an equal basis with others, to the physical environment, to transport, to information and communications, including information and communications technologies and systems, and to other facilities and services open or provided to the public, in both urban and rural areas.

The pandemic revealed deficiencies in providing information to people with disabilities. Many public websites still need improvement despite the adoption of the Web Accessibility Directive, while the implementation of the European Accessibility Act is still in its early stages. Accessibility challenges remain in areas such as electoral settings, courts and transport.

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# PROMOTING AND PROTECTING YOUR FUNDAMENTAL RIGHTS ACROSS THE EU —

FRA's *Fundamental Rights Report 2022* reviews major developments in the field in 2021, identifying both achievements and areas of concern. It also presents FRA's opinions on these developments, including a synopsis of the evidence supporting these opinions.

This year's focus chapter looks at the impact of the Covid-19 pandemic on social rights. It examines the measures in national recovery and resilience plans which address the social vulnerabilities among a variety of population groups in the EU.

The remaining chapters cover: the EU Charter of Fundamental Rights; equality and non-discrimination; racism, xenophobia and related intolerance; Roma equality and inclusion; asylum, borders and migration; information society, privacy and data protection; rights of the child; access to justice; and the implementation of the Convention on the Rights of Persons with Disabilities.



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