UN & CoE

January

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

February

March

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

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

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

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

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

April

May

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

June

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

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

July

August

September

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

October

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

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

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

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

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

November

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

December

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

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

EU

January

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

February

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

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

March

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

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

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

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

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

April

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

May

June

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

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

July

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

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

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

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

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

August

September

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

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

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

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

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

October

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

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

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

November

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

December

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

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

6

Asylum, visas, migration, borders and integration

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

6.1. Fundamental rights challenges persist as arrivals drop

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

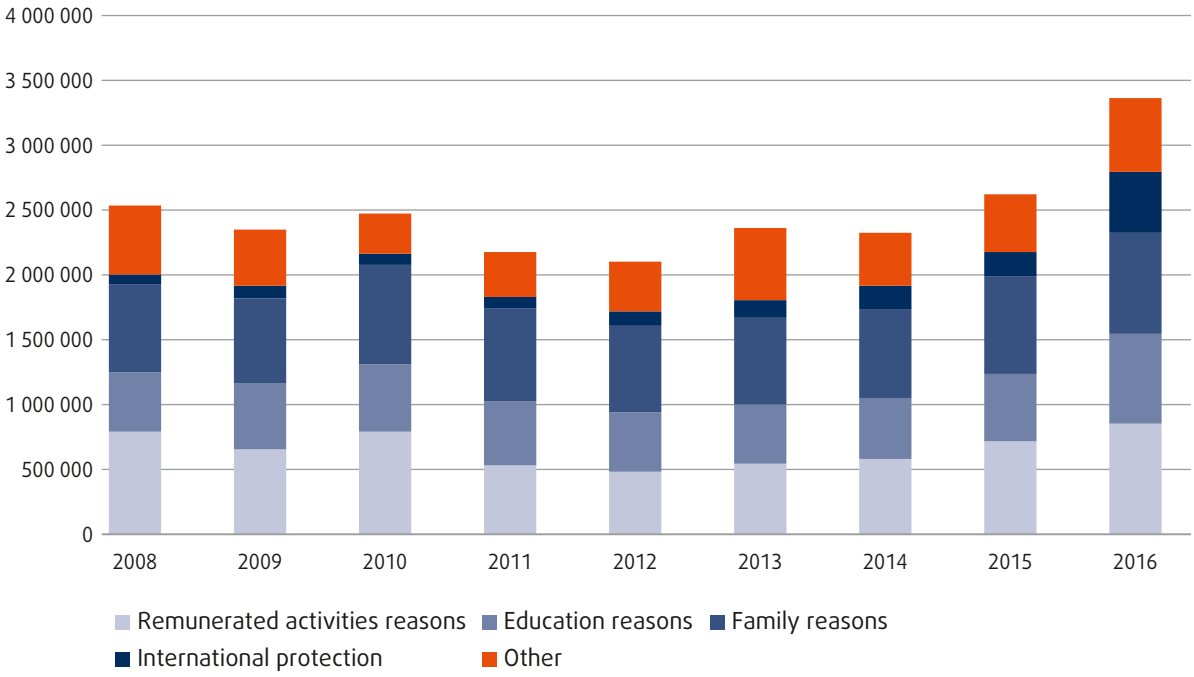
Globally, the number of displaced persons remained at a record, but arrivals in the EU dropped significantly. According to the European Border and Coast Guard Agency (Frontex), some 204,300 people entered EU territory irregularly in 2017 (compared to some 500,000 in 2016). Nigerians and Syrians formed the largest shares. Most crossed the Mediterranean Sea to reach Italy (some 119,000 people) or Spain (nearly 22,900); or crossed the land or sea borders into Greece (some 45,600 people). The number of people detected after entering the EU through the Eastern land borders and the Western Balkans remained limited (with some 10,500 people crossing the Croatian and Hungarian land borders irregularly in 2017).[1]

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

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

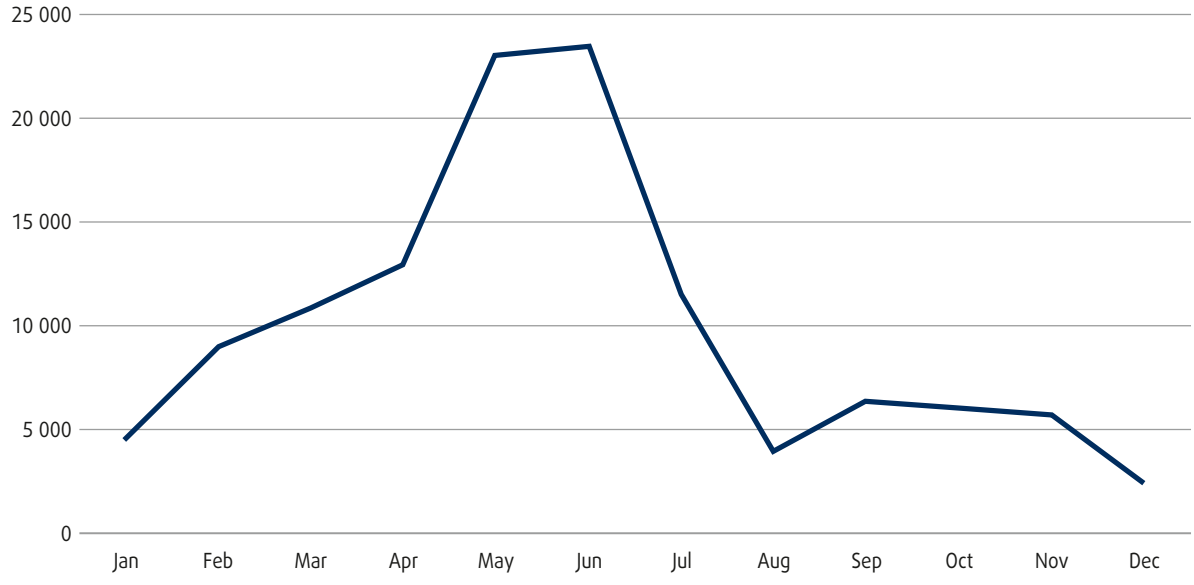
Although primarily implemented as part of bilateral initiatives, the cooperation with Libya reflects a more general EU approach.[6] In this spirit, in July 2017, the

Figure 6.1: First residence permits issued to third-country nationals 2008-2016, EU-28



Source: *Eurostat, migr_resfirst and migr_resoth (data extracted on 25 April 2018)*

Figure 6.2: Number of people arriving irregularly by sea to Italy by month, 2017

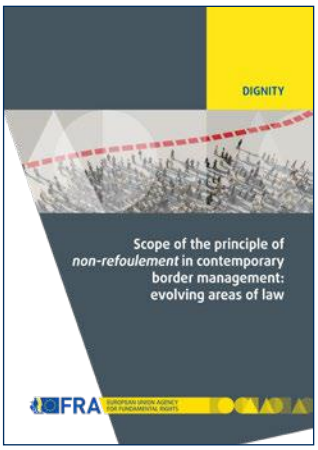


Source: *Italy, Ministry of Interior, 2018*

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

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

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



The possible legal consequences for EU Member States supporting operationally third countries to prevent the departure of migrants towards the EU depend on the individual circumstances of each operation. It is presumably for this reason that the Council of Europe's Commissioner for Human Rights requested clarification about the details of Italy's bilateral cooperation.[10] FRA developed practical guidance on preventive steps EU Member States can take to avoid *refoulement*; in 2017, it translated this into several official EU languages, including Greek, Italian and Spanish.[11] Frontex used the guidance, inserting it as an important reference document on fundamental rights in the document regulating their operation off the West African coast.

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

6.1.1. Death at sea

Continuing fatalities at sea served as a stark reminder that the emergency is not over. The International Organization for Migration (IOM) estimates that some 3,139 migrants died or went missing at sea in 2017 – against some 172,000 arrivals recorded by IOM.[16] Most fatalities occurred in the Central Mediterranean in the first six months of the year.[17] Fatalities did drop in absolute numbers compared to 2016, when they were estimated to total 5,143 people. However, calculated in proportion to the number of arrivals, the death rate increased from 1.41 % to 1.75 %, as Figure 6.3 illustrates.

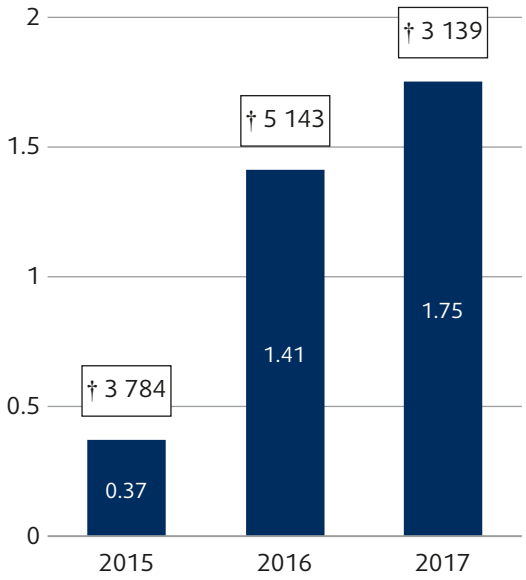
Most fatalities occurred near the North African coast, mainly off the shores of Libya or near the Tunisian coast, with incidents increasing on the Alboran Sea and near the Strait of Gibraltar in the last months of the year.[18]

6.1.2. Mistreatment of migrants

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

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

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



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

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

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

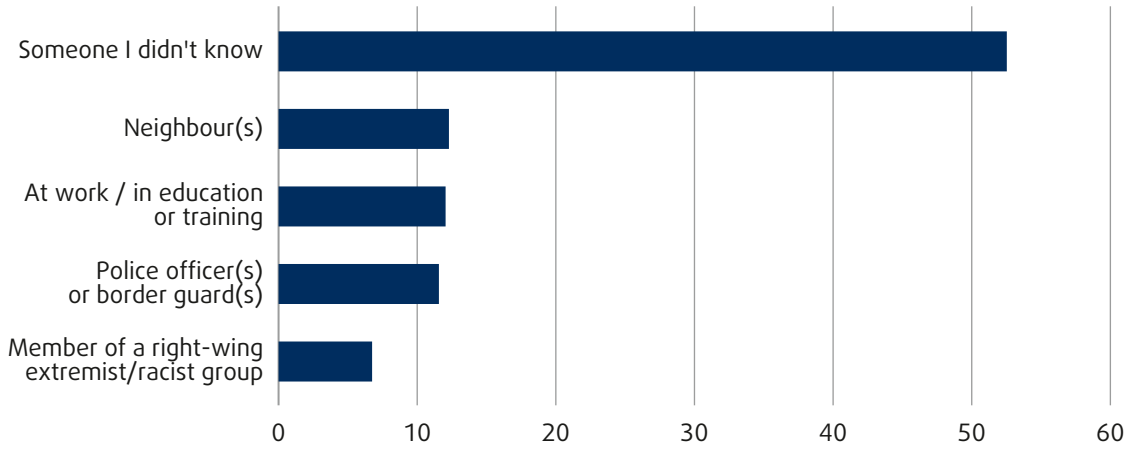
As of late 2017, a dedicated webpage documents allegations of violence and ill-treatment inflicted on migrants by EU Member State. For 2017, it lists some 110 alleged incidents, mainly concerning people claiming mistreatment in Croatia and Hungary. Volunteers working for various organisations in Serbia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

Despite the significant number of allegations, some of which were brought to the attention of the Public Prosecutor, to FRA's knowledge, none of the investigations resulted in formal court proceedings. FRA also could not identify a single 2017 court case in which police or border guards were convicted of mistreating migrants. However, a case was brought before the European Court of Human Rights against Hungary concerning police violence and brutality against a Syrian man; this case was still pending at year's end.[24] In this context, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) returned to Hungary in October 2017 to review the treatment and conditions of detention in the transit zones and border police holding facilities, and held interviews with foreign nationals who had recently been escorted by border police officers to the other side of the fence.

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

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

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



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

Source: *FRA EU-MIDIS II, 2016*

6.1.3. Reception conditions

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

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

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

Italy faced massive challenges in providing adequate housing to an ever-increasing number of asylum applicants, as the following two examples illustrate. In June, a parliamentary commission published a report on the largest Italian reception facility in Mineo (Sicily), noting disrespect of hygienic standards, serious gaps in medical and psychosocial services, as well as security issues.[30] In May, at the reception centre in Sant'Anna in Isola di Capo Rizzuto (Calabria), the police arrested 67 people accused of having embezzled € 36 million from funds allocated to the reception of asylum applicants over the years.[31] In response, the Ministry of Interior established the Permanent Observatory for the Reception of Asylum Seekers to organise the oversight and discuss the findings of inspections,[32] and announced the closure of all large reception facilities.[33] It also implemented an EU-funded project on "Monitoring and improvement of reception conditions (MIRECO)". Auditors coordinated by the ministry have carried out inspection missions since May 2017, visiting a significant number of reception facilities by year's end. Plans exist to make the oversight work more permanent (and not project-based), but – at the time of writing – little information was available on follow-up measures taken to address situations where serious disrespect of standards persists.

6.1.4. Temporary restrictions on family reunification

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

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

6.1.5. Relocation comes to an end

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

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

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

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

6.1.6. Border checks within the Schengen area

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

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

6.2. Information systems multiply

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

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

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

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

Two new IT systems are planned, including:

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

In addition, the proposed Interoperability Regulations[54] will establish:

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

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

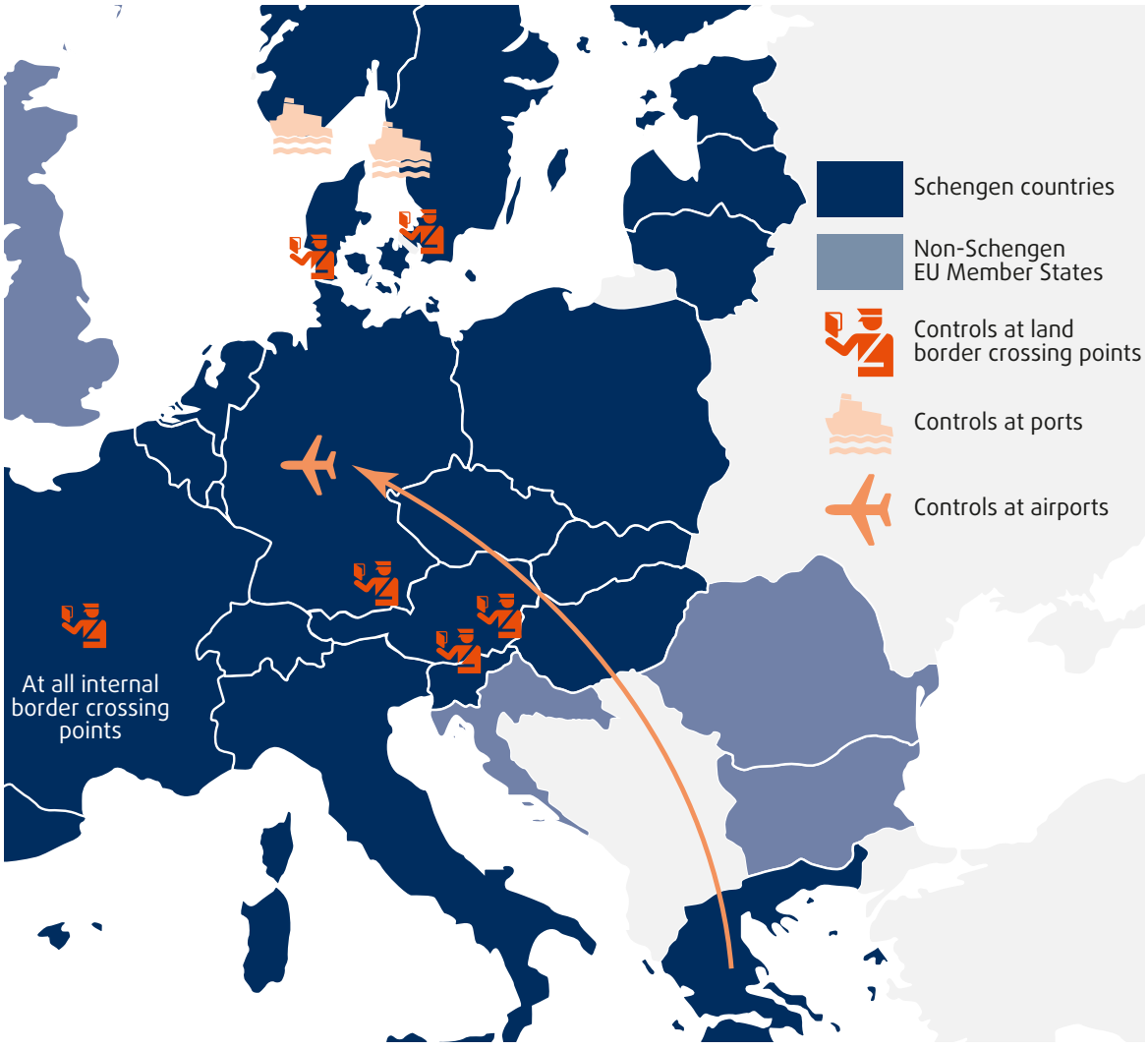
Most of the existing and planned systems store biometric data, such as fingerprints and/or facial images. Biometrics are unique to the person in question and considered the most reliable method to identify a person. The large-scale processing of personal data, including sensitive biometric data, affects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

The European Commission estimates that the number of people whose data will be stored in the different IT systems that will be made interoperable amounts to close to 218 million.[56] Once pending legislative reforms are completed, data – including biometrics – on most third-country nationals coming to or staying in the EU will be stored. Taken together with national databases, these systems will give authorities access to data on a large number of persons, presenting an attractive tool also for law enforcement.

6.2.1. Swift adoption of legislation leaves little time to assess fundamental rights implications

The EU gave high priority to reforming and improving its large-scale IT systems in the field of migration and security in 2017. Initially created for specific purposes, most IT systems are being redesigned to also fulfil two horizontal purposes: to help Member States enforce immigration law and to fight terrorism and serious crime. This has important consequences for fundamental rights.

Figure 6.5: Border controls within the Schengen area on 31 December 2017



Source: *FRA, 2018 (based on information from the European Commission)*

Table 6.1: Large-scale EU IT systems in the field of migration and security

IT system	Main purpose	Persons covered	Applicability	Biometric identifiers
European dactylography (Eurodac)	Determine the Member State responsible to examine an application for international protection *Assist with the control of irregular immigration and secondary movements*	Applicants and beneficiaries of international protection, *migrants in an irregular situation*	all EUMS + SAC	
Visa Information System (VIS)	Facilitate the exchange of data between Schengen Member States on visa applications	Visa applicants and sponsors	24 EUMS (not CY, HR, IE, UK)[1] + SAC	
Schengen Information System (SIS II) - police	Safeguard security in the EU and Schengen Member States	Missing or wanted persons	26 EUMS (not CY, IE)[2] + SAC	
Schengen Information System (SIS II) - borders	Enter and process alerts for the purpose of refusing entry into or stay in the Schengen Member States	Migrants in an irregular situation	25 EUMS (not CY, IE, UK)[2] + SAC	
Schengen Information System (SIS II) - return	*Enter and process alerts for third-country nationals subject to a return decision*	*Migrants in an irregular situation*	*25 EUMS (not CY, IE, UK)[2] + SAC*	
Entry-Exit System (EES)	*Calculating and monitoring the duration of authorised stay of third-country nationals admitted and identify over-stayers*	*Travellers coming for a short-term stay*	*22 EUMS (not BG, CY, HR, IE, RO, UK)[3] + SAC*	
European Travel Information and Authorisation System (ETIAS)	*Assess if a third-country national who does not need a visa poses a security, irregular migration or public health risk*	*Visa free travellers*	*26 EUMS (not IE, UK)[3] + SAC*	*None*
European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN)	*Share information on previous convictions of third-country nationals*	*Third-country nationals with a criminal record*	*27 EUMS (not DK)[4]*	
Interoperability – Common Identity Repository	*Establish a framework for interoperability between EES, VIS, ETIAS, Eurodac, SIS II and ECRIS-TCN*	*Third-country nationals covered by Eurodac, VIS, SIS II, EES, ETIAS, and ECRIS-TCN*	*28 EUMS[5] + SAC*	

Notes: *Planned systems and planned changes within systems are in italics, or shown by a light blue background*

: Fingerprints; : Palm prints; : Facial image; : DNA profile.

EUMS: EU Member States; SAC: Schengen Associated Countries, i.e. Iceland, Liechtenstein, Norway and Switzerland.

[1] *Ireland and the United Kingdom do not participate in VIS. Denmark is not bound by the Regulation but has opted in for VIS. VIS does not yet apply to Croatia and Cyprus, and only partially applies to Bulgaria and Romania as per Council Decision (EU) 2017/1908 of 12 October 2017.*

[2] *Cyprus and Ireland are not yet connected to SIS. Denmark is not bound by the Regulation or the Council Decision but has opted in for the SIS II, and must decide whether to opt in again upon the adoption of the SIS II proposals. The United Kingdom is participating in SIS but cannot use or access alerts for refusing entry or stay into the Schengen area. Bulgaria, Croatia and Romania cannot issue Schengen-wide alerts for refusing entry or stay in the Schengen area as they are not yet part of the Schengen area.*

[3] *Denmark may decide to opt in for EES and ETIAS.*

[4] *ECRIS-TCN does not apply to Denmark. The United Kingdom and Ireland may decide to opt in.*

[5] *Denmark, Ireland and the United Kingdom will take part as they participate in the IT systems made interoperable.*

Source: *FRA, based on existing and proposed legal instruments, 2018*

Negotiations on the EU legal instruments establishing new IT systems or revising existing ones proceed quickly compared with those for most asylum instruments. The Council as well as the LIBE Committee of the European Parliament agreed on their respective positions on all seven proposals concerning IT systems tabled by the Commission in 2016 – in ETIAS and the three proposals concerning the revision of SIS II – in less than one year. In contrast, two core asylum instruments – the proposed Dublin and Asylum Procedures regulations (tabled in May and July 2016, respectively) – were still discussed in the Council (and the proposed Asylum Procedures Regulation also in the LIBE Committee of the European Parliament) at year's end. The EES proposal – tabled just one month before three of the still pending asylum proposals (Eurodac, Dublin and the EU Asylum Agency) – was adopted in November 2017.

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The speed at which negotiations on IT systems progress leaves limited time to explore and understand the possible consequences of an increasing use of databases for people's rights. The European Commission's increased investment in preparatory work – best illustrated by the establishment of a High-Level Expert Group on Information Systems and Interoperability, in which FRA participated[57] – only partially mitigates this. To illustrate this, FRA – as a member of this group – produced a report mapping the relevant fundamental rights issues.[58] However, in a fast-changing environment, new elements – such as the Multiple-Identity Detector (MID) described in the next sub-section – only emerged at a late stage of the preparations. FRA therefore did not analyse its possible impact on fundamental rights.

Apart from the data protection angle – primarily analysed in publications by the European Data Protection Supervisor[59] – the impact of large-scale EU IT systems on fundamental rights remains largely unexplored. A FRA project is partly filling this gap. Recent FRA research analyses the immediate fundamental rights implications of processing biometric and other data in large-scale EU IT systems in the field of asylum and migration. The use of IT systems entails both risks and opportunities for fundamental rights. IT systems can offer more robust and timely protection – for example, for missing children and victims and witnesses of crime – and can help prevent identity fraud and identity theft. At the same time, many fundamental rights challenges result from the weak position of the individuals whose data are stored in large-scale IT systems. They range from respect of human dignity when taking fingerprints and challenges in correcting or deleting data inaccurately or unlawfully stored, to the risk of unlawful use and sharing of personal data with third parties. One of the most serious risks concerns data of people in need of international protection: if such data get into the hands of the persecuting agent – be it a state authority or a private actor – they may result in serious harm for the persons concerned (including a risk of kidnapping) or their family members remaining in the country of origin.[60]

Next to these immediate benefits and concerns, there are also longer-term implications, the fundamental rights consequences of which are difficult to assess. According to some experts, curtailing privacy by processing large amounts of personal data, including biometric data, may affect democracy since privacy is a value inherent to a liberal democratic and pluralist society, and a cornerstone for the enjoyment of human rights.[61]

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The development of face-recognition technology brings new potential fundamental rights risks. It is conceivable that, in the future, technology will make it possible to match faces recorded on video taken from surveillance cameras – installed, for example, at the entrance of a shopping mall – against biometric pictures stored in IT systems. These developments could drastically change the way immigration law is enforced, opening up new possibilities to find migrants in an irregular situation or asylum applicants who moved on from one Member State to another without authorisation. Police in a number of countries, including the United States and the United Kingdom, are already developing and testing facial-recognition systems, utilising surveillance footage to find criminal suspects, as eu-LISA reported.[62] The extension of such pilots to immigration law enforcement – which is not planned under the proposed initiatives on the table – would raise serious necessity and proportionality questions.

6.2.2. Interoperability: the Common Identity Repository (CIR) and the Multiple-Identity Detector (MID)

In its December 2017 proposals on interoperability, the European Commission suggests, among other things, replacing the basic identity data of all people whose data are stored in large-scale EU IT systems with a central identity repository. This data repository would be common and used by all IT systems – except SIS II, for which a separate technical solution is envisaged. In other words, the fingerprints, facial images and other data, such as names, nationality, dates and places of birth, sex and travel document references, are removed from the individual IT systems and stored in a common platform – the Common Identity Repository (CIR), illustrated in Figure 6.6 – which

the EES, VIS, Eurodac, ETIAS, and ECRIS-TCN will use. Such a common platform will store a reference to the IT system from which the data originated. Officers will not search for a person in an individual database anymore, but will directly consult the common repository through a European Search Portal, which will allow for searches using biometrics.

Attached to the proposed Common Identity Repository, there will be a mechanism to detect if data on the same person are stored in the IT systems with different names and identities: the Multiple-Identity Detector. Different identities used by one and the same person will be linked. The officer searching the system will see – provided he or she has access rights – all entries relating to the individual, regardless of whether they have been stored under a different name.

Such reforms will result in an overhaul of the large-scale EU IT systems insofar as they will create a new database – the Common Identity Repository – storing the identity data of virtually all third-country nationals who entered or applied to enter into the EU for a short stay, sought asylum or stayed irregularly. Combined with the Multiple-Identity Detector, the Common Identity Repository is intended to become an efficient tool to ensure the correct identification of a person whose data are stored in one or more IT systems. If deemed necessary and proportionate, in future, the Common Identity Repository and the Multiple-Identity Detector could also be used for purposes beyond those currently envisaged.

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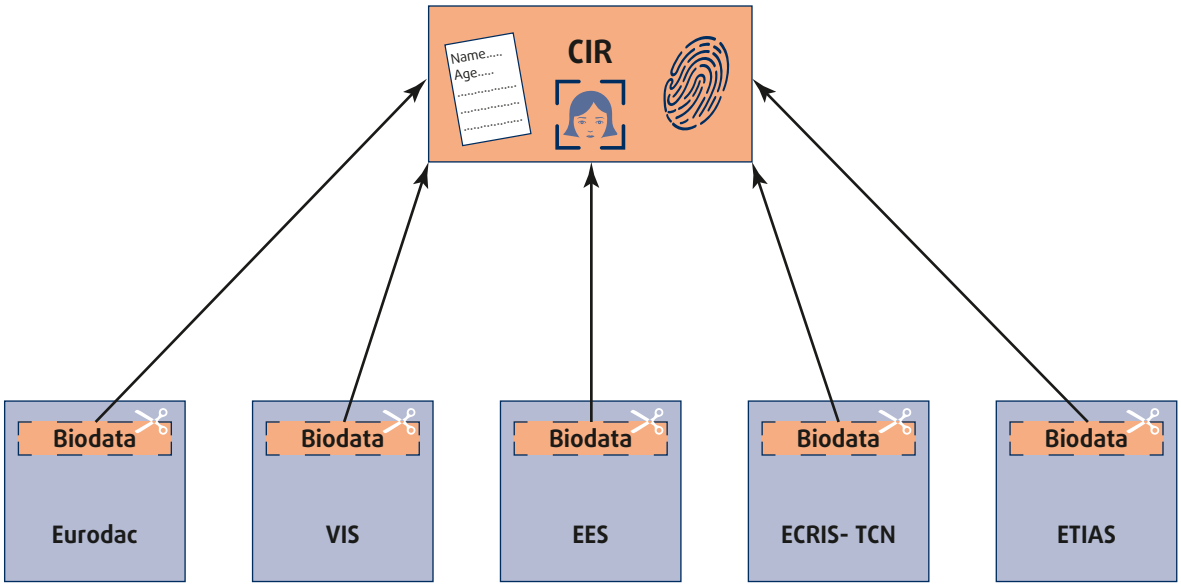
However, the Common Identity Repository and the Multiple-Identity Detector also have new fundamental rights implications. For example, in case personal data on an individual are stored in different systems under multiple identities, any officer entitled to query the Common Identity Repository will be able to see which IT systems store data on an individual. In such situations, even if an authority is not entitled to consult ECRIS-TCN – as this system stores sensitive data on past criminal records, it is only accessible to a restricted number of authorities – it will be able to deduce that an individual has a past criminal record as soon as the Common Identity Repository flags that the person is included in ECRIS-TCN. Such information, which the officer should not be entitled to have, will likely affect the officer's perception of the individual and actions taken.

In other cases, interoperability will exacerbate existing fundamental rights challenges. FRA's research on the existing IT systems found serious difficulties with informing data subjects about what will happen with the personal data being processed. In addition, in cases of mistakes in the system, a person trying to get wrong information corrected or deleted already faces many practical obstacles. Interoperability will make more complex exercising the right to information as well as the right to access, correction and deletion of data. Therefore, the fundamental rights safeguards will need to be carefully reviewed.

Figure 6.6: Common Identity Repository



Source: FRA, 2018

6.3. Fight against irregular immigration intensifies fundamental rights risks

In 2017, the European Union and its Member States made significant efforts to return more migrants in an irregular situation and to combat migrant smuggling. Such actions implicate core fundamental rights, including the right to life, the prohibition of torture, the right to liberty, the right to an effective remedy, and the principle of *non-refoulement*.

After briefly outlining the main EU-level policy developments regarding returns, this section highlights the increasing risk of arbitrary detention, and addresses effective return monitoring. The last sub-section looks at the collateral effects of policies to combat migrant smuggling.

6.3.1. Detention for purposes of return

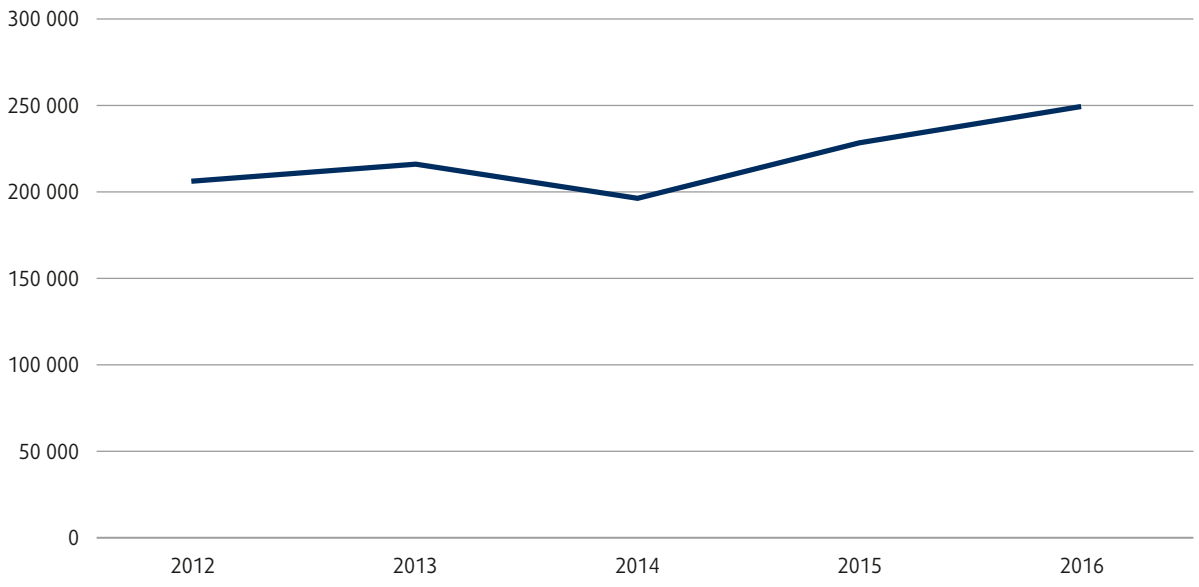
At EU Member State level, the number of returns increased from fewer than 200,000 in 2014 to over 250,000 in 2016 and decreased to 213,000 in 2017, as Figure 6.7 shows. In **Germany**, removals increased from 10,884 in 2014 to 23,966 in 2017.[63] According to the Ministry of Security and Justice, in the **Netherlands**, the total number of returns increased from 16,590 in 2015 to 20,770 in 2017.[64]

In March 2017, the European Commission published recommendations, accompanied by a renewed Action Plan, to make returns more effective.[65] Suggested measures cover different areas, such as improving cooperation between authorities, making full use of existing large-scale EU IT systems, simplifying procedures (for example, issuing return decisions together with decisions ending legal stay), and more effective enforcement of return decisions.

In the recommendations, deprivation of liberty features as an important building block for effective returns. EU Member States are encouraged to implement in their national laws the upper limits of pre-removal detention set in Article 15 (6) of the Return Directive (six months extendable to 18 months in certain exceptional situations); and to bring detention capacities in line with actual needs. The revised Return Handbook, adopted later in the year, contains a list of situations which EU Member States should consider as indications of a 'risk of absconding' – in practice, the most frequent justification for ordering detention. It also defines circumstances where a risk of absconding should be presumed, shifting to the individual the burden to rebut the presumption. It also recommends that EU Member States adopt a stricter approach in the granting of voluntary departure to persons issued a return decision.[66]

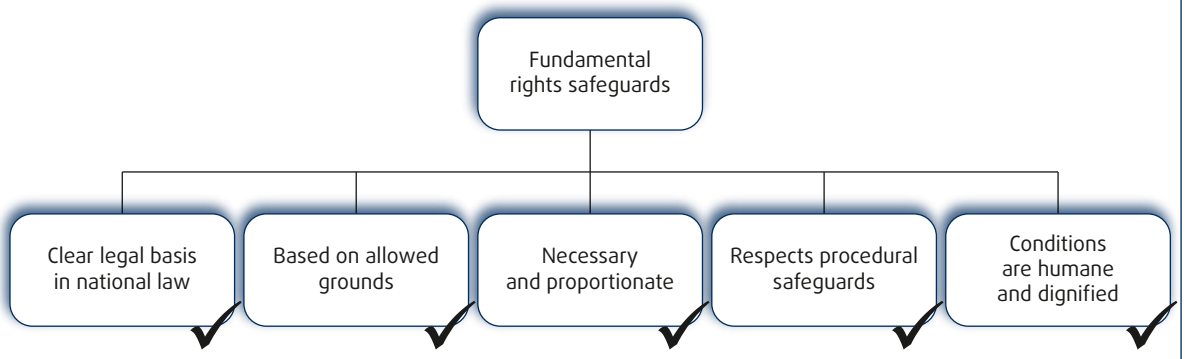
Detention constitutes a major interference with the right to liberty protected by Article 6 of the Charter. Any deprivation of liberty must, therefore, respect the safeguards established to prevent unlawful and arbitrary detention. Figure 6.8 summarises schematically the five conditions detention must fulfil to respect fundamental rights. To support the judiciary, the European Law Institute analysed these safeguards in a statement published in September 2017.[67]

Figure 6.7: Third-country nationals returned following an order to leave, EU-28



Source: *Eurostat, migr_eirtn, data extracted on 17 January 2018*

Figure 6.8: Five conditions deprivation of liberty must meet to avoid being unlawful and arbitrary



Source: FRA, 2018

One of the many controversial issues relating to deprivation of liberty is the maximum length a person can be detained for the purpose of return. European and international law requires that immigration detention be only as long as necessary. This means, for example, that detention in view of implementing a removal becomes arbitrary where a reasonable prospect of removal no longer exists.[68]

Neither international nor European human rights law establishes a maximum time for detention of adults or children. The Return Directive is the first binding supra-national document limiting it, albeit only for pre-removal detention. The directive sets two ceilings. The first ceiling is set at six months (Article 15 (5)). Pre-removal detention should normally not be extended beyond such a period. Article 15 (6) of the directive specifies two exceptional situations in which detention can be extended for a further 12 months (up to 18 months in total), provided that the possibility is set forth in national law and the authorities make all reasonable efforts to carry out the removal. The first is when the removal procedure is likely to last longer because the person does not cooperate. The second is beyond the person's influence; it is if the country of return delays issuing the necessary documentation. Further extension is not possible beyond these deadlines for any reason whatsoever.[69]

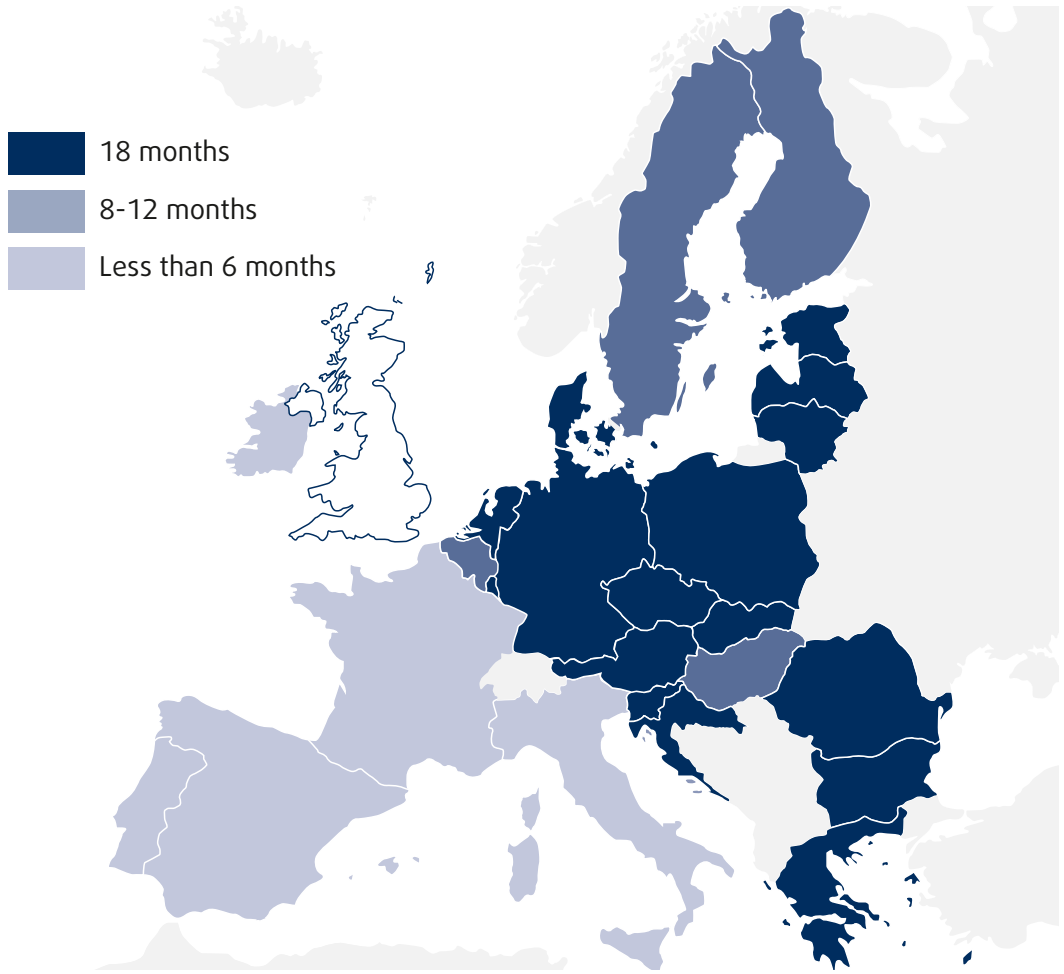
The national laws of all EU Member States bound by the Return Directive, as well as Ireland (which is not bound by it),[70] set maximum time limits for detention pending removal. The United Kingdom – which does not apply the Return Directive – is the only EU Member State that does not set a maximum time limit (Figure 6.9).[71] Of the 26 EU Member States bound by the Return Directive, 17 apply the maximum limit of pre-removal detention of 18 months set out in the Return Directive and four (Belgium, Finland, Hungary, and Sweden) apply a maximum length between 8-12 months. In 2017, Austria increased its upper limit from 10 to 18 months in exceptional cases,[72] in line with the Return Directive and the European Commission's recommendations.

The lack of comparable statistics on immigration detention in the EU makes it difficult to assess to what degree the reinforced attention on making returns more effective has prompted an increase in the use of immigration detention – as, for example, reported from the **Netherlands**. The Dutch authorities indicated that, in the first half of 2017, the total number of people in immigration detention rose by 33 % compared to the same period in 2016, apparently caused by an increase in the apprehension of people from the Western Balkans and North Africa.[73]

Nevertheless, reports pointing to patterns of arbitrary detention emerged from different EU Member States, as the following three examples show. In mainland **France**, the organisation *La Cimade* noted that, since 2 October 2017, instances of judges overturning immigration detention decisions have increased to 41 % – compared to 30 % in 2016.[74] The French Public Defender of Rights also criticised the greater use of administrative detention in cases of families with children in an irregular situation.[75] In **Spain**, the authorities started to hold migrants in facilities other than formal immigration detention centres. This included the Archidona facility in Málaga – a newly created but not yet used prison – which the Ombudsman criticised for not respecting minimum standards, recommending improving healthcare, providing adequate means of communication to detainees, and addressing other identified shortcomings.[76] The **Danish** Refugee Council, which offers advice to asylum seekers in detention, noted that the police are detaining some rejected asylum applicants (in particular from Iraq) to encourage them to cooperate with their return, as envisaged in Article 36 (5) of the Danish Aliens Act.[77] This may raise issues in light of the strict approach taken by the ECtHR on Article 5 (1) (b) of the ECHR, which regulates deprivation of liberty to secure the fulfilment of any obligation prescribed by law.[78]

Deprivation of liberty being imposed systematically without assessing whether it is necessary and proportionate in an individual case appeared more frequent at the external borders. In two of the **Greek**

Figure 6.9: Maximum length of pre-removal detention, 27 EU Member States



Notes: *The United Kingdom is not bound by the Return Directive and has no maximum length of detention.*
In Cyprus, 'prohibited immigrants' can be detained for up to three years under the Aliens and Immigration Law, Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος (ΚΕΦ.105), Article 19 (2).

Source: *FRA, 2018 (based on national legislation listed in the Annex)*

hotspots (Moria in Lesvos and Pyli in Kos), newly arriving men of specific nationalities considered to have only small chances of receiving international protection are systematically held in closed facilities. In **Hungary**, virtually all asylum applicants, except for unaccompanied children under 14 years of age, are placed in the two transit zones in Röszke and Tompa at the Serbian border. Under international and European law, these are to be considered places where people are deprived of liberty,[79] as those held there can only leave the facility if they agree to return to the Serbian side of the border fence. Finally, in Southern **Spain**, migrants who arrive by sea are systematically detained, according to the Spanish Commission of Aid to Refugees (CEAR).[80]

The groups of immigrants covered by FRA's EU-MIDIS II survey include some who have experience with irregular residence. Some 3 % of first-generation immigrants included in EU-MIDIS II indicated that they did not hold a residence permit at the time of the survey. A higher number – 8 % – indicated that they did not have a residence permit when they arrived in the EU. As many as 16 % of immigrants in the sample indicated that they did not have a valid residence permit at least once during their stay in the EU. Among them, more than one third indicated that they were without papers several times (i.e. 6 % of all immigrants in the sample).

Out of those who stayed irregularly in the EU at least once, 8 % were detained at one point. Looking at all immigrants who arrived in their country of residence in the five years before the survey (2010 to 2015 – hence more recent immigrants), this percentage increases to 11 %. Of all respondents who were detained at one point, slightly more than half (56 %) were in detention for two days or less. Some 30 % of those detained were in detention for more than one week.[81]

Reacting to the fact that immigration detention often takes place in facilities that do not respect human dignity, the Council of Europe continued to work on developing European Rules on the Administrative

Detention of Migrants.[82] One controversial point is immigration detention of children, a matter regarding which significant developments occurred in 2017 (see ▶ Section 8.1.1. in Chapter 8 on the Rights of the Child).

6.3.2. Forced return monitoring

FRA has repeatedly highlighted the importance of forced return monitoring pursuant to Article 8 (6) of the Return Directive as a tool to promote fundamental rights-compliant returns. The implementation of this provision has only progressed slowly. By the end of 2017, Cyprus, Germany, Slovakia and Sweden had no operational monitoring systems in place. In **Germany**, pre-return procedures are only occasionally monitored by charity organisations at *Länder* level. In **Cyprus**, monitoring bodies have been appointed, but did no monitoring in 2017. In **Slovakia**, monitoring is not effective, as it is implemented by an agency that belongs to the branch of government responsible for returns. In **Sweden**, legislation adopted in 2017 established that the Swedish Migration Board is responsible for monitoring forced returns.[83] Structural changes are underway to establish a functioning return monitoring mechanism within the service's international relations entity.

Table 6.2 compares developments in EU Member States over the past four years. Two aspects warrant highlighting. First, in 2014, ten EU Member States lacked operational return monitoring systems that FRA considered sufficiently independent to qualify as "effective". By 2017, that number dropped to four – and two of them, **Germany** and **Sweden**, were taking steps to have effective monitoring systems by 2018. Second, developments have not been linear: in **Croatia** and **Lithuania**, monitoring was project-based and was suspended when funding came to an end and only resumed when funds were available again. In **France**, the independent authority tasked with forced return monitoring did not carry out any monitoring missions in 2016, resuming them in February 2017. At the same time, even where systems are operational their effectiveness may be questioned: as an illustration, Myria, the **Belgian** Federal Migration Centre, criticised the lack of transparency and independence of the General Inspectorate.[84]

In 2017, Frontex coordinated and co-financed 341 return operations by charter flights at EU level, an increase of 47 % compared to 2016. A monitor was physically present on board during 188 of these return operations, including all "collecting return operations" (i.e. for which the forced-return escorts are provided by a country of return) and over 80 % of the joint return operations. By contrast, in 130 out of 150 national return operations supported by Frontex, there was no monitor.

Under Article 29 of the European Border and Coast Guard Regulation (EU) 2016/1624 (EBCG Regulation), Frontex established different pools of experts, including of forced-return monitors, which it started using as of 7 January 2017. The pools consist of experts trained in cooperation with FRA and the International Centre for Migration Policy Development (ICMPD).[85] By year's end, the pool included 61 monitors, all associated with the organisation responsible for forced-return monitoring at the national level. Based on the requests received from Member States, Frontex deployed forced-return monitors from the pool in 94 return operations. These deployments concerned return operations that could not be covered by the national forced-return monitors established under Article 8 (6) of the Return Directive. As it lacked a national return monitoring system, upon request, Frontex supported **Germany** with a monitor from the pool in 48 national return operations.[86] Although such support filled an important gap, if continued in the longer term, it undermines the purpose of the European pool of forced-return monitors, which is primarily intended to support return operations involving more than one returning Member State.

During 2017, the forced-return monitors who reported to Frontex did not note any serious incidents. They did, however, provide suggestions and recommendations for enhancing compliance and protection of vulnerable persons during return operations.

Recurrent issues identified by monitors concern the provision of specific measures for the return of families with children, communication between escorts and returnees, the unsystematic issuance of fit-to-fly certificates, privacy during body searches, and the protection of sensitive health data while ensuring its exchange between medical personnel in the Member States and medical personnel on board the return flight. At the same time, reports analysed by Frontex's Fundamental Rights Officer indicate that, in general, means of restraint and force were applied based on individual assessments, with escort officers treating detainees subject to these measures in a humane and professional manner.[87]

The monitors recommended increasing female escort officers, providing separate waiting areas for families at airports, adapting pre-departure facilities to the special needs of families with children and vulnerable groups, and using interpreters. They noted that this would not only reduce the risk of violating the rights of children or of vulnerable individuals, but would also help avoid unnecessary tensions.

Table 6.2: Forced return monitoring systems 2014-2017, EU-28

EU Member State	Organisation responsible for monitoring forced return	Operational?*			
		2014	2015	2016	2017
AT	Human Rights Association Austria (*Verein Menschenrechte Österreich*) and Austrian Ombudsman Board (*Volksanwaltschaft*)	✓	✓	✓	✓
BE	General Inspectorate of the General Federal Police and the Local Police (AIG) (*Inspection générale de la police fédérale et de la police locale, Algemene inspectie van de federale politie en van de lokale politie*)	✓	✓	✓	✓
BG	Ombudsman (*Омбудсманът*), Centre for the Study of Democracy NGO (national and international NGOs)	×	✓	✓	✓
CY	Office of the Commissioner for Administration (Ombudsman)	×	×	×	×
CZ	Public Defender of Rights (PDR) (*Veřejný ochránce práv*, VOP)	✓	✓	✓	✓
DE	Fora at various airports (Frankfurt, Hamburg, Düsseldorf, Berlin)	(×)	(×)	(×)	(×)
DK	Parliamentary Ombudsman (*Folketingets Ombudsmand*)	✓	✓	✓	✓
EE	Estonian Red Cross (*Eesti Punane Rist*)	✓	✓	✓	✓
EL	Greek Ombudsman (*Συνήγορος του Πολίτη*)	×	✓	✓	✓
ES	Ombudsman (*Defensor del Pueblo*)	✓	✓	✓	✓
FI	Non-Discrimination Ombudsman (*Yhdenvertaisuusvaltuutettu*)	×	✓	✓	✓
FR	General Inspector of All Places of Deprivation of Liberty (*Contrôleur général des lieux de privation de liberté*)	×	✓	×	✓
HR	Croatian Ombudsman and Croatian Law Centre (*Hrvatski pravni centar*))	×	✓	×	✓
HU	Hungarian Prosecution Service (*Magyarország ügyészsége*)	✓	✓	✓	✓
IE**	No monitoring system in law	–	–	–	–
IT	National Authority for the Rights of Persons Deprived of Liberty (*Garante nazionale dei diritti delle persone detenute o private della liberta' personale*)	×	×	✓	✓
LT	Lithuanian Red Cross Society (*Lietuvos Raudonojo Kryžiaus draugija*)	✓	×	×	✓
LU	Luxembourg Red Cross (*Croix-Rouge luxembourgeoise*)	✓	✓	✓	✓
LV	Ombudsman's Office (*Tiesībsarga birojs*)	✓	✓	✓	✓
MT	Board of Visitors for Detained Persons (DVB)	✓	✓	✓	✓
NL	Security and Justice Inspectorate (*Inspectie Veiligheid en Justitie*)	✓	✓	✓	✓
PL	Various NGOs, e.g. the Helsinki Foundation for Human Rights, Rule of Law Institute Foundation, Halina Nieć Legal Aid Centre, MultiOcalenie Foundation	✓	✓	×	✓
PT	General Inspectorate of Internal Affairs (*Inspecção-geral da Administração Interna*, IGAI)	×	✓	✓	✓
RO	Romanian National Council for Refugees (*Consiliul Național Român pentru Refugiați*, CNRR) (NGO)	✓	✓	✓	✓
SE	Swedish Migration Board (*Migrationsverket*)	×	×	×	×
SI	Karitas Slovenia	×	✓	✓	✓
SK	Ministry of Interior		✓	✓	✓
UK**	Her Majesty's Inspector of Prisons (HMIP), Independent Monitoring Boards (IMBs)	✓	✓	✓	✓

Notes: ✓ = Yes

× = No. In Slovakia and Sweden, monitoring is implemented by an agency belonging to the branch of government responsible for returns. Thus it is not sufficiently independent to qualify as 'effective' under Article 8 (6) of the Return Directive. In France, the "Contrôleur général des lieux de privation de liberté" did not monitor any forced return operations during 2016.

(×) = In Germany, the return monitoring system covers only parts of the country.

* Operational means that a monitoring entity which does not belong to the branch of government responsible for returns has been appointed and has carried out some monitoring activities during the year.

** Ireland and the United Kingdom are not bound by the Return Directive.

Source: FRA, 2018

6.3.3. Fundamental rights impact of actions against migrant smuggling

Activities to implement the EU Action Plan against migrant smuggling (2015-2020) continued.[88] The European Commission published its evaluation of the EU Facilitation Directive (2002/90/EC) and Framework Decision (2002/946/JHA) in March.[89] It concluded that there is no need to revise the EU facilitation acquis, but acknowledged that some actors perceive a risk of criminalisation of humanitarian assistance. The Regulation establishing the European Border and Coast Guard (Regulation (EU) 2016/1624) also recognises that the EU Facilitation Directive allows Member States not to impose sanctions where the aim of the behaviour is to provide humanitarian assistance to migrants (recital (19)).

Although there is limited evidence of the prosecution and conviction of individuals or organisations that facilitate irregular border crossings or transit and stay for humanitarian reasons, individuals providing humanitarian assistance to migrants in an irregular situation within a Member State territory, at land borders or on the high seas, are fearful. To strengthen legal clarity and avoid punishing humanitarian actions, the European Commission recommends enhancing the exchange of knowledge and good practices between prosecutors, law enforcement and civil society, and has indicated that it plans to closely cooperate with Eurojust and FRA in this endeavour.[90]

At Member State level, in **Croatia**, the protection of humanitarian actors improved with a change of legislation introducing a safeguard clause.[91] In the past, police indirectly threatened to pursue for migrant smuggling volunteers and some NGO staff who accompanied asylum seekers to police stations to apply for international protection. Such incidents stopped.[92] Eurojust analysed selected French court cases on migrant smuggling from 1996 to 2016: only cases adjudicated before 2012 (the year when **France** introduced legislative changes exempting humanitarian actions from punishment) concerned individuals prosecuted for sheltering migrants without papers.[93] In the **Netherlands**, where the law does not provide for a humanitarian exception, the Dutch Supreme Court ruled that if the person was brought into the Netherlands to avoid an emergency, this constitutes a ground for not punishing a person who would otherwise be found guilty of migrant smuggling under the criminal code.[94]

In practice, in 2017, reports of threats of punishment for providing humanitarian assistance emerged from **France**, particularly around Calais and at the French-Italian border. For instance, in March, in the Italian border town of Ventimiglia, three volunteers with the NGO "*Roya Citoyenne*" were arrested for distributing food to irregular migrants, an action banned by local decree.[95] Similarly, the Paris prefect banned food distribution outside the *La Chapelle* reception centre, which led to arrests and fines for members of the NGO "*Solidarité Migrants Wilson*" in February.[96] In Calais (France), after the charity organisation "*Secours Catholique*" installed portable showers in an informal camp for homeless migrants, riot police arrested one of the charity's employees for providing assistance to the illegal residence of a foreigner, prohibited by the French law on foreigners; charges were ultimately dropped.[97]

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In the Central Mediterranean, vessels deployed by civil society organisations continued to play an important role in search and rescue at sea. During the first six months of 2017 (1 January–30 June), some ten vessels deployed by NGOs[98] rescued more than a third of the persons rescued at sea (33,190 of the 82,187 persons rescued at sea during this period).[99] Nevertheless, allegations that some NGOs are cooperating with smugglers in Libya prompted a shift in perceptions of their contribution. The **Italian** Senate, which examined this issue in detail, dismissed such allegations. It found that NGOs were not involved directly or indirectly in migrant smuggling, but recommended better coordination of their work with the Italian coast guard.[100]

The Action Plan on measures to support Italy indicates that "Italy should draft, in consultation with the Commission and on the basis of a dialogue with the NGOs, a Code of Conduct for NGOs involved in search and rescue activities."[101] The Code of Conduct subsequently drawn up prohibits NGOs from entering Libyan territorial waters, envisages the presence of police officers aboard NGO vessels, prohibits NGOs from communicating with smugglers, forbids NGOs to switch off their transponders, and obliges them not to obstruct the Libyan coast guard.[102] Several civil society organisations criticised the code, indicating that it would increase the risk of casualties at sea.[103] Some NGOs signed the code, while others – such as *Médecins Sans Frontières* – refused, indicating that it mixes EU migration policies with the imperative of saving lives at sea.[104] With departures from Libya decreasing in the second half of 2017, the role of NGOs in the Central Mediterranean also diminished, and some suspended or ended their operations.

At the same time, the Italian authorities took measures to address actions by NGO-deployed vessels considered to exceed their rescue-at-sea activities. In August, a court in Trapani (Italy) ordered the seizure of the "Juventa", the rescue boat deployed by the NGO "*Jugend Rettet*".[105] In October, the Italian police conducted a search on board of the "Vos Hestia", the Save the Children ship, after an undercover agent worked on the ship.[106] These legal proceedings will have to deal with the delicate question of determining the scope of acts covered by the humanitarian clause excluding punishment for what would otherwise be deemed smuggling of migrants.

FRA opinions

Although the number of people arriving at the EU's external border in an unauthorised manner dropped in 2017, significant fundamental rights challenges remained. Some of the gravest violations involve the mistreatment of migrants who cross the border by circumventing border controls. Reports of abusive behaviour increased significantly in 2017, particularly on the Western Balkan route. Respondents in FRA's EU-MIDIS II survey, which interviewed over 12,000 first-generation immigrants in the EU, also indicated experiences with violence by police or border guards. Despite the significant number of allegations, criminal proceedings are rarely initiated – partly due to victims' reluctance to pursue claims, but also because of insufficient evidence. Convictions hardly occur.

Article 4 of the EU Charter of Fundamental Rights prohibits torture, inhuman or degrading treatment. The prohibition is absolute, meaning that it does not allow for exceptions or derogations.

FRA opinion 6.1

EU Member States should reinforce preventive measures to reduce the risk that individual police and border guard officers engage in abusive behaviour at the borders. Whenever reports of mistreatment emerge, these should be investigated effectively and perpetrators brought to justice.

In 2017, the EU gave high priority to reforming its large-scale information technology (IT) systems in the field of migration and asylum. Through 'interoperability', the different systems will be better connected with one another. A central repository will pull together the identity of all persons stored in the different systems, and a mechanism will detect if data on the same person are stored in the IT systems under different names and identities. Not all aspects of the proposed regulations on interoperability have been subjected to careful fundamental rights scrutiny.

The reforms of the IT systems affect several rights protected by the EU Charter of Fundamental Rights, including the right to protection of personal data (Article 8), the rights of the child (Article 24), the right to asylum (Article 18), the right to an effective remedy (Article 47) and the right to liberty and security of person (Article 6).

FRA opinion 6.2

The EU should ensure that either the EU legislator or independent expert bodies thoroughly assess all fundamental rights impacts of the different proposals on interoperability prior to their adoption and implementation, paying particular attention to the diverse experiences of women and men.

The European Union and its Member States made significant efforts to increase the return of migrants in an irregular situation. Immigration and other relevant authorities consider deprivation of liberty as an important building block for effective returns. The revised Return Handbook, adopted in 2017, contains a list of situations which EU Member States should consider as indications of a 'risk of absconding' – in practice, the most frequent justification for ordering detention. It also defines circumstances where a risk of absconding should be presumed, shifting the burden to rebut the presumption on the individual. The lack of comparable statistics on immigration detention in the EU makes it difficult to assess to what degree the reinforced attention on making returns more effective has prompted an increase in the use of immigration detention. However, reports pointing to patterns of arbitrary detention emerged from different EU Member States.

Detention constitutes a major interference with the right to liberty protected by Article 6 of the EU Charter of Fundamental Rights. Any deprivation of liberty must, therefore, respect the safeguards established to prevent unlawful and arbitrary detention.

FRA opinion 6.3

When depriving individuals of their liberty for immigration-related reasons, EU Member States must respect all safeguards imposed by the Charter as well as those deriving from the European Convention on Human Rights. In particular, detention must be necessary in the individual case.

FRA has consistently highlighted the importance of forced return monitoring pursuant to Article 8 (6) of the Return Directive as a tool to promote fundamental rights-compliant returns. Not all EU Member States have set up operational forced return monitoring systems.

The implementation of returns entails significant risks related to core fundamental rights set out in the EU Charter of Fundamental Rights, including the right to life (Article 2), the prohibition of torture, inhuman or degrading treatment or punishment (Article 4), the right to liberty (Article 6), the right to an effective remedy and the principle of non-*refoulement* (Article 19).

FRA opinion 6.4

All EU Member States bound by the Return Directive should set up an effective return monitoring system.

Annex – Maximum permitted length of detention pending removal

EU Member State	National legislation
AT	Police Act (*Fremdenpolizeigesetz 2005*), version of 18.04.2017, Section 80 (4)
BE	Aliens Act (Loi du 15 Décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers), Art. 74/6
BG	Law on Foreigners (*Закон за чужденците*), last amended 27 December 2016, Art. 44 (8)
CY	Aliens and Immigration Law (*Ο περί Αλλοδαπών και Μεταναστεύσεως Νόμος*), Cap 105, Art. 18 (7) and (8)
CZ	Act on the Residence of Foreign Nationals (*Zákon č. 326/1999 Sb. o pobytu cizinců na území České republiky*), Section 125 (1)
DE	Residence Act (*Aufenthaltsgesetz*), last amended on 22 December 2016, BGBl. I S. 3155, Section 62 (4)
DK	Aliens Act, Consolidated Act No. 1117, 2 October 2017, Section 37 (8)
EE	Obligation to Leave and Prohibition on Entry Act (OLPEA) (*Väljasõidukohustuse ja sissesõidukeelu Seadus*), Section 23(1), 25(1); 2005 Act on Granting International Protection to Aliens (AGIPA) (*Välismaalasele rahvusvahelise kaitse andmise Seadus*), Section 36 (2)
EL	Law 3907/2011, Art. 30 (5) and (6)
ES	Organic Law 4/2000 of 11 January 2000 on rights and liberties of aliens in Spain and their social integration (Aliens Law) (*Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social* (LOEX)), Art. 62 (2)
FI	Aliens Act (*Ulkamaalaislaki, Utlänningslag*), Art. 127
FR	Code of Entry and Residence of Foreigners and of the Right to Asylum, as amended by Law no. 2016-274 of 7 March 2016 (*Code de l'entrée et du séjour des étrangers et du droit d'asile* (Ceseda)), Art. L.552-1, L.552-
HR	Law on Foreigners (*Zakon o izmjenama i dopunama Zakona o strancima*), 1475, Art. 124–126
HU	Act No. 2 of 2007 on the Entry and Stay of Third-Country Nationals (*2007. évi II. törvény a harmadik országbeli állampolgárok beutazásáról és tartózkodásáról*), Art. 54 (4)-(5), 55 (3) and 58 (1)-(2); Act No. 80 of 2007 on Asylum (*2007. évi LXXX. törvény a menedékjogról*), Art. 31/A (6)-(7)
IE	Immigration Act 1999, Section 5 (6)
IT	Legislative decree No. 286/1998 (*Testo unico sull'immigrazione*), as amended, Art. 14 (5)
LT	Law on the Legal Status of Aliens (*Istatymas dėl užsieniečių teisinės padėties*), Art. 114 (4)
LU	Immigration Law (Loi du 29 août 2008 portant sur la libre circulation des personnes et l'immigration), Art. 120 (3)
LV	Immigration Law 2003 (*Imigrācijas likums*), Section 54 (7)
MT	Subsidiary Legislation 217.12, Common standards and procedures for returning illegally staying third-country nationals regulations, Section 11 (12) and 11 (13)
NL	Netherlands, Aliens Act 2000 A (*Vreemdelingenwet 2000*), Art. 59 (5) and (6) as well as Art. 59b (2), (3), (4), and (5)
PL	Law on Foreigners (*Ustawa o cudzoziemcach*), Art. 403 (3, 3a, 5)
PT	Act 23/7 of July 4 on the entry, stay, exit and removal of foreign citizens from Portuguese territory (*Lei No. 23/2007, de 4 Julho entrada, permanência, saída e afastamento de estrangeiros do território nacional*), Art. 146 (3)
RO	Act on the Regime of Aliens in Romania, Official Gazette No. 421 of 5 June 2008, Art. 101 (6) and (7)
SE	Aliens Act (*Utlänningslag (2005:716)*), Ch. 10, Section 4
SI	Aliens Act (*Zakon o tujcih*), Art. 76 (4) Art. 79 (1)
SK	Act No. 404/2011 of 21 October 2011 on Residence of Aliens and Amendment and Supplementation of Certain Acts, Art. 88 (4)
UK	Not applicable

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UN & CoE

January

24 January – Guidelines on big data adopted by the Consultative Committee of the Council of Europe's data protection convention (Convention 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data)

February

24 February – UN Special Rapporteur on privacy issues a report to the UN Human Rights Council (A/HRC/34/60), focusing on the relation between privacy and surveillance activities, and the need for increased privacy-friendly oversight

March

22 March – UN Human Rights Council adopts a resolution on right to privacy in the digital age (A/HRC/34/L.7/Rev.1), calling on states to ensure that privacy rights are effectively respected, notably in context of digital communications and surveillance activities

April

28 April – Parliamentary Assembly of the Council of Europe (PACE) adopts Recommendation 2102 (2017) on Technological convergence, artificial intelligence and human rights, which calls upon the Committee of Ministers to better define regulations applying to robotics

May

5 May – UN OHCHR issues a report on ways to bridge the gender digital divide from a human rights perspective (A/HRC/35/9), which insists on the crucial importance of ensuring that new technologies do not exacerbate gender discrimination

June

22 June – In *Aycaguer v. France* (No. 8806/12), the ECtHR holds that being convicted for refusing to be registered in the national automated registry of genetic fingerprints is contrary to the right to respect for private life (Article 8 of the ECHR)

27 June – In *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (No. 931/13), the ECtHR holds that banning mass publication of personal tax data in Finland did not violate the right to freedom of expression (Article 10 of the ECHR)

July

August

September

5 September – In *Bărbulescu v. Romania* (No. 61496/08), the ECtHR holds that states should ensure that, when an employer takes measures to monitor employees' communications, these are accompanied by adequate and sufficient safeguards against abuse (Article 8 of the ECHR)

October

19 October – Report of the UN Special Rapporteur on the right to privacy to the 72nd Session of the UN General Assembly (A/72/540), focusing on Big Data and Open Data, highlights the need for better and clearer regulatory frameworks for the use of new technologies

October – Council of Europe publishes its new Internet Literacy Handbook (ILH) meant to support children, parents, teachers and policymakers of the 47 member states in making positive use of the internet

November

28 November – In *Antovic and Mirkovic v. Montenegro* (No. 70838/13), the ECtHR holds that video surveillance of university auditoriums amounted to an interference with the applicants' right to privacy and was incompatible with Article 8 of the ECHR, since domestic authorities failed to show any legal justification for the surveillance measure

December

EU

January

10 January – European Commission adopts a Proposal for a Regulation of the European Parliament (EP) and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications or e-Privacy Regulation)

10 January – European Commission adopts a Proposal for a Regulation of the EP and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No. 1247/2002/EC (EU institutions data protection Regulation)

February

March

14 March – EP adopts a Resolution on fundamental rights implications of big data: privacy, data protection, non-discrimination, security and law-enforcement, insisting on crucial importance of respecting data protection principles to ensure both effectivity of, and trust in, big data techniques

April

4/5 April – Article 29 Working Party adopts final guidelines on right to data portability, designation on the lead supervisory authority and on Data Protection Officers

6 April – LIBE Committee adopts Resolution 2016/3018(RSP) on EU–US Privacy Shield: MEPs alarmed at undermining of privacy safeguards in the US

24 April – EDPS issues Opinion 6/2017 on the Proposal for a Regulation on Privacy and Electronic Communications (e-Privacy Regulation)

May

June

July

26 July – CJEU issues Opinion 1/15 on the envisaged EU-Canada Agreement on the transfer and processing of passenger name record data (PNR Agreement), stating that the agreement could not be concluded as its current form is incompatible with the EU Charter of Fundamental Rights

August

September

13 September – European Commission and High Representative for Foreign Affairs and Security Policy adopt a joint communication to the European Parliament and the Council on '*Resilience, Deterrence and Defence: Building strong cybersecurity for the EU*'

October

3/4 October – Article 29 Working Party adopts final guidelines on data protection impact assessment and on administrative fines

18 October – Report of European Commission on the first annual review of the Privacy Shield concludes that the United States continues to ensure an adequate level of protection for personal data transferred under the Privacy Shield from the Union to organisations in the United States; practical implementation of the Privacy Shield framework can be further improved to ensure that the guarantees and safeguards provided therein continue to function as intended

November

December

7 Information society, privacy and data protection

For both technological innovation and protection of privacy and personal data, 2017 was an important year. Rapid development of new technologies brought as many opportunities as challenges. As EU Member States and EU institutions finalised their preparatory work for the application of the EU Data Protection package, new challenges arose. Exponential progress in research related to 'big data' and artificial intelligence, and their promises in fields as diverse as health, security and business markets, pushed public authorities and civil society to question the real impact these may have on citizens – and especially on their fundamental rights. Meanwhile, two large-scale malware attacks strongly challenged digital security. The EU's recent reforms in the data protection and cybersecurity fields, as well as its current efforts in relation to e-privacy, proved to be timely and relevant in light of these developments.

7.1. Data protection and privacy developments

The General Data Protection Regulation (GDPR)[1] and the Data Protection Directive for Police and Criminal Justice Authorities[2] (together, the data protection reform package) were published in May 2016[3] and come into effect in May 2018. Throughout 2017, EU Member States adapted their national frameworks to the new legislation, and national data protection authorities – cooperating within the Article 29 Working Party – provided guidelines on the new rules. The European Commission presented proposals for two regulations, the EU institutions data protection Regulation and the e-Privacy Regulation. These would replace the existing regulation and directive on these matters, respectively, to update the regulatory framework in line with the GDPR.

The GDPR will apply as of 25 May 2018. As a regulation rather than a directive, it will be directly applicable. However, it allows Member States to implement national legislation through a number of so-called 'opening clauses', thereby providing some flexibility.[4]

Member States are also required to incorporate into their national law before 6 May 2018 the Data Protection Directive for Police and Criminal Justice Authorities. It seeks to facilitate information exchange and ensure a high level of personal data protection in the context of criminal law enforcement.

7.1.1. National implementation of EU data protection reform enters final stretch

The long-awaited data protection reform follows four years of difficult negotiations. The substantial changes introduced by the GDPR and the Data Protection Directive for Police and Criminal Justice Authorities justified the long implementation period of two years. **Austria**[5] and **Germany**[6] already have in place the implementing legislation for the regulation and the directive, while the majority of EU Member States have submitted legislative proposals to public consultation, as FRA recommended in its *Fundamental Rights Report 2017*.[7]

Some EU Member States addressed the potential impact of the GDPR on the tasks and powers of their national data protection authorities (DPAs), as independent oversight bodies, in 2017. The GDPR[8] and the Data Protection Directive for Police and Criminal Justice Authorities[9] reinforce the independence of DPAs, ensuring that

they have the human, technical and financial resources, premises and infrastructure necessary for the effective performance of their tasks and exercise of their powers. In the **Netherlands**, a report commissioned by the Dutch DPA highlighted the need to significantly increase the first estimate of the DPA's budget to cope with the new requirements of the GDPR.[10]

> *"Member States need to equip DPAs to act independently as centres of excellence for protecting individuals' rights and interests. At the moment, there are major disparities in the budgets for individual authorities in proportion to the number of people they are meant to protect: from 50 EUR per 1000 population in one Member State to 7,600 EUR per 1000 population in another."*
>
> *European Data Protection Supervisor, blog post, 7 December 2017*

DPAs have also been working at EU level to address the challenges in the implementation of the GDPR through the Article 29 Working Party (WP29), the institutional coordination mechanism created by Directive 95/46/EC (Data Protection Directive). The WP29 has produced different guidelines clarifying compliance requirements for controllers and processors, such as the Guidelines on the right to portability, on Data Protection Officers, on the designation of the lead supervisory authority, on Data Protection Impact Assessments, and on the administrative fines on data breach notification.[11] The adoption of the final version of those guidelines followed public consultations open to stakeholders.

Promising practice

Helping controllers conduct data protection impact assessments

The French DPA (*Commission nationale de l'informatique et des libertés*, CNIL) developed in 2017 an open software that helps controllers to conduct a Data Protection Impact Assessment (DPIA), which is a "process designed to manage the risks to the rights and freedoms of natural persons resulting from the processing of personal data by assessing them and determining the measures to address them".* This software provides a contextual database accessible at any time during the execution of the impact assessment. Its contents, based on the GDPR, the DPIA guides and CNIL's Security Guide, adapt to the elements of the treatment under study.

**Article 29 Working Party, Guidelines on Data Protection Impact Assessment (DPIA), wp248, 4 April 2017.*

For more information, see the website of the French DPA.

Senior and vulnerable citizens: enhancing awareness

The GDPR tasks DPAs with promoting public awareness and understanding of the risks, rules, safeguards and rights related to data processing. Notably, DPAs are to give particular attention to activities addressed specifically to children.[12] Children's awareness has a direct impact on their capacity to give consent for the processing of their personal data.[13]

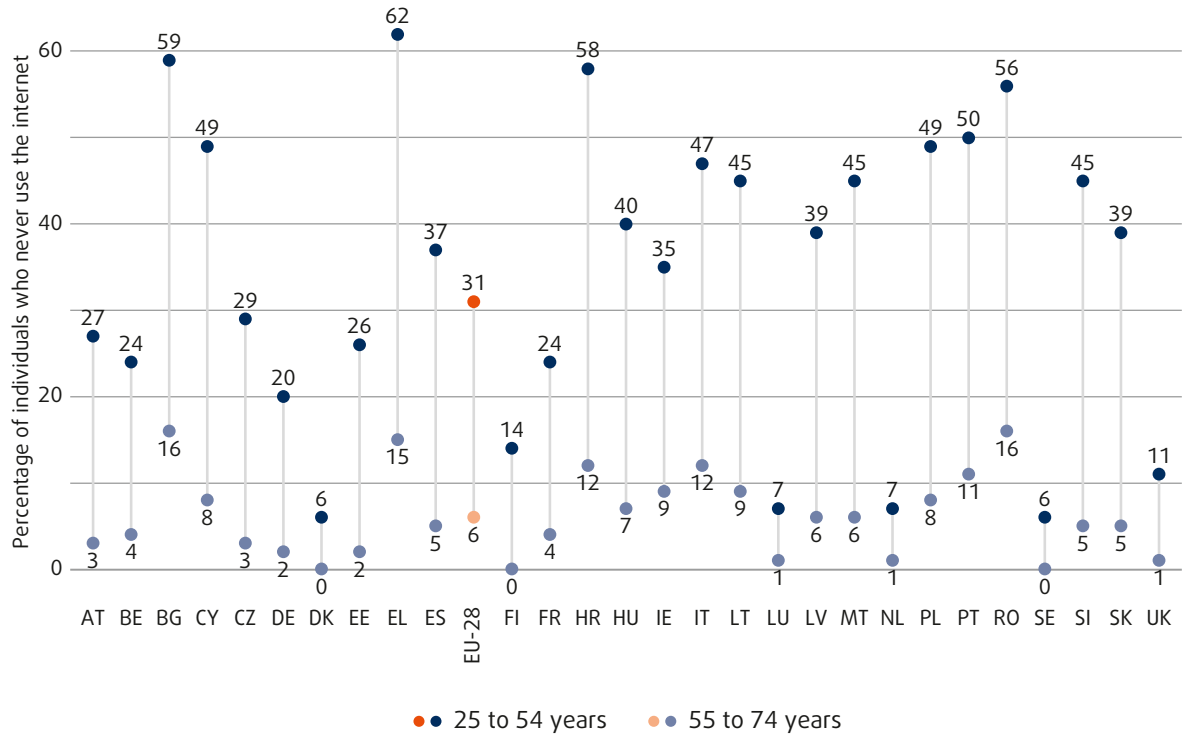
Indeed, one of the GDPR's relevant opening clauses allows Member States to specify the conditions applicable to a child's consent in relation to information society services. According to Article 8 of the GDPR, where the child is below the age of 16 years, such processing shall be lawful on the basis of consent only if and to the extent that consent is given or authorised by the holder of parental responsibility over the child. However, Member States may set by law a lower age for those purposes, provided that this is not below 13 years. Several Member States, such as the **Czech Republic**, **Denmark**, **Estonia**, **Ireland**, **Poland**, **Spain**, **Sweden** and the **United Kingdom**, proposed in 2017 to reduce the minimum age requirement to 13 years. **Austria** opted for 14 years.[14]

The age requirements for children to consent to the processing of their personal data are very diverse. (For more information, see FRA's mapping of minimum age requirements[15] concerning the rights of the child in the EU.) However, the age and maturity of the child, linked to their fundamental right to express their views freely on matters that concern them (Article 24 of the Charter), must be taken into account, and complemented with other positive obligations of public and private institutions considering the best interest of the child. Thus, Article 57 (1) (b) of the GDPR gives DPAs the task of promoting children's awareness and understanding of risks, rules, safeguards and rights related to data processing.

Age remains linked to the level of use of new technologies in most EU Member States, as shown in Figure 7.1. **Denmark**, **Luxembourg**, the **Netherlands**, **Sweden** and the **United Kingdom** have a low 'digital divide' of less than 10 % between the proportions of individuals in different generations who in 2017 had never used the internet. The average difference between generations for the EU-28 is 25 %.

The average number of people in the EU who never use the internet has decreased significantly since 2010, especially for older persons (see Figure 7.2). This is a major positive trend, as digital illiteracy is a key factor of vulnerability in relation to the level of awareness about the risks and the rights of individuals in the EU while using new technologies. In **Estonia**, the strong governmental push for digital uptake across various sectors was a key issue during the Estonian EU Presidency; FRA took part in those efforts, working to ensure recognition of fundamental rights in digitalisation.

Figure 7.1: Individuals never using the internet in 2017, by age group (%)



Source: *FRA, 2018 (based on Eurostat data extracted on 25 January 2018)*

7.1.2. Passenger Name Records collection needs safeguards

The Passenger Name Record (PNR) Directive (2016/681)[16] allows air carriers to transfer PNR data of passengers, and EU Member States (all but Denmark, who opted out) to process these data for the purposes of preventing, detecting, investigating and prosecuting terrorist offences and serious crime.

At the end of 2017, significant disparities remained between EU Member States' progress in setting up their national PNR systems: **Belgium**,[17] **Germany**[18] and **Hungary**[19] have transposed the PNR Directive, while the other Member States are preparing the ground for its transposition with relevant legislation.[20]

The EU has concluded PNR agreements with the USA and Australia, and negotiated another one with Canada. However, on 26 July 2017, the CJEU[21] deemed the envisaged PNR Agreement between Canada and the EU incompatible with the Charter in so far as it does not preclude the transfer of sensitive data from the EU to Canada and the use and retention of that data. FRA raised similar concerns in its 2011 Opinion and its *Fundamental Rights Report 2017*.[22] Notably, the court declared that the continued storage of the PNR data of all air passengers after the passengers' departure was not limited to what is strictly necessary, and therefore should be limited to the data of passengers who may objectively be held to present a terrorism or serious transnational crime risk.[23]

7.1.3. Draft e-Privacy Regulation: the latest EU proposal to modernise data protection rules

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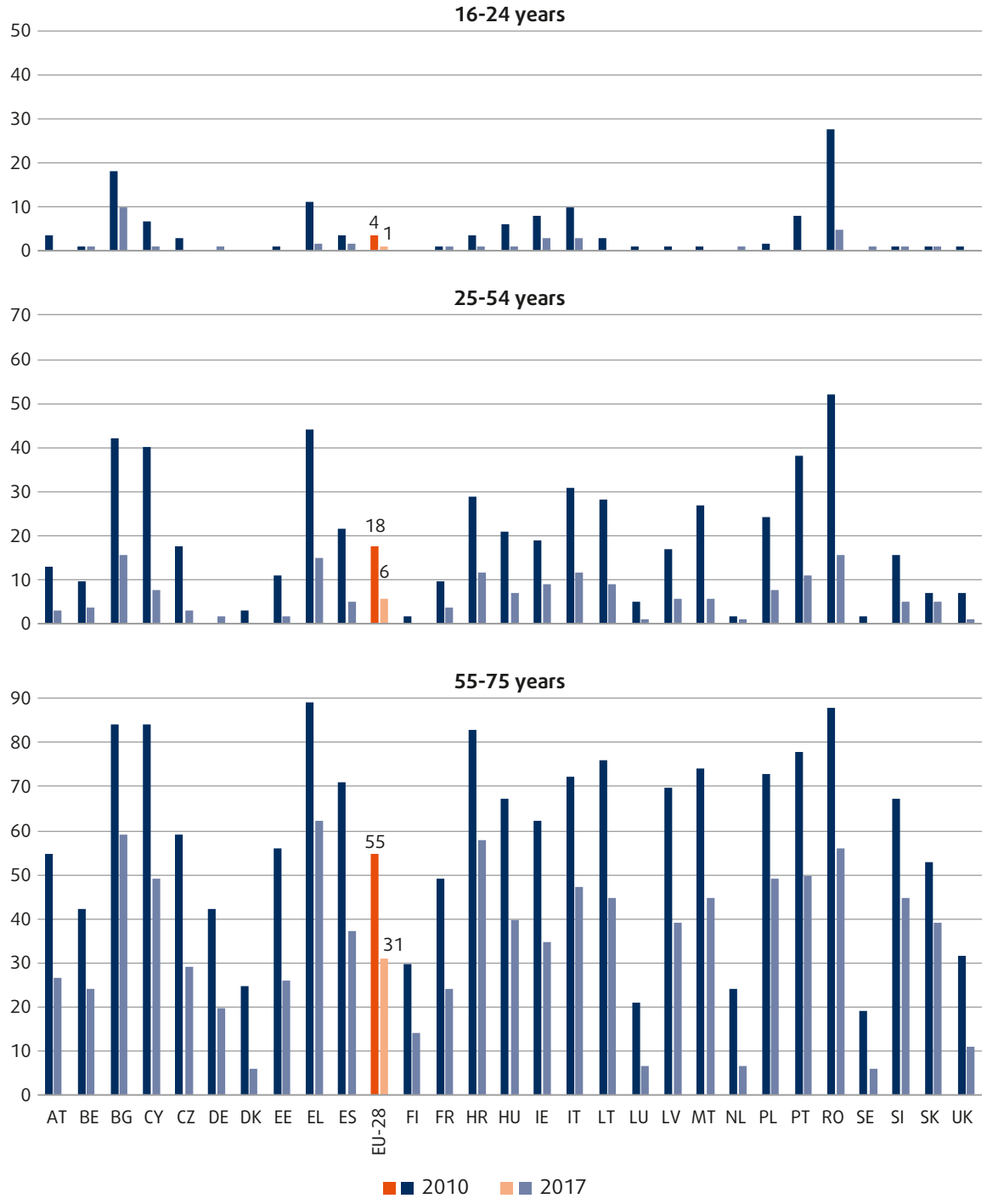
The e-Privacy Regulation Proposal[24] will adapt the previous e-Privacy Directive (2002/58/EC) to new technologies and market realities and will complement and particularise the GDPR. The e-Privacy Regulation will thus be *lex specialis* to the GDPR. The new draft regulation covers the processing of "electronic communications data", including electronic communications content and metadata that are not necessarily personal data. The territorial scope is limited to the EU, including when data obtained in the EU are processed outside it, and extends to over-the-top communications service providers, which do not provide internet networks but deliver content, services or applications over the internet – such as WhatsApp, Skype or Viber.

The Council of the EU issued its first revisions to the e-Privacy Regulation on 8 September 2017.[25] The

Figure 7.2: Individuals never having used the internet in 2010 and 2017, by age group (%)



Source: *FRA, 2018 (based on Eurostat data extracted on 25 January 2018)*

European Parliament published a draft resolution, including its report on the e-Privacy Regulation, on 23 October 2017.[26] On 5 December 2017, the Council of the Bulgarian Presidency released a progress report,[27] which summarises the work done so far in the Council as a basis for its future work. After the publication of the proposal, European Data Protection Authorities raised some points of concern.[28]

The e-Privacy Regulation Proposal repeats and widens the derogations included in the e-Privacy Directive, which allow data retention and access to data that authorities retain; it therefore has an impact on the regulation of data retention and data encryption of electronic communications. The proposal does not include any specific provisions restricting retention of, and access to, data on the basis of a targeted retention scheme and after a prior review by a court, as the

CJEU required in *Tele2* for data retention and access to conform with the fundamental rights to privacy, protection of personal data and freedom of speech.[29]

Another topical amendment to the draft e-Privacy proposal that the European Parliament proposed relates to encryption's role in strengthening privacy. Encryption allows users to shield their internet communications and safeguard their personal data against unauthorised access or leaks. FRA already suggested reinforcing privacy through encryption in its *Fundamental Rights Report 2017*,[30] as did the European Data Protection Supervisor in its Opinion 6/2017.[31] In October 2017, the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) voted in favour of an amendment[32] that precludes EU Member States from imposing any obligation that would result in weakening the security of networks and electronic communication services, such as the creation of "back doors".

In 2017, the European Commission also looked at the issue of encryption in criminal investigations. While stressing the importance of encryption in ensuring appropriate security for the processing of personal data, it noted that law enforcement and judicial authorities increasingly encounter challenges posed by the use of encryption by criminals. It discussed the technical and legal aspects, including potential impact on fundamental rights, with relevant stakeholders, drawing upon the expertise of Europol, Eurojust, the European Union Agency for Network and Information Security (ENISA) and FRA, as well as Member States' law enforcement agencies, industry and civil society organisations. In October, it announced a set of technical measures aiming to support Member State authorities, without prohibiting, limiting or weakening encryption. Exchange of expertise, provision of additional funding for training of law enforcement and judicial authorities, and supporting Europol in further developing its decryption capabilities were among the envisaged measures. Measures that could weaken encryption or could have an impact on a larger or indiscriminate number of people are excluded.[33]

7.2. Intensification of cyberattacks triggers diverse cybersecurity efforts

Interlinked with the challenges that the use of encryption raises, cybersecurity became a top priority in the EU in 2017, as cyberattacks of international nature and unprecedented scale hit Member States. Cyberattacks are a borderless[34] and rapidly evolving problem, which often results in disruption of services and can undermine citizens' trust in online activities.[35] They can have serious implications for the fundamental rights to privacy and data protection, since they usually target computer systems where large amounts of (sensitive) personal data are stored, such as passwords, medical files, company documents and financial information, and may reveal those data to unknown networks.[36] The 2017 WannaCry and NotPetya malware cyberattacks affected hundreds of thousands of users and organisations, and highlighted the need for a coordinated and effective response, as well as for more strengthened protection, at both EU and national levels.[37] These malware cyberattacks acted as wake-up calls and triggered the first ever case of cyber-cooperation at EU level.

> *"Cyber-attacks can be more dangerous to the stability of democracies and economies than guns and tanks. Last year alone there were more than 4,000 ransomware attacks per day and 80 % of European companies experienced at least one cyber-security incident."*
>
> *Jean-Claude Juncker, President of the European Commission, 'State of the Union address 2017', Speech/17/3165, 13 September 2017*

7.2.1. 'WannaCry' and 'NotPetya' prompt unprecedented cooperation

Both the WannaCry and NotPetya cyberattacks had an impact on critical European infrastructure operators in the sectors of health, energy, transport, finance and telecoms, as well as service providers and computer systems dedicated to specific tasks, such as robotics, medical scanners or production manufacturing plants.[38] The virus hit several EU companies quickly: **Spain**, **France**, **Germany** and **Belgium** were amongst the first Member States where the attack was reported.

In the **United Kingdom**, for example, the WannaCry cyberattack had potentially serious implications for the National Health Service, leading to widespread disruption in at least 81 of 236 hospital trusts in England.[39] WannaCry involved a type of malware that prevents access to inform ation systems by encrypting multiple common file types and then demands a ransom for the files to be unlocked (ransomware).[40] According to the UK National Audit Office, which conducted an independent investigation into the WannaCry cyberattack, between 12 and 18 May 2017, about 19,000 medical appointments were cancelled, computers at 600 general practitioner surgeries were locked and five hospitals had to divert ambulances elsewhere. The conclusions of the independent investigation highlighted the importance of developing, among other things, a coordinated plan for responding to such threats.[41]

Following the WannaCry cyberattack, and by virtue of Article 12 of Directive 2016/1148 on security of network and information systems (the NIS Directive),[42]

an EU Computer Security and Incident Response Team (CSIRT) was set up to assess, with ENISA's dedicated taskforce, the situation and provide effective operational cooperation. The CSIRT deployed the EU Standard Operating Procedures, which ENISA and Member States developed.[43] When the subsequent global outbreak of the NotPetya malware affected IT systems mostly in Europe, the EU CSIRTs Network also responded by exchanging synchronised information in a prompt and secure manner.[44] In addition, the 'Innovation Activity' of the European Institute of Innovation and Technology started developing a cloud-based Security Operations Centre focusing on the protection of critical infrastructures against so-called advanced persistent threats.[45]

7.2.2. EU and Member States strengthen their stance

Cybersecurity strategy: enhanced resilience, deterrence and defence

Even before these attacks, cybersecurity was already at the heart of the EU agenda, ranking high in the Digital Single Market Strategy. The fight against cybercrime was one of the three pillars of the European Agenda on Security. In May 2017, the European Commission published its mid-term review of the 2013 EU Cybersecurity Strategy. The evaluation took stock of the progress made so far and outlined further actions in the field of cybersecurity.[46] It reviewed the mandate of ENISA to define its role in the changed cyberspace context and developed measures on cybersecurity standards, certification and labelling, to make systems based on information and communication technology, including connected objects, more cybersecure.[47]

Specifically, the European Commission adopted a cybersecurity package on 13 September 2017, presenting new initiatives to further improve EU cyber-resilience and responses.[48] Regarding ENISA, the package outlines a reform proposal for a permanent mandate – which the agency currently lacks – to ensure it can provide support to Member States, EU institutions and businesses in key areas,[49] including implementing the NIS Directive. The cybersecurity package provides guidance on the practical implementation of the directive and further interpretation of its provisions. In addition, the Commission developed a blueprint recommendation so that the EU has in place a well-rehearsed plan in case of a large-scale cross-border cyber incident or crisis.[50]

On 20 November 2017, the General Affairs Council adopted conclusions on the *Joint Communication to the European Parliament and the Council: Resilience, Deterrence and Defence: Building Strong Cybersecurity for the EU*,[51] as the European Council had asked it to in October 2017. Specifically, the conclusions stress the need for both the EU and Member States to enhance cyberresilience, as well as the need for strong and closer cooperation among Member States and ENISA. Therefore, the conclusions welcome the proposal for ENISA to have a strong and permanent mandate.

A 2017 Eurobarometer survey on cybersecurity showed that ever more European residents use the internet for their daily activities.[52] At the same time, they are increasingly concerned about the security of internet transactions and cybercrime. This reiterates the findings of the 2015 and 2013 Eurobarometer surveys.

Eurobarometer survey signals increasing concerns about cybersecurity and cybercrime

In a 2017 special Eurobarometer survey on cybersecurity, a majority of respondents (87 %) regarded cybercrime as an important challenge to the internal security of the EU. Half of the respondents (49 %) said that law enforcement agencies in their respective countries were doing enough to combat cybercrime. Nearly half of respondents (46 %) said that they feel well informed about the risks of cybercrime, with significant differences among Member States (e.g. 76 % in Denmark and 27 % in Bulgaria).

The two most common concerns about using the internet for online banking and purchases were the misuse of personal data (45 %) and the security of online payments (42 %). Nearly a fifth (19 %) of respondents expressed no concerns about the security of online transactions. Victimisation rates are rising, the survey suggests. This is particularly true for "phishing" (38 % in 2017, 32 % in 2013); online fraud (16 % in 2017, 10 % in 2013); online banking fraud (11 % in 2017, 7 % in 2013); encountering racial hatred (18 % in 2017, 14 % in 2013); and hacking of social media profiles (14 % in 2017, 12 % in 2013). This trend towards increased reporting of incidents may reflect the public's raised awareness of such threats in the online world, which the media highlighted during 2017.

Most of the respondents would contact the police if they experienced cybercrime, especially if they were the victim of identity theft (85 %) or online banking fraud (76 %), or if they accidentally encountered child pornography online (76 %).

Source: European Commission (2017), Special Eurobarometer 464a on Cybersecurity, Brussels, September 2017.

NIS Directive implementation: aligning security principles with privacy and data protection safeguards

To effectively prevent and combat cybercrime, the NIS Directive aims to enhance the overall level of network and information system security by, among others, imposing a variety of obligations on national "operators of an essential service" to ensure that Members States

have implemented an effective strategy across all vital sectors. It sets up a cooperation group so that Member States can coordinate prompt responses and exchange information against potential threats.[53] EU Member States have until 9 May 2018 to transpose the directive into domestic law and until 9 November 2018 to identify operators of essential services.[54]

The **Czech Republic**,[55] **Germany**[56] and **Hungary**[57] have already implemented the directive into their national legal frameworks. However, the majority of EU Member States are currently in the process of adapting the provisions of the NIS Directive, either by setting up working groups[58] or by initiating public consultations[59] to assess if they need to amend existing national laws and adopt new legislation.

Article 8 of the directive obliges Member States to designate one or more national competent authority, as well as a national single point of contact on the security of network and information systems, which "shall, whenever appropriate and in accordance with national law, consult and cooperate with the relevant national law enforcement authorities and national data protection authorities".[60] National implementation efforts thus need to pay due regard to aligning the security principles contained in the directive with fundamental rights safeguards, particularly the data protection principles enshrined in the GDPR – notably the principles of purpose limitation, data minimisation, data security, storage limitation, and accountability.[61]

For example, various public institutions will be involved in the **Polish** national cybersecurity system. The draft law proposal enables them to process sensitive data within the meaning of Article 9 (1) of the GDPR.[62] However, the opinion that the Polish data protection authority issued on the draft proposal considered the right to process such data excessive and unjustified in the context of the tasks of these institutions.[63] The opinion voices additional concerns about the exemption of data controllers from a series of GDPR duties pertaining to subjects' rights of access, rectification and erasure, notification, and data portability,[64] without any prior impact assessments.[65] It also underlines that the draft proposal should refer more precisely to the safeguarding of personal data, instead of allowing data retention for the "period necessary for the completion of the tasks", which is too general and vague.

In **Germany**, the Act for the implementation of the NIS Directive came into force on 29 June 2017.[66] The IT Security Act had already anticipated many of the provisions of the directive in 2015. The Act makes no explicit reference to the GDPR, but, in principle, the Federal Office for Information Security (BSI) is obliged to delete as soon as possible any data that are processed for IT security purposes. In addition, any use of data by the BSI for other purposes is strictly forbidden, except for national security, counterterrorism and the investigation of serious crimes and cybercrimes. In these cases, it may transfer personal data to public prosecutors, the police and the three federal intelligence agencies.[67]

7.3. Big data: EU and international bodies urge respect for fundamental rights amidst push for innovation

The security of digital data in case of cyberattacks is not the only area where the need to establish data protection safeguards is increasingly important. Nowadays, personal data are collected in areas such as transport, communications, financial services, healthcare and energy consumption. These data can be subject to automatic processing by computer algorithms and advanced data-processing techniques, and may be used to generate correlations, trends or patterns. These techniques provide unprecedented insight into human behaviour and both public and private sectors are willing to use such datasets to bolster competitiveness, innovation, scientific research and policymaking. The development of the Internet of Things (IoT) and of 'big data'[68] analytics, allowing unprecedented availability, sharing and automated use of data, brings opportunities in terms of innovation and economic growth. However, it also poses a number of challenges for individuals' fundamental rights,[69] such as the protection of privacy and personal data, and the rights to equality and non-discrimination. Indeed, intelligence services of Member States have increasingly been relying on processing and analysing such datasets, as FRA highlighted in its report on surveillance activities and fundamental rights.[70]

FRA ACTIVITY

In-depth research on the impact of surveillance on fundamental rights

Terrorism, cyberattacks and sophisticated cross-border criminal networks pose growing threats. The work of intelligence services has become more urgent, complex and international. But intelligence work to counter these threats, particularly large-scale surveillance, can also interfere with fundamental rights, especially privacy and data protection. Following a specific request by the European Parliament, FRA published, in October 2017, its second report on the impact of surveillance on fundamental rights. It updates FRA's 2015 legal analysis on the topic, and supplements that analysis with field-based insights gained from extensive interviews with diverse experts in intelligence and related fields, including overseeing intelligence.

Digital surveillance methods serve as important resources in intelligence efforts, ranging from intercepting communications and metadata to hacking and database mining. Most EU Member States have enacted intelligence laws and have given independent expert bodies the task of overseeing the work of their intelligence services, FRA's 2017 report shows. It also reveals that opinions of these bodies' efficiency are mixed. Similarly, although law provides for diverse remedies, critics contend that actually accessing them is less straightforward. Failing to confront these flaws raises fundamental rights concerns, and carries the risk of undermining the public's trust in their governments' pledges to uphold the rule of law even when confronted with challenges that may make short-cuts look tempting.

For more information, see FRA (2017), Surveillance by Intelligence Services: Fundamental Rights Safeguards and Remedies in the EU. Volume II: Field Perspectives and Legal Update, Publications Office, October 2017.

In 2017, authorities at national, EU, and international levels took stock of these realities, and their potential impact on citizens and fundamental rights.

7.3.1. EU and international guidelines: catching up with big data challenges

The latest contributions of EU and international bodies or agencies on the use of big data analytics offer important clarifications to policymakers and legislators. The common idea reflected in the work of the EU, the Council of Europe and the United Nations is that technological innovation must go hand-in-hand with human rights compliance. Strong and effective supervisory mechanisms and a consistent legal framework at an international level can address security risks and issues of privacy, data protection and discrimination that emerge from big data analytics.

The European Parliament adopted a resolution on fundamental rights implications of big data in March 2017.[71] The resolution stresses that fundamental rights should be at the centre of attention when big data analytics are used for commercial, scientific and law enforcement purposes. Big data analytics could result in infringements of individuals' fundamental rights, and in differential treatment of or discrimination against some groups of people. Therefore, EU institutions and bodies, such as the European Commission and the European Data Protection Board, as well as the national data protection authorities, have the job of promoting and ensuring concrete safeguards for fundamental rights.

Similarly, the Council of Europe adopted *Guidelines on the protection of individuals with regard to the processing of personal data in a world of Big Data* in 2017,[72] drawing attention to the fact that data subjects' control over their personal data is at risk. Indeed, while they may choose what data they provide for processing, it is almost impossible to control data that have been observed or inferred about them, such as data derived from closed-circuit television cameras, or created through big data analytics.

This capacity to create profiles and make automated decisions has not gone unnoticed. The WP29 in its *Guidelines on automated individual decision-making and profiling for the purposes of Regulation 2016/679*[73] underlines its opacity and its potential to significantly affect individuals' rights and freedoms. In addition, ENISA, in its latest report on *Baseline Security Recommendations for IoT*,[74] insists on the right of individuals not to be subject to a decision based solely on automated processing, as enshrined in the GDPR.[75]

Furthermore, attention has been brought to big data analytics related to artificial intelligence appliances and robotics. The Council of the EU in its conclusions on the Tallinn Digital Summit on September 2017[76] invites the European Commission to put forward a European approach on emerging trends, such as artificial intelligence and blockchain technology, while ensuring a high level of fundamental rights protection and ethical standards. In addition, the European Parliament stresses in its *Resolution with recommendations on Civil Law Rules on Robotics*[77] that robotics research should respect fundamental rights. In addition, it calls for the designation of a European Agency for Robotics and Artificial Intelligence, which would provide the technical, ethical and regulatory expertise needed. Furthermore, the Parliamentary Assembly of the Council of Europe (PACE), in its Recommendation 2102,[78] recognises that it is

increasingly difficult for law to adapt to the speed at which technology evolves. It concludes that the only way forward is close cooperation of the Council of Europe, the EU and the United Nations on this matter.

However, big data analytics can be also used as a tool to support fundamental rights compliance. The Office of the United Nations High Commissioner for Human Rights (OHCHR), in its latest Report of the Special Rapporteur on the Right to Privacy,[79] underlines that big data has the potential to help states respect, protect and fulfil their human rights obligations. More precisely, it offers the means to develop new insights into intractable public policy issues such as climate change, the threat of terrorism and public health.

7.3.2. National initiatives assessing big data challenges slowly emerge

In some Member States, data protection authorities offered clarifications in 2017 on what the concept of big data analytics encompasses, what laws apply in this area and what risks to the individual's rights and freedoms arise.

At national level, Article 22 of the GDPR and its provisions on automated decision making are a matter of discussion and debate. In **Belgium**, for example, the Privacy Commission[80] stresses the need to define practically the meaning of the right of access and rectification in the context of big data analytics, and to clarify the relation between these rights and the operational part of algorithms. In **Germany**, the Federal Commissioner for Data Protection and Freedom of Information has noted that Article 22 is not sufficient, as it lacks effective limitations.[81] Automated decision making, including profiling, in the era of big data analytics can lead to social exclusion and discrimination, and algorithmic bias is a major societal issue that constitutes a risk to fundamental rights and freedoms.

In **Hungary**, the national data protection authority challenged[82] the fundamental rights compliance of a draft Act. The latter would have established a central system for storing image and voice recordings from police, public transportation companies, road management companies, road tax collectors, public safety offices and financial service providers. Such a central system could systemise these recordings by using a computer algorithm to find correlations and connections between these data and analyse patterns. The data protection authority's intervention prompted the Hungarian Parliament to adopt the draft Act without all of the provisions relating to the establishment of the central image and voice recording storing system.[83] This clearly demonstrates the power of data protection authorities to challenge and influence the regulatory powers and the decision-making process.

Promising practice

Raising awareness on legal and ethical concerns arising from use of algorithms

In **France**, the national data protection authority has developed a system intended to help people understand how algorithms structure and influence our digital interactions. The aim is to raise awareness about the functioning of algorithms so that individuals will be able to retain their free will and not allow algorithmic calculations to constrain them. In addition, with its latest survey, the French data protection authority aims to raise public awareness of the role of algorithms and artificial intelligence in everyday life. This work does not touch upon legal matters exclusively, but also assesses the ethical concerns that arise from these new technologies.

For more information, see Commission nationale de l'informatique et des libertés (CNIL), 'The Oracle of the Net' (L'oracle du net), September 2017; and CNIL, 'Report on the ethical matters raised by algorithms and artificial intelligence', December 2017.

FRA opinions

Article 8 (3) of the EU Charter of Fundamental Rights and Article 16 (2) of the TFEU recognise the protection of personal data as a fundamental right. They affirm that compliance with data protection rules must be subject to control by an independent authority. The oversight and enforcement of data protection rights can become reality if such authorities have the necessary human, technical and financial resources, including adequate premises and infrastructure, to ensure effective performance of their tasks and exercise of their powers. Such a requirement is grounded in Article 52 (2) of the General Data Protection Regulation (GDPR).

FRA opinion 7.1

EU Member States should thoroughly assess the human and financial resources, including technical skills, necessary for the operations of data protection authorities in view of their new responsibilities deriving from the enhanced powers and competences set out under the General Data Protection Regulation.

The GDPR requires that data protection authorities ensure awareness and understanding of the rights and risks related to the processing of personal data. However, most of the guidelines and awareness-raising campaigns are mainly accessible online, so access to the internet is crucial for awareness of rights. In a majority of Member States, there is still an important digital divide between generations in terms of the use of the internet.

FRA opinion 7.2

Data protection authorities should ensure that all data controllers give specific attention to children and older EU citizens to guarantee equal awareness of data protection and privacy rights, and to reduce the vulnerability caused by digital illiteracy.

Taking into account the analysis of the CJEU, the scope of data retention carried out pursuant to the Passenger Name Record (PNR) agreement and PNR Directive should be limited to what is strictly necessary. This means excluding the retention of data of passengers who have already departed and who do not present, in principle, a risk of terrorism or serious transnational crime – at least where neither the checks and verifications nor any other circumstances have revealed objective evidence of such a risk.

FRA opinion 7.3

When reviewing the PNR Directive pursuant to Article 19, the EU legislator should pay particular attention to the analysis of the Court of Justice of the European Union (CJEU). Notably, it should consider reviewing the provisions of the PNR Directive to limit the scope of data retention, after air passengers' departure, to those passengers who may objectively present a risk in terms of terrorism and/or serious transnational crime.

Data protection authorities have the task of monitoring and enforcing the application of the GDPR, and promoting the understanding of risks, rules, safeguards and rights in relation to personal data processing. This role becomes even more important in the context of 'big data' analytics, which allows for unprecedented availability, sharing and automated use of personal data. As the European Parliament and the Council of Europe have highlighted, such processing – operated by natural persons, private companies and public authorities – could pose a number of challenges to individuals' fundamental rights, notably their rights to privacy, protection of personal data and non-discrimination. Further research is still necessary to identify such challenges clearly and address them promptly.

FRA opinion 7.4

EU Member States should evaluate the impact of 'big data' analytics and consider how to address related risks to fundamental rights through strong, independent and effective supervisory mechanisms. Given their expertise, data protection authorities should be actively involved in these processes.

The Directive on security of network and information systems (NIS Directive) enhances the overall level of network and information system security by, among other strategies, imposing a variety of obligations on national "operators of an essential service", such as electricity, transport, water, energy, health and digital infrastructure, to ensure that an effective strategy

is implemented across all these vital sectors. In particular, Article 8 of the directive obliges Member States to designate one or more national competent authorities, as well as a national single point of contact on the security of network and information systems, which "shall, whenever appropriate and in accordance with national law, consult and cooperate with the relevant national law enforcement authorities and national data protection authorities". Implementation initiatives in several Member States have highlighted the need to ensure that the data protection principles enshrined in the GDPR are properly taken on board and reflected in national legislation transposing the NIS Directive.

FRA opinion 7.5

EU Member States should ensure that the national provisions transposing the NIS Directive into national law adhere to the protection principles enshrined in the General Data Protection Regulation (GDPR). In particular, national provisions need to adhere to the principles of purpose limitation, data minimisation, data security, storage limitation and accountability, especially as regards the NIS Directive's obligation for national authorities to cooperate with national law enforcement and data protection authorities.

Index of Member State references

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UN & CoE

January

February

March

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

8 March – UN Committee on the Rights of the Child issues concluding observations on the periodic report of Estonia

April

18 April – Croatia ratifies Third Optional Protocol to the UN Convention on the Rights of the Child (CRC) on a communications procedure

May

12 May – In *International Federation for Human Rights (FIDH) v. Ireland* (110/2014), the European Committee of Social Rights holds that Irish law, policy and practices on social housing do not comply with European housing, social protection and anti-discrimination standards, violating Article 16 of the Revised European Social Charter (right of the family to social, legal and economic protection)

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

June

July

13 July – UN Committee on the Rights of the Child issues its concluding observations on the fifth periodic report of Romania

August

September

11 September – Cyprus ratifies Third Optional Protocol to the CRC on a communications procedure

October

3 October – In *D.M.D. v. Romania* (No. 23022/13), a case concerning domestic abuse proceedings against a father, the ECtHR finds a violation of the prohibition of inhuman and degrading treatment (Article 3 of the ECHR) because of the lengthy investigation, which lasted over eight years and was marred by other serious shortcomings; and a violation of the right to a fair trial (Article 6 § 1 of the ECHR) because the courts failed to examine the merits of the children's complaint about the failure to award him compensation, as guaranteed by the domestic law

13 October – UN Committee on the Rights of the Child issues concluding observations on the periodic report of Cyprus

26 October – UN Committee on the Rights of the Child issues concluding observations on the fifth periodic report of Denmark

November

17 November – Adoption of Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the UN Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration

17 November – Adoption of Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the UN Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return

December

EU

January

February

March

7 March – European Commission issues revised EU Guidelines on the Promotion and Protection of the Rights of the Child (6846/17)

31 March – European Parliament (EP) and Council of the EU adopt Directive (EU) 2017/541 on combating terrorism

April

12 April – European Commission sets out actions to reinforce the protection of all migrant children in the Communication on 'The protection of children in migration' (COM(2017) 211 final)

May

10 May – In *C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others* (C-133/15), the CJEU holds that a non-EU citizen, as the parent of an under-aged child who is a citizen of an EU country, may rely on a derived right of residence, if their child's rights as a EU citizen could be violated if forced to leave the EU

June

8 June – Council of the EU adopts Conclusions on the protection of children in migration

July

27 July – European Commission sets up the High-level Commission Expert Group on radicalisation

August

September

28 September – European Commission adopts Communication on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms

October

November

7-8 November – 11th European Forum on the rights of the child, devoted to children deprived of their liberty and alternatives to detention

17 November – European Pillar of Social Rights is proclaimed by the EP, the Council and the Commission

December

1 December – First joint meeting of the informal expert group on children in migration and the rights of the child

6 December – European Economic and Social Committee adopts an opinion on cooperation with civil society to prevent the radicalisation of young people

8 Rights of the child

Child poverty rates in the EU decreased slightly overall, but remained high. Almost 25 million children are at risk of poverty or social exclusion. Severe housing deprivation affects 7 % of families with children in the EU. The European Pillar of Social Rights underlines children's right to protection from poverty and to equality; it specifically focuses on affordable early childhood education and good-quality care. Migrant and refugee children continued to arrive in Europe seeking protection, although in lower numbers than in 2015 and 2016. While the European Commission provided policy guidance through a Communication on the protection of children in migration, Member States continued efforts to provide appropriate accommodation, education, psychological assistance and general integration measures for children. Implementing the best interests of the child principle remained a practical challenge in the migration context. There was very limited progress in reducing immigration detention of children. Meanwhile, diverse European and national initiatives focused on the risks of radicalisation and violent extremism among young people.

8.1. Tackling child poverty and social exclusion

8.1.1. European Pillar of Social Rights calls for protection from poverty, but child poverty rate remains high

Despite important policy developments in 2017, child poverty remained a persistent challenge. The number of children at risk of poverty or social exclusion (AROPE) in the EU remains high. The AROPE indicator measures the EU 2020 target on poverty 'Population at risk of poverty or social exclusion'. It combines three different indictors: 'at risk of poverty', 'severe material deprivation' and 'very low household work intensity'.[1] In 2016, 26.4 % of children were living in such circumstances, according to the latest EUROSTAT data[2] – almost 25 million persons below the age of 18 years. However, in recent years the trend has improved, albeit slowly, as the *Fundamental Rights Report 2017* indicated.[3]

The European Pillar of Social Rights was proclaimed in 2017. (For more information on the Pillar, see ▶ Chapter 1). One of its 20 principles – principle 11 – focuses on child poverty, childcare and support to children. The Pillar states that children have the right to protection from poverty, and that children from disadvantaged backgrounds have the right to specific measures to enhance equal opportunities. It also enshrines the right of children to affordable early childhood education and care of good quality. Other principles, such as principle 2 on gender equality and principle 3 on equal opportunities, also have direct relevance for the well-being of both boys and girls.[4]

> *"Being a poor child is like paying for a crime you didn't commit at all."*
>
> *Girl participating in FRA symposium 'Is Europe doing enough to protect fundamental rights?', Brussels, 28 June 2017*

Civil society's response to the Pillar has been ambivalent, welcoming the package in general, but raising some significant criticisms. Anti-poverty and children's rights organisations have welcomed the explicit reference to children and child poverty in the Pillar, but would have also appreciated cross-references to children's rights in other principles related to health, housing and employment, issues that affect children and their families.[5] Concrete legislative proposals[6] in areas such as minimum

income, minimum wage and funding levels for social protection would all have an impact on families' living standards. The lack of these raised concerns, including among trade unions.[7] Furthermore, some organisations criticised the lack of an implementation plan.[8] Critics suggested that an exclusive focus on employment ignores in-work poverty or job insecurity,[9] issues that many families also face.

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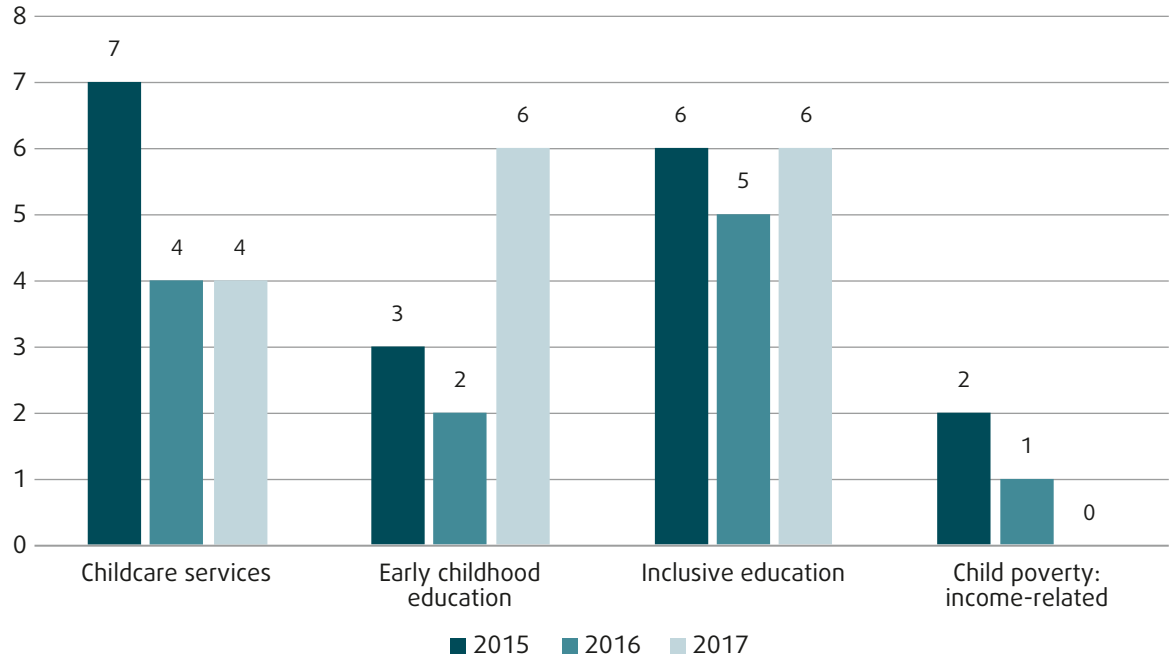
In its April proposal on the Social Rights Pillar, the European Commission included a state-of-play on the implementation of the 2013 Recommendation 'Investing in children', the key European policy framework for combating child poverty.[10] The Staff Working Document suggests progress in mainly the first two pillars:[11] the areas of parents' access to resources (employment and social services) and to social services (such as early childhood and childcare services). The least amount of progress has taken place with respect to the third pillar, regarding child participation. The document suggests there is much more scope to involve children in actions and decisions that affect them, such as involving children in policy or service design, or ensuring that policy planning reflects the views of children on services delivered to them.

In the context of the European Semester, the number of country-specific recommendations relating to children increased from 12 in 2016 to 16 in 2017 (see Figure 8.1). A total of 13 EU Member States received recommendations on childcare services, early childhood education or inclusive education. For the first time, no recommendation in 2017 directly focused on child poverty. Despite high levels of child poverty, the European Commission considers that the reduction in the number of country-specific recommendations on children in recent years was due to the need to focus on areas where Member State action was most needed and because some Member States had improved their policies.[12]

In addition, national reform programmes, which are developed in the European Semester context, do not use the 2013 Recommendation as a guiding policy. Out of 27 national reform programmes, only the **Irish** one made specific reference to the 2013 European Commission recommendation to invest in children.[13] This shows the limited leverage such recommendations have in national policy developments and the European Semester process.

The European Parliament voted for a Preparatory Action on a Child Guarantee in 2017, to be implemented by the Commission, to ensure that every child in poverty can access free healthcare, free education, free childcare, decent housing and adequate nutrition.[14] The preparatory action's general aim is to analyse the feasibility and possible design, governance and implementation options of a future Child Guarantee Scheme, and whether or not such a scheme would

Figure 8.1: Number of country-specific recommendations focusing on children in 2015, 2016 and 2017, by area



Source: FRA, 2017 (based on European Semester – Country Specific Recommendations for 2015, 2016 and 2017)

bring added value compared with the current situation. The European Commission intends to use a € 2 million budget on research, regional seminars and an EU-wide conference to analyse the current state of play and the feasibility of such a child guarantee, with a focus on four specific vulnerable groups of children.[15]

There has been progress on only some of the indicators related to Sustainable Development Goal (SDG) 1, 'End poverty in all its forms everywhere', Eurostat data indicate.[16] In March 2017, the UN Human Rights Council adopted a resolution on the protection of the rights of the child in the implementation of the 2030 Agenda, in which it encouraged states to promote a child rights-based approach in implementing the SDGs. It also calls on states to pay additional attention to children living in poverty or from marginalised groups when developing measures intended to comply with the SDGs.[17]

8.1.2. Housing and homelessness in Member States under the lens

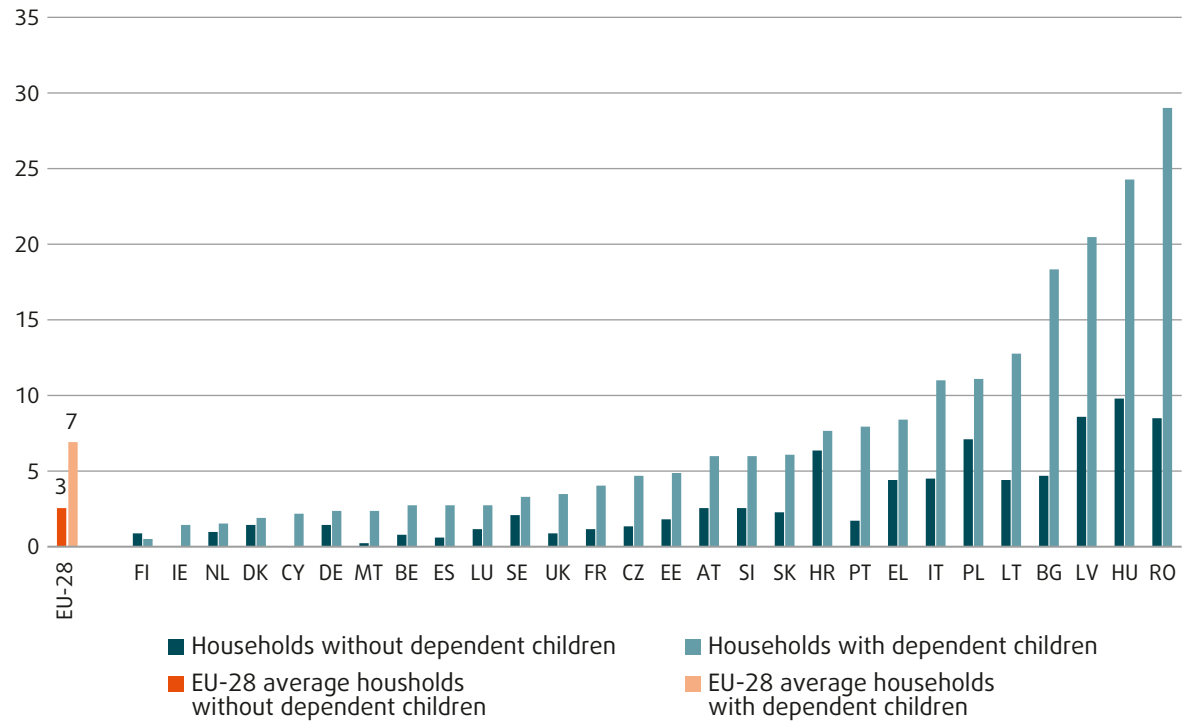
When examining the implementation of the 2013 Recommendation, the European Commission highlighted the problem of severe housing deprivation affecting children and the increased number of children in homeless shelters. It also acknowledged that child poverty is linked with housing deprivation and barriers to accessing education, school attendance, educational attainments, good health and overall wellbeing.[18]

Severe housing deprivation

'Severe housing deprivation' is defined as living in an overcrowded household with a leaking roof, no bath/shower or no indoor toilet, or in a dwelling considered too dark. A household is overcrowded if it does not have a minimum number of rooms equal to one room for the household; one room per couple in the household; one room for each single person aged 18 or above; one room per pair of single people of the same gender between 12 and 17 years of age; one room for each single person between 12 and 17 years of age and not included in the previous category; and one room per pair of children under 12 years of age.

Figure 8.2 shows the rate of severe housing deprivation in households with and without dependent children in the EU-28. The total for the EU is 7 % for families with children and 3 % when there are no children in the household. Having or not having dependent children has almost no impact on the rate in some Member States, such as **Croatia** or **Denmark**. In other Member States, the likelihood of severe housing deprivation is much higher for families with children, such as in **Portugal** (with a difference of 6 points) or **Lithuania** (difference of 9 points). It is highest in **Romania** (difference of 20 points). Only **Finland** shows a higher rate, although marginally, of housing deprivation for households with no dependent children. Severe housing deprivation particularly affects Roma people

Figure 8.2: Percentage of severe housing deprivation rate by household type, 2016



Source: *FRA, 2017 (based on Eurostat (2017), Severe housing deprivation rate by household type: EU-SILC survey, [ilc_mdho06b], last update 19 December 2017)*

within the EU, as shown in FRA's second European Union Minorities and Discrimination Survey (EU-MIDIS II).[19] For example, 'insufficient space' is more frequent in Roma households than in the general population, the survey results show.[20] For more information on Roma integration, see Chapter 5.

Housing is a matter of national, regional and local competence. However, several European policies have dealt with housing, such as the 2013 Recommendation 'Investing in children'[21] and the European Pillar of Social Rights. The Pillar provides for access to social housing, protection from forced eviction and support for homeless people, all of which can have a direct impact on the living situation of children.[22] Civil society, however, has raised concerns over the implementation of the aspects of the Pillar that deal with housing, given the non-binding nature of the principles and the lack of legislative proposals.[23]

In the European Semester, country-specific recommendations often include the topic of housing. In 2017, **Ireland**,[24] the **Netherlands**,[25] **Sweden**[26] and the **United Kingdom**[27] received recommendations on housing. The European Commission established a Housing Partnership[28] and an Urban Poverty Partnership under the Urban Agenda.[29] Both partnerships are developing action plans touching upon affordable housing as a way to support social cohesion, as well as national measures to combat child poverty and homelessness.

The EU is also supporting the efforts of Member States by funding various housing programmes, the majority of which specifically support families. It does this through the Urban Innovative Actions funds,[30] the Regional Policy EU Invest[31] and the European Regional Development Fund or Cohesion Fund.[32] The projects funded are very diverse, and range from supporting housing for unaccompanied children in Antwerp (**Belgium**)[33] to the construction of 71 social houses for families with children with health problems or disabilities in Sofia (**Bulgaria**).[34]

The Revised European Social Charter, a treaty of the Council of Europe, provides for the right to housing, and addresses adequate standard of housing, reduction in homelessness and affordability of housing.[35] However, only **Finland**, **France**, **Greece**, the **Netherlands**, **Portugal**, **Slovenia** and **Sweden** accepted the right to housing (Article 31) when ratifying the Revised European Social Charter.[36]

Housing is a broad and multifaceted issue and Member States approach it through different actions. In 2017, several Member States adopted new laws or regulations related to social housing, eviction or homelessness. For example, in **Italy**, the Law on urgent provisions on the safety of cities[37] establishes that, in cases of squatting of buildings, the mayor can decide to prevent forced eviction if children or particularly vulnerable people live in the building. In **Romania**, the parliament adopted an amendment on housing, introducing the concept of 'support housing'. This is a type of social housing for individuals and families who have been evicted through forced implementation procedures because they cannot pay their mortgages.[38] In the Walloon region in **Belgium**, a new decree aims to extend the obligation to provide emergency housing; it introduces modifications to help bring unoccupied dwellings into use, and creates a mechanism to force the sale of social housing to its inhabitants.[39]

Evictions

The number of families with children evicted every year in Europe is not known and there is no EU-wide collection of such data. National data are not always disaggregated to show if the household had children, and, if so, their gender and age. In 2015, 13 out of 28 EU Member States had no data regarding the characteristics of households affected by eviction, a study shows. Only seven countries had reliable and structured information on eviction.[40]

Local authorities generally ensure that families with children fall within the priority categories for accessing social housing. In addition, some Member States have adopted measures to protect families with children from eviction. For example, in **Sweden**, the National Board of Health and Welfare compared all Swedish municipalities' policies on homelessness and found that 23 % of the municipalities had action plans on how to protect children from evictions.[41] In **Portugal**, it is possible to postpone, also in private contracts, by one year the enforcement of the rental contract termination if the tenant has children below 18 years, or for persons under 26 years attending secondary or higher education.[42]

In **Spain**, the government approved a decree with measures to protect mortgage debtors in particularly vulnerable situations, such as households with children, single-parent households and large families.[43] Measures include suspending eviction for up to four years. Problems with evictions in Spain, however, have prompted severe criticism from civil society[44] and international human rights bodies. In 2017, the UN Committee on Economic, Social and Cultural Rights indicated that Spain had violated the right to housing in the case of a family with two young children, who were evicted from a rented room in a flat without being provided with alternative housing.[45] In addition, the Supreme Court declared the eviction of a family with three children in Madrid inappropriate until protection measures for the children were established, and required the previous instance to revise the

eviction decision.[46] A study on the demolition of illegal dwellings in Roma neighbourhoods in **Bulgaria** claimed that, despite the existence of a Roma strategy and action plan, alternative housing is available only as part of pilot projects funded by the EU, while the lack of funds prevents most municipalities from offering municipal housing to evicted Roma families.[47] For more information on Roma integration, see Chapter 5.

Promising practice

Private sector tackles energy poverty

A private gas company in **Spain**, Gas Fenosa, developed an action plan in 2017. It contains 20 measures to address energy poverty, and has a budget of € 4.5 million. The measures include a free-of-charge phone number with 24-hour support for clients in vulnerable situations and the establishment of a so-called Energy School. The courses at the Energy School target social workers working with families and answer questions such as how to read the bill, reduce the total due amount, reduce energy use or request a deadline extension to pay the bill.

Gas Fenosa also offers a discount of between 25 % and 40 % to clients who fulfil certain need criteria: disability, families with more than three children, long-term unemployed people, etc. For certain categories of persons at risk of social exclusion, the energy supply cannot be interrupted even when bills are not paid.

For more information, see Gas Fenosa's foundation's website.

Homelessness

The unsystematic nature of measures to prevent eviction, and the delays in accessing social housing, are reflected in the number of homeless people in Europe, including children. Although Eurostat does not collect data on homelessness, some figures are available from national statistical offices and NGO reports. Statistics are often not comparable as some Member States register homeless households as one case, irrespective of the number of individuals concerned. In its 'Second overview of housing exclusion in Europe 2017', the European Federation of National Organisations Working with the Homeless (FEANTSA) draws attention to the alarming trend in Europe of worsening homelessness in all Member States except Finland. This exception shows the effectiveness of implementing a long-term homelessness strategy.[48]

In **Ireland**, recent statistics indicate that 3,000 children are currently homeless, with a reported 27 % increase in the number of homeless families from June 2016 to June 2017.[49] In the **Netherlands**, the Statistics Office publishes figures about the number of homeless people each year, but the information does not include any figures about children.[50] Disaggregated information is, however, collected at municipal level and a new collaborative project with the central level will start in 2018.

Promising practice

Providing support to families at risk of homelessness in Austria

In **Austria**, there are a number of support services for people at risk of or in homelessness. They range from consulting, prevention of eviction, help in finding a new home, emergency shelter, day-centres, temporary apartments and assisted living.

During 2017, in seven out of the nine Austrian regions – Burgenland and Carinthia being the exceptions – social organisations provided a dedicated service for the prevention of eviction. People who have difficulties with paying the rent or are at risk of eviction for other reasons can get advice and counselling on how to proceed. There are also specialised services for specific groups, such as women with children and pregnant women.

For more information, see the website of the Austrian government.

International human rights monitoring bodies have raised concerns about the lack of access to adequate housing. In its decision in the case of the *International Federation for Human Rights (FIDH) v. Ireland*,[51] the European Committee of Social Rights found a violation of Article 16 of the Revised European Social Charter[52] (right of the family to social, legal and economic protection). The complaint was that the Irish legal, policy and administrative framework for housing was insufficient, as were the adequacy, habitability and regeneration of local authority housing. The Department of Housing, Planning and Local Government of **Ireland** has since adopted 'Rebuilding Ireland', an Action Plan for Housing and Homelessness.[53] The plan envisages concrete targets in the areas of homelessness, social housing and the rental market, and includes several legislative proposals.

8.2. Protecting children in migration remains a daunting challenge

People continue to arrive in Europe and apply for asylum, but their number has considerably decreased. More than 656,800 persons applied for asylum in the EU in 2017, including 199,665 children.[54] The number of children decreased almost by half compared to 2016, when 398,260 applied for asylum.[55] Given the temporary reintroduction of border controls,

the EU–Turkey statement[56] and changing migration routes, there were drastically fewer applications in some Member States, such as **Austria**, **Bulgaria** and **Germany**. However, in other Member States, mainly on the Mediterranean arrival route, such as **Italy, Greece, Spain**, as well as in **France**, the number of applications remained similar or increased compared to 2016.[57]

Unaccompanied children filed 63,245 asylum applications in 2016, according to the latest available Eurostat figures.[58] In **Italy**, by 31 December 2017, 18,303 unaccompanied children, 93 % male and 7 % female, were registered as being present, according to the Ministry of Labour and Social Politics.[59] In **Greece**, 5,446 unaccompanied children arrived between January and December 2017, according to UNHCR: 5,204 boys and 242 girls.[60]

These statistics, however, represent only part of the picture. Data collection about children in migration remains a critical issue. The European Commission's Knowledge Centre on Migration and Demography has expanded the datasets within its Dynamic Data Hub to include data on children in migration, disaggregated by age, on asylum, residence permits, resettlement, arrivals and UNHCR's populations of concern. Nevertheless, to better understand the necessary policy interventions, data are still needed in areas such as Dublin transfers, family unity and reunification procedures, irregular border crossings, children returned, children in immigration detention, missing children, as well as disaggregation by gender. Eurostat, as a follow-up to the Commission's 2017 Communication on the protection of children in migration, is already working on specific proposals to respond to policy needs raised. Eurostat has added a separate folder on children in migration to improve the visibility of children in data already collected.[61]

8.2.1. International and European efforts to protect children in migration

In April 2017, the European Commission published the long-awaited Communication on the protection of children in migration. It sets out a series of actions to be taken in view of the high numbers of migrant children arriving and living in the EU and the growing pressure on national migration and child protection systems.[62] The Council of the EU upheld the recommendations in its conclusions on the protection of children in migration adopted on 8 June 2017.[63] Meanwhile, in May 2017, the Council of Europe adopted its Action Plan on protecting refugee and migrant children 2017–2019.[64]

In its Communication, the Commission raises a series of issues, ranging from addressing root causes of migration and protecting children on migration routes, to suggesting actions and appropriate treatment of children arriving or staying in the EU. It calls on Member States to actively implement in relations with non-EU countries the 2017 EU Guidelines on the Promotion and Protection of the Rights of the Child.[65] The Communication requires child-friendly and gender-sensitive procedures when, for instance, assessing age or taking fingerprints and biometric data. FRA has published a report on the fundamental rights implications of large-scale EU information systems and the use of biometrics, including the implications for children.[66] As one of the actions that the Communication planned, the European Asylum Support Office (EASO) is developing a guide on age assessment.[67] The Council of Europe's Ad hoc Committee for the Rights of the Child is elaborating recommendations on age assessment and guardianship, for consideration and adoption by the Committee of Ministers in 2019. These recommendations will also support the network of guardianship authorities created in 2017 by the European Commission, and coordinated by the Dutch guardianship authority, NIDOS.

A positive development has been the appointment of child protection staff in the hotspots in **Greece**, a recommendation deriving from the Communication. However, the reception conditions in Greek hotspots are still a major challenge. These include a lack of appropriate accommodation – with unheated containers or tents being used – and very limited educational activities.[68] During 2017, FRA, together with EASO, provided training to the appointed child protection staff and other local actors to identify the best ways to deal with the protection of unaccompanied children. Following an urgent monitoring round, the Lanzarote Committee adopted a Special report outlining 37 recommendations to Member States to protect refugee and migrant children, especially girls, from sexual exploitation and sexual abuse.[69]

Appropriate accommodation is not enough to secure the future well-being of children. Indeed, the Communication stresses that children also need access to education, healthcare, psychosocial support, leisure activities and integration-related measures. Member States need to ensure durable solutions for all children. The 2017 Recommendation on the Return Directive also calls on them to establish clear rules on the legal status of unaccompanied children, based on an individual best interests assessment.[70] The return of unaccompanied children is highly contested and often difficult to implement in practice, especially when the family members are not found. According to the latest guidance by the UN Committee on the Rights of the Child and the UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW Committee), children can be returned only if there are guarantees that they will be appropriately cared for and that their fundamental

rights will be respected, and if it is in the best interests of the child.[71]

8.2.2. Immigration detention of children

Under EU law, the Return Directive regulates the detention of migrants in an irregular situation pending removal, and the Reception Conditions Directive governs detention of applicants for international protection. Article 28 of the Dublin Regulation also envisages detention in the context of transfers between Member States. These instruments emphasise that children are to be detained only as a last resort and only if less coercive measures cannot be applied effectively. Such detention must be for the shortest time possible.[72] The stringent requirements flowing from the Charter and from Article 3 (prohibition of torture) and Article 5 (right to liberty and security) of the ECHR mean that deprivation of liberty will be in line with EU law only in exceptional cases.

Different European actors paid particular attention to immigration detention of children with various important initiatives in 2017, as illustrated in Figure 8.3. At the EU level, the European Commission's Communication on the protection of children in migration underlined that deprivation of liberty is allowed only under exceptional circumstances and never in prison accommodation.[73] This clarification is important, given that, a few weeks earlier, it had also recommended to Member States not to ban immigration detention of children.[74] The European Forum on the Rights of the Child was devoted to children deprived of liberty, and discussed concrete ways to promote alternatives to detention for children.[75] FRA published a report on the European legal and policy framework on immigration detention of children.[76] Later in the year, the Council of Europe (CoE) held a major conference on ending immigration detention of children.[77] The CoE's Parliamentary Assembly continued its campaign to end immigration detention of children, publishing a guide on monitoring[78] and a study of immigration detention practices and the use of alternatives.[79]

At the UN level, the Committee on the Rights of the Child and the CMW Committee issued two Joint General Comments in which they deemed immigration detention of children a violation of the rights of the child. They affirmed that children "should never be detained for reasons related to their or their parents' migration status".[80]

Children's right to protection and care and the principle of the best interests of the child are the starting points when examining deprivation of liberty of children. Detention has a negative impact on children, no matter in which context it takes place. Deprivation of liberty can have short- and long-term negative effects on the physical, psychological, social and general development of a child, as research shows.[81] The impact of detention can persist long after the child has been released. Detention has undeniable immediate and long-term mental-health effects on asylum-seeking children, mental-health experts report.[82] Although some children recover, for others, mental-health effects may continue for a long time, according to child psychiatrists who work with

Figure 8.3: Main initiatives regarding immigration detention of children in 2017

Note: *The thumbnails provided were downloaded from the relevant websites (Council of Europe, European Union, FRA and the Office of the United Nations High Commissioner for Human Rights). Copyright lies with the respective organisations.*

Source: *FRA, 2018*

children after their release.[83] For this reason, the European Court of Human Rights (ECtHR) considers the child's "extreme vulnerability" to be the "decisive factor and takes precedence over considerations relating to the status of illegal immigrant".[84] In a case decided in December 2017, the ECtHR found that the detention of an Iraqi family in an inadequate facility for a period of 32 or 41 hours – the exact length of detention was disputed – amounted to the **Bulgarian** authorities having subjected the family to inhuman and degrading treatment.[85]

Respecting the right to liberty and security requires states to adopt less intrusive alternatives to detention. Where the authorities fail to examine all alternatives – including placement in an open facility without restrictions on the child's fundamental rights – the detention of children will be considered arbitrary and a violation of the right to liberty and security. Against this background, the European Commission encouraged EU Member States to ensure that alternatives to detention are available and accessible and to monitor their use, indicating that it would support initiatives in this direction.[86]

Some EU Member States made progress in the use of alternatives to detention. In **Poland**, apprehended migrants in an irregular situation include a significant number of families with children. The percentage of decisions imposing an alternative to detention increased from 11 % in 2014 to over 23 % in 2017. Almost 80 % of the 2,139 migrants subject to alternatives to detention in 2017 respected the conditions imposed.[87] This did not, however, result in a decrease in the number of children in detention, given that families who breached the conditions imposed with the alternatives to detention were subsequently placed in administrative detention. In **France**, administrative detention in cases of families with children in an irregular situation has increased,[88] despite recent ECtHR judgments condemning such practices as incompatible with children's rights and best interests.[89] In **Belgium**, a coalition[90] of more than 100 NGOs has taken a stand against the construction of a new closed centre for the detention of families with children.

One tool to reduce the need for deprivation of liberty in the context of returns is case management. This approach prioritises social work and engagement with migrants over the use of coercive measures. Through regular contacts with social workers who are independent from the immigration authorities, migrant children are given an opportunity to understand their situation and the realistic options they have. A European Alternatives to Detention Network, established in 2017, links civil society organisations developing case-management-based pilot projects.[91] This network supports different projects in EU Member States, including a case-management pilot project with 50 people in **Bulgaria**. This specific project currently mainly addresses single men, but could equally be applied to children. Nevertheless, the results, in terms of preventing people from absconding, are revealing: after one year, in December 2017, only two persons had absconded, four had returned voluntarily, two had obtained humanitarian status and the remaining 42 were still participating in the project.[92]

Although no legal norm in human rights or EU law explicitly prohibits immigration detention of children, there is an increasing consensus among international organisations, treaty bodies and other human rights protection mechanisms that immigration detention of children contradicts the duty to provide care imposed by the Convention on the Rights of the Child. As international human rights law is evolving, an increasing gap is emerging between EU law and the way international human rights law is interpreted.

8.2.3. Implementing best interests of the child in migration context proves challenging

Protecting migrant children remains challenging, as FRA's monthly updates on migration have shown.[93] Given the reduction in the number of children arriving, the focus is increasingly on long-term needs, where a durable solution for each child needs to be found. In this context, assessing the best interests of the child becomes even more essential.

The best interests of the child is a complex concept which, according to the UN Committee on the Rights of the Child, forms a principle of law, an actual right, and a rule of procedure.[94] It is established in the UN Convention on the Rights of the Child (Article 3), in the EU Charter of Fundamental Rights (Article 24), in EU secondary law and in most national legislation related to children. In the area of asylum, EU directives and regulations have made abundant reference[95] to the need to consider the best interests of the child in different processes. The UN Committee on the Rights of the Child often mentions the need to apply best interests in practice in its concluding observations when examining national reports.[96]

The best interests of the child is an important element in decisions taken by the CJEU, such as in *C. Chavez-Vilchez and Others v. Raad van bestuur van de Sociale verzekeringsbank and Others*,[97] or in pending cases, as evidenced in the Opinion by Advocate-General Bot in the case on family reunification.[98] It is also important in national case law. For example, in **Slovenia**, an administrative court rejected the Ministry of the Interior's decision to return a Somali woman and her child to Italy, the Member State through which they entered the EU; it held that assessing the best

interests of the child required the authority to make a more detailed and deliberate investigation of the conditions in the Member State to which it proposed to return them.[99] In **Luxembourg**, an administrative court granted permission to an Albanian boy to stay until the age of 18, based on the best interests of the child, going against the Ministry of Foreign Affairs' decision to remove the boy, who did not qualify for international protection.[100]

> *"Children should be always involved when adults take decisions that affect them."*
>
> *Girl participant at FRA symposium 'Is Europe doing enough to protect fundamental rights?', Brussels, 28 June 2017*

Despite its broad inclusion at all levels of legislation, the practical implementation of the best interests principle remains a challenge. The Committee on the Rights of the Child and the CMW Committee[101] provided some guidance on best interests implementation in 2017, as shown in Table 8.1.

Best interest-assessment practices in Member States are diverse, and depend not only on the Member State but also on the different actors or specific procedure involved. Some Member States might assess best interests on a regular basis and rather informally, or more formally only in certain procedures. This more formal procedure may have different names in Member States: determination process, risk assessment or something else.[102] Initial evidence suggests that most assessments of best interests are considered informal, undertaken on an ad hoc basis, by one or two officials, with no systematic method, and with no record made of them.

> *"An adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention."*
>
> *UN Committee on the Rights of the Child, General Comment No. 14, paragraph 4*

Although the EU *acquis* enshrines the legal obligation to consider the best interests of the child, the data collection undertaken for this report found only a few structured systems in place where trained and competent staff follow a method, tools or concrete guidance.

Nevertheless, throughout 2017, different national authorities and organisations developed and used clear processes and methods that specify how the best interests of the child will be assessed in practice. For example, in the **Netherlands**, the University of Groningen developed a tool that allows a multidisciplinary team to assess the best interests of the child and prepare a report for use in administrative or judicial migration proceedings.[103] The model is based on the guidance provided by the UN Committee on the Rights of the Child and includes 14 aspects to consider when assessing the best interests of the child.[104]

In **Ireland**, the best interests assessment is called the 'care plan'. It is a statutory requirement;[105] a social worker of the Child Protection Services carries it out during the first week of the stay in care. The voice of the child is central, and during the interview the child can bring a person of trust. Teachers, family members and NGOs can be consulted when developing the care plan.

Table 8.1: Elements to consider when assessing the best interests of the child, according to the Committee on the Rights of the Child and the CMW Committee

General elements	Specific elements in context of migration
Care, protection and safety of the child	Child's specific reasons for migrating
Situation of vulnerability	Social and cultural contexts
Child's views	Belonging to a minority group
Child's identity	Need for comprehensive and long-term solutions
Right to health	Promoting integration
Right to education	Priority to family- and community-based accommodation
Family environment and relations	In case of a return to the country of origin, ensuring the child will be safe and cared for and his/her rights ensured
	Assessment carried out by actors independent from migration-enforcement authorities

Source: *FRA, 2018 (based on UN, Committee on the Rights of the Child, General Comment No. 14; and UN, Committee on the Rights of the Child and CMW Committee, Joint general comment No. 3 on the general principles regarding the human rights of children in the context of international migration, 16 November 2017)*

In **Sweden**, the assessment is called the 'child impact analysis'. It is carried out at municipal level and recorded in a digital online migration database. The case handler cannot proceed if best interests of the child-related steps have not been completed. The system was developed by national authorities together with the Ombudsperson for children and is currently under review. In **Luxembourg**, the government took the initiative to create an 'Evaluation Committee for the best interests of the child', which is to evaluate, on a case-by-case basis, the best interests of unaccompanied children who have not been granted international protection. The committee is to be formed of representatives of different authorities, such as from the youth system, reception, immigration and the National Children's Office. Its opinions will not be binding, but will have an advisory status.[106]

EASO is currently developing guidance on the best interests assessment to be published in 2018. It will provide guidance to Member States on specific elements of best interests assessments in the asylum procedure. For more information on asylum and migration, see Chapter 6.

8.3. Extremism and radicalisation of children and young people

Terrorist attacks in several Member States in 2017 again raised the debate about the danger of radicalisation leading to violent extremism and terrorism. However, available research data are scarce, with no EU-wide research, and they do not always focus on children and young people or include a gender perspective.[107] Regarding online radicalisation, the current evidence on the link between the internet, social media and violent radicalisation is limited and inconclusive.[108] Nevertheless, at the EU level, the issue of children and young people being at risk of radicalisation is attracting particular attention, since children might be more vulnerable to being influenced and manipulated by adults and extremist propaganda, requiring the development of tailored responses.[109]

8.3.1. Stepping up efforts to counter radicalisation

Radicalisation is the process leading to violent extremism and terrorism. The EU institutions in 2017 multiplied their actions to support Member States in exercising their powers in the field of protecting children and young people from radicalisation and extremist propaganda. Preventing and countering it is a primary component of the EU policy to fight against terrorist threats and a priority for the EU internal security strategy.[110] National security remains the sole responsibility of each Member State, as provided by Article 4 (2) of the Treaty on European Union.[111] However, fighting the spread of radicalisation, especially online, and preventing and countering violent extremism are among the priorities of Member States' cooperation at the EU level.[112]

The Directive on combating terrorism reflects the need to pay special attention to protecting and preventing children from being radicalised. The directive was adopted in March 2017 and is to be incorporated into national legislation by 8 September 2018.[113] It calls on Member States to adopt the necessary measures to ensure that, in sentencing, judges take into account that criminal offences related to recruiting and training for terrorism may have targeted children.[114]

The European Council updated the Guidelines for the EU Strategy for Combating Radicalisation and Recruitment to Terrorism in 2017. It pointed out that "policy responses need to make use of all relevant policy areas and instruments, including criminal justice, education, social inclusion, citizenship and European values" to protect children and prevent their radicalisation.[115]

The European Commission established a High-Level Commission Expert Group on Radicalisation (HLCEG-R) in 2017.[116] It brings together Member States' competent authorities, the European Commission and EU services, institutions and agencies, including FRA. It aims to enhance efforts to prevent and counter radicalisation, including of children and young people, and to improve coordination and cooperation among all relevant stakeholders.

In its first report in December 2017,[117] the HLCEG-R underlines that its work refers to all forms of radicalisation, but sets Islamist extremist ideology as a priority area. The report also points out that special attention should be paid to right-wing extremism. It provides a number of recommendations for the Commission and for Member States, recognising education, social inclusion and youth policies as important factors in tackling radicalisation. In this respect, it recommends raising awareness and implementing measures to prevent early school leaving or school exclusion; enhancing equity and social cohesion; and encouraging active citizenship and promoting such common fundamental values as freedom, tolerance and non-discrimination. Children are among the selected priority topics for the HLCEG-R in 2018.

One main focus of the EU's actions in 2017 was the treatment of young European 'foreign fighters' in conflict zones such as Syria and Iraq returning to Europe; children born to and raised by European

'foreign fighters' in those areas coming to Europe (child 'returnees'); children remaining in the EU but with parents or siblings who have left for Syria/Iraq; and refugee and migrant children arriving in Europe from that region. Because of their exposure to radicalised environments and, in some cases, violence, these children and young people are perceived as a potential threat, but also as victims. The EU Counter-Terrorism Coordinator carried out a survey in 2017 aimed at identifying Member States' approaches to dealing with child returnees, including refugee children who arrive in the EU.[118] There is not much experience yet in dealing with these children, the survey shows. Handling children in this context must give due importance to, among other considerations, the role of child protection authorities, the importance of an individual risk- and needs-assessment for each child, and tailored responses, as well as to respect for the rights of the child, the survey report suggests.

The Radicalisation Awareness Network (RAN), which the European Commission funds and supports, launched an initiative entitled RAN Young, calling for the involvement of young persons in the development of anti-radicalisation programmes.[119] Engaging children not just as beneficiaries, but as partners, is also a principle for any programme developed, as suggested by research.[120] Moreover, RAN has established a specific working group focusing on youth, families and communities and published a manual on responses to the issue of foreign fighters and their families returning to their home countries in the EU from conflict zones. The manual highlights the need for a gender perspective when dealing with women and girls. It suggests that women returnees are often isolated, and might require specific support given possible traumatic experiences.[121] A report by the European Parliament analyses the motivation of women and girls to join ISIS and provides a number of recommendations to address the misconception that female radicalisation can be explained as a single-causal process, predominately fed by emotional or personal factors.[122]

In December 2017, the EU's European Economic and Social Committee (EESC) adopted an Opinion highlighting the major role that civil society actors, especially youth organisations, play in preventing the radicalisation and extremism of young people.[123] The opinion underlines the importance of inclusive formal and non-formal education, the social responsibility of religious communities and the need for social media businesses to get involved in countering hate speech and extremist narratives.

The European Commission addressed the removal of terrorist and violent extremist online content in its Communication on tackling illegal content online, adopted in September 2017.[124] The EU Internet Forum also adopted an Action Plan to combat terrorist propaganda online.[125] The Commission has established the Civil Society Empowerment Programme, which undertakes various activities to promote the involvement of civil society.[126] For example, RAN organised 27 training sessions around Europe for civil society organisations, covering the skills and knowledge needed to develop online counter- and alternative-narrative campaigns to address radicalisation and violent extremism, and promote moderate voices.[127]

The UN Security Council has also emphasised the need to support education programmes to prevent young people from accepting terrorist narratives, and the need to engage a wide range of actors, including youth, families, women and civil society in general.[128] The UN Office on Drugs and Crime (UNODC) produced a manual on recruitment and exploitation of children by terrorist groups, focusing on prevention, justice for children, rehabilitation and reintegration.[129]

Promising practice

Developing counter-narratives in Germany

Germany has set up an umbrella programme to prevent extremism and radicalisation, with children and young persons a key target group. '*Demokratie leben!*' (Live Democracy!) began in 2015; the German Government gave it € 104.5 million in funding in 2017. Most of its initiatives focus on raising awareness regarding racism, antisemitism, homophobia and online hate.

One of the projects that it funds focuses on civic education on Islamophobia and Islamism among peers. Called '*Was postest du*?' ('What are you posting?'), it aims to provide alternative perspectives to challenge Islamist narratives in social networks. Muslim adults enter into online discussions with young Muslim people, encouraging them to develop individual responses to relevant societal topics. Follow-up projects are taking up these experiences – for instance, developing online videos or tools for schools, countering radical propaganda. All of the initiatives render visible the diversity of Muslim approaches and intervene in early stages of radicalisation.

For more information, see the website of the 'Live Democracy' programme and of Ufuq.de.

The HLCEG-R has also emphasised the need to map, promote research into and evaluate the impact of anti-radicalisation programmes.[130] There is little research on this. For example, the Department for Education in the **United Kingdom** surveyed how local authorities respond to radicalisation cases, and what social interventions worked in 10 municipalities. The report makes a number of recommendations,

including strengthening multiagency coordination and information sharing, working with the families of the children, and establishing a single referral system.[131] The European Commission funded the initiative IMPACT Europe, which aims to fill the gap in knowledge and understanding of what works in tackling violent extremism. This project came to an end in 2017, with the development of an evaluation guide, a database of interventions, a compilation of lessons learned and a training manual.[132]

8.3.2. Member States' national agendas target radicalisation

Addressing radicalisation and violent extremism remained high on the policy agenda of some Member States during 2017. Most Member States have implemented programmes in the field of radicalisation, ranging from action plans and training of police or teachers, to developing educational programmes for schools[133] and creating centres of expertise.

For example, the government of **Denmark** presented a National Action Plan to combat radicalisation. The priorities for 2017 include improving the capacities of educational institutions to prevent radicalisation and extremism through tailor-made educational material and guidance for professionals, dialogue activities, and online campaigns with a focus on strengthening critical thinking, particularly among children and young people.[134] In the **Netherlands**, a report from the Dutch General Intelligence and Security Service and the National Coordinator for Security and Counterterrorism focused on what to do with children and young people returning from Islamic State (IS) territory.[135]

The **Slovak** Ministry of Education published Pedagogical-organisational Guidelines for School 2017–2018, with recommendations on preventing extremism and radicalisation in schools.[136] The **Swedish** Agency for Youth and Civil Society published a guide on how civil society actors and municipalities can cooperate in actions counteracting extremism that promotes violence.[137]

In **Belgium**, the Wallonia–Brussels Federation opened a centre for help and care of persons affected by radicalisation and violent extremism. It offers systematic individualised care to children and adults susceptible to radicalisation and provides support to families. Concretely, it provides a telephone contact line and psycho-social assistance, initiates tailor-made disengagement paths, and coordinates a research centre.[138]

Promising practice

Using education to address the radicalisation of young people

In **Belgium**, an educational tool accompanies *Lettres à Nour*, a play that tells the story of the correspondence between a father and his daughter who went to fight for IS. The tool is divided into nine chapters, each of which deals with a topic such as Islam, geopolitical considerations or manipulation methods. The tool is meant to serve as a resource for teachers of students in years 5 and 6 to generate in-depth reflection on the phenomenon of radicalisation in the classroom.

For more information, see the webpage on the play.

In **Sweden**, the Dialogue Compass offers governmental-developed educational material for professionals (such as social workers, teachers, police officers, nurses and youth leaders) who meet young people at risk of radicalisation. The material aims to prevent radicalisation of young people by engaging in supportive and preventive dialogue.

For more information, see the project website.

FRA opinions

In line with the trend of the previous two years, the number of children in the EU living at risk of poverty or social exclusion continued to decrease. Nevertheless, almost 25 million children are at risk of poverty or social exclusion; this requires the urgent attention of the EU and its Member States. Article 24 of the EU Charter of Fundamental Rights provides that "[c]hildren shall have the right to such protection and care as is necessary for their well-being". The European Semester in 2017 included an increased number of country-specific recommendations related to children – but, for the first time, none related to child poverty. EU Member States make very limited use of the European Commission's 2013 Recommendation 'Investing in children: breaking the cycle of disadvantage' in their National Reform Programmes as part of the European Semester. Although it has been criticised by civil society actors, the European Pillar of Social Rights might present an opportunity to change child poverty rates and reinforce the Commission's 2013 Recommendation, the implementation of which the Commission evaluated in 2017.

FRA opinion 8.1

The European Union and its Member States should ensure they deliver on the commitments included in the European Pillar of Social Rights to protect children from poverty, provide access to affordable early childhood education and care of good quality without discrimination. They should also ensure the right of girls and boys from disadvantaged backgrounds to specific measures to enhance equal opportunities. The implementation of the Pillar requires concrete legislative proposals, action plans, budgetary allocation and monitoring systems in all areas that affect children and their families, such as employment, gender equality, access to health services, education and affordable housing.

EU Member States should make use of the Commission's 2013 Recommendation 'Investing in children' when presenting their National Reform Programmes for the European Semester.

Seven per cent of families with children in the EU experience severe housing deprivation. They are living in overcrowded households with at least one of the following: a leaking roof, no bath/shower and no indoor toilet, or insufficient light. Despite the lack of EU-wide data on evictions and homelessness, reports from national statistical offices and NGOs highlight an increased number of children in homeless shelters. Article 34 (3) of the EU Charter of Fundamental Rights recognises "[t]he right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices". The European Pillar of Social Rights' principles also include access to social housing, protection from forced eviction and support to homeless people – but, in contrast to the Revised European Social Charter, the Pillar does not establish any binding measures. However, when ratifying the Revised European Social Charter, only seven Member States accepted as binding the provision on the right to housing.

FRA opinion 8.2

EU Member States should establish the fight against severe housing deprivation as a political priority and ensure that families with children, especially those living at risk of poverty, have priority access to social housing or are provided with adequate housing assistance. Relevant authorities should address homelessness and implement measures that include the prevention or delay of evictions of families with children, especially during winter. While doing so, Member States should make use of various housing funding programmes that the EU offers.

The EU should promote regional and cross-national exchange of practices related to practical measures to prevent evictions of families with children. It should also promote EU-wide efforts to collect data on evictions of families with children and on homelessness.

The number of asylum seekers and refugees arriving in Europe decreased in 2017. Fewer than 200,000 children applied for asylum in the EU, a reduction of almost 50 % compared with 2016. The European Commission's 2017 Communication setting out actions to protect children in migration was a positive step forward. The best interests of the child is a well-established international human rights law principle enshrined in the Convention on the Rights of the Child (Article 3), the EU Charter of Fundamental Rights (Article 24) and EU secondary law, as well as in most national legislation related to children. However, there is a shortage of guidance, data collected for FRA's *Fundamental Rights Report 2018* show; only a few Member States have developed structured processes and methods to implement the best interests of the child in practice.

FRA opinion 8.3

EU Member States should formalise procedures appropriate for their national contexts for assessing the best interests of the child in the area of asylum or migration. Such procedures should clearly define situations when a formal best interests determination is necessary, who is responsible, how it is recorded and what gender and cultural-sensitive methodology it should follow.

The EU could facilitate this process by coordinating it, mapping current practice and guiding the process, through the existing networks of Member States on the rights of the child and the protection of children in migration, which the European Commission coordinates.

Children continue to be detained for immigration purposes. However, a number of Member States have taken positive steps towards developing alternatives to detention. The EU *acquis* establishes that children are to be detained only as a last resort and only if less coercive measures cannot be applied effectively. Such detention must be for the shortest period of time possible. At the United Nations level, the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families issued two Joint General Comments in which they deem immigration detention of children a violation of the rights of the child. They affirm that children "should never be detained for reasons related to their or their parents' migration status". The stringent requirements flowing from the EU Charter of Fundamental Rights and from Articles 3 (prohibition of torture) and 5 (right to liberty and security) of the European Convention on Human Rights (ECHR) mean that deprivation of liberty will be in line with EU law only in exceptional cases.

FRA opinion 8.4

To promote children's right to protection and care, the EU and its Member States should develop credible and effective non-custodial alternatives that would make it unnecessary to detain children during asylum procedures or for return purposes, regardless of whether they are in the EU alone or with their families. This could include building on, for example, case management, alternative care, counselling and coaching.

The European Commission should consider the systematic monitoring of the use of immigration detention for children and other people in a vulnerable situation.

Radicalisation and violent extremism, rooted in different ideologies, is a reality in Europe. The establishment of the EU High-Level Commission Expert Group on Radicalisation (HLCEG-R) is a promising development towards a comprehensive response. A number of fundamental rights concerns come into play in the area of radicalisation and in implementing the EU's internal security strategy. Member States have implemented a combination of law enforcement measures, but also established educational programmes or centres of support for children at risk of radicalisation and their families, or promoted alternative narratives on online platforms.

FRA opinion 8.5

EU Member States should address the complex phenomenon of radicalisation through a holistic, multidimensional approach going beyond security and law enforcement measures. For this, Member States should establish programmes that promote citizenship and the common values of freedom, tolerance and non-discrimination, in particular in educational settings. Member States should encourage effective coordination among existing actors in child protection, justice, social and youth care, health and education systems to facilitate comprehensive integrated intervention.

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UN & CoE

January

February

March

2 March – In *Talpis v. Italy* (No. 41237/14), the European Court of Human Rights (ECtHR) holds that the Italian authorities failed to protect a mother and son because they did not take prompt action on a complaint concerning conjugal violence, which resulted in violation of the right to life, inhuman or degrading treatment and discrimination (Articles 2, 3 and 14 of the European Convention on Human Rights (ECHR))

13 March – Council of Europe's Commission for Democracy through Law (Venice Commission) adopts its Opinion on questions relating to the appointment of judges of the Constitutional Court in Slovakia

April

26 April – Parliamentary Assembly of the Council of Europe (PACE) adopts Resolution 2159 on protecting refugee women and girls from gender-based violence

May

12 May – Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse (Lanzarote Committee) adopts its 3rd activity report

19 May – Committee of Ministers of the Council of Europe adopts its revised Guidelines on the protection of victims of terrorist acts

June

29 June – PACE adopts resolution 2178 on the implementation of judgments of the ECtHR, stressing that the excessive length of judicial proceedings and lack of an effective remedy in this respect has remained an issue for more than ten years; this problem concerns, among others, Bulgaria, Hungary, Italy, Poland and Romania

PACE also adopts resolution 2177 on putting an end to sexual violence and harassment of women in public space

July

August

September

27 September – Monitoring mechanism GREVIO set out in the Istanbul Convention publishes the first evaluation report on the situation in Austria and its compliance with the convention

October

November

22 November – Austria, Bulgaria and Luxembourg sign the Council of Europe's Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons

24 November – GREVIO (Istanbul Convention monitoring mechanism) publishes first evaluation report on the situation in Denmark and its compliance with the convention

30 November – European Network of National Human Rights Institutions (ENNHRI) adopts a statement highlighting the need for strong and independent national human rights institutions to uphold the rule of law and democratic space across Europe

December

8 December – Council of Europe's Venice Commission adopts two opinions on the judicial reforms in Poland, concluding that they enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to judicial independence

EU

January

February

March

7 March – EU adopts Directive (EU) 2017/541 of the European Parliament (EP) and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA

April

4 April – European Parliament (EP) adopts a recommendation following an inquiry into emission measurements in the automotive sectors, calling for the establishment of an EU-wide system of collective redress regarding emission measurements in the automotive sector

28 April – Based on decisions of the Court of Justice of the EU (CJEU), the European Commission adopts a Notice on Access to Justice in Environmental Matters on how national courts should address questions of access to justice related to EU environmental legislation

May

22 May – European Commission launches call for evidence on the operation of collective redress arrangements in the Member States of the EU within the meaning of Commission Recommendation 2013/396/EU

June

13 June – EU signs the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

July

August

September

12 September – EP issues a resolution asking the Council, the Commission and the Member States to speed up negotiations on ratification and implementation of the Istanbul Convention and to make sure that the Member States enforce the convention on national level

October

12 October – In *Frank Sleutjes* (C-278/16), the CJEU clarifies which documents must be translated to ensure a fair trial

12 October – Council Regulation establishing the European Public Prosecutor's Office (EPPO) 2017/1939 is adopted by 20 EU Member States that are part of the EPPO enhanced cooperation

26 October – EP issues resolution 2017/2897 (RSP) on combating sexual harassment and abuse in the EU

November

14 November – *In Maximilian Schrems v. Facebook Ireland* (C-498/16), Advocate-General Bobek observes that Regulation 44/2001 does not provide specific provisions for collective redress; the Opinion concluded that Article 16 (1) of the regulation, which deals with jurisdiction over consumer contracts, cannot be interpreted as allowing consumers to invoke at the same time as their own claim, claims on the same subject assigned by other consumers, irrespective of their domicile

December

4 December – European Commission publishes a Communication containing a list of concrete actions to better prevent trafficking in human beings

12 December – Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004 is adopted

14 December – European Parliament adopts resolution on the implementation of Directive 2011/93/EU of the EP and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography (2015/2129(INI))

20 December – European Commission issues the Reasoned Proposal in accordance with Article 7(1) of the Treaty on EU regarding the Rule of Law in Poland accompanied by the Rule of Law Recommendation; it also refers the Polish Government to the CJEU for breach of EU law, concerning the Law on the Ordinary Courts and, specifically, the retirement regime it introduces

9 Access to justice including the rights of crime victims

Despite various efforts by the EU and other international actors, challenges in the areas of the rule of law and justice posed growing concerns in the EU in 2017, triggering the first-ever Commission proposal to the Council to adopt a decision under Article 7 (1) of the Treaty on European Union. Meanwhile, several EU Member States took steps to strengthen their collective redress mechanisms in line with Commission Recommendation 2013/396/EU, which potentially improves access to justice. Victims' rights also saw progress. About a third of EU Member States adopted legislation to transpose the Victims' Rights Directive; many implemented new measures in 2017 to ensure that crime victims receive timely and comprehensive information about their rights from the first point of contact – often the police. The EU signed the Istanbul Convention as a first step in the process of ratifying it. Another three EU Member States ratified the Convention in 2017, reinforcing that EU Member States recognise the instrument as defining European human rights protection standards in the area of violence against women and domestic violence. This includes sexual harassment – an issue that received widespread attention due to the #metoo movement.

9.1. Rule of law challenges and hurdles to justice pose growing concerns

"The rule of law means that law and justice are upheld by an independent judiciary. Accepting and respecting a final judgment is what it means to be part of a Union based on the rule of law … To undermine [the judgments of the Court of Justice], or to undermine the independence of national courts, is to strip citizens of their fundamental rights. The rule of law is not optional in the European Union. It is a must."

Jean-Claude Juncker, President of the European Commission, Speech on the State of the Union, 13 September 2017

An independent judiciary is the cornerstone of the rule of law, which Article 2 of the Treaty on European Union (TEU) lists as one of the core values on which the Union is founded. The European area of justice can only work if all EU Member States adhere to the rule of law. An independent judiciary is also – as outlined in a study by the EU's Joint Research Centre – intrinsically linked to a country's prosperity and international standing.[1] According to Goal 16.3 of the 2030 Agenda for Sustainable Development, UN member states are expected to promote the rule of law at the national and international levels and ensure equal access to justice for all.[2]

The rule of law situation in **Poland** continued to cause growing concern. In 2017, for the first time in the history of the EU, the European Commission recommended that the Council adopt a decision under Article 7 (1) of the TEU.[3] The main concerns related to Poland's executive and legislative branches interfering with the composition, powers, administration and functioning of the judicial branch. The situation worsened despite continued efforts to address these fundamental rights challenges by the EU, including the European Parliament[4] and the Council,[5] as well as various international actors. These included the Council of Europe – particularly its Venice Commission and Commissioner for Human Rights[6] – and the United Nations (via the Special Rapporteur on the independence of the judges and lawyers).[7]

The European Commission's reasoned proposal under Article 7 (1) was accompanied by the specific Rule of Law Recommendation, which identified justice-related laws that negatively affect the Supreme Court and the National Council for the Judiciary.[8] In addition to

activating Article 7 and issuing the recommendation, the Commission decided to take the next step in its infringement procedure. It referred Poland to the Court of Justice of the EU for breaches of EU law, based on the legislation that introduced different retirement ages for female and male judges and provided the Minister of Justice with discretionary powers to prolong the mandates of judges who have reached the retirement age and to dismiss and appoint court presidents.[9]

EU and international actors in 2017 also called for looking into the rule of law situation in the area of access to justice in three additional EU Member States: **Bulgaria**, **Malta** and **Romania**. In the case of **Malta**, the European Parliament adopted a resolution calling on the Commission to start dialogues on the functioning of the rule of law in the country.[10] According to the European Parliament, this was due to the specific circumstances of the investigation into the assassination of Daphne Caruana Galizia, an investigative journalist, and the country's worsening track record in prosecuting financial crimes.

The Council of Europe's Parliamentary Assembly (PACE) adopted a resolution on 11 October 2017, calling on several Council of Europe member states to fully implement the principle of the rule of law.[11] In relation to justice systems in **Bulgaria** and **Poland**, the assembly expressed concerns about, among others, the tendency to limit the judiciary's independence through attempts to politicise the judicial councils and the courts. Regarding **Romania**, PACE called for ensuring that the government and the judiciary respect the separation of powers as regards the competences of the parliament, especially by avoiding the excessive use of emergency ordinances.[12]

In its reports on progress in Romania and Bulgaria under the Co-operation and Verification Mechanism of November 2017, the European Commission – while welcoming the considerable progress made – concluded that more work was still needed in relation to the judicial independence benchmark. In relation to **Romania**, it stressed the need to, among others, safeguard the practical application of the newly introduced codes of conduct for parliamentarians as well as minsters, which include a broad provision on respect of the separation of powers.[13] As for **Bulgaria**, the Commission pointed out, among others, the need to eliminate any doubts regarding possible undue influence on judges through the Supreme Judicial Council, as such influence could undermine the impression of an independent decision-making process within this key institution.[14]

The European Commission in 2017 continued to support EU Member States' efforts to strengthen the efficiency, quality and independence of their national justice systems through its EU Justice Scoreboard, underlining the crucial role of the national justice systems in upholding the rule of law.[15] The EU Justice Scoreboard contributes to the European Semester process by bringing together data from various sources and helping to identify justice-related issues that deserve particular attention for an investment, business- and citizen-friendly environment.

The 2017 Scoreboard looked into new aspects of justice systems – for example, how easily consumers can access justice and which channels they can use to submit complaints against companies. For the first time, it also showed the length of criminal court proceedings relating to money-laundering offences. The 2017 Scoreboard highlights improvements achieved regarding the length of civil and commercial court proceedings since last year's Scoreboard. However, the findings also show that the length of administrative proceedings and judicial review varies a lot depending on the country; that citizens whose income is below the Eurostat poverty threshold do not receive any legal aid in some types of consumer-related disputes; and that the use of ICT tools in justice systems is still limited in some countries.

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In the context of the existing recommendation by the European Parliament on the creation of an EU mechanism on democracy, the rule of law and fundamental rights, the Commission in 2017 followed up on the European Parliament resolution recommending that the variety of existing data and reports on human rights issues by diverse actors – such as the UN, the Organization for Security and Co-operation in Europe (OSCE), the CoE and the EU – become more accessible and visible, including at national level. In its follow up, the Commission referred to FRA's role in "making easily accessible a clear overview of existing information and reports relating to Member States or particular themes".[16]

9.2. Facilitating access to justice through collective redress mechanisms

EU developments

Collective redress mechanisms allow individuals to jointly request unlawful business practices to be stopped or prevented, or to obtain compensation for the harm caused by them.[17] In 2011, the Flash Eurobarometer on 'Consumer attitudes towards cross-border trade and consumer protection' found that

79 % of European consumers agree that they would be more willing to defend their rights in court if they could join other consumers complaining about the same issue. Allowing individuals to join claims that concern breaches of law that affect identical or similar interests belonging to more than one legal or natural person improves access to justice. Such mechanisms allow multiple claimants to share the cost of judicial proceedings, reducing the financial burden on individuals; and expedite the resolution of their cases. They make remedies more accessible and so help fulfil EU citizens' rights to an effective remedy and to a fair trial – as protected under Article 47 of the Charter and Articles 6 and 13 of the ECHR – in practice.

The European Commission in 2017 declared that it will assess the practical implementation of Recommendation 2013/396/EU, which aims to establish national collective redress mechanisms (to request cessation of illegal behaviour and to obtain compensation for harm done) based on a set of common principles.[18] The recommendation requires such an assessment.[19] The Commission aims to assess the impact of the common principles, which Member States were supposed to have implemented by 26 July 2015, on access to justice.

FRA ACTIVITY

Promoting collective action for better rights protection

In 2017, FRA issued an Opinion on business and human rights, calling for the enactment of procedural rules to allow victims to "join forces to overcome obstacles" or so that "organisations may act on behalf of victims", thereby making effective their access to a remedy for human-rights abuses caused by businesses.

As emphasised in the Opinion, which is also based on the 2016 Council of Europe recommendations and 2016 UN guidance, broad collective action has to be put in place with clear criteria and consistently applied to allow entities to bring claims on behalf of alleged victims. As it notes, a "uniform approach to criteria applied across the EU Member States would facilitate access to remedy in cases of business-related human rights abuse".

See FRA (2017), Opinion on Improving access to remedy in the area of business and human rights at the EU level, Vienna, 10 April 2017, pp. 6-7; Council of Europe, Committee of Ministers (2016), Recommendation CM/Rec(2016)3 to member States on human rights and business, 2 March 2016, para. 42; UN, Human Rights Council (2016), Business and human rights: improving accountability and access to remedy for victims of business-related human rights abuse, 10 May 2016, para. 15.3; UN Human Rights Office of the High Commissioner, The OHCHR Accountability and Remedy Project – Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, 5 July 2016, p. 30.

Progress at Member State level

The vast majority of EU Member States have some form of collective redress mechanism in place. These mechanisms vary widely. Some EU Member States establish collective mechanisms with a wide scope, while others restrict collective forms of relief to certain areas – for example, consumer protection. Throughout the year, while the European Commission began assessing the impact of Recommendation 2013/396/EU on access to justice, a number of related developments took place at national level.

A few Member States adopted new legislation to introduce collective redress mechanisms in line with the recommendation. In **Slovenia**, a new law that aims to implement the recommendation entered into force in 2017. The Class Action Act[20] for the first time introduced a wide mechanism for collective action, the provisions of which by and large mirror the common principles of Recommendation 2013/396/EU. In **Hungary**, Act CXXX of 2016 on Civil Procedures was adopted in 2017, and will enter into force on 1 January 2018; it introduces a mechanism enabling collective action.[21] Legislators referred to the recommendation while drafting this law, showing that it played a role in the law's development.[22]

Several other Member States amended their legal frameworks to improve or reinforce existing collective redress mechanisms. For example, **Belgium** and **Poland** did so, making reference to Recommendation 2013/396/EU. In **Belgium**, with the Law of 6 June 2017, violations of rules applying to undertakings – particularly the prohibitions concerning practices or activities that affect trade between Member States or the functioning of the internal market, as described in Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU) – will join the list of grounds that can lead to collective action.[23] In **Poland**, an amendment of the Act on group redress mechanisms aimed to eliminate issues relating to the length of proceedings, legal certainty and the costs of the process.[24] According to the rationale of the draft act, this was necessary to ensure that collective redress mechanisms as described in Recommendation 2013/396/EU are fair, equitable, timely and not prohibitively expensive.[25]

Other Member States tabled draft bills on collective redress in their national parliaments. At the stage of parliamentary consultation, following the "Plan of Legislative Work of the Government for 2017",[26] the Ministry of Justice in the **Czech Republic** tabled a draft bill on collective actions.[27] In **Italy**, the Senate conducted informal hearings to assess the impact of, and reforms introduced by, Draft Law No. 1950[28] on "Dispositions Concerning Class Actions". Notably, in one of the hearings, civil society organisations proposed changes

to the draft law based on the common principles of Commission Recommendation 2013/396/EU.[29]

Other Member States – such as **Austria**[30] and **Germany** – continued their efforts to develop draft bills in 2017. In **Germany**, a discussion paper prepared by the Federal Minister of Justice and for Consumer Protection proposed a draft bill that introduces a model declaratory procedure, which was explicitly based on Recommendation 2013/396/EU.[31]

The recommendation has also been used as an instrument of interpretation by national courts. For example, in **Belgium**, a new law was adopted in 2017 following a ruling of the Constitutional Court.[32] In this ruling, the court held that excluding representative entities from other Member States of the EU and European Economic area from the possible entities that can represent a group of people breaches Article 10 and 11 of the Constitution in conjunction with Article 16 of the Services Directive.[33] The court relied on, among other things, Recommendation 2013/396/EU to determine whether the difference in treatment was justified by an objective criterion, since the aim of the impugned law and the recommendation were aligned as they both dealt with consumer protection.[34]

9.3. Advancing victims' rights

EU developments

About one third of Member States adopted legislation in 2017 to transpose the Victims' Rights Directive (2012/29/EU) and thus improve the rights of crime victims across the EU. These included Bulgaria,[35] Croatia,[36] the Czech Republic,[37] Estonia,[38] Greece,[39] Ireland,[40] Luxembourg,[41] the Netherlands[42] and Slovakia.[43] FRA has reported on Member States' actions to implement the Victims' Rights Directive since 2015, and the past few years have seen steady progress in terms of many Member States putting into practice new laws and measures to ensure that crime victims can access their rights under the directive. However, while the deadline for transposing the Victims' Rights Directive passed in November 2015, the European Commission has yet to evaluate full compliance with the directive.[44]

At the EU level, the European Commission placed effective compensation for crime victims high on the agenda by appointing, in October 2017, Joëlle Milquet as Special Adviser to President Jean-Claude Juncker for the compensation of victims of crime. The Special Adviser is mandated to promote better enforcement of existing laws on compensation, including advancing cooperation between national authorities responsible for compensation and expediting victims' access to compensation across the EU.[45]

Other key developments at EU level focussed on specific categories of crime victims. The year saw considerable political and policy-level interest in different categories of victims, such as victims of terrorism; victims of trafficking in human beings; victims of gender-based violence (dealt with in Section 9.4.); and victims of hate crime (see Chapter 4 on Racism, xenophobia and related intolerance for developments in this area). These are all categories of victims to which the Victims' Rights Directive pays particular attention.

Eight EU Member States reported 142 failed, foiled and completed terrorist attacks in 2016 alone.[46] To strengthen the EU's response to terrorism, the European Parliament and Council adopted Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism (Directive on Combating Terrorism). In addition to strengthening the EU's legal framework for preventing terrorist attacks, it outlines a number of rights for victims of terrorism, such as the right to receive immediate access to professional support services, to receive legal and practical advice, as well as help with compensation claims. Member States must transpose the directive by 8 September 2018.

To support Member States in ensuring an effective legislative and policy response that safeguards the rights and needs of terrorism victims, the European Parliament commissioned and published a study on responses to the needs of victims of terrorism in Belgium, France, Germany, Hungary, Spain and the United Kingdom. It contains recommendations and best practices for Member States to follow to empower and support victims of terrorism and allow them effective access to justice.[47] The research and findings focus on the two main EU instruments in this field: the Victims' Rights Directive and the Directive on Combating Terrorism.

Building on the EU Strategy towards the eradication of trafficking in human beings 2012-2016, the European Commission published a Communication in December 2017, containing a list of concrete actions for the EU and its Member States to better prevent trafficking in human beings.[48] Key areas that require immediate action from the EU and the Member States include: providing better access to and realising rights for victims; disrupting the business model that trafficking in human beings depends on; and ensuring that EU internal and external actions provide a coordinated and consistent response. The communication stresses the need for all actions to follow a human rights-based, gender-specific and child-sensitive approach.

Promising practice

Supporting the fight against severe forms of labour exploitation

In 2017, FRA followed up on its 2015 report on 'Severe labour exploitation' by extending the evidence beyond the views of professionals who deal with labour exploitation to interview foreign workers themselves about their experiences with criminal forms of such exploitation.

The agency – through face-to-face interviews and focus groups in selected EU Member States – reached 250 workers from diverse EU and third countries, covering sectors such as agriculture, construction, domestic work, manufacturing, transport and hotel/food services. Findings will be published in 2018 and 2019, and will provide a rich base of evidence concerning the main risk factors for severe labour exploitation from exploited workers' perspectives and experiences.

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

Implementing the Victims' Rights Directive

EU Member States introduced new legislation and practical measures to implement the Victims' Rights Directive. This included introducing protection measures (for example, when interviewing victims/witnesses with specific protection needs); enhancing the possibilities for victims to access support services; and facilitating victims' rights to information in a language they understand.

A notable trend in 2017 was that police services in several Member States focussed on systematically providing better information to crime victims – to ensure that they can access their rights under the Victims' Rights Directive to receive information from their first contact with a competent authority (Article 4) and to access victim support services (Article 8). For example, police authorities in **Cyprus** issued instructions to police regarding their duties arising under the law transposing the directive. In addition, a new awareness leaflet comprehensively sets out the rights of victims (including the right to lodge a complaint against the police and contact details for support organisations in the private and public sectors). It is available in six languages (Greek, English, Turkish, Arabic, French and Russian).[49]

The European Public Law Organisation – supported by the Greek Ministry of Citizens' Protection and the Hellenic Police – published a guide for police officers on services across **Greece** for crime victims, as police are often uncertain as to what to advise victims concerning their right to support.[50]

Ireland introduced specialist 'Protective Services Units' within the police that will specialise in the investigation of sexual and domestic violence and human trafficking, and will provide victims of these crimes with better support. The first four divisional units were operational on 2 June 2017. Further units will be established in other police divisions throughout the country by early 2018. The move has been welcomed by several national victims' groups.[51]

A new regulation introduced in the **Netherlands** in 2017 mandates police to inform victims about their rights at the start of criminal proceedings.[52] Finally, a 'Victim Support Unit' within the **Maltese** Police Force, providing a single point of contact for crime victims after they report to police, began operating in 2017.[53] The police will provide crisis counselling services to victims; facilitate effective and timely referrals to other support services; and monitor the number of victims that are accessing their rights and victim support services.

Promising practice

Improving the police's response to crime victims

The Human Rights Monitoring Institute, together with the **Lithuanian** Police School, began a project in 2017 that aims to equip law enforcement officers with the knowledge and tools necessary to effectively respond to victims of crime. The project also seeks to improve victims' access to information and raise public awareness on victims' rights. It is funded by the Justice Programme of the EU.

A toolset for officers will be produced, consisting of a handbook, dissemination material for victims, and professional training modules. More than 300 officers and lecturers will be trained in 10 regions of the country. A website for crime victims will also be launched, comprising information on victims' rights, available support services and what happens during criminal proceedings.

For more information, see the Human Rights Monitoring Institute's webpage on the project.

Assessing victims' satisfaction with treatment received

Article 26 (2) of the Victims' Rights Directive states that Member States shall take action to raise awareness of the rights set out in the directive, among other things "reducing the risk of victimisation, and minimising the negative impact of crime and the risks of secondary and repeat victimisation". Meanwhile, Article 28 obliges Member States to report to the Commission every three years on how victims have accessed the

rights set out in this directive. Several Member States took action in this area throughout the year.

In November 2017, **Estonia** published a report on victims' experience and treatment. It concluded that, although 60 % of victims are satisfied with the way they have been treated by the criminal justice system, the system is still not considered 'victim-friendly'.[54] Findings show that information about victims and their cases is not passed smoothly from one institution to another, causing secondary victimisation to the victim.

The Ministry of Justice in **Denmark** published the findings of a study of 58 victims who reported sexual assaults to the police. Around one third of the victims found that the police handled their case in a "dissatisfactory" or "very dissatisfactory" way. A third of victims also experienced difficulties in reporting – for example, stating that the police doubted their statements or asked them to reconsider their report. One third of the victims also claimed that they were not properly informed about the proceedings of their case.[55] In a separate development, the Director of Public Prosecutions established an expert group of investigators and prosecutors and a consultancy forum (of police officers and organisations working with victims of sexual assaults) to exchange views and discuss new initiatives to improve responses to victims of sexual assaults.[56]

In **Finland**, the Ministry of Justice appointed a working group (comprised of representatives of relevant ministries, other relevant authorities and civil society) to advance best practices in respecting victims' rights in criminal proceedings – with a focus on victims of sexual offences and child victims.[57] The working group will assess criminal proceedings from the victim's perspective with particular attention to how victims are treated and how they access information about their rights and possibilities of support and protection. The group will then advise on how to improve the situation in line with victims' rights.[58]

The **Italian** Ministry of Justice released a Circular Letter in June, announcing the creation of a permanent monitoring mechanism on the implementation of the directive. It asked relevant public stakeholders, such as courts' presidents and public prosecutors, to regularly provide data and statistics concerning the applications of the instruments aimed at providing information and judicial protection to victims.[59]

Finally, in the **United Kingdom,** the Ministry of Justice started an online survey of crime victims in 2017. It looks into victims' views of the Code of Practice for Victims of Crime,[60] with the aim of improving services for victims.

FRA ACTIVITY

Collecting evidence to support the implementation of the Victims' Rights Directive

FRA carried out field research in 2017 for a project on victims' rights, collecting information on the state of play of the rights of adult victims of violent crime under the Victims' Rights Directive. The project was carried out in seven Member States (Austria, France, Germany, the Netherlands, Poland, Portugal, and the United Kingdom). Some 240 interviews were conducted with practitioners and victims, including 50 interviews with victims of domestic (partner or ex-partner) violence.

The agency will publish two reports in 2019. One will focus on victims' access to justice and their role and participation in proceedings. The other will focus specifically on effective protection of women as victims of domestic violence against repeat victimisation and their situation in criminal proceedings.

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

Trends in support services for child victims

Throughout the year, various Member States introduced initiatives to protect child victims in line with their obligations under the Victims' Rights Directive – such as addressing child victims' specific protection needs during criminal proceedings (Article 24). For other 2017 developments relating to child rights, see Chapter 8 on the Rights of the child.

In **Germany**, as of January 2017, children who have been victims of serious sexual or violent acts are now entitled to professional psychosocial support and care free of charge before, during and after criminal proceedings. This also applies to adult victims or witnesses of serious crimes deemed to be particularly vulnerable.[61]

Finland published a guide containing information on the different stages of the criminal procedure for parents and guardians of child victims of violent or sexual offences. It provides information on practical arrangements during criminal proceedings, includes answers to the most typical questions that parents/guardians have, and directs them to sources of help and support.[62]

Malta integrated existing child-related regulations into one coherent legislative framework by enacting 'The Child Protection (Alternative Care) Act, 2017'.[63] The law introduces the concept of mandatory reporting of 'significant harm' to the Director responsible for Child Protection or the Executive Police. The reporting

requirement applies to 'any person' who, in the context of their work, comes into contact with a child suffering or likely to suffer harm, including professional workers and volunteers. Failure to report such cases can result in four to twelve months' imprisonment, a fine not exceeding € 5,000, or both. Upon receipt of such a report, the Director is obliged to conduct an investigation and assessment to determine whether the child is in need of care and protection, and to subsequently take action to protect the child.

Finally, although not bound by the Victims' Rights Directive, **Denmark** in 2017 took an important step for the realisation of the rights of child victims of sexual crime. It published a draft bill (to enter into force in spring 2018) abolishing all current Danish rules regarding statute-barre in future cases concerning sexual abuse of minors. The bill also abolishes, with retroactive effect, statute-barre for compensation claims in cases involving a municipality's omission and passivity on notifications about neglect or abuse.[64]

9.4. Violence against women and domestic violence

The Victims' Rights Directive aims to protect all victims of criminal offences, but also notes that women victims of gender-based violence often require special support and protection. In 2017, the EU signed the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) – the first step in the process of ratifying the convention. The instrument continued to strongly influence developments relating to combating violence against women and domestic violence at EU and national levels, with several Member States taking steps towards ratifying or implementing its provisions throughout the year.

9.4.1. Developments at EU level

In June 2017, the EU signed the Istanbul Convention as a first step in the process of the EU joining the convention.[65] As mentioned in FRA's *Fundamental Rights Report 2017*, the EU's accession to the Istanbul Convention will ensure accountability for the EU at the international level as it would have to report to the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), the convention's monitoring body. This would reinforce the EU's commitment to combating violence against women and domestic violence.

The European Parliament issued a resolution on 12 September 2017, asking the Council, the Commission and the Member States to speed up negotiations on the ratification and implementation of the Istanbul Convention and to make sure that the Member States enforce the convention at national level.[66]

As part of the Gender Equality Index 2017, the European Institute for Gender Equality (EIGE) published a methodology for assessing the extent of violence against women in the EU in terms of the prevalence, severity and level of disclosure of violence against women.[67] Several of the indicators used in the satellite domain on violence, which is included in the Gender Equality Index, are based on data provided by FRA's 2014 *Violence against Women survey*.

9.4.2. Improvements at Member State level: legislation, policy and data collection

GREVIO is part of the monitoring mechanism set out in the Istanbul Convention, and is responsible, together with the Committee of the Parties to the Convention, for monitoring the convention's implementation. The Istanbul Convention obliges State Parties to report to GREVIO on the legal and policy measures they have adopted to fulfil their obligations under the convention. On the basis of this reporting, GREVIO publishes evaluation reports assessing the legislative and other measures taken by states.

In 2017, GREVIO adopted and published its first evaluation reports on the situation in **Austria**,[68] Monaco,[69] Albania[70] and **Denmark**.[71] One – crucially important – issue addressed in the reports of Austria and Denmark concerns the failure of criminal codes to comprehensively criminalise sexual violence in line with the Istanbul Convention. Article 36 of the Istanbul Convention does not require the victim to express an opposing will for the act of sexual violence to be punishable; rather it suffices that the act was committed without the consent of the victim. In other words, what is decisive is not that the victim dissented, but that they did not consent. Thus the Istanbul Convention adopts an approach that highlights and reinforces a person's unconditional sexual autonomy.

This challenge has been discussed in other EU Member States, as well. In December 2017, the Government of **Sweden** presented a proposal to the Council on new sexual offence legislation based on lack of consent, and the obvious: sex must be voluntary. Convicting a perpetrator of rape will no longer require that violence or threats were used, or that the victim's particularly vulnerable situation was exploited. The Government also proposed introducing two new offences, 'negligent rape' and 'negligent sexual abuse'. The negligence aspect focuses on the fact that the other person did not participate voluntarily.

In its *Fundamental Rights Report 2017*, FRA called upon all EU Member States to ratify and effectively implement the Istanbul Convention. **Cyprus**, **Estonia** and **Germany** ratified the Istanbul Convention, bringing to 17 the number of EU Member States that had ratified it by the end of 2017. In addition, several other EU Member States took measures towards ratifying or implementing the convention's provisions. **Latvia**[72] and **Lithuania**[73] proposed draft legislation to ratify the Istanbul Convention. In addition, **Luxembourg**[74] introduced a bill foreseeing its ratification, while **Bulgaria**[75] began discussions on how to harmonise national legislation with the convention's requirements. In **Greece**,[76] a draft law introducing the Istanbul Convention to the national legal system is under public consultation.

In line with the Istanbul Convention and Victims' Rights Directive, EU Member States should collect statistical data on violence against women at national level. In 2017, Eurostat set up a Task Force to develop a new survey on gender-based violence to be carried out in EU Member States. FRA's EU-wide survey on violence against women served as a benchmark for the development of this survey. Ten EU Member States have expressed their willingness to pre-test the survey, which is planned to interview both women and men concerning their experience of gender-based violence. The countries are expected to submit their final pilot results by January 2019. In addition, several EU Member States, including **Belgium**,[77] **Finland**[78] and **France**,[79] among others, conducted surveys or published statistics on violence against women. Furthermore, in 2017 a majority of EU Member States took initiatives to conduct research or collect data on violence against women, indicating EU Member States' willingness to address the issue.

In 2017, several EU Member States took measures to criminalise and combat violence against women, especially with regards to Female Genital Mutilation (FGM) and stalking. The Istanbul Convention requires states to criminalise various forms of violence through establishing criminal offences in national legislation. Article 38 of the Istanbul Convention requires State Parties to take measures to ensure the criminalisation of FGM, and Article 34 requires them to take measures to ensure the criminalisation of stalking. In **Belgium**, amendments to the criminal code are currently under discussion to allow physicians to report risks of FGM.[80] Belgium also adopted a new policy to enhance prosecution of FGM, forced marriage and so-called honour related violence and to improve collaboration between relevant actors for this purpose.[81] **Estonia**[82] **and Latvia**[83] also made changes to their penal codes to criminalise FGM. In addition, **Sweden** adopted legislation increasing the penalty scale for the crime of FGM.[84] In 2017, several EU Member States, such as **Estonia**,[85] **Germany**[86] and **Latvia**,[87] also introduced or improved legislative measures to combat stalking by criminalising stalking and adopting protection measures for victims of stalking.

Protecting victims of domestic violence

Several EU Member States introduced new laws specifically addressing domestic violence. For instance, **Croatia** enacted a new law on protection from domestic violence.[88] In the **United Kingdom**, the Domestic Abuse (Scotland) Bill was passed on 1 February 2018, with a similar bill planned to be introduced in England and Wales. This latter bill focuses on early intervention and prevention and will ensure victims feel safe and supported, both to seek help and to rebuild their lives. In **Portugal**, the civil code was amended to allow for the public prosecutor to consider imposing protection orders due to domestic violence when initiating and deciding on parental responsibilities.[89] **Ireland** also introduced a Domestic Violence Bill as part of its strategy to implement the Istanbul Convention.[90]

In its *Fundamental Rights Report 2017*, FRA also called upon EU Member States to ensure immediate and reliable protection from domestic violence in line with Article 52 of the Istanbul Convention, allowing the police to effectively adopt emergency barring orders in cases of domestic violence. **Ireland**'s Domestic Violence Bill allows for the award of emergency barring orders even in cases where the victim has no legal or beneficial interest in the property in question.[91] **Croatia**'s newly adopted law on protection against domestic violence introduced provisions on emergency barring orders and other measures of protection.[92] **Malta** also proposed legislation that includes provisions on emergency barring orders and the issuing of protection orders.[93] In **Romania**, legislation including several amendments in the field of protection orders is under public consultation.[94]

GREVIO's first report on the relevant situation in **Denmark** expressed criticism concerning the implementation of emergency barring orders. GREVIO called on Denmark to step up efforts to implement the full range of emergency barring and protection orders available under the Act on Restraining Orders and to ensure their vigilant enforcement.[95] Meanwhile, GREVIO's report on the situation in Austria acknowledged "the strong leadership Austria has shown in the past 20 years in introducing a system of emergency barring and protection orders for victims of domestic violence. Today, this system is well established and is widely considered a success."[96]

Promising practice

Improving the protection of domestic violence victims

The MARAK method aims to improve the security of persons who are victims of domestic violence or at risk of such violence. It was designed in **Finland** based on experiences in the United Kingdom, where it was originally developed. The method comprises a risk assessment of an individual at risk of domestic violence through a questionnaire and an evaluation of the case in a multi-professional team at municipality level.

The multi-professional team is composed of representatives from relevant sectors, such as the police, social services, health services, child protection and victim support services. The team, based on the questionnaire and their evaluation, establishes a security plan and a support person for the victim in question. In addition to improving security for the victim, the team also plays an important role in sharing information between relevant authorities.

In 2017, a study was conducted to measure the impact of the MARAK method, which showed a significant improvement in the protection of victims of domestic violence.

For more information, see the website of the National Institute for Health and Welfare.

Countering sexual harassment

The recent global #metoo movement has drawn attention to the extent of sexual assault and harassment worldwide – which significantly affects women as victims, and also some men – and has sparked discussion about what is being done to prevent and combat this problem in Europe. FRA data have long highlighted the extent of sexual assault and harassment against women and girls in the EU. The agency's 2014 report on *Violence against women: An EU-wide survey* found that one in three women have been victims of physical and/or sexual violence during their lifetimes, and 55 % of women have experienced sexual harassment. In December 2017, the European Parliament issued resolution 2017/2897 (RSP) on combating sexual harassment and abuse in the EU, condemning all forms of sexual violence and physical or psychological harassment and recognising that such acts constitute a systematic violation of fundamental rights.[97]

Article 40 of the Istanbul Convention requires states to take necessary legislative or other measures to ensure that sexual harassment is subject to criminal or other non-criminal legal sanctions. Directive 2006/54/EC recognises that sexual harassment in matters of employment and occupation are contrary to the principles of equal treatment between men and women and could constitute discrimination on grounds of sex. It also obliges EU Member States to take effective measures to prevent sexual harassment in the workplace. However, reports assessing the directive's implementation indicate that it has not had any major impact on EU Member State efforts in preventing and combating sexual harassment.[98]

Several EU Member States took action in 2017 to combat sexual harassment. **Austria** amended the criminal code to criminalise the intentional gathering of persons with the purpose of perpetrating sexual harassment in a group.[99] Furthermore, one of the major trade unions in **Cyprus** prepared a draft code of conduct for addressing sexual harassment at the workplace.[100] In **Denmark**[101] and **Sweden**,[102] measures were discussed to criminalise and combat non-consensual distribution of intimate images and videos, including through improvements relating to case administration by the police and public prosecutors.

FRA ACTIVITY

Challenges to women's human rights in the EU

FRA published a paper in 2017 underlining the need for EU institutions and Member States to maintain their commitment to safeguarding the dignity of all women and girls in the EU. This paper was highlighted during the 2017 Annual Fundamental Rights Colloquium, which focused on "Women's rights in turbulent times".

Evidence collected by FRA confirms that women and girls in the EU experience persistent gender discrimination and gender-based violence. This severely limits their ability to enjoy their rights and to participate on an equal footing in society. The paper highlights concrete areas of intervention, such as gender inequality contributing to persisting discrimination, hate speech and violence against women, where the EU and its Member States could work actively to turn commitment into reality.

For more information, see FRA (2017), Challenges to women's human rights in the EU: Gender discrimination, sexist hate speech and gender based violence against women and girls, November 2017.

FRA opinions

The EU and other international actors in 2017 continued to be confronted with growing challenges in the area of justice at the national level and, in particular, regarding the issue of judicial independence. An independent judiciary is the cornerstone of the rule of law and of access to justice (Article 19 of the TEU, Article 67 (4) of the TFEU and Article 47 of the EU Charter of Fundamental Rights). Despite continued efforts of the EU and other international actors, the rule of law situation in one of the EU Member States caused increasing concern, particularly in terms of judicial independence. This prompted the European Commission to submit, for the first time in the history of the EU, a proposal to the Council for adoption of a decision under Article 7 (1) of the TEU.

FRA opinion 9.1

The EU and its Member States are encouraged to further strengthen their efforts and collaboration to reinforce independent judiciaries, an essential rule of law component. One way forward in this context is to depart from the existing approach of tackling rule of law emergencies in individual countries in an ad-hoc manner. Instead, the existing efforts should be stepped up to develop criteria and contextual assessments to guide EU Member States in recognising and tackling any possible rule of law issues in a regular and comparative manner. In addition, existing targeted advice from European and international human rights monitoring mechanisms, including the remedial actions set out in the European Commission's recommendations issued as part of its Rule of Law Framework procedure, should be acted on to ensure compliance with the rule of law. All EU Member States should always stand ready to defend the rule of law and take necessary actions to challenge any attempts to undermine the independence of their judiciary.

Collective redress mechanisms enhance access to justice, which is paramount to secure the effectiveness of Union law and ensure respect for fundamental rights, as required by Article 47 of the EU Charter of Fundamental Rights. For this purpose, European Commission Recommendation 2013/396/EU on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law has sought to facilitate access to justice and to that end recommended a general collective redress mechanism based on the same basic principles throughout EU Member States. In 2017, the Commission initiated its assessment of the implementation of Recommendation 2013/396/EU and several Member States took steps to directly implement it. Nevertheless, legislation at national level still significantly diverges among Member States, creating different forms and levels of collective action.

FRA opinion 9.2

EU Member States – working closely with the European Commission and other EU bodies – should continue their efforts to ensure that Commission Recommendation 2013/396/EU on collective redress mechanisms is fully implemented to enable effective collective action and access to justice. The collective redress mechanisms should be wide in scope and not limited to consumer matters. The European Commission should also take advantage of the assessment of the implementation of Commission Recommendation 2013/396/EU, initiated in 2017, to provide the necessary support to EU Member States to introduce or reform their national mechanisms for collective redress in line with the rule of law and fundamental rights in all the areas where collective claims for injunctions or damages in respect of violations of the rights granted under Union law would be relevant.

The year 2017 saw positive developments in terms of more EU Member States adopting legislation to transpose the Victims' Rights Directive, including efforts to ensure that victims are informed about the rights they have under new legislation. Evidence at national level in some Member States shows that victims still encounter obstacles to reporting crime and that victims do not always receive comprehensive information about their rights. This can negatively affect the victims' opportunity to access their rights in practice.

FRA opinion 9.3

Following positive legal developments to transpose the Victims' Rights Directive up until 2017, EU Member States should focus on the effective implementation of the directive. This should include the collection of data disaggregated by gender on how crime victims have accessed their rights; such data should be used to address gaps in institutional frameworks to enable and empower victims to exercise their rights. Further data collection at national and at EU level will shed light on this and highlight gaps that need to be filled to ensure that victims of crime have access to rights and support on the ground.

In 2017, another three EU Member States ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), bringing to 17 the total number of EU Member States that had ratified the convention by the end of the year. When it comes

to determining European standards for the protection of women against violence, the Istanbul Convention is the most important point of reference. In particular, Article 36 obliges State parties to criminalise all non-consensual sexual acts and adopt an approach that highlights and reinforces a person's unconditional sexual autonomy. However, the 2017 evaluation reports by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) revealed gaps in national legislation regarding the criminalisation of non-consensual sexual acts, which is not in line with the convention's requirements.

FRA opinion 9.4

All EU Member States and the EU itself should consider ratifying the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). EU Member States are encouraged to address gaps in national legislation regarding the criminalisation of all non-consensual sexual acts. EU Member States should – in line with Article 36 of the Istanbul Convention – unambiguously and unconditionally criminalise the respective acts.

The stark realities brought to the surface by the global #metoo movement underline FRA's findings from its 2012 Violence against Women survey, which showed that violence against women – including sexual harassment – remains widespread. Hence, there is a clear need for renewed emphasis in this area at both EU and Member State level.

FRA opinion 9.5

EU Member States should reinforce their efforts and take further measures to prevent and combat sexual harassment. This should include necessary steps towards effectively banning sexual harassment as regards access to employment and working conditions in accordance with Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

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UN & CoE

January

February

March

23 March – In *A.-M.V. v. Finland* (No. 53251/13), the European Court of Human Rights (ECtHR) finds no violation of Article 8 (right to respect for private and family life) or Article 2 of Protocol No. 4 (freedom of movement) of the European Convention on Human Rights (ECHR) as the Finnish courts' decision not to replace the mentor of a man with intellectual disabilities was justified, taking into account his inability to understand what was at stake if he moved

April

May

8 May – CRPD Committee publishes concluding observations on the initial report of Cyprus

June

July

14 July – UN Special rapporteur on the rights of persons with disabilities publishes a report on the sexual and reproductive health and rights of girls and young women with disabilities

August

31 August – CRPD Committee adopts General Comment No. 5 on Article 19 (right to independent living) of the CRPD

September

October

3 October – CRPD Committee publishes concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland

10 October – CRPD Committee publishes concluding observations on the initial reports of Luxembourg and Latvia

November

28 November – In *N. v. Romania* (No. 59152/08), the ECtHR finds that Romania violated Articles 5 § 1 (right to liberty and security) and 5 § 4 (speedy review of the lawfulness of detention by a court) of the ECHR on account of prolonged psychiatric confinement without sufficient assessment of the applicant's dangerousness and lack of regular review of his confinement

December

12 December – UN Special rapporteur on the rights of persons with disabilities publishes a thematic study on the right of persons with disabilities to equal recognition before the law

EU

January

16 January – Council of the EU confirms the European Commission's withdrawal from the EU Framework to promote, protect and monitor the implementation of the CRPD

February

2 February – European Commission publishes progress report on the implementation of the European Disability Strategy 2010-2020

14 February – Grand Chamber of the Court of Justice of the EU (CJEU) delivers an opinion (Opinion Procedure 3/15) concluding that the EU has exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled

March

April

May

June

July

12 July – European Ombudsman opens a strategic inquiry (OI/6/2017/EA) on the accessibility for persons with disabilities of websites and online tools managed by the European Commission

August

September

14 September – European Parliament (EP) adopts its position on the European Accessibility Act

October

November

30 November – EP adopts a resolution on the implementation of the European disability strategy 2010-2020

December

7 December – Employment, Social Policy, Health and Consumer Affairs Council agrees its position on the European Accessibility Act and adopts conclusions on enhancing community-based support and care for independent living

10

Developments in the implementation of the Convention on the Rights of Persons with Disabilities

The European Commission's progress report on implementation of the European Disability Strategy 2010-2020 provided an opportunity to take stock of the EU's efforts to realise the rights set out in the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD). Movement towards the adoption of the European Accessibility Act indicated that a major legislative milestone is moving closer. Despite significant achievements at the EU and national levels, however, implementation gaps persist in key areas such as accessibility and independent living. Tools such as indicators, as well as rulings by national courts on the justiciability of the CRPD, can help to ensure that practice follows the promise of legal obligations. Monitoring frameworks established under Article 33 (2) of the convention also have a crucial role to play, but a lack of resources, limited mandates and a lack of independence undermine their effectiveness.

10.1. The CRPD and the EU: taking stock for the future

Important milestones at the start and close of 2017 provided an opportunity to take stock of the EU's progress in implementing the CRPD. These marked the latest step in efforts to follow up on the CRPD Committee's recommendations to the EU, published in September 2015.[1] In January, the European Commission replied to the CRPD Committee about steps to address the three most urgent recommendations:

- declaration of EU competence concerning the CRPD;
- adoption of the European Accessibility Act; and
- EU Framework to promote, protect and monitor the implementation of the CRPD (EU Framework).

The following month, the European Commission published its progress report on implementation of the European Disability Strategy 2010-2020. While showing significant progress, the report reaffirms that persons with disabilities "remain consistently disadvantaged in terms of employment, education and social inclusion".[2] Discrimination on the grounds of disability is covered in Chapter 3, and the intersection between age and disability is addressed in Chapter 1.

The brief response to the CRPD Committee focused on the three urgent recommendations. On the first and third recommendations – the declaration of EU competence and the EU Framework – the European Commission highlighted concrete progress. An annex to the progress report on the European Disability Strategy presented an updated overview of EU legal acts referring to the CRPD, which showed an increasing number of legislative acts relating to matters governed by the convention. On the third recommendation, the Council of the EU formally adopted the European Commission's withdrawal from the EU Framework (see Section 10.3.). Adoption of the European Accessibility Act remains on the agenda for 2018 (see Section 10.1.1.).

The progress report on the European Disability Strategy covers the full range of EU action to implement the CRPD as set out in the strategy's eight 'areas for action': accessibility, participation, equality, employment, education and training, social protection, health and external action.[3] This reflects the strategy's position as "the main instrument to support

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the EU's implementation of the [CRPD]".[4] A look at a few of the 'areas for action' illustrates some of the steps EU institutions and Member States took in 2017 to implement the CRPD. Each shows achievement tempered by ongoing challenges.

10.1.1. Improving accessibility of information and communications

Accessibility is one area in which concrete steps forward have been taken since the adoption of the CRPD and the European Disability Strategy, particularly in the area of information and communication. Member States began taking steps to implement the requirements for the accessibility of websites and mobile applications set out in the Web Accessibility Directive, which was adopted in 2016 and has a transposition deadline of 23 September 2018.[5] For example, as a first step, the responsible ministries in **Bulgaria**[6] and **Finland** established working groups to support transposition.[7] In July, the Finnish working group published its draft mid-term report, which emphasises that the national implementation should be based on the realisation of fundamental rights, including the CRPD. **Denmark** launched a public consultation on a draft bill to implement the directive.[8] Although broadly welcoming the proposal, the Danish Institute for Human Rights, the country's national human rights institution, expressed concern about weaknesses in the enforcement procedure for the bill.[9] The EU institutions' own websites are not covered by the Web Accessibility Directive, but they are "encouraged to comply" with its accessibility requirements.[10]

In February 2017, the Court of Justice of the EU (CJEU) ruled that the EU has exclusive competence to conclude the Marrakesh Treaty to facilitate access to published works for persons who are blind, visually impaired or otherwise print disabled.[11] This paved the way for the adoption in September of a directive[12] and a regulation[13] introducing into EU law a new mandatory exception to copyright rules, in line with the treaty. This will "allow beneficiary persons and organisations to make copies of works in accessible formats, and to disseminate them across the EU and in third countries which are party to the treaty".[14]

The flagship piece of EU legislation in this area, the European Accessibility Act (EEA), is yet to be adopted, however. Following publication of the European Commission's proposed directive in late 2015, 2017 was marked by ongoing negotiations concerning the scope of the legislation and the technical accessibility requirements it contains. In April, the European Parliament's internal market and consumer protection committee (IMCO), the main committee responsible for the directive, adopted its report on the proposal.[15] Civil society organisations criticised its position as weakening the Commission proposal, in particular by excluding microenterprises from the scope of the legislation, limiting the requirements for audiovisual services to websites and mobile applications, and weakening the obligation to replace self-service terminals.[16]

When the plenary of the European Parliament voted on its final position on the draft EAA in September, however, it strengthened the Commission's proposal in several important ways.[17] For example, it included mandatory provisions on accessibility of the built environment around goods and services, expanded the modes of transport and tourism services covered by the legislation, and underlined the applicability of the act to other EU law, as the Commission had proposed.[18] Limits on the applicability of the draft directive to microenterprises and small and medium-sized enterprises remain, however.

On the Council side, technical negotiations throughout 2017 culminated in the adoption of a general approach on the draft legislation in December.[19] The Council's approach reflects in several important ways the positions that IMCO adopted in April. For example, it limits provisions concerning audiovisual media services, reduces its applicability to transport services and weakens the requirements for self-service terminals. Moreover, it removes provisions addressing the built environment and linking the EEA to "other Union acts", including European Structural and Investment Funds (ESIF) and the Public Procurement Directive.[20] Now that each of the three main EU institutions have adopted their position, negotiations on the final text can start in 2018. For developments at the national level, see Section 10.2.1.

10.1.2. Investing in independent living

Although not an explicit area for action, the right to independent living, set out in Article 19 of the CRPD, cuts across many of the main elements of the European Disability Strategy. As in previous years, deinstitutionalisation was a particular focus of attention. In October, FRA published three reports on the deinstitutionalisation process (see FRA activity box). The reports' publication coincided with a conference on the same topic hosted by the Estonian Presidency of the Council of the EU.[21]

FRA ACTIVITY

Promoting the right to independent living

In October, FRA published a series of three reports looking at different aspects of deinstitutionalisation for people with disabilities across the EU. The first report, exploring deinstitutionalisation plans and commitments, highlights the obligations the EU and its Member States have committed to fulfil, while the second one looks at how funding and budgeting structures can turn these commitments into reality. The final report assesses to what extent Member States have implemented the right to independent living, focusing on the impact that commitments and funds are having on persons with disabilities' daily lives.

FRA also conducted qualitative fieldwork research in five EU Member States (**Bulgaria**, **Finland**, **Ireland**, **Italy** and **Slovakia**) to explore the drivers of and barriers to deinstitutionalisation at the local level. The results of this fieldwork will be published in December 2018.

See FRA (2017), From institutions to community living – Part I: commitments and structures, Publications Office; FRA (2017), From institutions to community living – Part II: funding and budgeting, Publications Office; and FRA (2017), From institutions to community living – Part III: outcomes for persons with disabilities, Publications Office. For more information on the qualitative fieldwork, see the project's webpage.

In follow up to the conference, the Employment, Social Policy, Health and Consumer Affairs council adopted conclusions on enhancing community-based support and care for independent living in December.[22] The conclusions reiterate many of the main findings and recommendations emerging from the FRA reports.[23] For instance, they highlight the importance of "a clear strategy and strong investment [...] to develop modern high-quality community-based services"[24] and invite Eurostat to look into the possibility of including collective households, such as institutions, in surveys. They also underscore the importance of a holistic approach to deinstitutionalisation, encompassing a "change in mind-set [...] to secure wider recognition of the principle that everyone has the right to live independently within their community" and the "development of community-based services in accordance with the needs of the persons concerned".[25]

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Although civil society organisations broadly welcomed the conclusions, they highlighted concerns about the compatibility of some of the wording with Article 19 of the CRPD. In particular, the European Network on Independent Living suggested that some passages implied that "rather than closing institutions, Member States should improve them" and that independent living is not possible for some people.[26]

Reflecting the importance of this issue across EU institutions and bodies, in November the Committee of the Regions also adopted an opinion on deinstitutionalisation in care systems at local and regional level. It notes that deinstitutionalisation "is more than closing down large institutions and creating alternative forms of care", but also means "combating prejudice" and "changing mindsets". Arguing that "developing a more community-based system of care should be a high priority for all EU Member States", it calls for actions including training, reducing guardianship and guaranteeing assistance.[27]

> *"There is no such thing as a 'good institution' as they all impose a certain type of living arrangement, which limits the individual's capability to live a good life on an equal basis with others. Persons with disabilities, including those with high support needs, must have the opportunity to live in their communities, to choose their place of residence and with whom they live."*
>
> *Catalina Devandas-Aguilar, UN Special Rapporteur on the rights of persons with disabilities, End of mission statement on her visit to France, 13 October 2017*

Deinstitutionalisation also featured heavily in discussions concerning the fundamental rights compliance of the ESIF in 2017. As FRA's 2017 report *From institutions to community living – Part II: funding and budgeting* shows, for many Member States ESIF are a key source of funding, in addition to national resources, to achieve the transition from institutional to community-based support for persons with disabilities.[28] However, evidence of ESIF funding the construction of new institutions or renovation of existing institutions has focused much civil society attention on how to prevent misuse of the funds.[29]

In November, for example, the Community Living for Europe: Structural Funds Watch initiative published a report on how to harness ESIF to promote deinstitutionalisation.[30] Drawing on practical case studies from EU Member States, the report highlights how the EU institutions, Member States and civil society can work to ensure the funds support independent living. Crucial to this is ensuring the full and effective use of the so-called ex-ante conditionality – or pre-condition – on deinstitutionalisation, to ensure that any projects that might perpetuate institutionalisation are rejected before funding decisions are made.

Looking ahead, the European Pillar of Social Rights, proclaimed in November, provides an additional policy tool to support CRPD implementation. The Pillar includes several principles linked specifically to persons with disabilities, including concerning the right to "income support that ensures living in dignity,

services that enable [persons with disabilities] to participate in the labour market and in society, and a work environment adapted to their needs".[31] It also underlines that "everyone has the right to affordable long-term care services of good quality, in particular home-care and community-based services".[32] More information on the European Pillar of Social Rights is available in Chapter 1 and Chapter 3.

10.2. The CRPD in EU Member States: reforms, rulings and measuring results

Last year's Fundamental Rights Report highlighted the role of two drivers of legal and policy changes in EU Member States to implement the CRPD: guidance from the CRPD Committee, and the growing body of national and European case law referring to the convention. These factors continued to spur reform processes in 2017, alongside the increasing use of indicators as a tool to measure CRPD implementation and the ongoing role of national strategies and action plans. At the end of 2017, **Ireland** remained the only EU Member State that has not ratified the convention; a further five Member States and the EU have not ratified the Optional Protocol to the CRPD, which allows the CRPD Committee to handle complaints and set up inquiries relating to CRPD implementation.

National monitoring mechanisms established under Article 33 (2) of the convention also play a key role; several can receive complaints, while others developed indicators to support their monitoring efforts (see also Section 10.3.).[33]

10.2.1. Independent living far from realised

With much focus in 2017 centred on the CRPD Committee's adoption of a general comment on Article 19 in August,[34] the topic of independent living provides a useful framework to look at the impact of guidance from the CRPD Committee in practice. The general comment provides the authoritative interpretation of the normative content of Article 19 and what States parties to the convention must do to implement it. Two key aspects of implementing the right to independent living were a particular focus of national reforms in 2017:

- personal assistance;
- accessibility.

Disabled persons' organisations (DPOs) have long highlighted personal assistance as essential to realising the right to independent living in practice. It is the only type of community support service specifically mentioned in Article 19 of the CRPD. The general comment strongly reinforces this position, identifying the "inadequacy of legal frameworks and budget allocations aimed at providing personal assistance" as one of the remaining barriers to implementing Article 19.[35] To support states in developing personal assistance services, the CRPD Committee provides an extensive 'definition' of personal assistance, highlighting four key elements: funding for personal assistance must be controlled by and allocated to the person with disability; personal assistance must be controlled by the person with disability; personal assistance is a one-to-one relationship; and persons with disabilities have "self-management of service delivery".[36] In practice, however, two long-term trends impede the realisation of these requirements. First, family members and other informal carers provide a large part of the assistance people with disabilities receive.[37] Second, eligibility criteria for disability benefits have tightened because of ongoing fiscal consolidation, as the Social Protection Committee highlighted in its 2017 report.[38]

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Reforms in 2017 demonstrate these challenges. Following a trend that has seen personal assistance more widely available in the EU,[39] **Slovenia** adopted a law regulating personal assistance.[40] The law targets persons aged between 18 and 65 years who require at least 30 hours of personal assistance per week, and will enter into force in January 2019. However, the law does not enable beneficiaries to receive the funding for personal assistance directly, which could raise questions about its compatibility with the requirements set out by the CRPD Committee. **Sweden**, by contrast, has one of the most long-standing and comprehensive personal assistance systems. However, concerns about rising costs prompted the government to look for ways to reduce the overall funds attributed to assistance allowances in 2017. In response, the National Association for Mobility-Impaired Children and Youths (*Riksförbundet för rörelsehindrade barn och ungdomar*) started a campaign called 'Stop the assistance lottery' (*Stoppa assistanslotteriet*). It focuses on stories of persons with disabilities who have had their assistance allowance hours reduced or removed altogether, resulting in family members having to stop working.[41] A government-appointed special investigator looking at state-funded assistance will report back in 2018.

In light of these challenges, several Member States have adopted pilot projects to test ways of providing personal assistance. For example, **Portugal** established the Independent Living Support Model (*Modelo de Apoio à Vida Independente*) programme to provide

personal assistance for persons with disabilities, developed through a series of pilot projects between 2017 and 2020.[42] The provision of assistance is based on a personalised plan identifying: the assistance needs; how support activities are carried out; and how the assistance is monitored and evaluated. The assistance may include: support in hygiene and personal care, health, nutrition, travel, higher education, vocational training, culture, sports, job search, participation in society, and citizenship. While such projects can be a useful way to develop modalities of personal assistance, they can raise questions of sustainability and risk unequal provision of services across different parts of the country.

Promising practice

Strengthening the role of municipalities in CRPD implementation

The involvement of and cooperation among all stakeholders at the local level is central to implementing the CRPD. In February 2017, the municipality of Ardea in Lazio, **Italy**, created a municipal council consisting of both delegates of municipal authorities and people with disabilities and their representative organisations. The council aims to promote policies and actions to overcome the barriers that persons with disabilities can face and to promote their rights.

The **Slovenian** Association of Disabled Workers runs a project to encourage municipalities to respond to the needs of their citizens with disabilities. It awards the title of "a municipality tailored to the needs of people with disabilities" to municipalities that analyse the situation of their residents with disabilities together with local disability organisations and adopt appropriate action programmes. The association, together with the disability organisations, then monitors the implementation of these activities. By the end of 2017, 30 municipalities had received this distinction.

For more information, see Municipal Council for overcoming disability (Consulta comunale per il superamento delle disabilità) and Slovenian Association of Disabled Workers (Občina po meri invalidov).

Independent living is closely tied to accessibility. Without it, persons with disabilities cannot access the services and facilities in the community mentioned in Article 19. The CRPD Committee emphasises this link in its general comment on Article 19, stating that "the general accessibility of the whole built environment, transport, information and communication and related facilities and services open to the public [...] is a precondition for living independently in the community".[43] A few examples illustrate the range of reforms that Member States implemented in 2017 to address the broad scope of the CRPD's accessibility obligations. In several instances, these show Member States anticipating the adoption of the EAA by moving to implement some of its key provisions on accessibility of goods and services.

Taking a horizontal approach, a decree on the accessibility of services took effect in the **Netherlands** in June.[44] It stipulates that the national government encourages the drafting and implementation of accessibility plans covering different sectors, and that the government will monitor the implementation of the norm of accessibility in society. It also requires suppliers of goods and services to ensure they are accessible for persons with disabilities, unless such steps would constitute a disproportionate burden. The 'disproportionate burden' test is a central element of the proposed EAA.

Other Member States focused on specific services and sectors. FRA's analysis of data from the European Statistics on Income and Living Conditions (EU-SILC) survey shows that, on average, persons with disabilities in the EU are more likely than other persons to have difficulty accessing services such as grocery shopping, banking, postal, primary healthcare and public transport.[45] Amongst these services, persons with disabilities most often face difficulties accessing public transport services (26 % compared to 19 % of persons without disabilities).

Reflecting this challenge, the **United Kingdom** Department for Transport published a draft transport accessibility action plan in August.[46] It sets out the department's strategy to address barriers for people with disabilities in transport services. For example, it includes measures to ensure that accessibility features required by regulations are consistently monitored and that compliance is enforced; to improve information on passenger facilities at stations and on trains; and to enhance awareness training for transport staff about the requirements of people with visible and hidden disabilities or impairments.

France and **Germany** both adopted measures related to the accessibility of telephone services. In France, a decree adopted in May specifies which services electronic communications operators must make accessible, and sets a threshold for sales turnover above which companies must ensure their customer service number is accessible to persons with visual or hearing impairments.[47] It also sets out how the government intends to evaluate the implementation of these obligations. The German reforms relate to contacting emergency services, with an amendment requiring that people with hearing impairments can make emergency calls via text messages or in sign language at any time. Previously, this was only possible between 8 am and 11 pm.[48]

Promising practice

Raising awareness of persons with disabilities' sexual and romantic relationships

FRA's research has indicated a lack of attention to persons with disabilities' romantic and sexual relationships. Two efforts have attempted to address this issue. In July 2017, the **Maltese** Commission for the Rights of Persons with Disabilities conducted a quantitative survey on the rights of persons with disabilities regarding intimate relationships, marriage, family, parenthood, and whether there is enough education on these matters. The survey looks at whether Malta is living up to its obligations under Article 23 of the CRPD (respect for home and the family) and was followed by the conference "Breaking the Silence: Sexuality, Intimate relationships and Disability".

In the **Czech Republic**, for example, two non-governmental organisations, 'Pleasure without Risk' and 'Freya', offer people with disabilities courses and coaching relating to sex and sexuality, and provide counselling on issues of sex and intimacy. They have helped support five specially trained sex counsellors to support persons with disabilities.

For more information, see Commission for the Rights of Persons with Disabilities (Il-Kummissjoni għad-Drittijiet ta' Persuni b'Diżabilità) and Pleasure without Risk/Freya (Rozkoš bez rizika/Freya).

10.2.2. What gets measured gets done

As already noted in last year's Fundamental Rights Report,[49] one thread linking many of the developments in Member States is the role of evaluation and consolidation in driving reform processes. In 2017, this took two particular forms: steps to improve the assessment of CRPD implementation and using the CRPD in national courts.

A consistent theme of FRA's research is the role of strategies and action plans in guiding implementation of the CRPD. The year 2017 was no exception, with several Member States adopting either overall or sector-specific action plans linked to the CRPD. Those adopted in **Croatia**, **Italy** and the **Netherlands** are the most comprehensive. All three put significant focus on how best to assess and measure implementation of the plans.

One way to help make strategies and other legal and policy commitments effective is to ensure that they are accompanied by clear targets, timeframes and budgets.[50] In this respect, the National Strategy for Equalisation of Opportunities for Persons with Disabilities 2017-2020 adopted by the **Croatian** government in April marks an upgrade on the previous strategy.[51] It introduces more measureable indicators to give a realistic overview of the implementation of the 78 measures and 199 activities set out in the strategy. A budget of around HRK 1 billion (approximately € 135 million) will support the strategy's implementation, with funding coming from the government budget, national lotteries and EU funds. Implementation assessments must, however, be underpinned by data. The second **Italian** Action Plan for the Promotion of the Rights and for the Integration of People with Disabilities, which was adopted by presidential decree in December, further develops the seven areas of action set out in the first plan.[52] However, it supplements these with a new area on the development of a reporting and statistical system on the implementation of disability policies.

Another implementation tool is the development of indicators, particularly those tied specifically to the fundamental rights standards set out in the CRPD.

Table 10.1: Strategies and action plans relevant to the CRPD adopted in 2017, by EU Member State

Member State	Strategy or action plan
BE - Wallonia	Walloon accessibility plan for persons with reduced mobility 2017-2019 (*Plan Wallon accessibilité pour les personnes à mobilité réduite*)
CY	First National Strategy for Disability 2018-2028 and National Action Plan for Disability 2018-2020
HR	National Strategy for Equalisation of Opportunities for Persons with Disabilities 2017-2020 (*Nacionalna strategija izjednačavanja mogućnosti za osobe s invaliditetom od 2017. do 2020. godine*)
IT	Second Action Plan for the Promotion of the Rights and for the Integration of People with Disabilities (*Programma di Azione Biennale per la Promozione dei Diritti e l'Integrazione delle Persone con Disabilità*)
NL	Implementation plan for the UN Convention on the Rights of Persons with Disabilities (*Implementatieplan VN Verdrag Handicap verdrag inzake de rechten van personen met een handicap*)
UK	Improving lives: the future of work, health and disability

Source: FRA, 2018

FRA has already adopted this approach for two CRPD articles: in 2014, on participation in political and public life (Article 29); and in 2015, on living independently and being included in the community (Article 19).[53] In the same vein, the **Netherlands** Institute for Human Rights, the country's national monitoring mechanism for the CRPD, commissioned research on indicators to monitor CRPD implementation. The preliminary report published in July details 17 quantitative indicators focused around independent living and employment (Articles 19 and 27 of the CRPD).[54] Using data from 2016 and 2017, the indicators will be applied and published in 2018.

In practice, a lack of data often hampers the use of indicators, including those developed by FRA.[55] As a consequence, FRA and other organisations sometimes have to use 'proxy indicators'. These make use of the best existing data to measure the situation approximately. This challenge is reflected in the research commissioned by the **Latvian** Ministry of Welfare on the development of indicators to monitor the CRPD. One of its first objectives was to evaluate the availability, adequacy and quality of existing administrative and survey data that monitor the policy areas the convention covers.[56] The proposed indicators were published in August, but have not yet been applied.

National jurisprudence clarifies applicability of CRPD to domestic law

Several national-level judgments outlined in last year's Fundamental Rights Report helped to clarify the scope of convention obligations and how they should be met. In 2017, a number of cases looked at the justiciability of the CRPD. These judgments shed light on how the courts view the applicability of the CRPD to domestic law.

The **Austrian** Supreme Court considered this issue in the case of an applicant who had been denied care allowance because he did not have a main residence in Austria. The applicant's submission to the court referred to Articles 18 (liberty of movement and nationality) and 4 (cross-cutting non-discrimination provision) of the CRPD. In its ruling, the court upheld the decision of the lower court, arguing that the CRPD has to be implemented by way of domestic law. Without specific legislation to bring the CRPD into national law, the CRPD is not directly applicable, does not afford any subjective rights and is not a benchmark for assessing the lawfulness of another legal act.

The High Court in the **United Kingdom** used similar reasoning to find that "great care must be taken in deploying provisions of the UNCRPD [...], which set out broad and basic principles as being determinative tools for the interpretation of a concrete measure, such as a particular provision of a UK statute. Provisions which are aspirational cannot qualify the clear language of primary legislation".

Sources: Austria, Supreme Court (Oberster Gerichtshof, OGH), 10 ObS 162/16w, Vienna, 24 January 2017; United Kingdom, High Court, Queen's Bench Division (Administrative Court), R. (on the application of Davey) v Oxfordshire CC, [2017] EWHC 354 (Admin), 27 February 2017, para. 47.

Given the EU's own ratification of the CRPD, another issue concerns the role of the CRPD in areas covered by EU law. A case heard by the High Court in **Ireland** – which has not itself ratified the convention – explored this question. The case concerned a man with a visual impairment who was required to use the assistance of a polling clerk to cast his ballot in local and European elections and referenda, undermining the secrecy of the ballot. EU law gives EU citizens the right to vote in European and municipal elections in any Member State of which they are resident under the same conditions as nationals of that state. However, Member States remain free to design and apply their own procedural rules to the extent that EU legislation does not harmonise respective procedures. In the ruling, the judge clarified that as "none of the [EU] Directives or regulations governed by the [CRPD] relate to electoral procedures [and] there is no common electoral procedure within the [EU]", any consideration of the UN convention in Irish law would require that the parliament had legislated to give the CRPD the status of domestic law.

Source: Ireland, Sinnott v The Minister for The Environment [2017] IEHC 214, 30 March 2017, paras. 83-85.

For more information, see also FRA (2014), The right to political participation for persons with disabilities: human rights indicators, Luxembourg, Publications Office.

Key jurisprudence related to discrimination on the grounds of disability is highlighted in the 2018 edition of the *Handbook on European non-discrimination law*, published by FRA and the European Court of Human Rights.

10.3. Familiar challenges impede effective CRPD monitoring

FRA's previous Fundamental Rights Reports have highlighted a number of recurring challenges that can impede the effectiveness of EU monitoring, both in Member States and at the EU level. These include the absence of a clear legal basis, insufficient financial and human resources, and a lack of independence. While these continued to pose a challenge, another feature of 2017 was a number of changes to the structures appointed under Article 33 of the CRPD. Such changes can both give renewed impetus to monitoring and risk a lack of continuity.

The EU Framework was among the monitoring bodies to see structural change. Although the European Commission stopped participating in EU Framework meetings after the publication of the CRPD Committee's concluding observations on the EU in autumn 2015, it remained an official member. The Council of the EU confirmed the European Commission's formal withdrawal on 16 January 2017, "in accordance with the recommendation of the [CRPD Committee] so as to ensure the independence of the monitoring framework".[57] The revised EU Framework adopted on the same day replicates that originally adopted in 2013, with references to the European Commission removed.[58]

In October, the new composition of the EU Framework met for the first time, with the European Commission in its role as the EU's focal point for CRPD implementation.[59] The meeting identified several concrete ways to strengthen regular and systemic dialogue between the EU's focal point and monitoring body, including through regular biennial meetings and contributions to mutually relevant activities, such as the annual Work Forum, events for the European Day of Persons with Disabilities, and the meeting between the EU and national monitoring frameworks for the CRPD.

On a day-to-day basis, EU Framework members continued to implement the Framework's 2017-2018 work programme.[60] A few examples serve to highlight some of the joint activities that EU Framework members undertook in 2017:

- Webinar on practical tools for implementing the CRPD: in March, the European Parliament, European Ombudsman and FRA each contributed to a webinar highlighting practical steps EU institutions and other parts of the public administration can take to implement the CRPD. Hosted by CEPOL, the EU's police training college, the webinar covered topics such as accessibility of offices, websites, events, human resources, and receiving and handling complaints.[61]

- Annual meeting with national monitoring mechanisms: in addition to allowing for an exchange of information about activities to promote, protect and monitor the implementation of the CRPD, the May meeting had a thematic focus on independent living. The Chair of the CRPD Committee presented the draft General Comment on Article 19, while a representative of the European Expert Group on the transition from institutional to community-based care discussed the role of ESIF in supporting deinstitutionalisation.

- Participation in key events on the EU's implementation of the CRPD: EU Framework members contributed a number of events related to the mid-term review of the European Disability Strategy (see Section 10.1.). In July, the European Ombudsman represented the Framework in an exchange with the European Parliament's Employment and Social Affairs Committee.[62] In October, all Framework members took part in a public hearing on the future of the EU disability strategy after 2020 organised by the European Economic and Social Committee.[63] In addition, FRA represented the EU Framework in a discussion with the Council working party on human rights in April concerning mainstreaming disability in all EU law, policies and programmes in external action, and the possibility of the EU ratifying the Optional Protocol to the CRPD, which allows for individual complaints to be brought to the CRPD Committee.[64]

FRA ACTIVITY

FRA evidence supports preparation of general comments

As in previous years, FRA supported the CRPD Committee's work in 2017 with evidence and expertise. In particular, FRA jointly organised two events to support the committee's work on general comments on Article 5 (equality and non-discrimination) and Article 19 (living independently and being included in the community) of the convention.

In March, FRA organised a side event on measuring the implementation of the right to independent living, alongside the UN Office of the High Commissioner for Human Rights and the European Disability Forum. This was followed up in August with a briefing co-organised with the International Disability Alliance and the Global Alliance of National Human Rights Institutions on how to ensure implementation of the Sustainable Development Goals and how the CRPD supports equality for persons with disabilities. The agency also submitted written input on the draft general comments.

For more information, see FRA's webpage on Measuring the right to independent living and the International Disability Alliance's webpage on SDG-CRPD implementation for equality for persons with disabilities: the role of organisations of persons with disabilities and National Human Rights Institutions.

At the national level, the most important structural development was the appointment in the **Czech Republic** and **Greece** of monitoring frameworks under Article 33 (2) of the CRPD. In the Czech Republic, the Public Defender of Rights – the ombuds organisation – was designated as the monitoring body and given new powers to fulfil this role.[65] From 1 January 2018, it will be able to propose legislative changes for the protection of the rights of persons with disabilities, and establish an advisory body composed of persons

with disabilities and their representative organisations to support its monitoring activities. The ombuds organisation will also fulfil this role in Greece. In addition, the Ministry of Justice, Transparency and Human Rights will act as focal point for implementing the CRPD and the Minister or State for coordinating government operations will act as the coordination mechanism under Article 33 (1) of the convention.

This leaves **Bulgaria**, **Estonia** and **Sweden** as the only three Member States yet to appoint monitoring bodies.[66] Preparations in Bulgaria took a step forward with the establishment of an interagency working group to design the coordination and monitoring mechanisms. The group includes representatives of the ombuds organisation, the Commission for Protection against Discrimination (*Комисия за защита от дискриминацията*), NGOs and DPOs.[67]

Less encouragingly, familiar concerns regarding funding, mandate and independence highlighted in FRA's 2016 Opinion on requirements under Article 33 (2) of the CRPD in the EU context persisted.[68] In their shadow report to the CRPD Committee, civil society organisations in **Luxembourg** criticised the failure to provide additional funding to the monitoring framework and highlighted possible gaps in the protection mechanisms with respect to actions by the private sector.[69] The CRPD Committee reflected these concerns in its recommendations.[70] Similarly, a number of **Swedish** NGOs expressed concerns that the planned human rights institution will not have adequate resources to be able to monitor the implementation of the CRPD in accordance with the requirements of Article 33 (2).[71]

These concerns were also reflected in the CRPD Committee's recommendations to the four EU Member States it reviewed in 2017 (see Table 10.2). The committee expressed concern about insufficient resources for monitoring in **Cyprus**[72] and the **United Kingdom**,[73] and the limited capacity and involvement of persons with disabilities and their representative organisations in **Latvia**[74] and **Luxembourg**.[75]

Table 10.2 CRPD Committee reviews in 2017 and 2018, by EU Member State

Member State	Date of submission of initial report	Date of publication of list of issues	Date of publication of concluding observations
CY	2 August 2013	5 October 2016	8 May 2017
LU	4 March 2014	10 April 2017	10 October 2017
LV	3 April 2014	26 April 2017	10 October 2017
MT	10 November 2014	March 2018	
PL	24 September 2014	March 2018	
SI	18 July 2014	10 October 2017	March 2018
UK	24 November 2011	20 April 2017	3 October 2017

Note: *Shaded cells indicate review processes scheduled for 2018.*
Source: *FRA, 2018 (using data from OHCHR)*

FRA opinions

The European Commission's progress report on implementation of the European Disability Strategy demonstrates how actions to implement the United Nations Convention on the Rights of Persons with Disabilities (CRPD) are helping to drive wide-ranging legal and policy reforms, from accessibility to independent living. Nevertheless, some initiatives at EU and Member State level do not fully incorporate the human rights-based approach to disability required by the CRPD, or lack the clear objectives, adequate budgets and operational guidance for effective implementation and assessment of progress.

FRA opinion 10.1

The EU and its Member States should intensify efforts to embed CRPD standards in their legal and policy frameworks to ensure that the human rights-based approach to disability is fully reflected in law and policymaking. This should include a comprehensive review of legislation for compliance with the CRPD. Guidance on implementation should incorporate clear targets and timeframes, and identify actors responsible for reforms. Member States should also consider developing indicators to track progress and highlight implementation gaps.

Intense negotiations saw the Council of the EU and the European Parliament adopt their positions on the proposed European Accessibility Act in 2017, demonstrating the EU's commitment to this flagship legislation to implement the CRPD. Nevertheless, significant differences remain over important issues, such as the scope of the act's applicability to audio-visual media and transport services, as well as its interrelationship with other relevant EU law, including European Structural and Investment Funds (ESIF) and the Public Procurement Directive. This raises the prospect of the proposal being weakened in key areas during legislative negotiations, which risks undermining the act's capacity to improve the accessibility of goods and services for persons with disabilities in the EU.

FRA opinion 10.2

The EU should ensure the rapid adoption of a comprehensive European Accessibility Act, which includes robust enforcement measures. This should enshrine standards for the accessibility of the built environment and transport services. To ensure coherence with the wider body of EU legislation, the Act should include provisions linking it to other relevant acts, such as the regulations covering the European Structural and Investment Funds and the Public Procurement Directive.

EU Structural and Investment Funds (ESIF) play an important role in supporting national efforts to achieve independent living. Civil society, including disabled persons' organisations, can play an important role in providing the information necessary for effective monitoring of the use of the funds.

FRA opinion 10.3

The EU and its Member States should ensure that the rights of persons with disabilities enshrined in the CRPD and the EU Charter of Fundamental Rights are fully respected to maximise the potential for EU Structural and Investment Funds (ESIF) to support independent living. To enable effective monitoring of the funds and their outcomes, the EU and its Member States should also take steps to include disabled persons' organisations in ESIF monitoring committees and to ensure adequate and appropriate data collection on how ESIF are used.

By the end of 2017, Ireland was the only EU Member State not to have ratified the CRPD, although the main reforms paving the way for ratification are now in place. In addition, five Member States and the EU have not ratified the Optional Protocol to the CRPD, which allows individuals to bring complaints to the CRPD Committee and for the Committee to initiate confidential inquiries upon receipt of "reliable information indicating grave or systematic violations" of the convention (Article 6).

FRA opinion 10.4

EU Member States that have not yet become party to the Optional Protocol to the CRPD should consider completing the necessary steps to secure its ratification as soon as possible to achieve full and EU-wide ratification of its Optional Protocol. The EU should also consider taking rapid steps to accept the Optional Protocol.

Two of the 27 EU Member States that have ratified the CRPD had not, by the end of 2017, established frameworks to promote, protect and monitor its implementation, as required under Article 33 (2). Furthermore, the effective functioning of some existing frameworks is undermined by insufficient resources, limited mandates and a failure to ensure systematic participation of persons with disabilities, as well as a lack of independence in accordance with the Paris Principles on the functioning of national human rights institutions.

FRA opinion 10.5

The EU and its Member States should consider allocating sufficient and stable financial and human resources to the monitoring frameworks established under Article 33 (2) of the CRPD. As set out in FRA's 2016 legal ***Opinion concerning the requirements under Article 33 (2) of the CRPD within an EU context****, they should also consider guaranteeing the sustainability and independence of monitoring frameworks by ensuring that they benefit from a solid legal basis for their work and that their composition and operation takes into account the Paris Principles on the functioning of national human rights institutions.*

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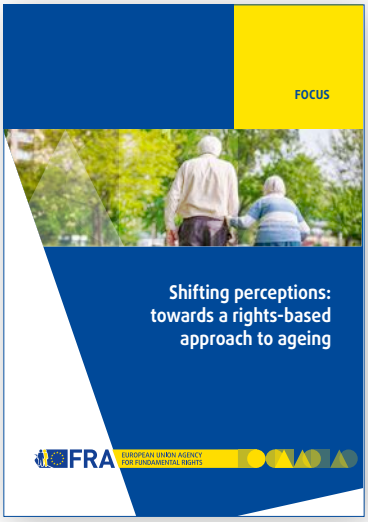

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FRA
EUROPEAN UNION AGENCY
FOR FUNDAMENTAL RIGHTS

HELPING TO MAKE FUNDAMENTAL RIGHTS A REALITY FOR EVERYONE IN THE EUROPEAN UNION

The year 2017 brought both progress and setbacks in terms of rights protection. The European Pillar of Social Rights marked an important move towards a more 'social Europe'. But, as experiences with the EU Charter of Fundamental Rights underscore, agreement on a text is merely a first step. Even in its eighth year as the EU's binding bill of rights, the Charter's potential was not fully exploited, highlighting the need to more actively promote its use.

Results from FRA's second European Union Minorities and Discrimination Survey (EU-MIDIS II), as well as myriad national research, left no doubt that much still needs to be done to ensure equality and non-discrimination across the EU. For immigrants and minority ethnic groups, widespread discrimination, harassment and discriminatory profiling remain realities. Anti-Gypsyism has proved to be particularly persistent.

Fewer migrants arrived, but continued to confront harrowing journeys. More than 3,100 died while crossing the sea, and allegations of police mistreatment caused concern. There was little progress in reducing immigration detention of children. Meanwhile, a growing number of large-scale EU information systems served to both manage immigration and strengthen security.

Child poverty rates remain high, and severe housing deprivation emerged as a major concern. The risks of radicalisation and violent extremism among young people spurred diverse initiatives.

The Convention on the Rights of Persons with Disabilities sparked significant achievements, but more needs to be done on accessibility and independent living. While monitoring frameworks can help, they remain hampered by limited resources and independence.

Rule of law challenges posed growing concerns, triggering the first-ever European Commission proposal to adopt a decision under Article 7 (1) of the Treaty on European Union.

Yet the news was not entirely grim. Equality for lesbian, gay, bisexual, trans and intersex (LGBTI) persons made some advances, particularly regarding the civil status of same-sex couples. Efforts to strengthen collective redress mechanisms held promise of better access to justice. Victims' rights also saw progress, especially in terms of ensuring timely and comprehensive information about rights.

Technological developments relating to 'big data' and artificial intelligence brought both great opportunities and great risks. Large-scale malware attacks also prompted concern. The EU's reforms on data protection and cybersecurity, as well as its ongoing efforts on e-privacy, proved to be timely and highly relevant in light of these realities.

FOCUS

In modern and fast-paced societies, 'older' individuals are often dismissed as burdens and their important contributions to society overlooked. But, as this year's focus chapter underlines, fundamental rights do not carry an expiration date.

The chapter explores the slow but inexorable shift from thinking about old age in terms of 'deficits' that create 'needs' to a more comprehensive one encompassing a 'rights-based' approach towards ageing. This gradually evolving paradigm shift strives to respect the fundamental right to equal treatment of all individuals, regardless of age – without neglecting protecting and providing support to those who need it.

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