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Bringing rights to life: The fundamental rights landscape of the European Union

FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

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FRA – European Union Agency for Fundamental Rights
Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 158030-0 – Fax +43 1508030-699
Email: info@fra.europa.eu – fra.europa.eu

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Acronyms

CAHLR	Committee of Experts of the European Charter for Regional or Minority Languages
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CAT OP	Optional Protocol to the CAT
CCVVC	Convention on the Compensation of Victims of Violent Crimes
CATHB	Convention on Action against Trafficking in Human Beings
CAOD	Convention on Access to Official Documents
CDDH	Steering Committee for Human Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEPEJ	European Commission for the Efficiency of Justice
CPIPPD	Convention for the Protection of Individuals with regard to automatic Processing of Personal Data
CPIPPD Additional Protocol	Additional Protocol to the CPIPPD, on supervisory authorities and transborder data flows
CPT	European Committee for the Prevention of Torture
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSEC	Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
CVW	Convention on Preventing and Combating Violence against Women and Domestic Violence ('Istanbul Convention')
ECECR	European Convention on the Exercise of Children's Rights
ECHR (as amended by Protocol 14)	European Convention of Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECRI	European Commission against Racism and Intolerance
ECSR	European Committee of Social Rights
ESC (1996)	European Social Charter (1996 revised)
CCVVC	European Convention on the Compensation of Victims of Violent Crimes
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
ECRML	European Charter for Regional or Minority Languages
ECtHR	European Court of Human Rights
FCNM	Framework Convention for the Protection of National Minorities
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICPED	International Convention for the Protection of All Persons from Enforced Disappearance
Oviedo Convention	Convention on Human Rights and Biomedicine
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Venice Commission	European Commission for Democracy through Law

Contents

Introduction

At the end of 2011, the European Union Agency for Fundamental Rights (FRA), created in March 2007, was approaching its fifth anniversary. The establishment of this EU agency, entrusted specifically with the protection of fundamental rights, reflects a broader trend within the EU and its Member States towards 'institutionalising' and mainstreaming fundamental rights within law and policy.

During those five years, fundamental rights have become increasingly visible within the EU, marked by important developments such as the 2009 entry into force of the Lisbon Treaty and the 2010 designation of the European Commission's Vice-President Viviane Reding as Commissioner of Justice, Fundamental Rights and Citizenship. The Council of the European Union also created in 2010 a permanent Working Group devoted to fundamental rights. In 2011, work continued apace, with negotiations on the EU's accession to the European Convention on Human Rights (ECHR) and the entry into force for the EU of the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD, 22 January 2011) – the first core international human rights treaty to which the EU has become a Party.

These recent steps are only part of a wider picture. At national, European and international levels, a variety of bodies exist with diverse mandates and powers, which are responsible for protecting, promoting or monitoring fundamental rights. They also offer guidance to EU Member States on how to improve rights protection and ensure that fundamental rights form an integral part of law and policy making. Collectively, these multiple and interactive layers, geared towards promoting the implementation of rights, can be referred to as a 'fundamental rights landscape'.

This focus report aims to describe this landscape. It starts at the national level since long before human rights were protected at international level, they were guaranteed in the laws and constitutions of a number of states. As new international human rights instruments came into existence and EU Member States became Party to them, the states went on to reflect or replicate also these human rights standards within their national legislation and constitutions. There has been a continuous reciprocal influence between nationally enshrined rights and those of European and international human rights instruments.[1] Similarly, the EU's own fundamental rights regime was based on Council of Europe and UN standards, and Member States' common constitutional traditions. The EU started only in the 1960s to develop fundamental rights standards through the case law of the Court of Justice of the European Union (CJEU), which drew inspiration from such standards and traditions.

Figure 1: Four layers of the fundamental rights landscape

Source: FRA, 2011

The different layers of the landscape connect, formally and informally, with each other. For example, an individual wishing to make a complaint about a fundamental rights violation will first try to have their case resolved in the national courts. If the complaint relates to an area of EU law, the national court may refer the case to the CJEU. If the complaint falls outside EU law, and the individual does not get a favourable outcome from the national court system – or if the EU-system does not offer a satisfactory conclusion – they may then have the option of taking the case to the European Court of Human Rights (ECtHR), or alternatively, to one of the UN treaty bodies, where these have an individual complaint mechanism.

The landscape's various layers are not only linked through complaints by individuals, which generally will be lodged first at the national level and then brought to a higher level. The interrelationship between the layers also becomes evident in certain monitoring mechanisms. When a state takes part in a reporting procedure before a UN treaty body, for example by submitting a report on their national human rights situation, that state's National Human Rights Institution (NHRI) may also contribute an independent perspective to the state's report or submit its own report to the UN. Certain international conventions even require the establishment of monitoring bodies at national level, as is the case for the Optional Protocol to the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT–OP) and the CRPD. This requirement is a new development showing that the layers of governance are increasingly interwoven. It is also reflected in the EU's accession to the CRPD which obliges the EU to establish a monitoring framework.

1 While not covered here, the Organization for Security and Co-operation in Europe (OSCE) also contributes to the region's overall fundamental rights landscape, for example, through the work of the OSCE High Commissioner on National Minorities (HCNM, The Hague) or the Office for Democratic Institutions and Human Rights (ODIHR, Warsaw).

In addition to these structural and procedural links, the landscape's layers also influence each other when it comes to shaping and interpreting fundamental rights. The influence works in both directions: from the national layer towards the European and international layers, and vice versa.

As a result, a relatively complex landscape emerges, both from the perspective of individuals wishing to enforce their rights through the courts as well as for observers wishing to understand how the system fits together. The fact that fundamental rights implementation is far from perfect highlights the need for greater efforts to put these rights into practice. The first section of this report outlines the rights, bodies and procedures relevant at each governance level. With this picture as a backdrop, it then positions the FRA within this landscape and identifies the added value that the agency offers ('A joined-up approach to fundamental rights').

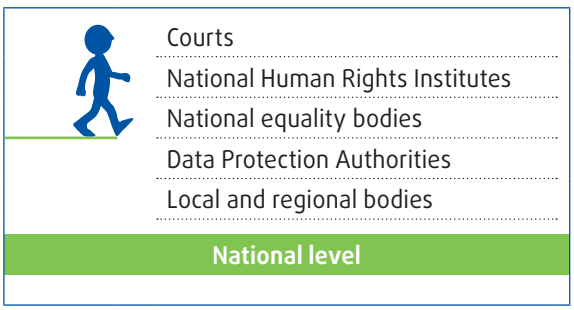
1

The landscape: rights, bodies and procedures

1.1. National level

International law recognises that the state has primary responsibility for ensuring the respect, protection, promotion and fulfilment of fundamental rights. The state has both the authority and the responsibility to put rights into practice on a day-to-day basis. Local and national public authorities, for example, are responsible for: ensuring public safety and order through a police force and courts; organising public services, such as healthcare and education; organising elections; and regulating many aspects of daily life, such as employment relations or consumer rights. Moreover, fundamental rights developed originally at the national level and were only later recognised and further developed at European and international level. Therefore, this Focus sets out its description of the overall landscape – composed of rights, institutions and procedures at national, European and international levels – by first looking at the national level. The national level also comprises different sublevels, including regions and municipalities.

Figure 2: Relevant institutions at national level



Source: FRA, 2011

1.1.1. Rights and complaint mechanisms

The way fundamental rights are protected in the national systems across the EU depends on the historical experience of each Member State. One common thread is that fundamental rights in EU Member States enjoy a status that tends to be superior to other legal norms in the national system. In some countries, a constitution may contain a specific list of rights, while in others a constitution may refer to a separate document. Alternatively, there may be a provision in national law that accords European and international human rights treaties some form of status that is superior to national law. Moreover, the types of rights guaranteed under national regimes may be affected by historical circumstances. Despite these differences, a strong common core of fundamental rights exists across the EU, reflected in the fact that all EU Member States are Parties to the ECHR and other Council of Europe treaties, as well as to a number of UN human rights treaties. This consensus finds also a strong expression in the Charter of Fundamental Rights of the European Union. The protection of fundamental rights within the EU is an expression of unity among diversity.

When it comes to complaint mechanisms, EU Member States use various national structures to ensure that rights protected by national, European and international law are implemented in practice. All Member States have functioning court systems which allow individuals to settle cases alleging rights violations. Apart from courts, which are usually well-known and are therefore not dealt with in this Focus in any great detail, many states have implemented additional independent mechanisms at the national level to offer guidance, assistance or even recourse. Such mechanisms are for instance Ombudsmen, Data Protection Authorities (DPAs), national equality bodies or NHRIs. In EU Member States where these bodies have no power to settle disputes, they may have the

authority to assist an individual in taking a case to court – limited by financial and human resources.

All these bodies can be placed at the national level and equally also at either the local or regional levels. In fact, when rights complaints are made, they should reasonably be settled as close to the victim's home as possible. This proximity is to ensure that violations can be put to an end quickly, and that local and national authorities have the opportunity to address the complaint, as well as any problems in how rights are implemented.

1.1.2. Bodies responsible for promoting rights

All EU Member States have one or more bodies responsible for promoting the implementation of fundamental rights. The mandates of these bodies may be restricted to particular fundamental rights issues or the bodies may offer a range of different functions. While this section will concentrate on three types of bodies – national equality bodies, DPAs and NHRIs – EU Member States have also put in place other bodies. For example, some EU Member States have bodies responsible for promoting specific rights, such as the rights of the child, gender equality or the prohibition of torture. Such specialised bodies are often created to help promote the implementation of fundamental rights protected by specific EU instruments, such as non-discrimination and gender equality directives, and UN treaties, such as the Convention on the Rights of the Child (CRC), the CAT or the CRPD. Some states have ombudsmen of various kinds, such as supervising government administration. Often these bodies coincide with the NHRI.[2]

Thus, the fundamental rights structures vary between EU Member States. Some Member States consolidate all fundamental rights issues under the mandate of a single NHRI; in others, several bodies exist with responsibility for different issues with varying degrees of power. In those EU Member States that are organised along federal lines, such as Austria, bodies have divided mandates and are set up at both the national and regional levels. No matter how the national architecture is structured, it is important to avoid overlaps and gaps between mandates in order to help minimise confusion for individuals who are seeking assistance or recourse to a complaint mechanism.[3]

These bodies usually have the power to advise or make recommendations to national authorities on how national legislation and policy could be developed and reformed so as to ensure more effective long-term rights implementation. This way of proceeding may take place systematically where legislative proposals are screened during the law-making process to ensure that they comply with human rights obligations. This falls within the mandate, for example, of the Danish Institute for Human Rights, the German Institute for Human Rights and the Greek National Commission for Human Rights – all 'accredited' NHRIs. In addition to such external and independent expert advice, specialised parliamentary committees (for example, in Finland and the United Kingdom) or services of national parliaments providing independent legal opinions (for example in Greece) or national ministries (for example in Austria, Germany and the Netherlands) also often carry out systematic checks of compliance with fundamental rights. Although such internal procedures cannot replace external input from an independent expert body, they are an important mechanism for preventing potential or future violations that could occur on a large scale if laws conflicting with fundamental rights were to be brought into effect.

Under EU law, in the area of non-discrimination and gender equality, all Member States have an obligation to establish and have, in fact, established, national equality bodies responsible for promoting equal treatment in the areas of racial or ethnic equality and gender equality. Many EU Member States have also established bodies dealing with discrimination on other grounds, such as sexual orientation, disability, age and religion or belief. In some EU Member States, one single body is responsible for dealing with equality across all these areas while in others separate institutions exist. In some countries, the existence of such bodies pre-dates EU legislation (such as Belgium, Ireland, the Netherlands, Sweden and the United Kingdom), while others have established new bodies (such as in France, Germany, Italy and Spain) or expanded the mandates of existing bodies (such as in Cyprus, Greece or Latvia).

These national equality bodies have two main tasks under EU law. The first is to offer assistance to victims in pursuing their complaints. To provide this assistance, national equality bodies were either given the power to issue decisions on individual complaints themselves or empowered to take cases to court on behalf of a victim or provide the victim with legal representation. National equality bodies also have the power to undertake surveys, publish reports and make recommendations. This allows equality bodies to collect information that identifies barriers to equality or shows the extent to which discrimination occurs in an EU Member State. It means that they can provide national and local authorities with guidance on how to improve the promotion of equality through policy and legislation. In addition, national equality bodies may carry out awareness-raising on discrimination and equality, which could include conducting campaigns to make people aware of their rights or offering guidance and training on non-discrimination law to civil servants or employers.

2 For more information, see FRA (2012b), Chapter 8.
3 FRA (2010a).

Similarly, all EU Member States have established bodies at the national level to monitor the application of, and ensure respect for, data protection legislation. In some Member States, one body has been put in place while in others these are divided among several bodies in particular sectors, such as healthcare, postal systems or telecommunications. EU law requires these data protection authorities to dispose of a range of powers, including the ability to advise national authorities during the legislative process, investigate potential violations, participate in legal proceedings and hear individual complaints.

A number of EU Member States have bodies with a mandate to promote fundamental rights in general, going beyond the area of discrimination law and covering all rights. No explicit obligation exists under international law to establish such institutions, called NHRIs. The UN, however, has urged all states to do so and, at least at a political level, all UN member states have agreed.[4] International criteria, known as the 'Paris Principles', have been established to guide states and provide some regulation of NHRIs.[5] National bodies may apply to the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) – an organisation of NHRIs, which determines the extent to which a national body meets ICC criteria. Bodies that are in full compliance are accredited with 'A-status'. Those in partial compliance are accredited with 'B-status', while those not in compliance receive 'C-status'. The main criteria can be summarised as:

- a mandate that covers all human rights;
- independence from government guaranteed by the constitution or legislation;
- adequate human and financial resources;
- pluralism, including through membership and/or effective cooperation;
- adequate powers of reporting, monitoring, advising, and investigating (not established as an obligatory requirement) including the power, capacity and staff to submit recommendations on any matter concerning human rights and proposals in relation to legislative and administrative measures.

NHRIs thus have similar tasks to those of the equality bodies established under EU law, including some or all of the following:

- providing advice on various human rights issues to national authorities;
- raising human rights awareness, including human rights education, publication of reports, training and capacity-building activities;
- monitoring of human rights violations and making recommendations;
- receiving, investigating and resolving complaints from individuals.

Seventeen of the 27 EU Member States have NHRIs that are accredited through the ICC; only 12 NHRIs in 10 EU Member States have been accredited with 'A-status'. In some EU Member States, the equality body and the NHRI are actually the same entity, such as the United Kingdom's Equality and Human Rights Commission, which has a mandate covering human rights in general, including non-discrimination law. Developments during 2011 in the EU Member States regarding NHRIs are described in Chapter 8 of FRA's Annual report 2011 on 'Access to justice'.[6]

1.1.3. Remarks on the landscape

When it comes to courts, evidence shows[7] that many barriers are in place threatening the efficient enforcement of rights through them. Such barriers relate, amongst others, to the cost of court proceedings and the adequacy of financial assistance (such as legal aid) to cover the financial burden, as well as to significant delays with court proceedings in some EU Member States, both of which discourage individuals from bringing cases to court. Moreover, victims of human rights violations are reluctant to bring their cases to the courts because they fear victimisation and often lack awareness of their substantive and procedural rights, in particular those rights guaranteed in EU and/or international law.

Problems such as these can be addressed through certain rules available under procedural law, including the shifting of the burden of proof to the respondent in certain circumstances. Another solution might be to give additional bodies the power to decide on individual complaints. This is the case for some of the bodies, such as the NHRIs and national equality bodies in certain EU Member States like Belgium, France, Sweden and the United Kingdom. However, even where these

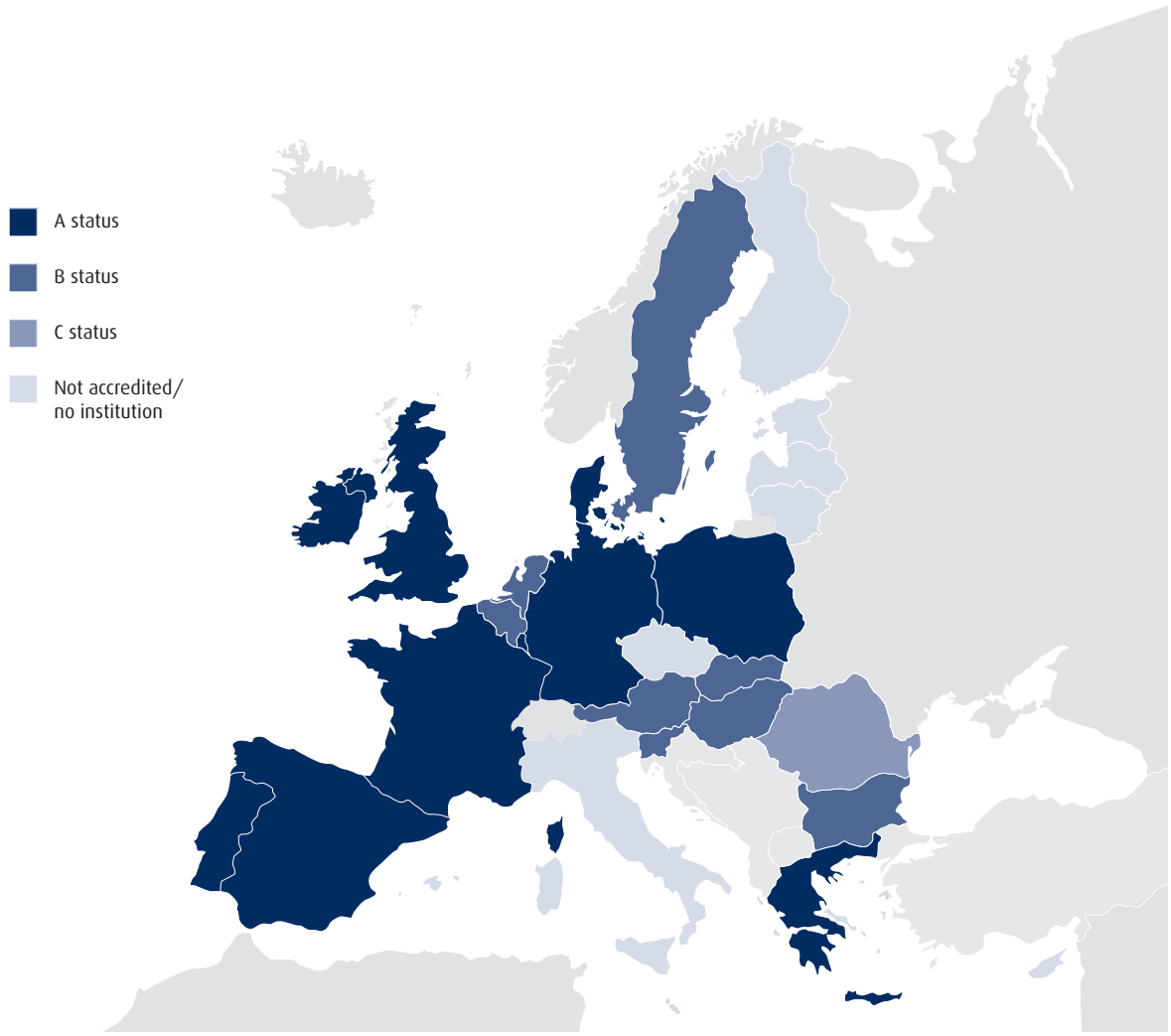
4 UN, Human Rights Council Resolution (2011), *National institutions for the promotion and protection of human rights*, *A/HRC/RES/17/9*, 6 July 2011; UN, General Assembly (1993), *Vienna Declaration and Programme of Action*, *UN Doc. A/CONF.157/23*, 12 July 1993, part I, para. 36.

5 For a thorough outline of the requirements set out in the Paris Principles, including how they may be achieved, see Chapter III.A, pp. 31-43 of: UN Office of the High Commissioner for Human Rights (2010).

6 FRA (2012b), Chapter 8.

7 FRA (2011a).

Figure 3: National Human Rights Institutes in EU Member States and Croatia, by accreditation status



Note: *While under EU law all EU Member States are required to establish equality bodies and DPAs, no comparable obligation exists to establish NHRIs. Consequently, the situation differs across EU Member States as illustrated on this map.*

Source: *FRA, 2011*

bodies have the power to settle complaints from individuals, they may not have the authority to impose a binding legal remedy, like awarding compensation. In addition, there appear to be particular factors that undermine the effectiveness of these bodies. These factors include: a lack of awareness among individuals about their rights and that these complaint procedures or even the respective bodies exist, as well as a lack of confidence that filing a complaint can actually make a difference.[8] These factors may explain to a certain extent why equality bodies in some EU Member States, so mandated, receive high numbers of complaints a year (sometimes numbering in the thousands like in France), while the volume is low in others (sometimes even only a handful, like in Estonia). Since many people who experience discrimination do not actually lodge a formal complaint, the volume of recorded cases does not reflect the frequency with which violations of fundamental rights occur.

The extent to which the bodies discussed are able to promote fundamental rights implementation depends on the human and financial resources available, as well as the scope of the powers that they possess, which often vary considerably among EU Member States. Concerns have also been raised in some Member States about the independence of these bodies, since they may have a close relationship with a government ministry. This may be physical (where a body shares its premises with a ministry), financial (where a ministry determines the level of funding) or organisational (where, for example, the body's director is appointed by a minister or attached to a ministry). While these issues may not affect the independence of these bodies in practice,

8 FRA (2010b).

they can give rise to unfavourable perceptions, undermining individuals' confidence in approaching them.

1.2. European Union level

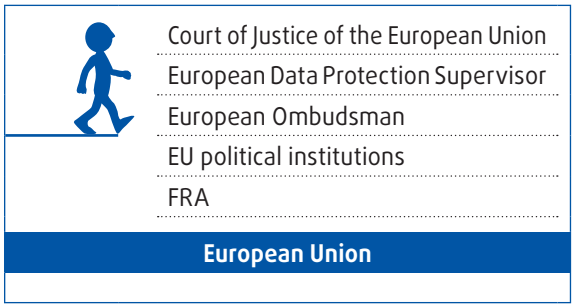
The EU contributes to the region's fundamental rights landscape in three main ways: it establishes bodies and procedures to ensure that the EU itself respects fundamental rights; it disposes over procedures which help to ensure that EU Member States implement EU law in conformity with such rights; and it provides for harmonisation in certain specific fields of fundamental rights protection.

Bodies such as the FRA, the European Data Protection Supervisor (EDPS) and the European Ombudsman provide a framework aimed at ensuring that the EU itself respects fundamental rights. In addition, the three key players in producing EU legislation – namely the European Commission, the European Parliament and the Council of the European Union – have introduced compliance checks with fundamental rights standards as part of the process of formulating and negotiating legislation and policy. The European Commission's 2010 Strategy on the effective implementation of the Charter[9] sets as an objective that the EU is exemplary as regards the respect of fundamental rights, in particular when it legislates. The European Commission further committed to preparing annual reports to better inform citizens on the application of the Charter and to measure progress in its implementation.[10] Furthermore, the EU has institutions, such as the CJEU and the European Ombudsman, which are empowered to various extents to hear complaints from individuals who feel the EU itself has violated their rights.

The EU has established a range of mechanisms to help ensure that EU Member States, as required, implement EU law in compliance with fundamental rights. The EU has the authority to create legislation across a range of policy areas, but the powers to put this legislation and policies into effect – through public administrations, courts and law enforcement bodies – lie at the national and local levels. When implementing EU legislation or policies, EU Member States must comply with fundamental rights. If, however, EU Member States fail to meet their obligations, the European Commission may initiate proceedings against them.

In certain limited areas, the EU holds the authority to create policy and legislation on specific fundamental rights issues, such as discrimination or data protection. This authority includes establishing common rules for all EU Member States in these areas, for instance, EU law requiring procedures or bodies, such as equality bodies and data protection authorities, to be established at the national level to ensure that rights are protected and promoted. The EU can, however, only act within the limits of the competences conferred upon it by the Member States through EU treaties. Moreover, EU law obliges Member States only to respect fundamental rights when they act within the scope of EU law.

Figure 4: Relevant institutions at EU level



Source: FRA, 2011

1.2.1. Protected rights

The protection of fundamental rights within EU law has evolved considerably over time. CJEU decisions on cases have elaborated on which rights are protected under the 'general principles' of EU law. The Court has thus developed a catalogue of fundamental rights. Although this catalogue is not formally written down, the EU and its institutions, as well as all of the EU Member States, must respect it whenever they are "acting within the scope of Union law", as defined by the CJEU. With regard to the content of these unwritten rights, the CJEU used two sources of inspiration, namely:

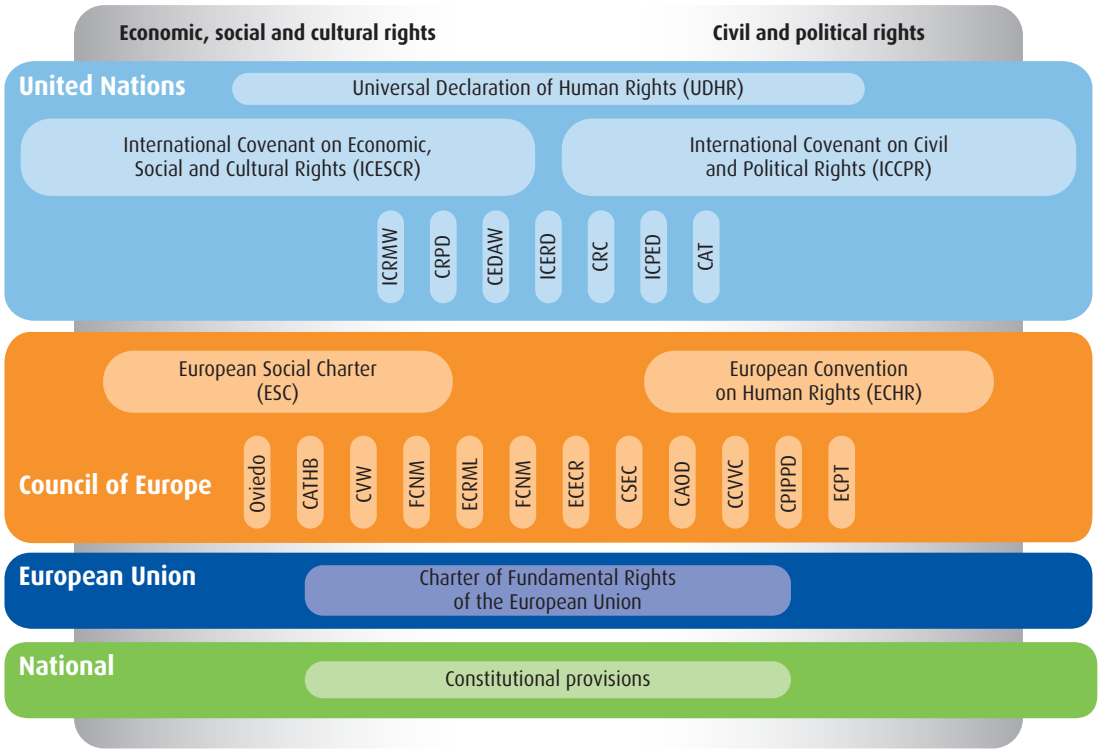
- the constitutional traditions common to the EU Member States;
- the rights guaranteed by international human rights treaties.

While the latter includes UN human rights treaties, the CJEU relied in practice mostly on the ECHR. In 1992, the EU made express reference to the ECHR in the Treaty on European Union (TEU), led to a clear-cut treaty obligation to ensure respect for fundamental rights as contained in the ECHR and the common constitutional traditions.

In 2000, the EU created the Charter of Fundamental Rights of the European Union, as a formal body of rights protected under EU law. The Charter became a legally binding document once the Lisbon Treaty came into effect on 1 December 2009. The list of rights contained in the Charter is based on written EU law, EU general principles and common constitutional traditions, as well

9 European Commission (2010b) and European Commission (2011b).
10 European Commission (2012a).

Figure 5: Coverage of rights and main instruments at the four levels



Notes: *The relative length of the horizontal bars represents a comparative reflection of the spectrum of rights covered. However, no hierarchy between different instruments exists. Blurred borders of the constitutional provisions indicate the wide diversity of explicit constitutional rights among EU Member States. For the full names of the conventions, see the list of acronyms at the beginning of this focus report.*

Source: *FRA, 2011*

as the rights in the ECHR and other Council of Europe treaties and in the UN human rights treaties.

The Charter sets limits on the way the EU exercises its authority: the EU may not take action in a way that violates the rights in the Charter. According to its Article 51, the Charter does not "establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties". Thus, the Charter does not give the EU the right to create new legislation where it did not have the power to do so before the Charter became legally binding. At the same time, the legally binding nature of the Charter implies the obligation and the task to ensure that EU institutions and EU Member States do not violate the Charter when implementing EU law.

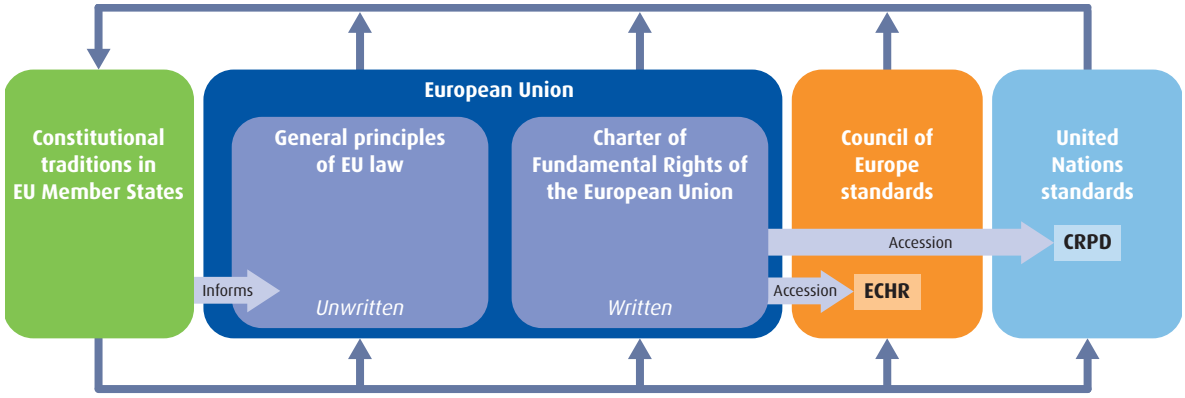
In addition to these internal rules of EU law – the general principles and the Charter of Fundamental Rights – the EU itself is also directly bound to the CRPD and is in the process of joining the ECHR, as required by the Lisbon Treaty. Generally speaking, such European and international treaties have been aimed at states and, in the past, made little or no provision to allow international organisations to join them directly. Although the CRPD and ECHR are notable exceptions to this practice, the heads of state and government of all Member States of the Council of Europe, hence also all of 27 EU Member States, agreed in May 2005 that the accession of the EU to other Council of Europe conventions should be considered.

So, according to EU law, the EU and its Member States, when acting in the scope of EU law, are bound by fundamental rights in three ways:

- the general principles of law as developed by the CJEU;
- the fundamental rights as listed and defined in the Charter of Fundamental Rights of the European Union;
- the fundamental rights as guaranteed by the Council of Europe's ECHR, to which the EU is now also bound to accede.

EU law puts Member States under a fundamental rights obligation only when acting in the scope of the EU treaties. As the European Commission frequently underlines, this is often misunderstood. In 2011, of those citizens' letters to the Commission on fundamental rights, 55 % concerned issues outside the

Figure 6: Interaction of fundamental rights in EU law



Source: FRA, 2011

remit of EU competences.[11] Therefore, it is important to underline that the reach of fundamental rights protection under EU law depends on the concrete context:

- when a legislative competence is available, the EU can harmonise fundamental rights protection in a specific field (compare for example the Data Protection Directive 95/46/EC);
- when EU Member States act in the scope of EU law, the CJEU can impose limits by referring to fundamental rights, for example, with regard to the right to family (see for example the *Zambrano* case, where the CJEU held that parents of a child who is a national of a Member State must be granted the rights to reside and work there);
- when a situation falls outside an EU-law context, the violation cannot be addressed by means of EU law (an example could be the mistreatment of soldiers of an EU Member State in a military barrack of that state).

At a more general level, Article 2 of the TEU provides for the EU to be "founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities". According to Article 7 of the TEU, the EU can determine that there is a "clear risk of a serious breach by a Member State" or even determine "the existence of a serious and persistent breach" of the values as stipulated in Article 2. The first procedure – identifying the risk of a breach – can be activated by a proposal submitted by a third of the EU Member States, the European Parliament or the European Commission. The second procedure – identifying the qualified breach – can be initiated by a third of the EU Member States or the European Commission. Whereas the Parliament cannot initiate the procedure that aims to determine a breach of the Article 2 values, the final decision determining a breach has to be taken by the European Council following consent of the Parliament.

Article 7 of the TEU even offers the possibility to impose sanctions on an EU Member State by suspending "certain of the rights deriving from the application of the Treaties to the Member States in question, including the voting rights of the representative of the government of that Member State in the Council". Interestingly, Article 7 procedures allow the EU to address under certain restricted conditions breaches in areas falling outside the scope of EU law, that is, in areas "where the Member States act autonomously".[12] It is, however, important to underline that these procedures are in the hand of the political institutions of the EU, whereas the role of the CJEU to review these procedures is limited. Such judicial review may concern "solely [...] the procedural stipulations" of Article 7 of the TEU (Article 269 of the TFEU).

In some instances, Members of the European Parliament have suggested having recourse to Article 7, for example, in the context of the involvement of Romania and Poland in so-called CIA flights in 2007 or in the context of the changes made to Hungarian law in 2011 and 2012. So far, however, since its inception in 1999 the EU has never applied Article 7 of the TEU in practice.

1.2.2. Complaint mechanisms: the Court of Justice of the European Union

Within the scope of EU law, a more regular fundamental rights control is offered through the standard procedures before the CJEU as laid down in the Treaty on the Functioning of the European Union (TFEU).

11 European Commission (2012a), p. 8.

12 European Commission (2003).

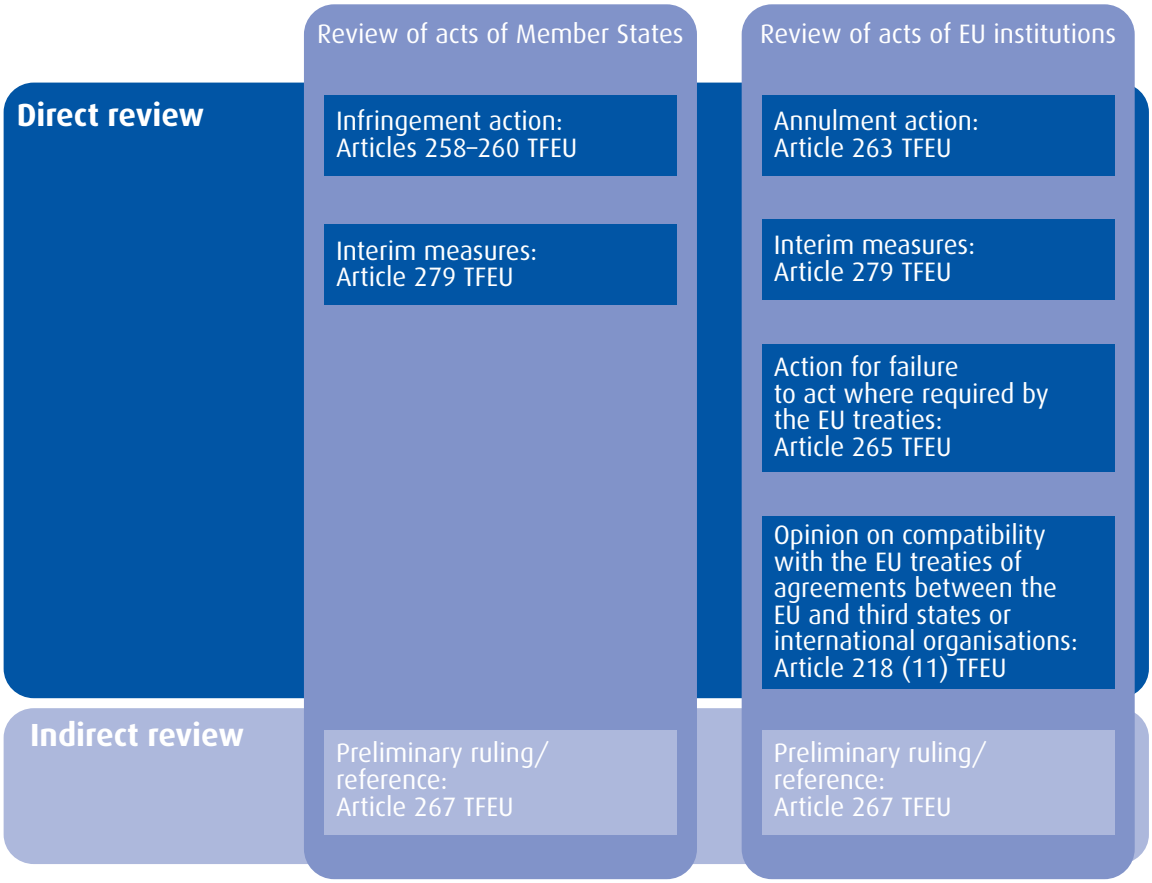
The CJEU is responsible for dealing with cases alleging a violation of the Charter of Fundamental Rights by the EU or by a Member State when it is implementing EU law. The CJEU is not primarily designed as a human rights court to deal with individual complaints. Its role is to judge whether the EU institutions themselves have failed to comply with EU law or to offer guidance to national courts on how to interpret the meaning of EU law. The Charter of Fundamental Rights is gaining prominence in this context. In 2011, the number of decisions quoting the Charter in its reasoning rose by more than 50 % against the year-earlier, to 42 from 27.[13]

In principle, an individual has the possibility to directly lodge a complaint with the CJEU if the EU fails to comply with the EU Charter of Fundamental Rights. An individual can, however, only institute proceedings against an individual EU act directed at him or her or which is of direct and individual concern to him or her, and against an EU regulatory act, if this act does not entail implementing measures and is of direct concern to the individual.

These limitations make it very difficult for an individual to complain about a piece of legislation because, by its nature, legislation establishes general rules that apply to everyone or to large groups of people. Thus, an individual is unlikely to satisfy the rules for legal standing before the CJEU unless they are specifically named by a piece of legislation, such as by being placed on a list of people suspected of involvement with terrorism. Furthermore, an individual may claim damages in cases of EU contractual and non-contractual liability (Article 340 TFEU).

Therefore, it is more common for an individual to reach the CJEU indirectly. This may happen when an individual brings a complaint to the national courts and questions arise in the case as regards the interpretation of the relevant EU legislation and its compatibility with the Charter. In such cases, the national court may opt to refer these questions to the CJEU for its opinion (preliminary reference according to Article 267 TFEU). When doing so, national courts also increasingly make reference to the Charter, with the number of such explicit references

Figure 7: Judicial enforcement routes in the EU



Source: European Parliament, 2011; based on The evolution of fundamental rights Charters and case law *by the European Parliament Directorate-General Internal Policies, Policy Department C 'Citizens' rights and constitutional affairs', p. 78*

13 European Commission (2012b), p. 6.

up 50 % in 2011 over the year earlier.[14] It is important to underline that last instance courts at national level are obliged to make recourse to the preliminary procedure in cases in which a question of EU law must be clarified.

Whereas direct access for individuals to the CJEU is limited in annulment procedures, the preliminary procedure allows for a unique and efficient dialogue between the national courts and the CJEU. It should be noted, nevertheless, that the national court decides – and not the individuals involved in the case – whether to refer the case to the CJEU. The CJEU may give its opinion on the interpretation or the validity of EU legislation, thereby enabling the national court to apply the correct interpretation of EU law in a specific case. It will also review whether a Member State is complying with the Charter of Fundamental Rights and general principles of EU law when implementing EU law or acting within the scope of EU law.

In its important role as the 'guardian' of EU treaties, the European Commission also has the power to launch an 'infringement' procedure against a Member State. This option represents a significant mechanism to protect fundamental rights in the EU and can be used when:

- a Member State fails to implement a piece of EU human rights-related legislation;
- a Member State implements EU legislation in a way that conflicts with fundamental rights.

The aim of an infringement procedure launched by the European Commission is different in character from that of a complaint lodged by an individual whose rights have been violated. Although the European Commission's interest in a particular case might result from information received by individuals, the infringement procedure is brought forward in the name of the European Commission as the guardian of the treaties. Its objective is to secure compliance with EU law by a Member State rather than to obtain some form of remedy for individuals. In this case, the European Commission, and not the individuals who may have had their rights violated, will decide whether to open a procedure. However, an individual whose fundamental rights guaranteed by EU law have been violated by a Member State may inform the Commission – which could again trigger infringement proceedings.

Such an infringement procedure is preceded by informal consultations between the state and the European Commission, during which potential problems are often addressed. This was, for example, the case in 2010, when the European Commission announced its intention to open formal proceedings against France concerning a possible breach of its obligations under the Free Movement Directive[15] due to the repatriation of Roma who were not French nationals. Since the European Commission was satisfied with the commitments and legislative amendments made by France to correctly implement the directive, it did not open an infringement procedure against France.

If, however, problems cannot be resolved through informal consultations, the European Commission sends a 'letter of notice' to a Member State explaining its position. Such a 'letter of formal notice' to a Member State opens the formal procedure. At this stage, negotiations can still resolve the issue. If the European Commission is not satisfied with the outcome of negotiations, it will deliver a 'reasoned opinion' explaining why it does not consider a Member State to be in compliance with EU law. Following the reasoned opinion, the European Commission will begin proceedings before the CJEU. Issues are often settled during the formal negotiation phase after the European Commission delivers a letter of notice, but before it issues a reasoned opinion.

The Racial Equality Directive provides an example where various Member States were found in violation of their obligations under the treaties (non-implementation). The European Commission began proceedings against almost all EU Member States because they had not transposed, or had only partially transposed, the Racial Equality Directive,[16] which obliges Member States to prohibit discrimination on the basis of race or ethnicity.[17]

Figure 8: Stages leading to infringement proceedings

Source: FRA, 2011

14 *Ibid.*, p. 5.

15 Directive 2004/38/EC.
16 Council Directive 2000/43/EC; FRA (2012a).
17 See European Commission (2005); European Commission (2009).

However, only five cases ended up before the CJEU, while other EU Member States resolved the issue through negotiation.[18]

A more recent example in this regard relates to Hungary. In 2011, the European Commission considered launching proceedings against Hungary in the context of Hungary's new constitution and corresponding legislation. Given that Hungary did not comply with the concerns expressed by the European Commission, it sent three letters of formal notice to Hungary. The letters argue that Hungarian legislation conflicts with EU law by putting into question the independence of the country's central bank and data protection authorities, and by the measures affecting its judiciary. The latter include measures forcing more than 200 judges to retire.

1.2.3. Complaint mechanisms: the Ombudsman, the EDPS and the petitions committee of the Parliament

In addition to formal court proceedings before the CJEU, there are a number of quasi-judicial mechanisms where an individual can have their complaint investigated by an EU body, which may then make recommendations. Although the outcome of these quasi-judicial mechanisms is not legally binding, three relevant bodies exist in the EU:

- the European Ombudsman may investigate complaints alleging maladministration in the institutions and bodies of the EU. These may include alleged violations of fundamental rights, such as discrimination or the right of access to information, which are often due to a refusal to grant access to official documents. The Ombudsman may conduct inquiries either on its own initiative, or on the basis of complaints submitted to it directly or through a Member of the European Parliament. Any EU citizen, or any natural or legal person residing or registered in a Member State, can make a complaint. It is important to note that the right to complain to the European Ombudsman is enshrined in Article 43 of the EU Charter of Fundamental Rights. It is a basic right of EU citizenship in accordance with Article 24 of the TFEU. In 2010, the European Ombudsman registered 2,667 complaints and processed 2,727, 27 % of which fell within his mandate;[19]
- similar to the European Ombudsman, under Article 227 of the TFEU, the European Parliament's Committee on Petitions may take up a complaint from an individual on any subject that falls within the EU's areas of competence. Unlike the European Ombudsman, however, the complaint can relate to the behaviour of a national or local authority and not merely EU institutions;
- the EDPS is responsible for ensuring that EU institutions and bodies respect the right to privacy. Its powers include conducting inquiries on its own initiative or dealing with the complaints lodged by individuals who feel their personal data has been mishandled by a European institution or body.

1.2.4. Other bodies responsible for fundamental rights

The EU institutions, particularly the European Parliament or the European Commission, often carry out activities to promote fundamental rights. The European Parliament frequently urges other institutions and EU Member States to consider addressing particular fundamental rights challenges through policy and legislation. In addition to its role to ensure compliance with EU law, the European Commission may promote fundamental rights through coordinating or funding particular programmes or projects including research. For example, the European Commission programme entitled 'Fundamental rights and citizenship' offers around €95 million in funding for projects that promote fundamental rights and covers the period from 1 January 2007 to 31 December 2013.

As explained in its Strategy for the effective implementation of the Charter of Fundamental Rights by the EU, the European Commission has established methods to mainstream fundamental rights considerations into legislation across policy areas, also covering the rights of the child and the rights of persons with disabilities.[20] In cases where legislation may have an impact on data protection, the European Commission is obliged to consult the EDPS.[21] In addition, the Council of the EU[22] and the European Parliament[23] have introduced internal procedures to ensure that policy and legislative proposals comply with the EU Charter of Fundamental Rights.

18 CJEU, C-327/04, *Commission v. Finland*, 24 February 2005; CJEU, C-329/04, *Commission v. Germany*, 28 April 2005; CJEU, C-335/04, *Commission v. Austria*, 4 May 2005; CJEU, C 320/04, *Commission v. Luxembourg*, 24 February 2005; CJEU, C-326/04, *Commission v. Greece*, 25 September 2004.

19 European Ombudsman (2010), p. 21.

20 European Commission (2011a); European Commission (2010a).

21 Regulation (EC) No. 45/2001, OJ 2001 L 8, p. 1, Art. 28 (2).

22 Council of the European Union (2011a).

23 A change introduced to the European Parliament's rules of procedure in December 2009. See Rule 36 of the current Rules of Procedure, adopted September 2011, available at: www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+RULES-EP+20110926+0+DOC+PDF+V0//EN&language=EN.

In the case of the European Commission, upcoming legislation is tested against the following check-list:[24]

- What fundamental rights are affected?
- Are the rights in question absolute rights (which may not be subject to limitations, like human dignity and the ban on torture)?
- What impact do the various policies under consideration have on fundamental rights? Is the impact beneficial (promotion of fundamental rights) or negative (limitation of fundamental rights)?
- Do the options have both a beneficial and a negative impact, depending on the fundamental rights concerned (for example, a negative impact on freedom of expression and beneficial one on intellectual property)?
- Would any limitation of fundamental rights be formulated in a clear and predictable manner?
- Would any limitation of fundamental rights:
  - be necessary to achieve an objective of general interest or to protect the rights and freedoms of others?
  - be proportionate to the desired aim?
  - preserve the essence of the fundamental rights concerned?

In this framework, the FRA plays a key role. Its objective is to provide the relevant institutions, bodies, offices and agencies of the EU and its Member States when implementing EU law "with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights."[25] The FRA does this by:

- collecting and analysing evidence and data from across EU Member States to inform EU institutions and Member States about the situation of fundamental rights throughout the EU. In particular, it informs on the degree to which rights are in practice being enjoyed by individuals in their daily life. This includes analyses of EU and national legislation, as well as analyses of sociological data and information gathered through large-scale surveys and in-depth interviews;
- providing assistance and expertise based on the evidence gathered. The FRA therefore issues opinions and conclusions to EU institutions and Member States on specific thematic topics. Moreover, the European Parliament, the Council of the European Union or the European Commission can request the agency to deliver opinions on EU legislative proposals "as far as their compatibility with fundamental rights are concerned".[26] This specific task contributes to the agency's overall objective to support EU institutions and Member States to fully respect fundamental rights. Such opinions on legislative proposals do not concern the legality of EU acts in the sense of annulment procedures (Article 263 of the TFEU) nor the question whether an EU Member State has failed a treaty obligation in the sense of infringement procedures (Article 258 of the TFEU).[27] In 2011, for example, the FRA delivered two such opinions on draft legislation concerning the European Investigation Order and Passenger Name Record (PNR) data;
- engaging in awareness-raising to increase understanding of fundamental rights among the general public, as well as specific target groups. The FRA has close relations with other international organisations working in the field of fundamental rights, in particular with the Council of Europe, to ensure the pooling of expertise and resources where appropriate. The FRA's Fundamental Rights Platform (FRP) and the collaboration with NHRIs enable the FRA to gather the views and expertise of non-governmental organisations (NGOs) and NHRIs in a structured manner.

Decision makers from both EU institutions and Member States can draw on the work of the FRA when making policies and laws. FRA's substantial body of evidence is also used by other international bodies, such as the Council of Europe, to inform their work.

1.2.5. Remarks on the landscape

The EU layer in the fundamental rights landscape provides EU Member States with a unique opportunity. Unlike rules developed by other international organisations, EU law automatically penetrates the national system, displacing national law that contradicts it. National courts therefore apply EU law; national administrations carry it out. In contrast, treaties, judicial decisions and guidance offered by the Council of Europe and UN bodies do not automatically take effect at the national level in all Member States. The state must instead actively take measures to implement them. The EU has made important use of the unique nature of EU law to strengthen the implementation of fundamental rights, in particular in the areas of data protection and non-discrimination and gender equality. In these two areas, EU Member States were required to create national data protection authorities and equality

24 European Commission (2010b), p. 5.
25 Council Regulation (EC) No. 168/2007, Art. 2, p. 4.
26 Council Regulation (EC) No. 168/2007, Consideration No. 13.
27 Council Regulation (EC) No. 168/2007, Art. 4 (2).

bodies. Given the potential impact of EU law at national level, the EU must be particularly vigilant in ensuring the compliance of its laws with fundamental rights.

In practice, the fundamental rights landscape at EU level is geared towards ensuring respect for fundamental rights through promotional activities. Moreover, the EU does play an important role in compliance enforcement through the infringement procedure of the CJEU. Even though the European Commission may not take this procedure to its final stages, the mere possibility that it could do so appears to help secure EU Member State compliance with EU law in the field of fundamental rights. Moreover, key elements of the fundamental rights landscape allowing for complaints at national level, namely the equality bodies and data protection authorities, have been introduced or further developed as a result of obligations under EU law. However, it remains a challenge and a shared responsibility for all players at all levels to better inform the Member States' populations where EU law applies and where not and which are, consequently, the right authorities to address in cases of fundamental rights violations.[28]

As regards external judicial control, the EU is not yet Party to the ECHR and thus as such not subject to external judicial scrutiny. This gap will be addressed by the EU's accession to the ECHR. The extent of the resulting obligations will, however, depend on the accession agreement as finally ratified.

When it comes to legislation, the impact assessment exercise as provided for within the European Commission looks at the impact on fundamental rights. Such an exercise is a promising step in the right direction. Since such mechanisms are based on expertise within the respective political institution, they can benefit from external opinions of independent expert bodies.

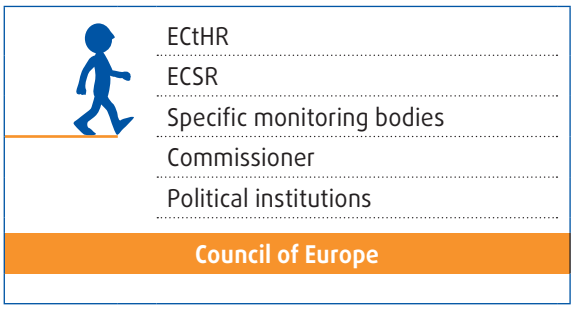
1.3. Council of Europe level

All EU Member States are members of the Council of Europe. Over the last 60 years, the Council of Europe has played a significant role in expanding and improving the protection of fundamental rights in Europe, as well as in fostering and safeguarding the principle of the rule of law. These improvements comprise norms linked, for example, with civil and political rights, social rights, rights of persons belonging to minorities as well as action against racism and trafficking in human beings as set out in conventions, recommendations and other legal instruments adopted by the Committee of Ministers.

28 See: https://e-justice.europa.eu/home.do?action=home or www.ombudsman.europa.eu/atyourservice/interactiveguide.faces.

They also include the active supervision of compliance with these norms, carried out by means of several specialised mechanisms. This includes judicial or quasi-judicial bodies with the authority to hear complaints of human rights violations and rule on the conformity of legislation and practice in the States Parties, such as the European Court of Human Rights (ECtHR) and the European Committee of Social Rights (ECSR), as well as non-judicial bodies monitoring the implementation of human rights standards in member states, discerning cases of non-compliance with such standards, proposing solutions or addressing recommendations to the member states.

Figure 9: Relevant institutions at the Council of Europe level



Source: FRA, 2011

1.3.1. Protected rights

States that have ratified the European Convention on Human Rights have undertaken to secure and guarantee to everyone within their jurisdiction, not only their nationals, the fundamental civil and political rights defined in the convention.

The rights and freedoms secured by the convention include, for instance, the right to life (Article 2), the right to a fair trial (Article 6) and to an effective remedy (Article 13), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), and the protection of property. The convention prohibits, in particular, torture and inhuman or degrading treatment or punishment (Article 3), forced labour (Article 4), arbitrary and unlawful detention (Article 5), and discrimination in the enjoyment of the rights and freedoms secured by the convention (Article 14). Other rights and freedoms, such as a general prohibition of discrimination, have been set out in additional protocols.

All EU Member States have ratified the ECHR and its Protocol No. 1, enshrining the rights to property, education and elections, and No. 6, abolishing the death penalty. Ratification of the ECHR has been an explicit

precondition for accession to the EU since the 1999 Amsterdam Treaty (see Articles 49 and 2 of the TEU).

The European Social Charter (ESC, adopted in 1961 and revised in 1996), is the natural complement to the ECHR, setting out fundamental rights in the social and economic field. It safeguards rights regarding employment, social and legal protection, housing, health, education, free movement and non-discrimination. All EU Member States are parties either to the 1961 Charter or to the revised Charter.

There are a total of more than 200 treaties created under the Council of Europe's aegis, many of which cover specific fundamental rights issues including data protection,[29] torture,[30] victims' rights,[31] children's rights[32] and the protection of minorities.[33]

1.3.2. Complaint mechanisms

The ECtHR is responsible for handling applications from individuals, as well as from groups of individuals, companies, NGOs or even States Parties, alleging violations by a State Party of their rights protected by the ECHR. Once the EU itself becomes Party to the ECHR, individuals will be able to make complaints about EU violations of the convention directly to the ECtHR.

In keeping with the principle that States Parties are primarily responsible for the implementation of human rights, cases can only be brought to the court after domestic remedies have been exhausted; in other words, individuals complaining of violations of their rights defined in the convention must first have taken their case through the courts of the country concerned, up through the highest possible level of jurisdiction. This gives the state itself the first opportunity to provide redress for the alleged violation at national level. The applicant must be, personally and directly, a victim of a violation of the convention, and must have suffered a significant disadvantage as a result. Applications must be lodged with the court within six months following the last judicial decision in the case, which will usually be a judgment by the highest court in the country concerned.

The ECtHR judgments on individual cases finding violations are legally binding. The States Parties concerned are obliged to carry them out, by paying the pecuniary compensation awarded and also, where necessary, by adopting other individual measures to restore the applicant's rights, or even by adopting general measures, especially amendments to legislation, to prevent similar violations from occurring in the future. The correct execution of the ECtHR judgments is supervised by the Committee of Ministers of the Council of Europe, which is composed of representatives of its 47 member states.

Perhaps the most significant challenge facing the ECtHR is the volume of complaints it receives, which far outweighs its capacity to issue judgments (see Chapters 8 and 10 of FRA's Annual report 2011).[34] This is due in part to the fact that the large majority of cases registered with the ECtHR are generally found to be inadmissible – that is, they do not conform to the basic requirements of a complaint, such as the requirement to exhaust domestic remedies or for the complaint to relate to a right covered by the ECHR. Many cases are also caused by identical problems – that is, the same rule or practice in national law is responsible for generating a large number of cases.

Several steps have been taken towards addressing these issues. Protocol No. 11 to the ECHR, which entered into force in 1998, made the ECtHR a full-time body. In addition, the ECtHR developed a 'pilot-judgment' procedure, applied for the first time in 2004. Under this procedure, where an application reveals a structural or systemic problem which has given rise or may give rise to similar applications, the ECtHR may decide one or more cases while adjourning other similar applications until the remedial measures required by the pilot judgment – a domestic remedy and a procedure to deal with similar applications – are adopted. Then, in 2010, Protocol No. 14 entered into effect and brought further reforms aiming at guaranteeing the long-term efficiency of the court by optimising the filtering and processing of applications. It allows, among other measures, single judges to deal with the simplest cases, principally admissibility decisions, and for a new admissibility criterion, of 'significant disadvantage'. The Council of Europe Committee of Ministers was also given the right to bring infringement proceedings against states which refused to comply with judgments (Article 46 (4) ECHR). It is not yet possible to assess fully the effects of the entry into force of Protocol No. 14. By the end of 2011, the ECtHR had over 150,000 applications pending and the reform of the control mechanism remained on the agenda. A high level conference on the future of the European Court of Human Rights was held in Brighton from 18 to 20 April 2012 and agreed on a package of concrete reforms to ensure that

29 Council of Europe, Convention for the protection of individuals with regard to automatic processing of personal data, CETS No. 108, 1981 and its protocol, CETS No. 181, 2001.
30 Council of Europe, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, CETS No. 126, 1987.
31 Council of Europe, Convention on the Compensation of Victims of Violent Crimes, CETS No. 116, 1983.
32 Council of Europe, European Convention on the Exercise of Children's Rights, CETS No. 160, 1996; Council of Europe, Convention on the Protection of Children against sexual exploitation and sexual abuse, CETS No. 201, 2007.
33 Council of Europe, Framework Convention for the Protection of National Minorities, CETS No. 157, 1995.

34 FRA (2012b), Chapters 8 and 10.

the court can be most effective for all 800 million citizens of Council of Europe member states.

The European Committee of Social Rights (ECSR) is an independent quasi-judicial body which interprets the rights enshrined in the ESC and rules on the conformity of legislation and practice in the States Parties with it. The monitoring procedure is twofold: a reporting procedure enables the ECSR to consider reports submitted by the States Parties and to issue conclusions as to their respect of the rights enshrined in the ESC; for the Parties who accepted the additional protocol to the ESC, there is also a collective complaint procedure. By the beginning of 2012, 12 EU Member States had become Parties to the Additional Protocol to the ESC.[35] Under this protocol, national and international organisations such as trade unions, employers' organisations and international NGOs may lodge complaints; individuals may not do so directly. The ECSR examines the complaint and, if the latter is declared admissible, it then takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report which is made public. Finally, on the basis of information provided by the State Party concerned as to remedial action taken in response to the decision, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the state concerned take specific measures to bring the situation into line with the ESC.

1.3.3. Bodies responsible for promoting and protecting fundamental rights

The Council of Europe Commissioner for Human Rights (Commissioner) is an independent, non-judicial institution mandated to promote awareness and respect for human rights in the member states. As a non-judicial institution, the Commissioner's Office cannot act on individual complaints. The activities of the Commissioner focus on three areas: a system of country visits and dialogue with national authorities and civil society leading to recommendations and dialogue on their implementation; thematic work and awareness-raising activities on specific human rights issues to provide guidance for the improvement of rights implementation; cooperation with other Council of Europe and international human rights bodies, as well as with national human rights structures, NGOs and other relevant stakeholders.

A range of bodies exist within the Council of Europe with responsibility for promoting the implementation of fundamental rights. Some of these bodies are established pursuant to or in view of the monitoring of the implementation of specific Council of Europe conventions by the respective contracting parties, such as:

- European Committee for the Prevention of Torture (CPT);
- Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM);
- Committee of Experts of the European Charter for Regional or Minority Languages (CAHLR);
- Group of Experts on Action Against Trafficking in Human Beings (GRETA);
- Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse;
- Group of Experts on Action against Violence against Women and Domestic Violence (as from the entry into force of the Convention on Preventing and Combating Violence Against Women and Domestic Violence).

Others have a more thematic approach and are addressed to all Council of Europe member states (and even beyond) monitoring their compliance and/or providing advice. This category includes, among others:

- the European Commission against Racism and Intolerance (ECRI), which focuses on the areas of discrimination on the grounds of race, ethnicity, citizenship, colour, religion and language, as well as xenophobia, antisemitism and intolerance;[36]
- the European Commission for Democracy through Law (Venice Commission), the Council of Europe's advisory body on constitutional matters;
- the European Commission for the Efficiency of Justice (CEPEJ), which aims at the improvement of the efficiency and functioning of justice in the member states, and the development of the implementation of the instruments adopted by the Council of Europe to this end.

Monitoring is generally carried out by observing the situation in a particular state and then issuing recommendations on how the situation could be improved. The reports and recommendations are directly addressed by the monitoring body to the state concerned or transmitted to the Committee of Ministers, such as in the case of the FCNM, or to a Committee of the Parties to the Convention, such as in the case of GRETA, which

35 See FRA (2012b), 'EU Member States and international obligations', Chapter 10. Council of Europe, Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, CETS No. 158, 1995.

36 Council of Europe, Committee of Ministers (2002); Council of Europe, ECRI (2009).

may then adopt a recommendation addressed to the state in question. Some of these mechanisms, such as ECRI, may also elaborate general policy recommendations addressed to all member states. As a rule, the monitoring bodies comprise independent experts in the relevant human rights field, appointed by the member states or by the Committee of Ministers on the basis of their moral authority and recognised expertise.

Information is gathered in various ways. Some bodies, such as the CPT, collect first-hand information through country visits to key places, such as detention facilities, meeting with authorities and persons concerned, such as persons deprived of their liberty. Other bodies rely primarily on information provided by the state itself through a reporting procedure and information collected by themselves through on-site visits and contacts with authorities and civil society. Many bodies combine these approaches.

Moreover, the role of the Council of Europe's political organs should be noted. As mentioned, the Committee of Ministers, which is made up of states' representatives, plays a role in overseeing or following up on the implementation of recommendations and guidance issued by most monitoring bodies, and has a key role in the supervision of the execution of judgments, decisions and recommendations by the ECtHR and the ECSR. The Committee of Ministers is also responsible for the adoption of new human rights standards, be they legally binding, such as a convention, or recommendations that elaborate on the content and meaning of states' human rights obligations. Some recommendations may also foresee 'light' follow-up mechanisms, such as periodical revisions of their implementation by member states.

In addition, the Parliamentary Assembly, composed of representatives of national parliaments, has several committees (such as the committee on Legal Affairs and Human Rights, the committee on Migration, Refugees and Displaced Persons, the Committee on Equality and Non-Discrimination and the Honouring of Obligations and Commitments by member states of the Council of Europe) which examine particular human rights issues. This often includes gathering information on particular human rights themes through country visits, secondary research, and the consultation of experts or NGOs. A report based on this information is then compiled and may then lead to the adoption of a resolution or recommendation. Although such instruments have a mainly political value and are not legally binding, they have often provided the foundation for the launch of new standard-setting activities in the human rights field by the Committee of Ministers.

1.3.4. Remarks on the landscape

The Council of Europe uses a rich variety of bodies to protect and promote the implementation of fundamental rights. These include judicial or quasi-judicial procedures that deal with complaints alleging rights violations, as well as a range of bodies that monitor the implementation of rights and issue guidance to states on how to improve implementation. To become more effective on the ground, it will be helpful if the Council of Europe and the EU can increase their inter-operationality. When EU Member States apply EU law, they remain responsible for implementing human rights under Council of Europe treaties. The ECtHR has, for instance, found EU Member States in violation of the ECHR for failing to implement it properly when enforcing EU rules related to asylum.[37] Similarly, the ECSR has found an EU Member State in violation of the ESC while implementing EU rules related to freedom of movement.[38]

Against this background, it is important to make positive use of the EU layer of governance to ensure that all branches of EU government – judiciary, legislature and administration – can contribute to the flowering of the Council of Europe standards, and to ensure full compliance with EU legal instruments that affect the fundamental rights of EU citizens. Already the 'Guidelines on the relations between the Council of Europe and the European Union' issued by the Council of Europe Committee of Ministers in 2005 referred to the need to further develop legal cooperation and complementarity between legal texts elaborated by the EU and the Council of Europe.[39] This principle was then expressed in the 23 May 2007 Memorandum of Understanding between the Council of Europe and the EU, which constitutes the legal and political reference for cooperation. Under this memorandum, the Council of Europe is regarded as the 'Europe-wide reference source for human rights'. The EU is called upon, among other matters, to cite Council of Europe norms as a reference in its documents, to take into account the decisions and conclusions of the Council of Europe monitoring structures and to ensure coherence of its law with the relevant Council of Europe conventions. The memorandum also requires both the EU and the Council of Europe, when preparing new initiatives in the field of human rights, to draw on their respective expertise as appropriate through consultations. The 2005 document already identified the FRA, though not yet established, as an institution through which to further increase cooperation, coherence and complementarity between the fundamental rights work of the Council of Europe and the EU.

The Council of Europe's standards and procedures are addressed mainly to states. The EU's competencies allow for accession only to selected Council of Europe conventions, allowing its full participation only in those instruments' monitoring mechanisms, and the EU has not acceded to all these instruments.

37 ECtHR, *M.S.S. v. Belgium and Greece*, No. 30696/09, 21 January 2011.
38 Council of Europe, ECSR (2011).
39 Council of Europe, Committee of Ministers (2005).

Thus, there remains a need for EU-specific procedures and institutions as already described. Moreover, the large array of mechanisms available under the Council of Europe system cannot hide the fact that not all the Council of Europe instruments bind all 27 EU Member States. Those instruments that are binding for the EU27 do not provide a comparative assessment across all participating states at one single moment – rather, groups of states are monitored at various moments in time, depending on the respective monitoring cycles. Finally, the monitoring procedures established under the Council of Europe rarely provide for the collection of primary data.

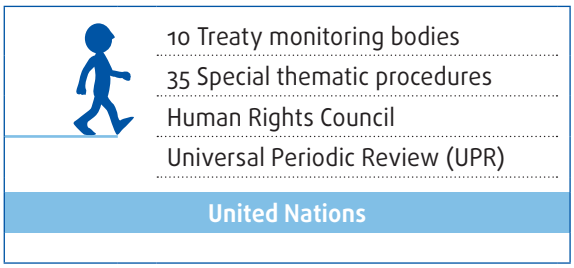
1.4. United Nations level

The United Nations (UN) Universal Declaration of Human Rights (UDHR), adopted in 1948, first elaborated the concept of 'human rights' in an international document. Although it was a declaration and not a legally binding treaty, the UDHR has served as starting point for a range of human rights treaties. These include general treaties covering a range of civil, political, economic and social rights as well as treaties designed to deal with specific issues, such as torture, or the position of particularly vulnerable groups, such as racial or ethnic minorities, women, children and persons with disabilities. The creation of human rights treaties remains an on-going process, with the CRPD and ICPED among the latest to be adopted. All EU Member States are members of the UN and parties to the majority of UN human rights treaties.

To promote the implementation of human rights, a variety of bodies with different types of powers have been created at the UN level. Each UN human rights treaty includes a provision for the creation of a committee of independent experts, referred to as a 'treaty body'. Treaty bodies are often given power to act in a similar way as a court, such as by deciding on complaints made by individual victims about violations. Although a state may be Party to a treaty, states have the option to consent to the corresponding complaint procedure. These bodies also review the performance of states through a reporting procedure, where, usually every three to five years, a state is expected to report on what action it has undertaken to implement the rights under the relevant treaty. On the basis of this procedure, the treaty body then adopts 'concluding observations' that offer guidance and advice to the state on where improvement is needed. The treaty bodies also offer more general guidance to states on the meaning of the rights in the treaties.[40]

States have the option to become Party to a UN human rights treaty, but they are not obligated to do so just because they are a UN member. All states that have joined the UN do undergo, however, some form of supervision from the UN Human Rights Council, under the so-called 'Universal Periodic Review' (UPR) procedure. Under this review, all UN Member States are examined by the Council, which then issues recommendations on how to improve the implementation of human rights at the national level. In 2011, nine EU Member States participated in the UPR.[41]

Figure 10: Relevant institutions at the UN level



Source: FRA, 2011

1.4.1. Protected rights

Since the adoption of the UDHR in 1948, the UN Member States have cooperated on the creation of a range of human rights treaties. There is no obligation on states to become Party to one or more of these treaties. Six core treaties have been ratified by all 27 EU Member States and by the acceding country Croatia.[42] These six treaties cover the following areas:

- protection against racial discrimination (International Covenant on the Elimination of Racial Discrimination, ICERD, 1965);
- economic, social and cultural rights (International Covenant on Economic Social and Cultural Rights, ICESCR, 1966);
- civil and political rights (International Covenant on Civil and Political Rights, ICCPR, 1966);
- elimination of discrimination against women (Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, 1979);
- protection against torture (CAT, 1984);
- protection of children's rights (CRC, 1989).

40 See Chapter 10 of the FRA Annual Report, *Fundamental rights challenges and developments in 2011*, outlining to which treaties EU Member States are Party and whether they were monitored in 2011.

41 See FRA (2012b), Chapter 10.

42 For the status of ratification of UN conventions, see Chapter 10 of FRA's Annual Report 2011 (FRA (2012b)).

In addition to the obligations that flow from becoming Party to these treaties, a state also falls under the obligation to implement fundamental rights standards simply through its membership in the UN. Under Articles 55 and 56 of the UN Charter, all members "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of [...] universal respect for, and observance of, human rights". Over the past 60 years, the UN has developed a practice of monitoring the implementation of rights through the UN's specialised human rights body, the Human Rights Council, which is composed of representatives from 47 states. These mechanisms apply to all states and exist alongside the monitoring procedures that exist under the separate human rights treaties. When considering state compliance with the UN Charter and human rights, the Human Rights Council will apply the UDHR, as well as any other human rights treaty that may be relevant.

While all EU Member States are parties to various UN treaties, the EU itself is only Party to the CRPD. This is primarily due to the fact that international human rights treaties have been directed towards states as states have the legal authority and administrative capacity to fulfil the obligations that the treaties require. The evolution of the EU and its gradual expansion of authority over different policy areas have also raised the question of whether the EU itself should become Party to international treaties. In regard to the CRPD, it was recognised that the EU holds a range of powers that can affect the rights of persons with disabilities. Therefore, this treaty specifically has a provision allowing for the EU to become Party to it.

Importantly, UN treaties tend to cover more rights than those listed in national constitutions or in the Charter of Fundamental Rights of the European Union. The CRC, for example, contains a list of around 40 specific rights of the child; the EU Charter, in contrast, contains one general provision. Similarly, some rights are not contained in the EU Charter, such as the rights of minorities, which can be found in the ICCPR (Article 27) or the right to food described in the ICESCR (Article 11). While the right to health and housing are featured in the EU Charter of Fundamental Rights, they are phrased in more limited terms than in the ICESCR (Articles 11 and 12). At the same time, the EU Charter contains an express right to data protection (Article 8), which does not appear in UN treaties. Data protection is, however, generally considered to form an integral part of the right to privacy, which is protected by the ICCPR (Article 17). Another example where a UN obligation in a sense goes further than EU law relates to the notion of equality. International law accepts that the obligation to treat everyone equally might *require* positive legal measures of protection. EU law is more limited in this respect: so far, it only establishes that the principle of equal treatment *shall not prevent* any EU Member State from maintaining or adopting measures providing for specific advantages to reach a specific gender balance, or to prevent or compensate for disadvantages linked to racial or ethnic origin.

1.4.2. Complaint mechanisms

The UN Charter imposes human rights obligations on states, and all states in the world are Party to at least one human rights treaty. Due to this situation, there are, broadly speaking, two sets of bodies responsible for monitoring states: those established under the UN Charter and those established under the various UN human rights treaties.

Each of the core UN human rights treaties mentioned provides for a monitoring body composed of independent experts, referred to as 'treaty bodies'. Most although not all of these bodies may receive complaints from individuals alleging a violation of their rights (see Table 1). However, to activate this function, a state must give its consent. To lodge a complaint, an individual must satisfy 'admissibility' requirements similar to those imposed by the ECtHR, such as the requirement to exhaust local remedies. When a treaty body issues its decision on a complaint, it will call for a specific course of action, such as the release of an individual from prison where this is found to be unlawful; it may also instruct payment of compensation. The decisions adopted are not legally binding. Nevertheless, they can carry great weight.

Under the UN Charter, opportunities for individuals to make complaints are more limited. The Human Rights Council has established 'special procedures', comprised of an independent expert or a group of experts with a mandate to investigate human rights in a particular state or, more commonly, to examine a particular human rights theme, such as the right to education or torture. An individual may contact such a specialised body with his or her complaint against a state if it falls within the mandate of one of these 'special procedures'. With a few exceptions, the relevant expert may then take up this case with the state in question. However, this procedure is usually limited to reminding the state of its international obligations and requesting further information on the case. There is nevertheless evidence that this procedure does result in improvements in particular cases, even if the extent of the success of this largely diplomatic exercise is unclear.

An additional complaint mechanism, the 'former 1503-procedure', accepts complaints from any individual in any state, if the complaint meets certain basic criteria. The complaints must concern "consistent patterns of gross and reliably attested violations".

Table 1: UN treaty bodies – existence and acceptance of individual complaint procedures and number of cases

	ICERD	ICESCR	ICCPR	CEDAW	CAT	CRC	ICRMW	CRPD	ICPED
Year (into force)	1965 (1969)	1966 (1976)	1966 (1976)	1979 (1981)	1984 (1987)	1989 (1990)	1990 (2003)	2006 (2008)	2006 (2010)
Total number of State Parties (EU Member States and Croatia)	175 (28)	160 (28)	167 (28)	187 (28)	150 (28)	193 (28)	45 (0)	109 (20)	30 (5)
Individual complaints (provision)	Yes (Article 14)	No (OP 2008 (not yet in force))	Yes (OP 1966 (1976))	Yes (OP 1999 (2000))	Yes (Article 22)	No (OP 2011 (not yet in force))	No (Article 77 (not yet in force))	Yes (OP 2006 (2008))	Yes (Article 31)
Total number of states accepting individual complaints (EU Member States and Croatia)	54 (23)	7 (1)	114 (27)	104 (25)	66 (23)	0 (0)	2 (0)	65 (17)	13 (4)
Total number of communications/ cases where a violation was concluded (violations concluded for EU Member States and Croatia)	49 / 12 (9)	n/a	2133 / 745 (104)	39 / 9 (5)	484 / 67 (30)	n/a	n/a	0 (0)	0 (0)

Notes: Information on cases since inception of mechanisms until March 2012. Treaties in which individual complaint procedures are provided are in green, yellow squares represent those which do not have individual complaint procedures. For the full names of the conventions see the list of acronyms at the beginning of this report.

Source: FRA, 2012; based on data provided by the Office of the High Commissioner for Human Rights (OHCHR)

1.4.3. Bodies responsible for promoting fundamental rights

In addition to their complaint function, the UN treaty bodies exercise an important two-pronged promotional function through 'state reporting' and 'general comments'. Under 'state reporting', states are required to periodically report to each treaty body on the status of rights implementation and what the state has done to implement the relevant treaty. Following a dialogue with state representatives, the relevant treaty body then issues its concluding observations and comments, and explains where improvements need to be made. In its 'general comments', each treaty body offers its opinion on what is required in order to fully implement a particular right. The Committee against Torture also features a Subcommittee on Prevention of Torture, mandated to visit detention facilities. The Optional Protocol to the Convention on Torture (OP-CAT) allows for such visits and also requires states to set up 'national preventive mechanisms',[43] effectively devolving monitoring according to international standards to the national level. While the views of the treaty bodies are not legally binding, they do offer a rich source of guidance for legislators and policy makers. One limitation to their potential impact is, however, the extent to which their findings are disseminated among national ministries and inform national policy making.

Parallel to the monitoring undertaken by the treaty bodies, the Human Rights Council conducts a UPR review, as mentioned earlier, on the human rights implementation of each UN member every four years. The Human Rights Council examines a state-submitted report, along with a report compiled by the OHCHR (including information about the human rights situation of that state gathered from the treaty bodies and the 'special procedures'), and a report, drafted by OHCHR based on information received from 'other relevant stakeholders' including NGOs, NHRIs, human rights defenders, academic institutions and research institutes, regional organisations and civil society representatives. The Council then issues recommendations for improvement which the state basically is free to accept or reject. Generally, states accept a majority of the recommendations.

The 'special procedures' operating under the Human Rights Council, aside from dealing with individual complaints, also and predominantly engage in monitoring work, which can be based on country visits as well as other information, such as reports from NGOs. Recommendations on how implementation can be improved are made on the basis of these reports. The special procedures may result in texts that later can be used as political guidance or legal standards on particular issues. Developing legal standards is the main task of the Advisory Committee of the Human Rights Council, which is a body of independent experts.

43 For more information, see: FRA (2012b), Chapter 8.

1.4.4. Remarks on the landscape

The UN-level mechanisms for promoting the implementation of fundamental rights at the national level could be considered as weaker than those in place at the national, EU or Council of Europe level. This is primarily related to the fact that the UN has limited enforcement powers and the decisions of its mechanisms are generally not legally binding, although UN treaties themselves are legally binding. The combination of weakness in terms of implementation powers but richness in terms of substantial standards suggests that there is a potential for increased inter-operationality between the UN and the EU levels of the overall fundamental rights landscape.

Similar to Council of Europe bodies, UN mechanisms do not directly monitor or engage with the EU but rather with individual Member States. The one exception to this is the CRPD, to which the EU is Party. This does not mean, however, that individual complaints handled by the treaty bodies, or guidance issued by various bodies, are not to be taken into account by the EU's bodies and institutions. While the CJEU relies less on UN documents than on Council of Europe materials, the political institutions have increasingly looked to guidance issued by UN bodies when formulating law and policy. Perhaps the best examples of where the two systems meet, apart from the area of disability,[44] are rights of the child and in the area of asylum. In these areas, UN standards are particularly detailed. As regards asylum, the EU has considerable powers and frequently consults with the UN High Commissioner for Refugees (UNHCR). More generally, the European Commission has access to UN standards and guidance when interpreting the EU Charter of Fundamental Rights to ensure the compatibility of legislative and policy proposals. The FRA also refers to these UN documents in its collection and analysis of data.

44 European Commission (2010a).

2

A joined-up approach to fundamental rights

2.1. Challenges

A wide variety of institutions protecting fundamental rights exists within the overall fundamental rights landscape. Some institutions protect fundamental rights in individual cases, such as court procedures and quasi-judicial mechanisms; others deal with the overall fundamental rights system using mechanisms, such as impact assessments, mainstreaming and monitoring of rights, guidance and evidence-based advice. These mechanisms have promotional qualities, which support states in implementing fundamental rights in their policies and laws, thereby preventing future violations. One of the challenges for the European fundamental rights landscape is to guarantee that all levels of the system are efficient, and use a variety of mechanisms to protect and promote rights and inform each other (horizontal dimension).

Another challenge is how to foster interaction among the different levels of the fundamental rights landscape (vertical dimension). Fundamental rights can only be efficiently protected if the levels are well connected. Fundamental rights must be protected where they matter, that is, in the daily lives of individuals. The implementation of rights is carried out through the courts and administrations of a state at the national and local levels. Therefore, the process of translating treaties, judgments and guidance from the international level to the national and local levels is key to improving rights implementation in practice. At the same time, it is essential that the situation on the ground informs the development of standards and policies at all governance levels.

2.2. Role of the FRA

The FRA has been established as an independent expert body. In a sense, the FRA is to the EU what the NHRIs are to the Member States: it is a Human Rights Institution for the EU. In fact, the agency's founding regulation refers to "the principles relating to the status and functioning of national institutions for the protection and promotion of human rights (the Paris Principles)".[45] Its role is to advise EU institutions and Member States on fundamental rights-related issues when implementing EU law. This function allows the FRA to offer added value to the EU's institutional and political reality.

Looking back at the past five years of FRA's existence, from 2007 to 2012, the agency's approach can be described as follows, namely its:

- EU-wide socio-legal research focusing on the situation on the ground;
- focus on rights holders (individuals), as opposed to duty bearers (states);
- outreach to civil society and to all governance levels;
- role as an independent expert body within the EU;
- contribution to a joined-up approach to the protection of fundamental rights in the EU.

45 Council Regulation No. 168/2007, Consideration No. 20.

2.3. Raising rights awareness and providing assistance through pan-EU socio-legal research

A lack of rights awareness remains at national level. At the same time, the EU sometimes faces criticism at the international level due to its alleged focus on human rights beyond its borders, while it appears to not take them seriously enough domestically. One way of addressing these shortcomings is to increase awareness about the fundamental rights situation within the EU. Consequently, there is a need for providing data and information from a comparative EU-wide perspective. However, due to differences in the way data are collected, existing secondary data are rarely comparable among EU Member States. For example, different definitions in studies of gender-based violence lead to some surveys covering violence against women focusing only on women of child-bearing age while others look at domestic violence only. To ensure better comparability, the FRA collects its own primary data. It conducts field research through quantitative and/or qualitative research. FRA experts design and draft surveys, which are applied in a variety of ways – including through face-to-face interviews or online questionnaires.

This type of research helps to address the lack of comparable and reliable information and data. In addition, FRA complements social research with legal research, thereby looking at legislation in the context of people living in the EU. The agency collects information about the protection of fundamental rights in the legal framework of the EU Member States through country-level experts who draw information from sources including legislative instruments, court judgments and academic commentary. This combined socio-legal approach is enriched with the identification of 'promising practices' within the EU that show promise in their adherence, promotion and respect for fundamental rights. This approach also identifies areas where work remains to be done in order for internationally accepted standards to be met. Proceeding in this way allows for an increasing exchange of know-how across the EU.

2.4. Looking at experiences and perceptions of rights holders instead of focusing on duty bearers

Within the European fundamental rights landscape, monitoring efforts focus on the performance of states. Even if some instruments include the possibility to also consult civil society representatives of the relevant state, traditional monitoring focuses on the legislation, policies or case law of the duty bearers under the respective convention, namely the states. In addition, it is important to assess how fundamental rights obligations change the situation on the ground, that is, in the daily life of those entitled to have their fundamental rights protected by the state, namely the rights holders. In fact, by applying the 'structure – process – outcome' approach to indicators as developed by the UN,[46] the need for looking at the perceptions and experiences of rights holders becomes obvious – that is, to see what the actual outcome is on the ground as opposed to on paper. At national level, various surveys and participatory studies are carried out by research institutions, NHRIs and governmental institutions. Also needed are comparable data allowing comparisons across the EU. Whereas the agency is not a monitoring body, it offers extensive data collection.

Building on its experience of delivering one of the most encompassing surveys done so far in the area of discrimination of persons belonging to minorities – the European Union Minorities and Discrimination Survey (EU-MIDIS) – the FRA is currently working on surveys in other fields, including a survey on violence against women and one on experiences of discrimination, hate crime and victimisation of self-identified lesbian, gay, bisexual and/or transgender persons (LGBT). Another set of EU-wide surveys will be delivered on National Roma Integration Strategies. Up to 2020, the FRA is supposed to run a regular Roma survey to measure progress on the ground, working together with relevant bodies to collect data on the situation of Roma with respect to access to employment, education, healthcare and housing. The agency will offer primary statistical data derived from surveying a large random sample of the target population, which will be as representative as possible. This method allows the collection of data that are comparable since the same methodology is applied in every EU Member State simultaneously.

2.5. Involving civil society across all fundamental rights topics

The degree to which civil society is involved in programming, policymaking and the general debate on fundamental rights protection differs from EU Member State to EU Member State. Civil society actors active in the field of fundamental rights can engage in FRA's Fundamental Rights Platform (FRP).[47] This platform brings together over 350 civil society organisations. Its uniqueness lies in the direct partnership between civil society

46 UN (2008), p. 6.
47 Council Regulation (EC) No. 168/2007, Art. 10.

and an EU agency, as well as in the cross-cutting approach to the different fundamental rights issues, creating dialogue between the different sectors. FRP participants can contribute to the work of the FRA.[48] The FRP also gives the FRA direct grass-roots input, which is crucial to addressing relevant issues and providing evidence-based advice.

FRP participants meet once a year at the FRP meeting, which allows direct interaction between the FRA and civil society organisations. Each annual meeting highlights several specific fundamental rights themes and provides a space for the exchange of ideas and promising practice, and networking. In 2011, the FRP annual meeting focused on access to justice and participation of civil society in the implementation of the UN CRPD. The use of engaging and fully participatory open space discussions between FRA project managers and civil society representatives created a rich information flow on a range of FRA work areas – ideas were exchanged and common concerns shared. Such a direct involvement of, and interaction with civil society, by an international player is unique and might serve as an example for future development in this direction.[49]

2.6. Providing evidence-based expert advice

The three EU institutions functioning as co-legislators – the European Commission, the European Parliament and the Council of the European Union – all have recently stepped up their efforts to ensure that potential conflicts and tension with fundamental rights are detected and avoided as early as possible in the policy cycle. Internal assessments of this kind benefit from complementary input delivered by independent and specialised institutions, such as the FRA. The European Council[50] and the European Parliament[51] explicitly recognised this benefit.

In 2011, at the request of the European Parliament the FRA provided an opinion on the draft Directive regarding the European Investigation Order (EIO) in criminal matters. The draft directive, aimed at mutual recognition of warrants for both existing and new evidence, is intended to replace an existing 'fragmented regime' with a more comprehensive legislative instrument. The agency's analysis identified the applicable fundamental rights standards by extensively drawing on the case law of the ECtHR and the CJEU as well as the EU Charter of Fundamental Rights. Based on this, it dedicated special attention to the review by the state executing an EIO and argued for the introduction of a qualified fundamental rights-based refusal ground. FRA's analysis also took practical concerns into consideration, in particular their possible impact on the overall effectiveness of cooperation in cross-border investigation.

Moreover, in 2011 the FRA delivered – again at the request of the European Parliament – an opinion on the proposed Directive on the use of Passenger Name Record (PNR) data. This opinion took earlier opinions of the EDPS and the Article 29 Working Group on the proposed directive as a point of departure. FRA then designed its 2011 opinion to complement these previous opinions. The added value of an expert institution is to raise fundamental rights concerns from a broader fundamental rights perspective. In the case of the PNR directive, fundamental rights concerns included the prohibition of discrimination, the requirements of necessity and proportionality for compliance with fundamental rights, effective supervision to ensure the rights of passengers and the need for data collection.

The FRA further offers expert advice to EU Member States. Member States may ask the FRA to supply information or data that would assist them in improving the respect of fundamental rights in areas falling within the EU's competence. The advice can take the form of access to specific data and evidence collected by the agency in its research or by facilitating the exchange of information among EU Member States. By acting as facilitator, the FRA brings together relevant players from the different Member States to help the spread of promising practices and experiences to improve rights implementation nationally and locally. For instance, in 2011 at the request of the European Commission the FRA launched a project aiming at the identification of promising practices in the field of victim support services. Promising practices allow for an exchange of know-how. This is also reflected in the European Commission's *Roadmap for strengthening the rights and protection of victims*, which makes provision for a future recommendation to EU Member States based on existing promising practices among the Member States.[52]

In addition, FRA's evidence-based advice can serve EU Member States through tailor-made tools for specific stakeholders. These include training and other forms of guidance to address the challenges identified through the agency's work. For example, in 2011 the FRA published a *Handbook on European non-discrimination law*, which was produced together with the ECtHR in Strasbourg. It guides legal practitioners through discrimination law. Other examples include: training materials and curricula, such as handbooks on human rights-based policing, manuals for legal practitioners; training sessions on fundamental rights or diversity

48 The results from the 2011 consultations are available on the FRA website and e-FRP.
49 See, for example, Art. 51 ('Consultative forum') of Regulation (EU) 439/2010, OJ 2010 L 132, pp. 1-28.
50 European Council (2010), p. 8.
51 European Parliament (2009), para. 38.
52 Council of the European Union (2011b), p. 1.

training for border guards or journalists; fundamental rights indicators on Roma inclusion and the rights of the child; and guidelines or codes of conduct.

2.7. Contributing to joined-up governance in the area of fundamental rights protection

Already back in 2005, the heads of states and government of the Member States of the Council of Europe agreed in Warsaw on an Action Plan to foster cooperation with other international (UN) and European organisations and institutions.[53] The Action Plan calls for taking the achievements and future standard-setting work of the other institutions into account. For example, it identified that FRA – the creation of which was at that point of time still under negotiation – has "an opportunity to further increase cooperation with the Council of Europe, and contribute to greater coherence and enhanced complementarity".[54]

The FRA is raising awareness about UN and Council of Europe standards across its work. In its annual report, for example, an entire chapter is dedicated to the international human rights obligations of the EU and its Member States and acceding country Croatia.[55] With this integrated approach, the FRA interacts more visibly between different governance layers. The agency is itself an example of a solid link between the national and the European level, since its steering body, the management board, is composed of independent experts who ideally head an NHRI or hold at least 'high-level responsibilities' in a national fundamental rights body. Other examples of such institutional links between the different levels – national, EU, Council of Europe – are the OP-CAT or the UN CRPD, both of which show that monitoring mechanisms increasingly build on direct links between the national and international levels. Examples such as these illustrate a development, which indeed justifies reference to the overarching fundamental rights landscape.

The FRA's integrative approach is not limited to the UN and the Council of Europe but also includes the regional and local governance levels. For example, the regular annual dialogue that the FRA holds with the Committee of the Regions reflects this cross-cutting approach. The same holds true for the agency's 'joined-up governance' project seeking to pool knowledge and experience on effective multi-level cooperation in implementing fundamental rights-related policies and measures across various government levels.[56] Such a joined-up approach to the protection of fundamental rights can contribute to making the overall landscape more efficient. Only permanent interaction of all the layers and players in the fundamental rights landscape will transform laws on paper into a living reality for all.

53 Council of Europe, Committee of Ministers (2005), Part IV.
54 Council of Europe, Committee of Ministers (2005), Appendix I (8).
55 See FRA (2012b), Chapter 10.
56 Committee of the Regions and FRA (2011).

Outlook

This report looked at the fundamental rights landscape within the EU. It explored fundamental rights and how they are respected, protected and promoted at three levels: national (states), European (EU and Council of Europe) and international (UN). It described the rights, bodies and procedures involved at the various layers of governance.

The focus report shows – without aiming to be exhaustive – that Europe's reality is indeed a complex one, the interlinking layers of fundamental rights protection require a joined-up approach to be efficient. Enhanced interaction and coordination provide potential for further improvements to the overall fundamental rights landscape.

Shortcomings persist, however. Rights awareness is lacking at all layers of governance. People do not know enough about their fundamental rights or about the relevant bodies and procedures that can assist them.

This lack of awareness underscores the need for complaint procedures and courts – crucial pillars of every system – to be complemented by additional mechanisms and policies. Rights must be actively promoted at all layers of governance. To do so, public authorities need evidence-based advice provided by independent expert institutions. At EU level there is also a need for relevant, objective and reliable data which are comparable across the different realities of all EU Member States. This requires data collection mechanisms different from traditional monitoring procedures.

In this context, the FRA – with its specific mandate, working procedures, expertise and experience – contributes to the EU's fundamental rights landscape.

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FRA
EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS

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

An intricate web of national, Council of Europe, European Union (EU) and international institutions has arisen to secure and safeguard the fundamental rights of everyone in the EU. The fundamental rights landscape evolved further in 2011 with the complex interplay among multiple protective layers increasingly taking centre stage. For instance, more EU Member States established National Human Rights Institutions, the European Union Agency for Fundamental Rights (FRA) approached its fifth year of existence and, for the first time, the EU itself was directly bound to an international human rights treaty – the UN Convention on the Rights of Persons with Disabilities (CRPD).

In light of this, the UN Regional Office for Europe recommended that all these various institutions enhance their cooperation to minimise the risk of gaps in fundamental rights protection. Meeting this challenge is essential to making fundamental rights a reality in the daily lives of all those who live in the EU. A closer look at the existing fundamental rights landscape also reveals that it is increasingly important not only to consider the duty bearers – that is, states – but also the rights holders – that is, individuals. Their experiences and perceptions must be taken into account to guarantee that the European fundamental rights structure makes a difference on the ground and does not become an end in itself.

Publications Office

FRA - EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS
Schwarzenbergplatz 11 – 1040 Vienna – Austria
Tel. +43 158030-0 – Fax +43 158030-699
fra.europa.eu – info@fra.europa.eu
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