EU NETWORK OF INDEPENDENT EXPERTS ON FUNDAMENTAL RIGHTS
RÉSEAU U.E. D'EXPERTS INDÉPENDANTS EN MATIÈRE DE DROITS FONDAMENTAUX
CFR-CDF

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2005:

CONCLUSIONS AND RECOMMENDATIONS

Ref.: CFR-CDF/Conclusions 2005

The E.U. Network of Independent Experts on Fundamental Rights has been set up by the European Commission upon request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union

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Le **Réseau UE d'Experts indépendants en matière de droits fondamentaux** a été mis sur pied par la Commission européenne (DG Justice, liberté et sécurité), à la demande du Parlement européen. Depuis 2002, il assure le suivi de la situation des droits fondamentaux dans les Etats membres et dans l'Union, sur la base de la Charte des droits fondamentaux de l'Union européenne. Chaque Etat membre fait l'objet d'un rapport établi par un expert sous sa propre responsabilité, selon un canevas commun qui facilite la comparaison des données recueillies sur les différents Etats membres. Les activités des institutions de l'Union européenne font l'objet d'un rapport distinct, établi par le coordinateur. Sur la base de l'ensemble de ces (26) rapports, les membres du Réseau identifient les principales conclusions et recommandations qui se dégagent de l'année écoulée. Ces conclusions et recommandation sont réunies dans un Rapport de synthèse, qui est remis aux institutions européennes. Le contenu du rapport n'engage en aucune manière l'institution qui en est le commanditaire.

Le Réseau UE d'Experts indépendants en matière de droits fondamentaux se compose de Florence Benoît-Rohmer (France), Martin Buzinger (Rép. slovaque), Achilleas Demetriades (Chypre), Olivier De Schutter (Belgique), Maja Eriksson (Suède), Teresa Freixes (Espagne), Gabor Halmai (Hongrie), Wolfgang Heyde (Allemagne), Morten Kjaerum (suppléant Birgitte Kofod-Olsen) (Danemark), Henri Labayle (France), Rick Lawson (Pays-Bas), Lauri Malksoo (Estonie), Arne Mavcic (Slovénie), Vital Moreira (Portugal), Jeremy McBride (Royaume-Uni), François Moyse (Luxembourg), Bruno Nascimbene (Italie), Manfred Nowak (Autriche), Marek Antoni Nowicki (Pologne), Donncha O'Connell (Irlande), Ilvija Puce (Lettonie), Ian Refalo (Malte), Martin Scheinin (suppléant Tuomas Ojanen) (Finlande), Linos Alexandre Sicilianos (Grèce), Pavel Sturma (Rép. Tchèque), Edita Ziobiene (Lituanie). Le Réseau est coordonné par O. De Schutter, assisté par V. Van Goethem.
Les documents du Réseau peuvent être consultés via :
http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_fr.htm

The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice, Freedom and Security), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. A Report is prepared on each Member State, by a Member of the Network, under his/her own responsibility. The activities of the institutions of the European Union are evaluated in a separated report, prepared for the Network by the coordinator. On the basis of these (26) Reports, the members of the Network prepare a Synthesis Report, which identifies the main areas of concern and makes certain recommendations. The conclusions and recommendations are submitted to the institutions of the Union. The content of the Report is not binding on the institutions.

The EU Network of Independent Experts on Fundamental Rights is composed of Florence Benoît-Rohmer (France), Martin Buzinger (Slovak Republic), Achilleas Demetriades (Cyprus), Olivier De Schutter (Belgium), Maja Eriksson (Sweden), Teresa Freixes (Spain), Gabor Halmai (Hungary), Wolfgang Heyde (Germany), Morten Kjaerum (substitute Birgitte Kofod-Olsen) (Denmark), Henri Labayle (France), Rick Lawson (the Netherlands), Lauri Malksoo (Estonia), Arne Mavcic (Slovenia), Vital Moreira (Portugal), Jeremy McBride (United Kingdom), François Moyse (Luxembourg), Bruno Nascimbene (Italy), Manfred Nowak (Austria), Marek Antoni Nowicki (Poland), Donncha O'Connell (Ireland), Ilvija Puce (Latvia), Ian Refalo (Malta), Martin Scheinin (substitute Tuomas Ojanen) (Finland), Linos Alexandre Sicilianos (Greece), Pavel Sturma (Czech Republic), and Edita Ziobiene (Lithuania). The Network is coordinated by O. De Schutter, with the assistance of V. Van Goethem.
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EXPLANATORY NOTE

Explanatory Note about these Conclusions and Recommendations

The EU Network of Independent Experts on Fundamental Rights has examined the reports prepared by the individual members of the Network on the situation of fundamental rights in the 25 Member States of the Union and on the activities of the institutions of the Union. These reports offer an evaluation of the situation of fundamental rights in the Member States and in the Union in 2005, on the basis of the EU Charter of Fundamental Rights. The Network has decided to highlight certain issues of particular concern, and to select a limited number of good practices in the implementation of fundamental rights, on the basis of a comparative reading of these reports.

For the purpose of these conclusions, "good practices" are defined as innovative answers to problems in the implementation of fundamental rights which are faced by all or most of the Member States. These are identified in these conclusions because, when experimented successfully in one Member State, they could inspire similar answers in other Member States, launching a process of mutual learning which the European Parliament has sought to encourage when it requested the European Commission to set up the EU Network of Independent Experts on Fundamental Rights.

In accordance with the communication which the Commission presented to the Council and the European Parliament on Article 7 EU, "Respect for and promotion of the values on which the Union is based" (COM (2003) 606 final, of 15.10.2003), certain recommendations are made to the institutions of the Union, either where the Network of Independent Experts arrives at the conclusion that certain violations of fundamental rights or risks of such violation by Member States are serious enough to justify that the attention of the European Parliament be drawn upon them, as they could imperil the mutual trust on which Union policies are founded, where it is found that certain initiatives taken by the EU in the limits of its attributed powers could truly add value to the protection of fundamental rights in the Union, or where the violations which are found to have occured in 2005 have their source in the law of the European Union, requiring
that this situation be remedied.

Article 51 of the Charter of Fundamental Rights limits the scope of application of the Charter to the institutions of the Union and to the Member States only in their implementation of Union law. However, the Charter also constitutes a catalogue of common values of the Member States of the Union. In that respect, the Charter may be taken into account in the understanding of Article 6(1) EU, to which Article 7 EU refers. In conformity with the mandate it has received, the Network considers the Charter as the most authoritative embodiment of these common values, on which its evaluation therefore may be based. This should not be seen as operating an extension of the scope of activities in which the Charter is legally binding, beyond the limits clearly defined by Article 51 of the Charter.

In adopting these conclusions, the Network has relied essentially on the reports prepared by the independent experts, although the findings made in the individual reports do not necessarily represent the views of the Network as a whole and are presented under the sole responsibility of the individual expert. In certain cases, outside sources known to the experts of the Network were also relied upon. In particular, the Network has taken into account the findings of bodies set up within the Council of Europe in order to monitor the compliance of the Member States with their human rights obligations, those of the independent expert committees set up under the human rights treaties concluded within the framework of the United Nations, as well as the information presented by non-governmental organisations recognized in the field of human rights, where that information could be independently verified. The principle according to which the situation of fundamental rights in the Member States should be approached on a non-selective manner has been scrupulously adhered to. All experts have followed the same guidelines, which served to identify the legislation or regulations, case-law or practice of national authorities which could be incompatible with the fundamental rights enumerated in the Charter, or which are positive aspects or constitute good practices under the definition given above. However, where the present conclusions mention particular Member States, this cannot be

construed as meaning that similar problems do not occur in other jurisdictions : indeed, as the conclusions focus, as the reports do, on the year 2005 (1 December 2004 – 1 December 2005), problems which have not developed or emerged during that period but may have been continuing since a longer period of time, will not be highlighted.

The interpretation of the EU Charter of Fundamental Rights is based on the explanations provided by the Presidium of the Convention entrusted with the elaboration of the Charter of Fundamental Rights[1], where justified as updated under the responsibility of the Praesidium of the European Convention[2], which the Network considers as a valuable tool of interpretation intended to clarify the provisions of the Charter. Moreover, in accordance with Article 52(3) of the EU Charter of Fundamental Rights, the Network reads the provisions of the Charter which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms as having the same meaning and the same scope of those rights, as interpreted by the European Court of Human Rights ; in certain cases, the provisions of the Charter however are recognized a broader scope, as confirmed by the second sentence of Article 52(3) of the Charter. The Network also takes into account the fact that other provisions of the Charter have to be read in accordance with the rights guaranteed in instruments adopted in the field of human rights in the framework of the United Nations, the International Labour Organisation or the Council of Europe. Where this is the case, these provisions of the Charter are interpreted by taking into account those instruments and the interpretation given to them in the international legal order. Finally, certain international instruments adopted in the field of human rights develop guarantees equivalent to those of the Charter, widening the scope of the protection of the rights of the individual or developing the procedural guarantees which are attached to these rights. The signature and ratification by the Member States of the Union of these instruments would ensure a minimal level of protection of the rights guaranteed in the EU Charter of Fundamental Rights throughout the Union. Therefore the Network encourages the States to make such ratifications or, if they have considered such ratification but rejected it, to explain their reasons for doing so and examine whether these explanations are still valid. These conclusions do not seek to be exhaustive on the domains covered by the individual reports. On the contrary, the conclusions select particular topics, which are felt to be of particular importance in the evaluation of the situation of fundamental rights in the Union in 2005. Moreover, even on the issues they do cover, these conclusions do not repeat all the findings and descriptions found in the individual reports, where they are detailed.

Certain provisions of the Charter have not led to the adoption of conclusions by the Network. This is either because no significant developments occured during the year 2005 which is the period under scrutiny, or because the reports on the Member States and the European Union presented a too fragmentary or unequal information. Indeed, where sufficient comparability could not be ensured, the Network took the view that it would be more advisable to refrain from formulating conclusions, which otherwise – especially if they mention certain countries in particular – would run the risk of being selective. Even where no conclusions have been adopted, however, the reports which served as the background to these conclusions may contain information to which the reader is referred.

The findings made in these conclusions are not binding upon the institutions of the Union, and the institutions cannot be held responsible for any information they contain. Although the EU Network of Independent Experts on Fundamental Rights was set up by the European Commission upon request of the European Parliament, the views expressed in these conclusions are formulated by the Network, acting in a fully independent manner.

[1] CHARTE 4473/00, CONVENT 49, 11 October 2000 (revised French version : CHARTE 4473/1/00 CONVENT 49 REV 1 of 19 October 2000.
[2] Declaration n°12 of the Declarations concerning Provisions of the Constitution, OJ C 310 of 16.12.2004, p. 424.

GENERAL COMMENTS

1. The fate of the Treaty establishing a Constitution for Europe

From the point of view of the protection of fundamental rights in the Union, it is regrettable that the ratification process of the Treaty establishing a Constitution for Europe has been suspended, and could even be abandoned and a new Intergovernmental Conference have to be reconvened. The most visible contribution of this Treaty to the protection of fundamental rights in the Union consisted in the insertion, in part II of the Constitutional Treaty, of the Charter of Fundamental Rights, whose rights, freedoms and principles already are to be considered as binding as general principles of Union law which the Court of Justice of the European Communities ensures the respect of in the field of application of the treaties. With respect to the protection of fundamental rights in the legal order of the Union however, the Treaty establishing a Constitution for Europe also matters for other reasons.

- The Constitutional Treaty intends to abolish the division in pillars of the European Union, and especially to extend the so-called 'Community method', however simplifying this terminology may be, to the matters of judicial criminal cooperation and police cooperation presently falling under Title VI of the EU Treaty. This implies, in particular, that the Court of Justice of the European Communities, relabeled Court of Justice of the European Union, would extend its jurisdiction to the acts adopted in these areas, whereas its jurisdiction under the current Title VI EU is fragmentary, differentiated according to the Member State concerned where the question arises of the compatibility with Union law of the acts of national authorities, and clearly insufficiently protective of fundamental rights.

- The abolition of the structure in pillars of the Treaty on the European Union also implies that the anomalous definition of the jurisdiction of the Court of Justice under Article 68 EC would have disappeared. Under current Article 68(1) EC, the referral procedure to the European Court of Justice under Article 234 EC applies under Title IV of the second part of the EC Treaty (Visas, asylum, immigration and other policies related to free movement of persons) only under specific circumstances and conditions: only where a question of interpretation or validity of Community acts based on this title, or a question of interpretation of this title, is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, shall that court or tribunal, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. As was recognized clearly in the course of the negotiations of the Treaty establishing a Constitution for Europe, this restriction to the possibility for the European Court of Justice to answer questions of interpretation or of validity of European Community law is particularly unacceptable in areas where the consequences of having to wait until a court of last instance may submit such a question may be particularly severe, as is the case when a person is deprived of his liberty –indeed, such delays may result in the question never being submitted, for instance where deportation proceedings are executed against a third-country national. The Constitutional Treaty not only abolished this anomaly inherited from the time when all Justice and Home Affairs issues were placed under Title VI EU and obeyed to intergovernmental mechanisms. Article III-369 al. 4 of the Constitutional Treaty goes even further, providing that 'If such a [preliminary] question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay', thus recognizing the need for the Court in certain cases, for instance when a third-country national is placed under arrest and facing deportation, to provide the national court within the minimum delay possible with the answer it requests on the interpretation or the validity of Union law.

- The Constitutional Treaty would have enlarged the possibilities for private individuals to seek the annulment of an act, even of a general nature, directly affecting them. The Court of First Instance and individual members of the European Court of Justice have expressed the opinion that the requirement imposed under Article 230 al. 4 EC, that the act of a general nature be of individual concern to the private applicant seeking to challenge it, even where the applicant is directly concerned by the act, may not be compatible with the right to an effective remedy recognized under Article 47 of

the Charter (Case T-177/01, *Jégo-Quéré et Cie SA v. Commission* [2002] ECR II-2365; see also, *inter alia*, the Opinion of Advocate General Jacobs delivered prior to the judgment of the Court of First Instance in the case of *Unión de Pequeños Agricultores v. Council* [2002] ECR I-6677). In its Report of May 1995 on certain aspects of the application of the Treaty of the European Union, drawn up at the request of the Corfu European Council of 24-25 June 1994, in view of the preparation of the 1996 Intergovernmental Conference (IGC), the Court of Justice itself had acknowledged that "It may be asked, (...), whether the right to bring an action for annulment under Article 173 (new Article 230) of the EC Treaty (...), which individuals enjoy only in regard to acts of direct and individual concern to them, is sufficient to guarantee for them effective judicial protection against possible infringements of their fundamental rights arising from the legislative activity of the institutions". Article III-365 § 4 of the Treaty establishing a Constitution for Europe at least partially would fill this lacuna, by providing for the possibility of direct actions for annulment being filed by private applicants against acts of a non-legislative (regulatory) nature where these acts are of direct concern to the applicant and does not entail implementing measures. The adoption of this provision would have ensured what seems to be a minimum requirement, which is the compatibility of the system of judicial remedies in Union law with Article 13 of the European Convention on Human Rights, from which Article 47 of the Charter is inspired.

- Finally, the Constitutional Treaty provides in Article 9(2) for the accession of the European Union to the 1950 European Convention on Human Rights. Within the Council of Europe, the Committee of Ministers of the Council of Europe adopted on 13 May 2004 a Protocol no. 14 amending the European Convention on Human Rights, which provides that the Union can accede to this instrument[3]. Although Protocol no. 14 is not in force and although its significance with regards to the accession of the Union to the European Convention on Human Rights is political rather than legal, since a subsequent modification of the European Convention on Human Rights defining the practical details of the Union's accession to this instrument will in any case be required (Explanatory Memorandum to Protocol no. 14, at para. 101-102), the agreement on the text of this Protocol demonstrates a strong political consensus, within the Member States of the Council of Europe, to the accession of the Union to the Convention. Such accession would improve the protection of the individual affected by the acts adopted by the Union, and would ensure that the EU Member States, who are all parties to the European Convention on Human Rights, would not risk being faced with conflicting international obligations, respectively under Union law and under the European Convention on Human Rights. The European Court of Human Rights would be clearly recognized in its role – which it already exercises in fact – of the final arbiter of human rights in Europe, thus strengthening the coherence of the European system for the protection of human rights.

The issues relating to the improvement of fundamental rights protection in the legal order of the Union remain as real today as they were in February 2002, when the Convention on the Future of Europe first met, or when the 2004 Intergovernmental Conference was convened. In the view of the Network, it is the responsibility of the Member States, whose governments have agreed on the constitutional compromise embodied in the Treaty establishing a Constitution for Europe signed on 29 October 2004, to adopt all the measures within their reach to achieve, without amending the treaties, the objectives of the Constitution in the field of fundamental rights. In the view of the Network, this implies in particular :

- *A normalization of the powers of the Court of Justice in referral procedures under Title VI EU*. In the system put in place by Article 35 EU, which defines the powers of the Court of Justice of the European Communities to give priliminary rulings on questions within the framework of Title VI EU, it is for each Member State to define the conditions of collaboration between the national courts and the Court of Justice. This, along with the impossibility for the Commission to bring infringement proceedings against a Member State that fails to comply with a decision or framework decision that has been adopted under that title, could threaten the uniform application of Community law and –

[3] Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, Article 17 (amending the existing Article 59 ECHR).

consequently – the equal treatment of all those covered by European Union law. Above all, it could prevent the Court of Justice, within the framework of Title VI EU, from fully carrying out its mission of protecting the fundamental rights where those are threatened by the adoption of instruments under that title. As a result of the variable geometry of referrals for preliminary rulings under Title VI EU resulting from the combination of Article 35 of the Treaty on European Union and Declaration no. 10 concerning Article K.7 of the Treaty on European Union annexed to the Final Act of the Intergovernmental Conference of Amsterdam, ten Member States (**Cyprus, Denmark, Estonia, Ireland, Latvia, Lithuania, Malta, Poland, Slovak Republic and the United Kingdom**) that had not made the declaration provided for in Article 35(2) EU have made no provision for their national courts to refer questions to the Court of Justice for a preliminary ruling on the interpretation or the validity of decisions and framework decisions adopted under Title VI of the Treaty on European Union. Four states provide for referral by all their national courts, without however those courts being obliged to do so, even courts of last instance (**Finland, Greece, Portugal, Sweden**). One Member State (**Spain**) provides that only national courts against whose decisions there is no judicial remedy under national law can refer questions for a preliminary ruling to the Court of Justice: those courts are obliged to proceed to such a referral if they are faced with a question of interpretation or validity of decisions or framework decisions adopted under Title VI EU.

Ten Member States (**Germany, Austria, Belgium, France, Hungary, Italy, Luxembourg, Netherlands, Czech Republic** and **Slovenia**) have aligned the conditions for exercising preliminary jurisdiction of the Court of Justice of the European Communities under Title VI EU with the conditions of preliminary jurisdiction exercised under Community law under Article 234 EC: any national court is authorized to refer questions for a preliminary ruling, while national courts against whose decisions there is no judicial remedy under national law are obliged to do so. The Network encourages all Member States to opt for this solution by making the declaration provided for in Article 35(2) EU. It points to the paradox of declaring itself in favour of ratifying the Treaty establishing a Constitution for Europe, the entry into force of which will in particular allow the Court of Justice to exercise its powers in referral procedures in the context of police and judicial cooperation in criminal matters, while at the same time not taking the steps already provided for by the Treaty on European Union, which make it possible to anticipate one of the improvements of this Treaty on that specific point which is important from the perspective of the protection of fundamental rights and the equal treatment of offenders in all Member States.

- *A normalization of the powers of the Court of Justice in referral procedures under Title IV of the Second Part of the EC Treaty (Visas, asylum, immigration and other policies related to free movement of persons).* Under Article 67(2) al. 2 EC, since the expiry on 1 May 2004 of the period of five years following the entry into force of the Treaty of Amsterdam, the Council, acting unanimously after consulting the European Parliament, may take a decision with a view to providing for all or parts of the areas covered by title IV of the second part of the EC Treaty to be governed by the co-decision procedure referred to in Article 251 EC and adapting the provisions relating to the powers of the Court of Justice. The Network shares the view of the Commission, as expressed in its Communication on the Programme of the Hague (COM(2005) 184 of 10.5.2005, p. 5), that it is unjustifiable that the Decision 2004/927/EC of the Council of 22 December 2004 (OJ L 396 of 31.12.2004, p. 45) did not extend the powers of the European Court of Justice in a field – that covered by Title IV of the second part of the EC Treaty – which is so crucial for civil liberties.

- *An improvement of the protection of fundamental rights ensured by the national jurisdictions of the Member States against national measures implementing Union law*. The EU Member States are under an obligation to ensure an effective judicial remedy against all potential violations of rights afforded under Union law (Article 47 of the Charter). Article I-29 para. 1, al. 2 of the Treaty establishing a Constitution for Europe states that 'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law', thus restating an obligation which may already be derived from the obligation to cooperate loyally to the application of

Community law, imposed under Article 10 EC[4]. This implies that they should ensure that their national jurisdictions have the powers necessary to effectively assume that role. National courts should have the power, in particular, to prevent violations of fundamental rights where there exists a demonstrated risk that such violations may result from the adoption of national measures implementing an act adopted by the Union. The Network points out in this respect that the Court of Justice has already specified – in order to dismiss the argument that in the present system of judicial remedies organized in the EC Treaty does not guarantee the right to an effective remedy – that "the opportunity open to individuals to plead the invalidity of a Community act of general application before national courts is not conditional upon that act's actually having been the subject of implementing measures adopted pursuant to national law. In that respect, it is sufficient if the national court is called upon to hear a genuine dispute in which the question of the validity of such an act is raised indirectly"[5]. In the *Jégo-Quéré* case, after considering that it cannot brush aside the conditions imposed by Article 230(4) EC on actions for annulment brought by an individual, even on the pretext of interpreting those conditions in the light of the principle of effective judicial protection, the Court of Justice points out that the fact that the Regulation in question applies directly, without intervention by the national authorities, "does not mean that a party who is directly concerned by it can only contest the validity of that regulation if he has first contravened it. It is possible for domestic law to permit an individual directly concerned by a general legislative measure of national law which cannot be directly contested before the courts to seek from the national authorities under that legislation a measure which may itself be contested before the national courts, so that the individual may challenge the legislation indirectly. It is likewise possible that under national law an operator directly concerned by [a regulation against which no action for annulment can be brought before the Community court] may seek from the national authorities a measure under that regulation which may be contested before the national court, enabling the operator to challenge the regulation indirectly"[6]. It should be noted that the Court of Justice has thereby clearly indicated the measures which the Member States must adopt in order to close, by extending the powers of the national courts, the gaps in judicial protection that might result from the conditions currently imposed by Article 230(4) EC on the admissibility of actions for annulment brought by individuals, and thus to help ensure that the complete system of remedies organized by the EC Treaty guarantees, by the combined review by the Community court and the national courts, the right to an effective remedy within the meaning of Article 47 of the Charter.

- *The negotiation of the accession of the Union to the European Convention on Human Rights*. The Summit of the Heads of State and Government of the Council of Europe, which took place in Warsaw on 16 and 17 May 2005, adopted an Action Plan containing Guidelines on the Relations between the Council of Europe and the European Union (Appendix 1), which recommends accelerating the preparations for the accession of the European Union to the European Convention on Human Rights (para. 4). Accession of the European Community or Union to the European Convention on Human Rights can only be achieved if an amendment to the treaties provides that the necessary powers to this effect are given to the Community or Union, in accordance with Opinion no. 2/94 delivered by the Court of Justice of the European Communities on 28 March 1996. Without wishing to prejudge whether the position expressed then by the Court of Justice would still be valid today, the Network recalls, however, the importance it attaches to this accession, the technical aspects of which have already been dealt with in detail in the Study of the legal and technical questions of a possible accession of the EC/EU to the European Convention on Human Rights, prepared by the Steering Committee for Human Rights of the Council of Europe on 25-28 June 2002.

The Network is aware that, should the accession of the European Community or Union to the European Convention on Human Rights take place prior to the incorporation of the Charter of Fundamental Rights in the Treaties, in order to make it a legally binding instrument, that incorporation could be described by some as unnecessary. This would be a complete misunderstanding of the

[4] ECJ, 25 July 2002, *Unión de Pequeños Agricultores v. Council*, Case 50/00 P, *ECR*, p. I-6677 (para. 41).
[5] ECJ, 10 December 2002, *The Queen v. Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd.,* Case 491/01, *ECR*, p. I-11453, para. 40.
[6] ECJ, 1 April 2004, *Commission of the European Communities v. Jégo-Quéré & Cie SA,* Case 263/02 P, *ECR*, p. I-3425, para. 35.

complementarity of both developments. Where the internal constitutional law of the States parties to the European Convention on Human Rights contains a catalogue of fundamental rights equivalent to that of the Convention, this ensures an improved compliance by those States with the obligations of the Convention. Similarly, it will be all the easier for the Community or the Union to meet its obligations under the European Convention on Human Rights since the incorporation of the Charter of Fundamental Rights in the Constitutional Treaty will result in an internal mechanism for the protection of the rights and freedoms listed in the Convention. For the States as well as for the Union, the undertaking to comply with an international instrument for the protection of human rights does not make it unnecessary to improve this protection in the internal order. On the contrary, such an undertaking encourages the pursuit of such improvement.

2. Improving the compliance of the laws and policies of the Union with the requirements of the Charter of Fundamental rights

Remarkable progress has been made in 2005 on the preventive dimension of compliance with the Charter of Fundamental Rights. First, in April 2005, the Commission has adopted a Communication by which it seeks to improve the compliance of its legislative proposals with the requirements of the Charter (Communication from the Commission, Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring, COM(2005) 172 final of 27.4.2005). On 13 March 2001 the Commission had already decided that any proposal for legislation and any draft instrument to be adopted by it would, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter of Fundamental Rights of the European Union (SEC(2001) 380/3). It also had decided that legislative proposals and draft instruments having a specific link to fundamental rights would incorporate a recital as a formal statement of compatibility. However, no specific methodology was prescribed to ensure that such scrutiny would effectively take place, on the basis of a well-defined division of tasks between the lead department, the legal service of the Commission, the Directorate General Justice, Freedom and Security (DG JLS) and DG RELEX. Second, on 15 June 2005, the Commission adopted a new set of guidelines for the preparation of impact assessments (SEC(2005)791, 15.6.2005). Although the new guidelines are still based, as were the former impact assessments (Communication of 5 June 2005 on Impact Assessment, COM(2002)276), on a division between economic, social and environmental impacts, the revised set of guidelines pays a much greater attention to the potential impact of different policy options on the rights, freedoms and principles listed in the EU Charter of Fundamental Rights.

These are important steps in the right direction. The Commission is to be commended for having adopted these instruments. In the view of the Network however, a number of questions remain :

- The participative dimension in impact assessments still could be improved, beyond the very general framework set by the 2002 Communication on General principles and minimum standards for consultation of interested parties by the Commission (Communication from the Commission, 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', COM(2002) 704 final, of 11.12.2002). Especially insofar as the impact assessments are to be prepared by the lead service of the Commission in charge of the initial proposal, which we may not presume has specialized expertise on the sometimes very delicate problems raised by the impact on fundamental rights of certain proposals, it should be recognized that no impact assessment in this field may be adequately performed without providing the possibility for human rights organisations to contribute to this exercise, either because of the expertise they possess in the requirements of the international law of human rights, or because of their understanding of the potential dangers even apparently innocuous proposals may entail for fundamental rights.

- Second, while impact assessments and the verification of compliance with fundamental rights of the legislative proposals of the Commission have an important function to fulfil once a proposal is made, these mechanisms do not compensate for the lack of a screening mechanism which would allow

to identify, on a systematic basis, the need for the Union to exercise one of its many competences to act in the field of fundamental rights.

• Third, it is clear that the compatibility of any given legislative proposal with the requirements of the EU Charter of Fundamental Rights does not ensure that the final text adopted by the European legislator will be equally compliant : the European Parliament has a crucial role to fulfil in this respect, both as co-legislator with the Council in the fields governed by co-decision and in the exercise of its right to seek the annulment of certain acts, *inter alia* where such acts are seen to violate fundamental rights, as has been the case with respect to the Directive 2003/86/EC of 22 September 2003 on the right to family reunification[7] and with respect to the decision of the Commission to allow for the transmission of Passenger Names Records (PNRs) data to the United States Borders Authorities[8].

• Fourth, the fact that a European Directive is considered to comply with the Charter of Fundamental Rights does not necessarily imply that the implementation of that Directive by the Member States will be equally in accordance with the requirements of fundamental rights. It is true that, with respect to the implementation by the EU Member States of Union law, the Commission – acting as 'guardian of the treaties' as provided under Article 211 EC – may, in particular in the procedure leading to the launching of actions for infringement of Community law, take into account the obligation imposed on national authorities under EU law to comply with the fundamental rights recognized as general principles of law. In practice however, the Commission does not appear to see it as a priority to monitor this dimension of the implementation of EC law (Commission communication better monitoring of the application of Community law, COM(2002)725 final of 20.12.2002), although it occasionally may do so ; and it may lack the necessary expertise to systematically verify such compliance, beyond the situations where the most obvious violations of the European Convention on Human Rights are concerned. Moreover, under Title VI of the Treaty on the European Union, the Commission may not file infringement proceedings against a Member State not complying with its obligations under Union law.

• Finally, we cannot but note that these preventive mechanisms which have been recently improved concern the legislative proposals of the Commission. But, under Title VI of the EU Treaty, the Member States may take the initiative of proposing the adoption of certain instruments, in particular framework decisions (Article 34(2) EU). No preventive mechanism, ensuring that the proposal will be compatible with fundamental rights, exists in that context.

3. The Fundamental Rights Agency for the European Union and the Framework Programme on Fundamental Rights and Justice

On 30 June 2005, acting upon the request of the European Council and the call of the European Parliament, the European Commission has proposed the establishment of a European Union Agency for Fundamental Rights[9]. This proposal followed a consultation process formally launched in October 2004, which has led to an exceptionally high level of mobilization of civil society organisations and academics. The Commission also has adopted a Communication establishing for the period 2007-2013 a framework programme on Fundamental Rights and Justice[10] in which it proposed, in particular, the adoption by the Council of a Decision establishing for that period a specific programme 'Fundamental rights and citizenship', as part of the framework programme. Under the proposed decision, the 'Fundamental rights and citizenship' programme would comprise a series of actions, including the

[7] OJ L 251 of 3.10.2003, p. 12. The European Parliament has sought the partial annulment of the Family Reunification Directive in Case C-540/03, currently pending before the European Court of Justice.
[8] Cases C-317/04, *Parliament v. Council* (annulment of Decision 2004/496 of the Council, of 17 May 2004, OJ L 183 of 20.5.2004), and C-318/04, *Parliament v. Commission* (annulment of Decision 2004/535 of the Commission, of 14 May 2004, OJ L 232 of 6.7.2004).
[9] Commission of the European Communities, *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*, COM(2005)280, 30.6.2005.
[10] COM(2005)122 final of 6.4.2005.

support for and management of networks of national experts,[11] with the objective, *inter alia*, of 'assess[ing] regularly the situation of fundamental rights in the European Union and its Member States, within the scope of application of Community law, using the Charter of Fundamental Rights as the guiding document and to obtain opinions on specific questions related to fundamental rights within this scope when necessary'[12].

The Network welcomes these proposals, which should be seen as important contributions towards the development of a fundamental rights policy for the Union, for which they should provide essential tools. The Network recalls, however, its previous positions adopted on the establishment of the Agency[13]. First, Article 3(3) of the Proposal of the Commission for the establishment of the EU Fundamental Rights Agency states that in its activities, the Agency shall concern itself with the situation of fundamental rights in the Member States only when they are implementing Community or Union law[14]. However, while this may be reflecting the scope of application of the Charter of Fundamental Rights – which does not bind the Member States unless they are implementing Union law –, it is more restrictive than the scope of fundamental rights as protected within the Union legal order by the European Court of Justice : the Member States clearly are bound under Union law to comply with the requirements of fundamental rights not only when they implement Community law but also whenever they act under the scope of application of Community law, i.e., also when they restrict a fundamental economic freedom or seek to rely on an exception provided under the Treaties or under secundary legislation, or recognized in the case-law of the European Court of Justice. More importantly, this restriction to the scope of activities of the Agency is incompatible with the very objective assigned to it by Article 2 of the draft Regulation, which is to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community 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.

The powers attributed to the European Community or the European Union to realize fundamental rights are generally attributed as competences which they share with the Member States – for instance, in order to combat certain forms of discrimination (Art. 13 EC), in order to contribute to the establishing and good functioning of the internal market (Art. 95 EC), in order to ensure compatibility in rules applicable in the Member States as may be necessary to improve judicial cooperation in criminal matters (Art. 31(c) EU) or in order to establish minimum rules relating to the constituent elements of criminal acts and to penalties applicable in certain matters of common interest (Art. 31(e) EU). Therefore, in order to contribute to an informed exercise of these powers, the institutions of the Union should receive from the Agency information about the situation of fundamental rights in the Member States, whether or not relating to fields where they are implementing Union law, in order to decide whether the intervention of the Community or the Union under these powers may be justified under the principles of subsidiarity and proportionality (Article 5 EC, Article 2 EU), and is necessary due in particular to diverging evolutions between the Member States or to the existence of significantly different levels of protection which may require further harmonization or approximation of national legislations.

Second, without prejudging the outcome of the current discussions which concern the structure of the Agency, the Network insists for the need to equip the Agency with a pole of independent expertise, ideally under the form of a group of independent experts attached to the Agency in order to provide

[11] Art. 4, a), of the proposal.
12 Art. 3, b), of the proposal.
[13] As expressed in the Position paper on the Human Rights Agency of the European Union, 16 December 2004, available on :
http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/news_contributions_fund_rights_agency_en.htm
[14] Although Article 3(3) of the Proposal for a Regulation only mentions Community law, Article 2 of the Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union provides that references to Community law in the provisions of the Regulation (adopted under Article 308 EC) shall be understood as referring to Union law in the area of Title VI EU.

the Agency with a reliable and objective information, collected on a systematic basis and following the principle of non-selectivity between the Member States, and on the basis of which the Agency will adopt its opinions and recommendations. In order for this expertise to be provided both effectively and in a truly independent fashion, it is not sufficient for the Agency to create and undo networks in order to collect the relevant information, as already provided for by Article 6 § 1 of the Draft Regulation. It is necessary that this independent scientific expertise be established as an element of the structure of the Agency, in order to ensure both the continuity of this task and the independency with which it is fulfilled, which will be difficult to maintain if the relationship of the Agency to information networks is of a contractual and temporary nature.

The Network notes in this regard that the proposal of the Commission does not establish the Network of Independent Experts as part of the structure of the Agency. In the extended impact assessment of its proposal to establish the Fundamental Rights Agency, the European Commission states :

> In the relatively short time of its operation, the Network has made a valuable contribution in the form of its annual reports on the situation of fundamental rights in the EU and thematic opinions. However, the Network lacks a legal basis, legitimacy and continuity. When establishing an agency, the existence of a separate Network is difficult to justify, as it would entail the existence of two parallel mechanisms for fundamental rights monitoring within and for the EU. On the other hand, for the Agency to be effective, it must have access to legal expertise in the Member States to get local information and analysis. The expertise of the Network would not be lost, if the network would be integrated in the work of the Agency. Therefore, one solution could be that the Network of independent experts would be incorporated into the structure of the Agency by becoming one of the networks operated by the Agency. In consequence, the focus of the work of a legal network would concentrate on fundamental rights within implementation of Union law[15].

If it is offered as a justification for not establishing the Network of Independent Experts on Fundamental Rights as a permanent structure within the Agency, the argument that the Network currently lacks a legal basis, legitimacy and continuity, is circular. By being established within the Agency as part of its structure, the Network would have the same legal basis as the Agency itself. A clear definition of the modalities of appointment of its members would ensure that it is legitimate : while such legitimacy would derive also from the scientific expertise of the individual members, it may be advisable to involve either the Member States, or the European Parliament, or both, in the selection of the members of such group of experts. This of course would ensure the continuity of the Network. If the establishment of the Agency is not to result in a lowering of the level of protection of fundamental rights in the Union, by the disappearance of the form of monitoring exercised by the Network, the Regulation establishing the Agency should be amended in this regard, and formally establishing the Network, in the form of a group of independent experts or of a scientific council, on a permanent basis.

4. The national institutions for the promotion and protection of human rights in the Member States

The Network prepared a comparative table of NHRIs within the EU Member States in March 2004. The comparative table illustrated, then, that the situation in the Member States with regards to the establishment of NHRIs remains varied. The Vienna World Conference on Human Rights recognized that ‘it is the right of each State to choose the framework which is best suited to its particular needs at the national level’. However, the variations between the Member States of the EU concern not only the precise modalities of implementing the Paris Principles according to different national contexts; they concern the establishment of NHRIs itself.

[15] SEC(2005)849, of 30.6.2005, at p. 17.

13 of the 25 Member States have established a NHRI. These States are **Cyprus, the Czech Republic, Denmark, France, Germany, Greece, Ireland, Latvia, Luxembourg, Poland, Portugal, Sweden** and **Spain**. All of these institutions with the exceptions of three (Cyprus, the Czech Republic and Latvia) have been granted 'A' status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, which implies that they are considered to conform fully with the Paris Principles.[16] These institutions are : for Cyprus, the National Organisation for the Protection of Human Rights (1998); for the Czech Republic, the Ombudsman Office (1999); for Denmark, the Danish Institute for the Protection of Human Rights (2002) ; for France, the Commission nationale consultative des droits de l'homme (1984); for Germany, the German Institute for Human Rights (2001) ; for Greece, the Greek National Commission for Human Rights (1998) ; for Ireland, the Irish Human Rights Commission (2001); for Latvia, the National Human Rights Office (1995) ; for Luxembourg, the Consultative Commission on Human Rights (2000); for Poland, the Commissioner for Civil Rights Protection (1999); for Portugal, the Provedar de Justiça (1999); for Spain, the Ombudsman (*Defensor del Pueblo*) (2000); for Sweden, the Ombudsman against Ethnic Discrimination (1999).

However, it is sometimes difficult to assess precisely whether the institution which is set up fully complies with the Paris Principles. For instance, although it has been granted 'A' status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC), the Swedish Ombudsman against Ethnic Discrimination has a mandate limited to combating ethnic discrimination,[17] which constitutes a more limited mandate than that recommended under the Paris Principles. As to the National Organisation for the Protection of Human Rights established in Cyprus, although it complies essentially with the Paris Principles, its funding remains problematic[18]. Certain institutions fulfil in the Member States functions which resemble those of a NHRI, although they may not present all the characteristics of such institutions : this is the case, for instance, of the Austrian Human Rights Advisory Board (*Menschenrechtsbeirat*) established in **Austria** in 1999 in response to a recommendation of the European Committee for the Prevention of Torture (CPT), which monitors the federal law enforcement agencies and advises the Minister of Interior in all human rights aspects ; of the Legal Chancellor of the Republic in **Estonia**, which is an independent official who is appointed to office by the Parliament (Riigikogu) on the proposal of the President of the Republic for a term of seven years, and who not only acts as an ombudsman on the basis of individual complaints, but also controls the conformity with the constitution of all new laws, foreign treaties, regulations and other legal acts of state and municipal organs, and may recommend that these acts be modified in order to ensure compliance ; or of the Slovak Centre for Human Rights established in 1993 in the **Slovak Republic**[19], which monitors the situation of fundamental rights in the country, and publishes reports and accomplishes research and educational activities. In the **United Kingdom**, there exists hitherto a NHRI for one part of the country (Northern Ireland Human Rights Commission).

Moreover, a number of Member States have ombudspersons, created following Recommendation No. R(85)13 on the Institution of the Ombudsman, adopted on 23 September 1985 at the 388th meeting of the Ministers' Deputies. Indeed, this Recommendation encourages the Member States of the Council of Europe to 'consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when

[16] http://www.nhri.net/ICCMembers.htm

[17] There are other Ombudspersons in Sweden, which in total has six official such institutions : the Office of the Parliamentary Ombudsman (JO), Consumer Ombudsman (KO), Office of the Equal Opportunities Ombudsman (JämO), Ombudsman against Ethnic Discrimination (DO), Children's Ombudsman (BO), Office of the disability Ombudsman and Ombudsman against Sexual Orientation Discrimination (HomO). These ombudsmen however deal with the complaints they receive; their functions may not be assimilated to those normally performed by NHRIs.

[18] The conditions under which this institution currently is working does not adequately ensure that it can remain independent. The organisation employs only one person, whose salary is arranged directly from the Government through the amount provided for the Law Commissioner Office.

[19] Act of the National Council of the Slovak Republic No. 308/1993 Coll. of 15 December 1993, as amended by the Act No. 136/2003 Coll.

questions of human rights are involved'; this to a certain extent aligns the mandate of the ombudsman with those normally entrusted to NHRIs. In **Hungary**, as a result of the amendment ot the Constitution in 1989 and the 1993 Act on the Parliamentary Commissioners, four commissioners exist : the Parliamentary Commissioner for Human Rights, the Deputy Ombudsman, the Parliamentary Commissioner for Data Protection and Freedom of Information, the Parliamentary Commissioner for Ethnic Minorities. These Parliamentary Commissioners were elected by the required two-thirds majority of the Hungarian Parliament on 30 June 1995. In **Slovenia** for instance, the Ombudsman is entrusted by the Constitution (Art. 159.1)[20] with the protection of human rights and basic freedoms in matters involving state bodies, local government bodies and statutory authorities. The Ombudsman may, in particular, submit initiatives for amendments of statutes and other legal acts to the National Assembly and the Government (Art. 45.1 of the Constitutional Court Act[21]) ; he may discuss broader questions important for the protection of human rights and basic freedoms as well as for the legal protection of citizens in the Republic of Slovenia (Art. 9.2 of the Ombudsman Act[22]). On the other hand, in a number of Member States, the Ombudsman does not have powers related to human rights matters, and his or her mandate is limited to the more classical function of controlling compliance with the principles of good administration. This is the case, for instance, of the Seimas (Parliamentary) Ombudsmen's Office established in 1994 in **Lithuania**[23]**.**

A number of EU Member States have no NHRI, nor any equivalent institution such as an Ombudsperson whose mandate extends to human rights matters and to proactive action, through the issuance of opinions or recommendations. These States are **Belgium**, **Finland**, **Italy**, **Lithuania**, **Malta**, the **Netherlands** and the **United Kingdom** (as regards the United Kingdom, there exists a NHRI for one part of the country (Northern Ireland Human Rights Commission)). However, the Network is encouraged by certain potentially positive evolutions which have recently occurred in this field. In **Belgium**, the governmental declaration of July 2003 contains a statement in favour of the establishment of a NHRI, and human rights non-governmental organisations are actively working on making a proposal to that effect, following an initiative of the Belgian section of Amnesty International. In **Finland**, there exists an Advisory Board on International Human Rights matters, nominated by the cabinet and linked to the Ministry of Foreign Affairs. There also exists a Parliamentary Ombudsman, elected by Parliament and independent from Government, which receives complaints under a broad mandate, including constitutional rights, international human rights and good administration. She can order prosecution in most serious cases, although she usually only issues reprimands. A study prepared in 2002 within the Abo Akademi University Institute for Human Rights proposed a network model for the setting up of a national institution where the office of the Parliamentary Ombudsman, the existing Advisory Board on International Human Rights and academic human rights institutes would work closely together in order to cover the functions required by the Paris Principles[24]. In the **Netherlands** an initiative to establish a national human rights institute was taken by three public-law bodies engaged in the protection of fundamental rights (the Ombudsman, the *Commissie gelijke behandeling* [Equal Treatment Tribunal] and the *College bescherming persoonsgegevens* [Personal Data Protection Authority]), together with the 'SIM' research institute of Utrecht University. These institutions drafted a comprehensive report *De Daad bij het Woord* [Complementing Words with Acts] in which they advised to establish a National Institute for Human Rights. The government of the **United Kingdom** has agreed to the proposal of the Parliament's Joint Committee on Human Rights that a Commission for Equalities and Human Rights should be established, to take over the work of the three existing equality bodies (Commission for Racial Equality, Disability Rights Commission, and Equal Opportunities Commission), while also focusing on the three other equality strands (age, religion and belief and sexual orientation) and taking responsibility for the promotional agenda which underpins the Human Rights Act. The Government

[20] Official Gazette RS, Nos. 33/91, 42/97, 66/00 and 24/03.
[21] Official Gazette RS, No. 15/94.
[22] Offical Gazette RS, Nos. 71/93, 15/94 and 56/02.
[23] There are five Seimas (Parliamentary) Ombudsmen : two are entrusted with the investigation of the activities of State institutions; three investigate the activities of local government officers. They receive complaints relating to abuse of office by state and local authorities.
[24] See http://www.abo.fi/instut/imr/norfa/miko-pohjolainen-martin.pdf (Finnish)

published a White Paper concerning the proposed Commission for Equality and Human Rights (CEHR) on 12 May 2004, describing the role, functions and powers of the new proposed new Commission[25]. Following a consultation period, the Government published a response on 18 November 2004, including certain changes to its initial proposal. The Equality Act 2006 has now provided the legal basis for the Commission for Equality and Human Rights. The Government intends to appoint the Chair and Commissioners by 2006 so that the body will be up and running in 2007. A process of phased entry is anticipated for the existing Commissions, with all of them being incorporated by 2008/09.

The Network strongly encourages this development, provided that the applicable standards are complied with when new institutions are created and that the protection and awareness raising functions of existing structures are not undermined as a consequence of the establishment of an NHRI. In principle the Network sees the national human rights institutions (NHRIs) of the Member States as the natural interlocutors of the EU Fundamental Rights Agency of the Union, with which the Agency should establish close links as envisaged by Article 8 § 1 of the Proposal made by the Commission for a Council Regulation establishing a European Union Agency for Fundamental Rights. The main task of National institutions for the promotion and protection of human rights in the Member States is to contribute to the implementation by each Member State of its international obligations in the field of human rights. The creation of a focal point for the NHRIs of the Member States within General Directorate Justice, Freedom and Security of the European Commission, could ensure, in particular, that the Commission will be informed where laws or policies of the Union create obstacles to the fulfilment of the international obligations of a Member States, or even disincentives discouraging the Member States from realizing the human rights they are internationally bound to comply with. In order for the link between the NHRIs of the Member States on the one hand, and the Fundamental Rights Agency and the European Commission, on the other hand, to be systematic, the European Coordinating Group of NHRIs should continue and develop further its activities. Even more importantly, the Member States which have not yet set up such an institution should examine how they should do so, while using the flexibility allowed by the Paris Principles of 1993. The Network recalls the consensus expressed in the Vienna Declaration and Programme of Action of 25 June 1993, where the World Conference on Human Rights reaffirmed 'the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights', and therefore encouraged 'the establishment and strengthening of national institutions, having regard to the 'Principles relating to the status of national institutions' and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level'[26].

In setting up a NHRI corresponding to their own needs, the Member States should seek inspiration from the 1993 Paris Principles on national institutions for the promotion and protection of human rights approved by the United Nations General Assembly[27], but also from Recommendation No R(97)14 of the Committee of Ministers of the Council of Europe on the establishment of independent national institutions for the promotion and protection of human rights, adopted on 30 September 1997, from General Comment No. 10 of the Committee on Economic, Social and Cultural Rights of 14 December 1998: *The role of national human rights institutions in the protection of economic, social and cultural rights*[28], and from the Copenhagen Declaration, adopted on 13 April 2002 by the Sixth International Conference for National Institutions for the Promotion and Protection of Human Rights,

[25] *Fairness for All: A New Commission for Equality and Human Rights* (Cm 6185).
[26] Vienna Declaration and Programme of Action of 25 June 1993, UN doc. A/CONF.157/23, at para. 36.
[27] UN doc. A/RES/48/134, adopted by the 85th plenary meeting of the UN General Assembly, 'National institutions for the promotion and protection of human rights'. These principles were initially approved by the Commission on Human Rights in resolution 1992/54 of 3 March 1992. They are further explained in *National human rights institutions: a handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights* (New York/Geneva, 1995), see :
http://www.ohchr.org/english/about/publications/training.htm.
[28] UN Doc E/C.12/1998/25.

held in Copenhagen and Lund[29]. They could also seek inspiration from the existing compendiums of best practices for the establishment of such institutions[30]. Finally, in establishing NHRIs, or in redefining, where necessary, the powers and working methods of already existing NHRIs, the Member States should identify the promising new developments in the field. One particularly illustrative example, which the Network wishes to highlight, is the method followed by the German Institute for Human Rights (*Deutsches Institut für Menschenrechte*) to ensure the follow-up at the national level of the findings of human rights treaty bodies[31]. Whereas the EU Fundamental Rights Agency should, in particular, facilitate the implementation of Community law in compliance with fundamental rights, a first step would be for all the Member States to set up effective mechanisms which would ensure that the concluding observations and recommendations of the human rights treaty bodies are effectively followed-up. This would contribute to the uniform application throughout the Union of Union law, and would importantly contribute to ensure that Union law will not be implemented in violation of the obligations imposed under the international law of human rights.

5. The Network of Independent Experts on Fundamental Rights

Since it adopted its last conclusions and recommendations (relating to the year 2004), the Network has published its Thematic Comment n°3 on the rights of minorities in the Union. It has also adopted a number of opinions upon the request of the European Commission, either on the initiative of the Commission, or following a request of the European Parliament. Opinion 1-2005 related to the participation of EU citizens in the political parties of the Member State of residence. Opinion 2-2005 concerned the situation of homosexuals in Slovenia. Opinion 3-2005 examined the requirements of fundamental rights in the framework of the adoption of measures adopted for the prevention of violent radicalisation and of recruitment of potential terrorists. Opinion 4-2005, delivered following the a request of the European Parliament, examined the right to conscientious objection and the conclusion by EU Member States of concordats with the Holy See, with a particular focus on the draft treaty which the Slovak Republic was considering for signature and ratification on this subject. Opinion 5-2005 examined the situation in the EU Member States with regards the adoption of criminal legislation combating racism and xenophobia. Other opinions are currently under preparation.

At the time of adopting these conclusions, the Network is uncertain about whether or not it will continue its activities beyond 12 September 2006. Neither the Regulation and Decision proposed for the establishment of a European Union Agency for Fundamental Rights, nor the framework programme on Fundamental Rights and Justice (2007-2013), both referred to above, formally provide for the establishment of the Network of Independent Experts on Fundamental Rights on a permanent basis, or with a structural funding. These proposals are now under examination by a working group of the Council (General Affairs), which, it is hoped, should adopt them in 2006. As already indicated, the Network is convinced that the Fundamental Rights Agency requires to be equipped with a pole of independent expertise, if it is to provide credible and reliable information and analysis to the institutions. The question of how this will be achieved, however, remains for the time being open. Meanwhile, the Network has expressed its willingness to continue functioning, on the same basis as it has done so far, until the Fundamental Rights Agency is fully operational. Thus a two-fold gap could be prevented: a gap in the monitoring of human rights and a gap in expertise on which the Commission and the EP can draw when confronted with human rights issues. This proposed interim solution would of course be without prejudice to the way in which the FRA is to be structured.

The Network was set up in September 2002 upon the request of the European Parliament. At the time, the European Parliament, through its Committee on Civil Liberties, Justice and Home Affairs, had

[29] available at: http://www.nhri.net/SixthConference.htm

[30] See, apart from the United Nations *Handbook* referred to above : Council of Europe, *Non-judicial means for the protection of human rights at the national level* (Strasbourg, 1998); Commonwealth Secretariat, *National Human Rights Institutions - Best Practice* (London, 2001).

[31] See the brochure *Examination of State Reporting by Human Rights Treaty Bodies: An Example for Follow-Up at the National Level by National Human Rights Institutions*, German Institute for Human Rights, April 2005, available at www.institut-fuer-menschenrechte.de

been adopting reports on the situation of fundamental rights in the Union since 1999 – based, since 2000, on the template provided by the Charter of Fundamental Rights of the European Union –. By its Resolution of 5 July 2001 on the situation as regards fundamental rights in the European Union (2000)[32], the European Parliament requested, and obtained from the Commission, that a network of legal experts be set up to ensure a more systematic and professional monitoring of fundamental rights in the Member States. The EU Network of Independent Experts on Fundamental Rights essentially took over from the rapporteur annually appointed within the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament the task of preparing an annual report on the situation of fundamental rights in the Union. Besides its annual reports, the Network is also be called upon to deliver specific information and opinions regarding the situation of fundamental rights in the European Union and in the Member States. Both the European Commission and the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament have made use, on a regular basis, of this possibility.

The Network has been working fully independently during its four years of operation. It is grateful to the Commission, and especially to the Unit (C3) Citizenship and Fundamental Rights within DG Justice, Freedom and Security (JLS), for having fully respected this independency, despite the sometimes highly sensitive nature of the questions addressed by the Network. The establishment of a network of legal experts entrusted with providing the institutions with advice on matters pertaining to fundamental rights on the one hand, the independency required from the experts, on the other hand, are not incompatible objectives. On the contrary, the Network is convinced that both the Commission and the Parliament have benefited in the past, and will benefit in the future when the Fundamental Rights Agency will be established, from such an independent expertise, just like, at the national level, the member States may benefit from the establishment of national institutions for the promotion and protection of human rights in accordance with the Paris Principles, to deliver recommendations and opinions on the implementation of fundamental rights. Indeed, only such independency may ensure that fundamental rights will not be instrumentalized for partisan purposes, and that their implementation can be seen as a shared objective, transcending political dividing lines. Another function of the Network has been to have regular exchanges with representative human rights non-governmental organizations and other stakeholders, such as the United Nations High Commissioner for Refugees and the unions, in order to identify whether the concerns these actors expressed about certain developments in the Union or in the Member States raised issues related to fundamental rights as identified by the EU Charter of Fundamental Rights, and whether such concerns could require an initiative from the institutions of the Union. This function is important, as human rights groups are not systematically consulted in the course of the law- and policmaking of the Union, despite the irreplacable contribution they can make, both thanks to the grassroots knowledge they possess and through their capacity to mobilize their constituencies on issues which matter. Such consultations in the future should continue and be made even more systematic, especially at a time where skepticism about European integration is at historically high levels.

At the same time, the Network regrets that neither the Commission, nor the Parliament, have fully realized the potential of the Network. In order to genuinely pursue policies aimed at the realization of fundamental rights, more is required than to set up a network of independent experts and receive its reports, and then refer to such reports on a purely *ad hoc* basis, in a way which external observers could perceive as being purely selective. Such reports should be analyzed and followed upon. Answers should be provided to the questions raised in those reports. Whether or not they are acted upon, the recommendations made at least should be examined by the competent services. The Commission could have, for instance, convened interservice meetings in order to discuss whether and how to follow upon the recommendations made in the reports of the Network. This would have avoided a situation where, instead of being examined in a serene atmosphere with a view of promoting fundamental rights within the limits of the competence of the Union, through a cooperation between the services of the Commission, the positions adopted by the Network are seen as the product of one

[32] Resolution of 5 July 2001 on the situation as regards fundamental rights in the European Union (2000), Cornillet report, OJEU C 65 14 March 2002, p. 350.

Directorate-General interfering with the agenda-setting of another Directorate-General. Similarly, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament could have organized an annual debate on the main annual reported submitted by the Network, in the presence of other stakeholders such as, in particular, human rights non-governmental organizations ; and it could have adopted on that basis a resolution on the situation of fundamental rights in the Union, defining which priorities it saw for the future work of the Union in this area.

The Network expresses the hope that, in the future, lessons will be drawn from this experiment. In particular, it would emphasize that independency and legal expertise, rather than being ends in themselves, should be seen as means – albeit indispensable ones – of developing a fundamental rights policy ; their potential will only be realized if, on the part of the institutions, there exists a genuine commitment to act on the basis of the opinions and recommendations adopted by any independent body set up in order to monitor the situation of fundamental rights. It is clear that neither the Network of Independent Experts on Fundamental Rights, nor – in the future – the Fundamental Rights Agency, may be recognized any power to adopt binding opinions or recommendations. These are purely advisory bodies. Nevertheless, more could be done in order to ensure that these opinions and recommendations effectively contribute to the grounding in fundamental rights of Union policies and legislation. As noted in previous reports of the Network, any independent monitoring of the situation of the fundamental rights in the Union would require, in order to be effective, that the body entrusted with such monitoring be recognized the competence to adoption own initiative opinions, where a problem emerges on which the attention of the institutions should be drawn ; there should also be an obligation imposed on the Commission, at a minimum, to provide information about which follow-up it intends of those opinions and recommendations[33]. In other terms, a set of conditions have to be fulfilled for an effective monitoring of fundamental rights to take place within the Union, which could make a true contribution to the protection and promotion of fundamental rights by the Union's legislation and policies. These conditions, which concern the relationship of such independent monitoring to the workprogramme of the institutions, should be created if the Fundamental Rights Agency in the future is to have a true impact on law- and policy-making in the Union.

[33] See, *mutatis mutandis*, Article 30 (3) and (5) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 23.11.1995, p. 31 (providing that 'the Working Party [established according to Article 29 of the Directive] may, on its own initiative, make recommendations on all matters relating to the protection of persons with regard to the processing of personal data in the Community' and stating that the Commission 'shall inform the Working Party of the action it has taken in response to its opinions and recommendations. It shall do so in a report which shall also be forwarded to the European Parliament and the Council. The report shall be made public').

CHAPTER I . DIGNITY

Article 1. Human dignity

Human dignity is inviolable. It must be respected and protected.

No Conclusions have been adopted under this provision of the Charter.

Article 2. Right to life

1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed.

In accordance with Article 52(3) of Charter of Fundamental Rights, this provision of the Charter should be seen as corresponding to Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It should also be read in accordance with the requirements formulated by Article 6 of the International Covenant on Civil and Political Rights (1966), by its Second Optional Protocol aiming at the Abolition of Death Penalty (1989), by the Rome Statute of the International Criminal Court (1998), by Protocol n°6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty (1983), and by Protocol n°13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all Circumstances (2002).

<u>The protection of non-nationals held in retention centres</u>

Eleven individuals were killed in a fire that occurred on 27 October 2005 in an aliens detention centre at the Schiphol Amsterdam Airport in the **Netherlands**. An official investigation revealed that, contrary to regulations, there was no direct connection between the various wings of the detention centre and the fire brigade station. As a result precious time was lost when the fire broke out. Despite assurances to the contrary, not all surviving detainees seem to have received appropriate care. On the contrary, the Minister for Immigration and Integration stated shortly after the incident that she would proceed to deport survivors as soon as their presence in the Netherlands was “no longer necessary” with a view to the investigation to the causes of the Schiphol fire. Meanwhile it became clear that the Schiphol detention centre was the subject of a dispute between the Ministry of Justice and the local authorities, who believed that the safety of persons required the centre to be closed. Court proceedings between the municipality and the State were still pending when the present report was completed. The courts were also involved in the Schiphol fire in a way one would not have expected. In various cities members of the public displayed posters which held the Minister for Immigration and Integration directly accountable. The authorities removed the posters, stating that the Minister’s good name was being tarnished. This led to court proceedings.

The Network has deep concerns regarding the causes underlying this event and the reactions of the Dutch authorities. It recalls that, as noted in the report on the situation of fundamental rights in the United Kingdom in 2004 submitted to the EU Network of Independent Experts, an investigation by the Prison and Probation Ombudsman into a disturbance and fire at Yarl’s Wood Centre in the **United Kingdom**, a removal centre for failed asylum-seekers and illegal immigrants, which led to the centre’s destruction, identified shortcomings in the design and construction materials for the centre, which was not fit for its intended purpose, and also highlighted that the incident arose out of the mishandling of the treatment of a particular detainee; that there was a lack of clarity as to who was in charge and the

command structure; that the operation that ended the disturbance worked well but the safeguards protecting those in detention from abuse broke down; that there was a lack of centrally-held information about the detainees; and that the tension there arose from genuine issues relating to food, communications, feedback from the Immigration Service, problems with heating; inconsistent application of rules and high shop prices (*Report of the inquiry into the disturbance and fire at Yarl's Wood Removal Centre*).

Asylum-seekers or third-country nationals who are detained by the authorities should be adequately protected from the kind of risks which have led to these tragic events. The neglect of the authorities in the cases reported, amount to a failure to exercice due diligence in order to prevent such events from occuring, and if they occur, in order to ensure that they are dealt with as speedily and effectively as possible.

The use of force, including lethal weapons, by law enforcement officers

In **Austria**, previous reports prepared by the Network addressed the death of the Mauretanain citizen Cheibani Wague during a police operation in the Viennese "Stadtpark", and the ensuing judicial proceedings (Report on the situation of Fundamental Rights in Austria in 2003, p. 11 and in 2004, pp. 16-17). Two years after the events, the criminal proceedings against six police officers, three ambulance men and the doctor resulted in the criminal conviction of one police officer and an emergency physician. Furthermore, the Administrative Court confirmed the decision of the Independent Administrative Tribunal which found a violation of Art 3 of the European Convention on Human Rights. The Network welcomes the fact that deficiencies of the most different types i.e. lack of coordination, gaps in the chain of command and severe deficiencies in the training of the police were identified in the course of the judicial proceedings. The judgement also confirms the criticism, expressed in the reports presented to the Network over the last two years, in regard to investigations carried out by the Bureau of Internal Affairs (*Büro für Interne Angelegenheiten*) (subordinate to the Ministry of Interior) which initially did not see any wrong doing by any of the police officers involved. At the same time, the Network notes that, had a video of the entire operation not existed, which was a pure coincidence, the case would almost certainly not have led to any criminal investigations, due to the fact that the reports of the police and the physician did not present a clear picture of the case. It is also questionable whether the police officers would have been prosecuted without the persistent media coverage of the case and the criticism by the Human Rights Advisory Board. Finally, the judgement does not apportion any blame to the police officers acquitted, as in the case of Binali Ilter, due to the flaws in their training, although one would assume that even without special training it should be obvious to anyone that restraining someone around the upper body for a long period of time can lead to suffocation. The Network attaches a particular importance to the follow-up which shall be made of this decision, especially with regards the training of law-enforcement officers in Austria. It recalls its previous conclusions concerning the year 2004, where, addressing the situation of Austria, it emphasized that 'guidelines on the conduct of law enforcement officers must be brought to the attention of the police officers and impact in the long run on the way police officers act in practice. Law enforcement officers must be made sensitive to situations that run the risk of escalating and be adequately trained to handle difficult situations without violating human rights' (p. 12).

This question of course does not arise only in Austria. In **Ireland,** in May 2005, the Garda Emergency Response Unit used lethal force against two men involved in a Post Office robbery in north County Dublin. The incident currently is the subject of an internal Garda inquiry. The Network shares the concerns of Amnesty International (Irish Section) and other NGOs about the internal nature of the inquiry in the absence of an established independent mechanism for the investigation of such incidents. The **Netherlands** was found to be in violation of Article 2 ECHR in the case of *Ramsahai*, due to the absence of an independent investigation into an incident where a youngster, who had just stolen a scooter, resisted arrest and threatened two police officers, to their surprise, with a gun, leading one of the officers to fire at the boy, causing his death. While the European Court of Human Rights accepted that the use of lethal force did not exceed what was "absolutely necessary", it also considered

that the proceedings for investigating the incident fell short of the applicable standards, because part of the investigation – during the first 15½ hours after the incident – was carried out by the Amsterdam/Amstelland police force to which the two officers belonged[34].

The Network recalls that, in the judgment it delivered on 22 November 2005 in the case of *Kakoulli v. Turkey* (appl. no. 38595/97), which concerned the killing of Petros Kakoulli by Turkish soldiers along the ceasefire lines in **Cyprus**, the European Court of Human Rights emphasized that, while Article 2 § 2 (b) of the European Convention on Human Rights authorizes the use of force which is no more than absolutely necessary 'in order to effect a lawful arrest or to prevent the escape of a person lawfully detained', this provision 'can only justify putting human life at risk in circumstances of absolute necessity'. The Court continued (in para. 108-110 of its judgment):

> … in principle there can be no such necessity where it is known that the person to be arrested poses no threat to life or limb and is not suspected of having committed a violent offence, even if a failure to use lethal force may result in the opportunity to arrest the fugitive being lost (…).
> In addition to setting out the circumstances when deprivation of life may be justified, Article 2 implies a primary duty on the State to secure the right to life by putting in place an appropriate legal and administrative framework defining the limited circumstances in which law-enforcement officials may use force and firearms, in the light of the relevant international standards (…).
> Furthermore, law-enforcement agents must be trained to assess whether or not there is an absolute necessity to use firearms not only on the basis of the letter of the relevant regulations but also with due regard to the pre-eminence of respect for human life as a fundamental value (…).

Although the Turkish soldiers patrolling along the ceasefire line cannot be considered 'law enforcement officers' in the strict sense, the principle according to which it is in principle not justified to use potentially lethal force against a person who poses no threat to life or limb and is not suspected of having committed a violent offence would be applicble also to law enforcement officers. This principle is also affirmed by para. 9 of the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted on 7 September 1990 at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders.

In the **United Kingdom**, the death on 22 July 2005 of Jean Charles de Menezes, a Brazilian citizen, who was shot in the head seven times after officers wrongly suspected him of being a suicide bomber following a surveillance operation connected with several suicide bombings in London but without having first been challenged or warned by the police, has led to the public disclosure of 'Operation Kratos', the name given to a range of tactics used to defend against the threat from suicide bombers. Operation Kratos was developed by the Metropolitan Police Service, in partnership with the national body for policing in the United Kingdom, the Association of Chief Police Officers ("ACPO"), after the terrorist attacks in the United States on 11 September 2001. It was adopted as national policy and promulgated through the 'Terrorism and Allied Matters Committee' of the Association of Chief Police Officers to all Forces around the United Kingdom in January 2003 (*Suicide terrorism*, report by the Metropolitan Police Commissioner to the Metropolitan Police Authority, 27 October 2005). The options for the three operations under the plan range from an unarmed stop of the suspect by uniformed officers, through to the deployment of armed police officers but the detailed range of tactics involved is not in the public domain. Specially trained ACPO officers, acting as the 'Designated Senior Officer', (DSO) will command these operations and give the order to a firearms officer to shoot. An important consideration in the tactics developed is the possible use by a suicide terrorist of a type of explosive that are extremely sensitive to impact, shock and electrostatic discharge and the advice of Government scientists that the use of baton guns, Taser, or firearms that impact on this material will cause it to detonate. Another important consideration is reliance on evidence that suicide bombers will spontaneously detonate their devices if they believe they have been identified, meaning

[34] Eur. Ct. HR, 10 November 2005, *Ramsahai a.o. v. the Netherlands*, Appl. No. 52391/99.

that any tactics deployed have to involve officers acting covertly to retain the element of surprise and they have to ensure immediate incapacitation to eradicate any opportunity for the bomber to cause the device to function. It has been emphasised by the Metropolitan Police Service that this is not a 'shoot to kill' policy and that the tactics are wholly consistent with Section 3 of the Criminal Law Act 1967, which provides that 'A person may use such force as is reasonable in the circumstances in the prevention of crime, or in the effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large'. This legal requirement is also articulated in the ACPO Manual of Guidance on Police Use of Firearms. There is no specific legal requirement for an officer to give a verbal challenge before firing and the ACPO Police Use of Firearms manual suggests that there will be occasions when it is not appropriate or practical to do so. The Metropolitan Police Service has stated there is a constant review of the threat and intelligence to ensure tactics are appropriate and proportionate and reviews of the policy have been undertaken within it and also at the national level. As a result of the former review the tactical options have been widened to cover a greater range of operational circumstances. There has also been a change to the terminology used in order to improve clarity around tactical selection. Training to update DSOs on these developments is imminent. The actual circumstances leading to the death of Mr Menezes is the subject of an investigation by the Independent Police Complaints Commission.

While full disclosure of the precise circumstances in which the use of force by the police led to the death of Mr Menezes might well undermine the efficacy of preventive operations, some awareness that there had been a change of approach might have allowed for a thorough scrutiny of the adequacy of the arrangements in place to ensure that the new tactics could be implemented in a manner consistent with the requirements of Article 2 ECHR. The Network is also concerned by the length of time taken for the investigation into the shooting, which has still not been finalised.

Applicability of the protection of the right to life

In its previous set of Conclusions (p. 12), the Network had noted the request for information made to **Germany** by the Human Rights Committee, in its Concluding Observations of 30 May 2004 on the fifth report submitted by Germany to the Committee under Article 40 of the International Covenant on Civil and Political Rights, about the applicability of the Covenant to persons subject to its jurisdiction in situations where its troops or police forces operate abroad, in particular in the context of peace missions (§ 11). The Network welcomes the announcement made, in the beginning of January 2005, by the Federal Government, according to which, pursuant to Article 2, paragraph 1, Germany ensures the rights recognized in the Covenant to all individuals within its territory and subject to its jurisdiction. Wherever its police or armed forces are deployed abroad, in particular when participating in peace missions, Germany ensures to all persons that they will be granted the rights recognized in the Covenant, insofar as they are subject to its jurisdiction.

Situations outside the national territory do not fall under the jurisdiction of a State, under international law, simply because the State organs deploy certain activities abroad, for instance in the context of armed operations. In dismissing appeals against the refusal of judicial review applications in respect of the alleged failure and/or refusal to conduct independent inquiries into the deaths of five persons shot in separate armed incidents involving British troops in Iraq and of a sixth person who died in a British military prison there, it was held in *R (on the application of Al-Skeini) v. Secretary of State for Defence* [2005] EWCA Civ 1609 that the **United Kingdom**, although an occupying power, was not in effective control of Basrah City during the Iraq occupation from May 2003 until June 2004 for the purposes of the ECHR and therefore, with respect to the five persons shot, did not apply to acts of British troops there during that period. There had been a concession in respect of the sixth death that the United Kingdom was exercising extra-territorial jurisdiction and the 1998 Act applied accordingly to this case, which was remitted to the administrative for consideration of further evidence as to whether there had been an infringement of the United Kingdom's procedural obligations in respect of Articles 2 and 3 ECHR.

Deaths of illegal migrants

In its Conclusions relating to the year 2003 (p. 14), the Network insisted that, in defining the measures to combat illegal immigration across the maritime borders of the EU, the Member States should take into account the impact these measures could have on the means of illegal immigration, and the risks entailed for the candidate immigrants. The Network reiterates its concerns about the lack of progress made on this issue. In **Spain,** there are more and more cases of migrants dying or disappearing as they cross the sea from Africa to Spain. The association ATIME (Association of Moroccan Workers and Immigrants in Spain) has recorded at least 163 deaths from January to June 2005, it being understood that the actual number of casualties cannot by definition be known with certainty. Another study carried out by the Euro-Mediterranean Consortium for Applied Research on International Migration puts the number of Moroccans who died as they tried to enter Spain at more than 8,000 since 1989. Moreover it has been reported by the Platform for International Cooperation on Undocumented Migrants (Picum) that Sive, the new surveillance system used by the Spanish coast guards, not being equipped for rescue operations, many candidates to illegal immigration to the EU through the Spanish coasts died when their boats were intercepted by the Spanish coast guards.

Article 3. Right to the integrity of the person

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must be respected in particular:
a) the free and informed consent of the person concerned, according to the procedures laid down by law,
b) the prohibition of eugenic practices, in particular those aiming at the selection of persons,
c) the prohibition on making the human body and its parts as such a source of financial gain,
d) the prohibition of the reproductive cloning of human beings.

This provision of the Charter must be read in accordance with the requirements formulated by Article 7 of the International Covenant on Civil and Political Rights (1966), by the Rome Statute of the International Criminal Court (1998) by Article 1 of the Council of Europe Convention on Human Rights and Biomedicine (1997) and by the Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (2005).

Female genital mutilation

The Network attaches particular importance to the advances made in combating female genital mutilation in the Member States. Noting that, in **Italy**, over 40,000 women annually suffered genital mutilation, and that each year at least 6,000 children between 4 and 12 years old undergo that violence, the Network encourages the adoption without further delays of the bill (A.C. no. 414) on the prevention and prohibition of female genital mutilation, in favor of which the Senate voted on 6th July 2005. An effective protection from female genital mutilation should reach this act when committed abroad by nationals of the Member States or by non-nationals resident in the Member States. The Network is encouraged by the fact that in **Spain,** the *Ley Orgánica 3/2005, de 8 de julio, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, para perseguir extraterritorialmente la práctica de la mutilación genital femenina* [Organic Act no. 3/2005 of 8 July 2005 amending Organic Act no. 6/1985 of 1 July 1985 on the Judiciary, allowing the extraterritorial prosecution of the practice of female genital mutilation] (BOE, 9 July 2005) was adopted in order to allow the prosecution of acts of genital mutilation committed on young girls habitually residing in Spain while on holiday in their country of origin. Similarly in the **United Kingdom**, like the Female Genital Mutilation Act 2003 for England, Wales and Northern Ireland, the Prohibition of Female Genital Mutilation (Scotland) Act 2005 repeals and re-enacts for Scotland the provisions of the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply), gives extra-territorial effect to those provisions and increases the maximum penalty

for FGM - procedures which include the partial or total removal of the external female genital organs for cultural or other non-therapeutic reasons - in Scotland from 5 to 14 years' imprisonment.

Rights of the patients

Positive aspects

Having examined the report concerning the situation of fundamental rights in **Ireland**, the Network welcomes the reactions which followed the death in that country, in April 2005, of a man who had received misleading health advice from an alternative health practitioner. After the practitioner in question had refused to attend the inquest, leading the coroner in charge of the inquest to express dissatisfaction at the fact that he had no powers to compel witnesses to attend in such cases, the Minister for Justice, Equality & Law Reform announced that he was considering the introduction of new legislation, which would provide for the imposition of fines up to 2,000 euros for key witnesses who refused to attend inquests. As the coroner also expressed concern at the fact that all qualified health care practitioners, from chiropodists to radiographers, were subject to regulation, but that what he called "freelance operators in health care" were not subject to any regulatory authority, the Medical Council called for the introduction of a regulatory regime for alternative health therapists. The Network also welcomes the adoption in December 2005 of the Coroners (Amendment) Bill 2005, which deals with some of the issues raised in the abovementioned case.

A number of positive developments occurred during the period under scrutiny in the field of patients' rights. In **Latvia,** the State Inspection for Control of Medical Care (Medicīniskās aprūpes un darbspējas ekspertīzes kvalitātes kontroles inspekcija (MADEKKI)), which supervises the quality of professional health care in medical institutions, has demonstrated its effectiveness through its exemination of the claims of breaches of patients' rights and inadequate treatment : during the period from January to June 2005, it received 571 claims, as compared with 486 claims for the whole of 2003. In **Malta,** the setting up of the Bioethics Consultative Committee is a positive, showing a greater awareness of the need to address problems raised in the field of medical experimentation, although this still is not a substitute for the adoption of an adequate legislation on issues of bio-ethics. In **Poland,** the amendment of the Act on mental health protection establishes a Patients' Rights Spokesperson at every psychiatric hospital, with the power to receive complaints and inspection powers, including the possibility to review the medical documentation with the consent of the complainant. The Act also clarifies the principles regulating the admission of persons with mental disorders to psychiatric hospitals, as well as the principles relating to the use of direct coercion[35]. In **Portugal**, the National Committee on the Ethics for Life Sciences published two important opinions during the period under scrutiny, relating respectively to the patient in a permanent vegetative state – for which the Committee accepted the possibility of refusal of feeding and hydratation as long as such option is in accordance with the patient's expressed (in a living will) or presumed will (45/CNECV/05) – and to the refusal of blood transfusions for religious motives – which the Committee accepts if there is a free and informed refusal (46/CNECV/05) –. These opinions adequately reflect the need to take into account the autonomy of the patient and his or her right to refuse unwanted medical treatment. In **Spain,** the Autonomous Community of Extremadura adopted *Ley 3/2005, de 8 de julio, de información sanitaria y autonomía del paciente* [Act no. 3/2005 of 8 July 2005 on health information and the autonomy of the patient] (Official Journal of Extremadura of 16 July 2005), which defines the rights and obligations of patients in all public and private health centres of the Autonomous Community. This Act contains provisions guaranteeing the confidentiality of health and genetic details, the patient's right to autonomy and the free and informed consent of patients. Furthermore, the Act establishes a Bioethics Advisory Board. A similar law was adopted in Galicia (*Ley 3/2005, de 7 de marzo, de modificación de la Ley 3/2001, de 28 de mayo, reguladora del consentimiento informado y de la historia clínica de los pacientes* [Act no. 3/2005 of 7 March, amending Act no. 3/2001 of 28 May on informed consent and the medical history of patients] (BOE,

[35] Ustawa z dnia 1 lipca 2005 r. o zmianie ustawy o ochronie zdrowia psychicznego (Dz.U. z 2005 r, nr 141, poz. 1182) [The Act of 1 July 2005 amending the Act on mental health protection (The Official Journal of 2005, No. 141, item 1182)]

19 April 2005)). In **Spain**, too, the new Ethical Code of Physicians came into effect in April 2005. This Code asserts the right of patients to oppose medical treatments that prolong their life unreasonably when the patient has reached the terminal phase. The new Code also opposes the manipulation of the human genome for aesthetic purposes or physiological perfection, but allows research on superfluous frozen embryos at centres for artificial reproduction.

Reasons for concern

The Network identifies the following situations as particularly worrisome in the Member States:

- In **Austria**, the conditions in Viennese nursing homes are a continuing source of concern. As denounced by the Ombudsman for Viennese Patients, Werner Vogt, poor medical treatment, bad care service and unhygienic conditions are not uncommon, and in fact may have been deteriorating since this was initially publicized two years ago. In order to put an end to the lack of qualified nursing staff, particularly in private institutions, but also in public ones, still more funding would be required, although the Network acknowledges the efforts made in this regard by the municipality of Vienna. The implementation of the Viennese Act on Nursing Homes (*Wiener Pflegeheimgesetz*), which now provides for a right to social contact and medical treatment, provides an opportunity to remedy this situation which must be seized.

- In **Belgium**, the application of the Act of 22 August 2002 on the rights of patients appears to be problematical with regard to mentally handicapped patients. The principle of the right to refuse medical treatment regularly raises questions with patients (who often feel 'obliged' to undergo certain treatments) as well as with their relatives (who for their part cannot understand why it is a matter of 'accepting' the refusal by a mental patient to undergo certain treatments)[36]. The mental patient's right of complaint also elicits reactions in special situations, whereas the professional practitioner (psychologist, psychotherapist) does not fall within the scope of application of the law on the rights of patients. Finally, the question of appreciating the patient's capacity for discernment is particularly delicate since the said appreciation – to be done by the professional practitioner – is not necessarily easy.

- In **Hungary**, according to the Civil Liberties Union TASZ, HIV-positive individuals are denied many of their self-determination rights: they may not decide whether they take advantage of medical treatment or not ; and they may not oppose the processing of their medical data together with their personal data. Nor are they granted a residence permit with regard to their health status[37].

- Also in **Hungary**, a legislative initiative should be taken in order to clarify the legal framework applicable to home birth. Although the applicable legislation allows a mother to give birth at home if the birth is likely to happen without problems, and provided a hospital is within 20 minutes reach from the place where the mother is giving birth, this right is in practice difficult to exercise as doctors appear at times unwilling to sign the birth certificates in the fear that they are registering a new-born who has been illegally "bought" by the parents from the natural mother.

- The Network encourages the adoption of a comprehensive legislation recognized patients' rights in **Latvia,** and explicitly guaranteeing rights of access to information about health care, and their right to be informed about their diagnosis and course of treatment. The draft law approved by the Cabinet of Ministers on 22 February 2005 and submitted to the Parliament (*Saeima*) should be improved, however, in accordance with the recommendations of the WHO, before being adopted by Parliament.

[36] See on this question the Bioethics Advisory Board, Opinion No. 21 of 10 March 2003 on "Forced Treatment in Case of Hospitalization under Duress". This document is available on http://www.health.fgov.be/bioeth
[37] TASZ, Hungarian Civil Liberties Union, May 16, 2005, available at: http://www.tasz.hu/index.php?op=contentlist2&catalog_id=186

- In **Lithuania,** a new version of the Law on Patients' Rights and Compensation of the Damage to their Health entered into force on 1st January 2005[38]. However, although this legislation seeks inter alia to protect the confidentiality of information relating to health, its interaction with Article 6.736 of the Civil Code remains unclear and, due to the legal uncertainty surrounding the conditions under which medical data may be processed, the guarantees of the new legislation are not effectively implemented. A legislative initiative clarifying the legal framework applicable to health data thus would be welcome.

Removal and donation of organs

The Network notes with interest that in **Luxembourg,** in October 2005, the Government Council adopted an amended version of the bill regulating the donation of organs. This piece of legislation, which is intended to transpose into Luxembourg law the Oviedo Convention on Human Rights and Biomedicine, will prohibit human cloning and will regulate organ transplantation, biomedical research and the removal of tissue of human origin. The Network will closely follow the parliamentary course of this bill.

The Network also notes with interest that in the **Slovak Republic,** section 159 of the new Criminal Code makes the "unauthorized taking of the organs, tissues and cells and unlawful sterilization" a criminal offence ; section 160 of the new Criminal Code provides that "a person who without authorization secures for himself/herself or for another an organ, tissue or cell from dead human being may be sentenced to a term of imprisonment from six months to three years"; section 161 of the new Criminal Code stipulates the new elements of crime of unauthorized experiment on human being and cloning of human being.

Article 4. Prohibition of torture and inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

In accordance with Article 52(3) of Charter of Fundamental Rights, this provision of the Charter corresponds to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It must be read in accordance with the requirements formulated by Article 7 of the International Covenant on Civil and Political Rights (1966), by the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1984), by Article 19 of the Convention on the Rights of the Child (1989) and, in the context of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987), by the European Committee for the Prevention of Torture. The protection of the rights listed in Article 4 of the Charter of Fundamental Rights has recently been improved at the international level by the adoption of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002) although this instrument is not in force yet.

Domestic violence

The Network has noted with interest that on 26 January 2005, the Committee on the Elimination of Discrimination against Women adopted its views under Article 7, par. 3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women in the case *Ms. A. T. v. **Hungary***[39]. The views adopted by the Committee on the Elimination of Discrimination against Women imply that all States parties to the Convention on the Elimination of All Forms of

[38] Pacientų teisių ir žalos sveikatai atlyginimo įstatymo pakeitimo įstatymas [a new version of Law on Patient's Rights and Compensation of the Damage to their Health]. Valstybės žinios, 2004, Nr. 115-4284.
[39] *A.T. v. Hungary*, CEDAW Communication No. 2/2003, U.N. Doc. CEDAW/C/32/D/2/2003 (2005).

Discrimination against Women are under an obligation to ensure an effective protection of victims of domestic violence and develop a national strategy for the prevention and effective treatment of violence within the family, which should in particular include the training on the Convention on the Elimination of All Forms of Discrimination against Women of judges, lawyers and law enforcement officials. At a minimum, States should investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards, and provide victims of domestic violence with safe and prompt access to justice. They should also provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

Positive aspects

As a good practice in this field, the Network would mention the impact in **Cyprus of** the *Violence in the Family (Prevention and Protection of Victims) Law* L. 119(I)/2000[40], as was last amended in 2004 by *the Law Amending the Violence in the Family (Prevention and Protection of Victims) Law*, L. 212(I)/2004[41]. As noted by the Group of Specialists of the Committee of Ministers of the Council of Europe[42], this legislation seeks to 'remedy the weaknesses of available judicial and administrative procedures in the handling of cases of domestic violence and also to provide for the necessary support and assistance to the victims'. The rules regulating the evidence in matters of violence in the family according to the *Violence in the Family (Prevention and Protection of Victims) Law of 2000 and 2004* ensure an improved protection of the victim of domestic violence. In particular, these rules provide that the spouse is a competent and also a compellable witness if the offence is committed against other members of the family; they make it possible to find an accused guilty with only the victim's testimony (which means that corroborative evidence is not required.); the psychiatrist or psychologist's testimony on things that the minor had confided in them, is admissible in court; and the complaint of ill-treatment to various people, such as close family friends or teachers are characterised as direct complaints and thus are acceptable testimonies at court. The Network assumes that these rules will be applies while fully taking into account the right to the presumption of innocence in criminal proceedings, as stated by Article 6 § 2 of the European Convention on Human Rights.

Other positive developments deserve mention. In **Poland,** the Act on counteracting domestic violence of 29 July 2005[43]. improves the protection of victims of domestic violence, in particular by making it possible for courts to oblige the perpetrator of the violence to refrain from contacting particular individuals, as well as to leave the premises occupied together with the victim ; to specify the manner in which the perpetrator is allowed to contact the victim, i.e. prohibit him/her from approaching the victim under given circumstances ; and to order the perpetrator to undergo treatment or to participate in educational and corrective programmes. The commune (*gmina*) and district (*powiat*) have an obligation to create their own programmes for counteracting domestic violence, as well as to conduct counselling and run support centres for the victims. In **Spain**, the *Ley orgánica 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género* [Organic Act no. 1/2004 on total protection measures against domestic violence] (BOE, 29 December 2004) provides for preventive measures in the areas of education, welfare, aid, health and criminal law, with special focus on the situation of the most vulnerable women (handicapped women, immigrant women and women in rural communities). The Act also provides for the establishment of specialized courts, where the combination of civil and criminal jurisdiction in one single judicial body is intended to contribute to greater coherence in the approach to domestic violence. It contains budgetary measures, in particular the creation of a financial fund to which the Autonomous Communities have access, as well as a guarantee fund for maintenance payments to underage children. It also provides for access by persons

[40] *Ο Νόμος που Προνοεεί για την Πρόληψη της Βίας στην Οικογένεια και για την Προστασία των Θυμάτων* N. 119(I)/2000.
[41] *Νόμος που Τροποποιεί τον Περί Βίας στην Οικογένεια (Πρόληψη και Προστασία Θυμάτων) Νόμος* (N. 212(I)/2004.
[42] Final Report of the Group of Specialists on the Implementation of and Follow-up to Recommendation Rec (2002)5 of the Committee of Ministers to member states on the protection of women against violence (EG-S-MV) Directorate General of Human Rights, Strasbourg, 2005.
[43]Ustawa z dnia 29 lipca 2005 r. o przeciwdziałaniu przemocy w rodzinie, (Dz.U. z 2005 r. nr 180, poz. 1493) [The Act of 29 July 2005 on counteracting domestic violence (The Official Journal of 2005, No. 180, item 1493)]

convicted of domestic violence to special rehabilitation programmes. The Act stipulates severer penalties for men than for women having committed acts of aggression. In the opinion of the Network, however, from the moment that such severer penalties also exist if the victim is a particularly vulnerable family member (elderly parents, for example), there is no need to stipulate different penalties according to the gender of the aggressor. As the Act stands now, such a difference in treatment based on gender could constitute an instance of discrimination. The Network also notes with interest the publication by the police in **Greece,** in May 2005, of a specialized manual designed to inform and raise awareness among police officers about questions relating to domestic violence, which will be distributed among all the police services and will be used in a special course at the police academies. The manual contains instructions on how to handle cases of domestic violence appropriately, including the investigation of such cases, the protection of victims, as well as the prevention of the "victimization" of victims.

The Network welcomes the major success, with 25,000 calls received in 2005, of the free helpline service set up in **Spain** by the Ministry of Labour and Social Affairs for victims of domestic violence protected by a restraining order delivered by the courts and who do not live together with the perpetrator of the aggression, and which allows them to be located immediately in order to ensure swift intervention to protect them. It also notes with satisfaction the institution in that country of a public prosecution officer specializing in violence against women, the *Fiscal de Sala delegado contra la violencia sobre la mujer*. In **Luxembourg**, as part of the fight against domestic violence, a new consultation and aid centre for perpetrators of violence was set up. Given that, since it was opened, 21 men have already sought consultation, the Network encourages the authorities of the Grand-Duchy to give wider publicity to the existence of that centre and to the services it can provide. In **Portugal,** there has been an effort to increase the number of shelters for victims and of treatment programmes for the aggressors, and centres of support to dysfunctional families are planned to be set up in order to prevent domestic violence. The *Commission for Equality and the Rights of Women (*CIDM*)* has a special phone number for victims of Domestic Violence. In the **Slovak Republic,** the Citizens' Association *Náruč – pomoc deťom* [Embrace – Help to Children], which focuses on help for abused, maltreated and neglected children, opened on 3 October 2005 in the city of Čadca a consulting and training centre for women, who are victims of domestic violence. In **Sweden**, the Prime Minister announced before the Parliament on 13 September 2005 that the National Centre for Battered and Raped Women will be made a national centre for knowledge on men's violence against women and that Government support for women's shelters will be reinforced[44]. Also in that country, the first emergency ward specialised for receiving raped women was inaugurated in October 2005 in Stockholm[45].

The Network notes that a large number of initiatives have been set up in this area in the past year which in some cases have yet to show tangible results and which will continue to hold its attention in the future. For instance, it attaches great importance to the action that will be taken in **Luxembourg** in response to the recommendations contained in the report published by Amnesty International in November 2004 on domestic violence in the Grand-Duchy of Luxembourg. This report emphasizes the need to collect and analyze figures on the situation of domestic violence. It also recommends the creation of a structure for the reception of expelled persons having perpetrated acts of violence, family monitoring in cases of domestic violence, and the availability of specially trained personnel in cases where the police intervene on the scene of domestic violence. In **Hungary**, the Code on Criminal Procedures was amended on 13 February 2006, in order to include provisions on ordering restraint of the violent family member. Now the Act has been published in the Official Gazette as Act No. LI of 2006. Similarly, the Network welcomes the presentation in **Malta**, on 13 May 2005, of a Parliamentary Bill making a special provision for domestic violence. The adoption of this bill would contribute significantly to address the deficiencies that exist in relation to domestic violence both in the domestic laws and in the national infrastructure. In the **Slovak Republic,** the Government approved by its

[44] Statement of Government Policy presented by the Prime Minister, Mr Göran Persson, to the Swedish Riksdag on 13 September 2005, p. 6.
[45] See www.sodersjukhuset.se

Resolution no. 635/2005 the *Národný akčný plán pre prevenciu a elimináciu násilia páchaného na ženách na roky 2005 – 2008* [National Action Plan for the Prevention and Elimination of Violence Exercised against Women for the years 2005 – 2008] prepared by the *Ministerstvo práce sociálnych vecí a rodiny Slovenskej republiky* [Ministry of Labour, Social Affairs and Family of the Slovak Republic]. The Network expresses the hope that the *Expertná skupina pre elimináciu a prevenciu násilia voči ženám a v rodinách* [Group of Experts for the Elimination and Prevention of Violence against Women and within families] of the *Rada vlády Slovenskej republiky pre prevenciu kriminality* [Slovak Government's Council for Crime Prevention] will put forward innovative proposals for improving the protection of women against violence.

The Network also welcomes the proposals made in the **Czech Republic,** for further legislative amendments improving the protection of victims of domestic violence. The new Sec. 215a of the Penal Code, introduced by Act No. 91/2004 Coll., made 'maltreatment of a person living in common with a perpetrator in an apartment or house' a special punishable offence. By granting the police a new power to expel a perpetrator of domestic violence from a common apartment in order to protect a victim against a menace of continuing maltreatment, the Czech Republic would be further reinforcing the protection owed to the victim. In **Denmark**, the Ministry of Gender Equality launched a new plan of action to fight men's violence against women and children in the family in April 2005. In **Italy,** the Ministry for Equal Opportunities has sponsored the creation of a toll-free phone number for women victims of domestic violence, which will be operational at the beginning of 2006. The Network also notes with satisfaction that in **Greece** the Minister of Justice on 25 November 2005 announced a new bill on domestic violence prepared by an interdepartmental committee. This bill aims, among other things, to safeguard the freedom, dignity and self-determination of persons in the family context, to protect the physical and mental well-being of underage children and to ensure a healthy family environment. The bill proposed by the Minister provides stiffer penalties for violations of bodily integrity where such violations are committed in the family; conjugal rape is expressly criminalized; a judicial mediation procedure has been introduced in an effort to re-establish family harmony; acts of violence committed before an underage child against a member of his family are henceforth punished, as are acts of violence against elderly, disabled or sick persons, intimidation or active corruption of witnesses examined in cases of domestic violence, and, in particular, the infliction of severe physical or mental pain. Offences of domestic violence are to be prosecuted automatically according to the procedure for flagrante delicto. The legislative instrument in question will not only apply to situations of marriage, but also to situations of cohabitation. The Minister of Justice has announced that the new bill will be subject to wide consultation before it is tabled in Parliament very shortly. The Network emphasizes that the bill proposed by the Minister of Justice will come to fill a serious gap that has been highlighted in the last two years by several committees of experts on the United Nations treaties in the field of human rights which have examined the reports submitted by Greece. It also expresses the hope that the new legislative instrument will offer adequate support to the victims of domestic violence.

In the **Slovak Republic**, an Amendment to the *zákon o Policajnom zbore* [Act on Police Corps] should empower the police to prohibit the entry to a flat or house, if there is justified fear that the life or health of person concerned is endangered because of violent conduct of an outrager. This Amendment should ensure the protection of the victim of the domestic violence until the preliminary injunction restricting use and enjoyment of a flat by the violator is issued. However it is unfortunated that although the adoption of the Amendment had been in the legislative plans (i.e. the Amendment should have already been adopted), the Parliament has failed to adopt it. The Network also will follow closely the follow-up which shall be given in **Slovenia** to the special report of the Human Rights Ombudsman entitled 'Domestic violence – prospective solutions', and the ensuing recommendations adopted by the National Assembly at its session of 22 February 2005[46].

Reasons for concern

[46] Državni zbor Republike Slovenije, številka: 542-08/92-2/21, Ljubljana, dne 22. februarja 2005 EPA 1508-III, Zbirke Državnega zbora RS – sprejeti akti.

While these developments are positive, the Network cannot fail to note the dilemma which women who are victims of spousal violence may be facing, when their stay in the country is based on the right to join their husband, under the national provisions relating to the right to family reunification. The report published during the period under scrutiny by the Danish Research Centre on Gender Equality, Roskilde University, published the report *Trapped between Law and Life* (Fanget mellem lov og liv) on violence committed against ethnic minority women in the Scandinavian countries describes the dilemma confronting abused women who do not have permanent residence permits, when they seek to leave their husbands. These women face the choice of either staying in the abusive relationship until they can attain permanent residence permits, or breaking out and risking expulsion[47]. This situation is of course not specific to **Denmark**. The Network notes with interest the position adopted in **Spain** by the *Defensor del Pueblo* [Ombudsman], who addressed a recommendation to the Directorate General of Police in *Informe sobre la asistencia jurídica a los extranjeros en España 2005* [Report on Legal Aid to Foreign Nationals in Spain 2005] that it should not institute administrative proceedings against illegal immigrants who come to the police station to file a complaint for domestic violence. Despite an initially unfavourable reply from the Directorate General in question, the Ministry of Home Affairs, through the State Secretariat for Security, gave instructions in August 2005 that make compatible the legal obligation of public officials to institute penalty proceedings if they are aware of the existence of illegal immigrants with the need to protect the victim. If a protection order has been issued in favour of a woman filing a complaint for domestic violence, a guarantee against expulsion is given; this opens the way to the granting of a residence permit once a criminal conviction has been delivered.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3.10.2003, p.12) provides no guarantee in this kind of situation and, on the contrary, states that the renewal of the residence permit may be refused 'where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship' (Art. 16 § 1). The Directive also provides that States may refuse the right to family reunification or refuse to renew the residence permit of the spouse, if it appears that the marriage is simulated and has been contracted for the sole purpose of benefiting from the family reunification (Article 16, §§ 2 and 4 of the Directive). Apart from the risk this provision entails of disproportionate interferences with the right to respect for private and family life[48]. the Network notes that the departure of the spouse from the family home, when motivated by the need to escape from violence, should in no circumstance justify that the residence permit of the victim should be denied or its renewal refused. If and when the Family Reunification Directive will be revised, it would be highly desirable to include a specific protection for women who are victims of spousal violence. This protection could seek inspiration from Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261 of 6.08.2004, p. 19), but resulting in the issuance of a permanent residence permit to women who have been mistreated, rather than in a temporary right to stay on the territory for the purposes of the criminal investigation. In the meantime, the Member States are reminded that Council Directive 2003/86/EC provides only for minimum safeguards, and that they may adopt provisions more favorable to the beneficiaries of family reunification. They should use the possibility in order to comply fully with their human rights obligations.

The Network would add that any national laws which, with aim of discouraging simulated marriages for immigration purposes – in order to benefit from the rules on family reunification –, establish a presumption that the marriage is suspect if it is dissolved within a defined period of time or if the spouses cease to live under the same roof, should be carefully scrutinized for the risk this entails of reinforcing the dependency of one spouse, usually the wife, on the other. A similar problem may result from a legislation such as the Maltese Citizenship Act, Chapter 188 of the Laws of Malta, under section 6 of which citizenship is only given upon proof that the marriage has lasted for five years and

[47] English version available at: http://www.celi.dk/cache/article/file/Rapport_uk1.pdf

[48] In its Conclusions and Recommendations concerning the year 2003 (at p. 37), the Network already insisted that the restrictions imposed by Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience (OJ n° C 382 , 16.12.1997, p. 1) should be scrupulously respected.

is not obtained immediately upon marriage. Indeed, under this legislation, if through no fault of the spouse seeking citizenship the marriage breaks down or if the other spouse dies, the separated spouse, or the surviving spouse, may find him- or herself without any right to continued residence in the country where he or she had made her home.

The Network finds encouraging the presentation in **Sweden,** of the report of the Inquiry Committee entrusted with proposing measures so that people who marry and want to be united with someone from another country will not have to wait, for what often appears at present, an unreasonably long time for a decision[49]. The report comprises a number of constructive proposals with respect to reducing the processing time of applications for residence permits based on personal ties without disregarding the need to protect the legal security of the individual. The Network notes that if the suggested changes were adopted, the examination procedure would be made more flexible by changing the present verbal requirement in the examination of the seriousness of the relationship so that the Swedish migration authorities will be able to determine which method is most suitable and effective in each individual case, while the requirement of undertaking verbal investigation in cases of arranged marriages in order to verify whether both parties have entered marriage with their full and free will, especially if one of the partners has been domiciled outside Sweden, would remain.

At the same time, the Network recognizes the legitimacy of combating both simulated marriages and forced marriages, as means to circumvent the national laws relating to the stay and residence of non-nationals. The reality of the phenomenon of forced marriages has been highlighted in **France** by an opinion of the National Human Rights Commission (CNCDH) on forced marriages, which it adopted on 23 June 2005. A number of reports in **Portugal** have also documented this phenomenon.

The Network also acknowledges the dilemma facing the national authorities in dealing with so-called 'honour crimes' : on the one hand, it is important to gain a better undertstanding of this phenomenon in order both to adopt preventive measures within the communities concerned and to improve the ability of law enforcement authorities to intervene at the earliest possible time; on the other hand, it is crucial that no ethnic community in particular be stigmatized as a result. In that sense, the Network welcomes the attempts of the **Netherlands** and of **Sweden** to improve an understanding of the issue of honour-related violence. It notes with interest in particular that, when the issue of *eerwraak* [honour related violence] was discussed in the Dutch Parliament in June 2005 (*Kamerstukken II,* 2004-2005, 29203, No. 40), measures were announced to strengthen the position of victims, also in connection to their residence status in the Netherlands, and that, in September 2005 the Minister of Integration Policies opened a budget line of € 200,000 for initiatives of minority organisations that seek to eradicate honour related violence (*Staatscourant* 2005, No. 184, p. 13). When the results of the pilot projects launched by the Netherlands for the first six months of 2006, during which the police in two regions will systematically register the ethnic background of perpetrators and victims, with a view to improving intervention strategies used by the police and social assistance agencies, the conclusions – including in particular how the right to respect for private life was respected in this context – should be made available to the other Member States in order to encourage them to improve their own strategies in this regard. In **Sweden**, after the government hosted in December 2004 an international conference on patriarchal violence against women, focusing on violence in the name of 'honour' and seeking to promote exchange of experience and working methods in the hope of fostering cross-border dialogue and commitment in this field, the Government decided in August 2005 to contribute with 5 million SEK to the Office of the Chief Prosecutor (*Åklagarmyndigheten*) with the aim to enable this authority to carry out a specially designed education programme for prosecutors on, *inter alia*, how to deal with cases concerning honour related crime.

Finally, the Network recognizes the need to reconcile the potentially conflicting concerns for respect of the right to family life and for the protection of victims from domestic violence. In **Hungary**, 2005. évi XCI. törvény [Act XCI of 2005] modified Article 195 of 1978. évi IV. törvény a Büntető

[49] SOU 2005:14, *Betänkande Effektivare handläggning av anknytningsärenden* : Government Report SOU 2005:14 on permit applications based on personal ties.

Törvénykönyvről [Act IV of 1978 on Criminal Code], making it possible to sentence a single parent to imprisonment, if s/he made it impossible for the other parent to meet or contact their child. The Network shares certain of the concerns expressed by the Habeas Corpus Working Group concerning this modification. Under the 1952. évi IV. törvény a házasságról, családról és gyámságról [Act IV of 1952 on Marriage, Family and Custody], upon dissolution of marriage, in the absence of agreement by the parents, the court places the child with the parent who can best ensure its physical, intellectual and moral development. The new legislation threatens the parent who can better ensure the development of the child with prison sentence, if s/he does not force the child to meet his or her other parent even if the child does not want to do so, without clearly referring to cases where the parent having custody rights unduly prevents the other parent from seeing the child : thus, it chooses to sanction *all* parents who make it impossible for the other parent to meet or contact their child[50]. A clarification of the legislation, defining more restrictively the conditions in which the criminal responsibility of the parent may by engaged, and excluding such liability where the child refuses to meet the other parent, would be desirable.

It is urgent to act on the issue of domestic violence, as the persistence of domestic violence remains a significant area of concern in the Union. In **Denmark**, every year 10.000 women are subjected to sexual assaults and 65.000 women are subjected to physical violence. In two out of three incidents the violator is a current or former partner. Every week a woman is subject to attempted murder and in every second case the woman dies. The risk of being subject to violence is three times as high for young women as for women in general. In addition to this, approximately 20.000 children aged 5-14 witness their mother being subjected to acts of violence and 2.000 children move to a crisis centre with their mother. In **Finland,** Amnesty International showed that in most of the municipalities the political engagement is lacking in order to prevent domestic violence against women[51]: out of 432 Finnish municipalities only 97 answered to the survey ; of these 97 municipalities, only 3 had made budgetary means available for preventive work on violence against women, and only 8 had investigated the extent of the problem. 88 municipalities did not have any statistics of the extent of the problem. The services provided for by the municipalities are inadequate, in particular with regard to women having an immigrant background. According to a survey some 20 % of women in a relationship have experienced violence[52]. In **Greece,** the Criminal Code currently contains no provision dealing specifically with domestic violence, such as conjugal rape, which the Human Rights Committee found regrettable when it examined the initial report of Greece under the International Covenant on Civil and Political Rights (ICCPR) (CCPR/CO/83/GRC (2005)). This is all the more regrettable since the phenomenon of domestic violence has taken on alarming proportions in that country. The same concern was expressed by the Human Rights Committee with regard to **Latvia** (CCPR/CO/79/LVA (2003), para. 13).

In **Ireland,** a report published by the Irish section of Amnesty International highlighted the state's failure to adequately address the issue of domestic violence perpetrated against women, resulting in particular from the under-funding of frontline services dealing with victims of violence, the inadequate collation of data relating to the incidence of violence against women, a fragmented statutory scheme for addressing the issue of violence against women, and the absence of a public education initiative to address the issue of violence against women[53]. The Network encourages the Irish government to pay all the required attention to the recommendations made in the report in order to improve the State's response to the issue of violence against women, which include (i) the adoption of a national strategy on violence against women, (ii) the systemic gathering, analysis and regular dissemination of data on violence against women, (iii) adequate funding for frontline service providers and a review, and where necessary amendment, of all relevant laws on violence against women.

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[50] http://hc.netstudio.hu/jogok/btk/lathatas.akadalyozasa.peticio.2005.06.17.htm

[51] The report is available in Finnish and Swedish at http://www.amnesty.fi/jokuraja/uutiset/uutiset.php?id=22. The Ministry for Social and Heath Affaires has published a handbook on domestic violence against women and how municipalities should respond to the problem 2005:7.

[52] Heiskanen &Piispa , Usko toivo hakkaus : kyselytutkimus miesten naisille tekemästä väkivallasta. Tilastokeskus, tasa-arviasiain neuvottelukunta. Oikeus 1998 :12.

[53] Amnesty International-Irish Section, *Justice and Accountability – Stop Violence Against Women: Summary Report* (June, 2005) at p.1.

In **Latvia**, still no shelters exist for women who have suffered domestic violence, although the State financed four shelters to provide social rehabilitation for children who have suffered violence[54]. No governmental strategy or action plan exists in this country to eliminate domestic violence against women[55]. Although the issue of domestic violence is included in the National Action Plan on Gender Equality, no financing for implementing of any activities is foreseen, with exception of 2900 Lats (4130 euros) for raising awareness among experts on the issue of domestic violence and risks related to it. Moreover no reliable statistical data on domestic violence against women are available in Latvia, although, according to information provided by the *Skalbes* crisis centre, every year domestic violence causes the death of about 35 women (which constitutes one-sixth of all homicides committed in the country). Allegedly, about half the reported cases of violence against women are cases of domestic violence[56]. Annually, around 300-400 women who have suffered domestic violence seek support at the *Skalbes* crisis centre. Victims of violence usually do not seek help from law enforcement and judicial institutions, as police and court systems tend to downplay the seriousness of the crime, as police officers reportedly frequently try to persuade women not to file complaints on spousal or partner violence, and as prosecutors' offices regularly close cases because of lack of evidence[57]. It is however a welcome development that aspects of work particularly with victims of domestic violence are now included in the Phare 2003 National programme Training for Police.

In **Italy**, although the Network could not identify any official data about domestic violence for 2005 – a situation which, it should be noted, may be problematic as such, as the absence of such statistics creates an obstacle to the tackling of the phenomenon by the authorities –, it notes that according to data collected by certain NGOs providing help to victims, the phenomenon remains widespread. A national survey (from a sample of 20,000 women) highlighted that 51.9% of women have been victims of sexual assaults, 27% of physical offences and 67% of psychological violence. In 77% of the cases the person responsible for these offences was the victim's partner or a relative. In **Luxembourg,** the capacity of shelters remains insufficient to cope with the recorded demand: in 2004, some 311 requests were refused due to lack of accommodation capacity (compared with 346 in 2003, which is 10% less). Furthermore, although the report drawn up at the end of the first year of the Act on domestic violence and published in September 2005 emphasizes the usefulness of this piece of legislation, it also suggests that the limitation to ten days of the expulsion measure issued against the violent partner may be too restrictive. In **Portugal,** despite the important efforts on training several sectors of society on "Equality of Opportunities", domestic violence still constitutes 88,6% (representing 10 041 cases) of the help provided by APAV-Associação Portuguesa de Apoio à Vítima *(Portuguese Association of Support to the Victim)*. In the **Slovak Republic,** the study *Násilie páchané na ženách ako problém verejnej politiky* [Violence Committed on Women as the Problem of Public Policy] published by the NGO *Inštitút pre verejné otázky IVO* [Institute for Public Questions] shows that one out of four Slovak adult women lives in a violent partnership[58]. This figure may show that the *Národná stratégia na prevenciu a odstránenie násilia páchaného na ženách a v rodinách* [National Strategy for Prevention and Elimination of Violence Exercised against Women and in Families], approved in 2004, still is not sufficient. The Network therefore places great hopes on the new *Akčný plán na prevenciu a elimináciu násilia na ženách* [Action Plan for the Prevention and Elimination of Violence against Women], mentioned above. In **Sweden,** the report SOU 2005:66, *Makt att forma samhället och sitt eget liv*, notes an increase in reported cases of sexual violence, including cases of rape[59], and highlights the persistence of violence against women, especially domestic violence, in this country. The 2005 annual

[54] Krāslavas bērnu sociālās rehabilitācijas centrs *Mūsmājas*, Talsu ev.lut. draudzes uzņēmums b/o *Talsu sieviešu un bērnu krīžu centrs*, Centrs pret vardarbību *Dardedze*, Allažu bērnu un ģimenes atbalsta centrs.

[55] In order to develop an integrated policy on protecting children against violence, the *National Programme for the Prevention of Sexual Violence Against Minors* was implemented from 2000 to 2004, while in 2004 the programme *Latvia Fit for Children 2004-2007* was elaborated. Apart from other issues, the programme includes protecting children against violence.

[56] Information provided by Dace Beināre, Director of *Skalbes* Crisis Centre, 25 November 2005.

[57] Cooperation Network of Latvia's Women Organisations. Shadow report for the joint initial, second and third periodic report on the *Convention of 18 December 1979 on the Elimination of Any Form of Women's Discrimination* in the Republic of Latvia, Riga: 2004, http://www.politika.lv/index.php?id=109499&lang=lv, visited on 4 November 2005.

[58] The study is available on the website http://www.ivo.sk/ftp_folder/produkt_4164.pdf (only in Slovak).

[59] SOU 2005:66, pp. 355-422. The statistics show an increase of approximately 16 per cent in cases dealing with violence against women. *Brottsförebyggande rådet halvårsstatistik*, www.bra.se

report of Amnesty International on Sweden disclosed a reality which gives rise to serious concern about the ability of local authorities to help survivors of domestic violence[60]. Most of the municipalities continue to lack strategic plans of action for addressing violence against women. Domestic violence against women with disabilities (*psykiska funktionsnedsättningar*) has been documented by the National Board of Health and Welfare (*socialstyrelsen*) [61].

Finally, the Network draws attention to the Amnesty International report entitled «*Con la violencia hacia las mujeres no se juega*» [Violence against Women is not a Game], which was published in December 2004. This report, which focuses on **Spain,** criticizes the fact that many computer games vindicate violence against women. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) imposes on the States Parties an obligation to take the necessary measures to eliminate all forms of discrimination. This necessitates a strict supervision of the legislation applicable in particular to the dissemination of such products, especially as regards the recommended age for each game.

Conditions of detention in general

Positive aspects

The Network finds encouraging signs in a number of evolutions during the period under scrutiny. **Belgium** on 12 January 2005 adopted the Act on the Principles of Administration of Penitentiary Establishments and the Legal Status of Prisoners[62]. This law sets out a set of principles that clarify or redefine the aspects of life in prison (material and community living conditions, outside contacts, religion and philosophy, work, education and leisure, health, social aid, judicial assistance and legal aid), more particularly the regime and disciplinary aspects. The bill introduces a right of complaint for prisoners, which allows conflicts to be settled through dialogue as a matter of priority; such complaints should only alternatively be settled by an appropriate authority. It also provides for the general organization of the prisons, the rules concerning the planning of detention, the principle of the separation of remand prisoners and convicted prisoners (to be assigned separate regimes). While welcoming the substantial progress that has been made in response to the repeated recommendations of the European Committee for the Prevention of Torture, the Network points out that several questions still remain unresolved, such as those concerning the exercise of established rights in case of strikes by warders, the financial resources to be allocated for the realization of the guaranteed rights, and the training to be given to prison officers.

In the **Czech Republic**, the amendment to the Civil Procedure Code limiting to six weeks the period during which, in order to obtain evidence, the court may place a person into a health care institution where his/her mental capability will be studied, took effect on 1 August 2005[63]. In **Ireland,** in the period under review, a protracted industrial relations dispute between the Prison Officers' Association and the Department of Justice, Equality & Law Reform on overtime pay and related matters was resolved. This, coupled with a commitment to invest significant additional resources for the purpose of upgrading facilities is to be welcomed. Moreover, the long overdue Prisons Bill was published during the period under review. In **Latvia,** sect. 63 of the 2005 Criminal Procedure Law clearly lays down the rights of detainees, including access to defence counsel, notification of custody, provision of written information about rights and duties and a copy of the detention protocol to the detainee. The Network regrets however, that the right of access to a doctor is not included in the list[64]. In **Portugal,** the June 2005 Resolution of the Council of Minister n.º 138/2005 created the "Penal Reform Mission Unity" ("*Unidade de Missão para a Reforma Penal"*) in order to evaluate the conditions, identify the problems and present recommendations related to the prison system. The Network expresses the hope

[60] Amnesty International Report 2005-Sweden, www.amnesty.org see also SOU 2005 :66, p. 397.
[61] *Socialstyrelsen*, Våld mot kvinnor med psykiska funtionshinder-Förekomst, bemötande och tillgång till stöd, Stockholm 2005, p. 33.
[62] *Moniteur belge,* 1 February 2005.
[63] Zákon č. 205/2005 Sb.
[64] *Kriminālprocesa likums* [*Criminal Procedure Law*], adopted 21 April 2005, in force since 1 October 2005, with amendments announced to 28 September 2005. Section 63.

that this process will accelerate the preparation of a framework law on the reform of the prison system.

Reasons for concern

In the view of the Network, and taking into account the importance of the norm contained in Article 3 of the European Convention on Human Rights, the EU Member States would not be complying with the values on which the Union is founded if they did not scrupulously seek to comply with the recommendations made by the Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment and Punishment (CPT) with regard to the situation of persons deprived of their liberty. The Network takes note in this regard of the report on its fourth periodic visit to **Austria** published by the CPT on 21 June 2005, which describes the regime under which foreign nationals are kept in one of the Viennese police detentions centres as "totally unacceptable". The Network also expresses its concern about the lack of concrete commitments in the follow-up response of the Government of the **Czech Republic** to the report of the European Committee for the Prevention of Torture, following its visit to the Czech Republic from 21 to 30 April 2002 (CPT/Inf (2004) 4), with regard to ill-treatment at police establishments. The response, published on 14 April 2005 (CPT/Inf (2005) 5), does not acknowledge the need to improve the basic safeguards against ill-treatment proposed by CPT for all persons deprived of their liberty: access to lawyer, access to doctor of own choice and notification of a third person. As regards institutions for mental patients, the CPT, among others, confirmed its view that 'net- and cage-beds are not an appropriate means of dealing with patients/residents in a state of agitation', and it recommended that 'cage-beds be immediately withdrawn from service and that net-beds cease to be used as a tool for managing such persons as soon as possible.' The Network observes with concern that the Czech Government has only partially followed this recommendation. The Network welcomes the progress which has been made in this area by the issuance by the Ministry of Health of the Methodical Instruction concerning the use of means of restraint in psychiatric institutions[65], which seeks to define net-beds and other means of restraint as having to be used only as an exceptional, last-resort measure, where the risk arising from the behaviour of a patient is too high and under the supervision of a medical doctor, and which improves the procedural guarantees of the patient. However, the Network regrets that the amendment to the Act on Social Security[66] which took effect on 1 October 2005[67] in effect legalizes the use of cage-beds, and that the safeguards against misuse still remain insufficient.

The Network also notes that, in the report adopted by Committee for the prevention of torture of the Council of Europe following its 2nd periodic visit to **Latvia** from 25 September to 4 October 2002, which was made public on 10 May 2005 ((CPT/Inf (2005) 8), the CPT noted that it received a considerable number of credible allegations of physical ill-treatment by the police throughout Latvia. The CPT also noted that the legal standards for provision of living space to prisoners in Latvia had recently been slightly increased to 2.5 m² per person for male adult prisoners and to 3.5 m² per person for female and juvenile prisoners; however, the new standards still do not offer a satisfactory amount of living space. The CPT recommended that the legal standards be raised as soon as possible, so as to guarantee at least 4 m² per prisoner in multiple-occupancy cells, and that official capacity and occupancy levels of cells in Latvian prisons be revised accordingly. The solution to the problem of overcrowding afflicting the Latvian prison system is to be found not in developing the prison estate, which is costly and may prove ineffective, but rather in reconsidering current law and practice in relation to remand detention as well as sentencing policies. For the same reasons, the Network encourages **Estonia** to answer to the serious concerns expressed by the report published by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on 27 April 2005[68], not only by the inauguration of a new prison facility in North Eastern Estonia, where Viru Prison should be opened in June 2007, but also by rethinking the reliance on prison sentences in the general criminal system of the country. The report concerning Estonia

[65] Cf. Bulletin of the Ministry of the Czech Republic No. 1/2005.
[66] Zákon č. 100/1988 Sb., o sociálním zabezpečení [Act No. 100/1988 Coll., on Social Security].
[67] Zákon č. 218/2005 Sb. [Act No. 218/2005 Coll., amending Act No. 100/1988 Coll., on Social Security].
[68] CPT/Inf(2005)6

moreover also highlighted issues of ill-treatments by police officers and the need to improve the safeguards against ill-treatment of persons deprived of their liberty, as well as the conditions of detention (especially the material conditions), the lack of activities for remand prisoners and the lack of healthcare services in prisons. The CPT report also addresses several alarming issues regarding conditions of detention in psychiatric establishments. Estonia is urged to act on the basis of the recommendations of the CPT in order to remedy these important shortcomings. **Sweden** should remove the unnecessary restrictions imposed on remand prisoners and take action to address inter-prisoner violence, as recommended in the Report of the CPT to the Swedish Government following the visit of the CPT to Sweden from 27 January to 5 February 2003 (CPT/Inf(2004)32). Finally, the CPT recommended that the**United Kingdom** should take all necessary measures to ensure that foreigners detained under the Anti-terrorism, Crime and Security Act (ATCSA) 2001 will be treated in a human and dignified manner. As recommended by the CPT, staff at Belmarsh Prison to be reminded that ill-treatment of any form, including threats, abusive or aggressive language and mockery, will not be tolerated and will be the subject of severe sanctions; the necessary steps to be taken to ensure that ATCSA detainees whose state of health so requires benefit, without further delay, from treatment appropriate to their specific needs, in or with the support of appropriate care facilities capable of offering the therapeutic environment necessary for such treatment and a proper doctor-patient relationship; the approach to managing persons deprived of their liberty under ATCSA to be reviewed, having due regard to the guidelines that it set out, and alternative approaches must be found if the prisobn system is unable to meet these needs; it should be expressly provided that persons certified under the ATCSA enjoy the right of access to notification of custody, the right of access to a lawyer and the right of access to a doctor as from the very outset of their deprivation of liberty, whatever their place of custody; it should be expressly provided that, where necessary, the assistance of a qualified interpreter must be organised to enable ATCSA detainees to benefit fully from the exercise of those three rights; steps to be taken to ensure that ATCSA detainees are informed in writing of all their rights in a language they understand; and proactive and constant efforts to be made to guarantee to persons detained under ATCSA humane and decent treatment preserving their physical and psychological integrity.

The Network also notes that, in the case of *Mathew*, the **Netherlands** was found in breach of Article 3 of the European Convention on Human Rights, following the detention of Mr Mathew from October 2001 until the end of April 2004 in a correctional institution on the Caribbean island of Aruba (Appl. No. 24919/03, judgment of 29 Sept. 2005). The Network welcomes the announcement by the Minister of Foreign Affairs that substantial investments will be made in the detention facility in which Mr Mathew had been kept, and that changes will be brought to the management of the institution (*Tweede Kamer* 2005-2006, *Aanhangsel* No. 285). The Network attaches particular importance to the action that will be taken by **Greece** in response to the interim resolution adopted by the Committee of Ministers of the Council of Europe in connection with the monitoring of the enforcement of the *Dougoz* and *Peers* judgments of the European Court of Human Rights. While welcoming the measures that have been adopted or are being taken by Greece in order to improve the conditions of detention in police facilities and in prisons as well as the professional training efforts being undertaken[69], the Committee considered that additional measures are necessary in this area in order to remedy the structural problems that have been highlighted by the aforementioned judgments, so as to prevent similar violations of Article 3 of the European Convention on Human Rights. The Committee encourages the Greek authorities rapidly to conclude the projects relating to the construction of new detention centres and prisons and invites the Greek government to provide statistics relating to the overcrowding and sanitary and health conditions in detention facilities. It also invites the competent Greek authorities to look into the question of ensuring the availability of effective domestic remedies with regard to conditions of detention.

Taking into consideration the relevant case-law of the European Court of Human Rights[70], the

[69] Interim Resolution ResDH(2005)21 concerning the issue of conditions of detention in Greece, raised in the cases of Dougoz against Greece (judgment of 6 March 2001, final on 6 June 2001) and Peers against Greece (judgment of 19 April 2001), adopted by the Committee of Ministers on 7 April 2005.
[70] See, lastly, Eur. Ct. HR (4th Section), *Fedotov v. Russia*, judgment of 25 October 2005 (Appl. No. 5140/02).

Network believes it also needs to identify a number of situations that create a risk of inhuman or degrading treatment in the penitentiary establishments of the Member States of the European Union. The situations that have been reported year after year call for budgetary investments on the part of those States along with a thoroughgoing reflection on the purely subsidiary function which deprivation of liberty should fulfil among the entire gamut of existing penalties. Deprivation of liberty should only be resorted to in exceptional cases before a person is convicted, for instance in order to prevent the risk of escape by persons accused of a criminal offence, to prevent an offence from being committed, or in the interest of the criminal investigation, though only insofar as those ends cannot be achieved by any other means. The Network draws the attention of Member States to the fact that, failing energetic action on this matter, in order to reduce prison overcrowding and the resulting consequences, judicial cooperation in criminal matters could itself be called into question, in particular from the moment that it would involve the extradition of a person to a country that is unable to detain that person in conditions that are in keeping with human dignity. The following situations in particular have caught the attention of the Network:

• In **Finland,** a special inquiry into deaths in police cells launched by the Deputy Parliamentary Ombudsman revealed serious deficiencies in the monitoring of remand prisoners with those in custody often left completely alone in their cells[71]. The deficiencies in the conditions of detention of prisons on remand have been highlighted already in 1998 by the CPT, which found that none of the detention facilities visited offered a suitable regime of activities for persons on remand, who spent almost all of their time locked in their cells, and that the provision of health care also remained inadequate[72]. Similarly, the UN Human Rights Committee had expressed concern at the situation of persons held in pre-trial detention at police stations and noted the lack of clarity as regards detainees' rights to a lawyer while in custody and the involvement and role of a doctor during that period[73]. These problems are now coupled with an increasing problem of overcrowding. As recognized subsequently by the Minister of Justice in a letter to the Finnish League for Human Rights, the proposal made in October 2005 that Finland might alleviate the problem of overcrowding by transferring prisoners of Estonian and Russian citizenship to prisons in Estonia and Russia would itself be highly questionable, considering the conditions of detention in those countries, as illustrated, in particular, by the concern expressed by the UN Committee against Torture about prison conditions in Russia, despite the assistance provided by Finland since 1995 to the Central and Eastern European countries, and in particular the Baltic states, to raise their prisons to European standards.

• In its report on **France** which he published on 15 February 2006, the Human Rights Commissioner of the Council of Europe said he was struck by "the problem of overcrowding and the fact that most of the establishments visited lack the necessary operating resources" (§69, p. 21). On 1 November 2005, there were 58,082 persons imprisoned in France, whereas the number of places officially available was 51,195, which brings the average occupancy rate in prisons to 113.5%. This tendency, instead of leading towards rehabilitation, "risks alienating the person concerned and causing him or her to rebel against the society that placed them there" (§74, p. 22). The Human Rights Commissioner does not mince his words and says he was "shocked by the living conditions I saw [at La Santé Prison in Paris] and [at Baumettes Prison in Marseilles]. These facilities seemed particularly lacking in resources. In my view, the inmates' living conditions are on the borderline of the acceptable, and on the borderline of human dignity" (§79, p. 23).

• The overcrowding of prisons is still a major reason for concern in **Hungary**, as illustrated by the findings of the CPT (CPT/Inf (2004) 18, point 32). During its visit to the Fejér County Remand Prison for instance, the Hungarian Helsinki Committee observed that in the smaller cells the overcrowding reached an unbearable level, for sometimes three or four detainees were placed in a cell of less than 7 square meters; subtracted the area occupied by the beds, lavatory, toilet, wardrobes,

[71] See press release by the Deputy Ombudsman, 22 December 2003, T 45/2003.
[72] CPT noted that several of its recommendations made in 1998 had not been implemented. See preliminary observations made by the delegation of the CPT, 21 October 2003, CPT/Inf (2003)38.
[73] UN Human Rights Committee concluding observations at its 2239th meeting (CCPR/C/SR.2239), held on 27 October 2004.

sometimes less than 2 sq. meters of free space were left to three or four remand prisoners to spend 23 hours a day[74]. In this context, the Network regrets that the *Draft of the Act on the Execution of Penalties and Measures* published at the end of March 2005 the Government, and which is to replace the Law-decree No. 11 of 1979 on the execution of penalties and measures, contains no new provisions regarding the free space to be provided to the detainees. Another concern specific to Hungary is the practice of segregating prisoners with HIV from other detainees, in violation of the recommendations expressed by the CPT since 1999 (CPT/Inf (1999) 2, para. 121-122; CPT/Inf (2004) 18, point 47). Article 18 of the 19/1995. (XII. 13.) BM rendelet a rendőrségi fogdák rendjéről [19/1995. (XII. 13.) Decree of the Minister of Interior on the regulation of police detention establishments], Article 39 of 6/1996. (VII. 12.) IM rendelet a szabadságvesztés és az előzetes letartóztatás végrehajtásának szabályairól [6/1996. (VII. 12.) Decree of the Minister of Justice on the execution of imprisonment and pre-trial detention] and Article 38 of 7/2000. (III. 29.) IM-BM együttes rendelet az elzárás, illetőleg a pénzbírságot helyettesítő elzárás végrehajtásának részletes szabályairól [7/2000. (III. 29.) Joint Decree of the Minister of Interior and the Minister of Justice on the detailed rules for detention and detention substituted for a fine] prescribes the segregation of HIV positive convicts from other convicts. Article 43 the 5/1998. (III. 6.) IM rendelet a fogvatartottak egészségügyi ellátásáról [Decree 5/1998. (III. 6.) of the Minister of Justice on the healthcare of the prisoners] orders that HIV positive convicts – respecting their special health protection and the protection of the community – shall be placed in a separate penal institute. In accordance with the recommendations of the CPT, these regulations should be abolished without further delay, whatever the outcome of the petition presented to the Constitutional Court by the Hungarian Civil Liberties Union (HCLU) [Társaság a Szabadságjogokért (TASZ)] on this issue.

• The Third Annual Report presented in **Ireland** by the Inspector of Prisons and Places of Detention recommends, in light of "gross overcrowding" and "appalling conditions", Cork Prison be given a different role within the prison system, so that it is required to hold fewer prisoners; and that Saint Patrick's Institution in Dublin, the main institution of young offenders in the State, be closed immediately.

• In **Italy,** the situation of overcrowded penal institutions has not improved in 2005 (56,532 convicted people in a prison system designed to hold 42,100), characterized by the lack of staff members, the lack of health assistance (almost 17,000 inmates are drug addicts, 10,000 suffer from mental illness, 10,000 suffer from infectious diseases, scabies, syphilis and tuberculosis) and for the high level of self-harming (during the year 91 inmates died, and 51 committed suicide). During 2004 the juvenile population increased: last year there were 965 entries of foreign minors, 60.5% of the total. 31% of inmates are foreigners (17,783). 95.3% are men and only about 2,551 women.

• In **Latvia,** conditions in the Central Prison Hospital, which is the only prison hospital in Latvia, are extremely bad and have been regularly criticised by domestic and international inspection bodies, including the Committee for the prevention of torture of the Council of Europe. The conditions at Daugavpils and Ventspils Police Headquarters, which were criticised by the CPT in immediate observations after their visit in 2002, have not improved and should be considered as dilapidated and inhuman. Overcrowding and lack of funding are also reasons for poor physical conditions in prisons. For example, under the report of the National Human Rights Office, prisoners are living in inhuman and critical conditions in Pārlielupe Prison, where the majority of HIV-positive prisoners are placed. In these circumstances, the Network hopes that the Latvian government will reconsider its plans, announced in the *Concept on Development of Prison Estate*, to proceed to the rehabilitation of Pārlielupe Prison, which has an urgent character, only in 2011.

• The Network also notes with respect to **Latvia** that, despite the entry into force on 9 December 2004 of amendments to the *Sentence Enforcement Code*[75], stipulating that correspondence of sentenced prisoners with UN bodies, the Parliamentary Human Rights Committee, prosecutors'

[74] http://www.helsinki.hu/docs/Szekesfehervar%20jelentes%202005%20junius.PDF
[75] Likums *Grozījumi Sodu izpildes kodeksā* [*Law Amendments to the Sentence Enforcement Code*], adopted 11 November 2004, in force since 9 December 2004.

offices, courts, sworn advocates, the National Human Rights Office, and, in the case of foreign prisoners, the relevant diplomatic or consular mission, is not to be subject to censorship, and that, with the exception of sworn advocates, postal expenses are to be borne by the prison authorities, some prisons appear not to act in conformity with this provision. Correspondence from and to these institutions have been censored, and the prison authorities have at times attached their own explanations on matters mentioned in the submissions of convicts[76]. Clear instructions should be given to put an end to these illegal practices.

• As regards **Luxembourg**, according to the report presented to the Council by the Minister of Justice, Luc Frieden, concerning the situation of prisons in Luxembourg, prison overcrowding is increasing sharply, with occupancy figures rising from 384 to 613 inmates at the Penitentiary Centre of Luxembourg between 1 September 2000 and 11 August 2005. The construction of the retention centre for asylum-seekers and the Dreiborn Centre for Minors should therefore be considered as an emergency measure since the completion of those constructions could help to reduce the prison population. Moreover, despite the consensus there seems to be in Luxembourg on the need to find a solution for the fate of minors who are likely to be placed in a foster family or in care by the guardianship court under the Act on the protection of young people and the tabling in the House of Representatives on 9 June 2004 of the bill no. 5351 amending the amended Act of 10 August 1992 on the protection of young people, no action has yet been taken in connection with that bill, which still remains to be adopted by parliament.

• In **Poland,** according to the Central Management of the Prison Service, the number of prisoners in 2005 amounts to 83,000, for a prison capacity of 70,000. Around 38,000 individuals await the execution of their sentence. There are 2.6 square meters of space for each prisoner and this is systematically decreasing. With this context in mind, the Network shares the concerns expressed by the Director of the Central Management of the Prison Service, that the reinforcement of penal policies, which has been announced by the new Government, may lead to violating the prisoners' rights defined in the Penal Executive Code[77].

• In **Sweden**, it has been reported by Amnesty International that overcrowding in the Kronobergs remand and detention centre has led to remand detainees being held in cells not intended to house them, such as isolation cells ordinarily used for intoxicated people and equipped only with plastic mattresses and a drain in the floor ; moreover, although detainees should be kept in such cells for only brief periods, they have sometimes spent up to 10 days in them. Amnesty International also has mentioned situations where several prisoners with mental disabilities have been held in ordinary prisons in contravention to international standards.

External supervision of the places of detention and of misconduct on law enforcement officers

The inspection of police detention facilities by an independent authority can make an important contribution towards preventing ill-treatment of persons held by the police and, more generally, help to ensure satisfactory conditions of detention. As emphasized by the CPT, in order to be fully effective, such visits should be both frequent and unannounced, and the authority concerned should be empowered to interview detained persons in private. Further, it should examine all issues related to the treatment of persons in custody: the recording of detention; information provided to detainees on their rights and the actual exercise of those rights; compliance with rules governing the questioning of criminal suspects; and material conditions of detention. All the EU Member States are encouraged to set up such an institution, and to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002) which provides for the creation of national institutions for the prevention of torture or cruel, inhuman or degrading treatment or punishment. The Network regrets in this regard that in **Germany,** the Optional Protocol to the UN

[76] Valsts Cilvēktiesību birojs. *Aktuālie cilvēktiesību jautājumi Latvijā 2005. gada 3. ceturksnī*. [National Human Rights Office. *Main Issues on Human Rights in the 3rd quarter of 2005*], available on the website of the NHRO http://www.vcb.lv/index.php?open=cetzinojumi&this=181105.190

[77] Central Management of the Prison Service, http://www.czsw.gov.pl Daily *Rzeczpospolita* of 14 October 2005 p. C2

Convention against Torture still may not be ratified, because of the apparent unwillingness of three Länder to allow for such ratification.

The Network welcomes in that respect the fact that in the preparation of ratification of the Optional Protocol to the Convention against Torture the **Czech Republic** passed an Act amending Law No. 349/1999 Coll. on the Public Protector of Rights78, which came into effect on 1 January 2006[79]. Under this amendment the Czech Ombudsman should be able to carry out random inspections of all places where freedom of persons is restricted by public order, his powers corresponding to the requirements of the national preventive mechanism as stipulated in the Optional Protocol. The Network notes in particular that, in order to carry out these tasks, the Ombudsman's Office will have additional twenty employees. Progress has been made in this area also by **Greece**, where the change in the attitude adopted by the Minister of Justice towards prison visits by the Ombudsman has made it possible for the Ombudsman to visit a penitentiary establishment in order to investigate the conditions of detention, as well as retention centres for foreign nationals and detention centres, including those for minors. In **Italy**, since 2004, the Town Councils of the cities of Rome, Bologna, Florence, Milan and Turin have established a new authority (Garante per i diritti dei detenuti) which aims at guaranteeing the rights of inmates. In **Latvia**, the Law on the National Human Rights Office (NHRO) was amended in 2005 by adding a provision stipulating that NHRO officials may visit closed institutions without special permission, to inspect all premises and to meet detainees without the presence of officials from the place of detention[80]. Additionally, the draft Law on Ombudsman's Bureau which is in process of adoption in the Parliament and is planned to replace the Law on the NHRO, stipulates that the ombudsman as well as officials from the Ombudsman's Bureau may visit closed institutions at any time without special permission, freely move within the territory of the institution, visit all premises and meet detainees without the presence of other people[81]. NGOs working on issues related to closed institutions have been also allowed to visit places of detention (short-term police detention places, prisons, the Olaine camp for illegal migrants, mental hospitals, and care homes) after prior notification without objections from authorities. On the other hand, the Network is concerned that the new Law on Order of Detention requires representatives of State and international human rights institutions to give advance warning of visits to the head of the respective police department[82]. This provision contradicts the obligations that the State has undertaken in regard to visits of the CPT and could in practice nullify the effectiveness of the two other legislations mentioned above. Finally, the Network welcomes the proposals made in **Ireland**, in July 2005, by the Inspector of Prisons and Places of Detention published his Third Annual Report, which relate to the further improvement of monitoring mechanisms, in particular his proposal that an independent human right lawyer be appointed as Prisoners' Ombudsman, that the State's prison structure and budget be examined by an independent body to ensure it was providing efficiency, transparency and value for money; that the office of Prisons Inspector be placed on a statutory footing ; and that, in future, annual reports be submitted to the Oireachtas (Parliament) and not to the Minister for Justice, Equality & Law Reform. The Network is confident that these recommendations will be carefully considered for adoption by the Irish government. In the **Netherlands**, on 1 January 2005, the Inspectie voor Sanctietoepassing [Inspection for implementation of sanctions] was formally established. This inspection service is an independent supervisory body which will monitor the proper implementation of liberty depriving measures in facilities across the Netherlands.

The Network notes that, in **Sweden,** the Government has stated upon the presentation of the Bill on the ratification of the Optional Protocol to the UN Convention against Torture and Other Cruel,

[78] Zákon č. 349/1999 Sb. o Veřejném ochránci práv. [Act No. 349/1999 Coll., on Public Protector of Rights]

[79] Zákon č. 381/2005 Sb., kterým se mění zákon č. 349/1999 Sb., o Veřejném ochránci práv, ve znění pozdějších předpisů, a některé další zákony [Act No. 381/2005 Coll., amending Act No. 349/1999 Coll., on Public Protector of Rights, as amended by later acts]

[80] *Likums Grozījumi Likumā par Valsts Cilvēktiesību biroju* [Law *Amendments to the Law on the National Human Rights Office*], adopted 15 December 2005.

[81] *Likumprojekts Tiesībsarga biroja likums* [Draft *Law on Ombudsman Bureau*], Reg.No. 858, adopted at the second reading on 15 December 2005, Sections 12(3), 20.

[82] *Aizturēto personu turēšanas kārtības likums* [*Law on Order of Detention*], adopted 13 October 2005, in force since 21 October 2005. Section 5(6).

Inhuman or Degrading Treatment or Punishment (prop. 2004/05:107) that there was no need for modification of the Swedish legislation in order to set up a new independent national body entrusted with the task to perform regular visits to places where people are deprived of their liberty, since the Parliamentary Ombudsman (JO) could undertake such missions. The Network recalls, however, that torture is not a crime defined in the Swedish Penal Code, but is envisaged undert the broader crime of assault (*Brottsbalken* (BrB)). Apart from the fact that this may complicate the investigations of alleged abuses, the absence of an explicit definition of torture demonstrates moreover the incompatibility of the existing Swedish legislation with the requirements of Article 1 of the UN Convention against Torture. A similar problem exists in **Denmark**, where there is at the moment no definition or explicit prohibition of torture in the Danish Criminal Code or Military Criminal Code: although the provisions on violence and threats are interpreted to also cover acts of torture, the present state of law results in a situation where the limitation of criminal responsibility for violence also applies to torture and is limited to 10 years. In **Finland**, although the prohibition of torture and other degrading treatment violating human dignity has been included in section 7 of the Finnish Constitution, there is currently no definition of torture in the Penal Code ; the Network welcomes the intention expressed by Finland before the Committee against Torture that it considers to include in the Penal Code a definition of torture in accordance with article 1 of the Convention against Torture (CAT/C/CO/34/FIN, 34th session held on 9 and 10 May 2005). In contrast, in the **Slovak Republic,** the new Criminal Code in Section 420 now has specified the specific criminal offence of torture and other inhuman or cruel treatment. The former Criminal Code had defined the elements of this crime but the new Criminal Code has brought two changes in this regard. One change concerns the inclusion of ill-treatment into the elements of this crime, and the other change is that the new regulation has increased the durations of sentences for offenders. The Network welcomes these changes as a positive development.

As recalled by the Committee of Ministers of the Council of Europe in its interim resolution relating to the execution by **Greece** of the *Dougoz* and *Peers* judgements of the European Court of Human Rights, effective remedies must be available to persons deprived of their liberty, in particular in order to complain about their conditions of detention. This may require amending the traditional rules relating to *locus standi* for the litigation of detainees' rights. The Member States could seek inspiration from the right which has recently been recognized in **Ireland** to the Irish Penal Reform Trust (IPRT), a non-governmental organisation that campaigns for the rights of people in prison and reform of Irish penal policy, to sue the State on behalf of prisoners with psychiatric problems. Mr Justice Paul Gilligan in the High Court held that the significant number of Irish prisoner who suffered from mental health problems would, in most cases, not be in a position to vindicate their own rights (either through ignorance of such rights or fear of retribution for challenging the authorities), their claims would be better advanced by the IPRT. Mr Justice Gilligan held that while mentally-ill prisoners could, in theory, assert their own rights, the IPRT, because it had the expertise and finance, could more effectively pursue claims for such prisoners against systematic failings in the prison system.

Finally, the Network is concerned that the **Czech Republic** and **Latvia** still lack an independent authority for investigating police misconduct. It welcomes on the other hand that, in the **United Kingdom**, the jurisdiction of the Independent Police Complaints Commission has been extended to cases where persons have died or been seriously injured following some form of direct or indirect contact with the police where there is reason to believe that this contact may have caused or contributed to the death or serious injury. It also welcomes the proposal made in **Cyprus** for the adoption of the *Police (Independent Committee of Investigating Allegations and Complaints) Law* (*Ο περί Αστυνομίας (Ανεξάρτητη Αρχή Διερεύνησης Ισχυρισμών και Παραπόνων) Νόμος του 2005*), according to which a Committee is to be established which will review the acts of the Police, and especially complaints about ill-treatment by the Police and any other human rights violations. With regards **Ireland**, the Network welcomes the entry into force of the Garda Siochana Act 2005. While acknowledging the important elements contained in this new legislation, in particular the requirement for members of the force to account for their actions while on duty and increased accountability of the Garda Commissioner to the Minister for Justice, Equality & Law Reform, the Network regrets however that the decision was made to appoint a three-person Garda Ombudsman Commission, instead of the office of Garda Ombudsman similar to that which pertains in Northern Ireland.

Detention of persons with mental health problems

The Network notes the continuing problems which result, in a number of Member States, from the lack of adequate institutions to accommodate the needs of convicts who have been found to be mentally ill. In **Austria**, the expert commission mandated by the Minister of Justice delivered its report on the "Improvements in the Care of Mentally Ill Inmates in Penal and Mental Institutions"[83] (*Verbesserung der Betreuung psychisch kranker Insassen im Straf- und Maßnahmenvollzug*), highlighting that the percentage of convicts with noticeable mental problems is steadily increasing, a phenomenon which might be caused by the tendency not to detain patients with mental problems in psychiatric institutions, but to treat them on an ambulant basis, thereby risking that they commit criminal offences while at liberty. As a result, more and more of the general budget for the penal system has to be spent on medical treatment in prisons, although again according to the report in none of the three biggest penal institutions (Stein, Graz-Karlau and Garsten) is the number of hours a psychiatrist is present sufficient, and in six court prisons (*Justizanstalten*) the psychiatric service is not available outside of office hours, which leads to high costs due to the necessary inmate transfer to psychiatric institutions. The conditions concerning the detention of inmates with mental disorders who are still criminally culpable, the so-called "Sec 21 para 2 Criminal Code Cases" particularly give reason for concern. The report underlined that the lack of psychological treatment violates the entitlement of inmates to medical treatment and causes the amount of time people have to be kept in custody to be prolonged. Austria should act on the basis of the conclusions of the report, and in particular to meet the growing needs for the treatment of convicts with mental health problems.

In its Conclusions relating to the year 2004 (p. 22), the Network has noted with concern that in the **Netherlands**, 'due to a structural lack of capacity in custodial clinics, TBS patients (subject to a non-punitive measure comprising confinement in a custodial clinic) and 'Article 37 patients' (psychiatric patients who have committed criminal offences but who are in a state of diminished responsibility) have to stay in regular prisons and remand centres because of a lack of capacity elsewhere'. The cases of *Morsink* and *Brand v. the Netherlands,* both decided in 2004[84], again illustrate the seriousness of this problem : although the applicants had been convicted of serious offences, and had been given prison sentences, the courts found that their mental faculties were so poorly developed that they could only be held responsible for their offences to a limited degree, and the sentence was combined therefore with a *TBS order*. Due to a structural lack of capacity in custodial clinics, however, the applicants had to stay in a regular prison after they had served their prison sentence, leading the European Court of Human Rights to find a violation of Article 5 ECHR on account of these delays. Noting that, according to official estimations, some 2500 'TBS places' will be needed by 2010, the Network welcomes the initiatives which have been taken to increase the capacity of the custodial clinics. It also looks forward to the conclusions which the the *Wetenschappelijk Onderzoeks- en Documentatiecentrum (WODC)* [Scientific Research and Documentation Centre of the Dutch Ministry of Justice] will arrive at, based in particular on a comparison of policies similar to TBS abroad.

Having examined the report on the situation of fundamental rights in **Ireland**, the Network finds worrying the figures issued in January 2005 by the Health Research Board, which showed that psychiatric patients in certain areas were four times more likely to receive electro-convulsive therapy (ECT) in some health board areas than in others. As also noted by the Chairman of the Mental Health Commission, such figures cannot be reconciled with the requirement that strict procedures are to be followed before such treatment can be decided. These findings therefore require that the procedures and how they are implemented be seriously examined, in order to minimize the risk or arbitrariness in the procedure. Also in Ireland, serious deficiencies in the services provided for people with mental

[83] See Report on the situation of Fundamental Rights in Austria in 2004, p.25.
[84] Eur. Ct. H.R., *Morsink v Netherlands*, judgment of 11 May 2004 (Appl. 48865/99) ; Eur. Ct. H.R., *Brand v Netherlands*, judgment of 11 May 2004 (Appl. 49902/99).

health problems have been reported to exist by the Inspector of Mental Health Services in her first comprehensive Annual Report[85]. The Network is particularly impressed by the paragraphs of the Report which highlight unsatisfactory sanitary conditions in a number of mental health institutions. The Inspector's visit to the Central Mental Hospital revealed substandard levels of hygiene and a shortage of toilets. The Report also raised concerns about the incidence of involuntary admission throughout the State. In particular, the Report raised concerns about the use of 'persons of unsound mind' orders (PUM orders), pursuant to which an individual can be detained indefinitely in a psychiatric hospital. The report highlighted the fact that, in East Galway, 50 such orders had been issued in the last year. Moreover, this report is not isolated. In October 2005, the Irish Human Rights Commission (IHRC), raised concerns about the government's failure to implement Part 2 of the Mental Health Act, 2001, which provides for the establishment of Mental Health Tribunals to review involuntary admissions to mental health institutions.

Finally, **Slovenia** should urgently adopt a regulatory framework defining in a comprehensive way, in accordance with international and European standards, the conditions under which persons with mental health problems may be deprived of their liberty, and the rights of such persons when they are effectively detained in order to treat their conditions. Noting that the Constitutional Court[86] has already found Articles 70 to 81 of the Non-litigious Civil Procedure Act[87] contrary to the Constitution (Ustava Republike Slovenije, Constitution of the Republic of Slovenia, *Official Gazette* 1991, nr. 33, 1997, nr. 42, 2000, nr. 66, 2003, nr. 24, 2004, nr. 69) because of the lack of guarantees accompanying the compulsory detention in closed wards of psychiatric hospitals, the Network urges the Slovenian government to take an initiative in this regard.

[85] Mental Health Commission, *Annual Report 2004, Including the Report of the Inspector of Mental Health Services* (July, 2005).
[86] CC (Constitutional Court), nr.U-I-60/03, 4 December 2003, *Official Gazette* 2003, nr. 131
[87] E.g. Zakon o nepravdnem postopku, Non-litigious Civil Procedure Act, *Official Gazette* 1986, nr. 30, 2002, nr. 87

Centres for the detention of foreigners

The Network welcomes the adoption by the Committee of Ministers of the Council of Europe on 4 May 2005, at the 925th Meeting of the Ministers' Deputies, of twenty Guidelines on forced return. Guideline 10 of the Recommendation relates specifically to conditions of detention pending removal. This Guideline states that persons detained pending removal should normally be accommodated within the shortest possible time in facilities specifically designated for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably qualified personnel (para. 1). The design and layout of the premises should avoid creating the impression of a carceral environment (para. 2). Recommendations are made concerning the staff in such facilities and their training (para. 3). The persons detained pending their removal from the territory should not normally be held together with ordinary prisoners, whether convicted or on remand (para. 4). Access of these persons to lawyers, doctors, non-governmental organisations, members of their families, and the UNHCR, should be ensured, and that they should be able to communicate with the outside world, in accordance with the relevant national regulations. The guidelines also emphasize that the functioning of these facilities should be regularly monitored, including by recognised independent monitors (para. 5). According to the guidelines, the detainees shall have the right to file complaints for alleged instances of ill-treatment or for failure to protect them from violence by other detainees, and both the complainants and witnesses shall be protected against any ill-treatment or intimidation arising as a result of their complaint or of the evidence given to support it (para. 6). Finally, the detainees should be provided with all the required information concerning their rights and obligations as well as the procedure applicable to them (para. 7). This guideline follows upon the 7th General Report of the Eurpean Committee for the Prevention of Torture, in which the CPT expressed the view that "in those cases where it is deemed necessary to deprive persons of their liberty for an extended period under aliens legislation, they should be accommodated in centres specifically designed for that purpose, offering material conditions and a regime appropriate to their legal situation and staffed by suitably-qualified personnel" (7th General Report (CPT/Inf(97)10), para. 29).

These are the parameters which the Network has taken into account in examining the information contained in the reports on the situation of fundamental rights in the Member States with regards the conditions of detention of foreigners facing removal from their national territory. Moreover, those principles ensue from the requirements under international law on human rights itself. Thus in its concluding observations made with regard to **Greece** during the period under scrutiny, the Human Rights Committee recalls the obligation incumbent on the States Parties to the International Covenant on Civil and Political Rights to ensure that illegal immigrants are detained in decent living and hygiene conditions, that they are informed of their rights, including the right to appeal against their detention and to file a complaint, and that they are given effective means to communicate with their families and with their lawyer[88.]

The Network welcomes the adoption in the **Czech Republic** of the Amendment to the Foreigners Act[89] which, since its entry into force on 25 November 2005, has significantly improved the legal framework regulating the conditions of detention in closed centres for foreigners. The Network notes in particular that the presence of police officers in such facilities will henceforth be reduced to a minimum, as all staff in principle will be civilians. It also improves the quality of the information delivered to the foreigners on their rights and obligations, which they shall be provided in their native language or in a language they are able to understand. Detainees are also guaranteed a minimum of one hour of outdoor exercise per day, as recommended by the CPT; during their stay in the facility, foreigners will use their civilian clothes; their dietary needs and religious requirements will be taken into account in the serving of meals. Timid progress has also been done in **Lithuania** on this chapter,

[88] Concluding Observations of the Human Rights Committee: Greece, 25/04/2005, CCPR/CO/83/GRC.

[89] Zákon č. 428/2005 Sb., kterým se mění zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů, ve znění pozdějších předpisů, a některé další zákony [Act No. 428/2005 Coll., amending Act No. 326/1999 Coll.], amending Zákon č. 326/1999 Sb., o pobytu cizinců na území České republiky a o změně některých zákonů [Act No 326/1999 Coll., on the residence of foreigners on the territory of the Czech Republic and on an amendment to certain laws].

since the 28 October 2005 Minister of Health Security Order on Hygiene Provisions and Rules in the Foreigners Registration Center[90] established detailed hygiene requirements for the premises, also providing for the distribution of hygiene items to foreigners and improving the nutrition and the health assistance systems in the Center. In **Luxembourg,** the decision which the government took in March 2005 to build a retention centre in Findel with a capacity of 150 persons for asylum-seekers whose application has been rejected and are awaiting removal is an important step forward, bearing in mind the unacceptability in relation to applicable European standards of the practice of detaining unsuccessful asylum-seekers together with common law criminals. The Network expresses the hope that the detention regime in the retention centre will be defined with the requisite clarity and that, when the rights of persons being detained are defined, account will be taken of the aforementioned Recommendation of the Committee of Ministers of the Council of Europe.

However, as illustrated by the events reported above under Article 2 of the Charter, or by the immediate closure of the Temporary Holding Centre for Foreigners at Agrigento, following an immediate observation made by the delegation of the Council of Europe's Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) at the end of its visit to **Italy** from 21 November to 3 December 2004, serious problems remain in the conditions of detentions in centres for the detention of foreigners awaiting to be removed from the national territory, or whose claim to asylum is still being examined. The Network has particular concerns about the following situations :

• In **Poland**, the Halina Nieć Human Rights Association has highlighted during the period under scrutiny the serious problems of foreigners placed in detention, with respect in particular to the access to information (these charges being aimed more specifically at detention facilities run by the Police), to the lack of access to legal assistance and interpreters, to the failure of the authorities to provide foreigners with such items as clothing suited to the time of year or the inability to organise their free time in any way and to provide them with access to newspapers, books, sports equipment and facilities (The Halina Nieć Human Rights Association, Monitoring of the Polish Deportation Arrests and the Detention Centre, Final Report, No. 6/2005, Krakow 2005). Other aspects of the conditions of detention in these centers which require immediate attention concern the access to medical services, assistance for persons requiring special treatment (psychological and post-traumatic) and a dietary regime more adequately suited to the foreigners' cultural habits and religious beliefs. At the same time, the Network acknowledges that in certain areas progress had been made by the Polish authorities, and that overall there has been an improvement in the living conditions of foreigners detained in closed centres, especially at deportation facilities run by the Border Guard.

• As regards **Latvia,** the Network recalls the recommendation of the Committee for the prevention of torture, which emphasized the need to provide a better range of activities for foreign nationals held at the *Olaine* Detention Centre (CPT/Inf (2004)5). The longer the period for which persons are detained, the more developed should be the activities offered to them. Further, specific measures should be taken to ensure that children and juveniles are offered activities suitable to their age. Although some detained aliens spend a long period in the *Olaine* camp, their possibility to carry any activities is seriously limited. The only place where detained aliens can spend time outside the premises irrespective of the season is a small asphalt backyard.

• In **Austria**, despite the firm reservations of both the Human Rights Advisory Board (HRAB)[91] and of medical doctors who objected this would be in violation of medical ethics[92], the Aliens Police Act which entered into force in January 2006, will not prohibit the forced feeding of detainees who go on hunger strike. The Network is aware that it has been publicly announced that forced feeding would

90 2005 10 28 LR sveikatos apsaugos ministro įsakymas Nr. V-836 "Užsieniečių registracijos centras. Higienos normos ir taisyklės" [28 October 2005 Minister of Health Security Order No. V-836 on Hygiene Provisions and Rules in the Foreigners Registration Center] // Valstybės žinios, 2005, Nr. 135-4863

91 *Stellungnahme des Menschenrechtsbeirates zum Begutachtungsentwurf des BMI zum Asyl- und Fremdenpolizeigesetz 2005*, available at www.menschenrechtsbeirat.at (30.10.05).

92 „Ärzte gegen Zwangsernährung" of 28.04.2005 available at http://science.orf.at (23.11.2005).

not take place in the future. However, under the existing regulations, the police will be authorized to transfer the detainees going on hunger strike to the medical department of a penal institution, and section 69 of the Enforcement of Sentences Act (Strafvollzugsgesetz - StVG) allows for detained persons to be force-fed. A clear undertaking from the authorities not to resort to forced feeding would be welcome and put an end to a situation which, in the absence of legal certainty, does not guarantee against the risk of abuse. More generally, the Network regrets that little progress has been made in Austria to improve the conditions of detention in the police detention centres, whose overcrowding and lack of adequate equipment can only contribute to create a tense climate and to worsen the psychological situation of detainees. The shortage of staff and its inadequate training, which stand in contrast to guideline 10 of the Guidelines on forced return adopted on 4 May 2005 by the Council of Europe Committee of Ministers, are particularly worrisome.

• With respect to **Cyprus**, the Network notes that, in his *Report on the Conditions of Detention of Foreigners in Central Prisons and Police Stations*[93], the Ombudsman has severely criticized the conditions of detention of foreigners awaiting expulsion in the police stations in Larnaka and especially in Limassol, while in contrast, the conditions in Nicosia are much better. The conditions of detention in the Police Stations in Larnaka and Limassol should thus be improved with regards to the condition of the detention of foreigners waiting for their deportation so that at least they reach the Nicosia standard. It is also imperative that detainees are provided with the possibility to file a complaint, as advocated by the National Organisation for the Protection of Human Rights and in accordance with Guideline 10 of the Guidelines on forced return adopted on 4 May 2005 by the Council of Europe Committee of Ministers (CM(2005)40 final and Addendum final and CM/Del/Dec(2005)924/10.1).

• The Human Rights Committee has expressed serious concerns about the conditions of detention of foreigners in **Greece**[94]. The Greek authorities are urged to act on the basis of these Concluding Observations, and in particular, to ensure that all detainees in these centers may effectively communicate with their lawyers and families, in accordance with guideline 10 of the Guidelines on forced return adopted on 4 May 2005 by the Council of Europe Committee of Ministers.

• In **Ireland**, a report published in November 2005[95] indicated that almost 3,000 people were held in ordinary prisons for immigration-related matters between 2003 and 2004, and that two-thirds of that number had spent more than 51 days in custody[96]. This is also a problem in the **United Kingdom**, prompting Mr Alvaro Gil-Robles, Commissioner for Human Rights, in the report on his visit to the United Kingdom, 4th – 12th November 2004**,** (CommDH(2005)6), to recommend that the United Kingdom take all possible measures to ensure that foreigners detained under Immigration Act powers are not held in ordinary prisons.

• In **Latvia**, the Network regrets the insufficiencies of the legal framework defining the detention regime. First, the regime imposed on the foreigners detained in the *Olaine* camp is governed by the order issued by the State Border Guard, and this results in a lack of clarity as to the rights they are recognized and the conditions in which those rights may be exercised. Second, the restrictions placed on *Olaine* detainees, including restrictions imposed on their contacts with family members, are disproportionate, and approximate to those for prison detainees.

• In **Lithuania,** neither social nor psychological staff is employed in the Foreigners Registration Center. The distribution of food, which is centralised in the Foreigners Registration Center, does not always secure religious or cultural dietary requirements. The medical unit, located in the Foreigners Registration Center, provides only the most basic health care services, while access to the hospitals

[93] *Έκθεση Επιτρόπου Διοικήσεως αναφορικά με τις Συνθήκες Κράτησης Αλλοδαπών στις Κεντρικές Φυλακές και στα Αστυνομικά Κρατητήρια,* published on 2 February 2005.
[94] Concluding Observations of the Human Rights Committee: Greece, 25/04/2005, CCPR/CO/83/GRC.
[95] Mark Kelly, *Immigration-Related Detention in Ireland: A Research Report for the Irish Refugee Council, Irish Penal Reform Trust and Immigrant Council of Ireland* (November, 2005).
[96] *Ibid* at p.6.

and services of specialists is available only in emergency cases. Neither psychological, nor mental health services are available in the Center. As a result, the Network finds that the basic rights of the foreigners detained in this facility, in particular their right to food culturally and religiously acceptable, their right to health care, and the right to education of children, are not respected.

• The Network has also taken cognizance of the *Report of the Commissioner for Human Rights on his visit to Spain (10-19 March 2005)* (CommDH(2005)8). This report draws attention to the inadequate physical conditions that prevail in certain retention centres for foreigners. The report cites in particular the Centres of Moratalaz (Madrid) and La Verneda (Barcelona), which are urgently in need of substantial improvements, in view of the overcrowding of those centres, the inadequacy of the cells, the small size of common areas and the lack of facilities for any type of exercise. The report also reveals that, pending the opening of a detention centre in Lanzarote (Canary Islands), illegal immigrants are transported to the airport hangar, which has been fitted out as a removal hall.

Guideline 10, para. 4, of the Twenty Guidelines on Forced Return adopted by the Committee of Ministers of the Council of Europe (CM(2005)40 final and Addendum final and CM/Del/Dec(2005)924/10.1) states that, where third-country nationals are detained in specialized centres pending their removal, the principle of the unity of the family should be respected and families should therefore be accommodated accordingly. The Network has already expressed the view that children should only be detained in exceptional circumstances in centres set up for adults facing deportation, where this is required by the need to preserve the unity of the family (Conclusions 2005, pp. 23-24). Moreover, this situation – where a child is detained with his parent(s) – constitutes the only situation where minors may be detained with adults. Nevertheless, where the deprivation of liberty of children in such circumstances is unavoidable, the facilities should be equipped in order to meet the educational and recreational needs of children. The Network cannot but be impressed by the report issued by the *Inspectie voor Sanctietoepassing* [the new inspection service for implementation of sanctions; see below] concerning the detention of juvenile asylum seekers together with their parents in the **Netherlands** (*Ouders met minderjarigen in vreemdelingenbewaring*, August 2005), which highlights that the focus in these detention regimes lies on order and security, which can be detrimental on the mental health of juveniles, especially on those who are forced to stay in the facility for a longer period of time, and emphasizes the need to equip these facilities in order to accommodate the needs of minors. The Network notes that the Government responded by announcing that it will investigate the viability of the inspection's suggestions (*Kamerstukken II,* 2005-2006, 29344, nr. 48).

In the view of the Network, the fact that in almost all the EU Member States very serious concerns continue to be raised, on a regular basis, about the conditions of detention in centers for the detention of foreigners awaiting to be removed from the national territory, justifies this matter being addressed at the level of the Union. The Network therefore welcomes the fact that the Commission has proposed the adoption by the European Parliament and the Council of a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005) 391 final, of 1.9.2005), Article 15 of which defines certain minimum safeguards relating to the conditions of the temporary custody of third-country nationals who have been addressed a removal order. However, the Network notes that Article 15 para. 3, while it states that 'Particular attention shall be paid to the situation of vulnerable persons. Member States shall ensure that minors are not kept in temporary custody in common prison accommodation', does not impose an obligation on the Member States to ensure that the educational and recreational needs of children are satisfied and that the facilities for the detention of third-country nationals facing removal are adequately equipped to accommodate those needs, and in particular to respect the right of the child to education. Moreover, the proposal of the Commission is silent about the right of the detainees put in such facilities to file complaints against any ill-treatment they may have been subjected to, without having to fear reprisals. The Network expresses the hope that these lacunae in the current text will be remedied in the course of the legislative procedure.

<u>Protection of the child against ill-treatments</u>

The Network notes that, during the period under scrutiny, both the Human Rights Committee[97] and the European Committee on Social Rights (in its decisions on the merits on the collective complaints lodged by the World Organisation against Torture (OMCT) against **Greece** (collective complaint n°17/2003), **Belgium** (collective complaint n°21/2003), **Ireland** (collective complaint n°18/2003), **Italy** (collective complaint n°19/2003), and **Portugal** (collective complaint n°20/2003)) have emphasized the obligation under Article 7 of the International Covenant on Civil and Political Rights and under Article 17 of the Revised European Social Charter to prohibit, by imposing effective, dissuasive and proportionate sanctions, any forms of corporal punishment of children, whether this occurs within the family or whether it is inflicted in educational institutions. Article 17 of the Revised European Social Charter requires that 'the prohibition of all forms of violence [against children] must have a legislative basis. The prohibition must cover all forms of violence regardless of where it occurs or of the identity of the alleged perpetrator. Furthermore the sanctions available must be adequate, dissuasive and proportionate' (decision on the merits of collective complaint n°18/2003, para. 64). Such an obligation is also imposed under Article 3 of the European Convention on Human Rights, and under Article 19 and 37 of the European Convention on Human Rights. The European Court of Human Rights has noted that : 'Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity [constituting inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals]'[98].

The Network takes note of the information supplied to the Committee of Ministers of the Council of Europe by the Greek government on the violations reported by the European Committee of Social Rights, in connection in particular with the preparation of a bill prohibiting all forms of corporal punishment in the family, and the prohibition by law of corporal punishment of pupils in secondary school, as well as the distribution to all institutions and structures for child care of a circular by the Ministry of Health and Social Solidarity prohibiting all forms of corporal punishment of children at the said institutions (Resolution ResChS(2005)12, adopted by the Committee of Ministers on 8 June 2005). It also takes note of the Irish Government's intention, of which the Committee of Ministers of the Council of Europe has been informed, to keep the question of a complete legislative ban on corporal punishment under review (Resolution ResChS(2005)9, adopted by the Committee of Ministers on 8 June 2005).

The Network points out that an identical problem exists in **Spain.** As the Committee of Social Rights observes in its Conclusions with regard to Article 17 of the European Social Charter (*Conclusions XVII-2 (Spain)* 2005), Article 154 of the Civil Code still provides that parents "may punish their children within reasonable limits and in moderation", and corporal punishment inflicted within the family environment is not prohibited. The ALUPSE association has alerted the EU Network of Independent Experts on Fundamental Rights to the fact that, in **Luxembourg,** the law does not formally prohibit corporal punishment inflicted by parents on their children. Bearing in mind that, in its annual report of 2005, the Ombuds-Comité fir d'Rechter vum Kand devotes special attention to this issue, the Network encourages Luxembourg to urgently improve the legislative framework in this matter without awaiting a formal observation by the European Committee of Social Rights or the Committee on the Rights of the Child that the current situation is not satisfactory. In the **United Kingdom**, after the European Committee of Social Rights had concluded that, as corporal punishment within the family had not been prohibited and the defence of reasonable chastisement still existed, the situation in the United Kingdom was not in conformity with Article 16 of the European Social Charter (Conclusions XVII-2), the use of reasonable chastisement as a defence to offences of assault occasioning actual bodily harm, cruelty to persons under 16 and wounding and causing grievous bodily harm, has been precluded by the Children Act 2004, s 58. It is expected that this will allow mild smacking but that any punishment causing visible bruising, grazes, scratches, minor swellings or cuts would lead to prosecution. Finally, upon considering the third periodic report of **Denmark** (CRC/C/129/Add.3, para. 35), the UN Committee on the Rights of the Child expressed its concern at

[97] Concluding Observations of the Human Rights Committee: Greece, 25/04/2005, CCPR/CO/83/GRC.
[98] Eur. Ct. HR, judgment A v. the United Kingdom of 23 November 1998 (appl. n°25599/94), § 22.

the high level of child abuse and neglect and other forms of domestic violence in that country, recommending to Denmark that it continue and strengthen its efforts to provide adequate assistance to children who are victims of child abuse, through various concrete initiatives.

Juvenile offenders detained in special institutions are at particular risk of being ill-treated or disciplined in ways which would be incompatible with the prohibition of inhuman or degrading treatments or punishments. Although it welcomes the adoption by **Luxembourg** of the Act of 16 June 2004 concerning the reorganization of the State Socio-educational Centre, which reduces from 20 to 10 days the maximum length of the disciplinary sanction that consists in putting a person under 18 in solitary confinement, and which gives minors the right to appeal to a juvenile court, the Network shares the concerns of the Committee on the Rights of the Child regarding the recourse to and length of solitary confinement as well as the particularly severe provisions that deprive children of all contact with the outside world and of outdoor activity. Solitary confinement for minors should be resorted to in absolutely exceptional circumstances. Conditions of detention should also be improved, and minors should be allowed to be outdoors for at least one hour per day and be granted access to recreational facilities. In **Latvia**, the only prison for convicted juvenile boys (at Cēsis) remains seriously overcrowded. On 1 April 2005, 184 juveniles were being held in the prison with an official capacity of 140 places. Conditions in the pre-trial section of the prison remained appalling and could only be described as inhuman and degrading. Finally, the Network notes that in **Poland,** the Regulation of the Council of Ministers on the conditions and manner of using direct coercion measures against juveniles[99] came into effect on 26 February 2005, regulating the conditions under which such measures may be adopted, and guaranteeing the juvenile the right to file a complaint against the application of a coercion measure against him, which is then considered by the judge responsible for supervising the facility or centre. The Polish authorities are encouraged to regularly monitor how this Regulation is applied in practice, and in particular, whether its application complies with the recommendations of the European Committee for the Prevention of Torture.

Article 5. Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. Trafficking in human beings is prohibited.

In accordance with Article 52(3) of the Charter of Fundamental Rights, paragraphs 1 and 2 of this provision of the Charter correspond to Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It must be read in accordance with the requirements formulated by Article 8 of the International Covenant on Civil and Political Rights (1966), by the Slavery Convention (1926), by the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956), by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), by Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (1979), by Articles 19, 32, 34 and 35 of the Convention on the Rights of the Child (1989), by the Convention against Transnational Organised Crime supplemented by the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) and the Protocol Against the Smuggling of Migrants by Land, Air and Sea (Smuggling Protocol) (2000), by Article 9 of the Convention on Cybercrime (2001), by ILO Convention (n° 29) concerning Forced or Compulsory Labour (1930), by ILO Convention (n° 105) concerning the Abolition of

[99]Rozporządzenie Rady Ministrów z dnia 1 lutego 2005 r. w sprawie szczegółowych warunków i sposobów użycia przymusu bezpośredniego wobec nieletnich umieszczonych w zakładach poprawczych, schroniskach dla nieletnich, młodzieżowych ośrodkach wychowawczych oraz młodzieżowych ośrodkach socjoterapii (Dz.U. z 2005 r. nr 25, poz. 203) [The regulation of the Council of Ministers of 1 February 2005 on the conditions and manner of using direct coercion measures against juveniles placed in correctional facilities, juvenile shelters, youth educational centres and youth socio-therapeutic centres, (The Official Journal of 2005, No. 25, item 203)]

Forced Labour (1957) and by ILO Convention (n° 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour (1999). The protection of the rights listed in this provision of the Charter of Fundamental Rights has recently been improved at the international level by the adoption of by the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000), as well as by the adoption of the Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197) which has been opened for signature on 16 May 2005. Finally, the Network takes into account in its reading of this provision of the Charter Article 7(10) of the European Social Charter, unmodified in the Revised European Social Charter, under which the States parties undertake to ensure special protection against physical and moral dangers to which children and your persons are exposed, particularly against those resulting directly or indirectly from their work.

Fight against the exploitation of prostitution and against the trafficking of human beings, in particular for the purpose of their sexual exploitation

The Network has taken note with interest of the Communication presented by the European Commission on 8 October 2005 with a view to the adoption of an action plan on the fight against trafficking in human beings, 'Fighting trafficking in human beings: an integrated approach and proposals for an action plan'[100]. This Communication is a response to the request formulated by the European Council in the Hague Programme. The Communication rightly emphasizes the contribution to fundamental rights made by stepping up the fight against trafficking in human beings, pointing out that 'Article 5(3) of the Charter of Fundamental Rights prohibits human trafficking in the context of inviolable human dignity which is at the very core of national constitutions and international human rights instruments binding the Member States'.

The Network underscores in particular the importance that the Commission attaches to the situation of the victims and to the need to put them in the centre of the response to be given, including through active protection measures. In the name not only of fundamental rights, but also of the very effectiveness of the fight against trafficking in human beings, it is important not to confuse the victims of trafficking with the individuals and groups that are responsible for this special form of organized crime. The Communication of 18 October 2005 underscores the close link that exists between trafficking in human beings and illegal immigration. Efficient checks and surveillance at the external borders of the European Union as part of the fight against illegal immigration should also help to prevent trafficking in human beings. The Commission recommends, on the one hand, the implementation of all the legal instruments already adopted at Community level in the fight against illegal immigration and surveillance of the external borders and, on the other hand, the strengthening of operational cooperation between Member States in the area of border controls. The European External Borders Agency should take into account the need to combat the traffic of human beings in the coordination and organization of joint operations and pilot projects at the external borders and in the fulfilment of its risk analysis function. Without questioning the reality of this link, the Network underlines the need to incorporate in the training of officers responsible for surveillance of the external borders the requirements ensuing from the right to seek asylum and from the very distinction that the Communication makes between the victims of trafficking and the criminal networks responsible for this trafficking.

As stated in previous conclusions by the Network, forced prostitution constitutes a serious violation of human rights, and must be combated as such by all appropriate means, including proportionate and dissuasive criminal sanctions. The person forced into prostitution should be seen as a victim in need of protection, rather than as a criminal, and this should be seen as a condition for the effective fight against coerced prostitution and the trafficking of human beings for sexual exploitation : as noted by the Committee on the Elimination of Discrimination against Women in its Concluding Observations on **Latvia** (CEDAW/C/2004/II/CRP.3/Add.5/Rev.1, points 30 – 31), only if the victims of forced prostitution benefit from adequate rehabilitation and integration services, shall they be encouraged to

[100] COM (2005) 514 of 18 October 2005

denounce their exploiters and to cooperate with the authorities. Moreover, as provided by the United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), the exploitation of the prostitution of others, even voluntarily entered into, should be made a criminal offence. The European Court of Human Rights has inferred from Article 4 of the European Convention on Human Rights a positive obligation incumbent on States Parties to adopt criminal-law provisions which penalize the practices referred to in that provision and to apply them in practice (Eur. Ct. HR (2nd sect.), *Siliadin v. France* judgment of 26 July 2005 (Appl. N°73316/01), § 89).

The international law framework for the fight against the trafficking in human beings has also been steadily developing during the recent years. The Network recalls that, in a Resolution of 20 October 2003 (OJ C 260 of 29.10.2003, p. 4), the Council has called upon the Member States to ratify the the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the UN Convention Against Transnational Crime. All the Member States are encouraged to follow upon this Resolution, and to ratify as well the Protocol Against the Smuggling of Migrants by Land, Sea and Air. The Network welcomes the fact that the two protocols have entered into force for the **Netherlands** in August 2005, and that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children has entered into force with respect to the **Slovak Republic** on 21 October 2004 (however, the Protocol was published in the Collection of Laws, i.e. has become applicable within the Slovak Republic, only on 10 February 2005). The Member States should also consider joining the ILO Programme Against Human Trafficking and Forced Labour, as has done **Portugal** this year.

In addition, the Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197) has been adopted on 16 May 2005. According to its Article 1 para. 1, the purposes of this Convention are 'to prevent and combat trafficking in human beings, while guaranteeing gender equality ; to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution ; and to promote international cooperation on action against trafficking in human beings'. Trafficking in human beings is defined for the purposes of the Convention as 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs' (Art. 4, a)) ; the consent of the victim is irrelevant (Art. 4, b)). Moreover, although the general definition of trafficking in human beings takes into account the means which are resorted to, the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in human beings' even if this does not involve any of the means listed (Art. 4, c)).

The Network points out in this respect that, according to the precedent set by Article 28(3) of the European Convention on Extradition of 13 December 1957 (European Convention on Extradition, done in Paris on 13 December 1957, ETS no. 24 (entry into force on 18 April 1960), the three conventions opened for signature on 16 May 2005 at the Third Summit of Heads of State and Government of the Member States of the Council of Europe contain a so-called "disconnection" clause, which withdraws the mutual relations between Member States of the European Union and the relations between Member States and the European Community from the scope of the rules laid down in those instruments. Article 40(3) of the Council of Europe Convention on Action against Trafficking in Human Beings[101] provides:

[101] CETS No. 197. See also, for similar clauses, Article 26(3) of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) and Article 52(4) of the Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198).

> Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

When the Committee of Ministers of the Council of Europe adopted the Convention on 3 May 2005, the European Community and the Member States of the European Union made the following statement, which forms part of the "context" of the Convention within the meaning of Article 31(2)(b) of the Vienna Convention on the rights of trafficked persons and should therefore guide its interpretation[102]:

> The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a "disconnection clause" is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.
>
> This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.
>
> The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties.

The principle of such a disconnection clause is such that the objectives of the instrument in which it is incorporated are fully maintained, but that as far as the Member States of the European Union and the Community/European Union are concerned, the obligations imposed by that instrument on its Parties may be performed by the Member States or by the Union according to how their respective competences develop as will ensue in particular from the adoption of legislation by the Union. The Network emphasizes that this should make no difference for the beneficiaries of the instrument in question, for example the victims of acts of terrorism or trafficking in human beings. The disconnection clause does not affect the scope of the obligations that are taken on, but simply the implementation modalities of those obligations. It does not seek to introduce an exception to the obligations stipulated by the instrument in which it is incorporated, but to meet the needs of the integration of that instrument within the European Union by taking into account the evolutionary nature of the division of competences between the Member States and the Community/Union.

Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings (OJ L 203 of 1.8.2002, p. 1), which the Member States were to implement by 1 August 2004, defines the obligations of the EU Member States under Union law in the field of combating trafficking in human beings. The above-mentioned 'disconnection clause' requires that this Framework Decision be implemented taking into account the requirements of the Council of Europe Convention on Action against Trafficking in Human Beings, where the Framework Decision is less extensive in the

[102] See paragraphs 375 and 376 of the Explanatory Report of the Council of Europe Convention on Action against Trafficking in Human Beings.

obligations it imposes or resorts to terms which may be vaguer. Contrary to certain fears which have been expressed, such a clause does not imply that the EU Member States would be exempting themselves from the obligations imposed to the other States parties to the Council of Europe Convention ; it does not create a 'double standard-setting' within the wider Europe. The EU Member States who become parties to the Council of Europe would be in violation of their obligations under this instrument if, due to the content of their obligations under Union law, they were unable to comply with their obligations under the former instrument. The 'disconnection clause' relates, not to the content of the obligations imposed by the Council of Europe convention, but to the means through which these obligations shall be fulfilled, either through national legislation or through Union law. The EU Member States and the European Community are encouraged to sign and ratify as soon as possible the Council of Europe Convention on Action against Trafficking in Human Beings, in order to demonstrate their willingness to address this question through the most effective means possible, and in conformity with the standards defined within the Council of Europe. In the future, the Network believes it should be explored whether the European Union should not be defined as a potential party to such agreements, which relate to competences the Member States exercise jointly within the framework of the European Union. The Network notes in this regard that it follows from Article 24 EU and, indeed, from its practice, that the Union has an international legal personality allowing it to conclude international treaties with other international organisations or States.

While the Network has no concerns about the disconnection clauses inserted into the Council of Europe conventions opened for signature at the Warsaw Summit on 16 May 2005, including the Council of Europe Convention on Action against Trafficking in Human Beings, it would nevertheless recall that human rights treaties 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction'[103]. For instance, in concluding the European Convention on Human Rights, 'the purpose of the High Contracting Parties (…) was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests, but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedom and the rule of law (…). The obligations undertaken by the High Contracting Parties in the European Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves'[104]. Disconnection clauses however appear to be based on an understanding of international treaties as purely reciprocal commitments between States. The Network therefore feels compelled to insist that such clauses should not serve to restrict the fundamental rights of individuals attributed to them under the concerned treaties. The impact of such clauses should be examined, on a case-by-case basis, in order to ensure that they will not have such impact.

With regard to the situation in the Member States, the Network would summarize its findings concerning the year 2005 thus. With regard to the exploitation of prostitution, the Network insists that victims of forced prostitution should not be criminalized, but as victims in need of assistance and reinsertion ; this, indeed, is the only efficient way to tackle the phenomenon of forced prostitution. Therefore, where States criminalize prostitution, the exploiter or the consumer should be criminalized, rather than the prostitute him- or herself. The Network moreover reiterates its concern that in certain countries, even where the exploitation of the prostitution of others is considered a criminal offence, the existing legislation may be under enforced. This matter should not be seen as a purely national

[103] Inter-American Court of Human Rights, *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Art. 74 and 75)*, Advisory Opinion OC-2/82 of 24 September 1982, Series A n°2, para. 29.
[104] Eur. Commiss. HR, *Austria v. Italy ('Pfunders case')*, Appl. No. 788/60, 4 *Eur. YB of Human Rights* (1961) 116, at para. 138-140.

concern. Any failure by a State to either prohibit, or effectively regulate prostitution in order to avoid the exploitation of the prostitution of others or forced prostitution, encourages the trafficking in human beings, and risks seriously diminishing the impact of the efforts consented by the other EU Member States. **Estonia** for instance remains a destination for sex tourism. Whereas in **Sweden**, paying for sex has been criminalized and neighbouring **Finland** currently also discusses a similar draft act criminalizing buying sex, these evolutions will only lead to the further development of prostitution in Estonia and make this business more profitable. Estonia is strongly encouraged to combat illegal forms of prostitution more effectively, and to harmonize the approach which is adopted in that respect throughout the country. **Hungary** still serves both as a transit country of victims trafficked from Russia, Romania, Ukraine, Moldova and Bulgaria to Western European countries and the United States, and as a country of origin and destination : thousands of Hungarian women each year fall into the trap of promises of employment abroad.

In the **Czech Republic**, the Ministry of Interior has prepared a draft law on the regulation of prostitution (as an independent profession under certain conditions). This proposal has been approved within the legislative bodies of the Government and by the Government. It has been under discussion in the Chamber of Deputies of the Parliament. The adoption of this draft legislation would lead to the denunciation by the Czech Republic of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others.

Important positive developments have occurred in the area of combating trafficking in human beings during 2005. In **Belgium,** the Act of 10 August 2005 amending various provisions with a view to reinforcing the fight against trafficking in human beings and against the practices of slum landlords[105] brings Belgian law into line with the international and European law instruments, with the exception, however, of Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261 of 6.08.2004, p. 19), although Member States are obliged to take measures to transpose this instrument by 6 August 2006. One of the peculiarities of this Act in relation to similar legislation in other Member States is that it includes the incrimination of the exploitation of begging by others in Article 433c of the Penal Code. The Act is not concerned with re-criminalizing begging as an offence (which was decriminalized in Belgium in 1993), but, after the example of what already exists in the area of prostitution, with punishing those who exploit begging by others. Are therefore punishable the hiring of a person with a view to obliging him or her to beg, inciting this person to beg or to carry on begging, using a beggar to arouse public sympathy, and exploiting begging by others[106]. This Act also imposes stiffer penalties on persons who profit from begging by unaccompanied minors.

In **Finland**, the government approved a national action plan against human trafficking on 25 August 2005, which insists on the need to identify rapidly, and to assist, the victims of human trafficking. In **Germany**, the Parliament adopted a Strafrechtsänderungsgesetz (§§ 180 b, 181 StGB [Act Amending the Penal Code – sections 180 b and 181] (BGBl. 2005 part I p. 239)) which modifies Sections 232 to 233a Penal Code in order to extend the criminal definition of trafficking in human beings. In **Cyprus**, the Government adopted an Action Plat to Combat Trafficking which seeks, inter alia, to promote the assistance to the alleged victims of trafficking, who are to be issued a work permit so that they can be able to work in another field. In **Greece,** coordination in the fight against the trafficking in human beings has been improved by the creation of a high level Task force on the attribution of responsibilities to judges or prosecutors specialised in this field. Moreover, a remarkable cooperation has taken place between the government and civil society on this issue, resulting in the adoption on 30 November 2005 of the Memorandum for the fight against trafficking between the Secretary Generals of the six competent Ministries, twelve non-governmental organisations and the International Organisation for migrations. Finally, Law 3386/2005[107] contains important new provisions about the

[105] *Moniteur belge,* 2 September 2005.
[106] Article 433c (1) and (2) of the Penal Code.
[107] Article 48, Νόμος 3386/2005, «Είσοδος, διαμονή και κοινωνική ένταξη υπηκόων τρίτων χωρών στην Ελληνική Επικράτεια» [Law no 3386/2005, « Entrance, stay and social integration of foreign people on the Greek territory".]

time of reflexion and the stay of victims of trafficking of human beings who are collaborating with judicial authorities. In **Ireland**, a Garda Siochana (state police force) has established a dedicated unit to investigate the alleged trafficking of non-national women into the State for the purpose of sexual exploitation in August 2005. In **Italy**, several police operations led to the arrest of a number of traffickers in human beings for various purposes, and the Government is also cooperating with foreign governments, including Nigeria, Ukraine, Moldova and Romania in order to fight organisations against the recruitment of clandestine immigrants for sexual exploitation. Moreover, the Italian Government provides legal and medical assistance to the victims of trafficking. There are shelters and programs for job training and also assistance and incentive programs for those willing to return to their home country. A budget has been set aside for victim assistance programs, and magistrates may seize convicted traffickers' assets to finance legal assistance, vocational training and other social integration assistance to the victims. The Department for Equal Opportunities financed, between 2000 and 2004, 296 social protection projects addressed to 6,781 victims. More than 10,637 victims have been helped by the social services. In **Latvia**, the *National Action Plan to Combat Trafficking in Human Beings 2004-2008* was approved on 3 March 2004, and should lead not only to the harmonization of legislation, but also to facilitating an improved understanding of the phenomenon of trafficking of human beings, to improving the work of law enforcement institutions, and to developing support services to the victims of trafficking, an area in which an important regulation[108] was adopted by the Cabinet of Ministers in 2005. The crime of trafficking in human beings was enlarged, in order to include trafficking within the country[109]. In **Lithuania**, the Programme for the Prevention and Control of Trafficking in Human Beings for 2005-2008[110] has served to identify the remaining obstacles to the effective combating of trafficking in human beings. In the **Netherlands**, the *Wet van 9 december 2004 tot uitvoering van internationale regelgeving ter bestrijding van mensensmokkel en mensenhandel* [International regulations on the fight against the smuggling of and trafficking of human beings (Implementation) Act] entered into force on 1 January 2005 (*Staatsblad* 2004, 645; *Kamerstukken* 29291), extending in Article 273a of the Criminal Code the notion of *'mensenhandel'* [trafficking in human beings] to exploitation in other branches than the sex industry, and prohibiting the smuggling of migrants in Article 197a of the Criminal Code. In order to effectively enforce the new provisions, a *Landelijk Expertisecentrum Mensensmokkel/Mensenhandel* [National Expert Centre on the smuggling of and trafficking of human beings] became operational in 2005. In **Poland**, the amendment of the Act on aliens and granting protection to aliens on the territory of the Republic[111] came into effect on 1 October 2005, improving the protection of victims of human trafficking. **Portugal** has announced that it will establish an Observatory on Human Trafficking for Sexual Exploitation by 2007, as well as a shelter for trafficked women and a registry of denouncements for the use of the authorities. **Slovenia**'s interdepartmental working group to combat trafficking, in which government and civil society have been actively cooperating, adopted a detailed National Action Plan in July 2004. The Government of the **Slovak Republic** by its Resolution no. 668 of 7 September 2005 approved the *Správa o aktivitách vlády v roku 2005 zameraných na prevenciu a potláčanie obchodovania s ľuďmi* [Report on governments´ activities focused on the prevention and suppression of trafficking in human beings in 2005]. According to this report, the Group of experts for the prevention and aid to the victims of trafficking in human beings, which operates at the Slovak Government Council for Crime Prevention, has to work out a National Action Plan on fight against trafficking in human beings till 31 December 2005. Moreover according to the Report, in 2006 there should be an increase of the number of

[108] MK Noteikumi Nr. 88 *Par kārtību, kādā cilvēku tirdzniecības upuri saņem sociālās rehabilitācijas pakalpojumus, un prasībām sociālās rehabilitācijas pakalpojumu sniedzējiem* [Regulation No.88], adopted 22 November 2005, in force since 1 January 2006.

[109] Likums *Grozījumi Krimināllikumā* [Law *Amendments to the Criminal Law*], adopted 16 December 2004, in force since 11 January 2005.

[110] Vyriausybės nutarimas, 2005 m. gegužės 19 d., Nr. 558, Dėl prekybos žmonėmis prevencijos bei kontrolės 2005-2008 metų programos patvirtinimo, [Government of the Republic of Lithuania, 19 May 2005, Resolution, No. 558, On the approval of the Programme for the Prevention and Control of Trafficing in Human Beings for 2005-2008], Valstybės žinios, 2005, No. 65-2333.

[111] Ustawa z dnia 22 kwietnia 2005 o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw, (Dz.U. z 2005 r. nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

policemen specialized in fight against the trafficking in human beings about 14 policemen in comparison with the year 2005. A new function of the National coordinator for the fight against trafficking in human beings should be established with the aim of effective communication during the preparation and execution of the National action plan on fight against trafficking in human beings. In addition the terms of sentence for the offenders of crime of trafficking in human beings (Section 179 of the new Criminal Code) and crime of trafficking in children (Section 180 of the new Criminal Code) have been increased in comparison with the former legal regulation. In **Sweden** also, a National Action Plan for the continued work to combat prostitution and trafficking in human beings for sexual purposes as well as for forced labour purpose is under consideration by the reviewing instances. This plan should improve the assistance to victims of prostitution and trafficking in human beings.

It is important to note that, in the measures which have been described, a reinforcement of the means invested in the criminal prosecution of traffickers of human rights have been combined with measures assisting the victims. In its conclusions relating to the year 2004, the Network expressed its conviction that the full cooperation of the victims is essential to the effectiveness of the fight against trafficking in human beings. It therefore welcomed the adoption of Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (OJ L 261 of 6.08.2004, p. 19). The purpose of the Directive is to allow non-Community nationals who are victims of trafficking in human beings or – if the Member State concerned chooses to make this extension – who have been the subject of an action to facilitate illegal immigration to be granted a short-term residence permit in return for their cooperation in combating those activities by testifying against the traffickers. The Directive does not prevent Member States from adopting or maintaining more favourable provisions for the persons covered by the Directive (Article 4).

The Network notes in this regard that, in its third report on **Sweden** – where, as of 1st of October 2004 victims of trafficking may apply for a temporary residence permit (SOU 2004 : 71, p. 108) –, the European Commission against Racism and Intolerance (ECRI) mentioned that it has received information which indicates that the material assistance and support provided to victims of trafficking, especially as concerns shelter and rehabilitation, are insufficient, *i.e.* they do not yet meet the levels of actual need. With regard to trafficking in human being, ECRI recommended that "the Swedish authorities ensure that residence permits are granted to victims of trafficking irrespective of their willingness to co-operate with the authorities." In addition, the Commission encouraged the Swedish authorities "to consider improving the access of victims of trafficking who agree to co-operate with the authorities to longer term residence permits" (CRI(2005)26, p. 29). Similar recommendations have been made by ECRI to **Poland**.

Similarly, whereas exemplary steps have been taken in **Austria** to coordinate the fight against trafficking, translating into the transformation in 2004 of the inter-ministerial working group on human trafficking into a permanent 'human trafficking task force', the amendment of the regulations regarding residence visas for humanitarian reasons in the new Settlement and Residence Act[112] (*Bundesgesetz über die Niederlassung und den Aufenthalt in Österreich – NAG*) is not entirely satisfactory : the law now provides for the issuance of residence permits for witnesses and victims of trafficking for the duration of the criminal and civil procedures for a minimum period of 6 months – which is to be considered as a positive development – however the legislator has refrained from entitling these persons to such a visa or to give them the right to appeal in case of rejection

In its conclusions concerning the year 2004, the Network recommended that the evaluation report on the application of the Directive which the Commission has to prepare in 2008 on the basis of the information supplied by the Member States devote a chapter to the question of compliance by the Member States with those international obligations in the transposition of the Directive and in the application of national implementation measures, in order to prepare an amendment to the Directive in

[112] Federal Law Gazette (BGBl.) I 100/2005. „kj"

order to incorporate explicitly those requirements should this evaluation reveal shortcomings in the fulfilment of those international obligations. In particular, however limited the protection afforded to the victims of trafficking under Directive 2004/81/EC, the Member States remain bound by the obligations imposed on them by the Geneva Convention of 28 July 1951 relating to the status of refugees and the other international instruments on the protection of human rights. The Network has already emphasized in its previous Conclusions that the Protocol to prevent, suppress and punish trafficking in persons, especially women and children appended to the 2000 Convention against transnational organised crime, includes a saving clause stating that its provisions are without prejudice to the obligations of States under International law, including the 1951 Geneva Convention and the 1967 Protocol relating to the status of refugees and the principle of non-refoulment contained therein and that, although the European Community is not a Party to the Geneva Convention, it is bound by its content in particular through Article 63 point 1 EC.

The Network also believes that the opportunity of extending the right to a temporary residence permit for the victims of human trafficking, in line with the recommendation of the ECRI mentioned above, should be examined in the context of the upcoming evaluation of Directive 2004/81/EC. In the *Siliadin v. France* judgment of 26 July 2005 (Appl. N°73316/01), the European Court of Human Rights has found France in violation of Article 4 ECHR, which prohibits slavery and forced labour, for failing to introduce legislation that would classify slavery and servitude as criminal offences under its penal code after it ruled that a woman was held in domestic servitude by two families in France for more than four years. The Court, in its judgment establishing this violation, attaches significant importance to the circumstance that "She was an adolescent girl in a foreign land, unlawfully present in French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised" (§ 118). The vulnerability of the victim of forced labour resulting from the fact that she was unlawfully residing on the territory and lived in fear of removal if she turned to the authorities should urge Member States to extend the guarantees given to the victim, in particular with respect to his or her right of residence. This should be seen not only as an instrument to enhance the efficacy of the fight against trafficking in human beings; it is also a requirement ensuing from Article 4 of the European Convention on Human Rights.

The programmes adopted by the Member States should be adequately funded. In **Latvia** for instance, much of the National Action Plan 2004-2008 (approved on 3 March 2004) could not be properly implemented in the absence of sufficient budgetary means. A similar lack of funds is an obstacle to the full implementation of the National Action Plan to Combat Trafficking in Human Beings adopted by **Slovenia**. The Network also remarks that in a number of countries, such as in **Greece** and **Slovenia** as mentioned in the examples above, non-governmental organisations and government have been cooperating effectively in order to combat human trafficking, especially in order to offer an assistance to victims who could be encouraged, by the availability of such assistance, to leave the circuits of exploitation and contribute to identifying and prosecutors the traffickers.

Fight against the sexual exploitation of the child and child pornography

Children are particularly vulnerable victims of trafficking in human beings. Unaccompanied minors are at special risk, and the Member States should adopt measures ensuring that they will not fear to report to the authorities because of the threat of being expelled from the country. As noted by the Human Rights Committee (Concluding observations of the Human Rights Committee : Greece. 25/04/2005. CCPR/CO/83/GRC), it is of the highest importance that **Greece** develops without further delay a procedure to address the specific needs of unaccompanied non-citizen children and to ensure their best interests in the course of any immigration, expulsion and related proceedings. Unaccompanied alien children should be protected, and any release of such children into the general population without supervision and the provision of welfare assistance should be absolutely avoided. Similar concerns have been expressed by the Committee on the Rights of the Child with respect to **Denmark** (CRC/C/15/Add.273 30 September 2005, para. 51-52).

A first step towards preventing sexual exploitation of children and child pornography would consist in fully implementing the applicable instruments of international law. ILO Convention (No. 182) Worst Forms of Child Labour (1999), defines the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances, as one of the worst forms of child labour the States parties undertake to prohibit and eliminate as a matter of urgency by immediate and effective measures. All the Member States but **Latvia** have signed and ratified ILO Convention (No. 182). All the Member States should also ratify the Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. At the time of writing, although all the Member States have signed the Protocol, **Belgium, Cyprus, Czech Republic, Finland, Germany, Greece, Hungary, Ireland, Luxembourg, Malta, Sweden** and **the United Kingdom** still have not ratified it. The Network notes that, while **Sweden** has not yet ratified the 2002 Optional Protocol to the UN Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, a number of legal amendments have been adopted in that country in order to make ratification possible at the earliest possible date[113]. The Network welcomes the fact that, after the ratification on 10 June 2004 of this Protocol[114], **Lithuania** confirmed that it would launch the *National Preventive Programme for Child Assistance and Against Violence*[115]. **Greece** should implement the recommendations of the Special Rapporteur on the sale of children, child prostitution and child pornography made after his visit in Greece in November 2005 concerning the coordination of action of different services and cooperation with civil society. As noted by the Committee on the Rights of the Child, **Sweden** should "strengthen measures to reduce and prevent the occurrence of sexual exploitation and trafficking, including sensitizing professionals and the general public to the problems of sexual abuse of children and trafficking through education including media campaigns"[116]. A similar recommendation has been addressed to **Finland** by that Committee (CRC/C/15/Add.272 of 30 September 2005).

Article 9 of the Council of Europe Convention on Cybercrime opened for signature in Budapest on 23 November 2001 (ECTS n° 185) also imposes on the States parties to that instrument an obligation to make producing child pornography for the purpose of its distribution through a computer system, offering or making available child pornography through a computer system, distributing or transmitting child pornography through a computer system, procuring child pornography through a computer system for oneself or for another, possessing child pornography in a computer system or on a computer-data storage medium, a criminal offence. The Network welcomes the ratification by **Cyprus** of this Convention[117], and strongly encourages all the EU Member States to follow suit. At the time of writing, although all the Member States have signed the Convention on Cybercrime, **Austria, Belgium, Czech Republic, Finland, Germany, Greece, Ireland, Luxembourg, Malta, Sweden** and the **United Kingdom** still have not ratified it.

The adoption of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13, 20.1.2004, p. 44), which the Member States are to implement before 20 January 2006, should be seen as an important contribution to the protection of the child. This Framework Decision complements Council Decision 2000/375/JHA of 29 May 2000 to combat child pornography on the Internet (OJ L 138, 9.6.2000, p. 1), by defining the sexual exploitation of children, including coercing or recruiting a child into prostitution, and child pornography as serious criminal offences the constituent elements of which in the criminal law of all Member States shall be harmonized through the Framework Decision, which shall also oblige States to

[113] Regeringskansliet, Statsrådsberedningen, Planerade propositioner och skrivelser 2005/2006, 13 September 2005, www.regeringen.se

[114] Įstatymas Dėl Jungtinių Tautų vaiko teisių konvencijos fakultatyvinio protokolo dėl vaikų pardavimo, vaikų prostitucijos ir vaikų pornografijos ratifikavimo [The Law on the ratification of Optional Protocol to the Convention of the Rights of the Child of Sale of Children] Valstybės žinios, 2004, No. 108-4028.

[115] Vyriausybės 2005 m. gegužės 4 d. nutarimas Nr. 491, Dėl nacionalinės smurto prieš vaikus prevencijos ir pagalbos vaikams 2005-2007 metų programos patvirtinimo [Government of the Republic of Lithuania, Resolution, 4 May 2005, No. 491] Valstybės žinios, 2005, No. 58-2021.

[116] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 8.

[117] *Ο περί Σύμβασης Κατά του Εγκλήματος μέσω του Διαδυκτίου (Κυρωτικός) Νόμος,* N. 22(III)/2004 (*Law Ratifying the Council of Europe Convention on Cybercrime* L. 22(III)/2004).

provide for effective, proportionate and dissuasive sanctions. As the Network already emphasized in its previous conclusions covering the year 2004 (p. 36), with respect to the dissemination of child pornography through a computer system, the effectiveness of the national measures implementing the Framework Decision 2004/68/JHA shall be enhanced by an adequate implementation of Article 19 of Title 4 of the Cybercrime Convention, which relates to the search and seizure of stored computer data. To this extent the two instruments should be seen as complementary. The protection of the right to respect for private life should not be considered as an obstacle to such searches, provided these are regulated by law with a sufficient degree of precision and remain strictly tailored to the needs of combating child pornography on the internet. Where constitutional provisions protecting the right to respect for private life do not provide for the possibility of exceptions in such cases – as is the case in **Cyprus**, under Article 17 of the Constitution –, the Member States are encouraged to envisage the possibility of creating such an exception.

During the period under scrutiny, a number of Member States have adopted measures which improve the protection of the child against the risk of sexual abuse or exploitation. The Network welcomes the amendment by **Poland**, on 27 July 2005, of the Penal Code and Penal Executive Code, which raised the level of the penalties for sex crimes, especially those committed against juveniles. In **Sweden**, the Government Bill 2004/05:45 (prop. 2004/05:45, *En ny sexualbrottslagstiftning*) introducing new legislation on sexual crimes entered into force on 1 April 2005. In **Italy**, the Chamber of Deputies has approved the bill (A.C. no. 4599) regarding the fight against sexual exploitation and pedo-pornography, initially presented on 13 January 2004. Certain good practices also should be highlighted. In **Sweden**, a specially designed handbook to be used in the training of, *inter alia*, members of the National Police Board, in the investigation of crimes involving the sexual exploitation of children, is under preparation[118]. The Swedish Police cooperate with Internet providers to develop Net Clean Technologies as a method to block access to child pornography on the Internet, with encouraging results : approximately 20-30 000 attempts to enter such websites were blocked daily[119]. The development of such devices should be reconciled, to the fullest extent possible, with the right to have access to information, as guaranteed under Article 10 of the European Convention on Human Rights. The **United Kingdom** has been cooperating with other governments and non-governmental organizations to address the problem of child labour. Thus, the Department for International Development provided approximately £3 million for a programme in the Greater Mekong region, covering parts of Cambodia, China, Laos, Thailand and Viet Nam, in order to address the prevention, protection and rehabilitation of trafficked women and children ; it is working in India with the Government and the ILO on a state-based programme for the elimination of child labour in Andhra Pradesh ; in 1997, it signed with the Philippines a Memorandum of Understanding to cooperate to combat the sexual exploitation of children.

Serious concerns remain, however. **Spain** should urgently include the crimes of child pornography and child prostitution in its criminal legislation. **Sweden** still has no specific legislation to combat child pornography on the Internet, although a report by ECPAT International[120] reveals that this State is among the hosts of commercial child pornography websites and that violence against children through new technologies is pervasive. In a Individual Direct Request concerning ILO Convention (No. 182) Worst Forms of Child Labour, cited above, the Committee of Experts on the Application of Conventions and Recommendations drew the attention of the **United Kingdom** to the fact that, according to section 48 of the Sexual Offences Act, 2003, a person (A) commits an offence if: (a) he intentionally causes or incites another person (B) to become a prostitute, or to be involved in pornography, in any part of the world; and (b) either: (i) B is under 18, and A does not reasonably believe that B is 18 or over, or (ii) B is under 13. The Committee noted that similar wording is used in several other provisions such as section 49 (controlling a child prostitute or a child involved in pornography) and section 50 (arranging or facilitating child prostitution or pornography). It noted with concern that a person who, for example, incites a child of 14 years to become a prostitute does not

118 UN Doc. CRC/C/SR.1002, Summary Record, Sweden 17/01/2005, p. 4.
119 *A.Careborg*, Tusentals pedofiler stoppas varje dygn, SvD 25 November 2005, p. 6 and www.polisen.se
120 ECPAT International, Violence against Children in Cyberspace, 11 November 2005. See www.ecpat.se

commit an offence in so far as he/she reasonably believes the child is 18 years old. It observed that only children under 13 years of age are protected, with certainty, from sexual exploitation, and it drew the Government's attention to the difficulty to ascertain the exact age of boys and girls.

Exploitation of undocumented workers

The Network notes that, since its Communication of 15 November 2001 on a Common Policy for Illegal Immigration, the Commission considers that return policy is an integral and crucial part of the fight against illegal immigration. The question which should now be addressed is whether the development of a common return policy does not require, in turn, that the question of the rights of illegal migrants be addressed at the level of the Union, beyond the question of the means through which they should be returned. In its Communication on a Community Return Policy on Illegal Residents of 14 October 2002, the Commission noted that '…for Community action for return to be fully effective, it must fit smoothly into a genuine management of migration issues, requiring crystal-clear consolidation of legal immigration channels and of the situation of legal immigrants, an effective and generous asylum system based on rapid procedures offering access to true protection for those needing it and enhanced dialogue with third countries which will increasingly be invited to be partners in dealing with migration.' In the view of the Network, it is artificial to separate these issues from that of the situation of illegal migrants staying on the territory of the Member States. Indeed, this is an issue which the Community has already been addressing, by defining the conditions for the qualification of third country nationals who cannot be returned to their State of origin and should be considered in need of international protection[121], by defining the conditions under which third-country nationals who are victims of trafficking in human beings and who cooperate with the authorities may be granted a short term residence permit[122], or by recalling the Member States to their obligation to take 'due account of the nature and solidity of the third country national's family relationships, the duration of his stay in the Member State and of the existence of family, cultural and social ties with his country of origin', in Article 5 of its more recent Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals[123].

Social cohesion will only be preserved if the Member States ensure that undocumented migrants are guaranteed, at a minimum, the effective enjoyment of the rights recognized under international law. This includes the right to health care, the right to education for children, and the right to social aid. It is entirely unacceptable in particular that, due to their fear of being denounced to the authorities and of being deported, third-country nationals decide not to see a medical doctor when confronted with a health problem, or not to put their children in schools. It is unacceptable also that, out of fear of being expelled from the country, undocumented migrants may hesitate to denounce to the authorities the exploitative practices they are subjected to, as has been amply documented for the **United Kingdom** by a report from the Trade Union Congress (*Forced Labour and Migration in the UK*, February 2005).

In the view of the Network, this matter should be addressed at the level of the Union. Insofar as regularisation measures may be interpreted as an incentive to further illegal immigration, each Member State acting individually may be hesitant, understandably, to move in this direction, except on an ad hoc and exceptional way. The Network shares the view of the European Economic and Social Committee where it expresses its disagreement with the Commission's statement, formulated in para. 3.2.2. of its Communication to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Study on the links between legal and illegal migration' (COM(2004) 412 final), that the only coherent approach to dealing with illegal residents is

[121] Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304 of 30.09.2004, p. 12.
[122] Council Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261, 6.8.2004, p. 19.
[123] COM(2005) 391 final, 1.9.2005.

to ensure that they return to their country of origin. As noted by the Economic and Social Committee, 'this is not a realistic approach, because the systems and instruments for return are not equal to the task of addressing the situation facing millions of people. (…) The EESC believes that compulsory return should not be the EU's only or prime response to immigrants currently in the EU in an irregular situation. What is needed is a comprehensive policy incorporating both return and regularisation. If the policy of compulsory return is not combined with regularisation measures, the numbers of people in irregular situations will remain unchanged, feeding the hidden economy and leading to increased exploitation in employment and social exclusion' (Opinion of the European Economic and Social Committee on the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Study on the links between legal and illegal migration' (COM(2004) 412 final), OJ C 157 of 28.6.2005, p. 186). The illegal situation of migrant workers are a source of abuse and exploitation of those workers in violation of the values on which the Union is founded, as expressed in particular in Article 5 of the Charter of Fundamental Rights. Regularisation therefore constitutes a contribution both to the promotion of fundamental rights and to combating organized crime.

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

Everyone has the right to liberty and security of person.

In accordance with Article 52(3) of Charter of Fundamental Rights, this provision of the Charter corresponds to Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Moreover, this provision of the Charter must be read in accordance with the requirements formulated by both Article 9 of the International Covenant on Civil and Political Rights (1966) and Article 37 of the Convention on the Rights of the Child (1989).

Pre-trial detention

A number of judgments delivered by the European Court of Human Rights during the period under scrutiny, in particular in the cases of *Vejmola v. the Czech Republic* ((Appl. No. 57246/00), judgment of 25 October 2005), *Sulaoja v. Estonia* ((Appl. No. 55939/00), judgment of 15 February 2005), *Pihlak v. Estonia* (Appl. No. 73270/01, judgment of 21 September 2005), *Osváth v. Hungary* (Appl. No. 20723/02, judgment of 5 July 2005), *Gosselin v. France* (Appl. No. 66224/01, judgment of 13 September 2005), and *Baginski v. Poland* (Appl. No. 37444/97, judgment of 11 October 2005), have found a violation of Article 5 of the European Convention on Human Rights, especially because of the excessive lengths of pre-trial detention or the deficiencies of the judicial review of the legality of the deprivation of liberty. Although these judgments concern cases closed since a number of years before the national courts and therefore cannot be seen to be necessarily representative of the current situation, they nevertheless provide indications about how such situations could be prevented in the future. A sufficient number of investigating judges should be available, in order to avoid that preventive detention is resorted to simply as a means to compensate for the practical impossibility to examine, with the required attention, the seriousness of the accusations presented against certain

defendants. The Network is informed for instance that in **Latvia**, situations occur where only one investigating judge covers a whole district (covering 5-6 regions) during weekends or holidays. This is obviously insufficient. It is also concerned by the information contained about **Portugal** in the Report of the special Commission on the Reform of the Prison System published in 2004, which shows that in 2002 only 21,3 % of the persons submitted to pre-trial detention were condemned to imprisonment measures after trial, and that a significant number of persons are convicted on a deprivation of liberty measure with the same length of the pre-trial detention already imposed. This may indicate that if another alternative measure had been imposed, perhaps a shorter deprivation of liberty measure could have been determined. In such cases, pre-trial detention clearly prejudges the determination of the criminal sentence, which should be a source of serious concern to the authorities in that country.

The Network recalls that one of the guarantees offered under Article 5 of the European Convention on Human Rights is the right to contact a lawyer immediately. As emerges from the report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Spain (10-19 March 2005) (CommDH(2005)8), the possibility of detention without the right to communicate with the outside world as provided by the Code of Criminal Procedure of that country exposes the person in question to the risk of ill-treatment. This should therefore remain an exceptional procedure, always under the supervision of the court, and must be strictly limited in time. In **Spain,** *incommunicado* detention may be ordered for a period of up to 13 days (Article 509, Code of Criminal Procedure), during which the prisoner is assisted only by a lawyer designated by the Bar Association – in other words, not chosen by the prisoner himself – and is unable to contact his family. In 2004, 213 persons were held in incommunicado detention on suspicion of terrorism. The use that is made of this form of preventive detention, as well as its regime and length of time, is a source of concern.

Preventive detention of a lawyer accused of having committed criminal acts whereas those acts are connected with the exercise of the rights of the defence should only be allowed in highly exceptional circumstances. Pointing out that, in **France,** Mrs France Moulin, lawyer, was detained between 19 April 2005 and 12 May 2005 on charges of having divulged information about a judicial investigation, which is an offence under the Act (called 'Perben II')[124] of 9 March 2004, the Network expresses the hope that this provision will be amended so as to become compatible with the exercise of the rights of the defence in order, in particular, to avoid the preventive detention of lawyers suspected of such an offence. Mrs France Moulin took on the defence of a person arrested in June 2004 for the alleged laundering of money from drug trafficking. She is suspected of having revealed information to a third party from the investigation file that made it possible to conceal part of the proceeds of the laundering operation[125]. The protection of the secrecy of investigation in France was reinforced significantly by the Perben II Act. The transposition in 2004 of Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering has imposed particularly severe rules on lawyers in this matter (e.g. declaration of suspicions) that often come into conflict with their obligations of professional secrecy. Act No. 2005-1549 of 12 December 2005 on the treatment of reoffenders[126] has brought certain improvements following criticism of the imprisonment of Mrs Moulin. Thus the person making revelations must now act wisely and must bear in mind that he is divulging information to a person who is liable to be criminally implicated: it is no longer specified whether the revelation may be 'direct or indirect'. This revelation must be committed with a view to hampering the proceedings, and therefore requires special fraudulent representation. Furthermore, the penalty has been brought to two years imprisonment, which prohibits the recourse to remand measures, unless the revelation concerns proceedings connected with the most serious offences of organized crime. In that case, the penalty is set at five years imprisonment. A second series of amendments concerns the provisions of Article 56-1 of the Code of Criminal Procedure relating to

[124] Act No. 2004-204 of 9 March 2004 on the adaptation of the legal system to developments in crime, published in the Official journal of 10 March 2004, p. 4567. The offence in question has been added to the Penal Code (Article 434-7-2) by Article 13 of the Act of 2004.
[125] The manager of the office of Mrs France Moulin, Mrs Dublanche, was subsequently interrogated for "complicity in money laundering" on 3 June 2005, and imprisoned.
[126] Published in the Official Journal of 13 December 2005

searches carried out at lawyers' offices or at their homes. Finally, the law also imposes, on pain of nullity, the principle of prohibition of transcribing phone taps of lawyers where such calls are connected with the exercise of the rights of the defence.

The Network is concerned by the new legal institute in the **Slovak Republic** named *zabezpečenie svedka* [securing of witness] introduced by the new Code of Criminal Procedure. This legal institute regulates the right of the court to detain a witness for up to 72 hours to secure the witness' presence at the hearing before the court. Such restriction of the witness' personal freedom can be seen unproportional especially in consideration with the Article 5 of the European Convention on Human Rights, as well as with the provisions of the Article 17 paragraph 3 and 4 of the Constitution of the Slovak Republic which provides, inter alia, that only the person suspected of serious crime may be detained for up to 72 hours. It is highly questionable whether it is necessary to establish such institute in criminal procedure law.

The Network also notes certain positive evolutions during the period under scrutiny. In **Latvia**, the new *Criminal Procedure Law*[127], in force since 1 October 2005, provides stricter rules for imposing pre-trial detention, and introduces specific time limits for pre-trial detention, depending on the gravity of the crime. In the **Netherlands**, on 1 January 2005, the *Inspectie voor Sanctietoepassing* [Inspection for implementation of sanctions] was formally established. This inspection service is an independent supervisory body which will monitor the proper implementation of liberty depriving measures in facilities across the Netherlands.

Detention under the suspicion of terrorism

In the **United Kingdom**, the Prevention of Terrorism Act 2005 provides for the making of 'control orders' imposing obligations on individuals suspected of being involved in terrorism-related activity. 'Involvement in terrorism-related activity' for the purposes of the Act as: (a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates or is intended to facilitate the commission, preparation or instigation of such acts; (c) conduct which gives encouragement or is intended to give encouragement to the commission, preparation or instigation of such acts; (d) conduct which gives support or assistance to those known or believed to be involved in terrorism-related activity. The provisions of the Prevention of Terrorism Act 2005 apply regardless of whether these relate to specific acts or to terrorism in general. 'Control orders' are preventative orders which are designed to restrict or prevent the further involvement by individuals in such activity. A control order may impose any obligations necessary for purposes connected with preventing or restricting an individual's further involvement in terrorism-related activity. The intention is that each order will be tailored to the particular risk posed by the individual concerned. Obligations that may be imposed include prohibitions on the possession or use of certain items, restrictions on movement to or within certain areas, restrictions on communications and associations, and requirements as to place of abode. It will be possible to make control orders against any individuals suspected of involvement in terrorism-related activity, irrespective of nationality, or terrorist cause. Control orders that do not, in the opinion of the United Kingdom, involve derogating from Article 5 ECHR, called 'non-derogating control orders', will be made by the Secretary of State. The Secretary of State must seek permission from the court to make a non-derogating control order. However, in cases of urgency, the Secretary of State can make an order without first seeking the permission of the court but he must refer it immediately to the court for confirmation. Control orders that do involve derogating from Article 5 ECHR will be made by the court itself on application from the Secretary of State. Such control orders are called 'derogating control orders'. All control orders will be subject to full hearings by the High Court or Court of Session, involving the hearing of evidence in open and closed session with Special Advocates representing the interests of the individuals concerned in the latter, and with a right of appeal on a point of law. At a full hearing of a non-derogating order, the Court must consider whether

[127] *Kriminālprocesa likums* [*Criminal Procedure Law*], adopted 21 April 2005, in force since 1 October 2005, with amendments announced to 28 September 2005.

any of the following decisions of the Secretary of State were flawed: his decision that there are reasonable grounds for suspecting that the person was involved in terrorism-related activity; his decision that a control order is necessary for purposes connected with protecting members of the public from the risk of terrorism; and his decisions on the imposition of each of the obligations imposed by the order. The civil standard of proof will apply to the question of involvement in terrorism-related activity in hearings relating to derogating control orders. The tests which the court must consider when deciding if a derogating control order can be made are that it must appear to the court that: (a) there is material which (if not disproved) is capable of being relied on by the court as establishing that the individual is or has been involved in terrorism-related activity; (b) there are reasonable grounds for believing that the obligations in the control order are necessary for purposes connected with protecting members of the public from a risk of terrorism; (c) the risk in question arises out of or is associated with a public emergency in respect of which there is a designated derogation from all or part of Article 5 ECHR; and (d) that the obligations in the control order are of a description set out in the designation order. In full hearings on control orders, the court can quash the control order, modify the obligations which it imposes or, in the case of non-derogating control orders, give directions to the Secretary of State to revoke or modify the control order. A non-derogating control order will last for 12 months and may be renewed, while a derogating control order will last six months, unless it ceases to have effect but can also continue for more than six months if the court renews it. There is provision in the Act for the arrest and detention of an individual in respect of whom the Secretary of State is seeking a derogating control order. He may be arrested and detained for 48 hours in the first instance, with the possibility of the court extending the detention for a further 48 hours. A constable may arrest someone under this section if the Secretary of State has applied to the court for a derogating control order to be made and the constable considers that the individual's arrest and detention are necessary to ensure the individual is able to receive notice of the order when it is made. The constable must take the arrested individual to an appropriate 'designated place'. If it considers it necessary to ensure that the individual is available to receive any notice, the court may during the first 48 hours of such detention, extend the period of detention for up to a further 48 hours. The power of detention shall cease once a person becomes bound by a derogating control order (i.e. once it has been served) or once the court dismisses the application from the Secretary of State. Breach of an obligation imposed by a control order, without reasonable excuse, will be a criminal offence punishable, following conviction on indictment, with a prison sentence of up to 5 years, or a fine, or both; or, following summary conviction, to a prison sentence of up to 12 months (or 6 months in Scotland or Northern Ireland), or a fine, or both.

There is provision for an independent review of the operation of the Act, with the first review to be carried out after the Act has been in operation for nine months and subsequent reviews to be carried out annually, and for reports by the Secretary of State to Parliament every three months on his exercise of the control order powers during that period. Where a derogation is in place which has been approved by Parliament, further annual Parliamentary approval of the continuing need to rely on the derogation to make derogating control orders are required.

Non-derogating control orders are currently being used in respect of nine persons. All eleven persons formerly detained under the powers in the Anti-terrorism, Crime and Security Act 2001 were initially made subject to control orders but nine of them are now being held pursuant to deportation orders. The restrictions in the control orders in force involve an eighteen-hour curfew, limitations of visitors, meetings to those persons to be approved by the Home Office, no cellular communication or internet use and a geographical restriction on travel. They have been described as not falling far short of house arrest and as inhibiting normal life considerably (*First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005*, February 2006).

Deprivation of liberty of juvenile offenders

Article 37(b) of the Convention on the Rights of the Child provides that 'arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time'. Article 40, § 2 (b) (ii-iv) and (vii) of the

Convention on the Rights of the Child guarantee the right of the child 'to be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence'; 'to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians'; 'not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality'. Article 40 § 2, b), (vii), of the Convention on the Rights of the Child states that the child shall 'have his or her privacy fully respected at all stages of the proceedings'. According to Article 40 § 3 of the same instrument, 'States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular: (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law; (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected'. Although these provisions do not as such set a minimum age of criminal responsibility, the Network is struck by the fact that the age of criminal responsibility in the **United Kingdom** – 10 in England, Northern Ireland, Wales and the Isle of Man and 8 in Scotland – is manifestly too low. Indeed, this has been found to be incompatible with Article 17 of the European Social Charter by the European Committee of Social Rights (Conclusions XVII-2).

The specific needs and vulnerability of children must be taken into account in the definition of the conditions of detention of juvenile offenders who are sentenced to a deprivation of liberty. According to para. 38 of the United Nations Rules for the protection of juveniles deprived of their liberty, adopted by General Assembly resolution 45/113 of 14 December 1990, "Every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for return to society. Such education should be provided outside the detention facility in community schools wherever possible and, in any case, by qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty. Special attention should be given by the administration of the detention facilities to the education of juveniles of foreign origin or with particular cultural or ethnic needs. Juveniles who are illiterate or have cognitive or learning difficulties should have the right to special education". The United Nations Rules for the protection of juveniles deprived of their liberty also provide that an independent supervisory mechanism of places of detention of juvenile offenders should be set up : para. 72 of the Rules in particular state that 'Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative, and should enjoy full guarantees of independence in the exercise of this function. Inspectors should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to all juveniles and to all records of such facilities'.

Having regard to the rules that have been recalled, the Network reiterates its concern about certain aspects of the regime at the Federal Closed Centre in Everberg, established in **Belgium** by the Act of 1 March 2002. The Ethical Commission for Support to Young People in the French-speaking Community of Belgium delivered an opinion which concluded that the Act of 1 March 2002 establishing that centre created the conditions for a context that is first and foremost focused on security and repression, posing a major threat to the educational activity that might take place there. The Commission concluded that there was a structural infringement of Article 4(3) of the Ethical Code, which provides that the professional practices of social workers are not compatible with a context where emphasis is on security. Placing young people in that centre also constitutes a measure contrary to Article 2(2) of the Code, which imposes a choice of measures that are most conducive to a young person's development and present the best chance of success.

Article 10(3) of the International Covenant on Civil and Political Rights states that "Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status". As recalled by the Network in previous conclusions (Concl. 2005, p. 23), the lack of sufficient budgetary resources cannot constitute an excuse for not complying with this requirement, especially where the lack of space in specialized centres for juvenile offenders is not due to an exceptional, temporary, and unexpected rise in the number of juvenile offenders concerned, but is a structural phenomenon developing over a number of years. While the **United Kingdom** has made a reservation on this point both to the International Covenant on Civil and Political Rights and to the Convention on the Rights of the Child, allowing for children to be detained alongside adults where there is a lack of suitable accommodation in separate facilities should remain in force, the Network notes the position of the Joint Select Committee on Human Rights that the Government should establish a timetable for full provision of separate accommodation for children, and withdrawal of the reservation[128].

In accordance with these rules, and as recommended by the Committee of the Rights of the Child[129], **Denmark** should as a matter of priority review the current practice of solitary confinement, which should be resorted to only in the most exceptional cases ; it should also limit the period for which it is allowed and make progress towards the abolition of this practice. **Sweden** should ensure that a sufficient number of of prosecutors and judges are trained on children's issues ; that, following the necessary legislative amendments, punitive measures are taken only by judicial authorities, with due process and legal assistance[130]. It should also devise means to revert the trend in an increase of the number of children in pre-trial detention, and ensure that no child placed in pre-trial detention will be detained in prison facilities ill-equipped to meet the specific needs of children. Finally, a last specific concern with respect to **Sweden** is in the absence of fully independent inspectors who can conduct regular inspections of the facilities run by the National Board of Institutional Care, which is in violation of para. 72-74 of the 1990 UN Rules for the Protection of Juveniles deprived of their Liberty, cited above. The Network also encourages the **Czech Republic**, to reexamine the amendment to the Act on Execution of Institutional Care[131], which appears to allow the placement juvenile offenders sentenced to protective care, in the same establishments as children put in institutional care, who are orphans or who have been removed from their families because of the risk of abuse or because of the inability of their families to take care of them. Still other developments raise serious concerns. In **Poland**, according to the information provided by the Helsinki Foundation for Human Rights and the Ombudsman Office, the average period of the juveniles' stay at correctional institutions has increased in recent times. Moreover, the Network has been informed of some cases where the court makes decisions to send minors to correctional institutions following pressure from public opinion, where other measures, of an educational nature, should have been adopted instead. In **Ireland**, it was reported that 147 children, between the ages of 15 and 17, had been placed in adult prisons since the beginning of this year. The Network fully supports the efforts of the Ombudsman for Children to put an end to the practice of placing children in adult prisons, and it welcomes information according to which plans to end the practice of incarcerating children in the same institutions as adults were to be brought before the Cabinet shortly[132].

The Network also identified a number of positive developments during the period under scrutiny. In **Denmark**, the commission appointed in 1994 by the Danish government in order to revise the judicial system in Greenland advocated in its final report no. 1442/2004[133] that the arrest, detention and imprisonment of a child be used only as a last resort and for the shortest time possible ; it also

[128] *Review of International Human Rights Instruments*, HL 99/HC 264, 31 March 2005.
[129] CRC/C/15/Add.273 30 September 2005, available at : http://www.humanrights.dk/frontpage/RogM/reports/
[130] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 9.
[131] Zákon č. 383/2005 Sb., kterým se mění zákon č. 109/2002 Sb., o výkonu ústavní výchovy nebo ochranné výchovy ve školských zařízeních a o preventivně výchovné péči ve školských zařízeních a o změně dalších zákonů, ve znění pozdějších předpisů a další související zákony [Act No. 383/2005 Coll., amending the Act No. 109/2002 Coll.], amending Zákon č. 109/2002 Sb., o výkonu ústavní výchovy nebo ochranné výchovy ve školských zařízeních a o preventivně výchovné péči ve školských zařízeních a o změně dalších zákonů [Act No. 109/2002 Coll., on Execution of Institutional Care or Protective Care].
[132] *Ibid*.
[133] Betænkning nr. 1442/2004

emphasized that children must be separated from adult prisoners. It is also welcome that the the ministerial order (988:2004) regulating the detention of intoxicated youngsters states in section 12 that children below the age of 18 must not be detained together with adults. In **Latvia**, the new *Criminal Procedure Law* sets time limits for pre-trial detention depending on the gravity of the crime for juvenile offenders[134]. Moreover, the *Law On Application of Compulsory Measures of a Correctional Nature to Children*[135], which replaced the *Law On Application of Compulsory Measures of a Correctional Nature to Minors* on 1 January 2005, provides for more compulsory measures not involving deprivation of liberty. In the **Slovak Republic**, the *zákon o výkone trestu odňatia slobody* [Act on execution of punishment of imprisonment][136] came into force on 1 January 2006. According to the mentioned law, the accommodation space in cell or room should be at least 3.5 m² for a sentenced man and 4 m² for a sentenced woman or adolescent (according to former legal regulation all sentenced persons were entitled to 3.5 m² of space). It seems that the minimum space in cell or room for a sentenced man still does not reach the CPT´s recommendations that the legal standards should guarantee at least 4 m² per prisoner in multiply – occupancy (this recommendation is mentioned in the draft conclusions on Article 4 in connection with the report of CPT following its second periodic visit to Latvia).

Deprivation of liberty for foreigners pending their removal

The Network notes that in **Lithuania**, the Law on Foreigners Legal Status[137] does not define the maximum period during which foreigners may be detained and that, in practice, foreigners are frequently detained for a significant period until their deportation is practically arranged. Moreover, according to a decision adopted on 18 March 2005 by the Supreme Administrative Court[138], foreigners can be detained on the ground of deportation even if the execution of their deportation is suspended. Such a practice violates Article 5 of the European Convention on Human Rights. The Network also takes note of the judgment delivered by the European Court of Human Rights in the case of *Singh v. The Czech Republic* ((Appl. n° 60538/00) judgment of 25 January 2005), in which the **Czech Republic** was found to be in violation of Art. 5 of the European Convention on Human Rights for having detained for a period of two years and a half two non-nationals pending their extradition although the extradition could not take place in the absence of the adequate documentation. In the **United Kingdom**, it was held in *R (on the application of Khadir) v. Secretary of State for the Home Department* [2005] UKHL 39, [2005] 4 All ER 114 that paragraph 16 of Schedule 2 to the Immigration Act 1971 authorised detention so long as the Secretary of State remained intent upon removing a person liable to be removed and there was some prospect of achieving that, with the word 'pending' meaning no more than 'until'.

These situations call for the following comments. Under the Twenty Guidelines concerning forced return adopted by the Committee of Ministers of the Council of Europe, 'Detention pending removal shall be justified only for as long as removal arrangements are in progress. If such arrangements are not executed with due diligence the detention will cease to be permissible' (Guideline 7). This guideline reflects the case-law the European Court of Human Rights, under Article 5 of the European Convention on Human Rights, which recalled that 'any deprivation of liberty under Article 5 para. 1(f) ECHR will be justified only for as long as deportation proceedings are in progress. If such proceedings

[134] *Kriminālprocesa likums* [*Criminal Procedure Law*], adopted 21 April 2005, in force since 1 October 2005, with amendments announced to 28 September 2005. Section 278.
[135] *Likums Par audzinoša rakstura piespiedu līdzekļu piemērošanu bērniem* [*Law On Application of Compulsory Measures of a Correctional Nature to* Children], adopted 31 October 2002, in force since 1 January 2005, with amendments announced to 24 March 2005.
[136] *Zákon č. 475/2005 Z. z. o výkone trestu odňatia slobody a o zmene a doplnení niektorých zákonov* [Act no. 475/2005 Coll. on execution of punishment of imprisonment, amending and supplementing certain other laws].
[137] Įstatymas "Dėl užsieniečių teisinės padėties [Law on Foreigners Legal Status] Valstybės žinios, 2004, Nr. 73-2539
[138] 2005 03 18 Lietuvos Vyriausiojo administracinio teismo sprendimas Nr. N7-809-05 [18 March 2005 Lithuanian Supreme Administrative Court Decision No. N7-809-05] // www.lvat.lt

are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 para. 1(f)'[139], which also implies that when it appears that the removal of the person within a reasonable period is unrealistic, the detention ceases to be justified and release must follow[140]. In its inadmissibility decision of 2 June 2005 in the case of *Ntumba Kabongo v. Belgium* (Appl. No. 52467/99), the European Court of Human Rights concluded that Article 5 ECHR had not been violated only after stating explicitly that the government has clearly adopted the measures required for the removal of the applicant, with all due diligence; and it considered that a total detention of 10 months and a half was not unreasonable, insofar as the national authorities had not remained inactive during that period. The Human Rights Committee inteprets the requirements of Article 9 of the International Covenant on Civil and Political Rights in a similar fashion[141].

The Network notes in this regard that, under Article 8 para. 3 of the Proposal for a Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005) 391 final, of 1.9.2005): 'If enforcement of a return decision or execution of a removal order is postponed […], certain obligations may be imposed on the third country national concerned, with a view to avoiding the risk of absconding, such as regular reporting to the authorities, deposit of a financial guarantee, submission of documents *or the obligation to stay at a certain place*.' Insofar as the part of this paragraph which has been highlighted would allow for the detention of third-country nationals who are illegally staying in a Member State and thus are facing the threat of removal, it should be considered in violation of Article 5 of the European Convention on Human Rights and Article 9 of the International Covenant on Civil and Political Rights. Therefore, this provision should be modified in the course of the legislative procedure, and the draft Directive should clearly state in Article 14 para. 1 that temporary custody of third-country nationals against whom a removal order has been adopted may only be allowed for as long as removal arrangements are in progress, and that if such arrangements are not executed with due diligence the detention will cease to be permissible.

The Network is equally concerned by the provisions of the new Asylum Act, the Settlement and Residence Act and the Aliens Police Act adopted in **Austria**, which allow the Federal Asylum Office to commence accelerated deportation proceedings at any stage of the asylum proceedings, provided that a negative assessment is made on the claim to asylum based on a preliminary examination, and the person concerned has either been convicted by a court of law for a deliberately committed criminal offence or indicted by the public prosecutor for allegedly having committed a crime. While the first ground can be questioned for it does not distinguish according to the severity of the committed offence and thereby might affect persons having committed a petty crime in the same way as professional criminals, the second ground is problematic not only for reasons of proportionality but also for its interference with the presumption of innocence. Any suspicion about a criminal involvement of an asylum-seeker could put him or her at a very real risk of being detained.

Under Article 5 para. 4 of the European Convention on Human Rights, a person arrested and/or detained for the purposes of ensuring his/her removal from the national territory must be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she should be released immediately if the detention is not lawful. This is made further explicit by Guideline 9 of the Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe and, indeed, has also been stipulated in Article 14, para. 2-3, of the draft Directive of the European Parliament and the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005) 391 final, of 1.9.2005). The Network regrets that in **Latvia**, the judicial review available to the third-country national who is deprived of his liberty lacks the required effectiveness, as the rights of the person concerned in the course of that procedure are not clearly defined, and as in practice the right to legal

[139] Eur. Ct. HR, *Chahal v. the United Kingdom*, judgment of 15 November 1996, para. 113.
[140] Eur. Commiss. HR, *Caprino v. the United Kingdom*, Appl. No. 6871/75, dec. of 3 March 1978, *YB ECHR*, 21, p. 285, 295-296 (and *DR*, 12, p. 14).
[141] See e.g., communication No. 794/1998, *Jalloh v. the Netherlands*, final views of 23 March 2002; and Concluding Observations relating to the United Kingdom, (2001) UN doc. CCPR/CO/73/UK, para. 16.

assistance appears difficult to exercise due to the limitations imposed on the contacts with the outside of those detained in the *Olaine* camp for detention of illegal immigrants. It would appear moreover, that the State provides no legal assistance or exemption from fees for legal assistance for detained aliens. Finally, in several cases, detainees appear to have been denied the right to get acquainted with documents related to their detention, as the documentation is kept in the central office of the State Border Guard, not in the *Olaine* detention camp. This renders in practice the right to challenge the detention ineffective. The Latvian authorities are urged to remedy this situation at the earliest time possible.

Deprivation of liberty of asylum-seekers

Under Article 17(1) of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326 of 13.12.2005, p. 13), the Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. This rule complements the rules enunciated in Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylumseekers in the Member States (OJ L 31 of 6/2/2003, p. 18), which already provided that on "when it proves necessary, for example for legal reasons or reasons of public order", should Member States be authorized to confine an applicant to a particular place in accordance with their national law (§ 3). Article 17 of the Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status and Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the Member States should be read in accordance with Recommendation (2003)5 adopted on 16 April 2003 by the Committee of Ministers of the Member States of the Council of Europe on measures for the detention of asylumseekers. According to this Recommendation, measures of detention of asylum seekers may be resorted to only in the following situations: when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained; when a decision needs to be taken on their right to enter the territory of the state concerned, or when protection of national security and public order so requires.

In **Lithuania**, Courts normally do not detain foreigners granted temporary territorial asylum (i.e., asylum seekers) and foreigners' families with children. On 6 May 2005 the Supreme Administrative Court in its decision[142] stated that the foreigner granted temporary territorial asylum should not be detained on the ground of illegal stay in Lithuania. On 13 July 2005 the Supreme Administrative Court in its decision[143] stated that the foreigners' family with children should not be detained if their identities were established and they did not constitute threat to national security and public order in Lithuania.

The Network notes that in **Austria**, the Austrian Peoples Party *(ÖVP),* the Freedom Party *(FPÖ)* and the Social Democratic Party (*SPÖ),* approved in July 2005 the new "Aliens Law Codification" (*Fremdenrechts paket*), introducing in particular the new Asylum Act, the Settlement and Residence Act and the Aliens Police Act which entered into force in January 2006[144]. The Network is concerned about the provisions of this legislation which empower the aliens police to detain asylum-seekers even prior to a negative decision at first instance, provided only that a procedural notice is issued by the

[142] 2005 05 06 Lietuvos Vyriausiojo administracinio teismo sprendimas Nr. N62-962-05 [6 May 2005 Lithuanian Supreme Administrative Court Decision No. N62-962-05] // www.lvat.lt

[143] 2005 07 13 Lietuvos Vyriausiojo administracinio teismo nutartis Nr. N6-1514-05 [13 July 2005 Lithuanian Supreme Administrative Court Decision No. N6-1514-05] // www.lvat.lt

[144] Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird, ein Asylgesetz 2005, ein Fremdenpolizeigesetz 2005 und ein Niederlassungs- und Aufenthaltsgesetz erlassen, das Bundesbetreuungsgesetz, das Personenstandsgesetz, das Bundesgesetz über den unabhängigen Bundesasylsenat, das Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991, das Sicherheitspolizeigesetz, das Gebührengesetz 1957, das Familienlastenausgleichsgesetz 1967, das Kinderbetreuungsgeldgesetz und das Tilgungsgesetz 1972 geändert werden sowie das Fremdengesetz 1997 aufgehoben wird (Fremdenrechtspaket 2005), Federal Law Gazette (BGBl.) 100/2005.

Federal Asylum Authority during the admissibility proceedings stating that the application for international protection is likely to be rejected or dismissed (section 29 para. 3 Asylum Act 2005), while such procedural notice is not subject to a separate appeal (section 76 para 2 Aliens Police Act). In **Luxembourg,** bill no. 5437 on the right to asylum and to complementary forms of protection, which is currently under discussion in the House of Representatives, contains a provision (Article 10) which simply stipulates that 'the applicant may, by a decision of the Minister, be placed in a closed structure for a maximum period of three months'; this period may be extended three times by one month up to a total period of six months. This formulation is particularly vague and does not in any way define the conditions justifying a deprivation of liberty.

Article 7. Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

The Network notes that this provision of the Charter must be read in accordance to the requirements formulated by Article 17 of the International Covenant on Civil and Political Rights (1966), Article 16 of the Convention on the Rights of the Child and Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). With respect to the right to family reunification, moreover, the Network also takes into account Article 19(6) of the European Social Charter (1961) or the Revised European Social Charter (1996), under which the Parties undertake to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory.

The right to respect for private life

Criminal investigations and the use of special or particular methods of inquiry or research

In its Recommendation Rec(2005)10 to the member states of the Council of Europe on "special investigation techniques" in relation to serious crimes including acts of terrorism, which it adopted on 20 April 2005 at the 924th meeting of the Ministers' Deputies, the Committee of Ministers of the Council of Europe emphasized that, where they intend to use such investigation techniques, the Member States should, in accordance with the requirements of the European Convention on Human Rights, define in their national legislation the circumstances in which, and the conditions under which, the competent authorities are empowered to resort to the use of special investigation techniques (para. 1). It also recommended the adoption of appropriate legislative measures to ensure adequate control of the implementation of special investigation techniques by judicial authorities or other independent bodies through prior authorisation, supervision during the investigation or ex post facto review (para. 3). As to the conditions of use of such techniques, the Committee of Ministers stated that:

1. Special investigation techniques should only be used where there is sufficient reason to believe that a serious crime has been committed or prepared, or is being prepared, by one or more particular persons or an as-yet-unidentified individual or group of individuals.

2. Proportionality between the effects of the use of special investigation techniques and the objective that has been identified should be ensured. In this respect, when deciding on their use, an evaluation in the light of the seriousness of the offence and taking account of the intrusive nature of the specific special investigation technique used should be made.

3. Member states should ensure that competent authorities apply less intrusive investigation methods than special investigation techniques if such methods enable the offence to be detected, prevented or prosecuted with adequate effectiveness.

4. Member states should, in principle, take appropriate legislative measures to permit the production of evidence gained from the use of special investigation techniques before courts. Procedural rules governing the production and admissibility of such evidence shall safeguard the rights of the accused to a fair trial

The Network welcomes the protection of the right to respect for private life by the Supreme Court of **Cyprus**, in the case of *Phylakti Aristodimou v Attorney-General of the Republic* which it decided on 7 June 2005 (Civil Appeal number 11760). It would emphasize that the notion of 'improper behavior' in Regulation 8 (1) of the *Police (Disciplinary) Regulations of 1989*[145] should be interpreted in accordance with the requirements of Article 8 of the European Convention on Human Rights, and that, as already indicated in the Supreme Court decision of *Andreas F. Grigoriou v Republic case* of 7 May 1996 (Application 375/95), the notion of private life encompasses the choice of a person to share an intimate relationship with another person, without being limited to the modalities of exercise of that choice which are compatible with the moral views of the community in any given society at any given time. Another welcome development concerns **Poland**. The judgment delivered on 20 June 2005 by the Constitutional Tribunal on the motion of the Ombudsman concerning the Act on tax control[146] appropriately recalls the limits imposed to the investigatory and surveillance powers of the tax authorities by Article 8 of the European Convention on Human Rights, and expresses doubts about the amendment of the said Act[147] authorizing the tax intelligence personnel to monitor and register images and sounds of events taking place in public locations using technical devices. The Network also shares the doubts expressed by the Constitutional Tribunal about the provisions concerning subscriber identification, which should be allowable only in cases concerning crime prevention or detection. Finally, the Network welcomes the establishment in the **Slovak Republic**, by Resolution no. 1500 of 9 February 2005 of the National Council of the Slovak Republic, of the *Výbor na kontrolu použitia informačno-technických prostriedkov* [Committee for oversight of use of information and technical means] the main task of which is to perform oversight activities resulting from the *zákon o ochrane pred odpočúvaním* [Act on protection against tapping][148]. In **Belgium,** judgment no. 202/2004 delivered on 21 December 2004 by the Court of Arbitration (Constitutional Court) partly annulled the Act of 6 January 2003 on special investigation methods by emphasizing the control that must be exercised by an independent and impartial judicial officer – the examining magistrate rather than the public prosecutor – over the recourse to measures that constitute a serious infringement of privacy, such as surveillance by technical means in order to gain a view inside a house, or 'discreet visual checks', an investigation method whereby the police services 'enter private premises without the knowledge of the owner, his claimant or the occupant, or without the consent of those persons'. A new bill on special investigation methods was tabled by the government in the House of Representatives on 28 October 2005 in order not only to draw conclusions from that judgment, but also to improve the investigation methods used in the fight against terrorism and serious and organized crime.

Having noted the judgment delivered by the European Court of Human Rights (4th sec.) in the case of *Sallinen* (Appl. n° 50882/99), the Network encourages **Finland** to amend the Code of Judicial Procedure in order to clarify the conditions under which correspondence between a lawyer and his client is privileged. It also encourages **France** to improve the quality of the national law relating to phone tapping and bugging, bearing in mind the lessons learnt from the *Matheron* (Appl. No. 57752/00) and *Vetter* (Appl. No. 59842/00) judgments delivered on 29 March 2005 and 31 May 2005 respectively by the European Court of Human Rights.

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[145] *Περί Αστυνομίας (Πειθαρχικοί) Κανονισμοί του 1989.*

[146] Ustawa z dnia 28 września 1991 r. o kontroli skarbowej (Dz.U. z 1991 r. nr 100, poz. 442 z późn.zm.) [The Act of 28 September 1991 on Tax control (The Official Journal of 1991, No. 100, item 442 with further amendments)

[147] Ustawa z dnia 19 marca 2004 r. o zmianie ustawy - Ordynacja podatkowa oraz o zmianie ustawy o kontroli skarbowej (Dz.U. z 2004 r. nr 91, poz. 868) [The Act of 19 March 2004 amending the act on the law on taxes and tax control (The Official Journal of 2004, No. 91, item 868)

[148] *Zákon č. 166/2003 Z. z. o ochrane súkromia pred neoprávneným použitím informačno-technických prostriedkov a o zmene a doplnení niektorých zákonov (zákon o ochrane pred odpočúvaním)* [Act no. 166/2003 Coll. on protection of privacy against unauthorized use of information and technical means (Act on protection against tapping)].

Answers to the threat of terrorism

A number of Member States have been recently examining whether the powers of their law enforcement authorities should be extended in order to more effectively combat the threat of terrorism. In **Denmark,** the working group established by the Government to identify the answers which could be given to the threat of terrorism published its report in November 2005 (*Det danske samfunds indsats og beredskab mod terror*), making a number of recommendations including an increase of the powers of law enforcement authorities and of the surveillance of citizens in public places. While the Network welcomes the fact that the government has not retained the proposal to scan telephone use in entire apartment buildings, the possibility to get access to information for the intelligence service which telephone companies possess without court order, would appear to have been maintained. An improved effort to hire and pay civil informants was also recommended. The Network comments on this latter recommendation in its conclusions adopted under Article 48 of the Charter. In **Sweden**, while new regulations are being developed dealing with the use of secret surveillance techniques, the Commission of inquiry which has been commissioned by the Government to evaluate the question of whether, and if so when, the resources of the Police need to be complemented with contributions from other public authorities in order to be able to prevent and combat crime (including terrorist attacks) presented its report SOU 2005:70, *Polisens behov av stöd i samband med terroristbekämpning*, (Government Report SOU 2005:70, The Need of Support for the Police in Connection with the Fight of Terrorism) on 31 August 2005. The Commission arrived at the conclusion that the resources of the Police are sufficient for several kinds of terrorist attacks, but not all. It proposed therefore that, when needed, requests should be made for support to prevent, investigate or in other ways intervene in such crimes that are covered by the Act on punishment of terrorist crimes (SFS 2003:148) (*lag om straff för terroristbrott* (SFS 2003:148)) and that are especially difficult to handle. According to the proposed new legislation (*lag om stöd till Polisen i samband med bekämpning av terrorism och annan liknande svår brottslighet*) support can be given in the form of intelligence and other information services as well as in the form of equipment, transportation and human resources.

In these debates, the Member States have a common interest in identifying how the adoption of effective counterterrorism measures may be best reconciled with the requirements of fundamental rights. In this regard, the Network notes with interest the view expressed by the Commission in its Communication concerning 'Terrorist recruitment: addressing the factors contributing to violent radicalisation' (COM(2005) 313 final, of 21.9.2005) that 'More preventive work in the area of counter-terrorism should be encouraged across Member States, along with further cooperation between operational, intelligence and policy levels. The Commission urges Member States that have already attained good results to share their experiences and best practices with others via EU structures' (at para. 2.5.). Such mutual learning in the conciliation between counter-terrorism strategies and compliance with fundamental rights could be generalized, and further developed, beyond the prevention of radicalization and of recruitment in terrorist organizations. Mutual learning and the sharing of experiences should concern not only how best to tackle to phenomenon of terrorism, but also how best to improve the protection of fundamental rights in that strategy, in order to avoid an imbalance according to which, while the national authorities would be encouraged to make progress in combating the terrorist threat by the most effective means possible, they would not be equally incentivized to ensure that fundamental rights are protected under that strategy.

The fight against terrorist financing

An effective fight against terrorist financing involves the development of information exchange, strengthening of judicial and police cooperation, improving the traceability of transactions and the transparency of the financial system, the operating modalities and the activities of legal entities, as well as promoting the exchange of information. The recommendation voted by the European Parliament on 7 June 2005[149] reminds Member States of the importance for the achievement of that objective of the ratification of the Protocol of 29 May 2000 to the Convention on Mutual Assistance in

[149] 2005/2065 INI.

Criminal Matters between the Member States of the European Union and the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, as well as the full transposition of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism and Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. At the same time, the Network points out that the European Parliament rightly stresses the necessity of "counterbalancing [initiatives aimed at reinforcing the fight against the financing of terrorism] by binding data protection legislation, in compliance with Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental Rights, in order to prevent the development of a society whose hallmark is surveillance" (para. L).

Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[150] implements the Hague Programme on one important point. This instrument takes into account the fact that terrorism can be financed by criminal means, such as drug trafficking, as well as by lawful means, such as through charitable channels. This Directive adds terrorist financing to money laundering, which was already covered by Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering[151]. The Commission proposal sought in this case to sum up the eight special recommendations of the Financial Action Task Force on Money Laundering (FATF) concerning terrorist financing and the forty FATF recommendations that were revised in 2003. The scope of the text has been extended to cover two more professions, namely life insurance intermediaries and trust and company service providers, and reinforces the obligations of vigilance incumbent on certain professions, as well as the obligations of customer identification. Terrorist financing has thus been included in the scope of the text and is distinguished from money laundering (which presupposes an illicit origin), unlike in the Commission proposal.

The Preamble of Directive 2005/60/EC asserts that "this Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union. Nothing in this Directive should be interpreted or implemented in a manner that is inconsistent with the European Convention on Human Rights" (48th Recital). From the perspective of the right to respect for private life, the main difficulty lies in the fact that lawyers are not allowed to inform their clients of declarations of suspicions. The text of Directive 2001/97/EC amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering had already imposed on lawyers the obligation to make a declaration to the relevant financial intelligence unit if they suspect their clients of engaging in money laundering activities. The imposition of this obligation on lawyers raised the question of the compatibility of such a declaration with professional secrecy, which the national transposition measures had arranged after a fashion. It also allowed Member States to authorize lawyers to inform their clients that they will make or have made a declaration of suspicion to the financial intelligence unit. France made use of this possibility when it transposed the Directive. The Directive now removes this possibility despite the recommendation to the contrary of the rapporteur to the European Parliament in the name of the right of lawyers to confidentiality[152].

The Network recalls in this respect the action brought on 22 July 2004 with the Court of Arbitration (Constitutional Court) by the French-speaking and German-speaking Bar Association and the Bar of Brussels for the partial annulment of the Act of 12 January 2004 amending the Act of 11 January 1993 on prevention of the use of the financial system for the purpose of money laundering, the Act of 22 March 1993 on the legal status and supervision of credit institutions, and the Act of 6 April 1995 on the legal status and supervision of investment firms, on intermediaries and investment advisers. The purpose of this Act was to transpose into Belgian law the above-mentioned Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001.

[150] OJ L 3 309 of 25.11.2005, p. 15. For the initial Commission proposal, see COM(2004) 448 of 30.6.2004.
[151] OJ L 166 of 28.6.1991, p. 77. Directive amended by Directive 2001/97/CE of the European Parliament and of the Council (OJ L 344 of 28.12.2001, p. 76).
152 Report H. Nassauer, A6-0137/2005.

The action for annulment claims the violation of Article 6 of the European Convention on Human Rights, the general legal principles relative to the rights of the defence, Article 6(2) of the Treaty on European Union and Article 48(2) of the Charter of Fundamental Rights of the European Union, resulting from the fact that Article 4 of the Act of 12 January 2004 makes the Act of 11 January 1993 applicable to lawyers, imposing on them the obligation to inform the President of the Bar Association to which they belong if facts come to their notice that they know or suspect are connected with money laundering. The applicants claim that this is contrary to the basic principles of the independence of lawyers and professional secrecy, which constitute the hard core of the rights of the defence as enshrined the aforementioned provisions. The action for annulment is also directed against Article 31 of the challenged Act, which amends Article 19 of the Act of 11 January 1993. The remedy is based on the violation of Articles 10 and 11 of the Constitution, Article 6 of the European Convention on Human Rights, the general legal principles relative to the rights of the defence, and Article 48(2) of the Charter of Fundamental Rights of the European Union. Article 31 of the Act of 12 January 2004 extends the scope of Article 19 of the Act of 11 January 1993 to cover lawyers and presidents of the bar associations, thus enjoining on them the absolute prohibition of informing the client concerned that information has been passed on to the Financial Intelligence Processing Unit (CTIF) or that an investigation into money laundering is under way. According to the applicants, the extension of this prohibition of *tipping off* conflicts with the right of defence guaranteed by the provisions referred to in the remedy and constitutes an unjustified and therefore discriminatory assimilation of lawyers to the other professions targeted by the Act. The third remedy of the action, founded on the violation of the same provisions as those invoked in the second remedy, is directed against Article 27 of the challenged Act, which replaces Article 15(1) of the Act of 11 January 1993, and provides that the CTIF can request a lawyer who has made a declaration of suspicion to directly communicate all additional information it considers useful to the accomplishment of its mission. By not providing for the intervention of the president of the bar association when the CTIF requests additional information, the Act infringes the professional secrecy of the lawyer and therefore the rights of the defence. This situation offers insufficient protection and constitutes a form of discrimination and an infringement of the principles and provisions referred to in the remedy. The fourth remedy is based on the violation of the same provisions as in the second and third remedies. Article 48(2) of the Act of 11 January 1993 as amended by Article 30(2) of the Act of 12 January 2004 allows every employee of a law firm to personally pass on information to the CTIF whenever the 'normal' procedure cannot be followed. The employee is therefore induced to act alone and on his own initiative, which represents an obvious infringement of professional secrecy and of the principles of the provisions referred to in the remedy.

By judgment no. 126/2005 of 13 July 2005, the Court of Arbitration decided to refer the following question to the Court of Justice of the European Communities for a preliminary ruling: "Does Article 1(2) of Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering infringe the right to a fair trial as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and consequently Article 6(2) of the Treaty on European Union, in that the new Article 2b(5) which it incorporated in Directive 91/308/EEC imposes the inclusion of members of the independent legal professions, without excluding the profession of lawyer, in the scope of application of that same Directive which, in substance, is aimed at imposing on the persons and establishments targeted by it an obligation to inform the authorities responsible for combating money laundering of any circumstance that could serve as an indication of such laundering (Article 6 of Directive 91/308/EEC, replaced by Article 1(5) of Directive 2001/97/EC)?" The question is currently pending.

Voluntary termination of pregnancy

The Network recalls the view it adopted in its Opinion n° 4-2005 according to which, under the current state of international human rights law, the right to seek the interruption of pregnancy must be recognized to women where the continuation of pregnancy would seriously threaten their health. Where the regulation of abortion is too restrictive, especially where abortion is made criminal in all

circumstances or only with too narrow exceptions, the practice of illegal abortions performed in unsafe conditions may threaten the right to life, guaranteed in particular under Article 6 of the International Covenant on Civil and Political Rights, as amply confirmed in the case-law of the Human Rights Committee, and as reinforced by the views of the UN Committee on Economic, Social and Cultural Rights, which has expressed its concern over the relationship between high rates of maternal mortality and illegal, unsafe, clandestine abortions, noting that restrictive abortion laws contribute significantly thereto. The Network also notes that, according to the Human Rights Committee, denying to a woman the effective possibility to abort in circumstances where abortion is lawful under the regulations of the State concerned may moreover amount to the infliction of an inhuman and degrading treatment, in the meaning of Article 7 of the International Covenant on Civil and Political Rights. This, which the Human Rights Committee has already recognized on previous occasions, has been confirmed recently in the case of *Karen Llontoy v. Peru*[153].

The debate is ongoing in the Member States whose abortion laws are most restrictive. In **Ireland,** the Irish Human Rights Commission, in its submission to the CEDAW Committee, proposed the Government introduce legislation aimed at regulating the circumstances when it would be lawful in this state for a woman to obtain abortion services. An application filed against Ireland is pending before the European Court of Human Rights, in which the applicant, an Irish woman, claims that the State's failure to provide adequate abortion services or information in relation to pregnancies affected by a lethal foetal abnormality constituted a violation of a number of her rights under the European Convention on Human Rights, including her rights not to be subject to inhuman and degrading treatment, her right to privacy and family life, to receive information and to non-discrimination. Irish law on the voluntary termination of pregnancy remains unsatisfactory as the basic provisions contained in Article 40.3.3 of the Irish Constitution depend unduly on judicial interpretation in the absence of clarifying legislation or further constitutional amendment. In the case of *Alicja Tysiąc*, currently pending before the European Court of Human Rights (Appl. N° 5410/03), the applicant alleges the violation by **Poland** the European Convention on Human Rights due to the lack of an effective means of appeal against the decision of a doctor, who refused to perform an abortion for health reasons, which resulted in the applicant becoming a category 1 disabled person due to loss of eyesight. The case presents the Court with the question of whether a State party to the Convention that allows abortion in certain circumstances in its laws, but fails to adopt effective regulations, procedures and policies to ensure the availability and accessibility of legal services, thereby rendering women's right to abortion ineffective in practice, violates its obligations under Articles 3, 8, 13, and 14 of the European Convention. Other developments in this State illustrate that the problem is not limited to certain marginal cases. On 14 June 2005, the Minister of Health appointed a supervisory group in connection with the case concerning the death of a resident of Piła, who lost her life as a result of a doctor's refusal to perform a necessary examination due to the risk of miscarriage. The group's task will be to examine all the circumstances and to explain the cause of this woman's death in connection with the violation of the Act on family planning, human embryo protection and conditions of permissibility of abortion. The Supreme Court considered the cassation appeal concerning a disability pension for a girl who was born seriously ill following the doctors' refusal to conduct pre-natal examinations and give her mother an abortion due to serious damage to the foetus : in its decision of 14 October 2005, the Court considered that the refusal of an abortion constituted a violation of the law and granted compensation to the parents. Despite the fact that Polish legislation allows for an abortion to be performed in situations specified in Article 4a of the Act of 7 January 1993 on family planning, human embryo protection and conditions of permissibility of abortion[154] there are cases of refusals to perform an abortion in Poland in circumstances where an abortion is legal. According to the information obtained at the Ministry of Health, 193 abortions were performed in 2004 in accordance with the above-mentioned Act and accordingly 174 and 159 such acts in 2003 and 2002. According to the data presented by the Polish Government to the Human Rights Committee, 50 000 – 70 000 illegal

[153] Communication n° 1153/2003, *Karen Noelia Llantoy Huamán v. Peru,* final views of 17 November 2005 (CCPR/C/85/D/1153/2003).

[154] Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego oraz warunkach i dopuszczalności przerywania ciąży (Dz.U. Z 1993 r. nr 154, poz. 1792) [The Act of 7 January 1993 on family planning, human embryo protection and conditions of permissibility of abortion (The Official Journal of 2003, No. 154, item 1792)]

abortions are performed in Poland each year[155].

In **Latvia**, the *Sexual and Reproductive Health Law*[156] regulates termination of pregnancy, allowing termination of pregnancy at a woman's request prior to the 12th week of pregnancy after a gynaecologist (childbirth specialist) or a general practitioner has informed the woman of the nature of pregnancy termination. Before 2005, the law also required that women be provided with written information approved by the Minister for Health on the moral aspects of pregnancy termination, possible medical complications, and the possibility to preserve the life of the unborn child ; the informative leaflet prepared by the Ministry of Health was sharply criticized however, by the Latvian Association of Gynecologists and Childbirth Specialists, as well as by the Latvian Association for Family Planning and Sexual Health *Papardes zieds* for its biased content. While the removal of an obligation to be provided with this information, considering the specific content of the information which was delivered, may be considered a positive development, the Network is concerned that in **Latvia,** if a pregnant woman is younger than 16 years, the doctor who establishes the fact of pregnancy must inform the parents or guardian of the woman regarding the fact of pregnancy, and may only perform the abortion requested if at least one of her parents or a guardian has given written consent for termination, also in the case of rape or where abortion is recommended for medical reasons. While noting that the Orphans' Court may allow the termination of the pregnancy if there is any dispute between a patient younger than 16 years and her parents or her guardian regarding preservation of the pregnancy[157], the Network is concerned that the existence of such a provision could deter a pregnant woman under 16 from addressing a doctor in case of pregnancy for fear of problems in the family, and to seek illegal termination. The woman concerned should be authorized to seek abortion either with consent of the parents or guardian, or with an authorization of the Orphans' Court, and the parents or guardian should not be systematically notified of the request she has made. In **Sweden,** the Official Government Report on the modification of the Swedish Abortion Act includes a chapter on the significance of free access to contraceptives as well as safe abortion services for the reproductive health of women[158].

As this brief overview of the developments in the period under scrutiny shows, this is an area which is not settled, and in which the legislation and policies of the Member States are in continuous evolution. Moreover, abortion services are services in the meaning of Article 49 EC, which implies that the national law of each Member State may be in practice ineffective, or unable in fact to achieve its asserted objectives, due to the possibility for the person seeking to have access to this medical service to seek abortion in another Member State. This is also an area where certain legislations, due to the way in which they are applied, may produce unintended effects (a tightening of the law concerning abortion encouraging the practice of illegal abortions, potentially dangerous for health, for example). In the view of the Network, while the different approaches adopted by the Member States on this issue are legitimate and deserve to be respected within the limits recalled above, it may be recommended to launch a process of collective learning through exchange of experiences in this field, which would allow each State to benefit from the experience gained by the other Member States in the regulation of abortion.

Right to respect for family life

Protection of family life

A number of positive developments which occurred in this area during the period under scrutiny deserve to be highlighted :

[155] As stated in the abridged minutes from the 2240th session of the Human Rights Committee, Geneva, 27 October 2004

[156] *Seksuālās un reproduktīvās veselības likums* [*Sexual and Reproductive Health Law*], adopted 31 January 2002, in force since I July 2002, with amendments announced to 12 October 2005.

[157] *Seksuālās un reproduktīvās veselības likums* [*Sexual and Reproductive Health Law*], adopted 31 January 2002, in force since I July 2002, with amendments announced to 12 October 2005, Section 27.

[158] SOU 2005:90 (del 1), p. 63 ff.

• The Network welcomes the publication in **Denmark** of the final report no. 1442/2004[159] of the commission appointed in 1994 by the Danish government in order to revise the judicial system in Greenland. The establishment of an institution for preventive custody in Greenland so that these convicted individual can serve their sentence in Greenland instead of Denmark will ensure a better protection of the right to family life, although the Network is concerned that the implementation measures have not been adopted yet, and also expresses the hope that in the future Greenlanders who are serving sentence at the present in Denmark will be brought to Greenland. The commission also underlined the requirement of proportionality in relation to the sentencing of indefinite imprisonments.

• In **Ireland,** in October 2005, a new Practice Direction was issued by the President of the High Court, Finnegan P., on family law proceedings. The objective of the direction is to ensure that proceedings are determined in a way that is fair, just and cost effective. An important aspect of the Practice Direction is that proceedings initiated in the High Court should be concluded within one year of the initiation of those proceedings. Another important component of the direction is that the parties should be given the opportunity to enter into discussion at the earliest possible opportunity.

• In **Ireland,** the Minister of State for Children announced plans to introduce legislation which would strengthen the position of parents who give children up for adoption, vis-à-vis access to the children, giving natural mothers and fathers and enforceable right to maintain contact with their children, should they so desire. While the announcement of plans to make provision for open adoptions is a welcome step, the delay with operationalising these plans may be a ground for concern.

• In **Latvia,** amendments to the *Sentence Enforcement Code* came into force on 9 December 2004[160], containing some provisions liberalising contacts with the outside world for convicted persons, e.g., entitling convicted juveniles to up to 12 long-term visits by relatives for 36-48 hours yearly, whereas such entitlement was previously granted only to convicted adults. The Network regrets however that by the end of 2005 no facilities for long-term visits had yet been set up in the Cēsis Correctional Facility for boys, thus ruling out the possibility to implement this provision.

• In the **Netherlands,** in a judgment of 27 May 2005, the *Hoge Raad* [Supreme Court] ruled that in the light of the right of access to court a father may, on his own, institute proceedings to apply for joint parental authority with the mother over their child. Prior to this judgment, the standing court practice was that a judge could only assign joint parental authority on the basis of a joint application of the parents; a sole application of the father would not be sufficient. The Supreme Court ruled that this interpretation of the relevant provision (Article 1:252 of the Civil Code) is incompatible with the father's right to access to court in order to claim the protection of his right to 'the exercise of parental rights', as enshrined in Article 8 ECHR (LJN AS7054).

• In **Poland**, the amendment of the Act on aliens and granting protection to aliens on the territory of the Republic of Poland[161] provided for the expansion of the scope of granting permission to stay for a limited period to aliens married to Polish citizens and aliens who came to Poland to reunite with their family.

As regards the interference with the right to respect for family life which results from the removal of the child from his or her family in circumstances where it is feared that the child may be at risk of abuse or ill-treatment, the Network recalls, first, that during its consideration of the report submitted by **Sweden** under the UN Convention on the Rights of Children in 2005, the Committee on the Rights of the Child expressed its concern about the increase in number of children placed in institutions rather

[159] Betænkning nr. 1442/2004

[160] Likums *Grozījumi Sodu izpildes kodeksā* [Law *Amendments to the Sentence Enforcement Code*], adopted on 11 November 2004, in force since 9 December 2004.

[161] Ustawa z dnia 22 kwietnia 2005 r. O zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw (Dz.U. Z 2005 r. Nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

than foster homes; about the fact that the proportion of children with a foreign background who are placed in institutions is higher than that of Swedish children ; and about the fact that the National Board of Institutional Care has a self-regulatory role (see above the concern expressed by the Network regarding the absence of fully independent inspectors who can conduct regular inspections of the facilities run by the National Board of Institutional Care).The Committee therefore recommended that: "a) preventive measures specifically targeted at families with a foreign background be taken, including awareness-raising within social services about the relevance of cultural background and immigrant status, so that help can be given before a situation develops that necessitates the taking of children into care; b) the regulation of cases where children are taken into care against their will take place under a separate umbrella from that of the National Board of Institutional Care, and that this regulation also ensures the quality of care"[162]. The Network also notes that, in its conclusions concerning **Sweden** under Article 17 of the Revised European Charter, while concluding that this country was not in violation of that provision, the Committee emphasized that in order to comply with Article 17 § 1 of the Revised Charter "children placed in institutions should be entitled to the highest possible degree of satisfaction of their developing emotional needs and their physical well-being as well as to special protection and assistance. In order to be considered as adequate institutions, they shall provide a life protecting human dignity for the children placed there and shall provide conditions promoting their growth, physically, mentally and socially. A special unit in a child welfare institution shall be set up to resemble the home environment and it should not accommodate more than 10 children"[163].

Right to family reunification

In its previous conclusions (Concl. 2004, pp. 28-29 ; Concl. 2005, p. 48), the Network recalled that, in the implementation of Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3.10.2003, p. 12), the Member States are bound to respect the Charter of Fundamental Rights and the other fundamental rights which belong to the general principles of Union law. The Network therefore invited the Commission to monitor closely the implementation measures adopted by the Member States, insofar as Directive 2003/86/EC – which fails to recognize the distinction between family reunification as a right protected under Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights and family reunification as a humanitarian measure granted by the State concerned – contains a number of important exceptions to the principle of family reunification, the invocation of which by the Member States could be in conflict with their obligation to comply with fundamental rights. Whether or not the conditions for family reunification as defined by Directive 2003/86/EC are satisfied, the Member States must grant a right to family reunification where this is required under Article 8 of the European Convention on Human Rights.

Similarly, Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States[164], which recognizes a right to family reunification as an aspect of the right of citizens of the Union and their family members to move and reside freely on the territory of the Member States, should be interpreted in accordance with the requirements of the Charter of Fundamental Rights. The Network has already noted that the definition of the 'spouse' in Article 2(2) of this instrument should take into account the Article 21 of the Charter, as well as Article 14 of the European Convention on Human Rights, read in conjunction with the right to respect for family life recognized under Article 8 of this instrument. As recalled by the Network in its Opinion n°1-2003 delivered on 10 April 2003, a Member State would be creating a direct discrimination based on sexual orientation if it refused to recognize as a 'spouse' the spouse of the same sex as the citizen of the Union wishing to move to that State, validly married under the laws of the Member State of origin (see also Concl. 2005, p. 130).

[162] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 6.
[163] Council of Europe, European Committee of Social Rights, Conclusions 2005 (Sweden), p. 10, www.coe.int
[164] Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (JOJ L 158 of 30.4.2004, p. 77).

It is therefore particularly important that in implementing these instruments, the Member States remain aware of their obligations under international human rights law. The Network notes, for instance, that in the case of *Tuquabo-Tekle v. the Netherlands* (Appl. No. 60665/00), on which it delivered a judgment on 1 December 2005, the European Court of Human Rights clearly indicated that the fact that a person had delayed making an application for family reunification, for instance because that person believed that she first had to obtain a passport and suitable accommodation for the family member joining her, could not justify a denial of the right to family reunification, where this right derives from the right to respect for family life, such as in situations where the sponsors live in the host country since a number of years and have opted for the nationality of that country. Upon examining the report submitted by **Sweden** under the Convention on the Rights of the Child, the Committee on the Rights of the Child expressed its concern about the 'excessive length of family reunification procedures for recognized refugees'.165 The Committee recommended therefore that Sweden strengthen the measures taken to ensure that family reunification procedures for recognized refugees are dealt with 'in a positive, fair, humane and expeditious manner'[166]. While these developments are directly addressed to the **Netherlands** and to **Sweden**, the requirements thus laid out in fact concern all the Member States and they are relevant for the implementation of both the abovementioned directives.

There are a number of issues which cause serious concern to the Network. In **Austria,** in the framework of the Aliens Law Codification 2005[167] the provisions regulating the issuance, denial and withdrawal of residence permits have been moved from the former Aliens Act to the new Residence and Settlement Act (*Niederlassungsaufenthaltsgesetz - NAG*). In comparison to the "old" Aliens Act[168] (*Fremdengesetz)* dependants of Austrian citizens or of their spouses in the direct ascending line are no longer entitled to join the sponsor. Moreover, while the Aliens Act (in sect. 27) provided an independent right for family members, having joined the sponsor, to reside in Austria after four years, the NAG only allows this right after five years (sect. 26 para. 1). If the sponsor loses his/her settlement permit, the family members lose theirs as well. The authorities do not have to issue any official notification and the person affected has no right to appeal.

Another aspect of the new Residence and Settlement Act adopted in **Austria** is a cause of concern. As already recalled above in the comments made about the issue of domestic violence under Article 4 of the Charter of Fundamental Rights, Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ L 251 of 3/10/2003, p. 12) provides that Member States may refuse to renew the residence permit of the spouse or of other family members who have been admitted for the purpose of family reunification where it is found that the sponsor and his/her family member(s) no longer live in a real marital or family relationship (Article 16 § 1, b)), which is the case for instance if the sponsor has begun a stable long-term relationship with another person (Article 16 § 1, c)). In a previous report prepared for the Network, it has been remarked that 'this provision puts the spouse (or the person with whom the sponsor is living in a *de facto* long-term relationship which the Member State considers to grant a right to family reunification) – statistically, this is in most cases the wife – in a particularly vulnerable position, since he finds himself at the mercy of a cessation of marital life, the maintenance of which constitutes a condition for his continued residence. The Directive ought to have provided that the right to family reunification does not cease if the break-up of the relationship is the fault of the sponsor only. Member States which claim to rely on this exception should avoid interpreting it in a way that establishes a right of refusal'.

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[165] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 8.
[166] Ibid., p. 8.
[167] Bundesgesetz, mit dem das Bundes-Verfassungsgesetz geändert wird, ein Asylgesetz 2005, ein Fremdenpolizeigesetz 2005 und ein Niederlassungs- und Aufenthaltsgesetz erlassen, das Bundesbetreuungsgesetz, das Personenstandsgesetz, das Bundesgesetz über den unabhängigen Bundesasylsenat, das Einführungsgesetz zu den Verwaltungsverfahrensgesetzen 1991, das Sicherheitspolizeigesetz, das Gebührengesetz 1957, das Familienlastenausgleichsgesetz 1967, das Kinderbetreuungsgeldgesetz und das Tilgungsgesetz 1972 geändert werden sowie das Fremdengesetz 1997 aufgehoben wird (Fremdenrechtspaket 2005), Federal Law Gazette (BGBl.) 100/2005.
[168] Bundesgesetz über die Einreise, den Aufenthalt und die Niederlassung von Fremden (Fremdengesetz 1997 - FrG), Federal Law Gazette (BGBl.) No. 75/1997 amdended by BGBl.151/2004.

For similar reasons, Sec 27 para 3 of the Residence and Settlement Act (*Niederlassungsaufenthaltsgesetz - NAG*) adopted in **Austria** may have negative effects on female migrants and could foster the dependence of women on their husbands. In order to establish the sponsor's guilt their wives would be forced to undergo long divorce proceedings, whereas short mutual divorces could have been carried out as well. Furthermore, in divorce proceedings involving spouses without Austrian Citizenship the Aliens Marriage Law often has to be applied, not foreseeing the institution of divorce due to the predominant guilt of one spouse. Although it is acknowledged that the exception clause has been expanded in order to make room for cases where particular circumstances arise, listing three such situations, in the future, it still will be up to the authorities to interpret this open-ended clause. This is especially so as it will be very difficult for young women with children to fulfil the second exception clause which grants them an independent right to settle if they can prove they have sufficient means to subsist according the social benefit standard rates.

The Network also remains concerned about certain aspects of the rules relating to family reunification in **Denmark.** In particular, the administration of the 24 year age requirement combined with the aggregate ties requirement, both prescribed in the 2004 Aliens Act, although it may be justified by the need to combat forced marriages for the purposes of family reunification, may constitute a disproportionate means of seeking to attain that objective, and therefore result in a violation of the right to family life according to Article 8 of the European Convention on Human Rights; it may also be in violation of the obligation of Denmark to ensure that the right to family life is protected without discrimination, under Articles 10 and 2(2) of the International Covenant on Economic, Social and Cultural Rights, as noted by the UN Committee on Economic, Social and Cultural Rights (Concluding Observations of the Committee on Economic, Social and Cultural Rights on Denmark E/C.12/1/Add.102 26 November 2004, adopted by CSECR at the Thirty-third session 8 -26 November 2004).

In **France,** in principle, the authorities should deliver a visa to the foreign spouse of a French national if their marriage has not been challenged by the courts. However, as long as there are "questions concerning the real motives for the marriages being entered into", the judge in interim injunction proceedings considers that the authorities were validly able to refuse the visa, even though the marriage has not been challenged before the courts and is therefore valid in theory[169.]

In **Ireland,** the Minister for Justice, Equality & Law Reform announced his intention to introduce a scheme to allow migrant workers bring their families to Ireland, provided, *inter alia*, that they would not be an economic burden on the State. This follows the Department's Discussion Document on the proposed Immigration and Residence Bill, which had envisaged changes with respect to this aspect of immigration policy[170]. The Network shares the view of the Irish Human Rights Commission that applications for family reunification should be assessed in light of the criteria under Articles 8 and 14 ECHR and that the category of persons entitled to enjoy family reunification should be considered broadly to include, *inter alia*, non-marital partnerships, same-sex partnerships and other adult relationships where there is a relationship of dependency.

In **Lithuania,** Article 30 of the Law on Foreigners Legal Status[171] limits the right to family reunification for persons recognized as refugees under the Geneva Convention of 28 July 1951. Although Article 12 para. 2 of the Council Directive 2003/86/EC on the right to family reunification explicitly exempts the Convention refugees from the two year residence requirement term, the Law in fact requires the Convention refugees along side with other third country nationals to reside for at least two years in Lithuania before having their family members join them.

In **Poland**, the amendment of the Act on aliens and granting protection to aliens on the territory of the

[169] Council of State, *Mr and Mrs Y.* , injunction n° 280432, 3 June 2005.
[170] Department of Justice, *Immigration and Residence in Ireland, Outline Proposals for an Immigration and Residence Bill, A discussion Document* (April, 2005) at p.79.
[171] Įstatymas "Dėl užsieniečių teisinės padėties" [Law on Foreigners Legal Status] Valstybės žinios, 2004, Nr. 73-2539

Republic of Poland was introduced in order to implement Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification. According to the Act, the possibility to reunite with family depends on the fulfilment of the condition of having a stable and constant source of income, sufficient to cover the costs of providing for oneself as well as family members remaining under the alien's care, and the costs of health insurance or confirmation that an insurance company has covered the costs of treatment on the territory of Poland. Individuals, who were granted refugee status, are released from the obligation to fulfil this condition if they apply for the reuniting with family members within three months of the day on which they were granted refugee status. The Network regrets that, in comparison with the previous act which relieved the refugee from the obligation to fulfil this obligation without time constraint, the current law restricts the refugee's opportunity to reunite with his/her family. This moreover could be in violation of Article 8 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights in the case of *Tuquabo-Tekle* mentioned above.

The right to respect for private and family life in the context of the expulsion of foreigners

The Network welcomes the fact that the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals which the Commission presented on 21 September 2005 (COM(2005) 391 final) includes a provision (Article 5) stating, under the title 'Family relationships and best interest of the child', that 'When implementing this Directive, Member States shall take due account of the nature and solidity of the third country national´s family relationships, the duration of his stay in the Member State and of the existence of family, cultural and social ties with his country of origin. They shall also take account of the best interests of the child in accordance with the 1989 United Nations Convention on the Rights of the Child'. The Network notes, however, that this provision may be too vague, even in combination with the 18th Recital of the draft Directive, which makes an explicit reference to the European Convention on Human Rights. Guideline 2, para. 2, of the Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe, states more explicitly that 'The removal order shall only be issued after the authorities of the host state, having considered all relevant information readily available to them, are satisfied that the possible interference with the returnee's right to respect for family and/or private life is, in particular, proportionate and in pursuance of a legitimate aim'. At the very least, in accordance with the case-law of the European Court of Human Rights[172], Article 5 of the draft Directive should include a reference not only to the right to respect for the family life of the person concerned in the expelling State, but also to his or her right to respect for private life. Whereas the current wording of this provision refers to the need to 'take due account of' the family relationships of this person in the host State, it should be emphasized that no interference should be acceptable unless necessary for the realization of a legitimate aim, including the 'prevention of disorder' which would result from the violation of the national rules relating to the entry, stay and residence of third-country nationals.

This requirement has again been emphasized also by the European Commission on Racism and Intolerance in its third report concerning **France**, which was released on 15 February 2005. As indicated by the European Court of Human Rights in a case following the refusal by Latvia to grant a permanent residence permit to the applicants, who has permanent ties with the country despite the fact that they had the Russia citizenship, circumstances such as, in particular, the lengthy period during which the applicants had been in a state of uncertainty and a precarious legal position in Latvian territory, may be relevant to the question whether a fair balance has been struck between the legitimate aim of preventing disorder and the applicants' interest in protection of their rights under Article 8 (Eur.Ct.H.R., *Svetlana Sisojeva and Others v. Latvia* (Appl. No. 60654/0), judgment of 16 June 2005). The Network welcomes the application which was made of these principles, for instance, in the case of

[172] Eur. Ct. HR, *C. v. Belgium*, 7 August 1996; Eur. Ct. HR, *Ezzoudhi v. France* judgment of 13 February 2001; Eur. Ct. HR (1st Sect.), *Amrollah v. Denmark* judgment of 11 July 2002, Appl. No. 56811/00; Eur. Ct. HR, *Boultif v. Switzerland* judgment of 2 August 2001, Appl. No. 54273/00; Eur. Ct. HR, *Benhebba v. France* judgment of 19 June 2003, Appl. No. 53441/99, para. 32; Eur. Ct. HR, *Mokrani v. France*, judgment of 15 July 2003, Appl. No. 52206/99, para. 30-32.

Valentīna Kruka vs. the Office of Citizenship and Migration Affairs (OCMA)[173] when it was presented to the Latvian courts.

In accordance with the amendment of the Act on aliens and granting protection to aliens on the territory of **Poland**, an alien is not presented with a deportation decision, and one that has been issued against him is not executed, if the alien is married to a Polish citizen or an alien who has received permission to settle or consent to stay as a long-term resident of the European Union and the alien's further stay does not constitute a threat to national defence and safety or public safety and order, unless the decision to marry was taken with a view to avoid deportation[174]. According to the amendment of the Act, such an alien no longer receives consent for a tolerated stay, as was the case before, but permission to reside for a limited period, which is granted to him/her even in the case of an illegal stay in Poland. This makes it easier for the alien to receive later permission to settle.

The Network also has a number of reasons for concern. The **United Kingdom** still maintains the immigration and nationality reservation to the Convention on the Rights of the Child, whereby the rights in the Convention do not apply as regards the entry, stay in and departure form the United Kingdom of children subject to immigration control, although the Joint Select Committee on Human Rights has stated its view that this reservation is contrary to the object and purpose of the Convention[175]. In **Latvia,** there are cases where established long-term private and family life ties are not taken into account in cases of expulsion. In October 2005, an expulsion order together with a prohibition on entering Latvia for five years[176], issued to a person who entered Latvia in 1989 (before the restoration of independence), was put into effect by forcibly expelling him to Azerbaijan. The expelled person had been living permanently in Latvia for the last 16 years, although he had not regularised his status. Since 1995 he had been cohabitating with a citizen of Latvia, and in 1999 their son was born. The *Office of Citizenship and Migration Affairs* failed to evaluate these factors in its decision to issue an expulsion order and to prohibit entry to Latvia for 5 years. There is reason to believe that this is not a unique case.

In **Lithuania,** Article 128 of the Law on Foreigners Legal Status[177] states that the foreigner's family relations in Lithuania shall be taken into account if the decision on his or her deportation is being examined. However, the Law fails to specify how foreigner's family relations might prevent deportation. In practice, if the foreigner, who is married to a Lithuanian national, is illegally residing in Lithuania, he or she is asked to leave Lithuania (or is deported) and suggested applying for the Lithuanian residence permit from abroad. Such practice might violate Article 8 of ECHR if due to objective reasons (e.g., impossibility to get travel documents, financial costs, health condition, etc.) the separated family did not have a chance to reunify legally and practically. Thus the Law probably should provide that in such cases residence permit should be granted in Lithuania without the requirement to leave Lithuania and apply for residence permit from abroad.

In the **Netherlands**, on 30 September 2005 the Ministers for Immigration and Integration submitted a policy document to Parliament which outlined a revision of the current legislation regarding expulsion of aliens on grounds of public order concerns (*Kamerstukken II* 2005-2006, 19637, No. 971). A "one-strike-out" policy was proposed, meaning that an alien could be removed after having been convicted of a crime once without regard being had to the gravity of the crime nor the punishment received. The *Adviescommissie Vreemdelingenzaken (ACVZ)* [Advisory Committee for Alien Affairs] found the proposal not to be in conformity with, *inter alia*, the case law of the European Court of Human Rights,

[173] Administratīvās apgabaltiesas 2004. gada 13. decembra spriedums lietā Nr. AA 372-04.
[174] Art. 89 ust. 1 p. 2 ustawy z dnia 22 kwietnia 2005 r. O zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw (Dz.U. z 2005 r. Nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]
[175] *Review of International Human Rights Instruments*, HL 99/HC 264, 31 March 2005.
[176] *Imigrācijas likums* [*Immigration Law*] stipulates that prohibition of entry to the Republic of Latvia shall be set in an expulsion order issued to an alien who breaches procedures for entry and residence of aliens in Latvia (mandatory administrative act).
[177] Įstatymas "Dėl užsieniečių teisinės padėties" [Law on Foreigners Legal Status] // Valstybės žinios, 2004, Nr. 73-2539

which takes the prospect of future conduct of the alien into consideration instead of just focusing on past behaviour (ACVZ, *Openbare orde en verblijfsbeëindiging*, April 2005). The Network notes in this connection that the case of *Üner v. the Netherlands*, which is highly relevant for the question whether the proposed policy is compatible with the ECHR or not, was referred to the Grand Chamber of the European Court of Human Rights in December 2005. It would seem prudent to await the outcome of this case before any further steps in this matter are undertaken.

Article 8. Protection of personal data

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.
3. Compliance with these rules shall be subject to control by an independent authority.

This provision of the Charter corresponds to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). It must be read in accordance with the requirements formulated by Article 17 of the International Covenant on Civil and Political Rights (1966), by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and by the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Dataflow (2001).

Exchange of information between law enforcement agencies

The Network welcomes the presentation by the European Commission, in accordance with the Hague Programme as well as with the request by the Council that this initiative be speeded up following the terrorist attacks in London in July 2005, of a proposal for a Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (COM (2005) 475 of 4 October 2005). It considers that the adoption of this instrument is an essential complement to the generalized exchange of information between police and judicial authorities in criminal matters, which is to be facilitated by the principle of availability simultaneously proposed in the proposal for a Framework Decision on the exchange of information under the principle of availability (COM (2005) 490 final of 12 October 2005). According to the principle of availability, the exchange of law enforcement information is subjected to uniform conditions across the Union. If a law enforcement officer or Europol needs information to perform its lawful tasks, it may obtain this information, and the Member State that controls this information is obliged to make it available for the stated purpose. As stated by the Explanatory memorandum to the proposal for a Council Framework Decision on the exchange of information under the principle of availability, the processing of personal data pursuant to this Framework Decision will be done in accordance with the Council Framework Decision to be adopted on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, and in accordance with the provisions of the Europol Convention concerning data protection apply to the processing of personal data by Europol, including the powers of the Joint Supervisory Body, set up under Article 24 of the Europol Convention, to monitor the Europol activities.

The retention by communications service providers of traffic data (including location data)

The Network notes that an agreement has been found between the Council and the European Parliament on the Proposal for a Directive of the European Parliament and the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM(2005)438 final, 21.9.2005). Traffic data are personal data, within the meaning of Article 2(a) of the Convention for the Protection of Individuals with regard to

Automatic Processing of Personal Data, opened for signature in the Council of Europe on 28 January 1981, and to which all Member States of the European Union are parties[178]. Processing of those data is only acceptable if the data being processed are adequate, relevant and not excessive in relation to the purposes for which they are stored. This requirement of proportionality also follows from Article 8(2) of the European Convention on Human Rights. The storing of traffic data (including location data) constitutes an interference with the right to respect for private life guaranteed by Article 8 ECHR[179]. From the point of view of these provisions, the draft Directive raises a number of questions which were already evoked in the *Thematic Observation no. 1* (March 2003) on the balance between freedom and security in the context of measures for combating terrorism[180], in which the Network had already expressed its viewpoint concerning the reliance upon Article 15(1) of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector,[181] as this clause already provides that Member States may "adopt legislative measures providing for the retention of data for a limited period where this is justified" by the necessity of safeguarding national security, defence and public security, or for the prosecution of criminal offences or of unauthorized use of the electronic communication system.

While acknowledging that Directive 95/46/EC of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[182] remains fully applicable to the storing of traffic data (including location data) prescribed by the draft Directive, the Network notes the following difficulties. First, the objective of the draft Directive is 'to harmonise the obligations on providers to retain certain data and to ensure that these data are available for the purpose of the […] investigation, detection and prosecution of […] serious crime *as defined by each Member State in national law*' (Recital 18 and Article 1(1) in the version adopted by the JHA Council on 2 December 2005). It would have been preferable to adopt a list of the most serious criminal offences which may justify that the data retained as required by the Directive are transmitted to the law enforcement authorities of the Member States, for example by reference to article 2(2) of the Framework Decision on the European Arrest Warrant (2002/534/JHA), to which the Member States must have 'due regard' in defining the notion of 'serious crime' under their national law, according to the Declaration appended to the draft Directive (annex III). As a result of the reference made to national legislations with regard to the identification of the 'serious crimes' the investigation, detection and prosecution of which may justify that the data are made available to them, the law enforcement authorities of each Member State may have more or less extensive possibilities to request access to these data, which is problematic if one takes into account the principle of availability. Indeed, the same data retained by the communications service providers in one Member State may be made available to the law enforcement authorities of certain Member States, and not to those of the other Member States, depending on the understanding under each applicable national legislation of the notion of 'serious crime'. This is not compatible with the principle according to which, in order for the interference with the right to respect for private life to be provided by law as required under Article 8 § 2 of the European Convention on Human Rights, it must be 'in accordance with the law'. This requires that the law be a quality which ensures that it will effectively avoid any arbitrariness by public authorities in the imposition of restrictions, and that the law authorizing the interference be accessible to the person concerned who must, moreover, be able to foresee its consequences for him. In particular, each individual must be able to determine which offences may lead to the adoption of secret surveillance measures or of other measures implying an interference with the right to respect for private life. The Network refers in this regard to para. 46 of the judgment of 30 July 1998 delivered by

[178] ETS no. 108.
[179] See ECHR, *Rotaru v. Romania* (Appl.n° 28341/95) judgment of 4 May 2000, § 46 : « …both the storing by a public authority of information relating to an individual's private life and the use of it and the refusal to allow an opportunity for it to be refuted amount to interference with the right to respect for private life secured in Article 8 § 1 of the Convention ».
[180] See section IV.3 of this Thematic Observation, pp. 26-28.
[181] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L201 of 31.07.2002, p. 37
[182] OJ L 281 of 23.11.1995, p. 31.

the European Court of Human Rights in the case of *Valenzuela Contreras v. Spain* (Appl. No. 27671/95).

Second, under Article 7 of the draft Directive, the Member States must ensure that the data concerned 'are retained for periods of not less than 6 months and for a maximum of two years from the date of the communication'. The Network recalls that, under the original proposal of the Commission, the data were to be retained 'for a period of one year from the date of the communication, with the exception of data related to electronic communications taking place using wholly or mainly the Internet Protocol. The latter shall be retained for a period of six months'. As a result of the amendment by the Council of this important point of the proposal, the draft Directive fails to achieve its proclaimed objective, which also justifies the reliance on Article 95 EC as the chosen legal basis, which is to eliminate 'the legal and technical differences between national provisions concerning the retention of data for the purpose of prevention, investigation, detection and prosecution of criminal offences [insofar as such differences] present obstacles to the internal market for electronic communications; service providers are faced with different requirements regarding the types of traffic data to be retained as well as the conditions and the periods of retention'. More importantly, the Network notes that, as agreed upon by the Council, the period of retention of the data concerned is significantly larger than that initially proposed by the Commission.

In the opinion he delivered on 26 September 2005, the European Data Protection Supervisor, expressing doubts even about the evidence of necessity of the retention of traffic data up to one year, noted that 'the period of one year reflects the practices of law enforcement, *as they have been indicated* by the figures that have been provided by the Commission and the Presidency of the Council. These figures show as well that, except for exceptional cases, retention of data for longer periods does not reflect the practices of law enforcement. A shorter period of 6 months for data related to electronic communications taking place using solely or mainly the Internet protocol is important from the perspective of data protection, since the retention of Internet-communications results in vast databases (these data are usually not retained for billing purposes), the borderline with content data is vague and the retention for longer than 6 months does not reflect the practices of law enforcement'[183]. The Data Protection Working Party 'Article 29' already had took the view in its Opinion n°9/2004 of 9 November 2004 that the periods of retention provided under the draft Framework Decision on the storage of data processed and retained for the purpose of providing electronic public communications services or data available in public communications networks with a view to the prevention, investigation, detection and prosecution of criminal acts, including terrorism, to which the amendments made by the Council to the proposal for a Directive submitted by the Commission now have reverted[184].

Third, while it welcomes the provisions in the draft Directive which ensure a regular evaluation of the application of the Directive and its impact, the Network regrets that the Council has not retained the proposal of the Working Party created under Article 29 of Directive 95/46/EC[185], which proposed that the measures adopted under the directive be time-limited, and automatically cease to be in effect after a period of three years, unless they are renewed.

Videosurveillance

[183] Opinion of the European Data Protection Supervisor on the Proposal for a Directive of the European Parliament and of the Council on the retention of data processed in connection with the provision of public electronic communication services and amending Directive 2002/58/EC (COM (2005) 438 final), para. 61.

[184] Opinion 9/2004 on a draft Framework Decision on the storage of data processed and retained for the purpose of providing electronic public communications services or data available in public communications networks with a view to the prevention, investigation, detection and prosecution of criminal acts, including terrorism. [Proposal presented by France, Ireland, Sweden and Great Britain (Document of the Council 8958/04 of 28 April 2004)], 11885/04/EN, WP 99, 9 November 2004.

[185] WP 113, Opinion 113/2005 on the Proposal for a Directive of the European Parliament and of the Council on the Retention of Data Processed in Connection with the Provision of Public Electronic Communication Services and Amending Directive 2002/58/EC (COM(2005)438 final of 21.09.2005), 21 October 2005 p. 3.

In **Belgium,** the Court of Cassation considered in a judgment of 2 March 2005[186] that the failure to inform the employee in advance of the installation by the employer of a video surveillance camera in a shop that is open to the public does not rule out that proof of an offence constituting serious misconduct on the part of the employee can be furnished by this process: if the irregularity committed does not compromise the right to a fair trial, does not affect the reliability of the evidence and does not infringe a stipulated purpose on pain of nullity, the court may, for the purpose of deciding whether irregularly produced evidence should be admitted, take into consideration the circumstance that there is no possible comparison between the unlawfulness committed and the seriousness of the offence, the detection of which was made possible by the irregular act, or that this irregularity has no impact on the right or freedom protected by the infringed regulation. The same judgment considers that the Act of 8 December 1992 on the protection of privacy with regard to the processing of personal data, which in its amended version of 1998 ensured the transposition in Belgium of Directive 95/46/EC of 24 October 1995, does not apply to the video surveillance of a cash register which, if it is limited to that function, does not contain any direct or indirect element identifying the person using it, by making reference to one or several specific elements proper to a physical, physiological, mental, economic, cultural or social identity[187]. Furthermore, a bill has been tabled in the House of Representatives to establish a uniform legal framework for the installation and use of surveillance and security cameras in areas that are freely accessible to the public, in accordance with the observations of the Commission on the Protection of Privacy[188]. In **Greece,** the Personal Data Protection Authority decided to prolong until 24 May 2006 the use of the surveillance cameras that were installed for the Olympic Games in 2004, but only for the purposes of traffic monitoring and under strict conditions (Decision No. 63/2004). On the other hand, it rejected the request by the Ministry of Law and Order to authorize the extension of the purpose of the processing of data collected by the cameras to the protection of persons and property (prevention of serious offences, safety of persons, etc), considering that, bearing in mind that no special, definite or major threat exists today to public safety or the rule of law, putting in place such a form of surveillance would result in a serious and overall infringement of the rights of the individual, without the citizens' right to safety being strengthened by it. The use of data collected by the cameras for other purposes remains possible, in cases of special and extraordinary necessity, after special authorization from the Authority, within the limits set by the respect for fundamental rights (Decision No. 58/2005). A few weeks before the aforementioned decision of the Authority, the Court of First Instance in Patras, ruling in interim injunction proceedings, considered that the operation of the surveillance cameras unlawfully infringed the citizens' right to individuality by preventing the free development of their social and political activities[189]. The Ministry of Law and Order decided to appeal against Decision No. 58/2005 of the Authority before the Council of State.

The debate launched in **Belgium** and **Greece** regarding the limits which the right to respect for private life sets to the use of video surveillance systems illustrates that it would be helpful if the requirements of Directive 95/46/EC of 24 October 1995 were to be clarified on this point. In this respect, the Network notes with interest that in **Portugal,** two legislations were adopted in order to regulate video surveillance measures, concerning respectively video surveillance systems on the roads, for the purpose of preventing traffic accidents and to insure the safety and security of the people (207/2005, of 29th November), and the use of video surveillance cameras in public places by police authorities for security reasons (1/2005, of 10th January). The extension of this technology in the public and the private sector is illustrated by the large number of decisions of the Comissão Nacional de Protecção de Dados *(CNPD) – the Portuguese Data Protection Control Authority* seeking authorisations to use video surveillance systems. The Network recalls that, in adopting regulations on the use of video

[186] Court of Cassation, (2nd Chamber), judgment of 2 March 2005, *C. sprl Le Chocolatier Manon.*

[187] This piece of legislation, however, applies in principle to the processing of personal visual data, and therefore also to video surveillance: the Belgian Commission on the Protection of Privacy acknowledged this in several opinions (Opinion n°34/99 of 13 December 1999 on the processing of images made in particular with video surveillance systems; Opinion n°14/95 of 7 June 1995 on the applicability of the Act of 8 December 1992 on the protection of privacy with regard to the processing of personal data and the recording of images and the consequences thereof).

[188] Bill regulating the installation and use of surveillance and security cameras in public places, House of Representatives, Ordinary Session, 2004-2005, *Doc. Parl.*, 51 2038/001.

[189] Court of First Instance in Patras [Μονομελές Πρωτοδικείο Πατρών], decision no 2765/2005.

surveillance, the national authorities should take into account the Opinion adopted by the Working Party on Data Protection created under Article 29 of Directive 95/46/EC on the processing of personal data by means of video surveillance (Opinion n° 4/2004 of 11 February 2004, 11750/02/EN - WP 89). The development of monitoring by video surveillance has led to serious concerns that the legal framework applicable to this form of monitoring is insufficiently clear, especially where private actors choose to rely on video surveillance. The clarification of the rules applicable to such form of surveillance should therefore be welcomed as a positive development, insofar as it gives more visibility to the rights of the subjects concerned.

The Network is concerned about a series of developments in **Austria**. First, the proposed amendments to the Security Police Act would extend the access of the police authorities to sound and picture data that has been recorded by other authorities, private persons or companies not only in order to prevent dangerous attacks or organised crime, but also to investigate potential hazards (*erweiterte Gefahrenerforschung*). As a result the police would be entitled to require the transmission or handing over of data for police security purposes (*sicherheitspolizeiliche Zwecke*) without any concrete suspicion of a criminal act having taken place (*Tatverdacht*). The Network takes the view that, especially considering the limited independence of the commissioner for legal protection, a judicial supervision of such measures would be advisable. At a minimum, the police authorities should be under an obligation ot report to the commissioner all instances where they collect data under these new powers, in order to make it possible for the commissioner to effectively fulfil its supervisory tasks. Second, the extension of the police authorities' power to investigate personal data (*personenbezogene Daten*) in connection with the protection of persons and objects during international events may be the source of disproportionate interferences with the right to respect for private life, in the view of the Network.

Independent supervisory authority

It is crucial, for the adequate implementation of Directive 95/46/EC, that the Member States not only set up independent supervisory bodies as required by Article 28 of that instrument, but also that they ensure that these bodies are fully independent and that they have the necessary resources to fulfil their tasks effectively. Referring also to the first report on the implementation of Directive 95/46/EC (COM (2003) 265 final, 15.5.2003), the Nertwork recalls its position according to which the obligation imposed by the EC Treaty (Art. 10 EC) on the Member States to contribute faithfully to the implementation of EC Law must necessarily include an obligation to ensure an adequate financing of the independent control authorities created according to Article 28 of Directive 95/46/EC, and required under Article 8(3) of the Charter of Fundamental Rights. In previous conclusions (Concl. 2004, p. 33), the Network emphasized that 'these authorities should be given the means necessary for their effective functioning, in budgetary terms and by providing them with the needed personnel. This is indispensable not only for their independency, but also for the very possibility for these authorities to adequately perform the missions assigned to them, in particular by using their investigatory powers (which may comprise in situ inspections conducted without prior announcements) and their powers to engage in legal proceedings where they find privacy regulations to be violated. In the view of the Network, the financing of these authorities must not only be ensured and maintained, it must be improved, in line with the extension of the supervisory functions of these authorities, which is in proportion to the development of technologies processing personal data, for example biometrics as a means of identification'.

Problems continue to exist in this regard. On 5 July 2005 the European Commission launched an infringement procedure against **Austria**, on the basis that the independence of the Austrian Data Protection Commission, which is part of the Federal Chancellery, is not fully guaranteed as required in the directive. The Network also points out that in **France**, a decree of 20 October 2005[190], adopted in implementation of Act No. 78-17 of 6 January 1978 on information technology, files and freedoms, amended by Act No. 2004-801 of 6 August 2004, redefined the powers of the National Commission

[190] Decree No. 2005-1309 of 20 October 2005, J.O.R.F 22/10/2005, p. 16769.

on Information Technology and Freedoms (CNIL), though without increasing its resources accordingly. Under this new decree, companies, local authorities, government agencies and associations can designate a data protection correspondent for the purpose of lightening the notification formalities and, for the entities appointing such a correspondent, making sure that their information technology will develop without threatening the rights of the users, customers and employees. In order to facilitate the task of those correspondents, the CNIL has set up a dedicated service that will offer them the necessary advice, information and guidance for the development of their activity. However, it emerges from the report submitted by the National Commission on Information Technology and Freedoms (CNIL) to the Prime Minister on 20 April 2005 that the CNIL suffers from a lack of the necessary human and logistical resources to successfully perform its new duties. Although the Act of 6 August 2004[191] has extended the powers of the Commission[192], the resources at its disposal have not increased accordingly. In **Portugal** also, there are still many operative difficulties in the Portuguese Data Protection Authority, due to the lack of sufficient human resources, especially to carry out audits/inspections. The Network notes that in 2005, the Comissão Nacional de Protecção de Dados *(CNPD) – the Portuguese Data Protection Control Authority* continues to have only two technicians to go out on the field. This situation raises significant obstacles to its investigative powers, to its access to data undergoing processing and to the use of the powers to collect all the information necessary for the fulfilment of its supervisory duties. While it welcomes the adoption of the new Personal Data Protection Act (E.g. Zakon o varstvu osebnih podatkov, Personal Data Protection Act, *Official Gazette* 2004, nr. 86) in **Slovenia**, through which Slovenia seeks to implement Directive 95/46 of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, the Network regrets that the new supervisory governmental body for personal data protection set up by this new legislation will start its activities on 1 January 2006, although the Human Rights Ombudsman has already lost his special role of independent supervisor based on the amendments of the former Act in 2001 (Human Rights Ombudsman, Annual Report 2004, Ljubljana, May 2005).

There are also positive developments to be reported in this field. In the **Slovak Republic,** on 1 May 2005 the Amendment to the *zákon o ochrane osobných údajov* [Act on Personal Data Protection][193] came into effect. The Amendment reinforced the independence of the position of the *Úrad na ochranu osobných údajov* [Office for personal data protection] and regulates several investigatory powers of the Office. According to the new regulation, the chief inspector and other inspectors, as well as the President of the Office and the Vice-President of the Office are authorized to access information systems as the system administrator in the extent necessary for performing the verification and identity check of inspected persons and of natural persons acting of behalf of the inspected persons.

Protection of the private life of workers

As mentioned above, the question of the applicability to video surveillance in the workplace of the Law of 8 December 1992, amended in order to implement Directive 95/46/EC into Belgian law, has been controversial in **Belgium**, as illustrated by the judgment adopted on 2 March 2005 by the Court of Cassation. Also in **Belgium,** a bill has been tabled which is aimed at regulating the surveillance of

[191] Act No. 2004-81 of 6 August 2004 on the protection of natural persons with regard to the processing of personal data, amending Act No. 78-17 of 6 January 1978 on information technology, files and freedoms (Official Journal of 7 August 2004, p. 14063). The Decree implementing the Act was adopted on 22 October 2005 (Decree No. 2005-1309, published in the Official Journal of 22 October 2005).

[192] With intensification of subsequent monitoring, setting up of a service to assist the CNIL correspondents (correspondents in companies, charged with promoting the protection of personal data), organization of limited training in the maintenance of the rights of the defence in the exercise of its new penalty powers, and intensification of its consultation work on regulatory matters.

[193] *Zákon č. 90/2005, ktorým sa mení a dopĺňa zákon č. 428/2002 Z. z. o ochrane osobných údajov v znení neskorších predpisov* [Act no. 90/2005 Coll. amending and supplementing the Act no. 428/2002 Coll. on personal data protection as amended].

workers using the monitoring system linked to the GPS navigation system in company vehicles[194]. The Network also notes that in **Italy,** the *Garante per la protezione dei dati personali* (Italian Data Protection Authority) adopted a decision on 21 July 2005 regarding the Use of Fingerprints for Assiduity Control at the Workplace. In response to the request by a company with 300 employees to process the biometric data related to its employees with a view to controlling their assiduity at work and thereby allocating standard and overtime pay, the Garante, while recognizing that employers are lawfully empowered to supervise performance at work (pursuant to Section 2094 of the Civil Code), and could verify employees' assiduity and compliance with working hours also in order to compute their wages, considered that it had not been shown that the processing of biometric data in question was in line with the requirement to process as few personal data as possible and to comply with the principle of proportionality in particular with regard to the use of fingerprints. Using such data in the workplace may be justified in specific cases as related to the purposes and context of their processing – e.g. in connection with accessing certain premises in a company that require especially stringent security measures either because of specific circumstances or on account of the activities performed in those areas; alternatively, their use may be justified in order to ensure security of the processing of personal data (see Annex B) to the DP Code). Conversely, the blanket use of these data may not be considered lawful; as regards fingerprints, this is compounded by the need to prevent their misuse and/or inappropriate use. To verify compliance with working hours and simultaneously prevent unauthorised conduct by employees, the employer can avail itself of other, less privacy-intrusive systems that do not impinge on personal freedom and do not involve an employee's body – which are both constituents of personal dignity, safeguarded by personal data protection provisions (see Section 2 of the DP Code). The Network welcomes this decision, which, in its view, only highlights further the need for a further clarification of the requirements of Directive 95/46/EC in this area. Another example of the usefulness such clarification would present is that, according to certain reports, all pilots, stewards and ground personnel of the air companies (namely the Czech Airlines) were subject to security screening by the National Security Authority in the **Czech Republic**. Although the information collected through the personal questionnaire and the inquiry by members of the NSA is based on Act No. 412/2005, on Protection of secret information and security competence, the resulting interference with the right to respect for private life may be disproportionate, both because of the quantity of information collected and because the screening would appear to be generalised on all workers irrespective of their position and actual security risks. In the **United Kingdom**, an initially successful challenge by a social worker to the disclosure under the Police Act 1997, s 115 of his arrest in relation to two incidents of indecent exposure that was followed by an acquittal as the complainant failed to make a positive identification was overturned in *R (on the application of X) v. Chief Constable of the West Midlands Police* [2004] EWCA Civ 1068, [2005] 1 All ER 610. The disclosure was made after a request by a social work agency for an enhanced criminal record certificate for him from the Criminal Records Bureau. In overturning the challenge of the disclosure, the court held that, having regard to the language of section 115, the chief constable had been under a duty to disclose if the information might be relevant, unless there were some good reason for not making a disclosure. The policy of the legislation, in order to serve the pressing social need to protect children and vulnerable adults, was that the information should be disclosed even if it only might be true. If it might be true, the employer should be entitled to take into account before the decision was made as to whether or not to employ the person and such disclosure was not contrary to Article 8 ECHR.

In its previous conclusions (Concl. 2005, p. 52), the Network welcomed the announcement, made by the European Commission in its Communication on the Social Agenda (COM(2005)) of 9 February 2005, that it would propose an initiative in 2005 on the protection of personal data of workers. The Network considers that the adoption of a sectorial directive would be most desirable in the area of employment relations, especially in view of the specific features of this field in relation to the general approach adopted by Directive 95/46/EC of 24 October 1995. It is regrettable that no proposal has

[194] Bill of 18 February 2005 regulating the surveillance of workers using the monitoring system linked to the GPS navigation system in company vehicles, in accordance with the Act of 8 December 1992 on the protection of privacy, Senate, Ordinary Session, 2004-2005, *Doc. Parl.*, 3-1044/1. This document is available at http://www.senate.be

been put forward yet on this issue, as there remain certain uncertainties as to the implementation of the general requirements of this directive in the field of employment.

Article 9. Right to marry and to found a family

The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

The EU Network of Independent Experts on Fundamental Rights notes that this provision of the Charter has the same meaning than the corresponding Article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) although its scope may be extended. It notes that this provision of the Charter must be read in accordance to the requirements formulated by both Article 23 of the International Covenant on Civil and Political Rights (1966) and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962).

Legal recognition of same-sex partnerships and recognition of the right to marry for transsexuals

Following the examples of the **Netherlands** and of **Belgium**, which opened up marriage to same-sex couples respectively in 2000 and 2003 – and on 1 December 2005, the bill authorizing adoption by same-sex couples was adopted in **Belgium**[195] - the Act of 1 July 2005 amending the Civil Code on the right to marriage[196] opened up marriage to same-sex couples in **Spain.** Although some controversy remains about the personal scope of application of that law – with some courts ruling out homosexual marriage if one of the partners is not a Spanish national and his national law does not authorize homosexual marriage -, a circular provides that homosexual marriage is open to any person who either has Spanish nationality or is domiciled in Spain, irrespective of the nationality or domicile of the partner[197]. At the time when those conclusions were adopted, an action for unconstitutionality brought on 30 September 2005 against the Act by the People's Party – which was more in favour of a law on stable partnerships providing for a form of civil union equivalent to marriage, excluding provisions on adoption by married couples – was pending before the Constitutional Court, which declared the action admissible. The unconstitutionality argument that was raised is that marriage as an institution would be challenged by the Act of 1 July 2005.

The Network notes that in a number of Member States, same-sex partners may rely on no legal institution, whether marriage, registered partnership or any other, in order to provide their relationship with a stable legal framework defining the rights and obligations of the partners, and providing for a minimum security of the partners in case of separation or death or one of the partners. The States concerned are **Austria**, **Estonia**, **Hungary**[198], **Italy**, **Latvia**, **Lithuania** (despite the proposal in that

[195] Bill of 1 December 2005 amending certain provisions of the Civil Code in order to allow adoption by same-sex couples, House of Representatives, Ordinary Session, 2005-2006, *Doc. Parl.*, 0664/010. This document is available at http://www.lachambre.be

[196] *Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio* [Act 13/2005 of 1 July, amending the Civil Code on the right to marriage] (BOE of 2 July 2005).

[197] *Resolución Circular de 29 de julio de 2005, sobre matrimonios civiles entre personas del mismo sexo* [Circular Resolution of 29 July 2005 on civil marriages between persons of the same sex], adopted by the Directorate-General of Registers and Notaryship (BOE of 8 August 2005).

[198] The only legal institution, which is also used for homosexual partners is the so-called domestic partnership regulated by the Polgári Törvénykönyvről szóló 1959. évi IV. törvény [Act IV of 1959 on the Civil Code]. According to Article 685/A currently in force partners (common-law spouses) are defined as two unmarried persons living together in an emotional and financial community in the same household, unless otherwise provided by law. The Hungarian Constitutional Court made clear in its decision 14/1995. (III. 13.) AB that while marriage remains an institution exclusively for heterosexuals, homosexual couples can live in the legally recognized domestic partnerships, without being registered.

country of a draft Law on Partnership between a man and a woman[199]) and the **Slovak Republic**. In **Poland,** the law still does not provide for registered partner relationships of partners of the same sex. It offers however some though rather limited protection for persons living in *de facto* relationships (hetero or homosexual). This protection covers only certain aspects of life, mainly parental rights and childs' obligations[200,] tenancy[201] (right to stay in rented apartment after the death of the partner), tax issues[202] (responsibility for partner's tax obligations). Moreover according to Article 182 para. 1 of the Code of Criminal Procedure[203] in conjunction with Article 115 para. 11 of the Penal Code[204] person staying in close relationship with accused person can refrain from giving testimony during criminal proceedings. Moreover, in some of these States, same-sex couples are not protected through other rules, for example those ensuring a certain protection to de facto cohabitants. This is in violation of the prohibition of any form of discrimination on the basis of sexual orientation, stipulated under Article 21 of the Charter. The Member States should ensure that the sexual orientation of a person does not result in an impossibility for that person to live with another individual, in conditions which ensure that both will benefit a certain level of security against the risks entailed by the illness or death of one partner, or by the separation of the couple when one of the partners is economically dependent on the other. The Network recalls that the Parliamentary Assembly of the Council of Europe, in the Recommandation 1474 (2000) addressed to the Committee of Ministers which it adopted on 26 September 2000, requested, inter alia, that the Committee recommend to the Member States that they introduce registered partnerships in their national laws (para. 11, iii, i).

In accordance with Article 23(2) of the International Covenant on Civil and Political Rights, 'the right of men and women of marriageable age to marry and to found a family shall be recognized'. Article 26 of the Covenant says that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground, including sexual orientation. Although, in the case of J. *Joslin v. New Zealand* presented to the United Nations Human Rights Committee, the Committee refused in its final views adopted on 30 July 2002 to interpret Article 23(2) of the Covenant, cited above, as imposing on the States parties an obligation to recognized the right to marry to same-sex partners (communication n° 902/1999, CCPR/C/75/D/902/1999), two members of the Human Rights Committee, Messrs Lallah and Scheinin, underlined in their concurring opinion that this conclusion 'should not be read as a general statement that differential treatment between married couples and same-sex couples not allowed under the law to marry would never amount to a violation of article 26. On the contrary, the Committee's jurisprudence supports the position that such differentiation may very well, depending on the circumstances of a concrete case, amount to prohibited discrimination. (…) [It] is the established view of the Committee that the prohibition against discrimination on grounds of "sex" in article 26 comprises also discrimination based on sexual orientation (Toonen v. Australia, Communication No. 488/1992). And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences (Danning v. the Netherlands, Communication No. 180/1984). No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or

[199] Bendro gyvenimo neiregistravus santuokos projektas [Draft Law on Parnership], Nr. IXP-3272.
[200] Art. 91 i 107 par. 2 Ustawy z dnia 5 lutego 1964 r. Kodeks Rodzinny i Opiekuñczy (Dz.U. z 1965, nr 9, poz. 59 ze zmianami) [Art. 91 and 107 para. 2 of the Family Code of 5 February 1964 (The Official Journal of 1964 no 9 item. 59 with further amendments)]
[201] Art. 691 par. 1 Ustawy z dnia 23 kwietnia 1964 r. Kodeks Cywilny (Dz.U. z 1964 r. nr 16, poz. 93 z póŸn. zm. [Art. 691 of the Act of 23 April 1964 - the Civil Code (The Official Journal of 1964, No. 16, item 93, with further amendments)]
[202] Art. 111 par. 1 i 3 Ustawy z dnia 29 sierpnia 1997 Ordynacja Podatkowa (Dz.U. z 1997 r. nr 137, poz. 926) [Art. 111 para. 1 and 3 of the Tax Law of 29 August 1997 (The Official Journal of 1997, No. 137, item 926)]
[203] Art. 182 par. 1 Ustawy z dnia 6 czerwca 1997 Kodeks postêpowania karnego (Dz.U. z 1997 r. nr 89, poz. 555) [Art. 182 para. 1 of the Act of 6 June 1997 Code of Criminal Procedure (The Official Journal of 1997, No 89, item. 555)]
[204] Art. 115 par. 11 Kodeksu Karnego z 6 czerwca 1997 (Dz.U. z 1997 nr 88, poz 553 z póŸniejszymi zmianami) [Article 115 para. 11 of the Penal Code of 6 January 1997 (The Official Journal of 1997, No. 88, item 553, with futher amendments)]

identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria'.

The Network makes this view its own. It emphasizes that neither the recognition of other forms of union than marriage between two persons of the different sex, nor, indeed, the recognition of same-sex marriage, can be plausibly described as in violation of the protection of the family, which is a value recognized in a number of national constitutions, and, indeed, also mentioned in Article 23(1) of the Charter of Fundamental Rights. The Network refers in this regard, in particular, to the judgment adopted on 20 October 2004 in **Belgium** by the Constitutional Court (Court of Arbitration), which rejected an action for annulment of the Law of 13 February 2003 opening up marriage to persons of the same sex and amending the Civil Code. The Court of Arbitration pointed out in its judgment that Article 12 of the European Convention on Human Rights and Article 23(2) of the International Covenant on Civil and Political Rights oblige the States that are parties to those conventions 'to recognize as marriage the communal life of a man and woman who wish to marry and who satisfy the conditions set by the national laws'. However, dismissing the argument which the applicants claimed to draw from those articles, it emphasized that those provisions – any more than Article 23(1) of the International Covenant on Civil and Political Rights – 'cannot be interpreted as obliging the Contracting States to consider the 'fundamental sexual duality of the human race' as a foundation of their constitutional order' (Recital B.5.8). Bearing in mind Article 53 of the European Convention on Human Rights and Article 5(2) of the International Covenant on Civil and Political Rights, which both clearly set out that neither the provisions of the Convention nor those of the Covenant prevent the States Parties to those instruments from adopting provisions that afford a higher level of protection of the rights enshrined in those instruments, the Court of Arbitration also concluded that Article 12 of the European Convention on Human Rights and Article 23(2) of the International Covenant on Civil and Political Rights, although they both guarantee the right of men and women to marry, 'cannot be interpreted as preventing the States Parties to the aforementioned conventions from granting the right guaranteed by those provisions to persons who wish to exercise this right with persons of the same sex' (Recital B.6.4).

The Network therefore welcomes the fact that in the **Czech Republic**, the Chamber of Deputies has adopted a proposal to regulate relations between two persons of the same sex, provided at least one is a citizen of the Czech Republic[205]. It also welcomes the fact that a debate has been launched on this issue in **Greece,** after the National Human Rights Commission delivered a decision/opinion in which it supports the legal recognition of *de facto* unions between persons of the same sex in order to remove the discrimination that exists in several areas (inheritance, tax law, social security, health care, pensions, social aid, employment)[206.] In **Ireland**, in July, the Minister for Justice, Equality & Law Reform announced a commitment to legislating for same-sex civil partnerships. In **Slovenia,** the National Assembly of the Republic of Slovenia adopted on 22 June 2005 the amended Registration of Same-Sex Partnership Act[207], which came into force on 23 July 2005.

The Network wishes to express its deepest concerns about the homophobic statements which were made when the Parliament in **Latvia** decided, on 26 October 2005, to amend the Constitution in order to define the marriage as the union between a man and a woman, in order to block attempts by any future parliamentary majority to open up marriage to same-sex couples. These regrettable events occur after Latvia failed until the end of the year to include sexual orientation among the prohibited grounds for discrimination in the relevant legislative amendments.

[205] Sněmovní tisk č. 969/0 (Draft No. 969), www.psp.cz

[206] Decision/opinion of the National Human Rights Commission (plenary) on issues of discrimination against sexual minorities in Greece and on the extension of civil marriage to same-sex couples, of 16.12.2004, available at the site of the CNDH (in Greek), www.nchr.gr

[207] Zakon o registraciji istospolne partnerske skupnosti, Registration of Same-Sex Partnership Act, *Official Gazette* 2005, nr. 65.

Article 10. Freedom of thought, conscience and religion

1. Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance. 2. The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

Paragraph 1 of this provision of the Charter corresponds to Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). This provision of the Charter must also be read in accordance to the requirements formulated by Article 18 of the International Covenant on Civil and Political Rights (1966). The interpretation of para. 2 of this provision should take into account not only those general provisions on freedom of religion (see also Article 18 of the International Covenant on Civil and Political Rights and General Comment n°22 of the Human Rights Committee, 30 July 1993 (para. 5)), but also para. 2 of Article 1 of the European Social Charter, Recommendation No. R(87)8 of the Committee of Ministers to Member States regarding conscientious objection to compulsory military service and Recommendation 1518 (2001) adopted by the Standing Committee acting on behalf of the Parliamentary Assembly of the Council of Europe, on the exercise of the right to conscientious objection to military service in the member States of the Council of Europe, as well as Resolution of 8 March 1993 on "The role of youth in the promotion and protection of human rights, including the question of conscientious objection to military service" (doc. E/CN.4/1993/L.107) adopted by the United Nations Human Rights Commission.

Conscientious objection to military service

Recommendation No. R(87)8 of the Committee of Ministers to Member States regarding conscientious objection to compulsory military service states that "Alternative service shall not be of a punitive nature. Its duration shall, in comparison to that of military service, remain within reasonable limits" (para. 10). Indeed, important differences in duration appear to be only justified where the reasons put forward by the conscript are subject to no verification whatsoever by the competent authorities (Eur. Commission H.R., decision of 6 December 1991, *Autio v. Finland*, Appl. n° 17086/90). Although States may provide that other forms of service may be longer than normal military service, to take account of the fact that the latter form of service may be more requiring and to ensure that the choice of other forms of service is based on genuine beliefs or convictions, the difference in length of both services must not be discriminatory : this would not only be in violation of Article 9 of the European Convention on Human Rights, taken either alone or in combination with Article 14; it would also be potentially in violation with Article 1 para. 2 of the (revised) European Social Charter, insofar as it imposes a possibly disproportionate restriction on the right of every worker to make a living by freely choosing his employment (see European Committee on Social Rights, decision on the merits of the collective complaint n°8/2000 *QCEA v. Greece*, 25 April 2001).

In view of these principles, the Network welcomes the pending adoption in **Cyprus**, of a bill amending the current legislation in relation to conscientious objectors and their exemptions from the obligation to complete armed military service (Official Gazette, 1.7.2005 - *Bill Amending the National Guard Laws of 1964 up to 2003*[208]). According to the new bill, a person who is granted exemption from military service as a result of being a conscientious objector, will have a duty to complete either an unarmed military service for the period of time that he would have had to serve in military service plus eight months, or alternative civil service for the period of time that he would have had to serve in military service plus thirteen months (sect. 5B, para. 1). Further, the bill affords the reservists the right to opt for an alternative unarmed service within army precincts or outside army precincts, even if they had completed the regular military service (sect. 5A, para. 4). According to information by the

208 *Νόμος που Τροποποιεί τους περί Εθνικής Φρουράς Νόμους του 1964 εως (Αρ. 2) του 2003,* Αρ. 4009 της 1ης Ιουλίου 2005.

relevant authorities, until the bill is passed and the alternative unarmed services are organised, as a matter of practice all Jehovah's Witnesses are granted an indefinite suspension from their reservist duty as well as from their military duty.

The Network notes with satisfaction the gradual improvement in the status of conscientious objectors in **Greece,** including in terms of the length of alternative service and the very high rate of approval of applications seeking the recognition of this status, despite the fact that the relevant decisions are not taken by the civil authorities. It welcomes the role played in this respect by the Special Committee of the Ministry of Defence, which is authorized to deliver an advisory opinion on the validity of the aforementioned applications and is composed essentially of non-military personnel. The 'Act on the Military Service of Greeks' codifies the provisions governing unarmed military service and alternative military service. It authorizes the Minister of Defence to set and adjust the length of service of conscientious objectors according to the length of military service. The Network points out in this connection that the length of alternative service has been gradually reduced from 36 or 30 months (depending on the type of service) in 1997 to 23 or 18 months in 2005. Nevertheless, the length of alternative service remains significantly greater than that of armed military service. The 'Act on the Military Service of Greeks' also provides that persons who have been sentenced for insubordination (before the entry into force of the Act of 1997 recognizing alternative service) to imprisonment for a period equal to or greater than the length of the alternative service which they would have performed if they had been recognized as conscientious objectors will be exempted from call-up to serve in the army. The Network expresses the hope that this provision will prevent successive prosecution and conviction for insubordination of persons who have not been recognized as conscientious objectors.

In the Concluding Observations which it delivered on **Greece** in the context of the International Covenant on Civil and Political Rights, the Human Rights Committee advises that country to ensure that the length of alternative service to military service does not take on a punitive character and to consider entrusting the assessment of applications for the status of conscientious objector to the civil authorities. Although the length of alternative service has diminished substantially in absolute figures over the years, it is still too long compared with armed military service and could therefore easily discourage and/or disadvantage persons claiming the right to conscientious objection. The Network is aware of the argument of the authorities that the principle of proportional equality justifies the longer term of alternative service, given that such service is performed under more favourable conditions. Although the Network acknowledges the relevance of this argument, the fact remains that there is still a disproportionate discrepancy between the respective terms of military service and various forms of alternative service. Similarly, in its concluding observations on **Finland**, issued in November 2004, the UN Human Rights Committee (HRC) had expressed concern that the right to conscientious objection was only acknowledged in peacetime, and that civilian alternative service was disproportionately long. The Committee also reiterated its concern at the fact that the preferential treatment of Jehovah's Witnesses who are exempted from the duty to serve either as conscripts or in alternative service, had not been extended to other groups of similarly situated conscientious objectors. The HRC recommended that Finland fully acknowledge the right to conscientious objection and, accordingly, guarantees it both in wartime and in peacetime; it should also end the discrimination inherent in the duration of alternative civilian service and in the different treatment of various categories of conscientious objectors (articles 18 and 26 of the ICCPR). The Network welcomes the fact that two governmental working-groups are currently working on possible amendments to the Conscription Act and the Alternative Service Act in order to take into account those recommendations.

Finally, the Network notes that the European Court of Human Rights held in two parallel decisions that the applications filed against **Austria** by Jehovah's Witnesses holding a full time functions as preachers, were admissible in regard to Article 4 para. 2 and para. 3, Art 9 and Art 14[209]. The appellants claimed that the Military Service Act (*Wehrgesetz*) and the Civilian Service Act (*Zivildienstgesetz*) regulating compulsory military and civil service were discriminatory as they only

[209] Eur. Ct. H.R. (1st sect.), *Markus Gütl v. Austria* (Appl n° 49686/99) decision of 1 February 2005. Eur. Ct. H.R. (1st sect.), *Philemon Löffelmann v. Austria* (Appl n°42967/98) decision of 1 February 2005.

exempt members of officially recognised religious communities, who have particular functions, from compulsory service. The Austrian religious community of Jehovah's Witnesses is also challenging the Religious Communities Act before the European Court of Human Rights for its restrictive criteria regarding the acquisition of the status as an officially recognised religious society. On 5 July 2005, the European Court of Human Rights declared the application of the Austrian religious community of the Jehovah's Witnesses and its four leading representatives admissible in regard to the Convention's Articles 9, 6, 13 and 14[210]. The applicants complained that the refusal of the Austrian authorities to grant legal personality to the religious community by conferring the status of a religious society under the Recognition Act would violate their right to freedom of religion. In particular, they challenged the Religious Communities Act (*Bekenntnisgemeinschaftengesetz*) for imposing discriminatory criteria for the granting of legal personality such as a minimum number of members (2 % of the population, i.e. approx. 16,000 members) and the ten year waiting period. The applicants furthermore pointed out several differences established by law between recognised religious societies and other religious communities such as subsidised religious education in schools, exemption from compulsory military and civilian service and tax advantages. In regard to freedom of religion, the court declared admissible the applicants' complaint about the refusal of recognition as a religious society and the complaint that the status of a religious community presently conferred was inferior to that of officially recognised religious societies which amounted to discrimination.

The wearing of religious signs

In the case of *Leyla Sahin v. Turkey*, the European Court of Human Rights agreed with the Turkish Constitutional Court that the principle of secularism, which guides the State in its role of impartial arbiter, and necessarily entails freedom of religion and conscience, also served to protect the individual not only against arbitrary interference by the State but from external pressure from extremist movements, and that upholding that principle could moreover be considered necessary to protect the democratic system in Turkey. The Court also noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women and gender equality. Taking into account the fact that in Turkey, the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhered to the Islamic faith, and that there were extremist political movements in Turkey which sought to impose on society as a whole their religious symbols and conception of a society founded on religious precepts, the Court took the view that imposing limitations on the freedom to wear the headscarf could be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since that religious symbol had taken on political significance in Turkey in recent years[211].

The present case-law of the European Court of Human Rights therefore does not confirm the view that the prohibition of the wearing of religious signs in public schools constitutes either a violation of the freedom of religion, or discrimination in the exercise of one's religion, under Articles 9 and 14 of the European Convention of Human Rights. On the other hand, the Network emphasizes that this case-law does not allow for any restrictions to freedom of religion in public institutions ; neither does it allow for a religious faith to be targeted by a regulation of vestimentary codes in public schools : any such regulation should be neutral between religious faiths and generally applied to all faiths. The European Court of Human Rights explicitly notes, in the judgment it delivered in *Leyla Sahin*, that 'practising Muslim students in Turkish universities are free, within the limits imposed by educational organisational constraints, to manifest their religion in accordance with habitual forms of Muslim observance', and that the contested regulation – a resolution adopted by Istanbul University on 9 July 1998 – 'shows that various other forms of religious attire are also forbidden on the university

[210] Eur. Ct. H.R. (1st sect.), *Religionsgemeinschaft der Zeugen Jehovas in Österreich v. Austria* (Appl n° 40825/98) judgment of 5 July 2005.
211 Eur. Ct. HR (GC), *Leyla Sahin v. Turkey*, application no. 44774/98, judgment of 10 November 2005.

premises' (para. 118). The Network recalls its observation in Thematic Comment n°3 on the rights of minorities in the Union (at para. 5.4.) that the prohibition of particular religious signs without any justification should be considered arbitrary and a violation of the freedom of religion protected under Article 9 ECHR and Article 18 ICCPR. The Network referred in this regard to the final views adopted by the Human Rights Committee on 5 November 2004 under Communication No. 931/2000 (*Hudoyberganova v. Uzbekistan*) [212], where the Human Rights Committee noted (at para. 6.2.):

> The Committee considers that the freedom to manifest one's religion encompasses the right to wear clothes or attire in public which is in conformity with the individual's faith or religion. Furthermore, it considers that to prevent a person from wearing religious clothing in public or private may constitute a violation of article 18, paragraph 2, which prohibits any coercion that would impair the individual's freedom to have or adopt a religion. As reflected in the Committee's General Comment No. 22 (para.5), policies or practices that have the same intention or effect as direct coercion, such as those restricting access to education, are inconsistent with article 18, paragraph 2, of the Covenant. It recalls, however, that the freedom to manifest one's religion or beliefs is not absolute and may be subject to limitations, which are prescribed by law and are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others (article 18, paragraph 3, of the Covenant). In the present case, the author's [a student at the Persian Department of the Faculty of Languages of the State Institute for Oriental Languages of Tashkent] exclusion took place on 15 March 1998, and was based on the provisions of the Institute's new regulations [under which students were no longer allowed to wear religious attire]. The Committee notes that the State party has not invoked any specific ground for which the restriction imposed on the author would in its view be necessary in the meaning of article 18, paragraph 3. Instead, the State party has sought to justify the expulsion of the author from University because of her refusal to comply with the ban. Neither the author nor the State party have specified what precise kind of attire the author wore and which was referred to as "hijab" by both parties. In the particular circumstances of the present case, and without either prejudging the right of a State party to limit expressions of religion and belief in the context of article 18 of the Covenant and duly taking into account the specifics of the context, or prejudging the right of academic institutions to adopt specific regulations relating to their own functioning, the Committee is led to conclude, in the absence of any justification provided by the State party, that there has been a violation of article 18, paragraph 2 of the Covenant.

The Network fears the impact which the application of the Act of 15 March 2004[213] could have on the dropout of recalcitrant pupils in **France.** Even though the start of the new school year in 2005 gave rise to fewer difficulties than in the previous year, it is difficult to measure how many pupils who are past compulsory school age (over 16 years) did not complete their education because of the prohibition on wearing those symbols. In her report following her visit to France from 19 September to 30 September 2005, the Special Rapporteur of the Commission on Human Rights on freedom of religion or belief, Mrs Asma Jahangir, observes that, although the Act of March 2004 on the wearing of conspicuous religious symbols in public schools contains a positive element in that it protects the autonomy of female children, it nevertheless denies the right of adolescents who have freely chosen to wear a religious symbol at school. It denies the innocent but visible expression of a religious belief, as in the case of Sikh children. The law has led, in a number of cases, to abuses that provoked humiliation, in particular amongst young Muslim women, which could lead to a radicalization of the persons affected. Furthermore, the stigmatization of the headscarf has provoked acts of religious intolerance when women wear it outside school.

The Network underscores the major efforts made in **France** to facilitate the practice of the Muslim

212 CCPR/C/82/D/931/2000, 18 January 2005.

[213] Act of 15 March 2004 regulating, in implementation of the principle of secularism, the wearing of signs or clothing demonstrating adherence to a particular religion in public primary and secondary education (Act n°2004-228 of 15 March 2004, J.O. of 17.3.2004, p. 5190)

religion. On 21 March 2005, the Minister of Home Affairs, Internal Security and Local Freedoms and the presidents of the four main French Muslim federations signed the draft bylaws of a Foundation for the Islam in France. This institution will be charged with collecting and distributing the funds paid by French and foreign donors for the purpose of financing the construction and renovation of mosques, the training of imams and prison or army chaplains, as well as the organization of the French Council for the Muslim Religion (CFCM). Generally, there are reassuring signs that inter-religious dialogue and dialogue between the religions and the State have been making progress during 2005. In **Italy**, the establishment of the Consultative body the Muslim community by the ministerial decree of 10 September 2005 is a meaningful advancement towards the dialogue with Muslims in order to favour reciprocal knowledge, integration and dialogue. In **Austria**, the first Austrian Conference of Imams took place in Vienna on 24 April 2005, at which the conference the Islamic Faith Community the adopted a final declaration acknowledging that official recognition as a religious society would promote dialog with state representatives and the society as such, including a clear condemnation of all terrorist and extremist acts, and emphasizing the importance of dialogue, the promotion of diversity, universal values and equal possibilities for women and men[214].

Implementation of the decisions of the European Court of Human Rights

The Committee of Ministers of the Council of Europe has adopted a number of resolutions to complete the monitoring of the execution by **Greece** of the judgments on religious freedom delivered by the European Court of Human Rights. The information supplied by the Greek government on the general measures that have been adopted and are satisfactory to the Committee of Ministers show the progress that has been made in Greece in the area of religious freedom under the impulse of the European case-law. This covers in particular convictions for proselytism[215], unlawful detention of ministers of Jehovah's Witnesses [216], conviction of Jehovah's Witnesses for establishing a place of worship without prior administrative authorization[217] and convictions of Muslim leaders in violation of their freedom of religion[218]. The Network points out that the series of judgments delivered by the European Court of Human Rights in the nineties for infringements of religious freedom induced the Greek authorities to make an effort to bring the Greek practice and case-law into line with the European standards. The aforementioned resolutions of the Committee of Ministers of the Council of Europe testify to the positive results of the process of execution of the rulings given by the European Court of Human Rights, in particular in the area of the criminalization of proselytism and permits to establish places of worship.

Article 11. Freedom of expression and of information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

[214] Final declaration of the Islamic Faith Community at the occasion of the Imame-conference in Vienna on April 24, 2005, available at: http://www.yenivatan.com/news/Imame-Konferenz.html (04.11.2005).
[215] Resolution ResDH(2004)80 concerning the judgment of the European Court of Human Rights of 24 February 1998 in the case of *Larissis* and others against Greece (adopted by the Committee of Ministers on 22 December 2004 at the 906th meeting of the Ministers' Deputies)
[216] Resolution ResDH(2004)82 concerning the judgments of the European Court of Human Rights in cases concerning unlawful detention of ministers of Jehovah's Witnesses and unfair compensation proceedings (*Tsirlis and Kouloumpas* v. Greece, *Georgiadis v. Greece*, judgments of 29 May 1997) (adopted by the Committee of Ministers on 22 December 2004 at the 906th meeting of the Ministers' Deputies)
[217] Resolution ResDH(2005)87 concerning the conviction of Jehovah's Witnesses for establishing a place of worship without prior administrative authorization in the case of *Manoussakis and others against Greece*, judgment of 26 September 1996 (adopted by the Committee of Ministers on 26 October 2005 at the 940th meeting of the Ministers' Deputies)
[218] Resolution ResDH(2005)88 concerning judgments of the European Court of Human Rights concerning the conviction of Muslim leaders in violation of their freedom of religion:- *Serif against Greece*, judgment of 14 December 1999 (final on 14 March 2000) - *Agga No. 2 against Greece*, judgment of 17 October 2002 (final on 17 January 2003).

This provision of the Charter corresponds to Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) without prejudice to any restrictions which Union law may impose on the possibility for the Member States to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Article 11 of the Charter must be read in accordance to the requirements formulated by both Article 19 of the International Covenant on Civil and Political Rights (1966) and Article 13 of the Convention on the Rights of the Child (1989).

Freedom of expression of the media

The Network notes that in the **Slovak Republic**, the offence of infringement of confidentiality of verbal communication and other communications of private nature was implemented into the new *Trestný zákon* [Criminal Code][219] following the Member of the Parliament's proposal. It is aware also that the Ministry of Justice of the Slovak Republic has prepared a proposal amending the Criminal Code proposing to abrogate or to amend this provision in the Criminal Code, in order to exclude from the scope of application of this provision journalists and individuals, who disclose unjustifiably recorded private communications in order to report a crime or in order to prevent commission of a crime. The National Council of the Slovak Republic however has refused to adopt the legislative proposal initiated by the Ministry of Justice.

Advocacy of terrorism

In the **Netherlands**, the Government is currently preparing a legislative proposal to criminalise the *apologie du terrorisme*. According to the draft text, a new provision (Article 137h) would be inserted in the Criminal Code. It would prohibit, *inter alia*, the glorification or denial of international crimes, crimes against humanity and terrorist offences which carry life imprisonment, where the person concerned knows or could have known that such statements will or may cause a serious disturbance of public order. The draft text has been submitted for consultation to a number of professional organisations, councils and associations. The *Nederlandse Orde van Advocaten* [Netherlands Bar Association] doubted whether the proposed provision would have any practical significance – but to the extent that it did, it might work counter-productive as it would create martyrs. The *Raad voor de rechtspraak* [Council for the Judiciary, a public body charged with promoting good quality execution of judiciary duties by the courts] observed that the proposed provisions will force the courts to take positions in historical, political and religious disputes (*advies* 2005/26, 15 September 2005). The *Vereniging voor Rechtspraak (NVvR)* [Netherlands Association of Magistrates] was critical too: although it is aware of the need to combat terrorism and to comply with international obligations, it found that the draft goes beyond that. The draft raises questions as to the scope of the prohibition and its relation to the principle of legality. One may also question the added value of the proposal, the NVvR observed, if one takes into account the possibilities to prosecute on the basis of existing legislation. Following the debate in Parliament on 3 November 2005, a motion was tabled, calling upon the Government to refrain from introducing the 'apology bill' (*Kamerstukken II,* 2005-2006, 29754, No. 59; *Handelingen* 2005-2006, TK17, p. 17-1036). The motion was not voted upon (*Handelingen* 2005-2006, TK21, p. 21-1331).

The Network recalls that in **Spain** the court on 20 February 2003 ordered the closing down of the newspaper Egunkaria, something which several non-governmental organizations denounced as an infringement of the freedom of expression. The Network recalls in this regard its opinion n° 3-2005 on the requirements of fundamental rights in the framework of the measures of prevention of violent radicalisation and recruitment of potential terrorists. The opinion addressed in the following manner the question of knowing under what circumstances restrictions imposed on the freedom of expression as part of the fight against violent radicalization and directed against the persons responsible for such radicalization are compatible with the requirements of Article 10 of the European Convention on Human Rights:

[219] *Zákon č. 300/2005 Z. z. Trestný zákon* [Act no. 300/2005 Coll. Criminal Code].

It should first be underlined that, in a democratic society, necessity for the fulfilment of a pressing social need is appreciated in particular in the light of the procedural guarantees surrounding the imposition of restrictions on the freedom of expression, and especially in the light of the effectiveness and speed of the remedies available to persons on whom such restrictions are imposed, which assume a particular importance where restrictions are concerned prior to the publication, making available to the public or dissemination of certain messages[220]. (…).

It emerges from the case-law of the Court that it is the incitement to violence rather than simply the expression of support for an objective or a cause that organizations using terrorism claim to uphold that can justify restrictions on the freedom of expression. (…) In its judgment of 8 July 1999 delivered in the Grand Chamber [in the case of *Sürek and Özdemir v. Turkey*], the European Court of Human Rights recalls that "While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones"[221]. The Court came to the conclusion that the conviction of the applicants constituted an infringement of their freedom of expression, after noting that "the fact that the impugned interviews were given by a leading member of a proscribed organisation cannot in itself justify an interference with the applicants' right to freedom of expression; equally so the fact that the interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in south-east Turkey. While it is clear from the words used in the interviews that the message was one of intransigence and a refusal to compromise with the authorities as long as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite to violence or hatred"[222]. Thus it is the question of knowing whether or not the impugned text constitutes an incitement to violence that seems to cause the Court either to consider that the expression in question does not deserve to be protected in a democratic society or on the contrary to rule that it does deserve to be protected, even if it seems shocking or offensive to some. This seems to be confirmed by the inadmissibility decision given on 20 January 2000 in the case of *B. Hogefeld v. Germany*[223] . (…).

It will not always be easy to distinguish speech that incites to violence and refusal to enter into a dialogue, which constitutes a negation of the idea of a democratic society and justifies allowing a broad margin of appreciation to a State that wants to suppress such speech, and speech which, while defending unpopular causes and political positions that conflict with those of the State, does not represent such an incitement to violence. This distinction is all the more difficulty to detect since, while freedom of expression also applies to ideas that are shocking, offensive or are disapproved by part of the population, the Court has sometimes acknowledged that restrictions on the freedom of expression may be allowed on account of the risk of public disturbances that may result from reactions triggered by certain ways of exercising freedom of expression[224]. The criterion that emerges from the case-law of the European Court of Human

[220] Although Article 10 does not as such prohibit every restriction prior to publication (see for example Eur. Ct. HR, *Markt intern Verlag GmbH and Klaus Beermann v. Germany*, judgment of 20 November 1989, series A No. 165), the Court believes that "the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest. This danger also applies to publications other than periodicals that deal with a topical issue" (Eur. Ct. HR (3rd section), *Association Ekin v. France* (Appl. No. 39288/98), judgment of 17 July 2001, § 56).

[221] Eur. Ct. HR, *Sürek and Özdemir v. Turkey* (applications nos. 23927/94 and 24277/94), judgment of 8 July 1999, § 58.

[222] Eur. Ct. HR, *Sürek and Özdemir v. Turkey,* above, § 61.

[223] Eur. Ct. HR (4th section), *Hogefeld v. Germany* (Appl. No. 35402/97), decision (inadmissibility) of 20 January 2000.

[224] See Eur. T. HR, D.H., *Steel and others v. United Kingdom*, judgment of 23 September 1998 (confronted with the deprivation of liberty for several hours suffered by a protester who had obstructed a shooting activity which she claimed to disapprove of, which constitutes a way of exercising the right to freedom of expression, the Court said it "has regard to the

Rights should therefore be gradually clarified in such a way that guidelines can be drawn from the cases that are brought before the Court.

Furthermore, the kind of incitement to violence that can be prohibited without resulting in an infringement of the freedom of expression can be direct or indirect. The CODEXTER, charged by the Committee of Ministers of the Council of Europe with preparing the draft Convention on the Prevention of Terrorism, has deduced from the *Hogefeld* decision that "the [European] Court [of Human Rights] has already held that certain restrictions on messages that might constitute an indirect incitement to violent terrorist offences are in keeping with the ECHR" (Explanatory Report, §91). It is on the basis of this appreciation that Article 5 of the Convention on the Prevention of Terrorism was able to define, in paragraph 1, public provocation to commit a terrorist offence as "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, *whether or not directly advocating terrorist offences*, causes a danger that one or more such offences may be committed" (our emphasis). It should, however, be underlined that, for such 'public provocation' to be considered incitement to commit a terrorist offence, "the result of such an act must be to cause a danger that such an offence might be committed. When considering whether such danger is caused, the nature of the author and of the addressee of the message, as well as the context in which the offence is committed shall be taken into account in the sense established by the case-law of the European Court of Human Rights. The significance and the credible nature of the danger should be considered when applying this provision in accordance with the requirements of domestic law" (Explanatory Report, §100).

As regards more specifically the role of the media in the propagation and dissemination of speech inciting to hatred or violence or inciting to committing terrorist offences, even indirectly, we should recall the lessons drawn from the *Jersild v. Denmark* judgment of the European Court of Human Rights[225]. The Court found in that judgment that there had been an infringement of the freedom of expression of a journalist of Danish television who was convicted for having recorded and disseminated a programme in which ample room was given to a group of Danish racists. This criminal conviction was based on a provision of the Danish Penal Code (Article 266(b)) that had been adopted by Denmark in order to comply with the International Convention on the Elimination of all Forms of Racial Discrimination[226]. In its judgment, the Court acknowledged the need to take into account the requirements of this Convention in the interpretation of the restrictions imposed on the exercise of the right to freedom of expression enshrined in Article 10 of the European Convention on Human Rights. According to the Court, "Denmark's obligations under Article 10 must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention" (§30). Nevertheless, the Court believes that the restriction imposed on the journalist's freedom of expression was disproportionate, taking into consideration two factors: firstly, "the applicant did not make the objectionable statements himself but assisted in their dissemination in his capacity of television journalist responsible for a news programme" (§31), and "the punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so" (§35); secondly, the Court points out that "the TV presenter's introduction started by a reference to recent public discussion and press comments on racism in Denmark, thus inviting

dangers inherent in the applicant's particular form of protest activity and the risk of disorder arising from the persistent obstruction by the demonstrators of the members of the grouse shoot as they attempted to carry out their lawful pastime": § 103). However, it does not seem that this case-law is sufficient to legitimize interferences with the right to freedom of expression that are justified solely by the risk of negative reactions from the population, such as seem to be allowed under English law (*Duncan v. Jones* [1936] 1 KB 218).

[225] Eur. Ct. HR, *Jersild v. Denmark*, judgment of 23 September 1994.

[226] At the time of the facts, this article provided: "Any person who, publicly or with the intention of disseminating it to a wide circle ("videre kreds") of people, makes a statement, or other communication, threatening, insulting or degrading a group of persons on account of their race, colour, national or ethnic origin or belief shall be liable to a fine or to simple detention or to imprisonment for a term not exceeding two years."

> the viewer to see the programme in that context. He went on to announce that the object of the programme was to address aspects of the problem, by identifying certain racist individuals and by portraying their mentality and social background. There is no reason to doubt that the ensuing interviews fulfilled that aim. Taken as a whole, the feature could not objectively have appeared to have as its purpose the propagation of racist views and ideas. On the contrary, it clearly sought - by means of an interview - to expose, analyse and explain this particular group of youths, limited and frustrated by their social situation, with criminal records and violent attitudes, thus dealing with specific aspects of a matter that already then was of great public concern" (§33).
>
> Similarly, a clear distinction should be made between reporting on terrorism and expressing support for terrorism, which could create a risk of a terrorist offence being committed if the circumstances lend themselves to it, and thus constitute, in the sense set out earlier, a public provocation to commit a terrorist offence. The Declaration on freedom of expression and information in the media in the context of the fight against terrorism, adopted by the Committee of Ministers of the Council of Europe on 2 March 2005 at the 917th meeting of the Ministers' Deputies, adopts a qualified position on this question which should be underlined. On the one hand, this Declaration calls on the public authorities in the Member States "not to introduce any new restrictions on freedom of expression and information in the media unless strictly necessary and proportionate in a democratic society and after examining carefully whether existing laws or other measures are not already sufficient", and "to refrain from adopting measures equating media reporting on terrorism with support for terrorism". On the other hand, the Declaration invites the media and journalists "to bear in mind their particular responsibilities in the context of terrorism in order not to contribute to the aims of terrorists; they should, in particular, take care not to add to the feeling of fear that terrorist acts can create, and not to offer a platform to terrorists by giving them disproportionate attention"; to "adopt self-regulatory measures, where they do not exist, or adapt existing measures so that they can effectively respond to ethical issues raised by media reporting on terrorism, and implement them"; to "refrain from any self-censorship, the effect of which would be to deprive the public of information necessary for the formation of its opinion"; to "bear in mind the significant role which they can play in preventing "hate speech" and incitement to violence, as well as in promoting mutual understanding"; and finally, to "be aware of the risk that the media and journalists can unintentionally serve as a vehicle for the expression of racist or xenophobic feelings or hatred"[227].

The Network also recalls the recommendation contained in the same Opinion No. 3-2005, which says:

> Insofar as advocacy of terrorism, as Article 5 of the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005 defines the concept of "public provocation" to commit a terrorist offence, does not appear to be covered by incitement to commit a terrorist offence for which the Council Framework Decision of 13 June 2002 on combating terrorism already provides an approximation of the penal laws of Member States[228], it might be worth considering proposing a Framework Decision, also based on Articles 29 and 31(e) of the Treaty on European Union, for the specific purpose of approximating the national laws on that point as well.

This does not mean that freedom of expression cannot be restricted for other reasons of public interest, more particularly in order to combat incitements to national, racial or religious hatred, intolerance or

[227] The European Commission against Racism and Intolerance (ECRI) stresses in this respect, in the aforementioned General Policy Recommendation No. 8, 'the particular responsibility of political parties, opinion leaders and the media not to resort to racist or racially discriminatory activities or expressions".

[228] The Convention on the Prevention of Terrorism defines public provocation to commit a terrorist offence as "the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed" (Article 5(1)). This appears to go further than incitement to commit a terrorist offence as is envisaged in European Union law by the Council Framework Decision of 13 June 2002 on combating terrorism.

discrimination. In **France,** the injunction which the Council of State imposed on the company *Eutelsat* to cease within 48 hours the broadcasting over its satellites of the television services of the channel *Al Manar* on the grounds that they contained an incitement to hatred or violence on grounds of religion or nationality, contributed to the restriction of expressions of hate speech[229]. Similarly, the Council of State considered that the CSA was right in ordering the company *Eutelsat* to cease the broadcasting in France of the Iranian television channel *SAHAR 1* because of its anti-Semitic programmes and incitements to racial hatred. As a matter of fact, satellite operators established in France are obliged to make sure that the contracts they conclude with television services which they allow the use of their networks make the broadcasting of programmes subject to compliance with French standards, in particular the prohibition on the broadcasting of speech inciting to racial hatred[230]. Those restrictions are perfectly acceptable, since they pursue by appropriate and necessary means the legitimate objective of combating incitements to national, racial or religious hatred, intolerance or discrimination, and of complying with the provisions of Article 20 of the International Covenant on Civil and Political Rights. The adoption, also in **France,** of the Act of 30 December 2004[231] amending the Act of 29 July 1881 on freedom of the press, calls for the same appreciation, since this Act introduces penalties for those whose speeches provoke hatred, violence or discrimination in access to employment or housing against a person or group of persons on grounds of gender, sexual orientation or disability, or for those who insult or slander such persons or groups of persons.

Media pluralism and fair treatment of the information by the media

Article 11 § 2 of the Charter of Fundamental Rights of the European Union states that "the freedom and pluralism of the media shall be respected". As illustrated recently by the imposition in the **Slovak Republic**, by the *Rada pre vysielanie a retransmisiu* [Council for Broadcasting and Retransmission],[232] of a sanction on the commercial television *Markíza* for providing unbalanced news[233] in violation of Section 16 paragraph 1 (a) of the *zákon o vysielaní a retransmisii* [Act on Broadcasting and Retransmission],[234] when it reported on 4 September 2005 on the meeting of the Board of the political party *ANO*, the regulation of the broadcasting sector by independent regulatory authorities can significantly contribute to the preservation of these values. The Network therefore welcomes the statutory creation in **Portugal** of the Entidade Reguladora da Comunicação Social (ERC),[235] following the 2004 amendment to the Portuguese Constitution providing in article 39 for the creation of a new independent public agency for media regulation[236]. Its role would be to ensure respect for the right of information and freedom of the press, prevent concentration of media ownership, guarantee media political and economic independence, protect fundamental rights from violation through the media, promote compliance with regulatory norms, provide for the possibility of expression and confrontation of different opinions, and guarantee the right to reply. At the same time, it is important that the independent broadcasting authorities regulating the media base their appreciation of the situations presented to them on the need to preserve the freedom of expression of the media which, as the European Court of Human Rights has repeatedly emphasized, extends to

[229] Council of State, *President of the Audiovisual High Council (CSA),* Injunction No. 274757, 13 December 2004. The Council of State prohibited the broadcasting of that television channel on the basis of Article 1(2) of the Act of 30 September 1986, according to which the exercise of the freedom of communication to the public by electronic means can be limited to the extent required in particular for the safeguarding of law and order.
[230] Council of State, *Société Eutelsat***,** Injunction No. 265482, 3 March 2005.
[231] Act No. 2004-1486 of 30 December 2004 establishing the High Authority against Discrimination and for Equality (Official Journal of 31 December 2004, p. 22567).
[232] Pursuant to the Section 4 of the Act no. 308/2000 Coll. on broadcasting and retransmission as amended, the Council for Broadcasting and Retransmission supervises the observance of law regulating the broadcasting and retransmission and exercises the state administration of the broadcasting and retransmission. The Council takes care of keeping the plurality of information on news programs of the broadcasting providers, who broadcast on the legal basis or on license basis.
[233] The resolution of the Council no. 05-19/76.722 of 8 November 2005. The resolution is available on the website of the Council for Broadcasting and Retransmission http://www.rada-rtv.sk/a7585039-38fa-42b4-91aa-46ae041bbb05/c19081105W.doc.
[234] *Zákon č. 308/2000 Z. z. o vysielaní a retransmisii v znení neskorších predpisov* [Act no. 308/2000 Coll. on broadcasting and retransmission as amended].
[235] Lei n.º 53/2005 of November 8th.
[236] Lei Constitucional n.º 1/2004 of July 24th.

statements which may offend, disturb, or shock the majority of the population of certain segments thereof. The Network notes in this respect that in **Greece,** the National Audiovisual Council (CNA) adopted a number of decisions imposing fines on private television channels for violations of the relevant ethical code in certain television reports. However, we should underline the important role that investigative journalism programmes can play, for example in order to expose certain unlawful practices that are likely to remain unnoticed if the journalists making such programmes are unable to assume their role of 'watchdog' in a democratic society.

As noted in the previous conclusions adopted by the Network (Concl. 2005, p. 62), the European Parliament (EP Resolution of the 22 April 2004 on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (2003/2237(INI), A5-0230/2004) and the Parliamentary Assembly of the Council of Europe (Council of Europe Parliamentary Assembly Resolution 1387 (2004) of 24 June 2004, Monopolisation of the Electronic Media and Possible Abuse of Power in Italy (Report by the Council of Europe Committee on Culture, Science and Education (Rapp: Mooney), Doc. 10195, 3 June 2004)) have deplored the concentration of political, commercial and media power in the hands of one person in **Italy**, stressing out the lack of independence of the public television service and evidencing a serious concern on the Italian freedom of expression and information. These concerns remain valid today. The 2004 Broadcasting Act ('Gasparri Law') did not solve the problem of the duopoly of Rai and Mediaset, which continue to control more than 90 per cent of the television audience and of all TV advertising revenue ; nor did if offer a solution to the imbalance between press and television. Neither the switch from analog to digital terrestrial television – despite the decision adopted on 2 March 2005 by the Communications Guarantee Authority which, stating the importance of pluralism in the television sector and in the field of financing sources related to the development of digital broadcasting, obliged RAI and Mediaset to speed up the digitalisation process and to guarantee independent producers significant access to digital television –, nor the privatization of the RAI – even apart from the doubts which remain about the constitutionality of that measure – seem to be within reach. The appointments in the Spring of 2005 of the new members of the independent authority for the regulation of broadcasting (AGCOM) showed the strong involvement of the political parties in the selection of the members and a risk of a greater political control over the regulators. The appointment of the new Management Board of the RAI aroused the same concern. The compatibility of the 2004 Broadcasting Act and of 2004 Conflict of Interest Law with the international standards in the field of freedom of expression was questioned by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, when he presented to the UN Commission on Human Rights, on 3 March 2005, the report on his mission to Italy from 20 to 29 October 2004. The Organization for Security and Co-operation in Europe (OSCE), organised a visit to Italy in March and April 2005, to assess the current situation in the television sector, one year after the adoption in 2004 of the Gasparri Law, Italy's first comprehensive regulation of all broadcast media, and of the Frattini Law, on the conflicts between public duty and private interests of public officials. In his Report of the visit, the OSCE Representative on Freedom of the Media Miklós Haraszti inter alios pointed out that: "Freedom of expression and press freedoms are in a healthy state in Italy. However, there is one media sector that is regularly referred to as the "Italian anomaly", the television broadcasting market. The enduring *RAI-Mediaset* duopoly, and especially the quasi-monopoly of *Mediaset* within the commercial television market, has deprived Italian audiences of an effective variety of sources of information, and has thereby weakened the guarantees of pluralism. Italy has an ongoing record of control over public-service television by political parties and governments. As the Prime Minister is also the country's main media entrepreneur, co-owning Mediaset, the 'traditional' fears of governmental control of RAI are aggravated by worries of a general governmental control of the nation's most important source of information, television". Similar concerns are expressed in the Opinion adopted by the Council of Europe Commission for Democracy Through Law (Venice Commission) upon request of the Parliamentary Assembly of the Council of Europe.

In its previous set of conclusions and recommendations, the Network of independent experts had noted that Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of

television broadcasting activities'[237] subsequently amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997,[238] could be amended in order to fulfil the requirement of Article 11(2) of the Charter. Indeed, although the Preamble of the directive mentions that "it is essential for the Member States to ensure the prevention of any acts which may prove detrimental to freedom of movement and trade in television programmes or which may promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole", the body of the Directive does not contain any provision aimed precisely at requiring that the Member States take certain measures to guarantee the maintenance of pluralism in television broadcasting, whereas the Directive does contain, for example, detailed provisions on the protection of minors (Article 22) or on the right of reply (Article 23). Noting that Council Directive 89/552/EEC would be subjected to evaluation in 2005, the Network took the view in its previous conclusions (Concl. 2005, p. 62) that

> in the course of such an evaluation, special consideration should be given to the added value which a specification at Community level of the requirements of pluralism in the media would present, in particular in order to clarify the legal framework applicable to such initiatives adopted by the Member States. The Member States should not be chilled from adopting certain regulations in this regard which could be seen as violating the freedom to provide audio-visual services or the freedom of expression of audio-visual service providers.

On 13 December 2005, the Commission proposed a new series of amendments to Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. The amendments which are now being proposed with a view to the adoption of a modified Audiovisual Media Services Directive (COM(2005) 646 final, 13.12.2005) are important contributions to the protection and the promotion of fundamental rights within the Union, especially under Articles 11 and 21 of the Charter of Fundamental Rights.

The Commission proposes, first, the insertion of a new Article 3 e in Directive 89/552 , stating that 'Member States shall ensure by appropriate means that audiovisual media services and audiovisual commercial communications provided by providers under their jurisdiction do not contain any incitement to hatred based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. By its reference to all the grounds of prohibited discrimination mentioned in Article 13 EC, this formulation goes further than current Article 22 a of Directive 89/552/EEC, which was inserted by Directive 97/36/EC, and according to which 'Member States shall ensure that broadcasts do not contain any incitement to hatred on grounds of race, sex, religion or nationality'. The requirement concerning the audiovisual media services and audiovisual commercial communications are in addition to the requirements specific to audiovisual commercial communications, which the Commission proposes to mention in Article 3 g of the amended Directive. Insofar as this latter provision seeks to prohibit commercial communications which include any discrimination on grounds of race, sex, or nationality or is offensive to religious or political beliefs, it does not substantially modify the current Article 12 concerning television advertising, a provision which would accordingly be deleted.

Most importantly, according to the proposal of the Commission, Article 23 b would be inserted, providing that :

> 1. Member States shall guarantee the independence of national regulatory authorities and ensure that they exercise their powers impartially and transparently.
> 2. National regulatory authorities shall provide each other and the Commission with the information necessary for the application of the provisions of this Directive.

[237] OJ L 298 of 17.10.1989, p. 23.

[238] Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, OJ L 202 of 30/7/1997, p. 60.

While these developments are welcome, the Network regrets that, except for the provision (Article 3 b § 1) which seeks to ensure that 'the fundamental freedom to receive information and to ensure that the interests of viewers in the European Union are fully and properly Protected', by providing that 'those exercising exclusive rights concerning an event of public interest should grant other broadcasters and intermediaries, where they are acting on behalf of broadcasters, the right to use short extracts for the purposes of general news programming on fair, reasonable and non-discriminatory terms taking due account of exclusive rights' (Preamble of the draft Directive, 27th Recital),[239] the amendments proposed to Directive 89/552/CEE still are based on the notion that the pluralism of the media are to ensured at the level of each Member State, without common rules or criteria being set at the level of the Union. On the other hand, the Network expresses the hope that the establishment, in all the Member States of the Union, of independent regulatory authorities who are to exercise their powers impartially, shall lead to progressively develop such criteria. These authorities should exercise their role with a view to preserving the pluralism of the media, as required by Article 11 of the Charter.

Protection from the advocacy of religious hatred constituting an incitement to discrimination, hostility or violence[240]

In **Denmark**, a Bill [Bill (2005:131) amending the Criminal Code (Abolition of the prohibition of blasphemy)][241] was introduced in March 2005, which proposed to abolish section 140 in the Criminal Code prohibiting blasphemy. In **Hungary**, an Islamophobic group, ITT has been describing the Koran as a handbook for criminals, and has pictured Islam as a criminal religion, and all Muslims as potential terrorists. Although the Hungarian Islam Community made a denunciation in the case, but the police did not begin an investigation.[242] In **France,** on 8 April 2005, the Court of Appeal in Paris upheld the injunction issued by the Court of First Instance in Paris on 13 March 2005 prohibiting an advertising poster inspired by Leonardo da Vinci's 'Last Supper', in the name of the prohibition of blasphemy and the protection of the religious feelings of believers. In **Denmark**, strong reactions, both in favour of journalistic freedom of expression and in favour of a greater respect for the faith of the Muslim community, followed the decision by a newspaper to publish on 30 September 2005 twelve cartoons featuring Muslim prophet Mohammed, in violation of the prohibition Islam imposes on the representation of the prophet.

The Network recalls in this regard that paragraph 18 of ECRI General Policy Recommendation No. 7 of 13 December 2002 on National Legislation to Combat Racism and Discrimination[243] provides that criminal law should penalise the following acts when committed intentionally: '(a) public incitement to violence, hatred or discrimination; (b) public insults and defamation or (c) threats against a person or a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin; (d) the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality, or national or ethnic origin (…)'.[244]

In its Opinion n° 5-2005 on combating racism and xenophobia through criminal legislation, the Network noted in this regard (in para. 3.2.4.) that the incrimination of forms of expression which encourage national, racial or religious hatred or intolerance would not be in violation of the guarantees of freedom of expression :

[239] The wording of Article 3 b § 1 should be put in line with the Preamble of the draft Directive, which refers to 'intermediaries' and not only to broadcasters, when defining the scope of persons having the right to use short extracts for the purposes of general news programming. This would contribute to access to information by the public, and would also contribute to pluralism in the media as certain broadcasters depend on the intermediaries (press agencies, in particular) for the information which they can distribute.
[240] On this issue, see also the report under Article 21 of the Charter.
[241] Forslag (2005:131) til lov om ændring af straffeloven (Ophævelse af straffelovens blasfemibestemmelse)
[242] http://hvg.hu/vilag/20050914koraneroszak.aspx
[243] This instrument is available on http://www.coe.int/T/e/human_rights/ecri/1-ECRI/3-General_themes/1-Policy_Recommendations/Recommendation_N%b07/3-Recommendation_7.asp#TopOfPage
[244] Underlined by the author.

All the EU Member States are parties to the International Covenant on Civil and Political Rights. Article 19(2) of the International Covenant on Civil and Political Rights guarantees freedom of expression which, it states, 'shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'. This right is not absolute. According to Article 19(3) of the Covenant : 'The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals'. Furthermore, Article 20(2) of the Covenant provides that 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. In its General Comment n°11 : Article 20 (1983), [245] the Human Rights Committee underlined that 'these required prohibitions are fully compatible with the right of freedom of expression as contained in article 19, the exercise of which carries with it special duties and responsibilities. The prohibition under (…) paragraph 2 is directed against any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, whether such propaganda or advocacy has aims which are internal or external to the State concerned. (…) For article 20 to become fully effective there ought to be a law making it clear that propaganda and advocacy as described therein are contrary to public policy and providing for an appropriate sanction in case of violation'. Therefore the prohibition of the advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence not only constitutes a restriction to freedom of expression which the States parties to the Covenant are authorized to adopt ; rather, the States parties are under an obligation to adopt legislation which effectively imposes such a prohibition, through the imposition of effective, proportionate and dissuasive sanctions. (...)

> Although the European Convention on Human Rights does not contain a provision similar to Article 20 of the International Covenant on Civil and Political Rights or Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, the principle of freedom of expression as stipulated in Article 10 ECHR does not constitute an obstacle to the States parties complying with those provisions. (…) Article 17 ECHR makes it impossible for an individual to rely on the guarantee of freedom of expression in order to (…) incite to discrimination, hostility or violence.

The European Court of Human Rights has recognized the legitimacy of interferences with freedom of expression whose aim it is to protect against the treatment of a religious subject in such a manner as to be calculated to outrage religious believers [246]. The Court also noted that 'Whereas there is little scope under Article 10 para. 2 of the Convention for restrictions on political speech or on debate of questions of public interest (…), a wider margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion' (§ 58). In the view of the Network, blasphemy laws should be strictly tailored to meet only the pressing need of protecting religious believers from what may amount to an incitement to religious hatred, intolerance and discrimination, without discouraging the critique of religious doctrines which form part of the pluralism characteristic of democratic societies. Such laws moreover should afford an equivalent protection to all religious groups within society without discrimination, as emphasized, inter alia, by the Advisory Committee of the Framework Convention for the Protection of National Minorities[247]. However, provided those

[245] Human Rights Committee, General Comment n°11 : Article 20 (1983), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 133.
[246] Eur. Ct. HR, *Wingrove v. the United Kingdom* judgment of 25 November 1996, at § 48.
[247] See the Opinion on the United Kingdom, made public on 25 May 2002, and the corresponding Resolution of the Committee of Ministers of the Council of Europe : Res CMN (2002) 9 on the implementation of the Framework Convention for the Protection of National Minorities in the United Kingdom, 13 June 2002 (see already the previous conclusions adopted by the Network : Concl. 2003 (Report on the situation of fundamental rights in the Union and its Member States in 2002, p. 178).

conditions are fulfilled, such laws may contribute to the protection of religious minorities. Any removal of such legislations should be used as an opportunity to examine whether the legislative framework provides a sufficient protection to those minorities. The European Commission should also examine, on the basis of a comparative overview of the existing national legislations, whether a Framework Decision on combating incitement to religious hatred and intolerance should be proposed on the basis of Articles 29 and 31, e), EU, in order to avoid that individuals or groups who disseminate ideas based on religious hatred or intolerance seek refuge under the laws of the Member States who impose the least important restrictions to this form of hate speech. The Network notes that, failing an approximation of the laws of Member States in this area, judicial cooperation in criminal matters could become hampered by the concern – perfectly legitimate from the perspective of Article 6(1) EU – that this cooperation should not lead to an infringement of the right to freedom of expression when the limits of that freedom are understood differently from one Member State to another. In **France,** during the period under scrutiny, the Court of Cassation, in view of the disproportionate penalties in connection with freedom of expression in other states, refused to extradite a person who was convicted in that way. With regard to the prison sentence which the applicant was given for abuse of freedom of the press on account of the statements he made about the detention conditions in the State prison where he was detained, the Court of Cassation set forth that "a prison sentence imposed for an offence committed in the domain of the press is only compatible with the freedom of expression enshrined in Article 10 of the European Convention for the Protection of Human Rights in exceptional circumstances, notably when other fundamental rights have been seriously infringed"[248]. In this case, the fact that the applicant was sentenced to imprisonment for two years and six months in a classic case of defamation on a topic of general interest was manifestly unjustified. In addition, the French authorities should immediately refuse to execute the European arrest warrant.

Article 12. Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests. 2. Political parties at Union level contribute to expressing the political will of the citizens of the Unio

In accordance with Article 52(3) of the Charter of Fundamental Rights, paragraph 1 of this provision of the Charter has the same meaning than the corresponding Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), although its scope is extended to include the exercise of this right at the European level. This provision must also be read in accordance with the requirements formulated by Articles 21 and 22 of the International Covenant on Civil and Political Rights (1966), by Article 8 of the International Covenant on Economic, Social and Cultural Rights (1966), by ILO Convention (n° 87) concerning Freedom of Association and Protection of the Right to Organise (1948), by ILO Convention (n° 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949), by ILO Convention (n° 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (1971), by ILO Convention (n° 154) concerning the Promotion of Collective Bargaining (1981), and by Article 5 of the European Social Charter (1961) or the Revised European Social Charter (1996).

Freedom of peaceful assembly

The European Parliament has recently called upon the Commission 'to ensure that the annual report on the protection of fundamental rights in the EU includes full and comprehensive information on the incidence of homophobic hate crimes and violence in Member States'[249]. In that resolution, the European Parliament expressed its concern about 'a series of worrying events have taken place in a

[248] Court of Cassation, Criminal Chamber, No. 05-84058, 21 July 2005.
[249] Resolution on homophobia in Europe, 16 January 2006, para. 7 of the operative part.

number of EU Member States, as widely reported by the press and NGOs, ranging from banning gay prides or equality marches to the use by leading politicians and religious leaders of inflammatory, hate or threatening language, police failing to provide adequate protection or even breaking up peaceful demonstrations, violent demonstrations by homophobic groups' (Preamble, C).

The Network regrets that in **Poland**, the President of Warsaw, Lech Kaczyński, refused on 3 June 2005 the Equality Foundation permission to organise the Equality Parade, which was intended as a demonstration in defence of the rights of homosexuals, and the appeals against which were not considered before the day of the parade**.** Although it is aware that the parade finally did take place on 11 June 2005, the Network notes that it could be considered as illegal in light of the decision issued by the President of Warsaw. This practice continued in the later period. On 19 November in Poznañ, the police detained around 60 participants of the manifestation entitled "The Equality March", for which the authorities had not given consent. The demonstrators protested against discrimination based on gender, colour, sexual orientation and disability. At the same time, the police failed to react to the slogans of the anti-gay demonstrators, who shouted out such slogans as "Gas the gay!" and "send dykes to Auschwitz". Decision of the Poznan authorities, was appealed by organizers of the march to the Regional Administrative Court in Poznan. In its judgment of 14 December 2005[250] the Court quashed the decision as taken in violation of Article 11 of the ECHR and Article 57 of the Constitution. The Network also has concerns about the exercise of the freedom of peaceful assembly in **Latvia**. It notes the difficulties the Latvian Gay and Lesbian Youth Support Group encountered when they sought to organise a LGBT Pride March through Old Riga, apparently after pressure was exercised on the Riga City Executive Director by the Latvijas Pirmā Partija (the Latvian First Party), and after a threat to organise public disorder from the radical nationalist organisations *Club 415* and Union of National Force, as well as statements by public officials that they could not accept a parade of sexual minorities in the middle of the capital next to the main Cathedral, as Latvia is a state based on Christian values. While it welcomes the fact that the Administrative Court overturned the decision of the Riga City Executive Director to annul the authorization to organize a march, finding it unjustified and discriminatory,[251] the Network is recalls that it is the duty of the public authorities to protect the right to assembly peacefully and to demonstrate, even in the face of public hostility. The Network also is concerned that certain amendments adopted in November 2005 to the *Law on Meetings, Processions and Pickets* [252] may set disproportionate limits on this freedom, because of the time limits which are imposed for seeking an authorization to manifest, in order to provide the opportunity for the competent municipality to deny permission to hold an event on legitimate grounds.[253] The Network is also aware that in the **Slovak Republic**, several meetings of the political party named *Slovenská pospolitosť – národná strana* [Slovak fellowship – national party] took place in number of Slovak towns on 29 and 30 October 2005, one of these meetings being scattered by the police in the town of Modra. Following the initiative of the public prosecutor, the mayor of the *Bratislava - Staré mesto* (municipal part of Bratislava) prohibited the meeting of *Slovenská pospolitosť - národná strana* [Slovak fellowship – national party] planned on 17 November 2005 in the centre of Bratislava. It should be noted, however, that public demonstrations which could degenerate into calls for hatred, intolerance or discrimination on national, religious, racial or ethnic grounds, or on grounds of sexual orientation and disability, may be prohibited insofar as they constitute a necessary means to protect the rights of others. Moreover, the freedoms recognized in Article 12 of the Charter may not be exercised in order to seek to destroy the the rights and freedoms contained in the Charter (Article 54 of the Charter), no more than the freedom of association and peaceful assembly recognized in Article 11 of the European Convention on Human Rights may be exercised with that aim (Article 17 ECHR).

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[250] Judgment of the Poznañ Regional Administrative Court of 14 December 2005, no. IV SA/Po 983/05

[251] Administratīvās rajona tiesas 2005. gada 22. jūlija spriedums lietā Nr. A42349805 A3498-05/19, available at website http://www.pride.lv/raksts-42

[252] Likums *Par sapulcēm, gājieniem un piketiem* [*Law on Meetings, Processions and Pickets*], adopted 16 January 1997, in force since 13 February 1997, with amendments announced to 22 November 2005.

[253] Legitimate grounds for prohibiting an assembly provided by law are mainly related to public security, e.g., prohibitions on making calls against the independence of Latvia, issuing calls for the violent overthrow of state power, to propagate violence, national and racial hatred, open Nazi, Fascist and Communist ideology, war propaganda, glorifying violations of the law or calls to violate the law.

Restrictions to the freedom of peaceful assembly have of course been imposed also in other Member States. In **Ireland**, in June, five men (who became known as 'The Rossport Five') were jailed for an indefinite period of time for contempt of court. The five had violated a court order restraining them from obstructing the construction of a gas pipeline by Shell E&P Ireland. The men, and their families and supporters, objected to the construction of the pipeline in proximity to their homes as they had safety concerns about the project.[254] The five men had been imprisoned on foot of committal orders sought by Shell and were only released, after spending 94 days in prison, when Shell applied to have the earlier injunction lifted.[255]

Freedom of association

The European Court of Human Rights pointed out that "a true and effective exercise of freedom of association is not limited to a mere obligation of non-interference by the State; such a negative notion would not be compatible with the purpose of Article 11 or with that of the Convention in general. There can exist positive obligations inherent in an effective respect for freedom of association (*Wilson & National Union of Journalists and others v. the United Kingdom, Nos.* 30668/96, 30671/96 and 30678/96, §41, Eur. Ct. HR 2002-V) that may even extend to relations between individuals (*Plattform « Ärzte für das Leben » v. Austria*, judgment of 21 June 1988, Series A No. 139, p. 12, §32). Therefore it is for the public authorities to guarantee the proper functioning of an association or of a political party, even if they annoy or give offence to persons who are opposed to the ideas or lawful claims they wish to promote. The participants must be able to hold demonstrations without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate (see, *mutatis mutandis, Plattform « Ärzte für das Leben » v. Austria*, above, §32)'. The Court has therefore concluded that there has been an infringement of Articles 6(1) and 11 of the European Convention on Human Rights in the case of *Ouranio Toxo v.* ***Greece*** [256]. The applicants, who are members of a political party which claims to represent the 'Macedonian minority', complained that their freedom of association was hampered by incidents that were staged against them, by the participation of members of the clergy and the municipal authorities in the incidents and the inaction of the police force as the crowd forced its way into the offices of the party, as a result of which the premises were destroyed. The Court considered that the risk of arousing tension within a community by the public use of terms that are liable to offend the patriotic or political feelings of the majority of inhabitants of a particular area does not in itself suffice to justify obstacles to the freedom of association. The local authorities, instead of exacerbating feelings of confrontation, should foster an attitude of conciliation. Moreover, in the case in question, the authorities had failed to take adequate measures to prevent acts of violence or, at least, to limit their extent; similarly, they had failed to take effective investigation measures.

Those criteria also apply, *mutatis mutandis*, to the banning of associations for reasons connected with the content of their opinions. The Network notes that in **Greece,** the case of the 'Turkish Union of Xanthi' reached its conclusion by a judgment delivered by the Court of Cassation, in plenary session, which confirmed the dissolution of the said association [257]. The Court based itself on an array of evidence brought up by the Court of Appeal, referring to the purpose of the association (which was found to be contrary to the Treaty of Lausanne which recognizes a religious Muslim minority in Thrace but not a Turkish national minority), as well as to the confusion created by the term 'Turkish' in its name which, in addition, suggests an attempt to promote political aims in a foreign State. In the eyes of the Court, this evidence justified the dissolution of the association, a measure that was necessary to maintain law and order and complied with the proportionality principle. While exercising a strict proportionality control, the Greek courts consequently showed themselves reluctant to

[254] *Irish Times*, 30 June 2005.
[255] *Irish Times*, 01 October 2005.
[256] Eur. Ct. HR, Case of *Ouranio Toxo v. Greece*, judgment of 20 October 2005.
[257] Court of Cassation (plenary) [Άρειος Πάγος], judgment no. 4/2005.

authorize the establishment or functioning of associations containing the term 'Turkish' in their name.

The Network takes note of the responses of **Hungary** contained in its Third Report on the implementation of the European Social Charter in June 2005.[258] It welcomes the changes regarding trade union membership of nationals of other Contracting Parties and their permanent residence permit, the protection of the right of workers not to join a union in law and in practice, the ban of automatic deductions from all workers' salaries including workers who are not union members. Indeed, the right to become members of trade unions should be reserved neither to nationals, nor solely to the nationals of other Contracting Parties to the European Social Charter ; in principle, this possibility should be open to all workers, with the exception of the special situation in the armed forced and the police, without consideration of nationality. An observation by the CEACR of the International Labour Organization[259] recalls that, under the obligations ensuing from Article 2 of the Convention, **Spain** must recognize that workers, without any distinction, have the right to join the organizations of their choice, with the sole exception of members of the armed forces and the police. The Committee therefore urges the Spanish government to take the necessary measures to amend the Aliens Act in such a way as to ensure that this right is not denied to individuals who have not been given a permit for residence in Spain.

Prohibition and dissolution of political parties

The Network recalls that in **Spain,** in accordance with Organic Act No. 6/2002 on political parties, Batasuna was declared illegal, and the electoral platforms or other organizations or parties replacing it have all been declared illegal following several judgments of the Supreme Court (Special Chamber) of 17 March 2003, 16 January 2004 and 30 March 2005; the latter judgment concerns another organization replacing Batasuna and is called Aukera Guztiak. Those judgments have been criticized by several non-governmental organizations, in particular the International League for the Rights and Liberation of Peoples, which refers in this respect to Article 25 of the International Covenant on Civil and Political Rights[260]. On 8 April 2005, the spokesperson for Batasuna announced that this organization calls upon the people to vote for the lists of the Communist Party of the Basque Country (EHAK). The question that now arises is that of the possible prohibition of the latter political party, given the support that Batasuna claims to give it. In the **Slovak Republic**, on 31 October 2005 the Prosecutor General of the Republic filed a motion to the Supreme Court of the Slovak Republic asking dissolution of political party named *Slovenská pospolitosť – národná strana* [Slovak fellowship – national party]. According to the *zákon o politických stranách a politických hnutiach* [Act on Political Parties and Political Movements][261], Supreme Court is entitled to dissolve a political party/movement on the motion of Prosecutor General if the political party/movement contravenes the Constitution of the Slovak Republic, constitutional laws, laws or international treaties by its statute, program or activities.

The Network recalls the applicable criteria. According to the case-law of the European Court of Human Rights, 'a political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a

[258] pp. 48-53 of the report.
http://www.coe.int/T/E/Human%5FRights/Esc/3%5FReporting%5Fprocedure/1%5FState%5FReports/Social_Charter/XVIII_1/Hungary_3rd%20_report.pdf

[259] *CEACR: Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organize, 1948* Spain (ratification: 1977) Published: 2005.

[260] *Nations Unies. Conseil économique et social. Commission des droits de l'homme. 57e session*. E/CN.4/Sub.2/2005/NGO/19, 8 juillet 2005.

[261] *Zákon č. 85/2005 Z. z. o politických stranách a politických hnutiach* [Act no. 85/2005 Coll. On Political Parties and Political Movements].

democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds'.[262] In order to determine whether the refusal to register a political party meets a 'pressing social need', the following points should be examined: (i) whether there was plausible evidence that the risk to democracy was sufficiently imminent; (ii) whether the leaders' acts and speeches taken into consideration in the case under review were imputable to the political party concerned; and (iii) whether the acts and speeches imputable to the political party formed a whole which gave a clear picture of a model of society conceived and advocated by the party which was incompatible with the concept of a 'democratic society'.

Where political parties represent a threat to the values of democracy or to the rights and freedoms recognized in a democratic society, the public authorities have a responsibility to combat these organizations, and if necessary, order their dissolution. In conformity with Article 20 para. 2 of the International Covenant on Civil and Political Rights, they should also outlaw advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. The Network welcomes the fact that in **Belgium**, the Act of 17 February 2005 amending the laws on the Council of State, coordinated on 12 January 1973, and the Act of 4 July 1989 on the limitation and supervision of electoral expenditure incurred for the elections to the Federal Parliament, as well as the funding and open accounts of political parties,[263] will make it possible in future to refuse public funds to any political party which 'by its own acts or by those of its components, its lists, its candidates or its elected office bearers demonstrates manifestly and through corroborating evidence its hostility to the rights and freedoms guaranteed by the Convention for the Protection (…) and by the Additional Protocols to that Convention in force in Belgium'. In **Portugal**, while fascist and racist organizations are explicitly prohibited, two demonstrations were called by well-known racist and fascist-type organizations, against gays, immigrants, etc., and could be organized under heavy police surveillance. Referring to its General Policy Recommendation No. 7, the European Commission against Racism and Intolerance (ECRI) recommended in its third report on **Sweden** from 2005 that "the Swedish authorities introduce legislation which provides for the possibility of dissolution of organisations that promote racism and penalises the creation or the leadership of a group which promotes racism; support for such a group, and participation in its activities."[264] However, despite the existence of a number of racist organisations in Sweden, and despite the observations and recommendations made on several occasions in this regard by various international human rights bodies, there is still no general prohibition in the Swedish legislation against their existence or the participation in such organizations.

The founding of political parties

Article 12 of the Charter of Fundamental Rights is an important component of the right recognized under Article 19 EC, which gives every citizen of the Union residing in a Member State of which he/she is not national the right to vote and stand as a candidate at municipal and European Parliament elections in the Member State of residence, under the same conditions as nationals of that Member State. According to Article 12 of the EC Treaty, any discrimination on grounds of nationality is prohibited within the scope of application of the Treaty. Article 39 and 40 of the Charter of Fundamental Rights confirm the electoral rights of non-national Union citizens in municipal and European parliamentary elections in their country of residence. Furthermore, Article 21(2) of the Charter prohibits any discrimination on the grounds of nationality in the field of application of Union law, corresponding thus to Article 12 of the EC Treaty.

The Report from the Commission to the European Parliament and the Council on the application of Directive 94/80/EC on the right to vote and to stand as a candidate in municipal elections and the Second report of the European Commission on Citizenship of the Union underline that the principle of

[262] Eur. Ct. HR (3d sect.), *Partidul Comunistilor (Nepeceristi) et Ungureanu c. Roumanie* (Appl. no 46626/99) judgment of 3 February 2005, § 46 ; and see *Yazar and Others v. Turkey,* nos. 22723/93, 22724/93 and 22725/93, § 49, ECHR 2002-II, and *[Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98,] § 98 [, ECHR 2003-II].
[263] *Moniteur belge*, 13 October 2005.
[264] CRI(2005)26, p. 12.

non-discrimination, enshrined in Article 19 of the EC Treaty, also means that citizens of the Union must be able to take part fully in the political life of the Member State of residence, with special reference to affiliation to existing political parties or even the founding of new political parties. In its Opinion n° 1-2005 on the participation of Union citizens in the political parties of the Member States of residence, the Network noted that

> insofar as Articles 12 and 19 EC are to be interpreted as guaranteeing the right of each citizen of the Union residing on the territory of a Member State other than the State of which he/she is a national to join political parties and to form political parties, thereby participating in the political life of the host Member State, Article 16 ECHR may not be invoked to restrict these rights. On the contrary, such restrictions should be considered in violation of the European Convention on Human Rights, and therefore also of the general principles of law which the European Court of Justice ensures respect of in the field of application of Union law. The citizens of the Union are entitled to the full enjoyment of Articles 10 and 11 of the Convention in the Member State in which they reside, even though they may be non-nationals of that State. Any difference in treatment on the grounds of the nationality should be treated as highly suspect [Eur. Ct. HR, *Gaygusuz v. Austria*, judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1141; Eur. Ct. HR (2nd section), *Koua-Poirrez v. France* (Appl. N° 40892/98), judgment of 30 September 2003], as emphasized in the recent case-law of the European Court of Human Rights, although the Court does admit that the establishment of a citizenship of the Union between the Member States constitutes a legitimate reason for creating a difference in treatment between the citizens of the Union and third country nationals [Eur. Ct. HR, *Moustaquim v. Belgium*, judgment of 18 February 1991, Series A n°193, § 49 ; *C. (Chorfi) v. Belgium*, judgment of 7 August 1996, *Rep.* 1996-III, § 38].

Opinion n°1-2005 concluded that a vast majority (16) of the Member States recognises the right of the non-national Union citizens both to join existing political parties and to found a new political party in the Member State in which they reside.

In 13 Member States (**Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Ireland, Italy, Luxemburg, the Netherlands, Sweden** and the **United Kingdom**), this recognition is based on the absence of any restriction based on nationality in the applicable legislation : in those States therefore, the law does not affirmatively recognize the right of Union citizens to become members of existing political parties or to found new political parties, but neither does it impose any obstacle on the exercise of these rights. The opinion highlighted, however, that the situation in two of these States is more problematic. In **Finland,** non-nationals are not similarly situated as Finnish nationals with regard to the registration of a political association,[265] while in **Germany** Section 2 (3) of the Political Party Act states: "Political organizations are not deemed to be parties if: 1. most of their members or the members of their executive committees are foreigners (…)", thus creating a difference in treatment between German nationals and aliens. However, in both these countries, Article 12 EC might be relied upon in order to disapply these provisions of national legislation which create a difference in treatment between nationals and other EU citizens.

In three other States (**Hungary**, **Latvia**, and **Portugal**), the right of non-nationals to join existing political parties and to found a new political party in the State of residence is explicitly recognized either in the laws or in the Constitution. However, in **Portugal**, although the legislation guarantees the right of non-national Union citizens residing in the country to become a member of an existing political party or to found a new political party, Article 20 (4) of the Law on Political Parties states that 'aliens and stateless persons that are legally resident in Portugal and who become members of a

[265] Indeed, in **Finland**, according to Section 2, subsection 1-2, of the the Act on Political Parties, an existing association can be registered (recognized) as a political party only if it provides a list of at least 5000 supporters that have the right to vote in parliamentary elections. As only Finnish citizens are entitled to vote in parliamentary elections, this means that foreigners, including non-national Union citizens may only found a political party with at least 5000 adult Finnish citizens who declare their support to the party in question.

political party *enjoy the rights of participation that are compatible with the political rights they are entitled to*', which would seem to imply that non-nationals are not entitled to equal and full membership rights. In **Latvia**, Article 45, part 3 of the *Law on Civil Society Organisations and Their Associations* as amended on 31 March 2004 by the *Saeima*, provides that : 'only political parties having 200 citizens can be registered and work. In a political party (organisation) with more than 400 members not less than a half of members shall be citizens' – therefore non-nationals may not be said to be recognized identical rights to the Latvians with respect to the founding of political parties; moreover the new draft law on political parties would be in violation of Articles 12 and 18 EC, insofar as it provides that only citizens may be founders of a party.

Three other countries (**Greece**, **Slovenia** and **Spain**) make a distinction between the right to found a political party and the right to become a member of a political party.

Finally, in six Member States (the **Czech Republic, Estonia, Lithuania, Malta, Poland**, and the **Slovak Republic**), non-nationals may neither become members of political parties, nor found political parties, although with respect to **Malta** this prohibition is not absolute and remains subject to interpretation. Apart from the discrimination this entails between nationals and other citizens of the Union, in violation of Article 12 EC, this situation seems difficult to reconcile with the right of all citizens of the Union to vote and stand for elections in local and European Parliament elections in the State in which they reside. As regards the **Slovak Republic,** the new *zákon o politických stranách a politických hnutiach* [Act on Political Parties and Political Movements][266] entered into force on 1 June 2005. Like the former legal regulation, also the new law states that only the citizens of the Slovak Republic have the right to vote and to stand as candidates to the bodies of a political party or political movement. The requirement of Slovak citizenship applies also to the exercise of the right to found political parties and movements as well as the right to associate in political parties and movements. In comparison with the former regulation, the new law tightens conditions required for registration of new political party/movement, namely it requires to present a petition signed by at least 10,000 of citizens of the Slovak Republic, who agree with establishment of the party together with the application for registration. Formerly the law required submission of a petition signed by only 1,000 citizens, i.e. ten-times less than the current law in force. In **Estonia**, on 26 January 2005, the Constitution Committee of the Parliament Riigikogu initiated the amendments of paragraph 5 of the Party Act which would bring the Act in accordance with EU norms and enable EU citizens of other member States become members of Estonian political parties. The parliament is currently proceeding with this amendment.

Article 13. Freedom of the arts and sciences

The arts and scientific research shall be free of constraint. Academic freedom shall be respected.

This provision of the Charter must be read in accordance with the requirements formulated by both Article 19(2) of the International Covenant on Civil and Political Rights (1966) and Article 15 of the International Covenant on Economic, Social and Cultural Rights (1966). It may be subjected to the limitations authorized by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

[266] *Zákon č. 85/2005 Z. z. o politických stranách a politických hnutiach* [Act no. 85/2005 Coll. on Political Parties and Political Movements].

Freedom of scientific research

The Network welcomes the adoption by **Greece** of the Act on Medically Assisted Procreation (MAP)[267], which, among other things, defines the methods and techniques of MAP, as well as the conditions of access thereto; it prohibits reproductive cloning and gender selection (except in order to avoid a serious gender-linked hereditary disease); establishes the general framework for research on gametes and fertilized eggs; lays down the conditions required for the establishment and operation of MAP Units and cryopreservation centres; sets up an independent national MAP authority, and imposes administrative and penal sanctions in case of violations of the law. Research on supernumerary gametes, zygotes and fertilized eggs for other purposes than securing pregnancy is allowed subject to authorization by the aforementioned independent authority. Research for procreation purposes is also subject to the authorization of the independent authority, under the conditions stipulated in Article 16 of the Convention on Human Rights and Biomedicine, which was opened for signature in Oviedo on 4 April 1997, and in accordance with the principle of proportionality and the consent of the persons concerned.

The Network also welcomes the presentation in **Ireland** of the report of the Commission on Assisted Human Reproduction (CAHR).[268] One of the main recommendations contained in the report is the establishment of a regulatory body by an Act of the Oireachtas to regulate AHR services in Ireland. This regulatory body should put in place guidelines to deal with, inter alia, (i) the freezing, storage and use of gametes, (ii) the fertilisation of ova, (iii) the freezing and storage of health embryos and (iv) delimitating the options available with respect to excess frozen embryos. The report also recommends that counselling should be provided before, during and after to people considering AHR treatment; donation of sperm, ova and embryos, subject to regulation, should be permissible; surrogacy, subject to regulation, should be permissible; embryo research, including embryonic stem cell research, should (subject to stringent control conditions) be allowed on surplus embryos donated specifically for research; human reproductive cloning should be prohibited.[269]

The implementation of these recommendations shall of course have to comply with Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells,[270] which aims to imposed a unified framework throughout the Union in order to ensure high standards of quality and safety with respect to the procurement, testing, processing, storage and distribution of tissues and cells across the Community and thus to facilitate exchanges thereof for patients receiving this type of therapy each year, by ensuring that human tissues and cells, whatever their intended use, are of comparable quality and safety, whichever the Member State in which they are procured.

Article 14. Right to education

1. Everyone has the right to education and to have access to vocational and continuing training.
2. This right includes the possibility to receive free compulsory education.
3. The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

[267] Νόμος 3305/2005, « Εφαρμογή της Ιατρικώς Υποβοηθούμενης Αναπαραγωγής» [Act No. 3305/2005, "Application of Medically Assisted Procreation"]
[268] CAHR, *Report of the Commission on Assisted Human Reproduction* (May, 2005).
[269] *Ibid* at pp.xv-xvii.
[270] OJ L 102 of 7.4.2004, p. 48. See also the Commission Directive 2006/17/EC of 8 February 2006 implementing Directive 2004/23/EC of the European Parliament and of the Council as regards certain technical requirements for the donation, procurement and testing of human tissues and cells, OJ L 38 of 9.2.2006, p. 40.

Paragraphs 1 and 3 of this provision of the Charter must be interpreted in accordance with Article 2 of the First Protocol to the Convention for the protection of Human Rights and Fundamental Freedoms (1952), although they are broader in scope. Moreover, Articles 14(1) and 14(2) of the Charter must be read in accordance with the requirements formulated by Articles 6(2) and 13 of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 28 of the Convention on the Rights of the Child (1989) and by Article 17 of the Revised European Social Charter. The right to vocational training recognized in Article 14(1) of the Charter must be read in accordance with the requirements formulated by Article 10 of the European Social Charter or Article 10 of the Revised European Social Charter. With respect to children who are members of national minorities, Articles 12(3) and 14(1) and (2) of the Framework Convention for the Protection of National Minorities (1995) should also be taken into account. Finally, Article 13 of the Framework Convention for the Protection of National Minorities should be taken into account in the interpretation of Article 14(3) of the Charter.

Access to education

The Network notes that the Court of Justice of the European Communities found **Austria**'s practice of permitting foreigners, including those coming from EU Member States, access to university only on the condition that they were entitled to an equivalent study place in their home country to constitute indirect discrimination on the grounds of nationality in violation of Article 12 of the EC Treaty.[271] The Court argued that requiring community nationals to meet specific requirements for a chosen course as laid down by the Member State which issued their diploma, would affect nationals from other Member States more than Austrians. Even though such a requirement would affect Austrian students equally, it would indirectly discriminate against students from other Member States. Austria therefore failed to take 'the necessary measures to ensure that holders of secondary education diplomas awarded in other Member States can gain access to higher and university education organised by it under the same conditions as holders of secondary education diplomas awarded in Austria […].' Austria had therefore failed to fulfil its obligations under Articles 12 EC, 149 EC and 150 EC.

Segregation of Roma in education

In para. 7.1. of its Thematic Comment n°3 on the rights of minorities in the Union, the Network already emphasized that the Member States would particularly benefit from exchanging information with respect to addressing the desegregation of Roma children in education, because of the need to identify ways to improve the access to education of Roma children, without coercing their families into sedentarization if they wish to preserve their traditional lifestyle. It recalled in this respect the view of the Advisory Committee of the Framework Convention for the Protection of National Minorities, which it expressed in an opinion on Ireland, that "Traveller children share the need for contact with children from different backgrounds and…the placing of Traveller children in separate educational facilities only on the basis of their Traveller background gives rise to deep concern form the point of view of Article 10 of the Framework Convention." The Network also referred, inter alia, to the study carried out by the European Roma Rights Centre (ERRC) on the segregation in schools in Central and Eastern European countries, including **Hungary**, the **Czech Republic** and the **Slovak Republic**. According to this research, the segregation of the Roma children in these countries' educational system is pervasive. Segregated schooling of Roma/Gypsies is a result of the interplay of a number of factors such as deep-seated anti-Roma racism, the indifference of the educational systems to cultural diversity, and a lack of effective protections against discrimination and equal opportunity policies. In some places, segregated school facilities for Roma/Gypsies appeared as a result of patterns of residential segregation. Segregation has also arisen as a result of the exclusion of Roma/Gypsies by virtue of their specific language and culture. Finally, segregation has resulted from the conscious

[271] Case C-147/03 *Commission v. Austria* [2005] (judgment of 7 July 2005).

efforts of school and other officials to separate Roma children from non-Roma children for reasons ranging from their personal dislike of Roma/Gypsies to responding to pressure from non-Roma.[272]

The concerns expressed then – in March 2005 – by the Network have been confirmed by the European Monitoring Centre on Racism and Xenophobia, which remarks in its Annual Report[273] that, in the **Slovak Republic**, many non-Roma parents enrol their children in schools with lower concentration of Roma children. In particular, in the vicinity of segregated Roma settlements, this leads to homogeneous Roma classes or schools. Moreover, Roma children are frequently placed in special institutions. The resulting pattern of educational segregation should be combated both through incentive measures and through legal actions being filed against school directors who are formally responsible for transferring children into special schools. The regulation of the Ministry of Education[274] stipulates the exact mechanisms that must be observed before making a decision about placing or transferring children into special schools. A thorough supervision of these mechanisms might prevent unjustified transfers. The introduction in the **Slovak Republic** of the post of Roma assistant teacher, the creation of auxiliary education programs, the reduction of the number of pupils in a class, and support to teaching of Roma language, all may contribute to ensuring the integration of the Roma children into mainstream education. However, the Network notes the view of the Committee on the Elimination of Racial Discrimination that while the extensive measures adopted by the State party in the field of education aimed at improving the situation of Roma children, including the 'Roma assistants' project, are to be welcomed, the de facto segregation of Roma children in special schools, including special remedial classes for mentally disabled children, continues to be a source of concern. The Committee recommended in its most recent Concluding Observations 'that the State party prevent and avoid the segregation of Roma children, while keeping open the possibility of bilingual or mother-tongue education [and] that the State party intensify its efforts to raise the level of achievement in school by Roma children, recruit additional school personnel from among members of Roma communities and promote intercultural education'[275].

Similar concerns have been expressed by the Committee on the Elimination of Racial Discrimination with respect to the **Czech Republic**. In its Concluding Observations of 10 December 2003, the CERD noted: 'While appreciating the complexity of the problem of special schooling and noting the accompanying measures taken by the Government with a view to promoting adequate support to Roma children, the Committee remains concerned, as does the Committee on the Rights of the Child (see CRC/C/15/Add.201, para. 54), at the continued placement of a disproportionately high number of Roma children in "special schools". Recalling its general recommendation XXVII, the Committee urges the Government to continue and intensify the efforts to improve the educational situation of the Roma through, inter alia, enrolment in mainstream schools, recruitment of school personnel from among members of Roma communities, and sensitization of teachers and other education professionals to the social fabric and world views of Roma children and those with apparent learning difficulties'[276]. Initiatives to address this problem have been taken by the Czech government since these Concluding Observations were adopted. The Government has adopted an amendment to its Regulation on conditions and way of granting subsidies from the State budget for activities of members of national minorities and in support of integration of the Roma community.[277] More needs to be done, however. The current practice of allowing a vast majority of the Roma children to be put in

[272] Stigmata: Segregated Schooling of Roma in Central and Eastern Europe, a survey of patterns of segregated education of Roma in Bulgaria, the Czech Republic, Hungary, Romania, and Slovakia. Available at: http://www.errc.org/db/00/04/m00000004.pdf

[273] Racism and Xenophobia in the EU Member States – trends, developments and good practice, EUMC – Annual Report 2005, Part 2.

[274] *Vyhláška Ministerstva školstva Slovenskej republiky č. 49/2004 Z. z., ktorou sa mení vyhláška Ministerstva školstva Slovenskej republiky č. 212/1991 Zb. o špeciálnych školách v znení neskorších predpisov* [Order of the Ministry of Education no. 49/2004 Coll. which amends the Order of the Ministry of education no. 212/1991 Coll. on special schools as amended].

[275] Concluding observations of the Committee on the Elimination of Racial Discrimination : Slovakia (CERD/C/65/CO/7, 10 December 2004), at para. 8.

[276] CERD/C/63/CO/4, 10 December 2003, at para. 14.

[277] Nařízení vlády č. 262/2005 Sb., kterým se mění nařízení vlády č. 98/2002 Sb. [Governmental Regulation No. 262/2005 Coll., amending Regulation No. 98/2002 Coll.].

special schools is discrimination under international law. In a judgment it delivered on 7 February 2006, a Chamber of the European Court of Human Rights (2nd sect.), 'while acknowledging that [the statistics presented by the applicants about the placement of Roma children in 'special' schools meant for children with learning disabilities] disclose figures that are worrying and that the general situation in the Czech Republic concerning the education of Roma children is by no means perfect' (§ 51), considered that it could not in the circumstances find that the measures taken against the applicants were discriminatory.[278] The Network disagrees. While it may be the case that, as stated by the Court, it is 'the parents' responsibility, as part of their natural duty to ensure that their children receive an education, to find out about the educational opportunities offered by the State, to make sure they knew the date they gave their consent to their children's placement in a particular school and, if necessary, to make an appropriate challenge to the decision ordering the placement if it was issued without their consent' (§ 52), it is unrealistic to approach the question of consent without taking into account the history of segregation of the Roma in education and the lack of adequate information concerning the choices open to parents. Moreover it is clear that the integration of the Roma children requires them to be encouraged to join the mainstream educational system, and cannot be said to be facilitated by such relegation in special schools devised for children with disabilities.

In **Portugal**, following the recommendations of the study on "Special Educational Needs" commissioned by the Ministry of Education[279], the revision of Decree-Law 319/91 and related legislation is apparently being envisaged. This revision should benefit all children with "special educational needs", which "includes pupils of all capacity levels who may have needs in cognition and learning, communication and interaction, sensory or physical aspects, and/or behavioural, emotional and social development." This comprises students with disabilities, students with learning difficulties, and students with socio-economic disadvantages (such as immigrants and the Roma).

These initiatives would gain from being collected on a systematic basis, and those experiences shared between the Member States in order to identify the most adequate solutions to a situation which calls for urgent action. The Network again repeats its recommendation in that respect contained in its Thematic Comment on the rights of minorities in the Union. The available indicators demonstrate that more should be done on this issue. While the **Slovak Republic** has developed certain good practices in this field which have been mentioned above, serious problems remain. According to the publication of the *Výskumné demografické centrum informatiky a štatistiky – INFOSTAT* [Demographic Research Centre of the Institute of Informatics and Statistics – INFOSTAT] named *Obyvateľstvo Slovenska podľa výsledkov SODB* [Population of the Slovak Republic according to Census 2001][280] from January 2005, the lowest attained level of education can bee seen in the regions with the higher concentration of Roma population. The Preliminary Report on the human rights situation of the Roma, Sinti and Travellers in Europe prepared by the Commissioner for Human Rights of the Council of Europe Mr. Alvaro Gil-Robles, shows that in some regions of the Slovak Republic 80% of Roma children were placed in specialized institutions, only 3% reached as far as secondary school and only 8% enrolled in secondary technical school.

According to data made available through the Ministry of Education on the ethnic breakdown of students at public schools, the division of students according to the language of instruction and their ethnicity, the number of minority schools and the number of students there, the situation of Roma in education has been decreasing in **Latvia**. For the last two years, the number of Romani children registered at mainstream schools has continued to fall: in the school year 2004/2005 there were 1,464, in 2003/2004 – 1,508.[281] Taking into account that the Roma in Latvia is the only ethnic group with a

[278] Eur. Ct. HR (2nd sect.), *D.H. v. the Czech Republic* (Appl. n° 57325/00) judgment of 7 February 2006.
[279] In http://www.min-edu.pt/ftp/docs_stats/d_1110569553310.pdf
[280] The publication goes out from the data of census of inhabitants, houses, and apartments in the year 1970, 1980, 1991 and 2001. The publication is published on website of the Demographic Research Centre of the Institute of Informatics and statistics: http://www.infostat.sk/vdc/sk/index.html (only in Slovak).
[281] Data provided by the Ministry of Education and Science: statistics on number of students at mainstream schools according to their ethnicity in 2004/2005, http://www.izm.gov.lv/default.aspx?tabID=7&lang=1&id=1268.

positive demography (more births than deaths) and that according to official sources very few Roma have left Latvia,[282] this may indicate that existing school practices fail to integrate Roma into the mainstream educational system (although the possibility that Roma have migrated to other countries cannot be fully excluded). Difficulties faced by Roma in the Latvian educational system are also documented by the study *Romani Identity in a Multicultural School* conducted by the NGO Centre for Educational Initiatives and presented in 2005. The report does not provide for specific numbers but indicates the main problems faced by Roma: low enrolment, early drop-outs, and others.[283]

The integration of minority children in education

Important efforts are being made in different parts of the Union in order to tackle the challenge of improving the integration of minority children in the educational system. In **Austria**, an initiative was presented in October 2005 to provide early language support especially targeted at children with mother tongues other than German[284]. Registration for primary schools started for the first time in October. During the registration process the children's language skills are tested. If deficiencies in German are identified, the child receives a so-called "language ticket" with can be used to receive 120 hours of remedial instruction. The ticket is worth € 80 and can be converted at kindergartens who will receive € 80 from the Integration Fund (*Integrationsfonds*) of the Ministry of Interior. The remaining costs for language support, which are estimated to be another € 80 per student, are to be carried by the community or the federal province[285]. According to the initiative, children with language problems should have the option of "growing into" the language subjects are taught in before entering primary school. The Network also welcomes the information concerning that same Member State that, due to the increasing interest in the languages of neighbouring countries, the number of pupils participating in minority language education increased during the school year 2004/05. Compared to the school year 2003/04 the number of pupils participating in bilingual German-Croatian or German-Hungarian education in Burgenland schools increased from 3,469 to 4,043.[286] In the federal province Carinthia the number of pupils participating in classes taught in Slovenian slightly increased from 3,407 in 2003/04 to 3,573 in 2004/05[287]. In its report on Austria the Committee of Experts on the European Charter for Regional or Minority Languages, "welcomes as a very positive element the fact that the structure of regional or minority language education in Burgenland, and to a lesser extent in Carinthia, is open to monolingual German speakers living in areas where bilingual education is provided in accordance with Austrian law."[288] On the other hand, this Committee also found that "the objective situation of the languages for which there is a specific legal framework, i.e. the Slovenian, Burgenland-Croatian and Hungarian languages in their respective language areas in Carinthia and in Burgenland, is considerably better than that of the other regional or minority languages." The Committee further identifies shortcomings with respect to teaching materials and teacher training in regional or minority languages. In regard to the situation in Vienna, the Committee states that the provisions for regional or minority language teaching in Vienna are in considerable need of development as there are no provisions for Burgenland-Croatian teaching, and Hungarian is only taught at the primary school level.[289]

In the **Slovak Republic**, the *Národný plán výchovy k ľudským právam na roky 2005 – 2014* [National

[282] Central Statistical Bureau of Latvia, Demographic Year Book of Latvia, 2004, page 44.
[283] The Centre for Educational Initiatives (2005), *Romani Identity at a Multicultural School*, http://www.iic.lv/petijums1/pdf
[284] Austrian Education News, Federal Ministry of Education, Science and Culture, No. 43, September 2005, available at: http://www.bmbwk.gv.at/fremdsprachig/en/schools/aen.xml?style=text (21.11.2005).
[285] "Neue Pläne: Deutschkurse schon im Kindergarten", in *ORF ON News,* 17.10.2005.
[286] Schülerzahlen im Bereich des Minderheitenschulwesens im Burgenland, published by *Landesschulrat Burgenland*, available at: http://www.lsr-bgld.gv.at/schul/daten/aps/mhs/statistikmhs.htm (10.11.2005).
[287] Information provided by the Austrian Focal Point of the European Monitoring Centre on Racism and Xenophobia upon request: original source, Landesschulrat für Kärnten, information provided on 21.10.2005.
288 Report on Austria of the Committee of Experts on the European Charter for Regional or Minority Languages, ECRML (2005) 1, 19.01.2005, p. 61, available at:
http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/ (10.11.2005).
[289] Report on Austria of the Committee of Experts on the European Charter for Regional or Minority Languages, ECRML (2005) 1, 19.01.2005, p. 61, 62, available at:
http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/ (10.11.2005)

plan for human rights education for the period of years 2005 - 2014][290] was approved in February 2005, paying specific attention to the education of national minorities, namely to Roma minority and to the right of parents to freely choose the education for their children. In **Poland**, the Act on national and ethnic minorities and regional language[291], adopted by the Sejm on 6 January 2005, confirmed, in Article 17, the right of individuals, who belong to national or ethnic minorities to learn the minority language or have classes held in the minority language, and to learn the history and culture of the minority.

In **Sweden**, on 26 October 2005 the Government Bill, prop. 2005/06:38, *Trygghet, respekt och ansvar- om förbud mot diskriminering och annan kränkande behandling av barn och elever*, was submitted to the Parliament for adoption. One of the major proposals contained in the draft Bill relates to the expansion of the Prohibition of Discrimination Act (*lagen om förbud mot diskriminering* (SFS 2003:37)) which currently guarantees protection against discrimination solely in higher education, so that it shall cover all levels of education.[292] Efforts should be pursued in this country, however. Despite the fact that a special University programme has been funded with the aim to remedy the serious shortage of teachers who can provide instruction in mother tongue education for Sámi children, the problem continues to persist. The large geographical distances place additional obstacles for many children to access some of the existing six Sámi schools in Sweden. The Network also regrets that the majority of the Swedish municipalities (3 out of 4) do not apply the legal guarantees for education in ones' mother tongue for children in pre-school age.[293] The European Commission against Racism and Intolerance (ECRI) noted in its third report on Sweden that "in practice, national minority children do not always have access to mother tongue education and that there are differences in this respect between municipalities".[294] Therefore, the Commission encouraged the Swedish authorities to intensify their efforts to guarantee the practical enjoyment by members of national minorities of their mother tongue education throughout the country. Moreover, all schools should educate their pupils about the culture, religion and history of national minorities. In its third report on **France**[295]**,** the European Commission against Racism and Intolerance recalls the recommendation it formulated in its second report, regarding which no action had been taken yet, on the disproportionate representation of immigrant children in certain schools.

The right to education of children with disabilities

According to para. 1 of Article 15 of the Revised European Social Charter : 'With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular (...) to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private". The European Committee of Social Rights views this provision as "both reflecting and advancing a profound shift of values in all European countries over the past decade away from treating them as objects of pity and towards respecting them as equal citizens – an approach that the Council of Europe contributed to promote, with the adoption by the Committee of Ministers of Recommendation (92) 6 of 1992 on a coherent policy for people with disabilities. The underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of "independence, social integration and participation in the life of the community". Securing a right to education for children and others with disabilities plays an obviously important role in advancing these

[290] The National plan for human rights education for the period of years 2005 – 2014 is published on website of the Ministry of Education of the Slovak Republic: http://www.minedu.sk/MIN/KaP/kap.htm (only in Slovak).
[291] Ustawa z dnia 6 stycznia 2005 r. O mniejszościach narodowych i etnicznych oraz o języku regionalnym (Dz.U. Z 2005 r. Nr 17, poz. 141) [The Act of 6 January 2005 on national and ethnic minorities and regional language (The Official Journal of 2005, No 17, item. 141)]
[292] See also Faktablad, U05.046, 26 October 2005, www.regeringen.se
[293] See Rapport om modersmål i förskolan, November 2005, www.skolverket.se
[294] CRI(2005)26, p. 10.
[295] ECRI, third report on France, adopted on 25 June 2004 and published on 15 February 2005, available at the site http://www.coe.int/T/F/Droits_de_l%Homme/Ecri/

citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education 'in the framework of general schemes, wherever possible'" (decision on the merits of the Collective Complaint n°13/2002, *Autisme-Europe v. France*, § 48).

Further efforts are required for the integration into mainstream education of children with disabilities, including learning disabilities. In **Sweden**, a recent study has highlighted that only 10 to 15 per cent of the students with disability (hearing impairement) continue their studies at university level.[296] The Network notes with interest that in **Latvia**, *Apeirons*, an organisation of people with disabilities and their friends, in co-operation with *Vaivari* elementary school, Liepaja City Council and the Regional Council of Madona launched a project, co-financed by the European Social Fund, *Creating a supportive environment for juveniles with special needs for integration in the education system*, which aims to promote a social, psychological, informative and physical environment for integration of juveniles with special needs into the educational system, reducing the risk of their being socially excluded. In **Poland**, the Educational Strategy 2007-2013 adopted by the government on 2 August 2005 seeks to raise the level of education of Polish society and to adapt the educational model to the changing social conditions. The Network welcomes that, as part of the strategy, the Government proposed *inter alia* to develop a system of early support for children who have additional schooling needs, to remove barriers in access to education for individuals with special educational needs, to increase access to education, and to increase the role of pre-school education. In addition, access of children from national minorities to education should be improved.

The affordability of education

The Network commends the States which have adopted measures in order to improve the accessibility of education, in particular its affordability for children whose parents have low revenues. As emphasized by the UN Committee on Economic, Social and Cultural Rights, 'educational institutions and programmes have to be accessible to everyone, without discrimination, within the jurisdiction of the State party'. The requirement of accessibility includes financial accessibility : 'education has to be affordable to all'.[297] In **Denmark**, in December 2004 Act (2004:1457) amending the Act on Public Schools (Free place subsidy on economical, social or educational reasons)[298] was adopted by Parliament. In act introduces an obligation of reduced payment for families with children in the so-called SFOs (a care institution linked to public schools) similar to families with children in day care institutions in all municipalities, which have an income below 387.400 DKK or where it may be necessary due to social or educational purposes. Previously families with low incomes experienced in some municipalities a high increase of fees when their children went from kindergarten to a SFO. In the **Netherlands**, the *Tweede Kamer* [House of Representatives] has adopted a legislative proposal abolishing tuition fees for 16 and 17 year-olds taking part in secondary and professional education from the school year 2005-2006 onwards (*Kamerstukken* 30199, *Handelingen* TK, 2005-2006, No. 21, pp. 1328-1329). The bill is now under consideration in the *Eerste Kamer* [Senate]. The Network notes that the abolishment of tuition fees is in line with art. 13 ICESCR, which provides for 'the progressive introduction of free education' with regard to both secondary and higher education. In a letter to the Dutch Member of the Network, of 24 November 2005, the responsible Ministry of Education, Culture and Science added that the proposal is also in line with Article 14 of the EU Charter of Fundamental Rights. The Government interprets the notion of "free education" as requiring that there are no financial obstacles to participation in secondary and higher education. Present rules applied that principle by offering financial support to indigent parents; the new rules set the next step by abolishing the tuition fees altogether. However, financial support will continue to be available for additional costs, for instance for school books.

[296] Hörselskadades riksförbund, Sanning och konsekvens, om hörselskadades situation i Sverige, Årsrapport 2005, p. 65.
[297] General comment No. 13: The right to education (art. 13) (1999), *Compilation of the general comments or general recommendations adopted by human rights treaties bodies*, HRI/GEN/1/Rev.7, 12 May 2004, para. 6.
[298] Lov (2004:1457) om ændring af lov om folkeskolen. (Fripladstilskud i skolefritidsordninger af økonomiske, sociale eller pædagogiske grunde).

On the other hand, the Network notes that in **Poland**, the Educational Strategy for the years 2007-2013 includes a recommendation to charge fees for all higher education, combined with a grant system for students from low-income families and a student loan system. The Network underlines in this regard that, when States have committed themselves to progressively realizing the right to education, 'any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources'.[299]

Access to education of children of undocumented migrants

The UN Committee for the Elimination of Racial Discrimination encourages the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination – this includes all the EU Member States – to ensure that public educational institutions are open to non-citizens and children of undocumented immigrants residing in the territory of a State party (General Recommendation n°30 on discrimination against non-citizens, adopted at the 65th session of the Committee, HRI/GEN/1/Rev.7/Add.1, 4 May 2005). As already recalled by the Network in these Conclusions (under Article 5 if the Charter), the right to education should be recognized to all children under the jurisdiction of the EU Member States, whatever the administrative situation of their parents. In **Poland**, the amended Act on the Educational System extended the right to free schooling to the children of individuals applying for refugee status: according to Article 94A par. 2 p. 10[300], since 1 October 2005 children of aliens applying for refugee status are granted the right to education on similar conditions as Polish citizens. In **Cyprus**, the Ministry of Education reaffirmed that the right to education is recognised by the Constitution and covers not only citizens of the Republic but also any other citizen irrespective of whether he/she resides in the Republic illegally or not. In **Greece,** following complaints received from underage foreign nationals, the Office of the Ombudsman (Section Children's Rights) asked the relevant Special Secretary of the Ministry of National Education to remind the heads of the country's educational establishments that all children have the right to primary and secondary education, irrespective of their nationality or legal situation (regular or not) of their residence in the country. The Network welcomes this initiative, which guarantees that the law ensuring access for all underage foreign nationals, including refugees, asylum-seekers and children in an irregular situation[301] to educational establishments can henceforth be applied without exception, in accordance with the requirements of the right to education. The situation in other Member States is less promising. In its Concluding Observations relating to **Sweden**, the Committee on the Rights of the Child expressed its concern about the fact "that children without residence permit, in particular children 'in hiding', do not have access to education" and that "there are considerable variations of results among various regions',[302] and recommended that this be remedied. The Swedish Government decided in September 2005 during the negotiations for the 2006 budget to reserve funds to cover the free education of children 'in hiding', *i.e.* asylum applicants whose requests for protection in Sweden have been rejected. However, the education of these children poses certain practical problems since it is difficult for a child to remain in hiding and to attend a school at the same time, unless the school board decides not to cooperate with the public authorities. In order to resolve these problems the Minister for Immigration referred recently to her plans to initiate the setting up of an inquiry with the explicit task to propose a new bill on this particular subject matter.[303]

As mentioned in the above conclusions adopted under Article 5 of the Charter, the Network considers it unacceptable that children do not attend school because of the illegal situation of their parents and

[299] UN Committee on Economic, Social and Cultural Rights, General comment No. 3: The nature of States parties' obligations (art. 2, para. 1, of the Covenant) (1990), *Compilation of the general comments or general recommendations adopted by human rights treaties bodies*, HRI/GEN/1/Rev.7, 12 May 2004, para. 9.
[300] Ustawa o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Act on the amendment of the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland]
[301] See Article 72 of Act 3386/2005.
[302] UN Doc. CRC/C/15/Add.248, 28 January 2005, p. 7.
[303] *D.Nilsson*, Gömda flyktingbarn får rätt att gå i skolan, SvD 17 September 2005, p. 12.

out of fear that this situation will be denounced to the authorities. The Member States should exchange the best practices in this field which provide a solution to such situations, which comply with Article 14 of the Charter of Fundamental Rights and Article 13 of the International Covenant on Economic, Social and Cultural Rights.

Article 15. Freedom to choose an occupation and right to engage in work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

This provision must be read in accordance to the requirements of Article 6 of the International Covenant on Economic, Social and Cultural Rights (1966), of Article 1(2) of the European Social Charter, which the Revised European Social Charter has not modified.

<u>The right to engage in work and the right for nationals from other member States to seek an employment, to establish themselves or to provide services, and access to employment of third country nationals</u>

On the basis of its examination of the reports concerning the situation of fundamental rights in the Member States, the Network of Independent Experts on Fundamental Rights wishes to highlight the following specific issues concerning the right to engage in work and the right for nationals from other Member States to seek an employment, to establish themselves or to provide services in any Member State:

- The Court of Justice of the European Communities has delivered several judgments during the period under scrutiny, highlighting infringements by Member States of their obligations under Community law intended to facilitate access to salaried employment or self-employment in another Member State. As regards **Greece,** the Court of Justice considered that, where national transposition measures have not been adopted within the time stipulated in Article 17 of Council Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC, a national of a Member State may rely on Article 3(a), first subparagraph, of that Directive in order to obtain, in the host Member State, authorization to pursue a regulated profession such as that of occupational therapist. That possibility may not be made subject to recognition of the qualifications of the person concerned by the competent national authorities[304]. The same case-law applies to another regulated profession, namely that of mechanical engineer305.

[304] ECJ, 14 July 2005, *Maria Aslanidou v. Ypourgos Ygeias & Pronoias,* Case C-142/04.
[305] ECJ, 14 July 2005, *Michail Peros v. Techniko Epimelitirio Ellados*, Case C-141/04.

- **France** has drawn lessons from several observations made by the Court of Justice that the French standards on access to French public service positions for European nationals are not compatible with Community law (ECJ, 9 September 2003, *Burbaud v. Ministère de l'emploi et de la solidarité*, Case C-285/01, ECR, p. I-8219; ECJ, 7 October 2004, *Commission of the European Communities v. France*, Case C- 402/02, ECR, p. I-9845: access to the profession of teacher specializing in the field of hospital public service and in national public service). The Network emphasizes the positive role played by the French administrative court during the past year in bringing France into compliance with its European obligations (EC, *Mlle Barneaud,* No. 261974, 10 December 2004; EC, *Ministre de la Santé et de la protection sociale / Mme Burbaud,* No. 268718, 16 March 2005, Recueil Lebon 2005 p. 109; EC, *Mme Weber,* No. 267979, 27 July 2005).

- Undertakings established in a Member State often still encounter difficulties when they want to deploy some of their staff members who are non-EU nationals to **Luxembourg** in order to provide services there. Those difficulties are the result of the conditions of entry (visa), residence, employment, as well as of return of the deployed employee to the State where the employer is established. For instance, when an employer established in a Member State wants to deploy an employee who is a third country national to the Grand Duchy of Luxembourg for the provision of services, the Luxembourg authorities demand a work permit or a collective work permit, delivered on the basis of several criteria, in accordance with a Grand Ducal regulation of 12 May 1979: depending on the situation of the labour market and in exceptional cases; subject to proof that the employee in question has been in his employer's service under a contract of unspecified duration for at least the last 6 months; finally, on payment of a bank guarantee of 1,487 euros. In a judgment of 21 October 2004 delivered on an action brought for failure to fulfil obligations (Case 445/03), the Court of Justice of the European Communities considered that the application of this national law provision constitutes a violation of Article 49 EC, which prohibits restrictions on the freedom to provide services, on the grounds that it would deprive of interest 'the free provision of services in the territory of Luxembourg by deployed workers who are nationals of non-member countries'. Luxembourg is urged to replace the work permit by an obligation for undertakings to supply all relevant information showing that the workers concerned are in a regular situation as regards residence, work permit and social welfare protection in the Member State where the undertaking employs them.

- On 1 April 2005 the *zákon o nelegálnej práci a nelegálnom zamestnávaní* [Act on illegal labour and illegal employment]306 came into force in the **Slovak Republic**. The Act has modified the *zákon o službách zamestnanosti* [Act on employment services][307], and by this Amendment the seeking of employment on the territory of the Slovak Republic became easier for foreigners. The Amendment extended the cases when the foreigner does not need to have the employment permit, specifically when the foreigner has been granted temporary residence for the purpose of family reunification and may enter employment relations according to the law concerning the residence of foreigners, and also when he/she has been granted temporary residence for the purpose of performance activities based on special programs.

- As part of their obligation to ensure the effective exercise of the right of the nationals of States parties to the European Social Charter to engage in a gainful occupation in the territory of other Parties, Article 18 of the Revised European Social Charter imposes on the States parties having accepted that provision 'to apply existing regulations in a spirit of liberality' (Art. 18 para. 1), 'to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers' (Article 18 para. 2), and 'to liberalise, individually or collectively, regulations governing the employment of foreign workers' (Article 18 para. 3). In conclusions adopted in 2005, the European Committee of Social Rights reiterated its earlier conclusions implying that the situation in **Sweden** with regard to the implementation of Article 18 para. 3 is not in conformity with

[306] *Zákon č. 82/2005 Z. z. o nelegálnej práci a nelegálnom zamestnávaní a o zmene a doplnení niektorých zákonov* [Act no. 82/2005 Coll. on illegal labour and illegal employment, amending and supplementing certain other laws].
[307] *Zákon č. 5/2004 Z. z. o službách zamestnanosti a o zmene a doplnení niektorých zákonov v znení neskorších predpisov* [Act no. 5/2004 Coll. on employment services, amending and supplementing certain other laws as amended].

the Revised European Charter 'because the conditions for the granting of temporary and permanent work permits were too restrictive since permanent work permits are only granted to workers with exceptional qualifications and temporary permits are granted only for a specific job, with a specific employer, in cases of shortages in the workforce'.[308] Moreover, the Committee considered the current administrative practice in Sweden which is related to the renewal of residence permits as not being in conformity with Article 18 para. 3 of the Revised European Charter on Social Rights since 'residence permit extensions for foreign workers who have lost their job in order to provide sufficient time for a new job to be found are not granted' (Concl. XVII-2 (Sweden) 2005). Similar conclusions were reached with regard to Spain (Concl. XVII-2 (Spain) 2005).

Access to employment for asylum seekers

The Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326 of 13.12.2005, p. 36) is silent on the question of access to employment of asylum-seekers or persons in search of another form of international protection. Council Directive 2003/6/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31 of 6.2.2003, p. 18) provides that Member States 'shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market' (Article 11(1)), although access to the labour market 'shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified' (Art. 11(3)), and although 'if a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant' (Art. 11(2)). The impossibility for the asylum-seeker to have access to the employment market, at least during the first year following the application, is regrettable, taking into account both the length of the procedures for the determination of the claim to asylum – which often last for several months before a final decision is taken – and because, as noted already in the previous conclusions of the Network (Concl. 2005, p. 71), the fact of being able to take a job, even on a purely provisional basis, may in actual fact not make it more difficult, but indeed make it easier for the person in question to subsequently return to his country of origin, since he has been able to acquire certain skills and undoubtedly accumulate some funds that will allow him to set himself up again and to justify his return in the eyes of the members of his family and his community whom he had left behind.

The Network notes however that, as clearly emphasized in the Preamble to the Directive, 'it is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is a refugee within the meaning of Article 1(A) of the Geneva Convention' (7th Recital). Certain developments are particularly encouraging from this viewpoint. In the **Czech Republic**, the Employment Act,[309] apart from providing for the access to employment without a work permit for the person who is recognized the status of refugee (Sec. 98), provides that asylum seekers may get work permits under preferential conditions 12 months after filing their application for asylum (Sec. 97). In **Lithuania**, as a part of the EU initiative EQUAL the Ministry of Social Security and Labour in partnership with a number of civil society organisations launched the project "In Corpore", which is aimed to prepare asylum seekers for professional integration into the Lithuanian labour market and increase their access to employment after they are granted asylum in Lithuania.[310]

[308] Council of Europe, European Social Charter (Revised), European Committee of Social Rights, Conclusions 2005 (Sweden), p. 12, www.coe.int

[309] Zákon č. 435/2004 Sb., o zaměstnanosti, ve znění pozdějších předpisů [Act No. 435/2004 Coll., Employment Act, as amended by later laws].

[310] Projekto aprašymas [Description of the Project] // www.equal.lt

Article 16. Freedom to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

No conclusions were adopted under this provision of the Charter.

Article 17. Right to property

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.

This provision of the Charter corresponds to requirements formulated by Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1952) and should be read accordingly.

The right to property on traditional lands

The Network notes that, under the contemporary standards in international human rights law, the concept of "property" includes indigenous peoples' communal property, such as traditional land and resource tenure systems that arise from and are grounded in indigenous customs and tradition[311]. It is concerned, in this regard, that the situation of the Sámi in **Finland** and in **Sweden** still remains unsatisfactory. Both countries still have to ratify the ILO Convention No. 169 on Indigenous and Tribal Peoples Rights. Issues connected with the land rights and with the hunting and fishing rights for the Sámi population in Sweden, which amounts to approximately 20,000 persons[312], are still unresolved and cause concern. Even though the Sámi peoples are vulnerable in a number of ways, the domestic courts' case law continues to reflect the position that they have no legal right to their traditional land. Thus, the Sámi peoples' traditional way of life is constantly threatened by the economic and recreational activities of modern society. In its third report concerning Sweden, the European Commission against Racism and Intolerance (ECRI) also observed that there is a need to "further enhance the influence of the Sámi in decisions concerning the use of natural resources, including forestry, tourism, and mining, which affect their traditional means of subsistence".[313] At the same time, information has been received by ECRI indicating that measures are underway to improve the involvement of the Sámi peoples in such decisions, including through the transfer of certain administrative responsibilities from the County Administrative Boards and the Board of Agriculture to the Sámi Parliament.

[311] IACourtHR, the case of *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, 31 August 2001.
[312] *The Ministry of Agriculture, Food and Consumer Affairs*, The Sami-an Indigenous People in Sweden, Sametinget, p. 3, www.regeringen.se
[313] CRI(2005)26, p. 27.

Article 18. Right to asylum

The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.

This provision of the Charter contains an explicit recognition that the European Union considers itself bound by the rules of the Convention relating to the Status of Refugees (1951) and the New York Protocol relating to the Status of Refugees (1967). This provision of the Charter must also be read in accordance to the requirements formulated by Article 22 of the Convention on the rights of the Child.

The allocation of responsibilities for the examination of asylum claims

At the centre of the right enshrined in this provision of the Charter is the assurance that must be given to each asylum-seeker that his application for refugee status will be examined carefully and impartially. The application of the rules established between the Member States for determining the member State responsible for examining asylum applications lodged in the European Union, as codified in Council Regulation 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ L 50 of 25.2.2003, p. 1), should not lead to derogation from this essential requirement.
As recalled by European Council on Refugees and Exiles (ECRE) in its memorandum to the Austrian presidency of the Union, 'the core aim of any mechanism for allocating state responsibility for determining an asylum claim must be to ensure that the application is properly heard by one EU Member State' (AD1/1/2006/EXT/RW, January 2006). The review of the 'Dublin II' Regulation in the Spring of 2006 should be seen primarily as an opportunity to identify instances where the rules set by the Regulation for the allocation of responsibility in the examination of claims to asylum have been misused in order to refuse to examine claims to asylum where there was no assurance that the merits of the claim would be examined by another Member State, or have resulted in situations which have separated families in violation of Article 8 of the European Convention on Human Rights.

The Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

The Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326 of 13.12.2005, p. 36) was formally adopted during the period under scrutiny. Although this instrument has been examined in previous reports of the Network when it still was in draft form (Report on the situation of fundamental rights in the Union in 2004, at pp. 80-88; Concl. 2005, pp. 73-78), it is important to assess the possible incompatibilities of the text as finally adopted with either the European Convention on Human Rights, or the Geneva Convention of 28 July 1951 on the status of refugees, which is made binding in EC law through Article 63(1) EC. The Network finds it all the more important to conduct such an assessment in view of the statement by the European Parliament, when it gave a favourable opinion to the text, that it reserved its right to file annulment proceedings against the Directive in order to ensure that its compatibility with the requirements of fundamental rights is subjected to judicial review. (European Parliament Legislative Resolution on the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (14203/2004 – C6-0200/2004 – 2000/0238(CNS); see para. 4). The Network makes the following comments.

1° Scope of application of the directive. Council Directive 2005/85/EC is applicable to the access to

procedures for the determination of all asylum claims presented on the territory of the Member States. This includes the applications for asylum made at the border, or in the transit zones of the Member States (Article 3(1)), although the Member States have preserved the possibility of continuing to process such claims in accordance with the existing national legislation and regulations without even the elementary safeguards prescribed in Chapter II (article 35(2)). The text however shall apply neither in cases of requests for diplomatic or territorial asylum submitted to representations of Member States (Article 3(2)), nor another form of international protection (subsidiary protection) is requested. Member States may however decide to apply this Directive in procedures for deciding on applications for any kind of international protection (Article 3(4)). The choice which is left to the Member States whether or not to extend the procedural guarantees of the directive to claims to asylum made at the border and to claims to subsidiary protection implies that the phenomenon of asylum shopping, consisting for the person seeking international protection in filing a claim with the State whose regime is most favourable, may continue after the still partial harmonization realized by the Directive. It will also be noted that, for the purposes of the proposed Directive, the 'refugee' is defined as 'a third country national or a stateless person who fulfils the requirements of Article 1 of the Geneva Convention as set out in Council Directive 2004/83/EC' (Article 2, f)). This approach confirms the restriction to the Geneva Convention of 28 July 1951 and to the New York Protocol of 31 January 1967, since the adoption of the Protocol on the right to asylum for the nationals of the Member States of the European Union annexed to the EC Treaty by the Treaty of Amsterdam.

2° *Purpose of the Directive*: establishment of minimum standards. Council Directive 2005/85/EC was presented to the United Nations High Commissioner for Refugees as the outcome of a search for the 'lowest common denominator', reduced to a 'compilation of optional provisions that accommodate the existing and planned practices of EU Member States, including those most seriously at variance with international protection standards, and provides for minimal harmonization'[314]. It is true that the Directive only establishes minimum standards, with Member States being given the option of introducing or maintaining more favourable standards on procedures for granting and withdrawing refugee status (Article 5). Nevertheless, since the very objective of the Directive is to avoid so-called "secondary" movements of asylum-seekers, given the differences in standards between Member States, one cannot from the outset rule out the risk that the Directive might on the whole have a negative impact by leading to a reduction in the average level of procedural guarantees given to asylum-seekers in the processing of their application. Therein lies the true significance of the remarks made above concerning the continued risk of 'asylum-shopping'.

3° *Detention of asylum-seekers*. Article 18(1) states that Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum. This guarantee is formulated in a particularly loose way, although this clarification forms a useful complement to the rules enunciated in Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the Member States.[315] According to this provision, 'When it proves necessary, for example for legal reasons or reasons of public order, Member States may confine an applicant to a particular place in accordance with their national law' (§ 3); furthermore, asylum seekers may be obliged to reside in a specific place, either 'for reasons of public interest, public order or (…) for the swift processing and effective monitoring of his or her application' (§ 2), or 'to benefit from the material reception conditions' (§ 4).

Article 18 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status and Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the Member States should be read in accordance with Recommendation (2003)5 adopted on 16 April 2003 by the Committee of Ministers of the Member States of the Council of Europe on measures for the detention of asylum-seekers[316]. The recommendation concerns the detention of asylum-seekers upon their arrival

[314] UNHCR, Aide Mémoire on the Procedures Directive, 18 November 2003.
[315] OJ L 31 of 6/2/2003, p. 18.
[316] Recommendation Rec(2003)5 of the Committee of Ministers to member states on measures of detention of asylum-seekers (adopted by the Committee of Ministers on 16 April 2003 at the 837th meeting of the Ministers' Deputies).

on the territory, justified in the system provided for in Article 5 of the European Convention on Human Rights for the purpose of preventing a person from effectuating an unauthorized entry into the country (Article 5 § 1, f)). Basing itself on several international texts[317] and the case law of the European Court of Human Rights[318], the Recommendation emphasizes that the aim of detention is not to penalize asylum-seekers. Article 31 of the Geneva Convention of 28 July 1951 on the status of refugees already implies that the asylum-seeker cannot be considered to have committed a criminal offence on account of his unauthorized entry into the territory, and that restrictions on his freedom of movement should only be permitted insofar as this is necessary. According to Recommendation Rec(2003)5 of the Committee of Ministers of the Council of Europe, measures of detention of asylum seekers may be resorted to only in the following situations: when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained; when a decision needs to be taken on their right to enter the territory of the state concerned, or when protection of national security and public order so requires.

Under Article 18(2) of the Directive: 'Where an applicant for asylum is held in detention, Member States shall ensure that there is the possibility of speedy judicial review'. This requirement must be read in accordance with Article 5(4) of the European Convention on Human Rights, which requires that a person arrested and/or detained for the purposes of preventing his/her unauthorised entry on the national territory shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and, subject to any appeal, he/she shall be released immediately if the detention is not lawful. Such a remedy must be accessible and effective. This implies that information on the available remedies should be provided to the asylum-seekers in a language that they understand, that they are able to contact a lawyer, and that, if they do not have sufficient means to pay for legal assistance, that they be granted free legal assistance[319]. These requirements go beyond the minimal standards set by the directive. Although Articles 10 (guarantees for applicants for asylum) and 15 and 16 (right to legal assistance and to representation and scope of those rights) provide for certain guarantees to be recognized to the asylum seeker, these guarantees only relate to certain aspects of the procedure of determination of the status of refugee proper, and not to the deprivation of liberty of the asylum seeker.

4° Guarantees given to asylum-seekers during the examination of their application. The guarantees for asylum-seekers are meticulously set forth in the Directive, with additional guarantees being recognized to unaccompanied minors (Article 17). Those guarantees, however, only apply for the stage of first instance. Member States must ensure that all applicants for asylum are 'informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not co-operating with the authorities' (Article 10(1)(a)). They must be informed about the time-frame, as well as the means at their disposal to fulfil the obligation to submit the elements required for claiming refugee status. The information must be given in time to enable them to exercise their rights and to comply with their obligations. They must receive the services of an interpreter for submitting their case to the competent authorities, "at least when the determining authority calls upon the applicant to be interviewed (…) and appropriate communication cannot be ensured without such services" (Article 10(1)(b)). The applicants for asylum must also have the opportunity (under strictly defined conditions) to communicate with the UNHCR (whose specific role

[317] Article 5 of the European Convention on Human Rights constitutes the main guarantee. Other texts to be taken into consideration are Article 31 of the Geneva Convention of 28 July 1951 on the status of refugees, Conclusion n° 44 (XXXVII) of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the detention of refugees and asylum-seekers, the Resolution on the detention of asylum-seekers of the Sub-Commission on the Promotion and Protection of Human Rights of the United Nations Commission on Human Rights, the United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Deliberation n° 5 of the United Nations Working Group on Arbitrary Detention, and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

[318] Eur. Ct. H.R., *Amuur v. France,* judgment of 25 June 1996, §§ 43 et seq.

[319] Eur. Ct. HR (3d sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 44-45.

is recognized in Article 21) or any other organization working on behalf of the UNHCR in the territory of the Member State (Article 10(1)(c)). In principle, they shall be given the opportunity of a personal interview on his/her application for asylum with a person competent under national law to conduct such an interview, although there are a number of exceptions (Article 12). They must be given notice in a reasonable time of the decision by the determining authority on their application for asylum. Finally, they have the right to legal assistance and representation (Articles 15 and 16), although such right may be restricted in certain cases [320].

Article 22 of Council Directive 2005/85/EC ensures that, in examining individual cases, Member States shall not: (a) directly disclose information regarding individual applications for asylum, or the fact that an application has been made, to the alleged actor(s) of persecution of the applicant for asylum; (b) obtain any information from the alleged actor(s) of persecution in a manner that would result in such actor(s) being directly informed of the fact that an application has been made by the applicant in question, and would jeopardise the physical integrity of the applicant and his/her dependants, or the liberty and security of his/her family members still living in the country of origin. This is absolutely essential to the safeguard of the safety of the asylum seeker and of his family. The new asylum law in **Austria** as contained in the Aliens Law Codification 2005 (*Fremdenrechtspaket*)[321] for example does not exclude that the state of origin learns about the fact that one of their nationals applied for asylum in Austria. Section 57 para. 11 authorising the Austrian authorities to contact and transmit to the state of origin personal data of the asylum-seeker, should be deleted, in accordance with a recommendation made by the UNHCR. In the **Netherlands,** after the Minister for Immigration and Integration had to admit in December 2005 that personal data of rejected asylum seekers had been disclosed to the authorities of the Democratic Republic of Congo (DRC), it appeared that, while no detailed information on the *content* of asylum files was disclosed to the authorities of the State of origin, the fact *that* the individuals had applied for asylum was revealed, putting the individuals concerned at a serious risk that they may be subject to reprisals upon their return, or that their families will be harassed or intimidated by the authorities. The Network is also surprised that in **Spain** the names of individuals seeking asylum are published in the Official Journal of the state, and welcomes the fact that a parliamentary motion was tabled in the House of Representatives in September 2005 to put an end to this unacceptable practice. It recalls that, under Guideline 12(4) of the Twenty Guidelines on forced return approved by the Committee of Ministers of the Council of Europe on 16 May 2005:

> The host state shall exercise due diligence to ensure that the exchange of information between its authorities and the authorities of the state of return will not put the returnee, or his/her relatives, in danger upon return. In particular, the host state should not share information relating to the asylum application.

The commentaries state: 'The only reason the authorities of the host state should give to the authorities of the state of origin or the state of return, in principle through the diplomatic representation of that state in the host state, when applying for a travel document, is that the person for whom the travel document is requested is not authorised to stay further on the national territory. Whether the person has applied for asylum or not is not relevant information for the obtaining of such travel documents. The criminal records of the returnee, or whether he/she has been convicted in the host state, should only be transmitted where this is in accordance with usual rules on judicial and police cooperation and with all relevant applicable laws. The authorities of the host state may inform the authorities of the

[320] See for example Article 16(1), 2nd alinea: *"Member States may make an exception where disclosure of information or sources would jeopardise national security, the security of the organisations or persons providing the information or the security of the person(s) to whom the information relates or where the investigative interests relating to the examination of applications of asylum by the competent authorities of the Member States or the international relations of the Member States would be compromised. In these cases, access to the information or sources in question must be available to the authorities referred to in Chapter V, except where such access is precluded in cases of national security"*. Restrictions for reasons of public order may also be imposed on access by counsellors to the transit zones.

[321] Federal Law Gazette (BGBl) I No. 100/2005. The provisions will become effective and apply to all applications for asylum and subsidiary protection as from 1 January 2006.

state of origin, to which the person concerned is returned, of the measures taken, "to ensure the expelled persons are not considered criminals" (Parliamentary Assembly Recommendation 1547(2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, para. 13, vii).' The practices which could ensure best compliance with those rules should be shared between the Member States.

Finally, the Network notes that, in accordance with Article 12(2) of Directive 2005/85/EC, the personal interview on the application may be omitted where "the determining authority is able to take a positive decision on the basis of evidence available". What is presented as a right of the asylum-seeker to a personal interview thus becomes a mere faculty for Member States, whose authorities responsible for determining refugee status may consider that they have sufficient evidence to take a decision without hearing the asylum-seeker.

5° Possibility of accelerated procedures. Council Directive 2005/85/EC provides for the possibility of accelerated procedures for the determination of asylum claims. According to Article 23(3), « Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II including where the application is likely to be well-founded or where the applicant has special needs ». Article 23(4) adds that

> Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II be prioritised or accelerated if:
> (a) the applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC; or
> (b) the applicant clearly does not qualify as a refugee or for refugee status in a Member State under Directive 2004/83/EC; or
> (c) the application for asylum is considered to be unfounded:
> (i) because the applicant is from a safe country of origin within the meaning of Articles 29, 30 and 31, or
> (ii) because the country which is not a Member State, is considered to be a safe third country for the applicant, without prejudice to Article 28(1); or
> (d) the applicant has misled the authorities by presenting false information or documents or by withholding relevant information or documents with respect to his/her identity and/or nationality that could have had a negative impact on the decision; or
> (e) the applicant has filed another application for asylum stating other personal data; or
> (f) the applicant has not produced information establishing with a reasonable degree of certainty his/her identity or nationality, or it is likely that, in bad faith, he/she has destroyed or disposed of an identity or travel document that would have helped establish his/her identity or nationality; or
> (g) the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC; or
> (h) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin; or
> (i) the applicant has failed without reasonable cause to make his/her application earlier, having had opportunity to do so; or
> (j) the applicant is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal; or
> (k) the applicant has failed without good reason to comply with obligations referred to in Article 4(1) and (2) of Directive 2004/83/EC or in Articles11(2)(a) and (b) and 20(1) of this Directive; or
> (l) the applicant entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities

and/or filed an application for asylum as soon as possible, given the circumstances of his/her entry; or
(m) the applicant is a danger to the national security or public order of the Member State, or the applicant has been forcibly expelled for serious reasons of public security and public order under national law; or
(n) the applicant refuses to comply with an obligation to have his/her fingerprints taken in accordance with relevant Community and/or national legislation; or
(o) the application was made by an unmarried minor to whom Article 6(4)(c) applies, after the application of the parents or parent responsible for the minor has been rejected and no relevant new elements were raised with respect to his/her particular circumstances or to the situation in his/her country of origin.

The extent of these derogations and the vague definition of certain situations where an application for asylum may be processed according to accelerated procedures – with Articles 23(4)(a) ('the applicant, in submitting his/her application and presenting the facts, has only raised issues that are not relevant or of minimal relevance to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC') and (g) ('the applicant has made inconsistent, contradictory, improbable or insufficient representations which make his/her claim clearly unconvincing in relation to his/her having been the object of persecution referred to in Directive 2004/83/EC') using wording that entails the risk of arbitrariness in the application of these clauses – raises fears that recourse to those derogatory procedures will serve to regulate the flow in the processing of asylum applications that are filed in Member States, to the detriment of the guarantees that should accompany the processing of those applications. Although the very principle of an accelerated processing of certain categories of applications may be justified by concerns of efficiency, as the UNHCR himself has acknowledged, the option of making use of such procedures should still be based on objective and pre-established criteria, which should not result in putting the most vulnerable asylum-seekers, whose traumatic experiences could explain the inconsistencies in their initial story, in the most unfavourable situation in terms of the guarantees surrounding the examination of their asylum application.

Indeed, during the period under scrutiny, concerns have again been expressed by human rights treaties expert bodies about the development of such 'accelerated procedures'. The Committee against Torture in its conclusions on **Finland**[322] concluded that the "accelerated procedure" under the Aliens Act is problematic in that it allows a very limited time for asylum applicants to have their case considered in depth and in case of rejection, exhaust the appeals possibilities prior to deportation. The Committee recommended to review the accelerated procedure in order to ensure sufficient time for using all available possibilities of appeal and to strengthen the legal safeguards of asylum seekers to be in conformity with Article 3 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatments and Punishments, and other international obligations in the field of refugee law. The Committee took notice of a recent case of the deportation of an asylum seeker allegedly subjected to torture in his country of origin, according to a report by the Parliamentary Ombudsman. The Committee on the Rights of the Child in its conclusions on Finland[323] for its part noted that the accelerated procedure of handling asylum applications may have a negative impact on children and urged Finland to ensure that the procedure respect the legal safeguards of asylum seekers.

The risks entailed by the recourse to the so-called 'accelerated procedure' for the examination of claims to asylum is also illustrated by the judgment delivered on 5 July 2005 by the European Court of Human Rights in the case of *Said* v. *The* ***Netherlands*** (Appl. No. 2345/02). A unanimous Court agreed with the claim by Mr Said that his expulsion to Eritrea would put him at risk of inhuman or degrading treatment in breach of Article 3 ECHR. Mr Said stated that he had been detained for criticizing his superiors while serving in the Eritrean army, but managed to escape. He applied for asylum in the Netherlands. In rejecting his application in the so-called accelerated procedure, the Dutch immigration authorities considered that the claim was not sufficiently substantiated. In its assessment the Court

[322] CAT/C/CO/34/FIN, 34 session held on 9 and 10 May 2005.
[323] CRC/C/15/Add.272 of 30 September 2005.

observed that the applicant's statements had been consistent and that the applicant had submitted persuasive arguments to refute the argument that his account lacked credibility. Concerning the alleged risk of ill-treatment the Court took into account the information of the Country Report prepared by the Netherlands Government, reports by NGO's and other public sources as well as a recent account of a group of Eritreans collectively expelled by the Maltese government. The *Said* judgment is the first in which a potential violation of Article 3 ECHR was found in a Dutch asylum case. The judgment highlights the deficiencies of the remedies available to asylum seekers under the so-called accelerated procedure. The Network refers in this respect to the concurring opinion of Judge Thomassen, who notes that Dutch courts only undertake a marginal review which substantially limits the meaning of the remedies available.

6° Right to a suspensive remedy against the threat of removal. According to the European Court of Human Rights, « Article 13 in conjunction with [a substantive provision of the ECHR, in particular with Article 2, Article 3, Article 8 or Article 4 of Protocol no. 4 ECHR] requires that States must make available to the individual concerned the effective possibility of challenging the deportation or refusal-of-residence order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum offering adequate guarantees of independence and impartiality »[324]. The refusal to recognize the asylum-seeker as a refugee may result in the concerned person being returned to his/her country of origin, with the irreversible consequences which may follow if he/she runs in that country the risk of being executed, or of being subjected to threats to his/her security, to torture or to inhuman or degrading treatments. The « effective » character of the remedy which the asylum-seeker must be granted against the decision exposing him to such removal requires that no deportation may take place until an authority presenting the required characteristics of independency and impartiality has been given an opportunity to examine the reality of the risk faced by the asylum seeker if the removal is indeed effectuated ; until such a decision has been made, the lodging of the remedy should have an automatic suspensive effect. This may be derived from Recommendation No. R(98)13 of the Committee of Ministers to member states on the right of rejected asylum seekers to an effective remedy against decisions on expulsion in the context of Article 3 of the European Convention on Human Rights, adopted by the Committee of Ministers on 18 September 1998 on the 641st meeting of the Ministers' Deputies. It is also a requirement under the case-law of the European Court of Human Rights. In the judgment of 5 February 2002 delivered in the case of *Conka v. Belgium*, the Court found that the Belgian legislation did not offer sufficient guarantees against the risk of a removal order being enforced before a judge or an authority presenting similar guarantees could adopt a decision on the risks which such removal would create for the person concerned. The violation of Article 13 of the Convention resulted, according to the Court, from the fact that the Executive was not under an obligation to wait until the competent judge decided whether or not to suspend the removal order before effectuating the removal [325]. In such instances, the remedy must therefore be recognized an automatically suspensive effect, at least until an authority presenting all guarantees of independency and impartiality required by Article 13 ECHR could adopt a decision.

The UNHCR therefore rightly insists on the need for the remedies prescribed in Chapter V of the Directive to have a suspensive effect:

[324] Eur. Ct. HR, *Shebashov v. Latvia* (dec.), 9 November 2000, no. 50065/99, unreported; Eur. Ct. HR (4th sect.), *Al-Nashif v. Bulgaria* judgment of 20 June 2002 (Appl. No. 50963/99), para. 133.

[325] See Eur. Ct. HR (3d sect.), *Conka v. Belgium* (Appl. N° 51564/99), judgment of 5 February 2002, para. 83: « … it appears that the authorities are not required to defer execution of the deportation order while an application under the extremely urgent procedure is pending, not even for a minimum reasonable period to enable the Conseil d'Etat to decide the application. Furthermore, the onus is in practice on the Conseil d'Etat to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there does not appear to be any obligation on it to do so. Lastly, it is merely on the basis of internal directions that the registrar of the Conseil d'Etat, acting on the instructions of a judge, contacts the authorities for that purpose, and there is no indication of what the consequences might be should he omit to do so. Ultimately, the alien has no guarantee that the Conseil d'Etat and the authorities will comply in every case with that practice, that the Conseil d'Etat will deliver its decision, or even hear the case, before his expulsion, or that the authorities will allow a minimum reasonable period of grace ».

> Given the potentially serious consequences of an erroneous determination at first instance, the remedy against a negative decision at first instance is ineffective if an applicant is not permitted to await the outcome of an appeal against such a decision in the territory of the Member State. Conclusion no. 30 of the Executive Committee, however, emphasizes that even in manifestly unfounded cases there should be some form of review of the decision. UNHCR would be likely to accept the proposal to limit the automatic suspensive effect of a remedy in the most manifestly unfounded cases if a judicial or other independent authority has first reviewed and confirmed denial of the suspensive effect, taking into account the chances of an appeal. [326]

This same concern is expressed by a number of non-governmental organisations [327]. However, Council Directive 2005/85/EC does not comply with the requirements of the European Convention on Human Rights which have been recalled. Although the Preamble recalls that « It reflects a basic principle of Community law that the decisions taken on an application for asylum and on the withdrawal of a refugee status must be subject to an effective remedy before a court or tribunal in the meaning of Article 234 of the Treaty establishing the European Community », it immediately goes on to state that « The effectiveness of the remedy, also with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State seen as a whole » (Recital 27). But the minimum standards provided in the proposed Directive concerning the organisation of an effective remedy against the refusals to recognize the status of refugee do not suffice to ensure the compatibility with Article 13 ECHR. Article 39(3) of Directive 2005/85/EC in particular states that

> Member States shall, where appropriate, provide for rules in accordance with their international obligations dealing with:
> (a) the question of whether the remedy pursuant to paragraph 1 [this includes the remedy against the decision to deny the claim to asylum or against the decision the withdraw the status of refugee] shall have the effect of allowing applicants to remain in the Member State concerned pending its outcome;
> (b) the possibility of legal remedy or protective measures where the remedy pursuant to paragraph 1 does not have the effect of allowing applicants to remain in the Member State concerned pending its outcome. Member States may also provide for an ex officio remedy; and
> (c) the grounds for challenging a decision under Article 25(2)(c) [inadmissibility of the application for asylum where a country which is not a Member State is considered as a safe third country for the applicant] in accordance with the methodology applied under Article 27(2)(b) and (c) [which provide that the national law contains rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant and rules allowing an individual examination of whether the third country concerned is safe for a particular applicant].

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[326] For details, see "Note on key issues of concern to UNHCR on the draft Asylum Procedures Directive, 30 March 2004" on the Appeals (Article 39 in conjunction with Articles 25(2), 23(4), 29(1) and 33) as provided under the (then draft) Directive :
'- Under the current draft Directive, the vast majority of rejected asylum seekers who lodge an appeal will not be permitted to remain in the European Union until their appeals are decided. Article 39 contains a list of wide-ranging exceptions to the principle of 'suspensive effect' which have no relation to the merits of a person's claim, but are based on technical or discretionary factors, or the claimant's behaviour. For example, persons may be removed pending appeal simply because they have been detained, or because they failed to make an application earlier. Such rules can badly prejudice refugees who are traumatized, confused or simply not properly informed about the asylum process.
- In UNHCR's view, such a restrictive appeal provision undermines the right to, and utility of, an effective remedy and could compel many Member States to curtail fundamental procedural rights which are presently enshrined as central principles in their constitutions and justice systems. It would increase considerably the possibility of persons being returned to persecution in violation of the principle of *non-refoulement* contained in the 1951 Convention and international human rights law instruments. In this context, it is important to bear in mind that in some European countries negative decisions in 30 to 60% of the claims are overturned on appeal.
- In UNHCR's view, an exception to the general rule could be considered in strictly limited categories, namely 'manifestly unfounded' and 'clearly abusive' claims, which are defined in UNHCR's Executive Committee Conclusion No. 30. In such cases, however, there must still be access to the possibility of an independent review of the decision to remove the person pending appeal. Such a review could be simplified and fast, taking into account the chances of an appeal'.

[327] ECRE, *Broken promises, Forgotten principles: an ECRE evaluation of the development of EU minimum standards for refugees protection*, June 2004; Amnesty International, *Union européenne, La protection des réfugiés menacée,* July 2004, p.12.

The provision seems to present as a mere faculty what, for the Member States, should instead be considered as an obligation derived from Article 13 ECHR read in combination with Articles 2 and 3 ECHR. These provisions not only require that the remedy which may be exercised against a decision taken on the application for asylum be lodged with a jurisdiction which has the power to order a suspension of the removal order, in the legal systems of the States where the refusal to recognize the asylum seeker as a refugee is not distinct from the decision to order that person to leave the national territory; they also imply that, during the interval between the exercise of the remedy and the adoption of that judicial decision, the asylum seeker may remain on the national territory, and that he/she is guaranteed against the enforcement of the removal order he/she may have been served with.

The Network cannot fail to make the connection between the requirement of a suspensive remedy and the potentially irreversible nature of the damage that would be caused by the enforcement of a removal order adopted on the basis of incomplete information on the reality of the risks incurred in the country of return, a connection which is suggested in the international case-law itself. For example, in the communication presented by Mafhoud Brada to the Committee against Torture [328], the applicant claimed that his forced repatriation to Algeria constituted a violation by France of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, since there were serious reasons for believing that his return would put him at risk of being tortured in Algeria. The applicant, after being removed, has since been reported missing. The Committee considers that France should have been aware that the applicant ran a serious risk of being tortured in France. It refers in particular to the fact that the expulsion order was enforced while the annulment proceedings before the Administrative Court of Appeal were still pending, and that those proceedings did effectively annul the expulsion order for violation of national law and of Article 3 of the European Convention on Human Rights. The Committee concluded that the Convention had been violated. Also during the period under scrutiny, the European Court of Human Rights noted that **Finland** would have been in violation of Article 3 of the European Convention on Human Rights if it had effectively deported the applicant to the Democratic Republic of Congo, as he had arrived in Finland on 20 July 1998 requesting political asylum having been a member of the special division (Division Spéciale Présidentielle, DSP) responsible for protecting former President Mobutu in the Democratic Republic of Congo (DRC). Although the Finnish authorities, in particular the Directorate of Immigration and the Supreme Administrative Court before which an appeal was filed, had considered that there was no substantial risk of a treatment contrary to Article 3 ECHR, the European Court of Human Rights concluded instead, by six votes to one, that on account of his former activities, he would still run a substantial risk of treatment contrary to Article 3 of the Convention if expelled to the DRC, in particular from the side of relatives of former dissidents who might seek revenge for the applicant's past activities, and not necessarily from the side of the current authorities[329].

7° Safe countries of origin

Directive 2005/85/EC provides that an application for asylum by a national of a 'safe' country of origin (or by a stateless person who has his habitual residence in that country) is unfounded, unless the applicant has been able to submit 'serious grounds for considering the country not to be a safe country of origin in his/her particular circumstances and in terms of his/her qualification as a refugee in accordance with Directive 2004/83/EC' (Article 31(1)). The minimum common list of safe countries of origin is adopted by the Council, acting by a qualified majority on a proposal from the Commission, after consultation of the European Parliament; the same procedure applies for amendments to this list by adding or removing countries (Article 29). Furthermore, Member States may retain or introduce legislation that allows for the national designation of third countries other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum; this may include designation of part of a country as safe where the necessary conditions are fulfilled in relation to that part (Article 30(1)). Although in principle, when designating a third country as a safe country of origin, Member States must comply with the criteria contained in Annex II to the

[328] Committee against Torture, Communication No. 195/2002: France. 24/05/2005 - CAT/C/34/D/195/2002.
[329] Eur. Ct. HR (former 4th sect.) *N v. Finland* (Appl. no. 38885/02), judgment of 26 July 2005.

Directive, Member States may retain legislation in force on 1 December 2005 that allows for the national designation of third countries, other than those appearing on the minimum common list, as safe countries of origin for the purposes of examining applications for asylum where they are satisfied that persons in the third countries concerned are generally neither subject to (a) persecution as defined in Article 9 of Directive 2004/83/EC, nor (b) torture or inhuman or degrading treatment or punishment; they may also retain legislation in force on 1 December 2005 that allows for the national designation of part of a country as safe, or a country or part of a country as safe for a specified group of persons in that country, where the same conditions are fulfilled in relation to that part or group (Article 30(2) and (3)).

In adopting this mechanism, the Council exceeds the authority that has been given to it by Article 63, first subparagraph, indent 1(d), of the EC Treaty. This provision refers to the adoption of 'minimum standards on procedures in Member States for granting or withdrawing refugee status'. However, the definition of a minimum common list of third countries that are considered 'safe countries of origin' for the purposes of examining applications for asylum means that Directive 2005/85/EC prevents Member States from giving asylum-seekers from those countries the same favourable treatment as asylum-seekers from other countries, which is inconsistent with the idea of standards giving the same 'minimum' guarantees. This is in fact implicitly acknowledged by Article 5 of the Directive, which says that "Member States may introduce or maintain more favourable standards on procedures for granting and withdrawing refugee status, *insofar as those standards are compatible with this Directive*". This is incompatible with the very notion of a Directive granting minimum guarantees, as emerges from the case-law of the Court of Justice of the European Communities, as well as from the individual positions adopted by members of the Court[330]. On the other hand, the possibility which Directive 2005/85/EC grants to Member States of unilaterally designating a third country as a safe country of origin, in accordance with the conditions set out in Article 30 of the Directive, means that each Member State may, as far as it is concerned, presume an application for asylum from a given country to be manifestly ill-founded, without it being prevented from doing so by the 'minimum' guarantees granted by the Directive as regards the procedure for examining applications for asylum filed with Member States.

From the perspective of the international obligations of Member States, and in particular the European Convention on Human Rights and the Geneva Convention Relating to the Status of Refugees, as well as the requirements ensuing from Articles 18 and 19 of the Charter of Fundamental Rights, the concept of 'safe country of origin' raises two questions. The first question concerns the compatibility of this concept with the prohibition of refoulement contained in Article 33 of the Geneva Convention and, in general, with the prohibition of returning a person to the frontiers of a State where he or she has reasons to fear for his life or safety, or to fear a serious violation of his fundamental rights. According to Annex II to Directive 2005/85/EC, a country may be considered a safe country of origin "if on the basis of the legal situation, the application of the law within a democratic system and the general political circumstances, it can be shown that there is generally and consistently no persecution as defined in Article 9 of Directive 2004/83/EC, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict". The presumption made in favour of countries of origin that are considered 'safe' cannot, however, in any case be absolute, since, as is acknowledged in the Preamble of the Directive, the identification of a given country as a safe country of origin is necessarily based on an assessment which "can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her" (21st Recital).

[330] ECJ, 17 December 1998, *Società italiana petroli SpA (IP) v Borsana Srl*, C-2/97, ECR, p. I-5755, para. 35 (concerning Directive 90/394, adopted on the basis of Article 118A EC, authorizing the adoption of instruments establishing minimum regulations governing health and safety at work); and conclusions by Mrs Advocate General Kokott in Case C-540/03 (action for annulment of Directive 2003/86/EC), para. 42.

Even in the system of the proposed Directive where the presumption is only made at the general level and may be rebutted in individual cases, thus ensuring that the concept of 'safe countries of origin' will not lead to a person being threatened with being returned to a country where he or she risks being subjected to human rights violations, there is a risk that the definition of a list of safe countries of origin will be discriminatory, in the meaning either of the Geneva Convention of 28 July 1951 – Article 3 of which explicitly excludes any discrimination based on the country of origin of refugees – or of Article 26 of the International Covenant on Civil and Political Rights or Article 14 of the European Convention on Human Rights (to the extent that the rejection of the application for asylum could expose the applicant to a real risk of being executed or of being subjected to torture or to an inhuman or degrading treatment). Considering the seriousness of the potential consequences for the individual applicant for asylum, the strictest scrutiny should be applied to such differences of treatment based on the country of origin. It should be verified, in particular, whether, even if the difference in treatment is based on objective criteria, the measure is proportionate to the aim pursued, which is of administrative convenience and in order to alleviate the burden on asylum-processing systems of the Member States.

8° Safe third countries. The proposed Directive also includes the concept of safe third countries. Member States may not have to assess the substance of an asylum application where the applicant, due to a connection to a third country as defined by national law, can reasonably be expected to seek protection in that third country, at least where the particular applicant would be safe in the third country concerned (Recital 23). Article 27 of the proposed Directive defines which guarantees the national law must contain in this regard. At the general level, Article 27(1) provides that

> Member States may apply the safe third country concept only where the competent authorities are satisfied that a person seeking asylum will be treated in accordance with the following principles in the third country concerned:
> (a) life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion;
> (b) the principle of non-refoulement in accordance with the Geneva Convention is respected;
> (c) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected; and
> (d) the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.

At the individual level, these guarantees include a requirement that the competent authorities may 'satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant'; the methodology therefore 'shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe' (Article 27(2), b)). The directive also provides that the national rules which, 'in accordance with international law', allow for an individual examination of whether the third country concerned is safe for a particular applicant, shall 'as a minimum, (...) permit the applicant to challenge the application of the safe third country concept on the grounds that he/she would be subjected to torture, cruel, inhuman or degrading treatment or punishment' (Article 27(2), c)).

The prohibition of removal in breach of the right to freedom from torture and cruel, inhuman or degrading treatment includes a prohibition of removal in exceptional circumstances where this would interrupt a life-saving medical treatment [331] or would put a person at risk of being convicted to a sentence of life imprisonment without any possibility of early release, [332] or of being applied the death

[331] Eur. Ct. HR, D. v. *the United Kindgom judgment* of 2 May 1997 (Appl. No. 30240/90); *Bensaïd v. the United Kingdom* judgment of 6 February 2001 (Appl. no. 44599/98); Eur. Ct. HR (2nd sect.), *Hukic v. Sweden* (Appl. no 17416/05) judgment of 27 September 2005.

[332] Eur. Ct. HR, Weeks v. *the United Kingdom judgment* of 2 March 1987, Series A no. 114; Eur. Ct. HR, Nivette v. France (dec.), no. 44190/98, 14 December 2000; Eur. Ct. HR, *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001; Eur. Ct. *HR, S. Einhorn v. France*, dec. of 16 October 2001 (Appl. No. 71555/01), § 27.

penalty in circumstances which would constitute a breach of Article 3 of the European Convention on Human Rights [333].

The rules relating to safe third countries appear compatible with the principles listed in the Recommendation adopted on the same subject by the Committee of Ministers of the Council of Europe in 1997 (Recommendation R(97)22 of the Committee of Ministers to the Member States, containing guidelines on the application of the safe third country concept, adopted by the Committee of Ministers on 25 November 1997, at their 609th meeting of Ministers' Deputies). The Network makes two comments, however.

Firstly, Article 27(1) of the Directive remains silent on the question of capital punishment. While protection against refoulement in conditions which are contrary to the Geneva Convention and to international instruments prohibiting torture is duly ensured, nothing is said about capital punishment imposed on grounds other than race, religion, nationality, membership of a particular social group, or political opinions of the asylum-seeker. In a Council declaration annexed to the Directive and concerning the concept of country of origin, "the Council stresses its support for the abolition of the death penalty, as expressed in Protocols No. 6 and 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms. However, the Council recognizes that ceasing to impose and execute the death penalty is a significant step towards abolishing the death penalty and encourages countries to continue their progress towards this end" (Doc. 14579/05). Although this declaration seems to suggest that a country that applies the death penalty cannot be considered a safe third country, the Network regrets the ambiguity that continues to exist on this point. The Network is aware of the hesitations of the European Court of Human Rights on this point[334].Nevertheless, the absolute prohibition on returning a person to a State where he or she risks being sentenced to death can be inferred from the undertaking of the Member States of the European Union with regard to Article 6 of the International Covenant on Civil and Political Rights, as interpreted by the United Nations Human Rights Committee[335]. The Member States of the European Union have all ratified Protocols Nos. 6 and 13 to the European Convention on Human Rights. Consequently, they are States that have abolished the death penalty within the meaning of Article 6(2) of the International Covenant on Civil and Political Rights. Therefore they cannot, in accordance with their international obligations, return a person seeking international protection to the frontiers of a particular State, even if it is considered a safe third country according to the criteria defined in Article 27(1) of Directive 2005/85/EC, without incurring their international responsibility. Furthermore, the designation of a third country as 'safe' while the person in question runs the risk of being handed over by the authorities of that country to a country that might impose the death penalty should be considered an infringement of Articles 2(2) and 19(2) of the Charter of Fundamental Rights.

Secondly, the criteria enumerated under Article 27(1) of Council Directive 2005/85/EC do not take into account that the European Court of Human Rights has also considered that 'it cannot be ruled out that an issue might exceptionally be raised under Article 6 of the Convention by [a decision to return a person] in circumstances where the [returnee] has suffered or risks suffering a flagrant denial of justice in the requesting country' (Eur. Ct. HR, *S. Einhorn v. France*, dec. of 16 October 2001 (Appl. No. 71555/01), § 32 (citing the judgment of the Court in *Soering v. the United Kingdom* of 7 July 1989, p. 45, § 113, and, *mutatis mutandis, the Drozd and Janousek v. France and Spain* judgment of 26 June 1992, Series A no. 240, p. 34, § 110; Eur. Ct. HR (GC), Mamatkulov and Askaraov v. Turkey (Appl. n° 46827/99 and 46951/99) judgment of 4 February 2005, § 88). There is no reason in principle to

[333] Eur. Ct HR (2nd section), *Chamaiev and 12 others v. Gerogia and Russia* (Appl. no 36378/02) judgment of 12 May 2005 (final on 12 October 2005), § 333 ; Eur. Ct. HR (GC), *Öcalan v. Turkey* (Appl. no. 46221/99) judgment of 12 May 2005, §§ 168-169.

[334] Eur. Ct. HR, *Soering v. United Kingdom,* judgment of 7 July 1989, Series A No. 161, §§103-104; Eur. Ct. HR, *S.R. v. Sweden* (Appl. No. 62806/00), decision of 23 April 2002; Eur. Ct. HR (2nd Section), *Chamaiev and 12 others v. Georgia and Russia* (Appl. No. 36378/02), judgment of 12 May 2005 (final on 12 October 2005), §333; Eur. Ct. HR (GC), *Öcalan v. Turkey* (Appl. No. 46221/99), judgment of 12 May 2005, §165; Eur. Ct. HR, *Bader and others v. Sweden* (Appl. No. 13284/04), judgment of 8 November 2005, §42.

[335] Human Rights Committee, *Judge v. Canada*, communication n° 829/1998, final views of 20 October 2003, ONU doc. CCPR/C/78/D/829/1998 (2003).

think that the prohibition which the ECHR imposed to indirect removals – i.e., removals to a country B from where the individual concerned may be removed to country C where he/she runs of real risk of a flagrant denial of his/her human rights –, which results from the inadmissibility decision of 7 March 2000 reached by the European Court of Human Rights in the case of *T.I. v. the United Kingdom* (Appl. No. 43844/98), should not apply also to such flagrant denials of justice.

9° *European safe third countries*.
Council Directive 2005/85/EC moreover includes the notion that 'with respect to certain European third countries, which observe particularly high human rights and refugee protection standards, Member States should be allowed to not carry out, or not to carry out full examination of asylum applications regarding applicants who enter their territory from such European third countries. Given the potential consequences for the applicant of a restricted or omitted examination, this application of the safe third country concept should be restricted to cases involving third countries with respect to which the Council has satisfied itself that the high standards for the safety of the third country concerned, as set out in this Directive, are fulfilled. The Council should take decisions in this matter after consultation of the European Parliament' (Preamble, 24th Recital). It is clear that a non-rebuttable presumption that, due to the country from where they arrived, applicants for asylum should be returned to that country, is not acceptable. It would create the risk of the violation of the non-refoulement principle stated in Article 33 of the Geneva Convention on the Status of Refugees, and further reinforced by the interpretation of the European Convention on Human Rights. It may also be seen as equivalent to a collective expulsion of foreigners, prohibited by Article 4 of Protocol n°4 to the ECHR, which requires that the expulsion of foreigner be based on a reasonable and objective examination of the particular case of each individual alien, rather than on such presumptions as derived from the country which they have been arriving from (see the inadmissibility decision of 23 February 1999 in the case of *Andric v. Sweden* (Appl. No. 45917/99), unpublished), and Eur. Ct. HR (3d sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 59). It is therefore particularly important that when implementation this provision of the Directive, the Member States provide for exceptions from its application for humanitarian or political reasons or for reasons of public international law, as they are authorized to do so under Article 36(4).

Asylum proceedings

Positive aspects

There are a number of positive developments to be reported for the period under scrutiny. Some of these developments have been encouraged by the adoption of instruments under Union law and their implementation by the Member States. Other evolutions, however, are independent. The Network welcomes the adoption in **Sweden** of the new rules of jurisdiction and procedure in matters affecting aliens and citizenship (prop. 2004/05:170, *Ny instans- och processordning i utlännings- och medborgarskapsärenden*). The replacement of the Aliens Appeals Board (*Utlänningsnämnden*) by Migration Courts on 31 March 2006 entails that the decisions of the Swedish Migration Board in matters concerning asylum or residence permits as well as citizenship will be subject to appeal through the appropriate court system, ensuring that applicants who appeal against the decisions of the Swedish Migration Board will be able to obtain an oral hearing in a Migration Court on the basis of the provisions governing administrative courts.

In **France**, access to an interpreter for foreigners seeking asylum and held in retention is now considered a fundamental right. The administrative court ruled that the refusal by the public authorities to provide a foreign national held in retention with the services of an interpreter to help with the preparation of his asylum application constitutes a serious and manifestly unlawful infringement of a fundamental freedom. The administrative court explained that "since an asylum application must obligatorily be formulated in French, it is essential that the applicant be provided with the services of an interpreter; whereas if the public authorities decline to bear the concomitant cost, an asylum-seeker

without financial means (…) cannot benefit from this constitutional right'[336].

Article 10(1)(a) of Directive 2005/85/EC provides that applicants for asylum "shall be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities". The transparency of the procedure constitutes both an essential legal guarantee facilitating the exercise of the rights of the defence and a means to establish a relationship of trust between the applicant and the state authorities responsible for processing the application. The implementation of this guarantee could benefit from the experience acquired by Member States in this area. In **Italy,** the Central Commission for the Rights of Asylum of the Ministry of the Interior published an informational booklet for individuals applying for refugee status, drawn up in accordance with Article 2, section 6 of the Presidential Decree 303 of 16 September 2004, which is available in Italian, French, Spanish and Arabic. Police headquarters must give individuals applying for refugee status a copy of the document in a language they can understand, which clearly explains the cases in which it is possible to obtain recognition of refugee in accordance with Law 189/2002 and the respective implementing regulation. In **Hungary**, according to the information received by the Network, the practice of the refugee authority of the Office of Immigration and Nationality of the Hungarian Ministry of Interior (Bevándorlási és Állampolgársági Hivatal –OIN) in providing asylum-seekers with information has improved significantly. The OIN has its own information publication, and the language skills of the staff have improved. This is also one reason why the Network welcomes a number of provisions contained in the new *Fremdenrechtspaket* 2005[337] adopted in **Austria** in July 2005. From 1 January 2006, these amendments will ensure that that asylum-seekers will receive newly translated information sheets informing them about the proceedings and their rights and obligations, in a language which, as far as possible, will be understandable to the person concerned. The Network expresses the hope that the explanations and information thus provided are kept as simple and readable as possible. The new legislation also does not provide for different procedural treatment claims to asylum which are manifestly ill-founded, which constitutes an encouraging sign in the light of the possibility which Council Directive 2005/85/EC provides for Member States in Article 23(4).

The Network also welcomes the fact that, with the coming into force of the new *Fremdenrechtspaket* in **Austria**, the staff of the asylum authorities will be significantly increased.[338] The official explanations to the Government Bill propose an additional staff of 60 persons for the first instance Federal Asylum Office and 72 more personnel in the Independent Federal Asylum Tribunal, of which there will be 16 new members of the tribunal and 20 legal assistants. For these reasons there is some hope that this will also result in the proceedings being completed faster in the future. In **Italy**, the entry into force on 21 April 2005 of the new Regulation relating to the procedures for recognition of the refugee status, approved with Presidential Decree no. 303 of 16 September 2004,[339] which provides for the decentralization of the procedure for recognizing the refugee status by the creation of seven Regional Commissions located across Italy, should reduce the amount of time necessary for a decision to be made on the claim to asylum to a maximum of 20 to 40 days following the application. The Network recalls in this regard that Article 23(2) of Council Directive 2005/85/EC provides that 'Member States shall ensure that such a procedure [for the determination of the asylum application] is concluded as soon as possible, without prejudice to an adequate and complete examination', which is in the interest of both the person seeking asylum and the authorities.

During 2005, a number of Member States have adapted their legislation in order to ensure the implementation of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in the Member States (OJ L 31 of 6.2.2003, p. 18). In **Cyprus,** the

[336] TA Toulouse, *M. Chien Chang c. Préfet de la Haute Garonne,* n° 05/450, 31 janvier 2005.
[337] Federal Law Gazette (BGBl) I No. 100/2005.
[338] See the official explanations to the Government Bill (*Erläuterungen zur Regierungsvorlage*, 952 d.B. XXII. GP) at pp. 18-19.
[339] Decreto del Presidente della Repubblica del 16 settembre 2004, n.303, Regolamento relativo alle procedure per il riconoscimento dello status di rifugiato, Pubblicato sulla Gazzetta Ufficiale 299 del 22 dicembre 2004 n.303

Government tabled in Parliament the *Refugee Regulations (Minimum Standards for the Reception of Asylum Seekers)* on 1 June 2005. In the **Czech Republic,** one of the amendments to the Asylum Act approved during 2005 seeks to implement the Council Directive 2003/9/EC. This was also the main objective of the amendments to the Act on Integration of Immigrants and Reception of Asylum Seekers which entered into force in **Finland** on 10 June 2005 (Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta annetun lain muuttamisesta 362/2005). In **Latvia,** the amendments to the Asylum Law[340] provide that an asylum seeker has a right to receive primary medical assistance from State resources, not limited to emergency medical assistance as before. As the number of asylum seekers remains very low, no medical staff (nurse or paramedic) is constantly employed in the accommodation centre for asylum seekers. However, the Office of Citizenship and Migration Affairs (OCMA) has prepared and is planning to sign agreements with two hospitals (*Saurieši* Centre for Lung diseases and Tuberculosis and *Gaiļezers* Children's Hospital), as well as with two family medical practices (for adults and paediatrics) in the village next to the *Mucenieki* accommodation centre.[341] These amendments also foresee that children of asylum seekers and minor asylum seekers will be provided with educational facilities in accordance with general State laws. The order for providing education should be set by regulations issued by the Cabinet of Ministers. As regards **Greece,** on the other hand, while the Court of Justice of the European Communities had already found that this country had failed to fulfil the obligations incumbent on it under Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, insofar as it has not adopted the necessary legislative, regulatory and administrative provisions to comply with this Directive (ECJ, 17 November 2005, *Commission v. Greece,* Case C-476/04), the Commission addressed a reasoned opinion to Greece for failing to have transposed into its domestic legal system Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers in Member States.

Reasons for concern

The Network also has a number of reasons for concern, however. Many of the concerns expressed in the previous conclusions remain valid. The more recent developments in the field of asylum also call for certain observations. In **Austria,** the new asylum law in Austria as contained in the Aliens Law Codification 2005 (*Fremdenrechtspaket*)[342] reinforces a tendency to criminalize asylum-seekers, as illustrated by the new possibility for the Federal Asylum Office under section 26 Asylum Act 2005 to issue an arrest warrant against an asylum-seeker that withdraws from the asylum proceedings, or by sections 43 to 47 of the Act which hold that asylum-seekers without a valid visa or residence permit for Austria shall be detained, body-searched and interrogated by the police before they are brought to one of the initial reception centres. Specific concerns raised by the new asylum law are the following:

- Negative decisions by the Federal Asylum Office on the application for international protection will frequently be issued together with a deportation order (see section 10), and shall be served upon the asylum-seeker by a police officer who may immediately arrest and detain the concerned person in order to effect the deportation. This may be incompatible with the requirement that the removal order be adopted after a separate examination. As suggested in Guideline 2 of the Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe, the removal order should not be adopted automatically once the claim to asylum is rejected, as there may be other compelling reasons not to remove a person from the territory, in particular where this may result in a violation of the fundamental rights of that person.

[340] *Likums Grozījumi Patvēruma likumā* [*Law Amendments to the Asylum Law*], adopted 20 January 2005, in force since 3 February 2005.
[341] Information provided by Aija Šibajeva, Deputy Head of the *Mucenieki* Accommodation Centre for Asylum Seekers, 21 November 2005.
[342] Federal Law Gazette (BGBl) I No. 100/2005. The provisions will become effective and apply to all applications for asylum and subsidiary protection as from 1 January 2006.

- A related concern is the relationship between the exclusion clause of Article 1(F) of the Geneva Convention and the determination of the status of refugee under Article 1(A). The UNHCR has rightly pointed out that the exclusion clauses of the 1951 Geneva Convention, particularly those in Article 1(F), should as a matter of principle be examined by the authorities after the status of refugee could be determined under Article 1(A). However, this system has been reversed by the Austrian Asylum Act 2005: an asylum-seeker will only be admitted to the proceedings if he or she does not fall under section 6 with the consequence that there will be no proportionality test balancing the committed crime with the personal threat which the concerned asylum-seeker is likely to face if being deported.

- The Network also regrets that the special protection of victims of torture and traumatised persons, which was only recently introduced by the 2003 amendment to the Asylum Act and was then welcomed by the UNHCR as best practice in Europe for the legal recognition of the special needs of these persons (section 24b Asylum Act 1997), is abandoned under section 30 of the new Asylum Act 2005. Unfortunately, the ambit of this section is very much reduced so that it will cover only very serious cases of traumatization.

- As recalled above, appeals against decisions in asylum proceedings must in principle carry suspensive effect. In the light of this the UNHCR considers section 38 of the Austrian Asylum Act 2005, setting out the criteria under which the Federal Asylum Office can refuse to grant suspensive effect to an appeal, to be potentially too broad. As regards negative decisions in admissibility proceedings, the general rule is that the deportation can be effected even if the concerned person filed an appeal (section 36(4)). Only if the Independent Federal Asylum Tribunal, which is not bound by the declaration of the first instance, still grants suspensive effect within seven days will the aliens police be prevented from enforcing the deportation order. Moreover unfortunately, the law does not set up a minimum standard for the interpreters to be employed for the hearings with the asylum-seekers. In the light of the exhaustive list of grounds where it will exceptionally be possible to produce new evidence in the appeal proceedings before the Independent Federal Asylum Tribunal, it is very uncertain if wrong translations of the applicant's statements can be corrected on appeal.

- Finally, the Network notes that once deported, it will not be possible for an asylum-seeker to return to **Austria** even if his application for asylum succeeded on appeal in case he or she fails to produce the respective decision to the border police. Given that all decisions of the asylum authorities are electronically stored in the Asylum Information System (*Asylinformationssystem- AIS*) this adverse condition for re-entry appears to have no justification.

The Network identified a number of concerns related to other Member States:

- In **Belgium,** the appeal proceedings brought before the Council of State by a foreign national who was issued with an order to leave the territory have no suspensive effect, despite the requirements of the European Convention on Human Rights[343]. This situation has led foreigners threatened with removal to take recourse to emergency suspension proceedings, which are nevertheless meant for exceptional circumstances only. By three judgments of 2 March 2005[344], the Council of State, deciding in General Assembly, restricted the use of emergency proceedings in actions by foreigners to applicants held in detention with a view to the enforcement of a removal order. The Council established the principle that the simple fear that such detention measure could be enforced at any moment – in the case of foreigners issued with an order to leave the territory – is not sufficient to take recourse to those proceedings. In practice, this means that the applicant must be able to show that the enforcement of a removal order has begun. This case-law makes the possibilities for an effective remedy even more uncertain and presupposes an extremely swift response – for example in case of arrest with a view to removal – which is not always realistic.

[343] Eur. Ct. HR, *Conka v. Belgium* (Appl. No. 51564/99), judgment of 5 February 2002
[344] Council of State, judgments of 2 March 2005, nos. 141.510, 141.511 and 141.512

- As is emphasized by the UN High Commissioner for Refugees in a report published in June 2005[345], **Greece** should focus on putting in place procedures to identify unaccompanied children, single women, victims of trafficking in human beings and victims of torture, and to treat them in a manner that is appropriate to their situation. Police officers and border guards should identify asylum-seekers and refer them to the competent authority, where appropriate with application of the readmission protocol or the implementation of removal measures. Other recommendations of the High Commissioner concern the registration without delay of applications for asylum and the prompt delivery of the necessary documents for the protection of asylum-seekers, as well as access during the asylum procedure to health care and other essential social services; strengthening of the system for the processing of asylum applications in the first instance; information of applicants on the asylum procedure and their rights and obligations in that connection; strengthening of the system of free legal aid and financial support for the relevant initiatives of non-governmental organizations; setting up of an independent body for appeal against refusals of asylum applications.

- In **Spain**, as is highlighted in the Report by Human Rights Commissioner Mr Alvaro Gil-Robles on his visit to Spain (10-19 March 2005) (CommDH(2005)8), the arrival and reception of asylum-seekers and assistance by a lawyer continue to be a problem. The assistance of a lawyer is certainly allowed if the illegal immigrant has unequivocally declared his intention to apply for asylum in Spain; in practice, however, this is very difficult given the applicant's ignorance of the language and of the legislation on asylum. In the **Czech Republic,** the Organization for Aid to Refugees claims, that foreigners, who want to ask for asylum and came illegally or stay illegally on the territory, are sometimes given the decision on expulsion by the Aliens Police before they are allowed to ask for asylum. Similar concerns – that it is in practice sometimes impossible to file a claim to asylum before being returned to the country of origin, in particular because of a lack of information about the applicable procedures and the unavailability of legal assistance – have been expressed with respect to other States, in particular **Italy**, as illustrated by the fate of immigrants arriving in Lampedusa which shall be considered further.

- The new Regulation relating to the procedures for recognition of the refugee status in **Italy**, which entered into force on 21 April 2005 after having been approved with Presidential Decree no. 303 of 16 September 2004,[346] raises a number of concerns. In particular, it is incompatible with the requirement that the remedy against a rejection of the claim to asylum by the Regional Commission has a suspensive effect that the appeal against a denial of status issued by the Regional Commission does not stay or suspend the deportation order. Moreover, far from constituting an exceptional measure justified by particular circumstances, the detention of asylum-seekers is very frequently resorted to under the Law n° 198/2002.

- In **Latvia**, despite the concerns expressed in 2003 by the Human Rights Committee about the short time limits for appeal procedures against decisions rejecting the claim to asylum,[347] these time limits remain very short (one day for decisions adopted at the border, two days under the accelerated procedure, and seven days by the regular procedure), especially considering that the decision is notified only in the State language and that asylum seekers are not systematically provided with complete information about their rights and the procedure for appeal. A distinct reason for concern is the expressed position of the State Border Guard that until submission of asylum application, a person should be treated as an illegal immigrant under the Immigration Law, which does not explicitly oblige the authorities to explain to detainees the procedure for submitting an asylum application.

Recognition of the status of refugee or of person in need of international protection

Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third

[345] UNHCR, *UNHCR Position on Important Aspects of Refugee Protection in Greece*, June 2005
[346] Decreto del Presidente della Repubblica del 16 settembre 2004, n.303, Regolamento relativo alle procedure per il riconoscimento dello status di rifugiato, Pubblicato sulla Gazzetta Ufficiale 299 del 22 dicembre 2004 n.303
[347] CCPR/CO/79/LVA (2003), Section 9.

country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304 of 30.09.2004, p. 12) establishes the minimum standards for persons to qualify for refugee status or for subsidiary international protection, leaving Member States free in principle to retain or introduce more favourable standards for the persons concerned (Article 3). Article 6 of Directive 2004/83/EC provides that actors of persecution or serious infringements of human rights, the risk of which justifies the granting of refugee status, may also include non-State actors. Taking into account the Geneva Convention of 28 July 1951 which provides that fear of persecution on grounds of membership of a social group justifies the granting of refugee status, Article 10(d) of Directive 2004/83/EC says:

> a group shall be considered to form a particular social group where in particular:
> - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
> - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

The Network welcomes the fact that in **Germany,** Sect. 60 para. 1 of the new Residence Act clarifies that victims of non-state or gender-specific persecution are to be considered Convention refugees, stating that 'When a person's life, freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group'. A similar development is witnessed in **France**, where the Refugee Appeal Commission, in a decision of 21 December 2004 (No. 483691, Ms D.), granted refugee status to an applicant with Mauritanian nationality who had been forced to marry while she was still under age at the time and was subsequently subjected to *"severe and repeated"* ill-treatment inflicted by her husband; the threat of forced marriage, forced marriage and the consequences thereof should therefore henceforth give entitlement to refugee status in France and not simply subsidiary protection. In **Sweden,** the Government has adopted an important decision relating to asylum-seeking children with symptoms of devitalisation on 7 July 2005. After making an overall assessment of the family's situation and the child's very serious condition (the child's state of health), combined with the situation of uncertainty in the country of origin and that a deportation would seriously affect the child's conditions, the Government granted the child in question and the other members of his family a permanent residence permit on humanitarian grounds.[348] The Government affirmed explicitly that a child's own grounds for seeking asylum are to be examined and assessed independently from the accompanying persons' application. The Government, furthermore, stressed that children may experience persecution and fear differently from adults and this must be taken into consideration when assessing a child's grounds for asylum. Most importantly, in the view of the Government "Greater consideration shall be given to how children are affected by a refusal of entry".[349] Thus, the risk of a child's psycho-social development being permanently harmed if he or she is being returned to the country of origin shall carry greater weight in the future decision making process of the public authorities. The above mentioned decision has had the effect that 8 out of 12 children with symptoms of devitalisation were granted residence permits in Sweden.[350] In the view of the Network, it should follow from this that children, once recognized as refugees, should benefit the full range of the rights in principle afforded to refugees. Therefore, like the Children's Ombudsman (BO), the Network welcomes the proposal that has been presented in the interim Government Report - SOU 2005:15*, Delbetänkande om uppehållstillstånd for familjeåterförening och fri rörlighet för tredjelandsmedborgar* - and which implies that unaccompanied refugee children shall be guaranteed a right to family reunification with his/her parents by the way of granting them residence permits in Sweden. Unaccompanied minors who have received residence permits in Sweden on humanitarian grounds should be given the same right to

[348] Government Offices of Sweden, Decision in indicative matter involving a child, Press release, 7 July 2005, www.sweden.gov.se
[349] Government Offices of Sweden, ibid., www.sweden.gov.se
[350] Utrikesdepartementet, Redovisning till regeringen vad gäller ärenden rörande barn med uppgivenhetssymptom (UD2005/54159/MAP) 30 November 2005. See also www.farr.se

family reunification as the refugee children.[351] In **Spain,** as is recalled in the Report by Human Rights Commissioner Alvaro Gil-Robles on his visit to Spain (10-19 March 2005) (CommDH(2005)8), the Spanish government decided to grant refugee status to a woman who was the victim of gender violence, although the new legislation on asylum does not explicitly mention this ground for persecution. In the view of the Network, these are extremely important and welcome developments.

In contrast, the Network is concerned that in **Poland**, the Office for Repatriation and Aliens has refused to grant refugee status to Chechen women, who were victims of rape by soldiers or other officials of the Russian Federation stationed or working in Chechnya. This is a violation of Article 1A of the Geneva Convention on the status of refugees. According to information received by the Network, the exclusion clause of Article 1F of the Geneva Convention would occasionally have been interpreted broadly, for instance in order to deny asylum to a woman who delivered food to fighters accused of terrorist activities (reference is made in this regard to Decision of the Chairman of the Office for Repatriation and Aliens of 6 November 2005 No. DP-II-2347/SU/2004). In **Greece**, the extremely small number of individuals being granted refugee status continues to be alarming. It would be advisable if the Minister of Law and Order, except in highly exceptional circumstances, were in future to follow all the positive opinions of the Asylum Appeal Commission leading to the granting of refugee or humanitarian status. While the decision in **Sweden** to examine separately the claim to asylum of the child from that of his or her parents or tutors has been referred to above as a good practice, such approach remains still exceptional in that country: a recent study carried out by Save the Children (*Rädda Barnen*) and the Swedish Council for Refugees (*Rådgivningsbyrån för asylsökande*) demonstrates that only in one fifth (out of 50 cases) of the children in families applying for asylum was the child questioned about his/her reasons for claiming asylum. Moreover, the recognition rate of refugees on the basis of the 1951 Geneva Convention continue to be extremely low, representing approximately 1, 2 per cent of all applicants.

Unaccompanied children seeking asylum

Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ L 31 of 6.2.2003, p. 18) contains a number of provisions relating specifically to minors seeking asylum. Article 10 provides for their schooling and education, which may be provided in accommodation centres. Articles 18 and 19, which both appear in the chapter of the directive on 'persons with special needs', state that the best interests of the child shall be a primary consideration for Member States when implementing the provisions of the Directive that involve minors and that they shall ensure access to rehabilitation services for minors who have been victims of any form of abuse, neglect, exploitation, torture or cruel, inhuman and degrading treatment, or who have suffered from armed conflicts, and ensure that appropriate mental health care is developed and qualified counselling is provided when needed (Art. 18); and that unaccompanied minors will be adequately represented and placed, possibly in accommodation centres, taking into account their specific needs (Art. 19). This latter provision is further reinforced by Article 17 of the Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, which provides for specific guarantees for unaccompanied minors seeking asylum. In the implementation of these rules, the Member States should seek inspiration from the "Declaration on Good Practices", adopted under the programme "Separated Children in Europe" ("Save the Children" and UNHCR). The Network notes with satisfaction the adoption by the Ombudsman Office in Greece with the UNHCR, on the basis of this Declaration, of Guidelines for the treatment of minor asylum seekers[352]. Since this year, another important reference is the General Comment n°6(2005) adopted by the Committee on the Rights of the Child on the treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6, 1 September 2005).

[351] Barnombudsmannen (BO), Remissvar, *Delbetänkandet om uppehållstillstånd för familjeåterförening och fri rörlighet för tredjelandsmedborgare* (SOU 2005:15), Stockholm 18 May 2005, www.bo.se
[352] See the text (in Greek) on the site of the Ombudsman, www.synigoros.gr /docs/odigies_prosfigon.pdf

In previous conclusions, the Network questioned whether the very principle of placing unaccompanied minors in detention centres, in particular in centres where aliens served with a removal order are deprived of their liberty, was compatible with Article 3(1) of the Convention on the Rights of the Child, which requires that in all actions concerning children, the best interests of the child shall be a primary consideration (Concl. 2003, pp. 75-76). Although Article 37 of the Convention on the Rights of the Child does not prohibit the detention of children it does provide in particular that this 'shall be used only as a measure of last resort and for the shortest appropriate period of time' (Art. 37(b)). According to Article 20(1) of this Convention moreover, "A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State".

As the Network already emphasized above in its conclusions under Article 4 of the Charter, unaccompanied children are particularly at risk of becoming victims of trafficking in human beings, and as noted by the Human Rights Committee with respect to **Greece** (Concluding observations of the Human Rights Committee : Greece. 25/04/2005. CCPR/CO/83/GRC) and by the Committee on the Rights of the Child with respect to **Denmark** (Concluding Observations relating to Denmark: CRC/C/15/Add.273 30 September 2005, para. 51-52), they should be protected, and not released into the general population without supervision and the provision of welfare assistance. Problems in this regard seem to have surfaced also recently in **Finland**. In **Sweden**, according to official statistics presented by the Swedish Government during the consideration of the third report under the UN Convention on the Rights of the Child, 124 cases of disappearances regarding asylum seeking children were registered by the end of 2004.[353] Despite that there are reasons to believe that, in some cases, one child could have been the object of two or more registered disappearances, this number still appears to be very high. ECRI therefore recommended in its third report on Sweden that "the Swedish authorities extend the competences of legal custodians of unaccompanied children in order to take better care of the children's needs and, in particular, avoid disappearances",[354] and the UN Committee on the Rights of the Child, while taking note of the efforts made by Sweden to address the situation of unaccompanied minors and to enhance the quality of interviewing and reception of asylum seeking children, also expressed concern about the high number of unaccompanied children that have gone missing from the Swedish Migration Board's special units for children without custodians as well as the very long processing period for asylum application, which obviously have negative consequences for the mental health of the child. Bearing this in mind, the Committee recommended that Sweden should pursue its efforts to: "increase coordination between the different actors, in particular the police, the social services and the Swedish Board of Migration, in order to react efficiently and in a timely manner when children disappear; consider appointing a temporary guardian within 24 hours of arrival for each unaccompanied child and conduct refugee status determination procedures of children in a child sensitive manner, in particular by giving priority to applications of children and by considering child specific forms of persecution when assessing an asylum seeking child's claim under the 1951 Convention relating to the Status of Refugees".[355] The Member States should take into account these recommendations in the implementation of Article 19 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, referred to above. Where unaccompanied children seek asylum, their claims should be treated with the highest priority, in order to ensure that they will be placed in reception centres for the shortest time possible. All appropriate measures should be taken in order to minimize the risk that they disappear and become targets for sexual and economic exploitation. Structures such as foster institutions or families, ensuring supervision and assistance without detention, should be privileged. In **Belgium,** the Guardians Service that was set up within the Department of Justice by the Act of 24 December 2002[356] became operational on 1 May 2004. Although the human and financial resources of this service are totally inadequate to enable it to carry out its assignment properly (although efforts are being made to professionalize guardians), this system could be a useful source of inspiration for other countries.

[353] UN Doc. CRC/C/RESP/74, Written replies by the Government of Sweden concerning the list of issues received by the Committee of the Rights of the Child relating to the consideration of the third periodic report of Sweden, p. 5.
[354] CRI(2005)26, p. 20.
[355] UN Doc. CRC/C/15/Add.248, 28 January 2005, pp. 7-8.
[356] Programme Act (I) of 24 December 2002, *M.B.*, 31 December 2002.

Unaccompanied children should be provided with adequate legal representation before they are served with a removal decision. Article 19 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers and Article 17 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, referred to above, are complementary with the Guidelines on forced return adopted by the Committee of Ministers of the Council of Europe, which provide that 'Before deciding to issue a removal order in respect of a separated child, assistance – in particular legal assistance – should be granted with due consideration given to the best interest of the child' (guideline 2, para. 5). This principle is derived from Articles 3(1) and 24 of the Convention on the Rights of Child, and from the requirement that the child be provided with legal and other appropriate assistance formulated in Article 37 (d) of the Convention on the Rights of the Child in all the situations where the child is deprived from his liberty. As regards **Spain**, the Special United Nations Rapporteur on the human rights of migrants has issued a report in which she criticizes irregularities in the removal of unaccompanied minors (*United Nations. Economic and Social Council. Specific groups and individuals migrant workers. Report submitted by Ms. Gabriela Rodríguez Pizarro, Special Rapporteur on the human rights of migrants*. E/CN.4/2005/85/Add.1, 4 February 2005). The reported irregularities concern the lack of information on the reasons for detention, the fact of not having received the assistance of a lawyer, of receiving inadequate assistance from an interpreter and of not being able to express one's personal wishes. Very often the authorities regarded the children in question as 'emancipated minors' who could be expelled or returned to their country of origin. The Special Rapporteur advised the Spanish authorities to conduct an in-depth inquiry into claims of summary expulsions of minors on the border with Morocco.

Positive aspects

The Network welcomes the fact that in the **Czech Republic**, the amendment to the Asylum Act, which offers a definition of the unaccompanied minor asylum seeker,[357] stipulates that an application by an unaccompanied minor cannot be dismissed as manifestly unfounded, that he/she must be provided with a guardian, and that, if a country that is willing to accept the unaccompanied minor is not able to provide him with conditions suitable to the age and self-development of the minor, that this will be considered an obstacle to leaving the territory of the Czech Republic.[358] In **Lithuania,** the Amendment of 28 April 2005 of Article 6 of the Law on Health Insurance[359] provides that unaccompanied minors asylum seekers can receive health insurance paid by the State and can receive all sorts of medical treatment.

The implementation of Article 19 of Directive 2003/9/EC and of Article 17 of Directive 2005/85/EC would also be considerably facilitated by the adequate training of the public servants in charge of examining the application to asylum by the unaccompanied minor and of the appointed representative of the child, and the members of social services involved. In **Hungary** for instance**,** in January 2005, Menedék (Hungarian Association for Migrants) and the UNHCR organized a training to employees working at local authority's family help services, in order to point out the defencelessness of refugee families with special regard to minors' social, mental and language troubles. In **Sweden**, the Swedish Migration Board has developed together with the Office of the Children's Ombudsman and the Linköpings University a method for conversing with asylum-seeking children in order to better understand and deal with children's vulnerability and considering their own grounds for asylum.[360] The translation and dissemination of the 'Declaration on Good Practices', adopted under the programme "Separated Children in Europe", referred to above, also would serve this goal, as illustrated by the example of **Portugal**. Similarly, initiatives such as that taken in **Spain** by the

[357] Zákon č. 57/2005 Sb., kterým se mění zákon č. 325/2005 Sb., o azylu (…) [Act No. 57/2005 Coll., which changes the Law No. 325/1999 Coll., Asylum Act]
[358] See Sec. 16 (4), 89 (1) and 91 of Asylum Act
[359] 2005 04 28 LR sveikatos draudimo įstatymo 6 straipsnio pakeitimo įstatymas Nr. X-178 [28 April 2005 Amendment of Art. 6 of the Law on Health Insurance No. X-178] // Valstybės žinios, 2005, Nr. 61-2159
[360] Government Offices of Sweden, To seek asylum-a human rights, Stockholm 2005, p. 11 at www.regeringen.se

Defensor del Pueblo (Spanish Ombudsman), who adopted the *Informe sobre la asistencia jurídica a los extranjeros en España 2005* [2005 Report on Legal Assistance to Foreigners in Spain], are welcome to encourage the development of good practices in this area. On the other hand, the Network regrets that in other States, the degree of acquaintance of public officials with the rights of asylum-seekers, in particular unaccompanied children, remains insufficient. In **Latvia**, the one year long study programme of the State Border Guard School includes only 4 academic hours in the course of the year are devoted to the question of asylum-seekers. And although the State Border Guard College (a two-year first-level higher professional education programme for qualification of State Border Guard junior officer) foresees 20 academic hours for matters related to asylum seekers, most of these are devoted to technical issues (e.g., use of the EURODAC system), according to information provided by I. Zālītis, Head of the State Border Guard College (letter Nr. 23/11-3/1400 from 4 November 2005).

Reasons for concern

The Network also refers to the presentation in **Ireland** of a report commissioned by the Health Service Executive (Pauline Conroy and Frances Fitzgerald, *Separated Children Seeking Asylum, Research Study 2004 – Health and Social Education Needs* (September, 2005)). This report raises a number of concerns about the standards of care provided to hundreds of unaccompanied children seeking asylum in the State, highlighting a disparity in the level and standard of services provided to unaccompanied minors seeking asylum, as compared to Irish children in State care and calling for a concerted effort to address such disparities.[361] The report recommended the adoption of a comprehensive action plan, incorporating the statutory and voluntary sectors, to improve the services provided to such children. The main elements of the proposed plan include (i) a preliminary, followed by annual, multidisciplinary roundtable for all those involved in service provision to unaccompanied minors to facilitate the orientation of a coherent policy, (ii) the development of a "school retention plan" to insure that children in this category benefit from education, (iii) the delivery of information packs, relating to their medical, social and educational entitlements, to all minors and (iv) a review of actions taken to promote the reproductive and sexual health of unaccompanied minors.[362]

The Network also wishes to express the following concerns :

- In **Latvia,** although unaccompanied minors should be provided with free legal aid during the asylum procedure, no independent lawyer is involved. Moreover, recent practice indicates that responsible state institutions have no interest in providing required legal assistance. The main source of information about their rights is officials of the State Border Guard and the Office of Citizenship and Migration Affairs (OCMA).

- In **Lithuania,** the Law on Foreigners Legal Status[363] does not recognise the right of a Convention refugee, who is an unaccompanied minor, to reunify with his parents in Lithuania, which might raise a serious concern with regard to the conformity of the Law with the Council Directive 2003/86/EC on the right to family reunification. Moreover according to 2 February 2005 Minister of Internal Affairs and Minister of Social Security and Labour Order on Accommodation of Unaccompanied Minors Asylum Seekers in the Refugee Reception Center[364], the Refugee Reception Center is empowered to act as the guardian. This will naturally lead to *de facto* compulsory accommodation of such children in the Refugee Reception Centre till the age of majority and excludes them from access to the permanent guardianship system including placement of children in foster families. This arrangement might raise a concern regarding its compliance with the principle of the

[361] *Ibid* at p.45.
[362] *Ibid* at pp.50-52.
[363] 2004 04 29 LR įstatymas "Dėl užsieniečių teisinės padėties" Nr. IX-2206 [29 April 2004 Law on Foreigners Legal Status No. IX-2206] // Valstybės žinios, 2004, Nr. 73-2539
[364] 2005 02 02 LR vidaus reikalų ministro ir LR socialinės apsaugos ir darbo ministro įsakymas Nr. 1V-31/A1-28 "Nelydymų nepilnamečių prieglobsčio prašytojų apgyvendinimo Pabėgėlių priėmimo centre taisyklės" [2 February 2005 Minister of Internal Affairs and Minister of Social Security and Labour Order No. 1V-31/A1-28 on Accomodation of Unaccompanied Minors Asylum Seekers in the Refugee Reception Center] // Valstybės žinios, 2005, Nr. 20-641

best interests of the child.

- In **Poland**, according to the Supreme Chamber of Control report of 27 June 2005 – covering the period from 1 September 2003 to 30 June 2004 – there were certain violations of rights of unaccompanied minors, in particular with regard to ensuring around the clock care, as required by the Regulation of the Minister of Internal Affairs and Administration on the conditions of accommodation for unaccompanied minors and the standards of care in centres for aliens. As a result of placing two families in the zone for minors, one of the unaccompanied minors was beaten and cut with a knife by an adult living in the zone.[365]

Article 19. Protection in the event of removal, expulsion or extradition

1. Collective expulsions are prohibited. 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

Article 19(1) of the Charter corresponds to Article 4 of Protocol n° 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1963). Article 19 (2) of the Charter must be read in accordance with Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), as well as with the requirements formulated by Article 7 of the International Covenant on Civil and Political Rights (1966), by Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (1984) and by Article 33 of the Convention relating to the Status of Refugees (1951). The protection of the individual from removal, expulsion or extradition also is ensured through Article 13 of the International Covenant on Civil and Political Rights (1966), Article 1 of Protocol n° 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (1984), Article 19(8) of the Revised European Social Charter (with respect to nationals from States parties to the Revised European Social Charter) and Article 19(8) of the European Social Charter (1961) (with respect to nationals from States parties to the European Social Charter (1961)), which states that the Parties to this instrument undertake to secure that migrant workers lawfully residing within their territories will not be expelled unless they endanger national security or offend against public interest or morality.

General Comments

In the case of *Ramzy v. the* ***Netherlands*** (Appl. N° 25424/05), currently pending before the European Court of Human Rights, the Governments of Lithuania, Portugal, Slovakia and the United Kingdom, who have been given leave to intervene in support of the Dutch government's position, are taking the position that suspected terrorists might be expelled in conditions which, if the persons concerned did not represent such a serious threat to the community of the expelling State, would be in violation of Article 3 ECHR. While these governments do not challenge the absolute nature of the prohibition in Article 3 against a Contracting State itself subjecting an individual to Article 3 ill-treatment, they insist however that, 'the context of removal involves assessments of risk of ill-treatment, and needs to afford proper weight to the fundamental rights of the citizens of Contracting States who are threatened by terrorism'; that 'it is necessary and appropriate for all the circumstances of a particular case to be taken into account in deciding whether or not a removal in the situation set out above is, or is not, compatible with the Convention - national security considerations cannot simply be dismissed as

[365]Najwyższa Izba Kontroli, Informacja o wynikach kontroli realizacji przez administrację rządową zadań związanych z ochroną cudzoziemców w kontekście przystąpienia Polski do Unii Europejskiej, 27 czerwca 2005 r. dostępna na stronie http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep [Supreme Chamber of Control (NIK), Information about the review results from the realization by the government administration of tasks associated with the protection of aliens in the context of Poland's accession in the European Union, 27 June 2005, available on the website http://bip.nik.gov.pl/pl/bip/wyniki_kontroli_wstep]

irrelevant in this context'.[366] These governments are asking the European Court of Human Rights to overrule the *Chahal v. the United Kingdom* judgment it delivered on 15 November 1996, where the Court clearly identified an *absolute* prohibition to expel, extradite, or return a person to a State where he or she would be facing a serious risk of torture or of treatment or punishment contrary to Article 3 ECHR, explicitly dismissing as without relevance the seriousness of the offences committed by that individual. The Network is deeply concerned by this attempt to move the clock of human rights backwards.

The return of illegally staying third-country nationals

The Network welcomes the presentation by the European Commission, on 1 September 2005, of a proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (COM(2005) 391 final), based on Article 63(3)(b) EC. If adopted, this proposal should contribute to improving the protection of human rights in the removals of third-country nationals by the EU Member States. In the view of the Network, the harmonization of such rules at the level of the Union should be seen as a necessary complement to the reinforced cooperation between the Member States in this field which Directive 2003/110/EC of 25 November 2003 on assistance in cases of transit for the purposes of removal by air (see Concl. 2004, pp. 57-58) and Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals (OJ L 261 of 6.8.2004, p. 28) both illustrate, and to the mutual recognition of decisions on the expulsion of third-country nationals, as provided for by Directive 2001/40/EC (OJ L 149 of 2.6.2001, p. 34). The Member States may only pursue together a common immigration policy including a return policy, if they can be mutually confident that all States will comply with certain minimum standards, defined at a sufficiently high level and, in any case, not situation below the minimum safeguards defined by the Charter of Fundamental Rights, the European Convention on Human Rights and the fundamental rights recognized among the general principles of Union law.

At the same time, the Network recalls the reservations already expressed in these conclusions concerning the formulation of Article 5 of the proposal (Family relationships and the best interests of the child) – which refers to the right to respect for family life but omits a reference to the right to respect for private life, although both may be obstacles to the adoption of a return decision, under Article 8 of the European Convention on Human Rights – and concerning Article 8(3) of the draft Directive, which could be interpreted to allow the detention of third country nationals in situations where the enforcement of a return decision or execution of a removal order is postponed, without this being conditional upon the continuation of the arrangements made for the removal and the continued prospect of the removal taking place within a reasonable delay. The Network also worries that the custody of returnees in normal prisons is not absolutely prohibited, although it acknowledges that third-country nationals in temporary custody shall at all times be separated from ordinary prisoners (Article 15(3)). Article 6(3) of the draft Directive states:

> Where Member States are subject to obligations derived from fundamental rights as resulting, in particular, from the European Convention on Human Rights, such as the right to non-refoulement, the right to education and the right to family unity, no return decision shall be issued. Where a return decision has already been issued, it shall be withdrawn.

Although this is a welcome clause, providing for the required flexibility in the face of evolving international obligations and making it possible to include the developing case-law of international jurisdictions and expert bodies, it also represents a failed opportunity to go beyond the minimal requirements imposed by those instruments, which Article 19(2) of the Charter of Fundamental Rights moreover only partially replicates. The Network considers that Article 19(2) of the Charter prohibits the return of a person to a country which still applies the death penalty, as explained above in these

[366] Observations of the governments of Lithuania, Portugal, Slovakia and the United Kingdom, presented to the European Court of Human Rights in the case of *Ramzy v. the Netherlands*, 21 November 2005.

conclusions. It also considers that a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals could have clarified the limited weight which much be given to diplomatic assurances by the State of return – which although they may in certain cases be a necessary condition, in no circumstance should be considered a sufficient condition for a deportation otherwise impermissible –, as well as the verifications which should be made, for instance with respect to the collection of information or the consultation of the UNHCR, with regard to the risks of human rights violations being committed in the State of return.

Collective expulsions

Article 4 of Protocol No. 4 to the European Convention on Human Rights prohibits any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien. (see the inadmissibility decision of 23 February 1999 in the case of *Andric v.* ***Sweden*** (Appl. No. 45917/99), unpublished). Although this does not prohibit the material organisation of departures of groups of returnees (as provided by Council Decision 2004/573 of 29 April 2004 on the organization of joint flights for removals, from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders (OJ L 261 of 6.8.2004, p. 28), which previous reports of the Network have commented upon), it does require that the removal order be based on the circumstances of the individual who is to be removed, even if the administrative situations of the members of that group are similar or if they present certain common characteristics. The adoption of individual removal orders in itself may not be sufficient, if the stereotypical character of the reasons given to justify the notification of a removal order or the arrest to ensure compliance with that order, or other factors, indicate that a decision may have been taken in relation to the removal from the territory of a group of aliens, without regard to the individual circumstances of each member of the group.[367]

The concerns expressed by the Network in its previous Conclusions regarding the treatment of illegal migrants, potentially asylum-seekers, arriving on the island of Lampedusa in **Italy** (Concl. 2005, p. 79), remain fully valid. On 18 March 2005, the United Nations High Commissioner for Refugees (UNHCR) requested explanations from the Italian authorities regarding the deportation of some 180 persons from Lampedusa to Libya. The group was deported on two flights, with an Italian police escort. Prior to that, they had been living at the reception centre on Lampedusa since arriving on boats during the preceding days. The UNHCR has repeatedly insisted that anyone who wishes to make an asylum claim should be provided an opportunity do so, and that the claims should be properly and fairly assessed. The risks entailed by the removal of the persons concerned to Libya were recognized by the European Court of Human Rights, a Chamber of which decided on 10 May 2005 to order a stay of the deportation of eleven immigrants who disembarked on Lampedusa in March, on the basis of Article 39 of the Rules of the Court.

A distinct question is whether these events, apart from resulting in violations by Italy of its international obligations, also constitute a violation of Union law. Following its inquiry into very similar events which took place in October 2004, the European Parliament adopted a resolution on 14 April 2005 condemning the attitude of Italy in this situation and calling on the European Commission as the guardian of the Treaties "to ensure that the right of asylum is respected in the European Union in accordance with Article 6 of the EU Treaty and Article 63 of the EC Treaty, to put a stop to the collective expulsions and to insist that **Italy** and the other Member States comply with their obligations under EU law". Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers should have been implemented by all the Member States by 6 February 2005. The Network considers that the manifest violations of this directive by Italy in the situation created on the island of Lampedusa would have justified the introduction of the action for

[367] Eur. Ct. HR (3rd Sect.), *Conka v. Belgium* judgment of 5 February 2002, Appl. No. 51564/99, para. 59; and the friendly settlements reached in the cases of *Sulejmanovic and others* and *Sejdovic and Sulejmanovic v. Italy* (Appl. No. 57574/00 and No. 57575/00) (judgment of 8 November 2002 (Eur. Ct. HR (1st Sect.)).

failure to comply against Italy, on the basis of Article 226 EC and of the powers granted to the European Commission by Article 211 EC.

In this respect, the Network expresses its reservations about the position adopted by the European Commission as contained in a letter of 18 March 2005 addressed to the President of the Group providing information and support to immigrants (GISTI), and of which the Network has received a copy. According to this position, "the situation of other groups of immigrants [than asylum-seekers], in particular those who entered the territory illegally, is not covered by [Directive 2003/9/EC above]. A Member State that deprives foreigners arriving at its border, whether legally or illegally, of the right to apply for asylum and therefore denies those foreigners the benefit of Directive 2003/9/EC deprives this Directive of all useful effect.

The past year was also marked by events connected with attempts made by individuals seeking to immigrate into the European Union to enter **Spain** through the enclaves of Ceuta and Mellila. On 27 September 2005, around 500 migrants arrived in successive waves to get over the fence using makeshift ladders. Between 27 and 29 September, several hundred Africans made fresh attempts to cross the fence. According to the Spanish Civil Guard, around 200 sub-Saharans succeeded in crossing over to the Spanish side. They came from Congo, Ivory Coast, Cameroon, Guinea-Conakry, Nigeria and Senegal. A new attempt at a mass crossing of the fence took place during the night of 2 to 3 October: around 650 people tried to cross the border at Melilla, of whom 350 managed to enter Spanish territory. On 5 October in the morning, according to the police, 65 more migrants (out of around 500), succeeded in entering Melilla. At dawn on 6 October, only one out of 400 to 1,000 managed to get across. The Network regrets in particular that migrants who were arrested as they crossed the security barrier were handed over to the Moroccan authorities by the Spanish police, without any assurances being given by the Moroccan authorities as to how those persons would be treated. The eventual fate of those prospective migrants or asylum-seekers in the European Union confirms in that respect the fears of non-governmental organizations. This lack of assurances also concerns the persons handed over to the Moroccan authorities in accordance with the readmission agreement of 1992 between Spain and Morocco, which was reactivated by those events. In that connection, a group of 73 African migrants expelled from Spain arrived in Tangier on 6 October. However, recalling Thematic Comment No. 2 which it devoted to this question, the Network echoes the fears of Amnesty International, which points out that the readmission agreement does not contain sufficient guarantees that persons who are returned to Morocco will be protected against torture or ill-treatment, whether in Morocco itself or upon their return to their country of origin (Amnesty International, *Spain: the southern border*, EUR 41/008/2005). Moreover, according to information in the Network's possession, those migrants who entered Spain irregularly did not always have the opportunity to apply for asylum and did not have the benefit of legal assistance or the assistance of an interpreter for that purpose. The Agreement of 13 February 1992 between the Kingdom of Spain and the Kingdom of Morocco on the movement of persons, the transit and readmission of foreigners having entered illegally, signed in Madrid (BOE of 25 April 1992), contains insufficient guarantees in terms of fundamental rights; moreover, even the minimum guarantees contained therein do not seem to have been respected.

Diplomatic assurances and the return of rejected asylum-seekers suspected of terrorist activities

The Network is particularly concerned about the recent tendency by EU Member States to rely on assurances given by states of return about the treatment which the persons removed will receive, in order to effectuate removals in circumstances which, in the absence of such 'diplomatic assurances', would not be acceptable. The Network emphasizes that such 'diplomatic assurances' cannot be a substitute for a verification, on a case-to-case basis, that the person returned will not be subjected to a real risk of torture, to other forms of inhuman or degrading treatment or punishment or to the death penalty, and that the security of that person will not be threatened. This position, which has been clearly expressed by the Special Rapporteur on Torture of the United Nations Commission on Human Rights to the General Assembly, is shared by international jurisdictions and the human rights treaties bodies. Thus, on 20 May 2005 the UN Committee against Torture (CAT) ruled that **Sweden** had

violated the cardinal principle embedded in international refugee law (the *non-refoulement* principle) as well as the unconditional ban on torture in public international law by expelling a terrorism suspect, Ahmed Agiza, to Egypt. The Swedish Government had based its decision to proceed with the expulsion in December 2001 on a so-called 'diplomatic assurances' of fair treatment from the Egyptian authorities upon his return. The Committee nevertheless came to the conclusion that Sweden had violated Article 3 of the UN Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment. In the view of CAT, the applicant had credibly alleged that he would be under a risk of torture after his forcible return to Egypt. The Committee stressed that assurances of the kind that has been given to the Swedish authorities could not protect Agiza from the risk of torture he faced upon return: "the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk"[368]. The Committee against Torture also pointed out that it "should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons". Finally, the Committee made the observation that the applicant's retrial in an Egyptian military tribunal in April 2004 was deemed unfair by the Swedish authorities themselves. In **Austria**, the case of Mohamed Bilasi-Ashri, an Egyptian national, who fears being extradited from Austria to his home country upon diplomatic assurances that he will not be tortured or exposed to inhuman or degrading treatment, even though a real threat could have been established, presents similar questions (the case of Mohamed Bilasi-Ashri is pending before the European Court of Human Rights for the second time).

The Network repeats its previous views on the issue of diplomatic assurances (Concl. 2005, p. 81). It recalls that in November 2004, the Committee against Torture expressed its concern at the **United Kingdom**'s reported use of diplomatic assurances in the refoulement context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees, were not wholly clear. The Committee requested that within one year, the United Kingdom provide it with details on how many cases of extradition or removal subject to receipt of diplomatic assurances or guarantees had occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases (CAT/C/CR/33/3, para. 4). It also recalls the statement made by the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, in July 2004, according to which: "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains"[369]. After having reviewed these and other developments, including those concerning the expulsion by Sweden to Egypt, in December 2001, of Ahmed Agiza and Mohammed al-Zari, which led to the abovementioned finding of the Committee against Torture, the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak[370], concluded in his interim report submitted to the United Nations General Assembly that 'diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated'. The UN Special Rapporteur therefore took the view that States 'cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return', and he called upon Governments to 'observe the principle of non-refoulement scrupulously and not expel any person to frontiers or territories where they might run the risk of human rights violations, regardless of whether

[368] UN Doc. CAT/C/34/D/233/2003, 20 May 2005, p. 34.
[369] Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, 21-23 April 2004, Council of Europe, document CommDH(2004)13, 8 July 2004, para. 9.
[370] Manfred Nowak is also the expert for Austria of the EU Network of Independent Experts on Fundamental Rights.

they have officially been recognized as refugees'[371].

The Network of Independent Experts considers that, in the view of the status of the international norm prohibiting torture and of the absolute and unconditional character of this prohibition, this is the only acceptable position under international law. With a view to facilitating the deportation of persons who would otherwise be considered at risk of being subjected to torture or inhuman and degrading treatment in the receiving State, the **United Kingdom** has concluded memorandums of understanding with Jordan, Lebanon and Libya whereby a commitment is made that deportees to those countries would be treated in a "humane manner in accordance with internationally accepted standards" and would not face the death penalty. Efforts are currently understood to being made to conclude similar agreements with Algeria, Morocco and Tunisia. The Network reiterates what should be self-evident under any reading of the international law of human rights. Only when an independent, impartial and competent court is convinced, based on reliable and credible evidence, of the absence of a risk of torture and other ill-treatment in the receiving state, may a person be sent there against his or her will.

States may not exonerate themselves from these basic prohibitions of refoulement, as stipulated in particular in Article 3 of the European Convention on Human Rights, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the Convention against Torture, by the conclusion of memorandums of understanding. Indeed, such memorandums of understanding are concluded by States already bound by such instruments. Therefore the conclusion of such memorandums only serves to raise the suspicion that the risk of torture or ill-treatment may be a real one. Indeed, there is no reason to believe that, if States have a record of non complying with the absolute and unconditional prohibition of torture and ill-treatment imposed under international law, they will be more respectful of the promises they make under such memorandums of understanding.

The Network emphasizes the conclusions arrived at by the UN Special Rapporteur on Torture, Mr Manfred Nowak, with regard to diplomatic assurances[372]:

> (a) The principle of non-refoulement (CAT, art. 3; ECHR, art. 3; International Covenant on Civil and Political Rights (ICCPR), art. 7) is an absolute obligation deriving from the absolute and non-derogable nature of the prohibition of torture;
>
> (b) Diplomatic assurances are sought from countries with a proven record of systematic torture, i.e. the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practising torture. In most cases, those individuals in relation to whom diplomatic assurances are being sought belong to a high-risk group ("Islamic fundamentalists");
>
> (c) It is often the case that the requesting and the requested States are parties to CAT, ICCPR and other treaties absolutely prohibiting torture. Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture for a few individuals, which leads to double standards vis-à-vis other detainees in those countries;
>
> (d) Diplomatic assurances are not legally binding. It is therefore unclear why States that violate binding obligations under treaty and customary international law should comply with non-binding assurances. Another important question in this regard is whether the authority providing such diplomatic assurances has the power to enforce them vis-à-vis its own security forces;
>
> (e) Post-return monitoring mechanisms are no guarantee against torture - even the best

[371] UN doc. A/60/316, 30 August 2005, at para. 51-52.
[372] Report of the Special Rapporteur on the question of torture, Manfred Nowak, submitted to the sixty-second session of the Commission on Human Rights, E/CN.4/2006/6 23 December 2005, para. 31.

monitoring mechanisms (e.g. ICRC and CPT) are not "watertight" safeguards against torture;

(f) The individual concerned has no recourse if assurances are violated;

(g) In most cases, diplomatic assurances do not contain any sanctions in case they are violated, i.e. there is no accountability of the requested or requesting State, and therefore the perpetrators of torture are not brought to justice;

(h) Both States have a common interest in denying that returned persons were subjected to torture. Therefore, where States have identified independent organizations to undertake monitoring functions under the agreement, these interests may translate into undue political pressure upon these monitoring bodies, particularly where one is funded by the sending and/or receiving State.

The Network does not consider that the judgment delivered by the European Court of Human Rights on 8 November 2005 in the case of *Bader and Others v.* ***Sweden*** (Appl. No. 13284/04) leads to a different conclusion. The applicants and their two children, of Syrian nationality, arrived in Sweden in August 2002 and submitted applications requesting for asylum. After their claim to asylum was rejected they sought a stay of execution of the deportation (*verkställighetshinder*) order in 2004, as Mr Bader alleged that if sent back to Syria he would be facing the death penalty because of a judgement that had been passed in 2003 stating that he had been convicted in his absence for involvement in a murder and therefore sentenced to death. In April 2004 the Aliens Appeals Board (*Utlänningsnämnden*) rejected the appeal of Mr Bader as, according to a local lawyer in Syria, the case would be re-opened and Mr Bader would therefore receive a full retrial. Furthermore, if he was convicted he would not be facing the death penalty as the case was related to family honour. After the applicants complained that if they were to be deported to Syria, Mr Bader would indeed face a risk of being arrested and executed contrary to Article 2 and 3 of the European Convention, the European Court noted that the information in the report from the Swedish Embassy in Syria is vague and imprecise as to whether the case would be re-opened and as to the likelihood, in the event of a conviction at a retrial, of Mr Bader escaping capital punishment. Thus, in the view of the Court the report contained only assumptions and no answers as to what would happen if the applicants were deported to Syria. The Court found it therefore surprising that Mr Bader's defence lawyer in Syria does not even seem to have been contacted by the Swedish Embassy during their investigation into the case, even though the applicant had furnished the Swedish authorities with his name and address and he could, in all probability, have provided useful information about the case and the proceedings before the Syrian court. In § 45 of its judgment, the Court noted : '…that the Swedish Government have obtained no guarantee from the Syrian authorities that the first applicant's case will be re-opened and that the public prosecutor will not request the death penalty at any retrial (see, among others, *Mamatkulov and Askarov v. Turkey* [(Appl. n° 46827/99 and 46951/99) judgment of 4 February 2005], § 76 [referring to the assurances received by the Turkish government from the Uzbek government, which is one of the elements on which the Court bases its conclusion that the extradition of the two applicants to Uzbekistan would not be in violation of Article 3 ECHR]; *Soering v. the United Kingdom*, cited above, §§ 97-98; *Nivette v. France* (dec.), no. 44190/98, ECHR 2001-VII). In these circumstances, the Swedish authorities would be putting the first applicant at serious risk by sending him back to Syria and into the hands of the Syrian authorities, without any assurance that he will receive a new trial and that the death penalty will not be sought or imposed.' The European Court concluded that Mr Bader has a justified and well-founded fear that the death sentence against him will be executed if he is forced to return to his home country. Moreover, since executions are carried out without any public scrutiny or accountability, the circumstances surrounding his execution would inevitably cause Mr Bader considerable fear and anguish while he and the other members of his family would all face intolerable uncertainty about when, where and how the execution would be carried out. Thus, the European Court of Human Rights concluded that there are substantial grounds for believing that Mr Bader would be exposed to a real risk of being executed and subjected to treatment contrary to Articles 2 and 3 of the Convention if deported to his home country, and that the deportation of the applicants to Syria, if implemented, would give rise to violations of Articles 2 and 3 of the

Convention. However, this judgment cannot be read *a contrario*, as implying that should diplomatic assurances have been obtained by the Swedish government, the removal of the applicant would have been acceptable. In any case, the position of the European Court of Human Rights should be seen as without prejudice of the requirements of the international law of human rights, which may be go beyond the minimal protection afforded by the European Convention on Human Rights.

The Network notes with interest that the national courts have not remained indifferent to the suspicious character of diplomatic assurances by receiving States where these assurances are not corroborated by concrete measures. In the **Netherlands,** after the *Rechtbank* [Regional Court] of The Hague decided on 8 November 2004 that Ms Nuriye Kesbir, a prominent PKK leader who asked political asylum in the Netherlands in 2001, should not be extradited to Turkey (KG 04/1161), this was confirmed by the *Gerechtshof* [Court of Appeal] of The Hague in its judgment of 20 January 2005 (LJN AS3366). The Court of Appeal of The Hague rejected the diplomatic assurances offered by the Turkish Government as too general and abstract in nature. The Court stated that an adequate guarantee should at least indicate that, and how, the Turkish authorities will ensure in practice that the judicial and other officials whom Ms Kesbir will encounter during her detention and trial will abstain from torturing her and from inflicting other forms of ill-treatment.

Another question which has recently emerged as central in the debate on the return of rejected asylum-seekers concerns the specific situation where, due to national security reasons invoked by the authorities, the remedies of the applicant are limited, especially as regards his or her right to have access to the information on which the decision to deport him of her is base. In **Sweden**, the *Agiza* case referred to above provides a good illustration of the deficiencies in the current legal system in that country with regard to expulsion of terrorist suspect asylum seekers. The Swedish Special Control of Foreigners Act (*Lag om särskild utlänningskontroll* (SFS 1991:572)) allows asylum seekers who have been suspected of terrorism in their country of origin to be expelled to the country in question under a procedure which deprives them from the opportunity to appeal the decision or have it reviewed in any other way. Moreover, the suspected individual is precluded from obtaining knowledge about what evidence is relied upon to reach the decision on expulsion. The Network notes in this regard that where national security interests are invoked in order to justify denying access to information by applicants contesting asylum and expulsion decisions, solutions must be found – such as the sensitive information being transmitted to court-appointed sworn attorneys – in order not to deprive the right to an effective judicial remedy in such circumstances from its significance.

Finally, the Network would evade its responsibilities if it did not mention that in the **Slovak Republic,** the *zákon o azyle* [Act on Asylum][373] still provides only a relative protection from expulsion in situations where an individual has reasons to fear for his life or security. As mentioned in the previous conclusions of the Network (Concl. 2005, p. 82), Section 47 paragraph 1 of the Act on Asylum allows expelling a person to the territory of the country where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion, provided that such a person can be reasonably regarded as a danger to the security of the Slovak Republic or who has been convicted by a final judgement of a particularly serious crime constituting a danger to the society. This provision violates Article 19 paragraph 2 of the Charter of Fundamental Rights.

Legal remedies and procedural guarantees regarding the removal of foreigners

The Network identified in particular the following difficulties:

- In **Spain**, the main problem lies in the means that foreigners facing expulsion have to exercise in practice the rights which the national law gives them. The Report by Human Rights Commissioner Alvaro Gil-Robles on his visit to Spain (10-19 March 2005) (CommDH(2005)8) highlights the fact

[373] *Zákon č. 480/2002 Z. z. o azyle a o zmene a doplnení niektorých zákonov v znení neskorších predpisov* [Act no. 480/2002 Coll. on Asylum, amending and supplementing certain other laws as amended].

that most of the foreigners being held in detention centres while awaiting their return to their country of origin are unaware of their rights under Spanish law. The problem is compounded by the very small number of lawyers entrusted by the Bar Association with the cases of foreigners and the lack of any special training for lawyers on the subject of foreigners, immigration and asylum.

- In **Latvia**, although the Immigration Law of 2003 sets the procedure for detention and forcible expulsion of foreigners, there are still several shortcomings in the law, as well in practice, limiting their rights considerably. For instance, the Immigration Law provides that if an official of the State Border Guard has detained an alien in the territory of Latvia, the Head of the Office of Citizenship and Migration Affairs (OCMA) or an official authorised by him shall take a decision regarding the forcible expulsion of the alien.[374] The OCMA interprets this to means that the decision of forcible expulsion should be issued as mandatory in a case of detention of an alien, and other considerations should not be taken into account.[375] The decision of forcible expulsion is issued in the State language, and no written translation (in some cases – no translation at all) is provided for a detained alien, thus seriously limiting the possibility to appeal it. Moreover, in some cases the written decision on forcible expulsion is delivered to a detainee after the end of the term of appeal (7 days). The *Law* does not contain explicit provisions on the procedure of making a detained alien aware of a decision on forcible expulsion.

- In **Lithuania**, Article 138 of the Law on Foreigners Legal Status[376] gives only 7 day period for submitting appeal against the decision on removal. Such a short term makes the right to appeal less effective. In addition, Article 139 of the Law foresees suspensive effect in case of appeal, but in case of removal it is executed immediately as there is no suspensive effect before the appeal is submitted. Therefore a right to appeal itself becomes practically not accessible. The European Committee of Social Rights concluded that the situation in Lithuania was not in conformity with Article 14 para 1 of the Revised Charter due to the existence of a length of residence requirement for entitlement to social services.[377] In Lithuania most social rights are granted only to citizens and persons, who have a permanent residence permit. Even asylum seekers, who get subsidiary protection (i.e., a temporary residence permit), after the period of social integration are left without the rights to social assistance. Such a situation could be regarded as *de facto* expulsion of foreigners.

- These problematic legislative provisions in Latvia and Lithuania appear to have been inspired by the accelerated procedure in the Aliens Act of **Finland**, in regard of which the Network has expressed its concern earlier.

[374] *Imigrācijas likums* [*Immigration Law*] adopted 31 October 2002, in force since 1 May 2003, with amendments announced to 12 July 2005. Section 47.
[375] PMLP Daugavpils pilsētas un rajona nodaļas vadītājas 2005. gada 22. augusta lēmums Nr.8/87 par ārzemnieka piespiedu izraidīšanu. [Decision No. 8/87on forcible expulsion of alien, issued by the Head of Daugavpils City and Regional Department of the OCMA 22 August 2005]
[376] Įstatymas "Dėl užsieniečių teisinės padėties [Law on Foreigners Legal Status] Valstybės žinios, 2004, Nr. 73-2539.
[377] European Committee of Social Rights, Conclusions 2005 (Lithuania)

CHAPTER III. EQUALITY

Article 20. Equality before the law

Everyone is equal before the law.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (1966) and by Article 14 the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), with respect to the rights and freedoms guaranteed in that instrument. The Preamble of the European Social Charter (1961), stating that the rights listed in that instrument should be recognised without discrimination, as well as Article E of the Revised European Social Charter, should also be taken into account. The Council of Europe Framework Convention for the Protection of National Minorities (1995) guarantees the members of national minorities a right to equality before the law (Article 4(1)).

All the issues relating to non-discrimination are dealt with in the conclusions adopted under the following Article of the Charter. No separate conclusions have been adopted under this provision of the Charter.

Article 21. Non-discrimination

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2(1) and 26 of the International Covenant on Civil and Political Rights (1966), by Article 2 of the International Covenant on Economic, Social and Cultural Rights (1966), by the International Convention on the Elimination of All Forms of Racial Discrimination (1965), by Article 7 of the International Convention on the Rights of All Migrant Workers and Members of their Families (1990) (with regard to the rights recognised to migrant workers and the members of their families under this instrument), by ILO Convention (n°111) concerning Discrimination in Respect of Employment and Occupation (1958), by Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by Protocol n° 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2000, entry into force on 1 April 2005), by Article 11 of the Convention on Human Rights and Biomedicine (1997) (with regard to discrimination based on genetic features) and by Article 4 of the Framework Convention for the Protection of National Minorities (1995). To the extent Article 21 of the Charter of Fundamental Rights prohibits any discrimination on the ground of membership of a national minority, Article 27 of the International Covenant on Civil and Political Rights (1966) should be taken into account in the interpretation of this provision, as well as provisions from the Framework Convention on the Protection of National Minorities (1995).

The Framework Strategy on non-discrimination and equal opportunities

In its Thematic Comment n°3 on the rights of minorities in the Union (2005), the Network presented an overview of the questions which could be addressed in order to ensure the mainstreaming of the rights of minorities in the laws and policies of the Union. The Communication of the Commission "Non-discrimination and equal opportunities to all – A Framework Strategy",[378] which results from the consultation process launched by the publication of the Green Paper on Equality and non-discrimination an enlarged EU on 28 May 2004,379 states that

the implementation and enforcement of anti-discrimination legislation on an individual level is not enough to tackle the multifaceted and deep-rooted patterns of inequality experienced by some groups. There is a need to go beyond anti-discrimination policies designed to prevent unequal treatment of individuals. The EU should reinforce its efforts to promote equal opportunities for all, in order to tackle the structural barriers faced by migrants, ethnic minorities, the disabled, older and younger workers and other vulnerable groups.

The Network welcomes this statement, which demonstrates a willingness to reflect upon the potential of Union law to address the question of discrimination experienced by minorities beyond the already important protection afforded to ethnic and religious minorities, respectively by Directive 2000/43/EC and by Directive 2000/78/EC. The Network recalls its invitation to consider whether disparate impact discrimination should not be outlawed in the Member States. This implies going beyond the current definition of indirect discrimination as included in the Racial Equality and Employment Equality Directives. Victims of discrimination should be allowed to establish a presumption of discrimination by bringing forward statistics, thus obliging the author of a measure creating a disparate impact on certain protected groups either to justify that measure as both appropriate and necessary to the fulfilment of a legitimate end, or to modify it. As explained in Thematic Comment n°3, the processing of data in order to monitor the situation of racial, ethnic or religious minorities, is not prohibited under the existing legal framework relating to the protection of private life in the processing of personal data. The Network also welcomes the statement that "Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities".[380] This however is not because, as suggested by the Communication, "it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups". The Network would emphasize that, while social and economic policies targeted towards the integration of minorities have a crucial role to play, there is also a role for legislation in combating structural discrimination.

In this respect, the Network again reiterates its invitation to clarify the precise scope of the restrictions imposed by the existing rules on the protection of personal data, where public or private organisations or individuals seek to affirmatively promote the representation of certain disadvantaged groups in society, as called for by the above-cited Communication of the Commission of 1 June 2005. It refers in that regard to the report presented in October 2003 to the European Commission (Directorate-General for Employment, Industrial Relations and Social Affairs) on the business case for diversity policies within the undertaking,[381] which noted that one specific obstacle to the adoption and implementation of workforce diversity policies are the restrictions on the processing of sensitive data in the EU, which may make it impossible to measure the evolution of the workforce, according to sexual orientation, race or ethnic origin, or religion. A more recent report identifies "workforce profiling" as a good practice of companies in monitoring progress towards diversity.[382] A study[383]

[378] COM(2005)224 final, 1.6.2005.

[379] COM(2004) 379 final, 28.5.2004. The reactions to the Green paper are available at: http://europa.eu.int/comm/employment_social/fundamental_rights/policy/aneval/green_en.htm

[380] COM(2005)224 final, at para. 3.3.

[381] *The Costs and Benefits of Diversity. A Study on Methods and Indicators to Measure the Cost-Effectiveness of Diversity Policies in Enterprises*, report drawn up by the Centre for Strategy and Evaluation Service (CSES) on behalf of the European Commission. The report is based on a survey of 200 companies in 4 EU countries, on literature reviews, on 8 case studies in 6 Member States, and on a number of interviews with a range of actors. See http://europa.eu.int/comm/employment_social/fundamental_rights/prog/studies_en.htm

[382] This is defined thus : "Workforce profiling including ethnicity, nationalities, religions, languages spoken, gender and age mix to enable identification of particular areas of under-representation, as well as to enable comparisons against local area

commissioned under the Community action programme to combat discrimination (2001-2006) concluded from a comparative study on the EU-15 Member States, similarly, that data collection ought to be improved in order to gain a better understanding of discrimination in the EU Member States, but also illustrated the high level of uncertainty about whether or not the existing rules on data protection represented an obstacle to the collection of data relating to discrimination, in order to combat discrimination and promote equality more effectively (at pp. 158-160). The Network shares the view of the authors of the 2004 *Comparative Study on the collection of data to measure the extent and impact of discrimination within the United States, Canada, Australia, Great-Britain and the Netherlands*, where these authors noted that the lack of sufficient statistics to illustrate and evaluate discrimination, because of the resistance to the use of such statistics, 'is not compatible with establishing an operational scheme whose main characteristic is the intensive use of statistical data', and that it necessary to 'transcend the European paradox opposing the fight against discrimination and the production of 'sensitive' statistics' (at p. 87). During the period under scrutiny, the European Commission on Racism and Intolerance noted for instance that gaps existed in **Sweden** in the information available on the situation of various minority groups in areas such as education, employment, health and housing and therefore suggested that the authorities think about how these gaps could be filled. In the view of ECRI 'the absence of such data in Sweden limits the general awareness of the need to take positive measures to improve the position of certain disadvantaged groups'.[384] Reliable data is, in other words, of importance when evaluating the situation of minority groups and the success of policies and measures designed to improve their situation in various areas in Sweden. ECRI therefore recommended that the Swedish authorities should 'improve their monitoring systems by collecting relevant information broken down according to categories such as religion, language, nationality and national or ethnic origin, and to ensure that this is done in all cases with due respect to the principles of confidentiality, informed consent and the voluntary self-identification of persons as belonging to a particular group. These systems should be elaborated in close co-operation with civil society organisations and take into consideration the gender dimension, particularly from the point of view of possible double or multiple discrimination'.[385] In its Third report on the **United Kingdom** (CRI (2005) 27), ECRI noted with satisfaction that monitoring of the situation of different ethnic groups across a wide range of areas has facilitated the identification of priority areas for action and the elaboration of targeted policies. In **Denmark,** the Danish Institute for Human Rights presented together with Norwegian and Dutch teams a preliminary report on exploring new possibilities for combining existing data for measuring ethnic discrimination, under a framework supported by the European Community Action programme to combat discrimination (2001-2006). The project's aim is to improve the measurement and examine the comparability of discrimination by linking data from individual complaints, surveys on perceived discrimination and statistics on negative outcomes for ethnic minority groups. The report focuses on discrimination three different areas (education, labour and income). All these findings and developments are convergent, and they reinforce the views put forward, from a human rights perspective, by the Network of Independent Experts on Fundamental Rights in its Thematic Comment n°3.

The Expert group to promote inclusion of ethnic minorities in the EU

The Network welcomes the establishment of the Expert group to promote inclusion of ethnic minorities in the EU, which held its first meeting on 13 February 2006 and should report back before the end of 2007 with policy recommendations on how the EU can approach the problems of social and labour market exclusion for disadvantaged minorities. The Network encourages this expert group to adopt a broad view of its mandate, and in particular to consider the close interdependency between integration on the labour market and integration of ethnic minorities in education. It also should see its mandate in a human rights framework, and take into account in this respect, in devising its

demographics » : *The Business Case for Diversity. Good Practices in the Workplace*, September 2005, European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (Unit D3), at 26.

[383] Reuter et al., *Study on data collection to measure the extent and impact of discrimination in Europe,* Final report of 7 December 2004.

[384] CRI(2005)26, p. 31.

[385] Ibid., p. 31.

recommendations, the right of each individual not to be treated as a member of the minority to which he or she belongs – as stipulated by Article 3 of the Framework Convention for the Protection of National Minorities –, and the restrictions imposed by Directive 95/46/CE of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 28 of 23.11.1995, p. 31) to the processing of personal data relating to the ethnic affiliation of individuals, taking also into account the fragility of a legitimization of the processing of personal data by the consent of the individual in the context of the recruitment process.

The mandate of the Expert group to promote inclusion of ethnic minorities in the EU also includes the answers to be provided to address the situation faced by the Roma/Gypsies throughout Europe – in terms of employment, education, housing and other areas. The situation of the Roma/Gypsies is examined in these Conclusions under a separate paragraph.

Islamophobia and Anti-terrorism strategies

In its Opinion n°3-2005 on the requirements of fundamental rights in the framework of the measures of prevention of violent radicalization and recruitment of potential terrorists (para. 2.3.1.), the Network noted the following:

> The preventive nature of the measures intended to meet the risk of violent radicalization increases the risk of discrimination against certain communities defined by their national or ethnic origin or their religion. The freedom of appreciation that is generally to be practised by the authorities responsible for enforcing the laws as part of the fight against terrorism or, more broadly, as part of the fight against violent radicalization, as well as, sometimes, the international nature of this form of crime, implies that the risk of discrimination on the basis of visible signs, such as national or ethnic origin or the wearing of religious symbols, is considerable here. Furthermore, it cannot be ruled out that, in certain situations, the fight against terrorism serves as a pretext for refusing members of certain population groups certain benefits which the majority prefers to reserve for itself[386].
>
> Whatever measures are taken to this end, care must be taken not only that the fight against violent radicalization does not give rise to arbitrary differences in treatment between groups of individuals, but also that it does not nurture the prejudices of part of the public opinion that equates the Muslim population with Islamic fundamentalism or harbours suspicion towards individuals on account for their foreign, e.g. Near Eastern, origin. It would therefore be most inappropriate to define "violent radicalization", irrespective of the purpose of such a definition, by targeting a specific section of the population, in particular the Muslim community. This could have the effect of nurturing Islamophobic feelings in the public opinion and the media which in the context of the fight against terrorism have very clearly become stirred up since the terrorist attacks of 11 September 2001[387] and which the recent attacks in Madrid in 2004 and in London in 2005 are likely to strengthen. Violent radicalization is not a phenomenon that is limited to a particular section of the population[388]. It would be inadvisable and potentially discriminatory to make such a restriction.

[386] For a situation where the applicants complain of being unlawfully refused public procurement contracts or the necessary security clearance to obtain such contracts on the grounds of their religious beliefs or their political opinions, on the pretext of antiterrorist legislation in force in Northern Ireland, see: Eur. Ct. HR, *Tinnelly & Sons Ltd. And others and McElduff and others v. the United Kingdom,* judgment of 10 July 1998. The applicants, however, did not press ahead with their claim of discrimination on the grounds of their (Catholic) religion, which dispensed the Court from adopting a position.

[387] See in particular *Racism, racial discrimination, xenophobia and all forms of discrimination. Situation of Muslim and Arab peoples in various parts of the world.* Report by Mr. Doudou Diène, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance (Doc. E/CN.4/2004/19, 23 February 2004).

[388] The current situation in the Netherlands may serve as an example, where particularly serious Islamophobic incidents have followed the assassination of filmmaker Theo Van Gogh: "Slogans (such as 'white power') were written on the walls of mosques; several mosques were set on fire, Islamic primary schools have been burned down. In its 'Rapid Response' report *"Current developments in the Netherlands regarding the murder of Van Gogh and attacks on religious buildings"* the Dutch

In the **United Kingdom** thus, the House of Commons Home Affairs Select Committee has reported that Muslims in Britain are more likely than other groups to feel that they are suffering as a result of the response to international terrorism. It concluded that community relations had deteriorated since 9/11, although not universally and that there are positive elements. It called for much greater recognition for the problems of Islamophobia and anti-Semitism and for all communities to tackle them. The Committee considered that the Home Office should review the links between its work on community cohesion and anti-terrorism. It was impressed by the energy and imagination shown by some local councils and stressed the importance of central Government reinforcing their work through a strategy to explain national policy and encourage local discussion. It called upon community leaders, including faith leaders, to build bridges to other communities, including by dropping defensive and reactive stances to create a climate of tolerance and mutual respect. Diversity in police forces, local government and the media was considered to be important for its own sake, because it shows minorities are valued and because it provides role models. It noted that public policy affecting British Muslims must recognise both their common identity and their diverse backgrounds. It did not believe that the Asian community was being unreasonably targeted by stops and searches but it accepted that Muslims perceived that they were being stigmatised by the legislation. The Committee considered that the police and Government should make special efforts to reassure Muslims and the Muslim community should be involved in independent scrutiny of police intelligence. It called for detailed and accurate statistics and information on terrorism-related detentions, arrests, charges and trials. The Committee also considered that a broader anti-terrorism strategy should include measures to support British Muslim leaders to resist extremists. It rejected any suggestion that that Muslims are in some way more likely to turn to terrorism and concluded that suggestions that there had been a Government strategy to manipulate media coverage of terrorism were unfounded (*Terrorism and Community Relations*, HC 151-I, 6 April 2005).

Protection against discrimination

The implementation of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (the Racial Equality Directive)[389] and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (the Framework Equality Directive)[390] has been continuing during the year 2005, although these instruments should have been fully implemented respectively in July and December 2003 or, for the new Member States, on 1 May 2004. After **Finland** and **Luxembourg**, **Austria** and **Germany** was found to have failed to implement the Race Equality Directive by the European Court of Justice.[391] Infringement proceedings were also launched for failure to transpose within the prescribed time limit – by 2 December 2003 – the Employment Framework Directive against **Austria**, **Germany**, **Finland**, **Greece** and **Luxembourg** – indeed, **Luxembourg** was already found to have failed to implement the Employment Framework Directive by the European Court of Justice, following infringement proceedings launched by the Commission in February 2005[392]. In **Germany,** the Bundestag adopted on 17 June 2005 a *Gesetz zur Umsetzung europäischer Antidiskriminierungsrichtlienen* [Act regarding the implantation of European Antidiscrimination Directives], which should have implemented under the Federal law the Race

Monitoring Centre on Racism and Xenophobia (DUMC) reported that 174 violent incidents took place in the period from 2 through 30 November 2004. In 106 cases (61%) there was evidence of anti-Muslim violence. The *Meldpunt Discriminatie Internet (MDI)* [Dutch Complaints Bureau for Discrimination on the Internet] reported that "a wave of Muslim hatred rolled over the Dutch part of the Internet" after the assassination. Thousands of anti-Muslim and Anti-Moroccan expressions were found on normal Dutch web forums and even on condolence sites especially made for Theo van Gogh. MDI estimated that 50.000 or more hate-mails were posted on the Internet since November 2. A significant part of the expressions (up to 25%) contained calls for violence".

[389] OJ L 180 of 19.7.2000, p. 22.

[390] OJ L 303 of 2.12.2000, p. 16.

[391] Case C-327/04, *Commission v. Finland*, judgment of 24 February 2005 ; Case C-320/04, *Commission v. Luxembourg*, judgment of 24 February 2005 ; Case C-329/04, *Commission v. Germany*, judgment of 28 April 2005 ; Case C-335/04 *Commission v. Austria*, judgement of 4 May 2005.

[392] Case C-70/50, *Commission v. Grand-duché de Luxembourg*, judgment of 10 October 2005.

Equality Directive, the Framework Equality Directive, and Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment or men and women as regards access to employment, vocational training and promotion, and working conditions;[393] however, the Bundesrat stated its view on the bill and required that the Mediation Committee be convened. Because of the early elections, the proceeding could not be finalized. The ruling coalition is preparing a new bill. In **Belgium**, while a number of instruments have been adopted both at the federal level and at the level of the Regions and Communities to implement Directives 2000/43/EC and 2000/78/EC, a number of lacunae remain: the Commission communautaire française, to which the French-speaking Community has transferred its competences since 1993 in the sphere of vocational training, and of the Region of Brussels-Capital, with respect to its own personnel, still must act in order to ensure implementation of Directives 2000/43/EC and 2000/78/EC; initiatives should be taken to enlarge the competences of the Equality Body which should be empowered to fulfil the missions defined under Article 13 of Directive 2000/43/EC, also with respect to the legislation adopted at regional and Community level to implement this Directive; the hesitance of the Regions and Communities concerning their competence to adopt procedural rules, relating for instance to sanctions (penal or civil), to the *locus standi* of organisations, to the organization of the burden of proof in discrimination cases, or to the powers of the court before which a complaint is filed alleging a discrimination, results in a situation where the implementation of Council Directives 2000/43/EC and 2000/78/EC remains unsatisfactory on a number of these issues.

Nevertheless, there are encouraging signs that the Member States are progressively adapting their national legislation to the requirements of the directives. The most significant developments in 2005 are the following:

- In **Austria**, the Disability Employment Act and the Disability Equal Treatment Act will enter into force on 1 January 2006, and the additional equality bodies responsible for discrimination on the grounds of race and ethnic origin, religion, age and sexual orientation have been set up.

- In **France**, the legislator instituted a High Authority against Discrimination and for Equality (HALDE) by Act No. 2004-1486 of 30 December 2004[394]. The HALDE's authority covers 'all discrimination, direct and indirect, prohibited by law or by an international commitment to which France is a party'. In order to fulfil its mission, this independent administrative authority helps victims to prepare their case (Article 7). It conducts communication and information campaigns to promote equality. It fosters the implementation of training programmes, and conducts and coordinates studies and research carried out within its remit. It identifies and promotes good practices in the area of equal opportunity and equal treatment. It can recommend all legislative or regulatory changes and helps, at the request of the Prime Minister, to prepare and define the French position in international negotiations in the area of the fight against discrimination (Article 15). Furthermore, the HALDE can formulate recommendations to remedy any circumstance or practice which it considers discriminatory or to prevent any repetition thereof. The authorities or persons concerned are obliged within a specified time to report on the appropriate action taken to that end.

- In **France**, in accordance with the requirements of the Framework Directive on equal treatment, an order of 2 August 2005[395] provides for the general abolition of age limits for most of the recruitment procedures in public sector employment with a view to facilitating the development of second professional careers. Furthermore, a decree of 29 August 2005[396] creates a track for access to national, hospital and public careers aimed at facilitating the professional integration of young people in difficulty. This new recruitment system is designed to allow young people aged 16 to 25 who have no degree or qualifications to conclude a public sector employment contract in which theoretical and

[393] Bundesrats-Drucksache 445/05.
[394] JORF, 31 décembre 2004, p. 22567. Voir également le décret n° 2005-215 relatif à la Haute autorité de lutte contre les discriminations et pour l'égalité, JO n° 55 du 6 mars 2005, p. 3862.
[395] Order No. 2005-901 of 2 August 2005, J.O.R.F 03/08/2005, p. 12720.
[396] Decree No. 2005-1055 of 29 August 2005, J.O.R.F 30/08/2005, p. 14044.

practical training alternate. The adoption of such measures to encourage the professional integration of certain groups of unqualified young people does not appear to be contrary to the Framework Directive on equal treatment, having regard to its Article 6(1).

- In **Greece,** the bill transposing the 'anti-discriminatory directives', which was tabled in Parliament last year, has finally been adopted[397]; it was welcomed by the Human Rights Committee of the United Nations. As regards the mechanism provided for combating discrimination, the law does not follow the model of a single agency, but establishes or designates several bodies according to the areas in which its provisions apply. For instance, the Office of the Ombudsman deals with issues of discrimination in relations between individuals and government agencies; a new non-independent Commission for Equal Treatment has been set up within the Ministry of Justice in order to promote the principle of non-discrimination in relations between private individuals, whereas in the area of employment and labour this authority has been given to the Labour Inspectorate.

- In **Hungary**, after the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities [2003. évi CXXV. törvény az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról] ordered the establishment of a public administrative body with the overall responsibility of ensuring the compliance with the principle of equal treatment, the Authority for Equal Treatment became operative in March 2005. The Authority may conduct an investigation to establish whether the principle of equal treatment has been violated, either upon receiving a complaint or ex officio. It is entitled to bring actions itself – in the interest of the public – for the protection of the rights of persons or groups. The Authority shall review and comment on drafts of legal acts concerning equal treatment; make proposals concerning governmental decisions and legislation pertaining to equal treatment; and regularly inform the public and the Government about the situation concerning the enforcement of equal treatment. In the course of performing its duties, it co-operates with the social and representation organisations and the relevant state bodies, and continually provides information to those concerned and offers help with acting against the violation of equal treatment. The staff of the Authority assists in the preparation of governmental reports to international organisations concerning the principle of equal treatment, including the European Commission concerning the harmonisation of directives on equal treatment. The Authority shall perform its duties in co-operation with an advisory body whose members have extensive experience in the protection of human rights and in enforcing the principle of equal treatment.

- In **Lithuania,** the Law on Equal Treatment, adopted on 18 November 2003, came into force on 1 January 2005.[398] The aim of the Law is to prohibit any direct or indirect discrimination based upon age, sexual orientation, disability, racial or ethnic origin, religion or beliefs. The Law widens the mandate of the Ombudsperson of the equal possibilities of men and women, which now includes discrimination on all grounds covered by the Racial Equality Directive and the Framework Equality Directive. The entering into force of the Law on Equal Treatment created a mechanism for the investigation of complaints of persons who suffers any form of discrimination. Opportunities Ombudsperson may start investigation of discrimination after having received a complaint or having learned about the possible violations of the Law on Equal Treatment or the Law on Equal Opportunities of Women and Men from the mass media or other information sources. Nevertheless, important aspects of the Racial Equality Directive and of the Framework Equality Directive still have not been adequately implemented, for instance the shifting of the burden of the proof in civil matters in favour of the person who considers being victim of discrimination or the possibility for non-governmental organizations to represent the victim of discrimination in the court or administrative procedures.

[397] Νόμος 3304/2005, 'Εφαρμογή της αρχής της ίσης μεταχείρισης ανεξαρτήτως φυλετικής ή εθνοτικής καταγωγής, θρησκευτικών ή άλλων πεποιθήσεων, αναπηρίας, ηλικίας ή γενετήσιου προσανατολισμού' [Act No. 3304/2005, 'Implementation of the principle of equal treatment irrespective of racial or ethnic origin, religious or other beliefs, disability, age or sexual orientation].
[398] Lygių galimybių įstatymas [Law on Equal Treatment], Valstybės žinios, 2003, Nr.114-5115.

- In **Luxembourg,** following the criticisms formulated by the Council of State with respect to the initial bill for the transposition of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, and of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, and amending Articles 8 and 13 of the Act of 12 September 2003 on handicapped persons and repealing Article 6 of the amended Act of 12 March 1973 reforming the minimum wage, the government tabled a new bill on 22 November 2005[399]. The new bill extends the prohibition of discrimination on grounds other than racial or ethnic origin beyond the sphere of employment. However, even though this new bill covers all forms of discrimination in the private and public sectors, access to employment in the latter sector has been excluded for no apparent reason.

- In **Poland**, by contrast, whereas Council Directive 2000/78/EC was implemented in its entirety, the implementation of Directive 2000/43/EC still is not satisfactory, and the recent developments in this field are a source of concern. In 2003, only laws concerning the ban on discrimination in employment were entered into the Polish legislation[400]. To date, no special body has been established under Article 13 of the Directive 2000/43/EC. Moreover on 5 November 2005, the new Government put an end to the functions of the Office of the Government Plenipotentiary for the Equal Status of Men and Women, which performed the tasks referred to in the Directive, mainly counteracting the discrimination of women, discrimination due to age, as well as racial discrimination, xenophobia and intolerance. The Office's tasks will now be handled by one of departments within the Ministry of Employment and Social Policies.

Facilitating the proof of discrimination. Certain States have moved beyond the minimum requirements imposed under the Racial Equality Directive and the Framework Equality Directive in order to improve the protection of victims of discrimination. This has been the case, in particular, with respect to the possibilities victims of discrimination are recognized to prove discrimination. For instance, the Committee on the Elimination of Racial Discrimination, in its concluding observations formulated with respect to **France** on 11 March 2005, welcomed the case-law of the Criminal Chamber of the Court of Cassation, which allowed the practice of 'testing' as means of proof in cases of racial discrimination, and encourages France to promote the more frequent use of that method. The right to supply evidence of discrimination using the said 'situation tests' is also provided for in the Act of 25 February 2003, which ensures the partial transposition in **Belgium** of the Directive on racial equality and the Framework Directive on equality, although it is to be regretted that, unless the Royal Decree implementing this provision is adopted, this piece of legislation will in practice remain dead letter. The Network is also concerned by the attitude of the Authority for Equal Treatment in **Hungary** when confronted with similar evidence of discrimination. According to the information provided in the Report on the situation of fundamental rights in Hungary, an applicant claimed the violation of the Act CXXV of 2003 on Equal Treatment and the Promotion of Equal Opportunities (AETPEO) as she was refused to be considered to be employed in a grocery store. The applicant, a woman of Roma origin, qualified for the job, called the shop in the presence of a human rights defender, after the shop had posted an advertisement in the local newspaper on that very day. Although she was told that the job is no longer available, the human rights defender made a further call and he got positive reply, and was asked to come back a few days later. The applicant in the procedure before the Authority claimed that she has been discriminated on the basis of ethnic origin since most of the people in that settlement with the same name as her belong to the Roma minority. However, as the human rights defender supported her claim, the Authority failed to accept the result of the testing.

[399] Bill No. 5518, (1) transposing Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; (2) transposing Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation; (3) amending Articles 8 and 13 of the Act of 12 September 2003 on handicapped persons; (4) repealing Article 6 of the amended Act of 12 March 1973 reforming the minimum wage.

[400] The Labor Code has been amended: Ustawa z dnia 14 listopada 2003 r. o zmianie ustawy – Kodeks Pracy (Dz.U. z 2003 r. nr 213, poz. 2081) [The Act pf 14 November 2003 on the amendment of the Act - Labour Code and the amendment of some other acts (The Official Journal of 2003 No. 213, item 2081)]; Ustawa z dnia 7 marca 2003 o zatrudnieniu i przeciwdziałaniu bezrobociu (Dz.U. Z 2003 r. nr 58, poz. 514) [The Act on 7 march 2003 on employment and counteracting unemployment, The Official Journal of 2003 No. 58, item 514)]

Other examples seem to illustrate that the Authority for Equal Treatment in **Hungary** assesses the evidence presented by the applicant in a far too requiring fashion, which in certain cases may lead to the protection from discrimination becoming entirely ineffective. Thus for instance, in a small primary school one Roma student took a German dictionary after the classes. The director of the school officially warned the pupil. The parents of the child claimed that the sanction applied by the director is too serious for the act committed: the director humiliated the student in front of the whole school, and created a hostile environment around him. The Authority found that the sanction applied is more serious than the one prescribed by the Code of Conduct of the school, but failed to find a casual link between the measure and the ethnic origin of the student. Thus, the complaint of the parents was rejected. Still further cases brought to the attention of the Network show that the Authority fails to apply the principle of shifting of the burden of proof as required by the Article 8 § 1 of the Racial Equality Directive. The Network is aware of the position of the representatives of the Authority according to which the requirement of a shifting of the burden of proof is hardly applicable to the Authority, which as an administrative institution is to carry out investigation into the relevant facts of the case, even if the parties do not provide evidence.[401] This however does not appear to the Network to be in accordance with the minimum requirements of the Racial Equality and the Framework Equality Directives. The other concern is that in practice, proving the causal link – as desired by the Authority – in many cases is impossible, thus the procedure does not result in finding a violation. According to Article 19 (1) of the AETPEO the injured party must prove that (a) the injured person or group has suffered a disadvantage, and (b) the injured party or group possesses a characteristic protected by the AETPEO. If these requirements are met, the other party shall prove that (a) it has observed, or (b) in respect of the relevant relationship was not obliged to observe the principle of equal treatment. By trying to establish a causal link between the damage or detriment caused and the allegedly unlawful act, the Authority itself exempts the other party from its procedural duty to provide evidence for observing the principle of equal treatment.

The Network also notes with interest the clarifications provided by the **United Kingdom** courts about the shifting of the burden of proof in anti-discrimination cases. It was held in *Wong v. Igen Ltd* [2005] EWCA Civ 142, [2005] 3 All ER 812 that the effect of amendments to the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1975, introduced by s 63A, s 54A and s 17A(1C) of those Acts, was to shift the evidential burden of proof to the respondent if the complainant proves what he was required to prove at the first stage, namely, facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has committed the unlawful act of discrimination against the complainant. The tribunal is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation the complainant would succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage, although it is possible that facts found relevant to the first stage may also relate to the explanation of the respondent. However, it was made clear that tribunals are not required to divide the hearings into two parts to correspond with the two stages, generally they will wish to hear all the evidence, including the respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the respondent has discharged the onus shifted to him. There may be cases where the complainant will have difficulty in proving that it was the employer who committed the unlawful act or may have no less difficulty in establishing other than the essential facts but that does not mean that it is sufficient for the complainant to prove only the possibility rather than the probability of those other facts at the first stage. The legislative intention is that the respondent should explain why he has done what he has been proved by the complainant to have done, rather than the respondent having to prove the fact that it was not he who did it at all.

[401] Article 50 (1) of 2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól (Act CXL of 2004 on the General Rules of Administrative Authorities and Services), provides that the acting administrative organ shall collect all the information required to make a decision; and if the information is not available, ex officio or on motion of the parties carries out an evidence collecting procedure.

National action plans or strategies against discrimination. Another direction in which to move beyond the minimal prescriptions of the Racial Equality and Framework Equality Directives is by adopting action plans or national strategies in order to combat racial or other forms of discrimination. In **Denmark,** in May 2005, the Government introduced its Action plan in relation to integration, entitled 'A new chance for all' *('En ny chance til alle')* which with a number of initiatives is to improve the integration efforts in Denmark e.g. access to the labour market, education in relation to immigrants and their descendants. The main focus has been on young immigrants and descendants, with an insistence in particular on improving the efforts towards children in public schools and those who have finished primary and lower secondary school. In **Lithuania,** during the period under scrutiny, the draft of the Strategy of Development of the National (Ethnic) Relationships Policy[402] was formulated. This Strategy constitutes the most important average term document (running up to 2015) of planning the national (ethnic) relationship policy. An important role in the implementation of the strategy will be given to the Department of National Minorities and Lithuanians Living Abroad to the Government of the Republic of Lithuania[403]. This institution forms and implements the Government policy of national minorities residing in the territory of the Republic of Lithuania[404]. In implementing that policy the Department investigates the needs, drafts international treaties on the protection of rights and the integration into the society of persons belonging to national minorities[405]. The Concluding Observations adopted on **Ireland** in March 2005 by the Committee on the Elimination of Racial Discrimination thus identify among the positive aspects the recent adoption of the National Action Plan Against Racism and the initiatives taken thus far with regard to the Traveller Community, which include the National Strategy for Traveller Accommodation and the Traveller Health Strategy. The National Action Plan Against Racism aims at developing 'reasonable and common sense measures to accommodate cultural diversity in Ireland'[406] and in providing strategic direction to combat racism. The Plan recognises that racism can take different forms and impact on various groups. It states that among those who are vulnerable in Ireland are Travellers, recent migrants (including labour migrants and refugees and asylum seekers), black and minority ethnic people and Jews and Muslims (racism in the form of anti-Semitism and Islamophobia).[407] The racism encountered by these groups can manifest itself through discrimination, assaults, threatening behaviour and incitement to hatred, labelling and institutional or systemic forms of racism.[408] The core of the Plan is the Intercultural Framework which is aimed at providing a structure to combat and protect against racism, focusing on five key objectives: protection, inclusion, provision, recognition and participation. In **Poland**, the National Action Plan for Counteracting Racial Discrimination Xenophobia and Related Intolerance was approved by the Council of Ministers in 2004, and should be implemented in the years 2004-2009. The Programme's strategic objective is to prepare methods of counteracting racism and xenophobia, in particular by means of educational and preventive activities intended to raise social awareness, as well as carrying out studies, including statistical ones[409]. The programme is being implemented by relevant ministers, central administration, central public institutions, the Ombudsman, public broadcasters and the provincial organs of government administration, in cooperation with local government entities and non-governmental organisations. In **Sweden,** in 2005, the 2002-2004 National Human Rights Action Plan, which addressed racism, xenophobia and racial discrimination as one of its priority issues, has

[402] Tautinių (etninių) santykių politikos plėtros iki 2015 metų strategijos projektas [The draft of the Strategy of development of the national (ethnic) relationships policy]
[403] Tautinių (etninių) santykių politikos plėtros iki 2015 metų strategijos projektas [The draft of the Strategy of development of the national (ethnic) relationships policy]
[404] 1989 11 23; Lietuvos Respublikos Tautinių mažumų įstatymas [Law on Ethnic Minorities] Valstybės žinios, 1989, Nr. 34-485.
[405] Tautinių mažumų ir išeivijos departamento prie lietuvos Respublikos Vyriausybės informacija [Information of The Department of National Minorities and Lithuanians Living Abroad to the Government of the Republic of Lithuania] // http://www.tmid.lt/index.php?page_id=339
[406] NCCRI, *National Action Plan Against Racism,* 2005-2008, p. 27
[407] *Ibid.* p. 29
[408] *Ibid.*
[409] National Action Plan for Counteracting Racial Discrimination Xenophobia and Related Intolerance 2004 – 2009, published on the webpage of the Government Plenipotentiary for Equal Status for Women and Men, http://www.rownystatus.gov.pl p. 4

been subject to an evaluation410 and a new Human Rights Action Plan (2006-2009) is being drawn up within the Department of Justice (Ju2004/11236/D).

Initiatives promoting diversity. National action plans or strategies against discrimination may serve to provoke a change in the culture of the institutional or private actors, whose contribution to promoting diversity is essential in order to achieve a society free of discrimination. Other initiatives may also contribute to that objective. In **Belgium**, there are proposals to extend the system of recruitment being based, during the first stage, on anonymized CVs, as is already the case in the public sector. In **France,** the Diversity Charter was launched in 2004 by 35 companies. So far, 250 businesses in the public and private sectors have signed up to this Charter, under which they undertake to "respect and promote the application of the principle of non-discrimination in recruitment, training, advancement and professional promotion", in order to "reflect the cultural and ethnic diversity of French society in their workforce […], at different levels of qualification"[411]. In March 2005, Galway city in the west of **Ireland** became the first Irish city to adopt an anti-racism strategy – the strategy aims to embrace diversity, eliminate racism and promote interculturalism. In **Italy,** certain companies have set up integration agreements under which special commissions on the integration of immigrant workers have been established. Such commissions are composed of both Italian workers and immigrant employees and deal with the needs of immigrants, who are offered language courses in Italian; they also organize seminars instructing managers in the language and culture of the countries of origin of the immigrants. Also in Italy, a number of undertakings also have called upon intercultural mediators in the workplace: in this case, their main objective is to intervene in conflicts between colleagues from different cultural backgrounds or between employees and clients. They are also engaged in preventive activities (for example they can implement training and awareness-raising campaigns) or in improving the working conditions. In **Portugal,** Decree Law 27/2005, of the 4th February 2005, on the High Commissioner for Immigration and Ethnic Minorities, created the 'immigrants support groups'. These structures aim at employing mediators, preferably immigrants themselves, indicated by civil associations and institutions, with the specific task of improving the contact between immigrants and public officers and agencies, for instance by removing the language problem or cultural differences. In the **Netherlands**, following the submission to Parliament in October 2005 a White Paper *Rechtshandhaving en discriminatie op de arbeidsmarkt* [Enforcing the prohibition of discrimination on the labour market] (*Kamerstukken II*, 2005-2006, 27223, No. 73), which reviewed the various possibilities that civil law, administrative law and criminal law have to offer in the struggle against discrimination of individuals belonging to ethnic minorities, and also emphasized that the fight against discrimination is a shared responsibility of many actors, the Government launched the *Breed Initiatief Maatschappelijke Binding* [Grand Initiative for Commitment to Society], leading to conferences being organized to strengthen the ties between representatives of minorities and employers. Codes of Ethics in certain professions may also contribute to the objective of promoting tolerance and diversity. In **Lithuania,** in April 2005, the representatives of the organizations of the journalists and publishers validated the new edition of the Lithuanian journalists and publishers' Code of ethics[412]. The 54 Articles of the Code declare that it is prohibited for the journalist or publisher to mock an individual's surname, race, nationality, ethnicity, his religious beliefs, age, sex, sexual orientation, disability or physical defect even if that person is delinquent. It is also prohibited to humiliate the person because of the mentioned features. According to the Article 55 it is prohibited for journalist or publisher directly or indirectly to incite to hatred on the mentioned grounds

problems of the Estonian society as interethnic relations, discrimination and unequal treatment of women and men.' It seeks to initiate public dialogue on EU policy and legislation in the sphere of unequal treatment and non-discrimination through publications in the local media but also improving skills of local journalists in addressing these issues. The project envisages monitoring of the local media, on-line consultations on the issues of local treatment and non-discrimination to all those who believe that their respective rights have been violated.

The Network emphasizes the important contribution to the identification of best practices in this field by the Commission of inquiry which has been entrusted with the task to review and present research and information in **Sweden** on structural discrimination due to ethnicity or religion, particularly in regard to the labour market, the housing market, mass media, the political system, the educational system and welfare services. The Commm

the establishment of an Office for Combating Racism and Discrimination at the Police Headquarters. The staff of the office has the responsibility to cooperate, monitor and advice on all aspects of policing in the area of ethnic and cultural diversity, via contact with the investigating officer or contact with the victim; (iii) the appointment of ethnic liaison officers at every Divisional Police Headquarters to liaise with the leaders of ethnic communities and to focus on issues of race/ethnicity; (iv) the development of specific guidelines on recording racially motivated incidents, whereby any incident is defined and recorded as racially motivated if it is perceived to be racially motivated by the victim or a member of the police, or by a person who was present during the incident and who witnessed the incident, or by a person acting on behalf of the victim. In **Denmark,** in February 2005 the municipality of Copenhagen launched a months long campaign in cooperation with, in particular, the Complaints Committee of Equal Treatment to fight discrimination in night life (e.g. denial of access to a bar, night club or discotheque on grounds of ethnic origin), whose main objective was to inform of complaint possibilities in case of experienced discrimination in night life. In **Portugal,** in the framework of the European Union campaign entitled 'For Diversity, against discrimination', the national Working Group has created a leaflet entitled 'Our differences make the Difference' *(As nossas diferenças fazem a diferença*), which provides information on the transposition of the relevant EU directives into national law, and the way to act in case of discrimination. In **Sweden**, the Commission of Inquiry entrusted with the task to review and present relevant recommendations, among other things, with regard to counteracting structural discrimination due to ethnicity or religion and enabling the achievement of equality in Sweden, presented its report SOU 2005:56, *Det blågula glashuset - Betänkandet om strukturell diskriminering på grund av etnisk eller religiös tillhörighet i Sverige*, on 13 June 2005. It proposed the establishment of a special fund for the development of case law related to equality issues since the development of related Swedish jurisprudence within this specific legal area has been very slow.[419]

More generally – beyond the provision of assistance and of information to victims of discrimination –, it is important that the remedies provided in instances of discrimination are sufficient and, as required by the Racial Equality and Framework Equality Directives, proportionate, effective and dissuasive. In **Lithuania,** on 9 of November 2004, the Parliament of the Republic of Lithuania passed the Law amending the Law on Equal Opportunities of Women and Men. The amendments of the Law on Equal opportunities of Women and Men have changed the burden of proof in the cases of gender discrimination. This achievement has a positive character in regard to the victim of discrimination. The fact of discrimination henceforth will be presumption. In future the same changes should be implemented to the Law on Equal Treatment. The burden of proof should however be changed also in cases of other forms of discrimination. The Ombudsman of the Equal Treatment is indeed facing a lot of problems during process of gathering evidences since the suspected person has a passive role in the process which creates an opportunity of incomplete recovering of situation. Moreover a new Article 24 was added to the Law amending the Law on Equal Opportunities of Women and Men. According this provision a person, who has suffered from discrimination on the ground of gender or sexual harassment, has a right to recover monetary compensation under the Civil Code. The same right is granted to the person, who has suffered discrimination on other grounds. However excepting these differences associated with the right to monetary compensation, no specific procedure is applied during the discriminatory cases hearings.

Providing law enforcement agencies with the capacities required. Certain initiatives aimed at reinforcing the training and the capacities of law enforcement agencies in the field of discrimination may also significantly contribute to the effectiveness of anti-discrimination strategies. In **Sweden** as from 1 January 2005, there is a special unit with nationwide competence '*Riksenheten för polismål*'. This independent body is comprised of prosecutors with special skills and who are entrusted with carrying out all of the investigations concerning alleged police misconduct, including acts of racism or racial discrimination. The unit cooperates with special internal investigation units within the police force. During the same period, the Office of the Ombudsman against Ethnic Discrimination (DO) has been further reinforced, with a three-fold increase in its budget from 2003 to 2005.

[419] Ibid., p. 55.

Positive action measures. The Network finally reiterates that, in certain circumstances, effective integration may only be achieved through the adoption of positive action measures, which are not prohibited under the Racial Equality and the Framework Equality Directives. In **Ireland,** in September 2005, the Department of Enterprise, Trade and Employment launched a project to help entrepreneurs from ethnic minority groups launch and sustain businesses. Members of ethnic minorities had identified a number of obstacles in the way of members of their communities wishing to begin a business, including the absence of a comprehensive government policy to assist them and difficulty accessing finance and information. Over the next two years 340 entrepreneurs will take part in the programme.[420] Moreover in the period under review, the Minister for Justice, Equality & Law Reform announced an initiative aimed at encouraging the recruitment of people from ethnic minority groups into An Garda Siochana (the state police force). In the **United Kingdom**, the Commission for Racial Equality has recommended a review by all chief officers of police in England and Wales of their positive action steps with regard to the recruitment and retention of under-represented minority groups and the adoption of annual intake targets (*A formal investigation of the police service of England and Wales*, 3 February 2005).

In its Conclusions relating to the year 2004 (Concl. 2005, p. 87), the Network noted the challenge filed by the **Slovak** Government against the provision of the *antidiskriminačný zákon* [Anti-discrimination Act][421] – which implements Council Directive 2000/43/EC of 29 June 2000 concerning the equal treatment between persons irrespective of racial or ethnic origin into Slovak legislation – concerning positive action, a provision which the government alleged to be incompatible with the Slovak Constitution. According to the action filed by the government, Section 8 paragraph 8 of the Anti-discrimination Act, providing that "With a view to ensuring full equality in practice and adherence of the principle of equal treatment, specific measures for prevention and compensation of disadvantages linked to racial or ethnic origin may be adopted", constitutes a positive discrimination, which is as such forbidden by Article 12 paragraph 2 of the Slovak Constitution.[422] The Network noted at the time that 'the adoption of positive action measures is not considered in international law a violation of the principle of non-discrimination, as confirmed for instance by Article 4(1) of the Convention for the Elimination of All Forms of Discrimination Against Women or by Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination. Moreover, in its resolution of April 2003[423], the Slovak government adopted specific measures containing also programs of positive action towards Roma population, thus recognizing that *de facto* discrimination against Roma minority cannot be eliminated or even effectively combated without a reasonable use of positive action'.

On 18 October 2005, the Constitutional Court delivered a final ruling on the merits of the case declaring the incompatibility of Section 8 paragraph 8 of the Anti-discrimination Act with the Article 1 paragraph 1 (Rule of Law principle), the first sentence of Article 12 paragraph 1 (principle of equality), and Article 12 paragraph 2 (non-discrimination principle) of the Constitution of the Slovak Republic. The Constitutional Court dismissed the rest of the motion. The ruling has been published in the Collections of Laws under no. 539/2005 on 7 December 2005. Since that day the Section 8 paragraph 8 of the Anti-discrimination Act has lost its applicability. This conclusion contrasts with earlier decisions of the Constitutional Court in which it had declared 'positive discrimination' as an instrument of material *(de facto)* equality being consistent with the Slovak Constitution. For instance, in its ruling Ref. no. PL. ÚS 10/02 of 11 December 2003 the Constitutional Court said that

[420] *Irish Times*, 20 September 2005 at p.4.

[421] *Zákon č. 365/2004 Z. z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon)* [Act no. 365/2004 Coll. on Equal Treatment in Certain Areas and Protection against Discrimination, amending and supplementing certain other laws (Anti-discrimination Act)].

[422] Article 12 paragraph 2 of the Slovak Constitution states: 'Fundamental rights shall be guaranteed in the Slovak Republic to everyone regardless of sex, race, colour, language, belief and religion, political affiliation or other conviction, national or social origin, nationality or ethnic origin, property, descent or any other status. No one shall be aggrieved, discriminated against *or favoured* on any of these grounds' (emphasis added).

[423] *Uznesenie vlády č. 278/2003 z 23. apríla 2003* [Governmental Resolution no. 278/2003 of 23 April 2003]. See also the Resolution adopted in November 2003 : *Uznesenie vlády č. 1117/2003 z 26.novembra 2003* [Governmental Resolution no. 1117/2003 of 26 November 2003].

'preferential treatment of some group of natural persons for their specific, often disadvantageous attributes, as compared with other natural persons, by adoption of special legal regulations, is not a discrimination of other natural persons but on the contrary, it must be understood as a security of the constitutional principle which is inherent in Article 12 paragraph 2 of the Constitution'.[424] The Network is concerned about the consequences this ruling may have, in particular, on the situation of the Roma minority in the Slovak Republic. It reaffirms its view that the widespread *de facto* discrimination of Roma minority may not be possible to reduce or eliminate without a reasonable use of positive action. The judgment adopted by the Constitutional Court in the Slovak Republic makes it even more urgent, not less, for the European Union to address affirmatively the situation of the Roma minority, by encouraging the Member States to go beyond the minimum requirements of the Racial Equality Directive, in particular by developing positive action schemes in favour of an effective integration of the Roma. The Network refers in this respect to its conclusions reached in chapter 7 of its Thematic Comment n°3 on the rights of minorities in the Union.

With respect specifically to the protection of the Roma in the **Slovak Republic**, the Network cannot but note the views adopted by the United Nations Committee on the Elimination of Racial Discrimination on 7 March 2005 under Communication no. 31/2003 of the petitioners Ms. L. R. and 26 other Slovak citizens of Roma ethnicity residing in Dobšiná[425]. The Committee found that the Slovak Republic has violated three provisions of the International Convention on the Elimination of All Forms of Racial Discrimination in a housing discrimination case: obligation under Article 2 paragraph 1 (a) to engage in no act of racial discrimination and to ensure that all public authorities act in conformity with this obligation, obligation under Article 5 paragraph d (iii) to guarantee the right of everyone to equality before the law in the enjoyment of the right to housing and obligation under Article 6 of the Convention. This case illustrates the remaining widespread discriminations against the Roma in the Slovak Republic and the need, therefore, to overcome this legacy of discrimination by affirmative measures.

Protection against incitement to national, racial or religious hatred or discrimination

Article 29 of the Treaty of the European Union mentions the prevention and combating of racism as a way to fulfil the objective of the Union to provide citizens with a high level of safety within an area of freedom, security and justice. The Council adopted on 15 July 1996 a joint action on the basis of Article K.3 (now Article 31) of the Treaty on European Union, concerning action to combat racism and xenophobia.[426] On 28 November 2001, the Commission adopted a proposal for a Council framework decision on combating racism and xenophobia, based on Articles 29(1) and 34 EU.[427] The objective of this proposal is the approximation of the laws and regulations of the Member States regarding racist and xenophobic offences by the definition of a minimum level of sanctions common to the member states. In its conclusions and recommendations on the situation of fundamental rights in the European Union and its member states in 2003, the EU network of independent experts on fundamental rights encouraged the Council to follow upon this proposal of the Commission.[428] In 2005, following upon a request of the Commission, the Network delivered an Opinion on combating racism and xenophobia through criminal law.

According to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination, the States parties undertake to "declare an offence punishable by law all dissemination

[424] In this case the Constitutional Court put under judicial review the provisions of Labour Code allowing the students, and only the students, to conclude special agreements on brigade-work with employers. The Court decided that although the challenged provisions constitute 'positive discrimination' of students in comparison with other natural persons, the aim of these special agreements is legitimate (these special agreements on student brigade-work were considered by the Constitutional Court as instruments which might enhance the access of students to labour market and thus improve their social-economic situation while studying) and consistent with the principle of equality and principle of non-discrimination.
[425] Communication no. 31/2003: Slovakia. 10/03/2005.CERD/C/66/D/31/2003.
[426] *O.J.* L 185, 24 July 1996, p.5.
[427] COM(2001) 664/F. See also *Report on the Situation of Fundamental Rights in the European Union in 2003*, pp.22-24.
[428] Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2003, p.64.

of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin" and "declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law". Article 20 of the International Covenant on Civil and Political Rights prescribes the prohibition of "[a]ny advocacy of national, racial or religious hatred tat constitutes incitement to discrimination, hostility or violence". Finally, Article 6 (2) FCNM imposes the obligation on states parties "to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural or religious identity." The ACFC has insisted on several occasions on the necessity to ensure this protection in an effective way, in particular through the criminal law.[429]

During the period under scrutiny, a number of international bodies have expressed their concern about the dissemination of hate speech, including racist and xenophobic propaganda, or of speech targeting immigrants or asylum-seekers. Such concerns are expressed with regard to **Austria** by the European Commission against Racism and Intolerance (ECRI), whose third report on Austria (covering the period from January to early December 2003) was made public on 15 February 2005, and which identified Muslims, black Africans and Roma as the minority groups which are most vulnerable to racism and racial discrimination. The report stressed that any condemnation of entire communities or generalisations made during public debate should be avoided[430]. Similar concerns were voiced in March 2005 by the Committee on the Rights of the Child, whose concluding observations relating to Austria note 'discriminatory attitudes and manifestations of neo-Nazism, racism, xenophobia and related intolerance towards migrant communities and those of certain ethnic backgrounds', expressing concern the impact of such attitudes on children belonging to these groups, as well as towards refugee and children seeking asylum. The Committee was concerned that the existing legal instruments that limit the dissemination of racist and violent images, texts and games through the Internet were inadequate.[431] In its third report on Austria[432], the European Commission against Racism and Intolerance (ECRI) notes that a restrictive approach in the implementation of the legal provisions against racism can be noted with respect to the provisions against racist insults and acts of racial incitement. In particular, ECRI refers to sec 283 of the Criminal Code prohibiting racial incitement as being rarely applied due to the narrow scope of its interpretation. In order to fulfil the requirements of sec 283, racial incitement, it is necessary that the incitement is likely to endanger public order. In its second opinion on **Denmark** which it adopted on 9 December 2004, the Advisory Committee on the Framework Convention for the Protection of National Minorities found a strong seam of intolerance has developed in Danish society; particularly towards immigrants and also Muslims and that there are particular concerns about the introduction of an anti-immigrant agenda in the political arena. Concerns also exist about the way in which certain media portray persons from different ethnic and religious groups, including members of the Muslim faith. The policy and practice of the Government towards immigration, as evidenced by the reform of the Aliens Act, may in view of the Committee have contributed to an increase in hostility towards persons belonging to different ethnic and religious groups. The Committee therefore invited the Danish government to further its efforts to tackle intolerance in society and to reconsider its immigration and integration policy. While not finding a

[429] Opinion on Slovakia, 22 September 2000, ACFC/OP/I(2000)001, para.29; Opinion on the Czech republic, 6 April 2001, ACFC/OP/I(2002)002, para.40. See also ECRI General Policy Recommendation No.1 on combating racism, xenophobia, anti-Semitism and intolerance, 4 October 1996, CRI (96) 43 rev. This recommendation encourages states to take measures to ensure that "racist and xenophobic acts are stringently punished through methods such as defining common offences but with a racist or xenophobic nature as specific offences" and "enabling the racist or xenophobic motives of the offender to be specifically taken into account". Moreover, it recommends that "criminal offences of a racist or xenophobic nature can be prosecuted ex officio".

[430] Third Report on Austria, European Commission against Racism and Intolerance, CRI (2005) 1, adopted on 25 June 2004, released on 15 February 2005, available at: http://www.coe.int/T/E/human_rights/ecri/1-ECRI/2-Country-by-country_approach/ (23.11.2005)

[431] Concluding Observations on Austria, Committee on the Rights of the child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 21, 31.

[432] Third Report on Austria, European Commission against Racism and Intolerance, CRI (2005) 1, adopted on 25 June 2004, released on 15 February 2005, available at: http://www.coe.int/T/E/human_rights/ecri/1-ECRI/2-Country-by-country_approach/ (23.11.2005)

violation of Articles 2 subparagraph 1 (d), 4 and 6 of the International Convention on the Elimination of All Forms of Racial Discrimination Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Racial Discrimination in *K.Q. v. Denmark* (Communication No. 32/2003),[433] which was confronted in that case with the reaction of the authorities to the speeches made at the Progressive Party's annual meeting held in October 2001, nevertheless called the State party's attention to the hateful nature of the comments concerning foreigners made at the conference and of the particular seriousness of such speech when made by political figures. In its concluding observations on **Luxembourg** of 9 March 2005 (CERD/C/LUX/CO/13), the Committee on the Elimination of Racial Discrimination of the United Nations regretted the fact that racist organizations cannot be banned; it also expressed its concern about allegations of discriminatory or vexatious conduct towards non-nationals on the part of officials. The increase in intolerance and racist behaviour in **Spain** – to which the terrorist attacks in Madrid of 11 March 2004 have contributed – has been noted by several agencies, such as the European Monitoring Centre on Racism and Xenophobia and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization (ILO), which has adopted individual observations following serious incidents in certain Spanish provinces involving immigrant workers. In **Sweden**, even though the situation is by and large being improving, discrimination in the treatment of customers in restaurants on the basis of their nationality/ethnicity persists.[434] Thus, the greater part of the complaints submitted to the Ombudsman against Ethnic Discrimination in 2005 concerned individuals being denied entrance to restaurants and pubs because of their skin-colour or ethnic origin (as of 11 December 2005 their number is 137). A subpoena against one of the restaurant owners was delivered in February 2005.[435] Indeed, after it found in its third report on Sweden that Black Africans are reported to continue to face discrimination in access to public places such as bars and restaurants, the European Commission against Racism and Intolerance (ECRI) recommended that the Swedish authorities should consider the possibility of using the provisions concerning the issuing and withdrawal of licenses to serve alcohol also in respect of licensees that are found in breach of civil anti-discrimination provisions and not solely with respect to licensees who are in breach of criminal law provisions prohibiting discrimination.[436] ECRI also recommended that 'further attention be paid to the problem of misconduct of public order guards and watchmen employed by private security companies towards members of ethnic minority groups'.[437] The Commission expressed its concern with regard to the active presence of the White Power movement in Sweden and the production as well as distribution of hate music. Subsequently ECRI recommended that the public authorities ensure that racial agitation committed through the Internet is prosecuted and punished. Mention could be made here of the 1998 Act on Responsibility for Electronic Bulletin Boards which requires suppliers of electronic bulletin boards to delete any message, which has a content that constitutes agitation against a national or ethnic group. Furthermore, the Commission reiterated its earlier recommendations implying a need to prohibit racist organisations and the participation in their activities.[438]

In **France,** the National Consultative Commission of Human Rights on 24 February 2005 adopted an opinion on measures to fight racism, anti-Semitism, xenophobia and discrimination. It noted a sharp rise in the number of racist, anti-Semitic and xenophobic incidents in 2004. This phenomenon is all the more worrying since the public authorities never cease to condemn them with the utmost firmness, the law has recently been tightened and public opinion widely reproves them. It recommends the compilation of reliable and exact figures, a harmonization of the statistical methods used by the police and the gendarmerie, and the setting up of a monitoring centre on racism, anti-Semitism and xenophobia on the Internet[439]. The European Monitoring Centre on Racism and Xenophobia also emphasizes the importance of having reliable data on acts of racism and xenophobia. It notes with

[433] Communication No. 33/2003 : Denmark. 10/03/2005, CERD/C/66/D/33/2003.
[434] UN Doc. CRC/C/SR.1002, Summary record, Sweden 17/01/2005, p. 2.
[435] International Helsinki Federation for Human Rights, The 2005 report, p. 11. See also, DO stämmer krogar i Stockholm, Göteborg och Malmö, April 2005, www.do.se
[436] Ibid., pp. 24-25.
[437] CRI(2005)26, p. 30.
[438] Ibid., p. 32.
[439] The opinion of the CNCDH is available at Internet site http://www.commission-droits-homme.fr/

regret the absence of official public figures on violent incidents and racist crimes in **Greece,** where no information is available either on any racist motivation for the offences that are committed[440.] The absence of official data on violent incidents and racist crimes does not allow an adequate assessment or monitoring of the situation in that country and consequently does not facilitate the adoption of corrective measures offering protection against discrimination. In the **United Kingdom**, the Commission for Racial Equality has noted in an inquiry into the police service of England and Wales the lack of proper support or full training for managers on how to handle race grievances, so relatively minor issues are often unnecessarily escalated. It recommended that the Home Office, as the central co-ordinating body of all the various organisations involved in governing the police service, assumed overall responsibility for dealing with race equality issues (*A formal investigation of the police service of England and Wales*, 3 February 2005). In its Third Report on the United Kingdom, ECRI recommended, *inter alia*, improvements in the methods by which racist incidents are reported and recorded and to monitor the implementation of the provisions against racially and religiously aggravated offences; and raising the awareness of the courts of the need to ensure that all racially or religiously aggravated offences are duly punished and that the sentences handed down adequately reflect the gravity of the offences (CRI (2005) 27).

The requirement of an effective protection from hate speech

As already recalled by the Network in its Opinion n° 5-2005 on combating racism and xenophobia through criminal legislation (at para. 2.2.1.), General Recommendation XV of the Committee on the Elimination of Racial Discrimination recalls that the provisions of Article 4 of the International Convention on the Elimination of All Forms of Racism Discrimination are of mandatory character: 'to satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced'[441].

The Network emphasized the requirement that the legislation enacted in order to comply with Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination be 'effectively enforced'. As noted by the Committee on the Elimination of Racial Discrimination, Article 4 (a) in particular requires States parties to 'penalize four categories of misconduct: (i) dissemination of ideas based upon racial superiority or hatred; (ii) incitement to racial hatred; (iii) acts of violence against any race or group of persons of another colour or ethnic origin; and (iv) incitement to such acts'.[442] The Committee insists that 'To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response'.[443] In the

[440] European Monitoring Centre on Racism and Xenophobia, 'Annual Report – 2005 – Part II'; 'Racist Violence in 15 EU Member States. A Comparative Overview of Findings from the RAXEN NFP Reports 2001-2004', April 2005; 'Policing Racist Crime and Violence: A Comparative Analysis', prepared by Dr Robin Oakley on behalf of the EUMC, September 2005.

[441] Committee on the Elimination of Racial Discrimination, General Recommendation 15, Measures to eradicate incitement to or acts of discrimination (Forty-second session, 1993), U.N. Doc. A/48/18 at 114 (1994), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.6 at 204 (2003).
See on the obligations which this provision imposes on the States Parties to the Convention on the Elimination of All Forms of Racial Discrimination: Committee on the Elimination of Racial Discrimination, General Recommendation No. 15: Organized violence based on ethnic origin (adopted at the 42nd session of the Committee, 1993) (UN Doc. A/48/18): 'To satisfy these obligations, States parties have not only to enact appropriate legislation but also to ensure that it is effectively enforced. Because threats and acts of racial violence easily lead to other such acts and generate an atmosphere of hostility, only immediate intervention can meet the obligations of effective response.'

[442] Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 3.

[443] Committee on the Elimination of Racial Discrimination, General Recommendation XV on Article 4 of the Convention, adopted by the Committee at its forty-second session (1993)(doc. A/48/18), in : Compilation of the general comments or general recommendations adopted by human rights treaty bodies, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, at 207, at para. 2.

examination of individual communications submitted to the Committee, it also could not accept the claim by a State party that 'the enactment of law making racial discrimination a criminal act in itself represents full compliance with the obligations of States parties under the Convention'[444] ; indeed, this implies that the freedom to prosecute criminal offences (expediency principle, principe d'opportunité), while in principle acceptable, 'should be applied in each case of alleged racial discrimination in the light of the guarantees laid down in the Convention'[445]. Indeed, this requirement also may be imposed under Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, according to which:

> States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Thus, a State will be considered in violation of its obligations under this provision if the investigation into alleged instances of racial discrimination (including all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, as defined in Article 4(a) of the Convention) is found to be lacking or ineffective.[446]

In this respect, the Network notes with concern that in Greece the penal laws against hate speech are still not being enforced, despite the fact that prosecution can be initiated automatically. Intolerance speech finds fertile ground in the electronic media, which often provide a platform for emotional and provocative speech, at the expense of more balanced and tolerant views. The National Audiovisual Council should step up its efforts to ensure scrupulous observance of the existing ethical codes in this area. This is all the more urgent when we bear in mind that figures show that suspicion and even resistance to phenomena connected with immigration and multicultural society in Greece is greater than the average among Member States of the European Union.[447]. In the **United Kingdom**, the House of Commons Northern Ireland Affairs Committee has identified a lack of firm and effective leadership by the Government, the Police Service of Northern Ireland (PSNI), and the criminal justice agencies in Northern Ireland to tackle 'hate crimes', i.e. offences committed against people and property on the grounds of ethnicity, sexual orientation, religion, political opinion or disability. The police need to improve general confidence in the reporting system, address reasons for under-reporting, and encourage victims to come forward and report crimes ; and police training to deal with racism, homophobia, sectarianism and disability must be improved (*The Challenge of Diversity: Hate Crime in Northern Ireland*, HC 548-I, 14 April 2005).

Discrimination against ethnic minorities

Article 21(1) of the Charter prohibits, in particular, any discrimination on grounds of membership of a national minority. In its first set of conclusions and recommendations including Estonia (covering the year 2003), the Network of Independent Experts concluded, with respect to the situation of the

[444] Committee on the Elimination of Racial Discrimination, *L.K. v. the Netherlands*, communication n°4/91, para. 6.4. (insuffient investigation and prosecution of a case of alleged incitement to racial discrimination and to acts of violence against persons of another colour or ethnic origin).

[445] Committee on the Elimination of Racial Discrimination, *Yilmaz-Dogan v. the Netherlands*, communication n° 1/1984, views of 10 August 1987 ; and Committee on the Elimination of Racial Discrimination, *L.K. v. the Netherlands*, communication n°4/91, para. 6.5.

[446] See Committee on the Elimination of Racial Discrimination, *Ahmad v. Denmark*, communication n° 16/99 (failure by Denmark to investigate and prosecute effectively an alleged instance of racial discrimination – the author had been insulted on the grounds of his national or ethnic origin – under sec. 266b of the Criminal Code : the Committee notes that 'if the police involved in the case had not discontinued their investigations, it might have been established whether the author had indeed been insulted on racial grounds' (para. 6.2.)).

[447] European Monitoring Centre on Racism and Xenophobia, 'Majorities' Attitudes towards Minorities in European Union Member States. Results from the Standard Eurobarometers 1997-2000-2003', March 2005.

approximately 11 percent "non-citizens" in **Estonia** who form part of the Russian-speaking minority, that "although including a language test requirement as a naturalization condition cannot be criticized as such, provided that such a test is organized in conditions which are transparent and non-discriminatory, (…) Estonia should send a more clear signal to its non-citizens that citizenship is both worth acquiring and acquirable. Information campaigns for the non-citizens to encourage them getting citizenship are desirable. Estonia should also make further efforts in making the study of Estonian language accessible in all regions of the country. In this respect, the Network encourages the recent campaign that the State gives back the money spent for a language course if the person has succeeded in the citizenship exam". These conclusions were shared by the Council of Europe Commissioner for Human Rights, when he dealt with this issue in his report on Estonia published on 12 February 2004 (CommDH(2004)5).

On 24 February 2005, the Advisory Committee of the Framework Convention for the Protection of National Minorities made public its second opinion on **Estonia**.[448] The opinion recognized that the number of persons without citizenship has decreased, due to measures taken and programmes adopted by the Estonian government but also due to Estonia's accession to EU on 1 May 2004.[449] The Advisory Committee also noted that not all responsibility for reducing statelessness lies on the Estonian authorities and recognized that some groups of individuals may, for various reasons, not be sufficiently motivated to apply for the Estonian citizenship. Nevertheless, the Advisory Committee concluded that 'the number of persons without citizenship, 150 536 as of 31 December 2004, remains disconcertingly high, indicating that further positive measures are needed to facilitate and encourage naturalisation'.[450] In particular, the Advisory Committee suggested considering the exemption of the elderly citizenship applicants from the Estonian language proficiency examination. Moreover, the Committee advised to widen the accessibility of free-of-charge state language training to those concerned.

The Advisory Committee acknowledged that during the last years, **Estonia** has improved guarantees against discrimination. However, it noted with regret that the adoption of the law on Equality and Equal Treatment has been delayed and as a result, the existing legal guarantees against discrimination still contained shortcomings.[451] Moreover, the Committee expressed its concern that the drafts of the above-mentioned equality legislation did not explicitly include citizenship as a prohibited ground of discrimination. The Committee further noted that the same was true as regards the right of recourse to the Legal Chancellor to conduct a conciliation procedure on the cases of alleged discrimination. The Advisory Committee recalled that in the Estonian context, where many residents are without the Estonian citizenship, legal safeguards against discrimination on the basis of citizenship – which would not exclude differential treatment with objective and reasonable justifications – would be of direct relevance to a large segment of society.[452] The Advisory Committee recommended that the authorities and the legislature expedited the passage of new non-discrimination legislation, ensuring also that adequate legal safeguards and procedures were in place in respect of discrimination on the basis of citizenship.[453]

Beyond the question of access to Estonian citizenship, the Advisory Committee also made the following observations. It noted that the authorities` commitment to **Estonia** as a multicultural society was not consistently reflected in the terminology used in official documents and statements, the use of the term 'non-Estonian' (mitte-eesti) to describe the country's minority population, while intended to refer only to ethnicity, creating the impression that the national minorities are not an integral part of Estonian society. The Committee went on to point out that a similar consequence results from the use

[448] See Advisory Committee on the Framework Convention for the Protection of National Minorities. Second Opinion on Estonia adopted on 24 February 2005. ACFC/OP/II(2005)001.
[449] Ibid., para. 46.
[450] See ibid., para. 10.
[451] Ibid., para. 36.
[452] Ibid., para. 37.
[453] Ibid., para. 39.

of the term 'foreign languages' to describe also the languages of national minorities.[454] The Advisory Committee recommended that the Estonian authorities should avoid using terminology that can be perceived as implying that national minorities and their languages were not an integral part of Estonian society.[455]

The Advisory Committee also noted that **Estonia** has recognised the need to make special efforts to improve development in Ida-Virumaa, were persons belonging to national minorities reside compactly, in order to ensure full and effective equality. However, the Advisory Committee was concerned that persons belonging to national minorities continue to be significantly more affected by unemployment than the majority population, and their number in certain sectors of employment, including in higher levels of administration, is remarkably low.[456] Although the Advisory Committee recognised that there were many factors affecting this situation, it emphasised that it was 'essential that the authorities ensure that there is no direct or indirect discrimination in the labour market, and in this respect the implementation and monitoring of the new legal guarantees against discrimination in the Employment Contracts Act is of particular importance.' Moreover, the Advisory Committee recommended that authorities should pursue further their efforts to address the disproportionately high unemployment rate amongst persons belonging to national minorities in Ida-Virumaa and elsewhere by launching regional development initiatives and measures to fight direct and indirect discrimination in the labour market. The Committee was also hopeful that this should also enhance the recruitment of qualified persons belonging to national minorities in public service.[457] The Advisory Committee went on to say that in addition to unemployment, persons belonging to national minorities are disproportionately affected by a number of other problems linked to social marginalisation, such as homelessness and drug abuse, 'which need to be addressed through special programmes'.[458]

Finally, the Advisory Committee expressed its concern at the alarmingly high rate of HIV/AIDS amongst persons belonging to national minorities in **Estonia**. 'It is to be welcomed that the authorities have increased their efforts in terms of prevention and treatment of HIV/AIDS, and there seems to be a wide agreement on the urgency of the matter. It is essential that the related services and documentation are consistently available also in the Russian language.' Furthermore, the Advisory Committee noted that there was a need to obtain more data and to analyse further reasons for the high incarceration rate of persons belonging to national minorities and to examine in this connection how Article 4 and other principles of the Framework Convention were reflected in various stages of law-enforcement.[459]

The Act of 6 January 2005 on national and ethnic minorities in the Republic of **Poland** and on regional language[460] introduces a ban on discrimination as a result of belonging to such minorities. According to Article 6 (2) of this Act, public authorities are obliged to take appropriate measures to support the full and actual equality in the sphere of economic, social, political and cultural life between Polish citizens[461] belonging to minorities and the majority; protect individuals who are exposed to discrimination, hostility and violence resulting from their belonging to particular minorities; and to consolidate multicultural dialogue. Based on Article 23 of this Act, a Joint Commission of the Government and National and Ethnic Minorities has been established as an opinion-making and advisory body for the President of the Council of Ministers.

[454] Ibid., para. 62.
[455] Ibid., para. 65.
[456] Ibid., para. 15.
[457] Ibid., para. 159 and 160.
[458] Ibid., para. 16.
[459] Ibid., para. 56.
[460] Ustawa z dnia 6 stycznia 2005 r. O mniejszościach narodowych i etnicznych oraz o języku regionalnym (Dz.U. z 2005 r. Nr 17, poz. 141) [The Act of 6 January 2005 on national and ethnic minorities and regional language (The Official Journal of 2005, No 17, item. 141)]
[461] In accordance with the contents of Article 2 of the Act, this only applies to Polish citizens.

Discrimination on grounds of sexual orientation

As was already pointed out under Article 12 of the Charter, prejudices continue to exist among a large section of the population towards homosexual, bisexual or transsexual persons. Member States cannot remain passive in the face of this situation: it is their task to take affirmative action against such prejudices, not only by combating individual incidents, but also through information campaigns and promotion of tolerance and diversity. Such a position has been adopted in the case-law of the European Court of Human Rights[462]. The Human Rights Committee, concerned by information suggesting a persistent discrimination towards certain persons on the grounds of their sexual orientation in **Greece,** advised this country not only to offer remedies against discriminatory practices on grounds of sexual orientation, but also to set up information campaigns to combat prejudices and discrimination[463]. The National Human Rights Commission has adopted a decision-opinion in which it also reports on the existence in Greece of prejudices and stereotypes on the basis of sexual orientation[464]. The National Human Rights Commission suggests extending the scope of Criminal Anti-Racism Act No. 927/1979 to sexual orientation and suggests a series of measures to combat prejudices in the electronic media, the conduct of the forces of law and order, and in the education system. In a number of Member States, one specific difficulty however is that the measure of the level of anti-gay prejudice is made difficult by the absence of specific data on hate crimes based on the sexual orientation of the victim. In **Sweden** for instance, the statistics dealing with hate crimes for 2005 which have been presented by the police[465] as well as by the Swedish Federation for Lesbian Gay, Bisexual and Transgender Rights (RFSL) disclose an increase in hate crimes targeting homosexual persons.[466] However, where such statistics do not exist, of where the official hate crime figures do not distinguish between different types of hate crimes, it may be difficult to establish the importance of homophobia.

Access to nationality

As mentioned above, one of the difficulties the Russian-speaking minority in **Estonia** encounters is the linguistic requirements imposed as a condition for having access to citizenship. The Network recalls the view it expressed in its Thematic Comment n°3 on the rights of minorities in the European Union (under 3.1.2.), which responded in particular to concerns about the difficulties certain Roma may face when seeking citizenship, the lack of citizenship reinforcing their vulnerability – for instance when they are victims of ill-treatment in the hands of the police – and constituting a potential obstacle to having access to certain public services or to employment:

> Although each Member State of the Union may determine who are its own nationals and, thus, is exclusively competent to define the rules according to which nationality may be attributed, it should be emphasized that Council Directives 2000/43/EC and 2000/78/EC apply to all persons, without distinction as to their nationality. Although, according to Recital 13 of the Preamble of Directive 2000/43/EC, the prohibition of all direct or indirect discrimination on grounds of racial or ethnic origin, although it also applies to third-country nationals, does not concern differences in treatment on grounds of nationality, it cannot be ruled out that the very conditions for granting nationality constitute that kind of discrimination, prohibited by the Directive. As a matter of fact, there where they create differences in treatment between certain categories of persons, the conditions for granting nationality do not create a difference in treatment between nationals and non-nationals, but between different categories of foreigners, which makes those

[462] Eur. Ct. HR, *Smith and Grady v. United Kingdom,* judgment of 27 September 1999 (Appl. Nos. 33985/96 and 33986/96), §97.
[463] Concluding Observations of the Human Rights Committee: Greece, 25/04/2005, CCPR/CO/83/GRC.
[464] Decision-opinion of the National Human Rights Commission (plenary) on questions relating to discrimination against sexual minorities in Greece and on the extension of civil marriage to same-sex couples, 16.12.2004, available at the site of the National Human Rights Commission (in Greek), www.nchr.gr
[465] See the report ‘ Brottslighet kopplad till inre säkerhet 2004 ’ which was submitted by the Swedish Secret Police to the Government in late November 2005, www.sakerhetspolisen.se
[466] See e.g. *Chr.Wahldén*, Fler anmälningar om hatbrott mot homosexuella, SvD 30 November 2005, p. 7.

differentiations come under Directive 2000/43/EC. Consequently, where access to nationality conditions or facilitates access to employment, education or housing, as well as to the other social goods to which this Directive applies in accordance with its Article 3, it needs to be verified whether the rules governing access to nationality do not institute direct or indirect discrimination against certain persons defined according to their ethnic origin.

By proposing one of the most rigid Citizenship Acts within the European Union[467] the Government of **Austria** excludes a big share of the resident population from political participation. As one of its last steps, in regard to restrictive immigration policy, the Austrian Council of Ministers adopted, on 15 November 2005, the amendment to the Austrian Citizenship Act.[468] In comparison to other European countries, where children who are born there automatically receive the citizenship of the country, Austria has not incorporated this aspect of the *ius solis* in its legal system. While under the current law these children had a right to naturalisation after four years, the amendment increases this period to six years. Spouses of Austrian citizens will only have access to citizenship after six years of lawful and permanent residence and only if they have been married and lived together for five years, even then it is not an absolute right but a discretionary entitlement. Under the current law, the spouse has an absolute right to citizenship after a five year period of combined residence and marriage. People who have been granted asylum and EU citizens are now entitled to citizenship after a period of 6 years. The period of time required for other aliens has stayed the same: the earliest they can get citizenship is after 10 years. However, the general conditions that need to be fulfilled to gain citizenship have been made more difficult; if the alien has, in the last three years before the application, taken advantage (in Anspruch nehmen) of social assistance, citizenship will be denied. Furthermore, aliens will now be tested on their command of the German language, their basic knowledge about the democratic order and the history of Austria and of the Federal Province where they apply for citizenship. The concept of the Austrian Citizenship Act and its amendment excludes a large part of the population (10 percent of the resident population are not Austrian nationals) from the political decision making process for a long time. Those who are third county nationals (approximately 6 percent) are excluded from voting for the European Parliament and at the municipal level. Bearing in mind that these people are paying taxes and contribute to the community in various ways, this has to be considered a serious democratic deficit

Italy is one of the Member States where access to the citizenship is the most difficult for immigrants and their children[469]. Italian legislation privileges indeed the *jus sanguinis* principle. For being authorised to access the Italian citizenship, a long period of legal residence (10 years) is required. The Parliament is currently discussing a proposal which aims at shortening this period, however no agreement has been reached at yet on such proposal. The Network notes, first, that such stringent conditions for accessing the Italian citizenship[470] favour illegal organizations and the traffic of false registrations in the register of births : thus, there have been reports about the racket of false birth certificates – paid 20.000 euros – discovered by the police of Rome in November 2005. Second, thus confirming the fears expressed by the Network in its Thematic Comment n°3 cited above, these conditions also cause discriminations in many other fields, especially accommodation in public housing, where points are given to the applicants if they are Italian citizens, and in employment, where, as appears from the Report Ires-CGIL 'Lavoratori immigrati nel settore edile' of July 2005, migrant workers are often paid less than Italian workers[471].

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[467] „Rigides Staatsbürgerschaftsgesetz" of 21.09.2005 in www.volksgruppen.orf.at (24.11.05)

[468] Regierungsvorlage für ein Bundesgesetz, mit dem das Staatsbürgerschaftsgesetz 1985 (StBG), das Tilgungsgesetz 1972 und das Gebührengesetz 19657 geändert werden (Staatsbürgerschaftsnovelle – 2005).

[469] The policy of annual entry quotas of immigrates is also discriminatory in certain aspects. In the system of division of the annual entry quotas, a preference is given to seasonal workers (for the year 2005 almost 50.000 out of the total of 79.500), and the immigrants are selected on the basis of 'influx decrees', depending on whether their country of origin has signed readmission agreements with Italy regarding the forced repatriation of expelled immigrants (see D.P.C.M. [Prime Minister Decree] 17 December 2004, on *Official Gazette* 2005, n. 26).

[470] It should be noted however that in 20 April 2005, the Minister of the Interior created an informational call centre for immigrants who required Italian citizenship. This is a welcome initiative from which other Member States could seek inspiration.

[471] Report Ires-CGIL 'Lavoratori immigrati nel settore edile' (July 2005), in

The Network reiterates the concerns it already expressed in its previous Conclusions (Concl. 2005, p. 95) concerning the situation of the 'erased' persons in **Slovenia**[472]. These constitute approximately 18,305 former Yugoslav citizens who were removed from the Slovenian population registry in 1992 and have since been living in Slovenia but have not filed an application for Slovenian citizenship, after Slovenia became independent. The Network recalls that the Slovenian Constitutional Court itself had recognized that the removal of these persons from the Slovenian population registry constituted a violation of the principle of equality and, in those cases where the individuals concerned had to leave the Slovenian territory, it gave rise to a violation of their rights to a family life and to freedom of movement[473]. The Network urges the Slovenian government to implement without further delay the decision of the Constitutional Court and to recognize an administrative status, either full citizenship or permanent residency, to those concerned.

Protection of Gypsies / Roma

As again illustrated recently by the Final Report presented by the Council of Europe Commissioner for Human Rights on the human rights situation of the Roma, Sinti and Travellers in Europe on 15 February 2006 (CommDH(2006)1), discrimination against the Roma remains widespread in the EU Member States. As indicated by the Resolution of the European Parliament on the situation of the Roma in the European Union which it adopted on 28 April 2005,[474] such structural discrimination requires, in order to be effectively addressed, that affirmative measures be adopted, accelerating the social and professional integration of Roma. In particular, as again emphasized by the Commissioner for Human Rights, and as developed in detail in the Thematic Comment n°3 on the rights of minorities in the Union adopted by the Network of Independent Experts in Fundamental Rights in March 2005 as well as in these conclusions above (under the right to education, guaranteed under Article 14 of the Charter), policies of segregating Roma communities in settlements outside otherwise inhabited areas must be ended and, when needed, reverted ; where segregated education still exists in one form or another, it must be replaced by regular integrated education and, where appropriate, prohibited as a form of illegal discrimination. In its abovementioned resolution, the European Parliament urged all Member States and candidate countries to 'take concrete measures to improve the access of Roma to labour markets with the aim of securing better long-term employment' (para. 14); and it has called upon Member States in which Roma children are segregated into schools for the mentally disabled or placed in separate classrooms from their peers to move forward with desegregation programmes within a predetermined period of time, thus ensuring free access to quality education for Roma children and preventing the rise of anti-Romani sentiment amongst schoolchildren' (para. 15).

Article 13 EC provides the adequate legal basis for further legislative action in this regard. The Network has repeatedly emphasized the need to develop such action. This proposal is based on the finding that the Racial Equality Directive may in certain respects fail to address the specific needs of the Roma due, first, to the structural discrimination they are facing and the need to complement an anti-discrimination strategy by a strategy aimed at ending segregation in housing, education, and employment; second, to the need to ensure an adequate accommodation of the specific lifestyle of the Roma who have preserved a nomadic or semi-nomadic tradition.

The Network reiterates that, in the face of the widespread segregation the Roma/Gypsies are facing in the fields of education and housing, but also employment and access to health care, not only protection from discrimination is required, but also affirmative desegregation in these different fields. As explained in Thematic Comment n°3, the European Commission should consider proposing a directive

http://www.filleacgil.it/stranieri_file/Rapporto_finale_ultimo_fillea_2005.pdf

[472] See also Committee on the Rights of the Child, 35th session, Consideration of reports submitted by State parties under Article 44 of the Convention, Concluding observations of the Committee on the Rights of the Child: Slovenia), CRC/C/15/Add.230).

[473] C.C. (Constitutional Court), nr.U-I-246/02, 3 April 2003, *Official Gazette* 2003, nr. 36

[474] P6_TA(2005)0151 (noting that 'on average Roma communities face unacceptably high levels of unemployment, so that specific measures are required to facilitate access to jobs').

based on Article 13(1) EC and specifically aimed at improving the situation of the Roma/Gypsies population. This directive should be based on the studies documenting the situation of the Roma/Gypsies population, and take into account the relevant rules of the Council of Europe Framework Convention on the Protection of National Minorities as well as the interpretation of this instrument given by the Advisory Committee established under its Article 26. It should provide that effective accommodations will be made to ensure the Roma/Gypsies will be able to maintain their traditional lifestyle, when they have chosen the nomadic or semi-nomadic mode of life, without being forced into sedentarization. It should take account the need to effectuate the desegregation of the Romani/Gypsy communities, where this is required, especially in employment, housing and education. It should address the question of the inaccessibility of certain social and economic rights due to the administrative situation of Roma/Gypsies to whom administrative documents are denied or who are considered stateless.

Alternatively, Thematic Comment n°3 of the Network noted that a more open form of coordination of the measures adopted by the Member States in order to tackle the situation faced by the Roma/Gypsy minority could be envisaged. Article 13(2) EC could be relied upon to ensure that the Member States will inform themselves mutually about the measures they are taking in order to ensure the desegregation of the Roma/Gypsies in the fields of employment, education and housing, to which health care and social security could be added, and about the reasons for their successes and failures in addressing this problem. This strategy would oblige the Member States to collect the requisite information about the situation of the Rome under their jurisdiction, in order to arrive at a better understanding of the problem to be addressed. Under this strategy, each Member State would submit at regular intervals a report on the measures which have been adopted in order to make progress towards the goal of ensuring the integration of the Roma/Gypsy minority, which should result in a process of mutual evaluation and contribute to collective learning. The information contained in the reports submitted by the Member States on these measures should be evaluated not only from the point of view of their success in achieving desegregation, but also, no less importantly, in their ability to do so while respecting the right of the Roma/Gypsies to maintain their traditional lifestyle, nomadic or semi-nomadic, where they choose to do so, and on the basis of the international and European standards applicable. Of particular relevance in defining the template according to which the performances of the Member States might be evaluated under a measure based on Article 13(2) EC and the open method of coordination it envisages are the Recommendation No. (2001) 17 on improving the economic and employment situation of Roma/Gypsies and Travellers in Europe addressed by the Committee of Ministers of the Council of Europe to the Council of Europe Member States, and the General recommendation XXVII on discrimination against Roma adopted by the Committee on the Elimination of Racial Discrimination at its fifty-ninth session in 2000. Any measure seeking to promote the integration of the Roma/Gypsy minority should be devised with the active participation of representatives of this group.

In its Concluding Observations on **France** which it delivered at its sixty-sixth session on 11 March 2005, the Committee on the Elimination of Racial Discrimination, noting the difficulties which Travellers continue to face, in particular in the areas of education, employment and access to the health care and social security system, has expressed its concern over delays in the full implementation of the Act of 5 July 2000 on the reception and accommodation of 'travelling people' and over the difficulties which Travellers continue to face, in particular in the areas of education, employment and access to the health care and social security system. In March 2005, in its Concluding Observations on the initial and second periodic reports of Ireland, the Committee on the Elimination of Racial Discrimination again expressed concern that the State refuses to recognise Travellers as a distinct ethnic group and recommended the State do so at the earliest convenience as well as take appropriate measures to implement the recommendations of the Task Force on the Traveller Community in taking all necessary steps in ensuring better access to all levels of education, employment, health care and accommodation suitable to the lifestyle of Travellers. ECRI recommended a series of measures in the **United Kingdom** to address the situation of disadvantage and discrimination faced by the Roma/Gypsy and Traveller communities, notably their inclusion in national and local ethnic monitoring systems, their mainstreaming in all housing policies both at central and at local levels, the

provision of adequate public permanent and transit sites, the use in practice of existing opportunities for schools for integrating the teaching of the history or culture of Roma/Gypsies and Travellers in the school curriculum and countering the appearance of "No Travellers" or "No Caravan Dwellers" signs on public establishments (*Third report on the United Kingdom*, CRI (2005) 27). When it considered the United Kingdom's implementation of the Convention on the Elimination of All Forms of Racial Discrimination in light of the Concluding Observations of the UN Committee on the Elimination of Racial Discrimination, the Joint Committee on Human Rights noted that the difficulties faced by Travellers in accessing essential healthcare and education services are likely to raise issues under Article 5(e) of CERD, by which the State undertakes to guarantee equal protection of rights including rights to public health, medical care, social security and social service (Article 5(e)(iv)) and rights to education and training (Article 5(e)(v)); in light of the inequalities in the provision of accommodation for Travellers as compared to accommodation for the settled community, the creation of a statutory duty on local authorities to provide or facilitate the provision of accommodation, in order to fulfil the State's obligations under CERD, in particular under Article 2.2 (positive measures to ensure equality for ethnic groups) and Article 5(e)(iii) (equality in housing).[475] Those findings corroborate the conclusions which the Network arrived at in its Thematic Comment No. 3.

Unfortunately, the findings on which the proposal for a desegregation directive was based in 2004 and in 2005 are further reinforced by more recent developments. In its third report on **France**[476], the European Commission against Racism and Intolerance (ECRI) calls upon the French authorities fully implement the Besson laws on stopping places for Travellers, ensuring that the sites created are sufficiently numerous, suitably located and properly equipped. Furthermore, it "urges the French authorities to look into the problems encountered in France by Roma. It is a matter of particular urgency to find solutions in order to improve the unacceptable living conditions of these families by finding suitable housing arrangements. Special attention should also be paid to the children, particularly as concerns health and access to education. ECRI strongly recommends that the French authorities take steps to prevent any illegal and violent forcible evictions that place Roma families in a desperate position". In its conclusions on **France** which it delivered on 11 March 2005, the Committee on the Elimination of Racial Discrimination reiterated its concerns over the difficulties which Travellers continue to face, in particular in the areas of education, employment and access to the health care and social security system. It is particularly concerned about the delays in the full implementation of the Act of 5 July 2000 on the reception and accommodation of 'travelling people' and about the difficulties which Travellers continue to face, in particular in the areas of education, employment and access to the health care and social security system. In its concluding observations of 25 April 2005 on **Greece,** the Human Rights Committee[477] finds that the Roma people remain disadvantaged in many aspects of life covered by the International Covenant on Civil and Political Rights, and advises the State party to intensify its efforts to improve the situation of the Roma people in a manner that is respectful of their cultural identity, in particular, through the adoption of positive measures regarding housing, employment, education and social services. It also asks for detailed information on the results achieved by public and private institutions responsible for the advancement and welfare of the Roma people. As regards **Greece,** the Special Rapporteur on the sale of children, child prostitution and child pornography also expressed his concern over the situation of Roma and Roma children. The Special Rapporteur visited a Roma settlement where housing conditions, sanitation, health and education were unacceptable. He advised the State to take specific measures to improve the living conditions of Roma communities and to give Roma children alternatives other than street work or prostitution as 'survival strategies' for them and their families.

The issue of housing appears, along with education and access to employment, to be central to the perspective of integration of Roma people. The Commissioner for Human Rights of the Council of Europe noted in his Final Report (para. 26):

[475] *The Convention on the Elimination of Racial Discrimination*, HL 88/HC 471, 31 March 2005.
[476] ECRI, third report on France, adopted on 25 June 2004 and published on 15 February 2005, available on the site http://www.coe.int/T/F/Droits_de_l%Homme/Ecri/
[477] Concluding Observations of the Human Rights Committee: Greece, 25/04/2005, CCPR/CO/83/GRC.

> During many of my country visits, I was shocked at the patent absence of adequate standards of living within Roma settlements. In a number of these settlements, the living conditions were of such a poor standard as to cause severe safety and health hazards for the inhabitants. Many Roma had to live in segregated ghettos of run-down buildings or shacks in settlements that were pushed to the margins of towns and sometimes built on contaminated land. Access to infrastructure, such as running water, electricity, roads, transportation and communication facilities was usually non-existent in these settlements. I find it unacceptable that in a continent of considerable prosperity resources are so unevenly distributed that such forms of extreme poverty continue to exist.

The European Committee of Social Rights has delivered its decision on Collective Complaint No. 15/2003 submitted by the European Roma Rights Centre (ERRC) against Greece with regard to Article 16 (right of the family to social, legal and economic protection) and the Preamble (non-discrimination) of the European Social Charter.[478]
The Committee found that 'Greece has failed to take sufficient measures to improve the living conditions of the Roma and that the measures taken have not yet achieved what is required by the Charter, notably by reason of the insufficient means for constraining local authorities or sanctioning them. It finds on the evidence submitted that a significant number of Roma are living in conditions that fail to meet minimum standards and therefore the situation is in breach of the obligation to promote the right of families to adequate housing laid down in Article 16'; according to the Committee, 'In light of the excessive numbers of Roma living in substandard housing conditions, even taking into account that Article 16 imposes obligations of conduct and not always of results and noting the overarching aim of the Charter is to achieve social inclusion, the Committee holds that the situation is in violation of Article 16 of the Charter' (para. 42-43 of the decision on the merits). Furthermore, the Committee noted that, in the absence of the diligence on the part of the local authorities on one hand to select appropriate sites and on the other the reluctance to carry out the necessary works to provide the appropriate infrastructure, Roma have an insufficient supply of appropriate camping sites. Finally, the Committee considered that illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However, the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure and these should be sufficiently protective of the rights of the persons concerned, which was not the case with the three sites in question[479]. Following the above-mentioned report of the European Committee of Social Rights, the Committee of Ministers adopted a resolution, in which it also took note of the implementation of the Integrated Action Plan (IAP) for the social integration of Greek Roma, which is still in progress, as well as the ongoing evaluation and reform of the IAP in order to ensure more effective coordination of the IAP between all partners involved (including the local authorities). The Committee of Ministers also took note of the extension and revision of the housing loans programme for Greek Roma, as well as the establishment of a Commission for the social integration of Greek Roma[480].

Other relevant indications that the problem of discrimination against the Roma should be addressed as a matter of urgency are the following:

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[478] The collective complaint no 27/2004 filed by the European Roma Rights Centre against Italy relates to Article 31 (right to housing) alone or in combination with Article E (non discrimination) of the Revised European Social Charter, and raises similar issues. The complaint alleges that the situation of Roma in Italy amounts to a violation of Article 31 of the Revised European Social Charter. In addition it alleges that policies and practices in the field of housing constitute racial discrimination and racial segregation, both contrary to Article 31 alone or read in conjunction with Article E. The European Committee of Social Rights declared the complaint admissible on 6 December 2004. At the time of the closing of this report, the decision on the merits of the Committee was not public yet.

[479] European Committee of Social Rights, Collective Complaint No. 15/2003, *European Roma Rights Centre (ERRC) v. Greece,* decision on the merits, 8.12.2004.

[480] Resolution ResChS(2005)11, Collective Complaint No. 15/2003 by the European Roma Rights Centre (ERRC) against Greece, adopted by the Committee of Ministers on 8 June 2005.

- In the Annual Report 2005 of the European Monitoring Centre on Racism and Xenophobia[481], the Roma minority is mentioned as the group that is most likely to suffer from discrimination in the **Slovak Republic**. The European Monitoring Centre on Racism and Xenophobia in its Annual Report welcomes the fact that the Ministry of Interior, together with several partners, initiated a programme to select and train police specialists to work more effectively with the Roma community. The Centre also welcomes a training programme for judges, prosecutors, teachers and labour office employees and training programmes for the police operating in areas with a significant Roma population. Moreover according to the Annual Report of the Centre, the program of developing social flats implemented by the Ministry of Construction and Regional Development can serve as a good example of tackling the housing problems of marginalised population groups. The Centre also welcomes another initiative undertaken by the government named 'Long-term Conception of Housing for Marginalised Groups of Citizens and Model of its Financing', which is intends to create a framework for addressing the problem of housing of marginalised groups, especially the Roma.

- In its Concluding Observations relating to **Slovenia**, the Human Rights Committee expresses its concern at the deprivation of Slovene citizenship to Roma who should have access to it, at the arbitrary expulsion from the country, at racially segregated schooling arrangements, and at a number of extremely substandard slum settlements[482]. The Committee is also concerned by the difference of status between the so-called 'autochthonous' (indigenous) and 'non autochthonous' (new) Roma communities in Slovenia. According to the Committee, Slovenia should consider eliminating discrimination on the basis of status within the Roma minority and provide to the whole Roma community a status free of discrimination, and improve its living conditions and enhance its participation in public life. While no measures are being undertaken to improve the living conditions of the Roma community, the Committee is concerned that the Roma community continues to suffer prejudice and discrimination, in particular with regard to access to health services, education and employment, which has a negative impact on the full enjoyment of their rights under the Covenant. Slovenia should take all necessary measures to ensure the practical enjoyment by the Roma of their rights under the Covenant by implementing and reinforcing effective measures to prevent and address discrimination and the serious social and economic situation of the Roma.

- The Report by the Commissioner for Human Rights, Mr Alvaro Gil-Robles, on his visit to Spain from 10 to 19 March 2005[483], advises the Spanish authorities to adopt the necessary measures to facilitate access by the Gypsy community to housing (eradicating the shanty-town settlements), employment and education. The report also recommends giving fresh impetus to the Gypsy Development Programme, actively including Gypsy organizations in this or any other government strategy seeking to develop and improve their living conditions.

- ECRI referred in its third report on **Sweden** in 2005 to information received which indicates that Roma communities continue to suffer disadvantages and discrimination in housing and harassment by neighbours, discrimination in access to public places such as restaurants and shops, as well as discrimination by potential employers.[484] ECRI was on the other hand pleased to note that the Office of the Ombudsman against Ethnic Discrimination (DO) will be provided with targeted funds to continue working with Roma issues, including structural discrimination. Finally, ECRI emphasised the importance of developing 'institutional arrangements to promote an active role and participation of Roma/Gypsy communities in the decision-making process, through national, regional and local consultative mechanisms, with the priority placed on the idea of partnership on an equal footing'.[485]

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[481] Available on the web site: http://eumc.eu.int/eumc/material/pub/ar05/AR05_p2_EN.pdf.
[482] European Roma Rights Centre and Amnesty International Slovenia Urge Slovene Government to Act on Key Concerns Identified by the Human Rights Committee, Budapest, Ljubljana, 6 September 2005; United Nations, International Covenant on Civil and Political Rights, Concluding observations of the Human Rights Committee: Slovenia, 25/7/2005, CCPR/CO/(SVN (Concluding Observations/Comments).
[483] CommDH(2005)8
[484] CRI(2005)26, p. 25.
[485] Ibid., p. 26.

Certain positive developments nevertheless should be highlighted, witnessing to a growing recognition that more should be done in order to overcome the legacy of discrimination against the Roma and the structural discrimination they are facing. Certainly the most promising initiative, which is characterized by a high level of ambition, is the launching in February 2005 of the 'Decade of Roma Inclusion', a joint initiative of Bulgaria, Croatia, the Czech Republic, Hungary, The Former Yugoslav Republic of Macedonia, Romania, Serbia and Montenegro, and the Slovak Republic in cooperation with the World Bank, the European Commission and the Open Society Institute for the period of 2005 -2015. Although the Decade of Roma Inclusion covers only three EU Member States, the lessons which can be drawn from this initiative clearly could inspire experiences elsewhere; indeed, in Lithuania, a new national strategy was put in place which explicitly borrows its inspiration from the national action plans which are adopted by the States participating in the Decade of Roma Inclusion. Such strategies should comprise the setting of clear, if possible quantitative targets for improving the socio-economic conditions of the Roma, combined with the adoption of the tools required to measure progress; the adoption of national action plans in order to achieve these targets; and the adjustment of the action plans, in the course of their implementation, in the light of the lessons emerging from the monitoring of progress. The Decade of Roma Inclusion focuses on four priority areas: education, employment, health, housing; and it has three cross-cutting themes: discrimination, gender, and poverty. Adopting such a national action plan could be particularly useful in countries such as **Slovenia**, where the lack of a coordinated policy aimed at solving Roma issues has been identified as the main lacuna in the approach to integrating the Roma, especially in a context where the local municipalities are unable and often unwilling to make efforts in this respect, and where an increased police surveillance appears to many as the only solution to Roma issues[486].

The Network also notes the following developments:

- In **Austria,** at the end of 2005, the first contact point for juvenile Roma and Sintis will be opened in Vienna. The contact point is called THARA and will offer special counselling in regard to career planning and orientation. Young Roma and Sintis often experience particular difficulties when entering the labour market. Low education and resentment by employers are indicated as obstacles in finding an adequate job. THARA focuses on measures of further education and provides a platform of exchange in order to dismantle prejudice between different cultures and promote dialogue. Concrete measures include learning aid, computer workshops, media laboratory including modern audio and video technologies etc. Similarly in **Italy,** some city Councils have established ad hoc offices aimed at helping and counselling Roma, Sinti and Travellers groups. These offices provide information and support with regard to bureaucracy issues, organize health screening, improve vocational training and take actions to make easier Roma access to employment.

- Following the above-mentioned report of the European Committee of Social Rights containing its decision on the merits of the aforementioned Collective Complaint No. 15/2005, the Committee of Ministers adopted a resolution, in which it took note of the implementation by **Greece** of the Integrated Action Plan (IAP) for the social integration of Greek Roma, which is still in progress, as well as the ongoing evaluation and reform of the IAP in order to ensure more effective coordination of the IAP between all partners involved (including the local authorities). The Committee of Ministers also took note of the extension and revision of the housing loans programme for Greek Roma, as well as the establishment of a Commission for the social integration of Greek Roma[487]. This year, too, the implementation of the Integrated Action Plan has yielded some positive results, in particular in the area of housing. The number of housing loans granted to Roma families has risen, especially following a reorganization of the relevant institutional framework. The action plan also provides for the allocation by the local authorities of municipal sites to Greek Roma families; a substantial number of houses, integrated in housing estates, have been made available to Roma families, while five municipalities have been given the go-ahead to acquire sites for the purpose of constructing equipped

[486] This is confirmed in the Human Rights Ombudsman's Annual Report 2004, Ljubljana, May 2005.
[487] Resolution ResChS(2005)11, Collective Complaint No. 15/2003 by the European Roma Rights Centre (ERRC) against Greece, adopted by the Committee of Ministers on 8 June 2005.

camping sites. The implementation of the Integrated Action Plan (IAP) has helped to improve the living conditions of a large number of Roma communities, particularly in the area of housing (financing of housing loans, acquisition of sites for the rehabilitation of Roma, construction of houses, whether or not prefabricated, etc). The participation of representatives of the Roma community in the decision and evaluation process of the IAP is a positive sign. The cooperation and coordination of the authorities involved has been developed. The existence of a clear political will and the strengthening of the institutional capacities ensure that the efforts of the authorities in this area will intensify in the future.

- In **Hungary,** in March 2005 the Ministry for Youth, Family and Social Affairs and for Equal Opportunities adopted a working document on the National Development-Policy Concept. Moreover in the framework of the 'Social and housing integration model-program of the Romani neighbourhoods' nine municipalities can initiate integration programs winding up poor Romani neighbourhoods. The first nine villages are Dencsháza, Galambok, Hencida, Kerecsend, Szentgál, Táska, Tiszabő and Uszka. In these settlements the reconstructions can start already in 2005. This is the first large-scale social housing construction project in Hungary since the transition. The high incidence and spatial concentration of exclusion and deprivation in many municipalities raise the need for co-operation policies and measures that promote inclusion in a complex context.

- In **Ireland,** a report entitled *Review of the Operation of the Housing (Traveller Accommodation) Act 1998* was published by the Minister of State for Housing and Urban Renewal. The review was carried out by the National Traveller Accommodation Consultative Committee and assessed the provision of accommodation for Travellers by local authorities in the preceding five years. The Report made a number of important recommendations which should be implemented to improve the provision of this essential service to members of the Traveller Community.

- In **Lithuania,** the Government on 24 of January 2005 approved the Strategy Plan of activities of the Department of National Minorities and Lithuanians Living Abroad to the Government of the Republic of Lithuania,[488] which includes a programme aimed at supporting the integration of Roms into the Lithuanian society while allowing them to retain their cultural and ethnic identity, and comprising measures aiming at the active education of Roma children and adults. Moreover the measures for 2005-2006 for the implementation of the Plan of Actions for the National Fight against Poverty and Social Exclusion for 2004-2006[489] include special measures aimed at improving the social and professional integration of Roms. The main objective of these measures is to increase the number of workers among the Roms as well as to increase the accessibility of health care and education.

- In **Poland,** a long-term, nation-wide Programme in support of the Roma community is currently being implemented by the Minister of Interior and Administration[490]. One of the objectives of this programme is to improve security and decrease Polish society's reluctance towards individuals belonging to the Roma community, in particular by preparing police officers for working within the Roma community. However, according to the ECRI's 2005 Report on Poland[491], despite the approval of two government programmes for the Roma, the majority of the Roma Community suffers due to exclusion from society and difficult living conditions, and continues to be the victim of racial violence. The ECRI recommended that the Polish authorities perform an analysis of the impact of

[488] 2005 01 24; Tautinių mažumų ir išeivijos departamento prie Lietuvos Respublikos Vyriausybės sutrumpintas veiklos planas [the Shorted Strategy Plan of activities of the Department of National Minorities and Lithuanians Living Abroad to the Government of the Republic of Lithuania]// www.tmid.lt

[489] 2005 09 13; Lietuvos Respublikos Vyriausybės nutartimas Nr. 1002 'Dėl Lietuvos Respublikos 2004-2005 metų nacionalinio kovos su skurdu ir soliacine atskirtimi veiksmų plano įgyvendinimo 2005-2006 metų priemonių patvirtinimo' [The reslution of the Government of The Republic of Lithuania No. 1002 'Concerning the measures 2005-2006 of the implementation of the plan of actions of national fight against poverty and social disjuncture for 2004-2006']//Valstybės žinios, 2005, Nr. 112-4091.

[490] Programme for the Roma community in Poland, Warsaw, August 2003, available on the webpage http://www.mswia.gov.pl./spr_oby_mn_prog_romowie_txt.html

[491] European Commission against Racism and Intolerance, The third report on Poland, Strasbourg, 14 June 2005

discrimination on the Roma Community and underlined the necessity to pass the entire legislation banning discrimination in all areas of social life.

In the abovementioned Resolution on the situation of the Roma in the European Union which it adopted on 28 April 2005, the European Parliament regrets that 'the Roma community is still not regarded as an ethnic or national minority group in every Member State and candidate country, and thus does not enjoy the rights pertaining to this status in all the countries concerned' (para. E). It is therefore particularly welcome that in **Germany,** the 'Rahmenvereinbarung zwischen der rheinland-pfälzischen Landesregierung und dem Verband Deutscher Sintis und Roma Landesverband Rheinland-Pfalz e.V.' [Framework Agreement between the Government of the Land Rhineland-Palatinate and the Association of German Sintis and Rome Land Association Rhineland-Palatinate] of 25 July 2005 recognises explicitly that the German Sintis and Roma constitute an acknowledged and traditional minority, which stands under the special protection of the Council of Europe Framework Convention for the protection of National Minorities. The Agreement also ensures the financial support by the Government of vocational training and the promotion of artistic talents.

In the Final Report presented by the Council of Europe Commissioner for Human Rights on the human rights situation of the Roma, Sinti and Travellers in Europe on 15 February 2006 (CommDH(2006)1), Mr. Alvaro Gil-Robles notes : 'In a number of countries (…), the indifference and inaction by the police towards crimes committed against the Roma have led to a situation where the Roma have generally very little confidence in the police. Rather than regarding the police as a protector of their rights, the Roma often view them with feelings of fear and suspicion' (para. 82). The Network can confirm this view. Research in the **Netherlands**[492] has shown that Roma and Sinti rarely report instances of discrimination to the authorities. Mutual distrust between these groups and the authorities, language problems and the fear that problems will only increase by the reporting are all relevant factors. The position of Roma and Sinti in society is weak and the problems in education and on the labour and housing market are bigger than among other minorities. The report expresses concern and recommends a more active role of the authorities in breaking the cycle of distrust and prejudice. In its previous Conclusions, the Network expressed its concern that in **Ireland**, 'the transfer of discrimination cases against publicans and hoteliers away from the Equality Tribunal and into the District Courts (section 19 of the Intoxicating Liquor Act 2003) could also result in diminishing the protection of the Traveller Community from discrimination, especially taking account the consistent resistance of the licensed trade to the effective implementation of the Equal Status Act 2000' (Concl. 2005, pp. 85-86). Indeed, it now appears that as a result of this change, there has been a steady reduction in the number of cases taken under the Equal Status Acts 2000-2004 by members of the Traveller Community. While some cases decided by the District Court during the period under review have been decided in favour of Traveller complainants the reduction in the number of cases taken in the absence of any compelling evidence of a reduced incidence of discrimination remains a cause of concern.

Article 22. Cultural, religious and linguistic diversity

The Union shall respect cultural, religious and linguistic diversity.

Protection of religious minorities

The Framework Convention of the Council of Europe on the protection of national minorities, which is to guide the interpretation of this provision of the Charter of Fundamental Rights of the European Union, provides that 'In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the

[492] P. Rodrigues & M. Matelski, *Monitor on Racism and the Extreme Right – Roma & Sinti*, special report 2004 (English translation April 2005) also available via www.annefrank.nl

national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities' (Article 20). The position adopted by the Human Rights Committee in its Concluding Observations on Greece are in keeping with this restriction where it expresses its concern over the impediments that Muslim women might face as a result of the non-application of the general law of Greece to the Muslim minority in Thrace on matters such as marriage and inheritance, and urges the State party to increase the awareness of Muslim women of their rights and the availability of remedies and to ensure that they benefit from the provisions of Greek civil law[493]. In this connection, it should be noted that the National Human Rights Commission has looked into the question as to whether the celebration by the competent Mufti of the marriage of an 11-year-old girl from the Muslim minority in Thrace and of Roma origin, in accordance with the Muslim law applicable to the members of the said minority, was in keeping with human rights. The National Human Rights Commission came to the conclusion that it was not. It emphasized that the international instruments which it believed governed such issues must give precedence to the modern conventions on human rights, such as the International Covenant on Civil and Political Rights (Article 23(2) and (3)) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Art. 16). Consequently, 'early' marriage of persons under 18 cannot be tolerated[494].

Protection of linguistic minorities

The Network shares the concerns expressed in its third report on **Austria** by the European Commission against Racism and Intolerance (ECRI), about the climate of hostility promoted against the Slovenian minority in Carinthia, and to which the attitude of the Governor of Carinthia, who has refused to implement the rulings of the Constitutional Court according certain rights to members of this group, has contributed.[495] The Network notes that as recently as November 2004, the Governor of Carinthia, Jörg Haider, refused to implement the Constitutional Court's decision from 2001 requiring a higher number of bilingual topographic signs in Southern Carinthia, in accordance with Art 7 of the State Treaty[496].

The Network acknowledges the steps adopted by **Estonia** in order to improve the implementation of the Framework Convention on the Protection of National Minorities. In particular, Estonia has abolished the language proficiency requirements for electoral candidates and has extended the validity of the certificates for Estonian language proficiency for occupational purposes that were issued under previous language regulations. After the Election Committee refused to register the list of an ethnic Russian politician, Mr Dimitri Klenski insisting that the name of the list ('Spisok Klenskogo' ('Klenski List')) should be in Estonian rather than Russian language, the Supreme Court's constitutionality chamber annulled the decision of the Election Committee not to register Mr Klenski's list as 'Spisok Klenskogo' in a 13 September 2005, illustrating a welcome change of attitude on these issues.[497] The Network regrets however that the Administrative Division of the Supreme Court in its decision of 16 June 2005 *Loksa Town Council v Chessclub Olympic* considered that the right to get answers in minority language, enshrined in the Constitution, was linked to physical persons and did

[493] Concluding Observations of the Human Rights Committee: Greece, 25/04/2005, CCPR/CO/83/GRC.
[494] See the text of the decision-opinion of the National Human Rights Commission (in Greek), on the site www.nchr.gr
[495] Third Report on Austria, European Commission against Racism and Intolerance, CRI (2005) 1, adopted on 25.06.2004, released on 15.02.2005, p. 22, available at: http://www.coe.int/T/E/human_rights/ecri/1-ECRI/2-Country-by-country_approach/ (23.11.2005)
[496] In December 2001, the Federal Constitutional Court (VfGH, G 213/01, of 13.12.2001) suspended specific regulations of the Ethnic Minority Act (*Volksgruppengesetz*) as unconstitutional because they restricted the right to bilingual names on topographic signs to communities, in which at least 25 percent of the population are members of an autochthonous minority. The ruling of the Constitutional Court suspended these regulations as unconstitutional with reference to the State Treaty of Vienna and demanded that the Federal Government passed a new Law in accordance with the treaty's requirements. The court further held that a town or community (*Ortschaft*) in an autochthonous settlement area, where over a longer period more that ten percent of the resident population belongs to a national minority are to be qualified as having a right to bilingual names on topographic signs according to the Treaty of Vienna. An emotional debate has followed this ruling, as Jörg Haider, Governor of Carinthia, made clear that he refused to act in accordance with this court decision, which of course outraged minority members.
[497] See Case no. 3-4-1-15-05, 13.09.2005, *Dimitri Klenski and Stanislav Cherepanov v. the Election Commission of the Republic of Estonia.* Published in State Gazette RT III 2005, 26, 264.

not create similar rights to legal persons.[498] It also regrets that the National Minority Cultural Autonomy Act has not been subject to any changes, despite the fact that the law, while having finally led to the establishment of one national cultural autonomy, 'is generally considered to be ineffective and impractical', as noted by the Advisory Committee of the Framework Convention for the Protection of National Minorities in its second opinion on Estonia which was made public on 24 February 2005.[499] As to the transfer to Estonian as the main language of instruction in upper secondary schools in the school year 2007-2008,[500] the Network notes the position of the Committee that 'it needs to be pursued in a manner that guarantees the maintenance and development of minority language education in secondary schools'. It is also important that the new legislative guarantees that were introduced by Estonia in 2003, ensuring that optional classes on minority languages will be offered to pupils whose mother tongue is not the language of instruction, be effectively implemented. While, in its second opinion on Estonia, the Advisory Committee recognised the need to promote and develop the Estonian language, the Advisory Committee considered that there remained a risk that the continuous reliance on a regulatory approach to promote the state language – sometimes at the expense of incentive-based voluntary methods – would lead to problems in the implementation of the right of persons to national minorities to use their language in private and in public, orally and in writing. The Advisory Committee held that the risk was accentuated by the fact that the Development Strategy of the Estonian Language for 2004-2010, approved by the Government in August 2004, while pursuing an important aim of protecting the Estonian language and while containing a number of valuable initiatives, also called for additional legal regulations on, and supervision of, the use of the state language in businesses, advertising and various other sectors. At the same time, the Committee was critical of the fact that the Strategy paid limited attention to some factors, such as the need to develop Estonian language education for adults, which were of central importance for persons belonging to national minorities. The Advisory Committee suggested that in order to ensure a balanced approach, it was important that the position of persons belonging to national minorities and their languages was more fully taken into account in this context.[501] Finally, the Network is surprised that, although in its second report on the implementation of the Framework Convention of June 2004, the Government of Estonia had indicated that municipalities that could employ parallel name(s) – in both Russian and Estonian –, the Minister of Regional Affairs of Estonia, Mr Jaan Õunapuu, rejected the request of Kallaste – a municipality on the shore of the Peipsi lake – to recognize the Russian parallel name for Kallaste, Krasnye Gory, relying on a stipulation in the Place Names Act (Kohanimede seadus) according to which parallel names cannot be used for administrative units.

Following its visit in **Slovenia** on 4-8 April 2005, the Advisory Committee of the Framework Convention for the Protection of National Minorities encouraged Slovenia to expand the scope of protection recognized by the Framework Convention to other national groups as well as of the German speaking minority and groups of Non-Slovenians from the former Yugoslavia, including non-citizens when appropriate. The Network encourages Slovenia to follow upon this recommendation.

The Network has taken note of Recommendation RecChL(2005)3 of 21 September 2005 of the Committee of Ministers of the Council of Europe on the application of the European Charter for Regional or Minority Languages by **Spain**, which recommends that the Spanish authorities take the necessary legal and practical measures to ensure that an adequate proportion of the judicial staff posted in the autonomous communities has a working knowledge of the relevant languages; strengthen the offer of education in Basque in the Basque country, in particular with regard to secondary education and technical and vocational education; strengthen the use of Basque in the private electronic media and in broadcasting in general in Navarra; and strengthen the protection of Aragonese ("Fabla") and Catalan in Aragon. On the other hand, this report calls the use of Catalan in the communication media and in the education system exemplary, although it notes that this language is used far less in legal affairs and in public administration in Catalonia. At the same time, the Network

[498] Loksa Linnavalitsus vs MTÜ Maleklubi Olympic, case no. 3-3-1-29-05, http://www.nc.ee/klr/lahendid/tekst/RK/3-3-1-29-05.html
[499] At para. 8.
[500] Ibid., para. 11.
[501] Ibid., para. 92.

stresses that in his Report on his visit to **Spain** of 10-19 March 2005 (CommDH(2005)8), Mr Alvaro Gil-Robles, Commissioner of Human Rights, reports on the situation of a group of non-permanent teachers of the Basque public education system. These teachers had received notifications from the Department of Education of the Basque government to the effect that they were to be removed from their posts on the grounds that they had not succeeded in passing the exams demonstrating they had the "linguistic profile" required for the posts they had held for several years in some cases. Those teachers alleged that the requirement to know the Basque language did not apply at the time they joined the public education system. The Commissioner shares the view of the Ararteko (Basque Ombudsman) and of the Defensor del Pueblo (Spanish Ombudsman) that the measures imposed by the Basque government are disproportionate, since they affect a group of teachers who represent 1% of all the teachers employed by the Basque administration and their presence in the education system cannot be regarded as a threat to the right of each citizen to express himself in the official language of his choice, even in the education system. The Network also finds a cause for concern in the proposal made by the municipal council of Guecho (Basque Country) to create a distinguishing mark to identify 'euskaldun' citizens (citizens speaking euskera, the Basque language, which is an official language in the Autonomous Community), in order that those citizens can be recognized, and to have shopkeepers use this distinguishing mark in order to indicate the language to be used in their shops. Such a measure would significantly increase the pressure on individuals and businesses alike to use the Basque language, at the expense of the right of each citizen to use the language of his choice in the private sphere.

The Network notes with satisfaction that in **Poland,** the Act on National and Ethnic Minorities and Regional Language, confirms the right of minorities to freely use their mother tongue in private and public life, in spreading and exchanging information and the right to learn their mother tongue or to be instructed in their mother tongue. According to the Act, traditional names of towns, villages and streets can be used alongside the official ones, but only on the territory of the communes entered into the Register of Communes, where the toponyms are used in the minority language. The Kashub language was recognised as a regional language. The regulation regarding the placement of additional names in the languages of national and ethnic minorities and in regional languages on signs and boards[502] has been introduced and entered into force 3 September 2005. The Act on National and Ethnic Minorities and Regional Language gives the members of minority groups the right to use and spell their first names and surnames according to the rules of the minority language, in particular to register their names in the Registry Office and use them in such a form on identity documents. The Act provides for the transcription of first names and surnames of persons from minorities whose languages use alphabets other than the Latin alphabet[503]. The Network is also encouraged by the fact that in **Lithuania,** the draft Law on the writing of the names and surnames in the documents is under consideration in the Parliament,[504] providing that names and surnames of the members of national minorities can be transcribed also in Latin characters (without Lithuanian characters).

Protection of ethnic minorities

The Network welcomes the presentation on 16 November 2005, by a joint Finnish-Norwegian-Swedish-Sami expert commission, of a proposal for a treaty between the three countries about the rights of the indigenous Sami people. The draft includes the recognition of the Sami people as the indigenous people of **Finland**, Norway and **Sweden**, and provisions on the Sami people's right of self-determination, on land rights, on consultation and co-deciding, on linguistic, cultural and other rights of the Sami, and on the establishment of a joint treaty monitoring body. According to the draft treaty, consent by the three national Sami parliaments would be required for the entry into force or

[502]Rozporządzenie Ministra Infrastruktury o umieszczaniu na znakach i tablicach dodatkowych nazw w językach mniejszości narodowych i etnicznych oraz językach regionalnych (Dz.U. Z 2005 r. nr 157, poz. 1320) [The regulation of the Minister of Infrastructure regarding the placement of additional names in the languages of national and ethnic minorities and in regional languages on signs and boards (The Official Journal of 2005, No. 157, item 1320)]
[503] Article 7 of the Act
[504] 2005 09 27; Vardų ir pavardžių rašymo dokumentuose įstatymo [the draft Law on the writing of the names and surnames in the documents]//2005, XP-689A.

amendment of the treaty. Work on the proposed Sami rights treaty will continue between the Presidents of the three Sami Parliaments and the Ministers responsible for Sami affairs in the three countries. The Network expresses the hope that parliamentary consideration will be possible in 2007.

The Network welcomes the fact that in **Greece** the new Immigration Act[505], for the first time, attaches particular importance to the social integration of third-country nationals, especially those whose jobs are not temporary, as well as of their family members (as part of family reunification), including second and third-generation immigrants and refugees. Article 66 of the Act provides for the implementation of an Integrated Action Programme by the Ministry of the Interior, in collaboration with the relevant government departments. The guiding principles of this Programme underline the importance of respecting diversity and the religious and cultural characteristics of the third-country nationals in question, the prevention of all forms of discrimination, the promotion of equal treatment in all areas of economic, social and cultural life, partnership in the implementation and evaluation of social integration policies, and the creation of consultation mechanisms. At the same time, the Programme provides for Greek language learning and for introductory classes on the history, culture and way of life of Greek society.

Article 23. Equality between men and women

Equality between men and women must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2(1), 3 and 26 of the International Covenant on Civil and Political Rights (1966), by Articles 3 and 7, a), i) of the International Covenant on Economic, Social and Cultural Rights (1966), by the Convention on the Elimination of All Forms of Discrimination against Women (1979), by ILO-Convention (n° 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951), by ILO Convention (n° 111) concerning Discrimination in Respect of Employment and Occupation (1958), by Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by Article 5 of Protocol n° 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1984), by Protocol n° 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (2000, in force from 1 April 2005), by Article 8 of the European Social Charter, by Article 1 of the Additional Protocol of the European Social Charter of 1961 (1988), and by Articles 8 and 20 of the Revised European Social Charter. The Convention on the Elimination of All Forms of Discrimination against Women has recently been reinforced by the adoption of an Optional Protocol (2000), which improves the international protection of rights which are equivalent to those of Article 23 of the Charter.

EU policy as regards equality between men and women seeks to adopt a comprehensive approach which includes legislation, mainstreaming and positive actions. This policy aims at the elimination of inequalities and the promotion of gender equality throughout the Community in accordance with Articles 2 and 3 EC (gender mainstreaming) as well as Article 141 EC (equality between men and women in employment and occupation) and Article 13 EC (fight against sex discrimination within and outside the workplace). The Commission recently adopted a roadmap for gender equality for the period 2006-2010 (COM(2006)92) which seeks to accelerate progress towards real equality between women and men. The realization of this fundamental right should also be seen as a necessary condition for the fulfilment of the objectives of the Community in terms of growth, employment and

[505] Νόμος 3386/2005, 'Είσοδος, διαμονή και κοινωνική ένταξη υπηκόων τρίτων χωρών στην Ελληνική Επικράτεια' [Loi no 3386/2005, 'Entry, residence and social integration of third-country nationals on the Greek territory'].

social cohesion.

Gender discrimination in work and employment

Despite the important progress which has been achieved in recent years in order to ensure the elimination of all forms of discrimination between men and women in work and employment, certain problems remain. The 2005 Report of the European Commission on equality between women and men (COM(2005)44) indicates that there is little evidence in closing the gender pay gap, which remains stable in the EU-15 at approximately 16% (Eustat estimate, 2003). The estimated figure for EU-25 is slightly lower (15% when the pay gap in the new Member States has been taken into account). Gender segregation in the labour market also shows slow progress and remains high both at occupational (17.5%) and sectoral (25.2%) levels.

In **Austria**, the Report on the Social Situation 2003-2004 indicates that women have a 14% greater risk of falling below the poverty line than men506. Poverty amongst women is principally related to their low earnings which translate into low pensions, unemployment and social assistance benefits. Within the old European Union of 15 Member States, Austria has the third highest 'gender income gap.'[507] In its Joint Employment Report 2004/2005 the European Commission admonishes Austria for its insufficient efforts to reduce the income gap between women and men.[508] The worst affected by the gender pay gap are female blue-collar workers with an average gross annual income that does not amount to even half of their male colleagues' income.[509] In Denmark, as noted by the Committee on Economic, Social and Cultural Rights, gender inequalities are persisting, particularly with regard to wages (a differential of 12-19 %) and the low participation of women in certain levels of decision-making[510]. In Spain, it emerges from an observation issued by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization[511] - in response to comments sent by the Union Confederation of Workers' Committees – that labour inspections with respect to equal remuneration are insufficient both in quantity and in quality, particularly as regards the detection of indirect discrimination which might exist with regard to remuneration. Moreover, although Spain is the country where female employment has seen the greatest increase in the European Union (1.9% increase in 2004 compared to the Community average of 0.2%), the level of female employment is still far behind that of men;[512] furthermore, a survey conducted by IESE and Adecco on the labour market (figures for the 4th quarter of 2004 and the 1st and 2nd quarters of 2005) shows that women's salaries in Spain are 18% lower than those of men. In **Greece,** as was observed by the European Committee of Social Rights in its examination of the compliance by this country with Article 1 of the Additional Protocol of 1988 to the European Social Charter, the gaps in the levels of employment and unemployment between men and women were the biggest in the European Union during the reference period (2001 and 2002), while the proportion of women holding positions of responsibility, although already low, had diminished even further. The Network recalls in this respect that the European Committee of Social Rights recommends an integrated approach towards equality between men and women, which should form part of a broad strategy covering all aspects of the labour market, including remuneration, career advancement, upgrading of occupations and of the education system, and asked the Greek government whether it plans to amend legislation in order to introduce business plans aimed at achieving greater equality in

[506] „Armut in Österreich' in *Bericht über die Soziale Lage*, Bundesministerium für Soziale Sicherheit, Generationen und Konsumentenschutz, 2005, pp. 213.
[507] Background document: Commission staff working paper revised following bilateral and EMCO meetings, COM(2005)13 final, available at: http://europa.eu.int/comm/employment_social/employment_strategy/employ_en.htm (20.11.2005)
[508] Joint Employment Report 2004/2005, Council of the European Union (Employment, Social Policy, Health and Consumer Affaires), 09.03.2005, available at: http://register.consilium.eu.int/pdf/en/05/st07/st07010.en05.pdf (20.11.2005)
[509] „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues' published by FIAN Austria & Protestant Development Co-operation, September 2005, p. 37.
[510] Denmark. 14/12/2004. E/C.12/1/Add.102.
[511] CEACR: Individual Observation concerning Convention No. 100, Equal Remuneration, 1951. Spain (ratification: 1967) Published: 2005
[512] *National Statistical Office,* Report of 9 December 2004.

the public and private sectors. In **Sweden,** notwithstanding the great number of initiatives which exist in the area of gender equality, both the gap in wages between women and men, in the private and in the public sectors, and the gender segregation in the labour market, both persist.[513] In the **United Kingdom**, the House of Commons Trade and Industry Committee has found that the tendency of men and women to work in different occupations, and the associated tendency of predominantly female occupations to be lower paid and lower valued than men's, has had a major effect on the gender pay gap. Such occupational segregation also deprived employers of potential recruits—a factor of particular importance in areas of skills shortages. Four elements in particular appear to contribute to occupational segregation: the lack of knowledge about career options that prevents young people from choosing non-traditional occupations; difficulties in accessing training in atypical areas; difficulties with alien or sometimes even hostile business cultures; and the unavailability of part-time or flexible working in the higher-paid occupations and at senior levels in all occupations (*Jobs for the girls: The effect of occupational segregation on the gender pay gap*, HC 300-I, 7 April 2005).

Specific areas of concern are the following:

- As illustrated by the case of **Austria,** the promotion of more flexible working times may lead to an increase in the number of women performing badly paid part-time jobs[514] or working under atypical or minimum employment contracts[515] (*geringfügige Beschäftigung*). Flexibility in employment should not divert attention from the need to spend more resources on the establishment of child care facilities[516]. Moreover, the child care benefit model (*Kindergeldmodell*) may appear counter-productive and discourage the integration of women into the labour market, as it provides incentives to keep women from gainful activity for as long as possible while lowering their chances of a successful re-entry into the job market. Non-governmental organisations have concluded that the last five years have been a period of social descent for women and recommends i.a. the introduction of a minimum wage of €1,000 per month. Particularly women, who are overrepresented in low income sector, would benefit from such a measure. The current government has welcomed this model in principal but shifted the responsibility to the social partners to renegotiate relevant collective agreements. [517]

- The Network shares the view of the Ombudsman that in **Cyprus,** the regulations on the transfer and /or assignment of teachers are discriminatory.[518] The said regulations identify two groups of persons who may be allocated points allowing them to be transferred to a school of their choice: those who have children and those who are married. Thus, those who have children, either married or not, have points; so do those who are married, with or without children. Whereas giving points to those who have children is considered a justifiable positive measure for the purpose of protecting motherhood and children,[519] giving points to married people who have no children as opposed to those who are unmarried with no children constitutes a violation to the right to equality as is safeguarded in

[513] SOU 2005:66, p. 172 and SOU 2005:73, pp. 270-274.
[514] According to a report prepared by NGOs for the UN Committee on economic, social and cultural rights ('Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues' published by FIAN Austria & Protestant Development Co-operation, September 2005), 52% of working women with children under the age of 15 do not earn enough to secure a minimum standard of living. Furthermore, the report points out, that the risk of poverty amongst working single mothers doubled from 14% to 28% in the period from 1999 until 2003/2004. Low female income leading to small pensions has a direct impact on the high number of female pensioners living below the poverty line. While pensioners are entitled to income support payments ('*Ausgleichszahlungen*') if their pension benefits are below a certain minimum level, no such income support exists with regard to emergency assistance (*Notstandshilfe*). Due to low income levels unemployed women are particularly affected by this lack of adequate social security.
[515] Employment with an income equal to or lower than € 323.46 for 2005.
[516] 'Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria', cited above. Across Austria, child care places presently only exist for 8% of children under the age of three.
[517] „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues' published by FIAN Austria & Protestant Development Co-operation, September 2005, p. 12, 27.
[518] A.K.I. 11/2004, 14 June 2005.
[519] Ibid., pp. 3-4.

the Constitution of Cyprus.[520] It may also result in indirect discrimination based on sex, prohibited by the *Equal Treatment in Work and Employment Law* L. 58(I)/2004,[521] because it singles out those who are not married and have no children due to their sexuality. Recognizing to married people a more favourable treatment than to unmarried ones also be be indirect discrimination on the grounds of sexual orientation, in a context where marriage is not open to same-sex couples. The regulations should be amended.

- In **Hungary,** a Report prepared by the Foundation for the Women of Hungary (Magyarországi Női Alapítvány - MONA)[522] evaluates that the gross average income of women is 19 % lower than men's. Women are overrepresented in poorly paid state sector jobs such as healthcare and education, and are underrepresented in national politics. The elaboration of national gender equality machinery with an independent and distinctive structure and sufficient human and financial resources, together with a comprehensive strategy or action plan on gender equality, would be advisable in order to tackle this situation. In the **Slovak Republic**, where a similar situation exists, the absence of an intersectoral strategy for equal treatment between men and women, which would coordinate the different departments and the activities of the regional units with the central government, would be especially useful[523]. The existing policies concerning gender equality – the National Action Plan for Women and the Conception of Equal Opportunities for Men and Women – still lack both adequate funding and a fully-integrative (mainstreaming) approach that would take into consideration all areas of life and which would be supported by appropriate institutional mechanisms.

- In **Poland,** the Ombudsman recommended the introduction of a flexible retirement age for women, because the currently binding retirement age, which is lower for women than for men, results in women receiving lower pensions.[524] Moreover the Open Society Institute report evaluated that women earn 83% of men's salaries. The report stresses that Poland does not have a transparent system that would enable to compare the salaries of men and women. According to the report there are no programmes encouraging men to play a greater role in family life, to change their views on the division of duties within the family or to take advantage of parental leave. **Lithuania** faces problems of a similar nature, in particular the lack of techniques for the evaluation of the implementation of this principle in the professional field. A methodology should be developed to evaluate jobs in term of equal pay for equal work and work of equal value.

- In **Portugal,** a research study published by the Bank of Portugal (Banco de Portugal) in the Autumn Economic Bulletin, concerning the wages in the public sector, demonstrates not only the persistently strong payment segmentation in comparison with the private sector, but also that, although women may get higher salaries than men, they have an inferior return compared to men's in what concerns individual characteristics, which increases when we move up in the hierarchical scale, which does not compensate their major endowment in terms of human capital, especially higher qualifications/studies. In addition, it concludes that there is a greater predominance of men in the positions connected to the attribution of pay awards (better relative remuneration for a certain level of qualifications).

- In its Concluding Comments on the combined fourth and fifth periodic report of **Ireland** on the implementation of the International Convention on the Elimination of All Forms of Discrimination against Women, the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) highlighted a number of positive developments in the State (including the adopting of the Equal Status Act, 2000 and the increase in the level of employment for women between the ages of 15 and 64), but also raised concerns about a number of issues within Irish society and made proposals for

[520] Ibid., p. 4.
[521] *Ίσης Μεταχείρησης στην Απασχόληση και την Εργασία Νόμος,* N. 58(I)/2004.
[522] www.mona-hungary.org
[523] See: Report of the Open Society Institute Network Women's program, "Equal opportunities for women and men – monitoring law and practise in new member states and accession countries of the European Union", April 2005.
[524]General Approach to the Minister of Social Policy of 11 May 2005, No. RPO/476111/04/III

improvement.[525] The CEDAW Committee noted in particular that the persistence of traditional stereotypical views about the social roles of women, which were reflected in the 'male-orientated' wording of Article 41.2 of the Constitution, were adversely affecting women's education choices and employment patterns. In response to this the Committee recommended that the State take additional measures to eliminate such attitudes, including through ongoing awareness-raising campaigns aimed at both women and men. The Committee also recommended that the All-Party Oireachtas Committee on the Constitution take the CEDAW into account in considering any changes to Article 41.2 of the Constitution.[526] The CEDAW Committee also noted the high levels of violence against women and girls, the low prosecution and conviction rates of offenders, the high withdrawal rates of complaints and the inadequate funding for organisations that provide support and services to victims ; it therefore recommended that the State take 'all necessary measures to combat such violence', including the sustained training and awareness for public officials and improved monitoring of the incidence of violence against women.[527] As it found that there existed no comprehensive policy to tackle the trafficking of women and girls into Ireland, coupled with the absence of sufficient statistical data on the problem, the Committee recommended that the State adopt such a policy, which should include appropriate legislation to punish those involved in such trafficking.[528] Finally the Committee noted the 'significant under-representation of women in elected political structures', in responses to which the Committee recommended that the State adopt sustained measures, including affirmative action.[529]

There are also important positive developments to be reported. In **Austria**, in August 2005, the Supreme Court ruled for the first time that protection against discrimination on the ground of gender also applies during a trial period (*Probezeit*), so that an employer seeking to terminate a trial period due to the employee's pregnancy will be violating the principle of equal treatment as stipulated in the Equal Treatment Act[530] (*Gleichbehandlungsgesetz*). In **Estonia,** after the Riigikogu had adopted the 2004 Gender Equality Act,[531] the Government adopted on 16 February 2005 the 'Basic Regulation of the Gender Equality Council'.[532] The Council is attached to the Ministry of Social Affairs and it is an advisory body in matters of gender equality. On 10 March 2005, the Government adopted the 'Basic Regulation concerning the Gender Equality Commissioner',[533] specifying the tasks of the newly created institution, the Gender Equality Commissioner. The Amendments to the Act on Equality between Men and Women entered into force in **Finland** on 1 June 2005 (*Laki naisten ja miesten välisestä tasa-arvosta annetun lain muuttamisesta 232/2005*). Apart from the changes which seek to implement in Finland the requirements of Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions[534] as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002,[535] these amendments include provisions concerning equality plans, drawn up by workplaces employing 30 or more employees, and dealing with the division of workplace responsibilities among men and women, the mapping pay distribution and ways to tackle gender-based inequalities ; the carrying out of workplace equality plans is overseen by the Ombudsman for Equality, who is empowered to set deadlines for creating them. In **France,** a bill on equal pay for men and women was adopted after its first reading by the Senate, after amendments, on 12 July 2005.[536] The bill centres on four objectives: achieve the elimination of all pay differentials between men and women within the next five years; reconcile work and private life; facilitate access for women to the deliberation bodies in companies and to industrial tribunals; finally,

[525] UNCEDAW, Concluding Comments: Ireland, adopted on the 22 July 2005 CEDAW/C/IRL/4-5/CO.
[526] *Ibid* at paras.24-25.
[527] *Ibid* at paras.28-29.
[528] *Ibid* at paras.30-31.
[529] *Ibid* at paras.32-33.
[530] OGH, 31.08.2005, GZ 9 ObA 4 / 05m.
[531] Soolise võrdõiguslikkuse seadus, RT I 2004, 27, 181.
[532] Soolise võrdõiguslikkuse nõukogu põhimäärus, VV, RTI, 23.02.2005, 12, 53.
[533] Soolise võrdõiguslikkuse voliniku põhimäärus, VV, RTI, 15.03.2005, 14, 73.
[534] OJ L 39 of 14.2.1976, p. 40.
[535] OJ L 269 of 5.10.2002, p. 15.
[536] Bill on equal pay for men and women, No. 2214, tabled on 24 March 2005, to be consulted on Internet site http://www.assemblee-nationale.fr

accelerate access for women and girls to vocational training and apprenticeship by urging the industrial partners to promote coeducation. In **Greece,** the Council of State considered, in plenary session, that the quotas restricting the participation of women in exams for the recruitment of border guards are contrary to the Constitution. Although, according to the Council of State, even after the constitutional review of 2001[537], the legislator may provide for certain 'derogations' from or 'exceptions' to the principle of equality between men and women, those must be established by a specific legislative provision on the basis of definite and appropriate criteria, allowing the persons concerned, and in the last instance the courts, to verify, taking into account also the 'common experience', whether the said 'derogations' or 'exceptions' are fully justified by the nature or conditions of the job in question and are absolutely necessary and appropriate to achieve the objective being pursued[538]. In **Italy,** a number of actions have been adopted which aim at increasing the entry and the continued presence of women in the labour market : these include the creation of centres for female employment; the preparation of ways for entry/re-entry into the labour market in case of special disadvantage; the preparation of ways of desegregated working insertions; the identification of innovative models of organization aimed at favouring conciliation between family and professional life; and measures aimed to favour the creation of self-employed entrepreneurial jobs for women. In **Lithuania,** the Programme on the Equal Opportunities of Women and Men for the years 2005-2009[539] seeks, in particular, to change the stereotypes regarding men and women in employment, and to facilitate the conciliation between family and professional life. In the **Slovak Republic,** the *Odbor rodinnej a rodovej politiky* [Section of Family and Gender Policy] of the Ministry of Labour, Social Affairs and Family in cooperation with French and German partners prepared a project named *Posilňovanie administratívnych kapacít v oblasti gender mainstreamingu* [Strengthening of the administrative capacities in the area of gender mainstreaming], focused on support of gender equality in the public bodies of the Slovak Republic. In **Sweden**, the Committee of Inquiry on Gender Equality Policy presented its report SOU 2005:66, *Makt att forma samhället och sitt eget liv-jämställdhetspolitiken mot nya mål* (Government Report SOU 2005:66, The Power to shape society and ones own live-the equality policy towards new objectives) on 1 August 2005, suggesting in particular that a gainful employment tax allowance for single parents be introduced, in order to lower the threshold and marginal effects for lone parents with low incomes and to strengthen the group that is financially vulnerable.

Positive actions seeking to promote the professional integration of women

One answer to situations of structural imbalance between men and women in employment consists in the adoption of positive action schemes, as are allowed under Article 141 § 4 EC and Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions as amended by Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, cited above. In **Ireland** for instance, the Minister of State for Equality instructed all State boards to put in place measures to ensure that at least 40% of its members were women, which comes as part of a Government decision to ensure equal gender representation on State boards. In **Spain,** the Consejo General del Poder Judicial [Spanish Council of the Judiciary] adopted an agreement aimed at promoting greater participation and presence of women in top positions of the judiciary. The Network notes that 60% of the Spanish judges under the age of 40 are women, who encounter considerable difficulties in trying to gain top positions in the judiciary, as some figures show: the Supreme Court numbers 4 women and 69 men; in the Audiencia de Madrid, the ratio is 2 to 95; the situation is better

[537] Article 116(2) of the Constitution, revised in 2001, expressly establishes positive measures in favour of women with a view to promoting *de facto* equality between men and women and no longer provides for the possibility of derogations from the principle of equality 'for serious reasons in the cases expressly provided for by law'.
[538] Council of State [Συμβούλιο της Επικρατείας], judgment no. 1986/2005 (plenary).
[539] 2005 09 26; LR Vyriausybės nutarimas Nr. 1042 Dėl Valstybinės moterų ir vyrų lygių galimybių 2005-2009 metų programos patvirtinimo' [The resolution of the Government of the Republic of Lithuania No. 1042]//Valstybės žinios, 2005, Nr. 116-4202.

in the national Audiencia, with 19 women and 37 men.[540]

Such initiatives appear to be generally welcomed by business, especially as, under the case-law of the European Court of Justice, they should not lead to preferring a woman above a man unless the two candidates are equally qualified and the preferential treatment is not absolute and unconditional, but instead allows for the male candidate to put forward certain arguments in favour of his application. In the **Netherlands,** in May 2005 the *Nota Voorkeursbehandeling* [White Paper on Preferential Treatment] was submitted to Parliament (*Kamerstukken II,* 2004-2005, 28770, No. 11). Dutch legislation allows for preferential treatment of women and members of ethnic minorities (and, since 2003, of persons with disabilities and chronically ill) but it does not oblige to do so. Research had shown that the various instruments of preferential treatment had a positive impact on the position of women and members of ethnic minorities at the labour market. Two out of three employers were well aware of the applicable regulations, and one out of three is actually pursuing these policies. Of all companies that have recruited personnel under these regulations, 84% indicated to support the policies.

It is especially important to note that positive action measures may be adopted under many different forms, and should certainly not be limited to the imposition of rigid 'quotas' or quantitative targets, with the risk that such measures be considered a violation of the principle of equal treatment between men and women. In **Poland** for instance, the National Programme for Women (Krajowy Program Działań na Rzecz Kobiet)[541], established by the Government, aims at improving the professional integration of women through the increase of women's access to information on employment opportunities**;** efficient professional training, advisory and employment agency services, including outside their typical areas of employment, preparation and performance of professional training for women; and publication of information on the entrepreneurial activities, as well as other activities included in the National Programme, mainly dealing the fight against discrimination and improving the possibility to consolidate motherhood and a professional career[542]. In **Austria**, a five point programme aiming at better integrating women into the labour market organised was presented, including :[543] specific measures for women by the Employment Service (*Arbeitsmarktservice, AMS*) to enhance access to counselling in the regions ; raising the awareness of young women seeking employment in order to avoid gender segregation in male dominated professions ; qualification measures for women who are particularly at risk of unemployment ; training and qualification measures in the expanding field of health professions ; improving the conditions for combining family life and work through the adequate opening hours of childcare institutions. Another incentive for women joining the labour market is the Women-Business-Mentoring-Programme, initiated in 2004, which aims at supporting women re-entering the labour market as well as women seeking employment for the first time : in 2004, more than 1000 mentoring couples have been counselled at the so-called 'mentoring points', which have been established in all 9 federal provinces. Another interesting development in **Austria** is the initiative adopted in April 2005 by the Federal Minister for Health and Women Maria Rauch-Kallat, who sought to raise awareness about the importance of gender sensitive budgeting and the impact of incentives and other opportunities in promoting equal treatment policies,[544] and who commissioned a pilot study for the development of methodological tools to implement gender budgeting in the Austrian administration.

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[540] These figures are taken from the *Informe del Consejo General del Poder Judicial sobre la estructura demográfica de la carrera judicial a 1 de enero de 2005* [Report of the Council of the Judiciary on the demographic structure of the judiciary on 1 January 2005].

[541] http://www.rownystatus.gov.pl/pl/index.php?m=artykul&art=65 (7.11.2005)

[542] Informacja Rządu dotycząca realizacji Krajowego Programu Działań na Rzecz Kobiet – II etap wdrożeniowy [Government information concerning the implementation of the National Programme for Women - the second phase of implementation] http://www.rownystatus.gov.pl/pl/index.php?m=dokumenty&kat=12 (07.11.2005)

[543] Runder Tisch zu „Frauenbeschäftigung und Gleichstellung am Arbeitsmarkt', 29.06.2005, further information available athttp://www.bmgf.gv.at/cms/site/detail.htm?thema=CH0267&doc=CMS1121933419670 (11.11.2005). '5 Punkte-Programm zur Frauenbeschäftigung' (29.06.2005), available at: http://www.bmgf.gv.at/cms/site/attachments/3/4/0/CH0267/CMS1121933419670/5_punkte_programm.pdf (11.11.2005).

[544] „Gender Budgeting Fachtagung. Strategieentwicklung für eine geschlechtergerechte Budgetgestaltung', 25.04.2005, further information available at: http://www.bmgf.gv.at/cms/site/themen.htm?channel=CH0101 (11.11.2005).

Participation of women in political life

A reinforced presence of women in political life is an essential pre-requisite for a genuinely democratic society. National authorities at all level should take measures to ensure a balanced participation of women and men in all spheres of decision-making, including in the economic sphere. However, the level of participation of women in political life remains at unacceptably low levels in many Member States of the Union. In **Denmark,** only 9 % of mayors are women and that only 17 % in municipal council's are female. In **Italy,** the female representation remains one of the lowest of Europe: in the national parliament the percentage of women is only 11,5% in the Lower House (Chamber of deputies) and 8,1% in the Upper House (Senate). In **Poland,** women were only 22 % of persons holding senior positions in the previous government; only one minister was a woman. Following the parliamentary elections that took place on 23 September 2005, 93 women were elected to the parliament, constituting about 20% of all parliamentarians. In **Portugal**, at the most recent local elections of October 2005, only 6,2% of women were elected as presidents of municipalities, which represents 19 women among a total of 308 posts. Moreover, the comparison with the previous results (2001) show an increase of only 0,8 %. In **Luxembourg,** although women make up 51% of the Luxembourg population, they still remain widely underrepresented in the world of politics: the participation rate is 20% at government level, 23.3% in the House of Representatives, 15% on the municipal councils and 28% on the municipal advisory committees[545]. In the **Netherlands**, although on the national level the level of participation of women in politics is quite high, the local level is lagging behind: the percentage of women among mayors is 20% and among city aldermen there has been a decrease from 20 to 16 % in the last twelve years[546]. In the **Slovak Republic,** the President of the Slovak Republic appointed on 17 October 2005 a new Minister of Labour, Social Affairs and Family (Mrs. Iveta Radičová) – the first and the only woman in the Slovak Government at present. Since 8 February 2006 there are two women in the Slovak Government, but the number of women in Parliament decreased from 26 to 24 of the 150 members of Parliament. There is still only one woman among 18 members of the *Súdna rada Slovenskej republiky* [Judiciary Council of the Slovak Republic] and only one woman among 11 members of the Constitutional Court of the Slovak Republic. Only 26 of the 150 members of Parliament are women. In **Spain**, although the presence of women in the parliaments of the Autonomous Communities has increased since the last elections in the Autonomous Communities (37.8% women on average)[547], the level of representation of women remains very low in Catalonia (29.6%) and Murcia (29.1%). In the national legislative chambers, too, there still remains much progress to be made: the House of Representatives numbers 36% women, while in the Senate the level is as low as 25%.

The Member States should pursue their efforts in this field. The Network regrets that in **Luxembourg**, although a bill (No. 5252) had been tabled in the House of Representatives on 27 November 2003 on action to promote equal opportunity between men and women at the municipal level, and amending the Municipal Act of 13 December 1988, this bill could not be finally adopted before the local elections of 9 October 2005. In its Concluding Observations relating to **Italy**, the Committee on the Elimination of Discrimination against Women encouraged the adoption of measures to increase the representation of women in elected and appointed bodies, in the judiciary and at international level. Deputies and Senators have however recently rejected the part of the electoral reform which introduced the so-called 'pink quotas', foreseeing that a certain proportion of women was required to be present among candidates. The Network expresses the hope that the Governmental Bill 18 November 2005 'Schema di disegno di legge recante Disposizioni in materia di pari opportunità tra uomini e donne nell'accesso alle cariche elettive della Camera dei deputati e del Senato della

[545] Commission on the Family and Equal Opportunity, Report No. 5252 (3) of 29 June 2005, quoting the report of the National Women's Council of Luxembourg, *Les femmes dans les commissions consultatives communales au Luxembour*g – 2001, January 2002.
[546] Ministry of Social Affairs and Employment, press release 05/171.
[547] The Autonomous Parliaments with the best female representation levels are those of Castilla-La Mancha with 54% women, Basque Country with 50% women, the Valencian Community with 43.8%, the Cantabrian Community with 43.5%, and Andalusia with 39.45%.

Repubblica' [Norms on equal opportunities between men and women in the access to electoral offices], which foresees that no sex can be represented on every list of candidates in a proportion higher than 2/3 and that no sex can be represented on every list in a succession higher than three in the first election and higher than two in the second election, and provides that political parties which do not comply with these provisions are subjected to financial penalties in the first election after their entry into force and to invalidation of the list in the second election, will be adopted shortly.

Article 24. The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

The Network of Independent Experts is preparing a Thematic Comment (n°4) on the rights of the child in the European Union. The developments relating to this provision of the Charter will be discussed extensively in that Thematic Comment, to which we refer.

Article 25. The rights of the elderly

The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

This provision of the Charter must be read in accordance with the requirements formulated by Article 23 of the Revised European Social Charter, or by Article 4 of the Additional Protocol to the European Social Charter of 1961 (1988), which have the same content. These provisions guarantee the right of elderly persons to social protection.

Participation of the elderly to the public, social and cultural life

The European Committee of Social Rights reads Article 23 of the Revised European Social Charter and Art. 4 of the 1988 Additional Protocol to the European Social Charter as requiring the provision of adequate resources to the elderly, by pensions or other financial assistance where they perceive no salary, or by an adequate level of wages; the provision of services and facilities, including home help services and day care centres in particular for elderly persons suffering from Alzheimer's disease; health care programmes and services specifically aimed at the elderly; the inclusion of the needs of elderly persons in national or local housing policies; the availability, accessibility and quality of residential institutions for elderly persons; and the possibility for elderly persons, their families, and social and trade union organisations to make complaints about care and treatment in the institution.

The European Committee of Social Rights has adopted the view that these provisions also require the introduction of non-discrimination legislation protecting elderly persons against discrimination on grounds of age (Concl. 2003, vol. 1 (Italy), p. 314). It is of course essential in this respect that the full potential of the prohibition of age-based discrimination as stipulated in Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation be explored.[548] In the judgment it delivered on 22 November 2005 in Case C-144/04, *Mangold v. Helm*, upon a request

[548] OJ L 303 of 2.12.2000, p. 16.

for a preliminary ruling from the Arbeitsgericht München (Germany), the European Court of Justice noted that "Directive 2000/78 does not itself lay down the principle of equal treatment in the field of employment and occupation (...) the source of the actual principle underlying the prohibition of those forms of discrimination being found (...) in various international instruments and in the constitutional traditions common to the Member States" (at para. 74-75). This should be seen as an encouragement to read the prohibition of age-based discrimination in employment and occupation in the widest way possible, in accordance with the approach traditionally adopted by the European Court of Justice in the interpretation of directives which seek to implement fundamental rights[549].

Much still needs to be done in order to improve the position of the elderly on the employment market, in conformity with the objectives of the European Employment Guidelines. This is not simply a macro-economic objective, which should be pursued in order to ensure the sustainability of our social protection systems. It is also a human rights issue. In its Concluding Observations on **Denmark**[550] for instance, the Committee on Economic, Social and Cultural Rights is concerned about the level of long-term unemployment affecting men aged 55-59. The Network is therefore concerned that in **Estonia**, while para. 10 of the Labour Contract Act states that workers may not be fired on the basis of their age, para. 86 point 10 of the same Act stipulates that (pension) age can be a legal reason for the employer to fire the worker. This latter provision should be amended as soon as possible, and the Network welcomes in this respect the initiative adopted by the Estonian government on 25 November 2005. Until this amendment enters into force, as suggested by the Chancellor of Justice, para. 10 should have priority over paragraph 86 point 10 of the Labour Contract Act, as only this approach fulfils the objective of Council Directive 2000/78/EC. Indeed, any form of pressure exercised on employees having arrived at the age of pension or approaching that age, which could be seen as encouraging them to leave employment, should be considered as suspect. In **Lithuania** for instance, the Office of the Equal Opportunities Ombudsman of the Republic received a written complaint from the Chairman of the Trade Union of Engineers of the company AB 'Vilniaus Vingis', requesting the Ombudsman to investigate whether the Decree of January 21, 2005 No. 11 of the Chief Executive of AB 'Vilniaus Vingis' was not discriminatory towards the employees of the company, insofar as this Decree, requesting that the employees of retirement age and those close to that age be questioned about their future plans, led to suggesting that those employees should leave their jobs[551].

The Network welcomes certain promising initiatives which contribute to the implementation of the right of the elderly to a dignified life. In **Cyprus,** a National Plan for the Elderly is being discussed at the Ministry of Labour and Social Security, which seeks to improve the provision of health services for the elderly, access to work and education for life.[552] The Ministry of Labour and Social Security also adopted a Plan for Encouraging Families to Care for their Elderly and Disabled Persons.[553] The plan allows families can take a fund of up to £6000 CYP for the purpose of altering buildings and making any other arrangements so that they can be able to keep their elderly or disabled in the family home. The Ministry also adopted a Subsidisation Plan for the Self-Employment of the Elderly, which allows people over 63 to be granted the amount of £1500 CYP for the purpose of acquiring equipment and/or materials useful for their new job. Indeed, according to information received by the Ministry of Labour and Social Insurance,[554] the Self-Employment Scheme for Older Persons was enforced on 30 November 2001. The Scheme targets persons of 63 years of age and over, whose income does not exceed £400 CYP per month for one person or £500 CYP per month for a couple. It aims at motivating older persons to enter, re-enter or remain in the labour market through self-employment. In **Austria**, the Federal Ministry of Social Security, Generations and Consumer Protection published a study on education facilities for elderly people in November 2005, which was presented at two

[549] ECJ, 20 March 1984, *Razzouk and Beydoun v. Commission of the EC*, joined cases 75 and 117/82, ECR, p. 1509; ECJ, 30 April 1996, *P. v. S. and Cornwall County Council*, C-13/94, ECR, p. I-2143 (para. 19 and 20); Opinion of Advocate General Tizzano of 8 February 2001, ECJ, 26 June 2001, *BECTU v.* Secretary of State of Trade and Industry, C-173/99, para. 28.
[550] Denmark. 14/12/2004. E/C.12/1/Add.102. Para. 15
[551] 2005 06 14; The decision of The Equal Opportunities Ombudsperson No. (05)-SN-50.
[552] Fileleftheros Newspaper, 20 February 2005.
[553] *Ετήσια Έκθεση, Υπουργείο Εργασίας και Κοινωνικών Ασφαλίσεων 2004,* p. 90.
[554] Note by the Ministry of Labour and Social Insurance, 3 November 2005.

workshops with the topic 'aging-education-learning'.[555] Furthermore, examples of good practices were collected and recommendations made for future measures. Under the title 'Nestor 2005' the Ministry awarded a prize to companies, which adopted positive measures for older employees.

Finally, the Network notes that the reports on the elderly issued in the **Netherlands** by the *Raad voor Maatschappelijke Ontwikkeling* [Council for Societal Development], an advisory council of the Government, on 12 January 2005[556] emphasize that instead of pressuring the elderly to keep on working and of paying for elderly-targeted amenities, the Government should use different strategies. Isolation of the elderly is countered much more efficiently by enlarging the possibilities for part-time pensions which in turn engenders better opportunities for volunteer work.

The Network emphasizes however that access to employment is simply one means, not the only means, of enabling elderly persons to remain full members of society for as long as possible, as formulated by the European Social Charter. Under Article 13(1) EC, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on age. This power is not limited to the spheres of employment and occupation. The Commission should consider making a proposal outlawing age-based discrimination beyond the scope of application of Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation. The fact that not all the Member States of the Union are bound by Article 4 of the Additional Protocol to the European Social Charter or by Article 23 of the Revised European Social Charter should not be seen as an obstacle to bringing about this protection of the elderly against discrimination and, indeed, could instead contribute to the fulfilment of the objectives of the Community, in particular to the free movement of the citizens of the Union. All the Member States of the Union are bound by Article 26 of the International Covenant on Civil and Political Rights. By adopting a Community directive prohibiting discrimination on the grounds of age also in areas such as education, social protection including social security and healthcare, social advantages and access to and supply of goods and services, the Community would be facilitating the compliance by all the Member States with their international obligations and would contribute to the protection of the elderly throughout the Union.

The right of the elderly to social protection and the possibility for the elderly to lead independent lives in their familiar surroundings

Article 4 of the Additional Protocol of 1988 to the European Social Charter, which corresponds to Article 23 of the Revised European Social Charter, guarantees the right of the elderly to social protection. The conclusions which the European Committee of Social Rights[557] has adopted with regard to **Spain** offer useful hints as to the meaning of this right. The Committee notes that the autonomous communities have set up home help services, the beneficiaries of which finance a small percentage of the costs of the services obtained depending on their income. Furthermore, as concerns the regional programmes provided to elderly persons who are unable to remain in their own homes and who are institutionalized, the Committee wants to know the number of places available in the different types of housing. It also wishes to receive further information on what percentage of their pension entitlements elderly persons need to pay for living in residential facilities, whether public or private with public financial assistance. As regards monitoring of the management of residential facilities for the elderly, the Committee asks Spain to set up an independent inspection body. Furthermore, the Committee notes that assisted decision-making in the event of incapacity is subject to complex rules and procedures. Legal incapacity may only be determined by a court order when the conditions as stipulated in the corresponding legislation are met; in those cases, Spanish law provides for traditional guardianship, tutorship, *de facto* guardianship and legal defence. Elderly persons admitted to homes and suffering from diseases such as Alzheimer's are taken care of and protected by the director of the home. The judge also has to be notified of any emergency commitment of an incapable person within

[555] For further information see: http://www.bmsg.gv.at/cms/site/detail.htm?channel=CH0109&doc=CMS1110804317920 (24.11.2005).
[556] www.adviesorgaan-rmo.nl; www.regeling.nl
[557] European Social Charter, European Committee of Social Rights. Conclusions XVII-2 (Spain) 2005.

24 hours. As the Committee lets it be understood, it is important that the legal protection of elderly persons with regard to such declarations of incapacity must be rigorously assured, and under the supervision of an independent authority.

Art. 23(2) of the Revised European Social Charter imposes on States parties an obligation to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able. The Network welcomes in this regard the presentation in **Italy** of a Bill introduced in December 2004 (AC 5465) entitled 'Disposizioni per favorire l'assistenza domiciliare ai cittadini anziani e disabili' (Dispositions to encourage domiciliary care of elderly citizens and of citizens with disabilities), which should contribute to the autonomy of the elderly. It has also been reported that in **Ireland,** Tanaiste (Deputy Prime Minister) and Minister for Health & Children, Mary Harney, would be considering a major initiative, including new grants and tax measures, to encourage older people to be cared for in their own homes rather than in residential institutions. The package, which was to be reflected in the Budget and the Book of Estimates, would include reductions in stamp duty for older people who want to move to more suitable accommodation. It was anticipated that there would also be a significant increase in the income and asset thresholds for qualification for State subventions for nursing home care. The Network also notes with interest that in **Finland,** elderly people over the age of 80 and recipients of special care allowances will be able to receive a service needs assessment from their local authority within seven days. The measure, which becomes law from March 2006, concerns non-urgent service needs. Urgent service needs are determined without an assessment procedure. The aim of the move is to improve services for elderly people so that they are available when needed and that people using them can benefit from them properly. More timely delivery of services should help elderly people cope better in everyday life and in living at home. Social service offices carry service needs assessments either by means of home visits or office appointments. Healthcare services may also contact social services about arranging urgent support to clients.[558] The Network welcomes the fact that in **Ireland,** funding totalling €70 million was allocated to local authorities for the payment of disabled persons and essential repairs in 2005. Since 2000, some 37,000 projects were completed allowing disabled and elderly persons to remain in their own home and enjoy improved housing conditions. In addition, funding of €16.5 million is being made available under the Special Housing Aid for the Elderly Scheme (SHAE) in 2005. This will enable still further progress to be made in addressing the accommodation needs of elderly persons.

Other situations are less encouraging. In **Austria**, there would appear to be a lack of outpatient care personnel, who are required to enable old people to stay as long as possible in their own accommodation. Furthermore, the restrictions concerning employment or work permits for care personnel from new EU Member states would lead to illegal employment and undocumented migration. Due to the lack of Austrian personnel and the high costs to be borne by the people in need illegal employment would often be the only possibility for the elderly to receive care services in their familial surroundings.[559] In the **Netherlands,** there is currently a discrepancy of 41.000 between the suitable housing units needed and those actually available for the elderly. The causes for this are a shortage of so called *nultredenwoningen* [housing without any stairs or doorsteps] and the lack of adequate care facilities in the neighbourhoods involved, or combinations thereof. The Network notes, however, that the Government aims to solve this problem by building 32.000 *nultredenwoningen* until 2009, and that the situation will be monitored yearly[560]. It recalls that, under Article 23(2), a), of the Revised European Social Charter, States parties should provide housing suited to the needs of the elderly and their state of health or provide adequate support for adapting their housing. Although it notes that the Netherlands have not ratified the Revised European Social Charter, and have not

[558] Ministry of Social Affairs and Health, http://www.stm.fi/Resource.phx/publishing/documents/3641/index.htx

[559] See Werner Vogt „The Austrian Health System and its current Reforms' in: Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues' published by FIAN Austria & Protestant Development Co-operation, September 2005, pp. 27-33.

[560] *Kamerstukken II*, 2004-2005, 29389, No. 5

accepted to be bound by Article 4 of the 1988 Additional Protocol to the European Social Charter, which corresponds to Article 23 of the Revised European Social Charter, when they ratified that instrument in 1992, the initiative recently announced constitutes a significant step towards implementing this provision. In **Poland**, the number of welfare institutions for the elderly continues to be very low, leading the majority of them to live in their own homes. But the lack of access to assistance services which can be performed at home results in a situation which cannot be considered satisfactory. In **Sweden** also, the availability of special sheltered housing for the elderly currently does not seem to meet the growing needs of an ageing society.[561] The decision to shut down the elderly housing in Luojddo which accommodates Sámi peoples is especially unfortunate, as this may affects those individuals' right to use ones' mother tongue.[562]

Access to social and cultural activities by the elderly must be facilitated. In **Italy** for instance, the Statistic Yearbook 2005 demonstrates that the greatest part of the population who does not frequent cultural entertainment and shows outside the home are elderly (81.4% over 75), above all if women (84%)[563]. Access to public transportation has an essential to fulfil in the social integration of the elderly. The Network welcomes the fact that in **Ireland,** the Government promised to give permanent financing each year to the Rural Transport Initiative. The scheme mainly benefits older people, and there had been concern that it might end. The scheme was set up four years ago to help end rural isolation in areas that do not have public transport. There are now about 34 projects under the scheme. Additional funding of €1 million is being made available this year bringing the total amount to €4.5 million. Next year the figure will be €5 million. As highlighted in the **Netherlands** by the reports on the elderly issued by the *Raad voor Maatschappelijke Ontwikkeling* [Council for Societal Development], an advisory council of the Government, on 12 January 2005,[564] general amenities (public transport, post offices, local shops) have a bigger impact on the well-being of the elderly than targeted amenities, such as community centres for the elderly. Keeping society accessible for all is thus a more effective, but also less costly way of accommodating the needs of the elderly than specific implementing specific measures.

The Network also has certain reasons for concern. In **Austria**, people living in private and public care homes are not sufficiently covered by the existing legislation on patients' rights, which are regulated by the Hospital Acts of the Federal Provinces. The establishment of the Vienna Care Ombudsman in 2003 should be complemented by the definition of clear legal powers of the Ombudsman, who currently depends on the good will of care institutions as he has no official right to inspect and to receive access to care related documents etc.[565] Although, in December 2004, the provincial Parliament of Vienna passed a bill on care homes[566] (*Wiener Wohn- und Pflegeheimgesetz*) specifying the rights for the inhabitants of care homes and improving the enforceability of these rights and introducing certain minimum standards in regard to personnel and constructional issues, this Act does not explicitly refer to the Care Ombudsman thus providing them with a clear mandate and specific inspection rights.[567] In **Ireland**, the inadequacy of the provisions in place to prevent abuse of the elderly has been denounced. There exists no legislation setting out minimum standards of care which has led to errors on the part of staff, particularly in the administration of drugs. The elderly who are cared for in public nursing homes are the most vulnerable as the Nursing Home Act 1990 only applies to private nursing homes and even this legislation does not seem to offer the required specificity.

[561] See the reports at www.aldrecentrum.se and *A.Engström*, Äldreomsorgen får underkänt, SvD 25 August 2005, p. 6.
[562] *Å.Lindstrand*, Samisk reaktion mot nedläggningshot, Kräver äldreboende kvar, Kuriren 14 November 2005, p. 2 ; *Å.Lindstrand*, Sameavdelning i graven, www.kuriren.nu 8 November 2005 ; *Å.Lindstrand*, Äldreomsorg i stöpsleven, www.kuriren.nu, 12 October 2005.
[563] Annuario statistico italiano 2005, in www.istat.it, p. 182
[564] www.adviesorgaan-rmo.nl; www.regeling.nl
[565] In 2004, the Ombudsman received 713 queries of which 685 were resolved. The complaints referred mostly to shortcomings in care and insufficient communication. See Werner Vogt „The Austrian Health System and its current Reforms' in: Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues' published by FIAN Austria & Protestant Development Co-operation, September 2005, pp. 27-33.
[566] Provincial Law Gazette of Vienna, No. 15/2005 as of 29.03.2005.
[567] 'Wien hat endlich ein Wohn- und Pflegeheimgesetz', press release by *the Greens* on 29.93.2005.

Legislation similar to the Care Standards Act in the United Kingdom should be implemented to provide adequate protection for the elderly in this area. In section 7 of its Submission to the Committee on the Elimination of Discrimination against Women, the Irish Human Rights Commission noted a chronic lack of support for older women to help them live independently in the community, as well as concerns as to access to long-term care for those who require this support. It recommended in particular that the support services for older women living in the community be put on a statutory basis and, in particular, be adequately funded, given the large percentage of older women that live alone ; that a rights-based approach be adopted in relation to the provision of long stay care for older people and, in particular, that the entitlement to long stay care should be clarified and specified in legislation ; and that adequate information be made available to people on their entitlement to long stay care in the public and private sectors.[568]

Article 26. Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2 and 23 of the Convention on the Rights of the Child (1989), by Articles 2 and 26 of the International Covenant on Civil and Political Rights (1966), by Article 2 of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 1 of ILO-Convention (n°111) concerning Discrimination in Respect of Employment and Occupation (1958), by Articles 3, 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by the Protocol n° 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (2000, in force from 1.4.2005) and by Articles 15 and E of the Revised European Social Charter.

Protection against discrimination on the grounds of health or disability

As both the Commission and the Council have fully acknowledged, while a necessary component of a strategy designed to ensure the full participation of persons with disabilities and their independence, the introduction of anti-discrimination legislation in order to remove existing barriers facing persons with disabilities is not in itself sufficient to fulfil the aims of Article 26 of the Charter. In particular, the introduction of anti-discrimination legislation in employment and occupation as provided under the Council Framework Directive 2000/78/EC will not, in itself, suffice to ensure the effective professional integration of persons with disabilities. In **Sweden** for instance, the number of persons with functional impairment/disability continues to cover a great part of the unemployed population in Sweden according to a recent study which has been carried out by the Disability National Board (*De Handikappades Riksförbund*).[569] Only four out of ten persons with functional impairment have some kind of employment.[570] In **Poland,** where the Act on vocational and social rehabilitation and employment of disabled persons came into force on 1 November 2005, while the amendment of the regulation of the Council of Ministers of 2005 on the conditions of giving *de minimis* assistance to businessmen, who operate sheltered workshops entered into force on 15 October 2005,[571] only 23.4%

[568] Irish Human Rights Commission, *Submission of the Irish Human Rights Commission to the UN Committee on the Elimination of Discrimination Against Women,* 2005, p. 6

[569] De Handikappades Riksförbund, Vi vill ha arbete- inte bidrag, 28 September 2005, www.dhr.se see also Hög arbetslöshet, Jusektidningen 6/05, p. 15 and Funktionshindrades situation på arbetsmarknaden 2004, Statistiska Centralbyrån 2005.

[570] TT, Svårt få jobb för funktionshindrad, SvD Näringsliv 7 July 2005, p. 8.

[571] Rozporządzenie Rady Ministrów z dbnia 13 września 2005 r. zmieniające rozporządzenie w sprawie szczegółowych warunków udzielania pomocy de minimis przedsiębiorcom prowadzącycm zakłady pracy chronionej (Dz. U. z 2005 r. nr 189, poz. 1591) [The regulation of the Council of Ministers of 13 September 2005 amending the regulation on the conditions of giving *de minimis* assistance to businessmen, who operate sheltered workshops has entered into force (The Official Journal of 2005 No. 189, item 1591)]

of disabled persons of a productive age have a job – compared to 74.9 percent of able bodied persons[572]. This number is 2.3% lower than in 2003. In part, these failures may be explained by the fact that legislation prohibiting discrimination on grounds of disability has only been introduced recently in most EU Member States, or by the fact that the existing legal framework may not be always complied with. In **Greece** for instance, the Office of the Ombudsman has drawn up a report revealing considerable shortcomings in the implementation of the legislative framework on the employment of disabled persons and other persons belonging to vulnerable groups, both in the public sector and in the private sector. The Ombudsman has observed, among other things, a lack of information among the persons concerned, bureaucratic difficulties, as well as an insufficient degree of acceptance by companies of their obligations under the aforementioned legislative framework[573]. In **Spain,** the Catalonian Ministry of Labour found that the majority of Catalonian businesses failed to comply with the law obliging them to reserve 2% of their jobs for the working population with disabilities: according to the U*nión General de Trabajadores* [General Union of Workers], that figure is only 0.8%. Government officials point to the lack of resources for inspection to monitor compliance with the law.

However, improving full compliance with the prohibition of discrimination may not be sufficient. More affirmative measures, including quotas, may be required to meet the challenge of a structural underrepresentation of persons with disabilities in employment. During the period under scrutiny for example, the Ministry of Labour of **Cyprus** prepared two initiatives on the professional integration of people with disabilities. The first initiative is called 'Plans of Professional Integration of People with Disabilities implemented by the Ministry of Labour, Department of Labour', which (a) encourage the self-employment of people with disabilities by providing a grant of £2000 CYP to people with heavy disability and by subsidising the interest of up to 300 CYP up to five years; (b) encourage people with disabilities to acquire professional qualifications by subsidising their fees up to £1000 CYP; (c) will provide personal help to people with heavy disability in order to find work in the open market.[574] The second initiative is called 'Programs for the professional integration of people with Disabilities co-funded by the European Social Fund for the years 2005-2006.' These programs involve the creation of incentives for employers to employ persons with disabilities. More specifically, these plans involve the subsidisation of the social security of people with disabilities for the first year of their employment; the providing of economic incentives to employers for the purpose of installing facilities for persons with disabilities; the subsidisation of the wages of people with heavy disabilities.

The structural underrepresentation of persons with disabilities in employment may be fed by prejudice, and anti-discrimination legislation such a provided by the Framework Equality Directive constitutes an appropriate, if not in all cases totally effective, answer. However, this underrepresentation also may be attributed to the fact that in public transportation, communications, housing, the specific needs of persons with disabilities are still not systematically considered, let alone met by measures accommodating those needs. On 30 October 2003, the European Commission published an important Communication which seeks to identify how it will build upon the momentum created by the European Year of Persons with Disabilities (COM(2003)650 final, 30.10.2003). This communication, which has been commented upon previously (see Report on the situation of fundamental rights in the Union in 2003, pp. 111-115), still constitutes the framework for the approach to the social and professional integration of persons with disabilities by the European Community. In previous conclusions, the Network expressed its regret that the European Year of Persons with Disabilities was not seized as an opportunity by the Commission to put forward a proposal for a Directive going beyond Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, and ensuring a general protection of persons with disabilities from direct and indirect discrimination education, social protection including social security and healthcare, social advantages and access to and supply of goods and services. The Network is not aware of any reason,

[572]Dane statystyczne Ministerstwa Polityki Społecznej [Statistical data of the Ministry of Social Policy] http://www.mps.gov.pl/_osobyniepelnosprawne.php?dzial=389 (07.11.05)
[573] See the report by the Ombudsman (in Greek) on the site http://www.synigoros.gr/reports/prosvasi_stin_apasxolisi.pdf
[574] Note by the Ministry of Labour, Labour Department, 1 March 2005.

apart from reasons of political expediency, which would argue against the presentation of such a proposal, whose contribution to improving the situation of persons with disabilities would be considerable.

Such a directive, in particular, should encourage the inclusion of children with disabilities in mainstream education, in accordance with the understanding developed by the European Committee on Social Rights of Article 15(1) of the Revised European Social Charter. However, the normal curriculum should be adjusted to take account of disability; individualized educational plans should be crafted for students with disabilities; resources should follow the child, by provision of support staff and other technical assistance; testing or examining modalities should be adjusted to take into account the disability, without this being revealed to third parties; the qualifications recognized should be the same for all children and rated the same after the child leaves the educational system. The Network also considers that it follows from the requirement of non-discrimination on the grounds of disability in education that where special education is provided where this cannot be avoided, it should lead to qualifications which are recognized and may give access to vocational training or employment on the open labour market.

The complaints raised before the Ombudsperson of Equal Opportunities under the new powers the Ombudsman has received in **Lithuania** since 1 January 2005 illustrate the nature of the contribution which such a directive could represent to the protection of persons with disabilities. For instance, the Ombudsperson of Equal Opportunities decided that the fact of determining life-insurances on the basis of criteria which are unfavourable to persons with disabilities violates the principle of equal rights of the persons with disabilities, insofar as the disability may not be relied upon as a proxy for a lower life expectancy[575]. In another case, a bank refused to perform banking operations, which exceed 200 litas, for a blind person without the participation of another person who is not blind and who can sign the required documents. The Ombudsperson decided that this practice constitutes discrimination towards persons with disabilities. The disable person is not indeed incapable and the fact of requiring the participation of another person during the banking operations is in breach of his/her rights576. In the **Netherlands**, the courts had to intervene after a school in Rotterdam decided to remove a pupil with the syndrome of Down : rejecting the argument of the school that the pupil was in need of extra attention and care, which the staff could not provide, and that she was disrupting the class, the *Rechtbank* [Regional Court] of Rotterdam noted that public policy is presently aimed at the integration of handicapped pupils in regular schools, and at respecting the parent's freedom to opt for regular or specialised schools, and quashed the decision which it considered not to be based on a sufficiently individualized assessment, balancing the interests of the child and those of the school in a fair and careful way, taking into account independent expertise and involving the parents in the decision making process[577]. In **Cyprus**, the Parliament proposes to include in the Radio and Television Law a new Section VIII entitled 'Protection of the Rights of Young People and People with Special Needs, Abolition of Discrimination and Protection of Language' imposing on TV stations an obligation to broadcast news that is understandable to deaf people, at least 5 minutes per hour from noon to midnight, and to ensure that the subtitles follow the rules and policies of the Republic concerning deaf people and that the size of the letters should constitute at least the 1/300 of the height of the screen. In **Ireland,** the Irish Human Rights Commission's Submission to the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) stated: 'In general, women with disabilities have low levels of educational attainment and low levels of participation in the labour force due to physically and socially inaccessible educational and working environments. Women with disabilities are particularly vulnerable to violence. However, this remains largely a hidden problem. The ability of disabled women to leave their violent situation is often limited due to geographically, physically and socially inaccessible refuges and other services for women experiencing violence.' Among other recommendations, the Commission recommended that, in accordance with General Comment 25 of the CEDAW Committee specific temporary special measures be put in place to increase the

[575] 2005 14 15; The decision of The Equal Opportunities Ombudsperson No. (05)-SN-10.
[576] 2005 08 29; The decision of The Equal Opportunities Ombudsperson No. (05)-SN-81.
[577] 24 January 2005, LJN AS4379

participation of women with disabilities in education and employment. Another report published in June 2005 highlighted the significant exclusion and disadvantage experienced by people with disabilities in Irish society,[578] finding, *inter alia* : (i) that half of those who were ill or disabled in Irish society have no formal educational qualification, as compared to one fifth of other adults,[579] (ii) that individuals with a chronic illness or disability were unlikely to be in employment and that those who were in employment received significantly lower hourly rates of pay than the general population,[580] (iii) that people living with an illness or disability were twice as likely as the rest of the population to be living either at risk of poverty or in consistent poverty.[581] In **Estonia**, a report published by the EU Monitoring and Advocacy Program (EUMAP), an Open Society Mental Health Initiative, notes that for people with intellectual disabilities in Estonia, access to inclusive education and to any kind of employment remains highly limited[582]. While the number of children with intellectual disabilities is increasing, most of these children are not able to receive education in an integrated environment. In the field of education, the right to education to everyone (enshrined in the Constitution) is often not realized; many mainstream schools will not enrol children with intellectual disabilities on the grounds that they cannot provide the needed support services.[583] The report takes note of the fact that following Estonia's accession to the European Union in 2004, the European Structural Funds are now being directed towards education and vocational training. However, the government has not yet allocated these funds towards projects specifically aimed at people with intellectual disabilities.[584] The barriers facing the integrated education of children with intellectual disabilities include lack of transportation, large class sizes, and opposition to integration from some teachers and parents or children without disabilities. The most important barrier, however, the report notes, is the insufficient number of support specialists. This situation contrasts with one in **Sweden** where, according to official statements, approximately 70 % of children with disabilities attend special classes in mainstream schools and 20 to 30 % of such children have been fully integrated into mainstream classes.[585] These are all examples of situations which would benefit from an equality framework being set at Community level.

The Network notes that a number of Member States have in fact anticipated upon such development, by implementing the principle of equal treatment of persons with disabilities beyond the limited scope of application of the Framework Equality Directive, which only concerns employment and occupation. In **Austria**, the Federal Parliament finally adopted the Disability Equality Package (*Behindertengleichstellungspaket*). Thereby a new act on the general equal treatment of persons with disabilities (Disability Equality Act, *Behindertengleichstellungsgesetz*)[586] was passed and three other acts dealing with disability were amended, which go far beyond the scope of the Framework Equality Directive. The related legislative amendments will enter into force on 1 January 2006 and ensure the implementation of the Directive after a delay of three years. The prohibition of discrimination on the grounds of disability is split in two acts: the Disability Equality Act which applies in regard to access to goods and services and the Disability Employment Act[587] (*Behinderteneinstellungsgesetz*) which applies only to employment related issues. The definition of the terms 'discrimination' and 'disability' and also procedural issues such as the shift in the burden of proof or the compulsory conciliation and mediation procedure are regulated in a similar manner in both acts. Both acts apply to the federal administration and private contracts prohibiting discrimination regarding access to public goods and services and in employment, vocational guidance and training. The obligation to ensure barrier free access to places which are accessible to the public is weakened through several, partly very extensive, transitional regulations and time limits/periods. For existing buildings and means of public

[578] Brenda Gannon and Brian Nolan, *Disability and Social Inclusion in Ireland* (June, 2005).
[579] *Ibid* at p.9.
[580] *Ibid* at p.10.
[581] *Ibid*.
[582] 'Rights of People with Intellectual Disabilities. Access to Education and Employment in Estonia', www.eumap.org.
[583] Ibid., p. 15.
[584] Ibid., p. 15.
[585] UN Doc. CRC/C/SR.1002, Summary Record, Sweden 17/01/2005, p. 8. In addition, there are some special schools for children who are deaf or have hearing problems.
[586] Federal Law Gazette (BGBl.) I 82/2005 as of 10.08.2005.
[587] Federal Law Gazette (BGBl.) 22/1970 as amended by BGBl. I 82/2005 as of 10.08.2005.

transportation the law will only enter into force after a transition period of 10 years. In the event that the prohibition of discrimination on the grounds of disability is violated the acts foresee financial compensation as a sanction. The protection against victimisation, in relation to the enforcement of the prohibition of discrimination, applies not only to the person concerned but also to witnesses or other persons supporting the anti-discrimination claim. In contrast to the Equal Treatment Act, which prohibits discrimination on the grounds of gender, ethnic origin, religion and belief, age and sexual orientation, the two new acts introduce a compulsory conciliation and mediation procedure. According to the Disability Equality Act the Umbrella Organisation of the Austrian Disability Organisations (*Österreichische Arbeitsgemeinschaft für Rehabilitaton, ÖAR*) is entitled to bring an 'general interest claim' (*Feststellungsklage*) in regard to cases of discrimination which affect the general interest of persons with disabilities in a permanent and serious way. By amending the Federal Disability Act[588] (*Bundesbehindertengesetz*), the position of a new Disability Ombudsperson was created.

The Network welcomes this important improvement of the protection of persons with disabilities against discrimination. However, the Network notes that the building codes fall under the competence of the Federal Provinces, so that no preventive measures can be enforced in order to prevent the construction of new buildings which ignore the obligation to provide barrier free access, despite the fact that the extra cost of providing barrier free access has been demonstrated to represent only a small fraction of the total construction costs if planned in advance. An agreement with the Federal Provinces should be reached in order to harmonise building codes and ensure barrier free access. The Network regrets that no prohibition of discrimination in regard to the access to school education was established. School directors may still legally, without a fear of sanctions, refuse to take children with physical, mental or psychological disabilities. Finally, the Network notes that the independence of the Ombudsperson, who is part of the organisational structure of the Ministry of Social Security, is not sufficiently guaranteed.

In **France**, Act No. 2005-102 of 11 February 2005[589] complements the legislative instrument to promote equal treatment. This law encourages access of disabled persons to employment. It organizes a support and aid by work contract and contains provisions on the obligation of employment, on professional integration in the mainstream workplace as well as in specially adapted businesses and adapted work, and on the work organization of disabled persons. However, the law goes beyond the sphere of employment. It prohibits public authorities from allocating grants for the construction, extension or conversion of certain buildings unless the principal has submitted an accessibility report. The law stipulates that "all disabled persons are entitled to the solidarity of the whole nation, which guarantees them, by virtue of this obligation, access to the fundamental rights that are granted to all citizens, as well as the full exercise of their citizenship. The state guarantees the equal treatment of disabled persons throughout the territory and defines the long-term action objectives". As part of those actions, this law institutes a compensatory benefit, specifies the conditions for allocating this benefit to disabled adults and stipulates the modalities for setting up Departmental Homes for the Disabled, whose duties include receiving, informing, supporting and advising disabled persons and their families, as well as public awareness building. Other provisions are worth mentioning, in particular those relating to citizenship and participation in social life for disabled persons, and those organizing the accessibility of polling stations and voting methods for those persons. In addition, the Decree of 18 January 2005[590] has made significant changes to the conditions of recruitment of disabled persons into the civil service. This decree puts an end to the procedure of reserved occupations as a means of recruiting disabled persons. Recruitment must now take place by supervised contract. As from 1 January 2006, the decrees authorizing the holding of competitions set the number of jobs to be filled by this type of contract at minimum 6%.

The **Netherlands** offers another illustration, during the period under scrutiny, of the growing recognition that the principle of equal treatment should be implemented beyond employment and

[588] Federal Law Gazette (BGBl.) 283/1990 as last amended by BGBl. I No. 82/2005 of 10.08.2005.
[589] ibid.
[590] Decree No. 2005-37, J.O.R.F 20/01/2005, p. 998.

occupation if the objective of achieving the professional integration of persons with disabilities is to be fulfilled. On 12 December 2004, the *Commissie Gelijke Behandeling* [Equal Treatment Tribunal] has issued an advisory opinion on Government plans to widen the scope of the Equal Treatment Act concerning the handicapped and the chronically ill. Currently the act solely covers equal treatment in the workplace and in professional education. The plans aim at extending the scope to equal treatment in the field of housing. The Commission generally welcomes the extension, but has asked the government to clarify the personal and material scope of the proposed legislation more precisely. Additionally, it strongly advocates in favour of accelerating equal access to public transport for the groups concerned, since this is an essential component of the possibility to work and participate in society. The plans at hand provide for such right to equal access only in the long term: 2010 for public transport and 2030 for trains (CGB, *Advies* 2004/08). Yet other examples of reasonable accommodations being provided in other contexts than in the employment context may be mentioned. In **Ireland,** in the period under review, the Equality Authority established a practice initiative with networks of local service providers to develop and promote guidance and implementation measures on reasonable accommodation. The Network included the National Library Council, the Pharmaceutical Union, two local authorities, the Irish Bankers' Federation and the retailers' body, RGDATA. In **Portugal,** the National Secretariat for the Rehabilitation and Integration of People with Disability (NSRIPD) has carried out initiatives with the National Commission on Elections and the Technical Secretariat for Electoral Affairs in order to raise awareness within local Municipalities on the necessity to ensure that the voting assemblies and venues are easily accessible to all the electors with reduced mobility. The program 'Accessible Beach – Beach for All' aims at making the coast and inland urban beaches fully accessible to people with disability. It includes pedestrian access with ramps, properly designed parking places, access to the bathing area, pathways throughout the sand, adapted toilets, access to first aid stations, amphibious sea aids for bathing wherever the sea conditions are favourable, bars and restaurants. However there are still strong reasons for concern as regards reasonable accommodation for persons with disabilities. Portuguese law notably does not oblige landlords and other tenants to allow housing facilities adaptations to be made due to health reasons. In the **United Kingdom**, the Disability Discrimination Act 2005 has made further substantial amendments to the Disability Discrimination Act 1995 ('the DDA'), which already contained provisions making it unlawful to discriminate against a disabled person in relation to employment, the provision of goods, facilities and services, and the disposal and management of premises, as well as some provisions relating to education and a power to make regulations with a view to facilitating the accessibility of taxis, public service vehicles and rail vehicles for disabled people. The 2005 Act builds on amendments already made to the DDA by other legislation since 1999. Thus for instance, it brings councillors within the scope of the DDA; ensures that, with some exceptions, functions of public authorities not already covered by the DDA are brought within its scope (so that it would be unlawful for a public authority, without justification, to discriminate against a disabled person when exercising its functions); introduces a new duty on public authorities requiring them, when exercising their functions, to have due regard to the need to eliminate harassment of and unlawful discrimination against disabled persons, to promote positive attitudes towards disabled persons, to encourage participation by disabled persons in public life, and to promote equality of opportunity between disabled persons and other persons; provides that the current exemption from section 19 to 21 of the DDA (which deal with the provision of goods, facilities and services to the public) for transport services extends only to transport vehicles themselves, and creates a power to enable that exemption to be lifted for different vehicles at different times and to differing extents.

The Network highlights the following good practices identified during the period under scrutiny:

- In **Portugal**, the '2 x 1 Agreement', based on a Protocol signed by the National Portuguese Railways provides that the escort of a person with a disability greater than 80% is entitled to benefit from a free ticket in long course trips, urban and sub-urban trains. Also, for the users with a disability over 60% who are at risk of social exclusion, there is the possibility of tariff reduction on railway trips. In addition, the National Portuguese Railways have created the 'Ombudsman for clients with disability', whose main objectives are to identify the needs concerning accessibility and to improve the relationship between people with disability and other entities/authorities of the sector.

- In **Italy,** Law No. 6/2004 (*Official Gazette,* 2004, nr.14) regarding the 'support administrator'[591] (*Amministratore di sostegno*) has proven its contribution to minimizing as much as possible the limits imposed on the juridical capacity of people who are considered unable to perform ordinary activities. Judges, in particular, appear to prefer to designate a support administrator instead of declaring the incapacitation of people affected by physical or psychological disabilities, reducing the measure of incapacitation to residual remedy[592]. Thus for instance, according to the data of Venice's civil court[593], from 19 March 2004 to 19 March 2005, on the total number of 206 proceedings of incapacitation in Venice, 118 have been transferred to the tutelary judge for the assignment of the support administrator. Furthermore, since the beginning of 2005 there has been a strong decrease of the prohibition appeals. At the same time, the Network would emphasize that the Law nr. 6/2004 requires tools for its full implementation. On 8 December 2004 for instance, the region of Emilia Romagna has launched a project to spread information about this issue, trying to organize and coordinate new public departments to provide assistance through new technologies[594]. Another such institution is the establishment of an institutional commission joining together public and private bodies – such as courts, municipalities, districts, voluntary services etc. – to improve the knowledge about the institution of the support administrator[595].

- In the **United Kingdom**, the obligation to provide an effective accommodation to a person with reduced mobility was imposed on the basis of the DDA in access to services. Having regard to the fact that it was unreasonably difficult for a disabled person to make use of the service involved in access to and use of an airport's 'airside', the airport and the airline with which he was travelling were found in *Ross v Ryanair Ltd* [2004] EWCA Civ 1751 to have discriminated against him, contrary to the obligation in the Disability Discrimination Act 1995, s 21, by failing to provide him with a wheelchair free of charge for use from the check-in desk to the aircraft where it was reasonably practicable for them to do so, given their financial resources. It was considered irrelevant whether a particular passenger might have the financial means to pay for the necessary auxiliary aid.

- The recognition of the sign language may contribute to the social and professional integration of persons with hearing disabilities. In **Austria,** Article 8 of the Federal Constitution[596] was amended in order to formally recognize Austrian Sign Language as an independent language. Further legislation should be implemented in order to determine its use before public authorities or in education. In **Cyprus,** the Parliamentary Committee on Human Rights concluded in its Report that a failure to officially recognize the sign language resulted in a violation of the rights of the deaf people in Cyprus;[597] the Parliament has tabled a law proposal accordingly,[598] providing for such a recognition and stipulating that the certificate of sign language can be used as a necessary or additional qualification for jobs in the public sector.

- Action plans and the systematic assessment of laws and policies on the situation of persons with disabilities may significantly improve the effectiveness of anti-discrimination provisions. In **Poland,** the State Fund for Rehabilitation of Disabled Persons (Państwowy Fundusz Rehabilitacji

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[591] Published on the Official Gazette, 2004 nr.14. Introduzione nel libro I, titolo XII, del codice civile del capo I, relative all'istituzione dell'amministrazione di sostegno e modifica degli articoli 388, 414, 417, 418, 424, 426, 427 e 429 del codice civile in material di interdizione e inabilitazione, nonchè relative norme di attuazione, di coordinamento e finali.

[592] See, for example, the decision nr 649 of 08/03/2005 of the Court of Bologna, and the decrees both of the Court of Rome of 28 January 2005 and of the Court of Modena of 15 Novembre 2004.

[593] For further details see the article 'Un anno di applicazione della legge sull'amministrazione di sostegno' of Sergio Trentanovi (the tutelary judge and the President of the 3rd section of the Venice's civil courts) available at www.altalex.com .

[594] 'Progetto integrato di iniziativa della Regione Emilia Romagna di sensibilizzazione e formazione finalizzato alla promozione dell'Amministrazione di Sostegno secondo la nuova normativa (Legge n. 6/2004)' available at www.altalex.com.

[595] 'Tavolo comune istituzionale – Amministratore di sostegno' available at www.altalex.com

[596] Federal Law Gazette (BGBl.) I No. 81/2005 of 10.08.2005.

597 Report of the Parliamentary Committee of Human Rights entitled *The Violation of the Rights of Deaf People in Cyprus*, 4 July 2005.

[598] *Πρόταση Νόμου με Τίτλο Νόμος που Προνοεί για την Αναγνώριση της Νοηματικής Γλώσσας.*

Osób Niepełnosprawnych - PFRON) launched three new programmes for the integration of disabled persons, which seek respectively to increase the accessibility of public utility buildings for disabled persons, to provide equal access of disabled children and youth to learning, to improve the conditions of children's and youths' stay in centres which provide 24-hour education and care, and to provide disabled persons, the institutions acting on their behalf, as well as their employers with current and reliable data necessary to receive and provide proper help and assistance.[599] In the **Slovak Republic**, where still many improvements are to made in order for the society to become truly inclusive – for instance with regard to access to transportation or with regard to the use of sign language –, the Government's Resolution no. 692 of 14 September 2005 approved the *Správa o realizácii Národného programu rozvoja životných podmienok občanov so zdravotným postihnutím vo všetkých oblastiach života za rok 2004 vrátane opatrení na rok 2005 a ďalšie obdobie* [Report on realization of National program for development of living conditions of disabled people in all areas of life in 2004, including measures for the year 2005 and next period], containing a number of important proposals for the year future. In **Portugal**, the Council of Ministers has adopted a resolution recognizing the need to assess the impact of each legislative project on the prevention, habilitation, rehabilitation and participation policies on behalf of people with disability, ensuring a transversal approach to the issue. In **Greece**, a Presidential Decree of January 2005 established 'accessibility units' for disabled persons within the Ministry of the Interior and other bodies and services under its supervision[600]. The powers of the units in question include the promotion and monitoring of the measures adopted by public services, national authorities and public corporations to ensure accessibility as well as other arrangements for disabled persons. Furthermore, the above-mentioned decree provides for raising awareness among public officials and citizens in general of the needs and rights of disabled persons; introduction of an 'accessibility label' for public buildings; codification and updating of the relevant legislation. Such accessibility units are planned in all government departments. The Network underlines the significance of the establishment of a mechanism aimed at promoting and monitoring the appropriate arrangements that make it easier for disabled persons to approach public services, as well as of the process of raising awareness among public officials and the monitoring of the 'compatibility' of public buildings with the rights and needs of disabled persons. The Network encourages the Greek authorities to continue the process of updating the relevant legislation.

- In the **Slovak Republic**, whereas emergency lines of the integrated safety system provided through the telephone no. 112 were previously available only as vocal calls, and therefore were not accessible to deaf persons, since 30 July 2005 deaf persons can use the service of *Úrad civilnej ochrany* [Civil Protection Office] and ask for help in crisis situations through the internet or by cell phones equipped with WAP or GPRS systems. The Civil Protection Office aims to improve the possibilities of emergency calls for disabled persons in cooperation with institutions defending their interests. A handbook named 'What is necessary to know in crisis situations' was translated into the Brail characters.

The Network also has two reasons for concern. It expresses its surprise at reports that more than 300 people with autism and other intellectual disabilities were being accommodated in psychiatric hospitals in **Ireland** because there the State was not providing services appropriate to their needs.[601] The Network notes that this practice persisted notwithstanding Government pledges to have completely abolished what they concede is an inappropriate practice by 2006.

Finally, the Network regrets that in **Poland**, it follows from Art. 559 in connection with Art. 545 par. 1 and 2 of the Civil Code[602] that there is no possibility for an incapacitated individual to file a motion to

[599] Information available on the Web page of the Ministry of Social Policy, www.mps.gov.pl

[600] Προεδρικό Διάταγμα 13/2005, 'Σύσταση Μονάδων Προσβασιμότητας Ατόμων με Αναπηρίες στο Υπουργείο Εσωτερικών, Δημόσιας Διοίκησης και Αποκέντρωσης (ΥΠ.ΕΣ.Δ.Δ.Α.) και σε εποπτευόμενους φορείς του [Presidential Decree No. 13/2005, 'Establishment of Accessibility Units for Disabled Persons within the Ministry of the Interior, Public Administration and Decentralization and the services or bodies under its supervision']

[601] Irish Times, 18 June 2005.

[602] Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny (Dz.U. z 1964 r. nr 16, poz. 93 z późn. zm. [The Act of 23 April 1964 - the Civil Code (The Official Journal of 1964, No. 16, item 93, with further amendments)]

initiate legal proceedings to overrule or change the incapacitation decision. It is aware that the Ombudsman has brought this matter before the Constitutional Tribunal[603] in order to affirm the inconsistency of the present situation with Articles 30 and 31 of the Constitution of the Constitution,[604] and that, in response to the request of the Ombudsman, the Head of the Codification Commission working on the amendments to Civil Code[605] announced that the Commission planned to amend the Civil Code in order to improve the protection of the rights of incapacitated individuals[606]. It encourages the Polish authorities to move speedily in that direction.

[603]General Approach of the Ombudsman to the Constitutional Tribunal of 27 July 2005, No. RPO/491629/04/XI
[604]Konstytucja Rzeczpospolitej Polskiej z 2 kwietnia 1997 r. (Dz.U. z 1997 r. nr 78, poz. 483) [The Constitution of the Republic of Poland of 2 April 1997, (The Official Journal of 1997, No. 78, item 483)]
[605]General Approach of the Ombudsman to the Head of the Codification Commission of 17 May 2005, No. RPO-418864-02-XI/GR
[606] Response of 13 September 2005, No. KKPC 136/04/01/2005

CHAPTER IV SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 21 and 29 of the Revised European Social Charter and by Article 2 of the Additional Protocol to the European Social Charter of 1961 (1988).In European Community law, Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community establishes certain minimum requirements of employees' right to information and consultation in undertakings and establishments located in the Community.[607] Directive 2002/14/EC should have been transposed into domestic law by the 25 March 2005 although, regrettably, six Member States still have not ensured the implementation of this directive one year after this deadline.

Another concern of the Network relates to the information given to atypical workers or workers who work on a freelance basis. In **Austria** for instance, according to sec 108 of the Industrial Relations Act (*Arbeitsverfassungsgesetz*) only members of the work council have access to information on the economic and financial situation of the enterprise they are working in. Apart from the fact that, where no work council exists, employees do not have access to unpublished economic data, people working under atypical contracts or freelancers have no right to information on a company's economic or financial situation. Given the increasing number of self employed, this lack of a right to information is problematic.

Finally, the Network emphasizes that the implementation of Directive 2002/14/EC should take into account the requirements of the European Social Charter and of the Revised European Social Charter, the provisions of which concerning the right to information and consultation within the undertaking have inspired to formulation of Article 27 of the Charter of Fundamental Rights. Noting that, according to the European Committee of Social Rights, the situation in this State is not in conformity with Article 29 of the Revised Charter,[608] the Network encourages **Lithuania** to improve the scope of the content of the information provided to worker's representatives in the event of collective redundancies.

The Network notes with interest, on the other hand, that in the **Netherlands,** the so-called *Wet Harrewijn* [Harrewijn Act] was adopted by the *Tweede Kamer* [Lower House] in June 2005 (*Kamerstukken* 28163; *Handelingen II*, 2004-2005, No. 86, p. 5131) and is currently pending in the *Eerste Kamer* [Senate]. The Act, which might enter into force in the first half of 2006, will replace certain provisions of the Worker's Council Act and obliges undertakings with at least 100 employees to provide annual information to their respective Worker's Councils regarding salary increases in all echelons of the undertaking. The Harrewijn Act is one of the instruments with which the Dutch government hopes to put a brake on excessive salary increases of the management.

Article 28. Right of collective bargaining and action

[607] OL L 80 of 23.2.2002, p. 29.
[608] European Committee of Social Rights, Conclusions 2005 (Lithuania).

Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

This provision of the Charter must be read in accordance with the requirements formulated by Article 8 of the International Covenant on Economic, Social and Cultural Rights (1966), by the ILO Convention (n° 98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (1949), by the ILO Convention (n° 135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking (1971), by the ILO Convention (n° 154) concerning the Promotion of Collective Bargaining (1981), by Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), by Article 6 of the European Social Charter and by Article 6 of the Revised European Social Charter.

Social dialogue

The Network expresses its concern over the weakening of certain safeguards in the Labour Code as a result of the adoption in **France** of Act No. 2005-32, called the 'Programme Act on Social Cohesion'[609]. This Act is likely to promote the substitution of collective labour agreements, even of a minority – signed by one member of one of the representative confederations –, for the minimum safeguards contained in the Labour Code. The new Article L.320-3 of the Labour Code provides that "company, group or sectorial agreements can, notwithstanding the provisions of sections III and IV, establish the conditions of information and consultation of the works council that apply when the employer plans to make at least ten employees redundant over one and the same period of thirty days". Consequently, agreements can very easily set aside the legal conditions of works council consultations in cases of mass redundancies. Furthermore, the very principle of prior consultation of the works council is weakened by certain provisions of the Act. A derogation from Article L.431-5, which requires written notification and consultation of the works council before any decision is taken by the head of the company, is introduced in the case of a public offer of exchange or a takeover bid. From now on, notification of a takeover bid or a public offer of exchange is not only given subsequent to the decision taken by the head of the company, but also after the public has been notified; this deprives the works council of an essential prerogative. Nevertheless, the works council can claim obstruction if the employer failed to supply it with sufficient information. The same applies for the three-yearly negotiations which, although required by law in companies with more than 300 employees, can from now on be settled by agreement. While acknowledging that the employer is obliged to negotiate on the conditions of information and consultation of the works council on the company strategy and its foreseeable effects on employment and on the employees, the Network notes that this development constitutes a weakening of the safeguards surrounding the right enshrined in Article 28 of the Charter of Fundamental Rights.

The right of collective action

The Network takes note of the decision of the European Committee of Social Rights on the merits of Complaint No. 16/2003, *Confédération française de l'Encadrement-CFE-CGC v. France*, published on 31 March 2005, which found that the situation created in **France** by Sections 2 VIII, 3 and 16 of the Fillon II Act of 17 January 2003 is inconsistent with the right to reasonable daily and weekly working hours (Article 2(1) of the Charter), the right to fair remuneration (Article 4(2) of the Charter) and the right to bargain collectively (Article 6(4) of the Charter). The Committee concludes that the situation of managers with annual working days (forfait en jours) and the treatment of on-call periods as periods of rest constitute, in view of the excessive length of authorized weekly working time and the lack of adequate guarantees, a violation of Article 2(1) of the Charter. With regard to Article 4(2) of the Charter, the Committee concludes that there is a violation as a result of the fact that "the number

[609] OJ No. 15 of 19 January 2005, p. 864.

of hours of work performed by managers who come under the annual working days system and who do not benefit, under this flexible working time system, of a higher rate for overtime is abnormally high". Finally, the Committee finds that the CFE-CFC does not provide evidence of any dispute giving rise to a strike in which managerial staff in the annual working days system were in fact subject to the restrictions it refers to. On the contrary, the Committee takes note of the fact that a salary deduction in excess of the actual duration of the strike for managerial staff in the annual working days system would not be permissible in French law. Consequently, the Committee concludes that there has been a violation of Article 6(4) of the Charter. In another case (Collective Complaint No. 26/2004 *Syndicat des Agrégés de l'Enseignement Supérieur (SAGES) v. France*), the European Committee of Social Rights found that the situation in France constitutes a violation of the right to organize (Article 5 of the Revised European Social Charter), since Decree No. 89-1 on the National Council for higher education and research (CNESER) does not guarantee collective legal remedies in respect of elections to the CNESER. The French trade union further alleges that the national regulations are in Breach of Articles E (non-discrimination) and G (restrictions), read in conjunction with Article 5, and in consequence the situation is also in breach of Article 1 (implementation of undertakings).

Article 6(4) of the European Social Charter requires that the right to strike be recognized also where it exercise is not related to the negotiation of a collective agreement. In this respect, the situation in the **Slovak Republic**, as concluded by the European Committee of Social Rights, is still not in conformity[610].

The Network recalls the judgment delivered on 2 July 2002 by the European Court of Human Rights in the case of *Wilson and Others v. the United Kingdom* (Appl. N° 30669/96), in which the Court made clear that a State party would be in violation of Article 11 ECHR if it were to allow employers to provide financial incentives to workers not joining a union. The same requirements follow from Article 6(4) of the European Social Charter. The Network welcomes as an application of this principle that in the **Netherlands,** the *Gerechtshof* [Court of Appeal] of Arnhem ruled on 9 August 2005 that the promise of a bonus to employees who will not take part in future strikes is in breach with the right to strike as guaranteed by Article 6 (4) of the European Social Charter (LJN AU3100), in a case where an employer had addressed a letter to those employees who had not participated in an earlier strike, containing a clear message regarding possible future strikes that when the financial situation of the company would allow so, employees who would not take part in a future strike could count on a financial bonus. The Court of Appeal ruled that since such a message puts severe financial pressure on employees not to take part in future strikes, it infringes the right to strike as guaranteed in the Charter.

Article 29. Right of access to placement services

Everyone has the right of access to a free placement service.

This provision of the Charter must be read in accordance with the requirements formulated by both ILO Convention (n° 168) concerning Employment Promotion and Protection against Unemployment (1988) and ILO Convention (n°181) concerning Private Employment Agencies, and by Article 1(3) of the European Social Charter (1961) or Article 1(3) of the Revised European Social Charter.

Access to placement services

ILO Convention (n°181) of 19 June 1997 concerning Private Employment Agencies, which came into force on 10 May 2000, provides that 'Private employment agencies shall not charge directly or indirectly, in whole or in part, any fees or costs to workers' (para. 1). However, para. 2 adds that 'In the interest of the workers concerned, and after consulting the most representative organizations of employers and workers, the competent authority may authorize exceptions to the provisions of

[610] Conclusions XI-2 [2003].

paragraph 1 above in respect of certain categories of workers, as well as specified types of services provided by private employment agencies'. Any use of such possibility of introducing exceptions should be carefully scrutinized. The Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization[611] examined the authorization of exceptions to the principle of non-payment by workers for services supplied by private employment agencies in Spain, by virtue of Article 7(2) of the Convention. The Committee requests the Spanish government to supply information on the exceptions authorized for temporary employment agencies by giving practical details of any complaints, presumed abuses or fraudulent practices to which those exceptions may have given rise. Furthermore, the Committee also requests information about the measures taken in order to avoid abuses involving immigrant workers.

Although the Charter of Fundamental Rights does not as such guarantee the right to work, the Network nevertheless wishes to report about encouraging developments which seek to improve the individualized character of the job-seeker, in order to more effectively combat unemployment. In **France** for instance, Act No. 2005-32, called the Programme Act on Social Cohesion, of 18 January 2005[612] set up employment centres. Those employment centres have no defined geographical scope, but, according to the legislator, they must be adapted to the configuration of the employment area, without however exceeding the mission of the region. Their main role is to allow the pooling of the resources of the different partners making up the public employment service with a view to taking action to anticipate needs and for retraining. They also have a reception, orientation and advisory function for jobseekers, as well as a support function in the establishment of businesses. In the **Netherlands**, a report published in August 2005 (*Tweede voortgangsrapportage IRO*) illustrates the success of the instrument of the *individuele reïntegratieovereenkomst (IRO)* [individual placement agreement], which can be utilized by unemployed persons receiving state allowances since 14 July 2004. The individual placement agreement was set up to offer unemployed persons the possibility to devise their own personal placement scheme, instead of following a state-organized programme. The IRO arrangement allows individuals to choose one or more certified private placement companies, with whom the individual will devise a plan including facilities like education, internships, personal guidance and occupational preference tests, which should eventually lead to durable employment of the individual. The placement scheme is funded by the UWV [Agency for Employment Insurances] on a *no cure, less pay* basis and must be authorized in advance by the UWV. Up to May 2005, 14.426 individual placement agreements have been agreed upon. In **Poland**, the Sejm adopted an amendment to the Act on the promotion of employment and on labour market institutions, which was published on 30 August 2005.[613] Changes of rules on financial support for employers providing working places for persons previously unemployed came into force on 1 November 2005. Employers are entitled to receive them from the employment office. The Act increases financial support to equip or supplement the workplace of an unemployed person over 50 years of age, who has been employed by a company as part of intervention work.

The Network is also encouraged by studies showing that in **Portugal**, the professional training provided by the IEFP (*Institute for Employment and Professional Training*) is generally effective: in 2004, 70,3% of those who have attended IEFP courses were offered a job within 3 months after the conclusion of the course, even if it is only a temporary job, as it is the case of 49,1%. The IEFP is also implementing two programmes of recognition, validation and certification of skills *(Programa de Reconhecimento, validação e certificação de competências)*, for people who learned some skills and expertise, along their life, in a formal, non-formal education system or informally, but did not reach a school certificate.

Such individualized accompaniment schemes also importantly contribute to the removal of barriers impeding access of certain minorities or disadvantaged categories of workers to employment

[611] *CEACR: Individual Observation concerning Convention No. 181, private employment agencies, 1997.*
[612] OJ No. 15 of 19 January 2005, p. 864.
[613] Ustawa z dnia 28 lipca 2005 o zmianie ustawy o promocji zatrudnienia i instytucjach rynku pracy (Dz. U. z 2005 r. nr 164, poz. 1366) [Act of 28 July 2005 amending the Act on the promotion of employment and on labour market institutions (the Official Journal of 2005 No. 164, item 1366]

opportunities. In **Ireland**, the FAS (the state training agency) produced its Statement of Strategy for 2006-2009, which emphasizes its commitment to social inclusion, equality and diversity. The FAS intends: 'To promote the removal of barriers, and help provide supports which ensure access to programmes, services and employment for individuals and groups experiencing exclusion, discrimination and labour market disadvantage.' In order to implement this goal the Statement of Strategy commits FAS to: analyse and highlight the barriers preventing individuals from taking up training and employment opportunities; work with other agencies and Government departments to review policies and practices that act as barriers and assist with developing new policies to enable access to and participation in the labour market ; implement programme and service changes within FÁS to address identified training and employment barriers and gaps in provision ; develop and promote supports and incentives for employers to recruit marginalised individuals ; promote specific employment measures and career progression supports for people with disabilities and other groups experiencing inequality across the nine grounds covered by equality legislation ; raise awareness among employers of the contributions that persons from diverse backgrounds can make to their enterprise ; develop positive action measures, as allowed under equality legislation, for specified target groups ; provide the necessary training, development and supports to enable staff to champion social inclusion, equality and diversity ; implement the FÁS Equal Status Framework ; equality-proof all FÁS Programmes and Services to embed inclusiveness, equality and diversity in the development and delivery of services and programmes ; set targets for participation of specific groups within FÁS Programmes and Services ; promote a policy of mainstreaming marginalised people into the labour market. In order to measure progress towards the realisation of this goal FAS will monitor the following: (i) number of Programmes and Services equality proofed, (ii) levels of participation and outcomes for targeted groups on FÁS Programmes and Services, and (iii) FÁS Equal Status Framework developed and implemented.[614]

Article 30. Protection in the event of unjustified dismissal

Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.

This provision of the Charter must be read in accordance with the requirements formulated by ILO Convention No. 158 concerning the Termination of Employment at the Initiative of the Employer, adopted on 22 June 1982 at the 68th International Labour Conference. This Convention provides that 'Employment may not be terminated by the employer unless there is a valid reason connected with the abilities or the conduct of the employee, or based on the operational requirements of the undertaking, establishment or service' (Article 4). It also provides procedural guarantees, before dismissal ('The employment of an employee shall not be terminated for reasons related to the employee's conduct or performance, before giving him an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the said opportunity' (Article 7)) and following dismissal (Articles 8 to 10 guarantee in that respect a right to appeal). Article 30 of the Charter should also be read in accordance with Articles 24 and 29 of the Revised European Social Charter. Article 24 of the Revised European Social Charter in particular provides that with a view to ensuring the effective exercise of the right of workers to protection in cases of termination of employment, the Parties undertake to recognise the right of all workers not to have their employment terminated without valid reasons for such termination connected with their capacity or conduct or based on the operational requirements of the undertaking, establishment or service; and the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief. Under this same provision, the worker who considers that his employment has been terminated without a valid reason shall have the right to appeal to an impartial body. Finally, as illustrated during the period under scrutiny by the judgment adopted by the European Court of Human

[614] See http://www.fas.ie/information_and_publications/strategy/sos_eng/goal_6.htm.

Rights in the case of *Rainys and Gasparavičius v. Lithuania,*[615] which confirms the *Sidabras and Džiauta v. Lithuania* judgment, the prohibition of discrimination under Article 14 of the European Convention on Human Rights, in combination with other provisions of the Convention such as, in particular, the right to respect for private and family life (Art. 8 ECHR), freedom of expression (Art. 10 ECHR), or freedom of association (Art. 11 ECHR), also must be taken into account.

Article 30 of the Charter also should be read to include the protection of workers in the event of their employer's insolvency, as ensured in Community law by Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer,[616] as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002,[617] and as also guaranteed in ILO Convention (n° 173) of 23 June 1992 concerning the protection of employees' claims in a case of insolvency of their employer ; and it should also be read to include the protection of the workers in the case of collective redundancies, as ensured in Community law by Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies[618].

No Conclusions were adopted under this provision of the Charter.

Article 31. Fair and just working conditions

1. Every worker has the right to working conditions which respect his or her health, safety and dignity.
2. Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.

This provision of the Charter must be read in accordance with the requirements formulated by Article 7 of the International Covenant on Economic, Social and Cultural Rights (1966), by ILO Convention (n° 105) concerning the Abolition of Forced Labour (1957), by the ILO Convention (n°148) concerning the Protection of Workers against Occupational Hazards in the Working Environment Due to Air Pollution, Noise and Vibration (1977), by the ILO Occupational Health Services Convention (No. 161) (1985), by Articles 2 and 3 of the European Social Charter (1961) and by Articles 2, 3 and 26 of the Revised European Social Charter.

In September 2004, the Commission had made a proposal[619] aiming at the amendment of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time.[620] The single most debated aspect of this proposal concerns the 'opt-out' provision it contained, allowing an individual opt-out from the 48-hour average weekly limit, but reinforcing the protection of the worker by introducing a dual system, which the Commission believed combined the advantages of the individual approach with those of collective bargaining. According to this dual system, 'the individual opt-out will require prior collective agreement or agreement among social partners, but only in those cases where such agreements are possible under national legislation and/or practice. In other cases, opt-out on the basis of individual consent alone will remain possible, but reinforced conditions will apply to prevent abuses and to ensure that the choice of the worker is entirely free. Furthermore, the [proposal] introduces a maximum duration of working time for any one week, unless otherwise provided by collective agreement'[621]. Moreover, in order to take into consideration the particular situation of SMEs, the

[615] Eur. Ct. H.R., *Rainys and Gasparavičius v. Lithuania,* judgment of 7 April 2005.
[616] OJ 1980 L 283, p. 23.
[617] OJ L 270 of 8.10.2002.
[618] OJ 1998 L 225, p. 16.
[619] COM(2004) 607 final of 22.9.2004.
[620] OJ L 299, of 18.11.2003, p. 9.
[621] Explanatory Memorandum to the Proposal, at para. 12.

Commission proposed to maintain the opt-out for companies with no collective agreement in force and no collective representation of the workers that is capable of concluding a collective agreement or an agreement between the two sides of industry on the issue. In a previous report submitted to the Network, it was noted with regard to this proposal that 'The flexibility allowed by maintaining the individual opt-out could have an impact on the health and safety of the workers concerned, since fatigue associated with the risk of cardiovascular diseases and with a rise in the number of work accidents is directly proportional to the number of hours worked. It could discourage women from entering the labour market, since it becomes more difficult to reconcile family and professional life. It may also reinforce the professional segregation between men and women, since the most senior positions in the professional hierarchy require greater availability on the part of the worker. Finally, although the Commission proposal sets out to strengthen the reality of worker consent by preserving the latter's freedom of choice, in particular by guaranteeing that no worker should be disadvantaged by the fact that he is not willing to agree to work longer than 48 hours a week, the worker finds himself restricted essentially by the fact that he finds himself in a competitive position with other workers of whom the same extension of working time is asked, and that because of his refusal he may end up being given tasks with less responsibility, as well as being denied promotion to positions with greater responsibility'.[622] That report noted in this connection that, according to a study giving an evaluation of the profound impact of the proposed Directive, 'a significant proportion of those who work longer than 48 hours [from 17% to 35%, according to the type of positions considered] want to work less, even if this means accepting a reduction in salary'[623]. That report continued:

> It is therefore essential that the consent of the individual worker may not, by and in itself, legitimize the opt-out. In the proposal of the Commission, Article 22(1) provides that the possibility of individual opt-out must be 'expressly foreseen by a collective agreement or an agreement between the two sides of industry at national or regional level or, in accordance with national law and/or practice, by means of collective agreements or agreements concluded between the two sides of industry at the appropriate level'. Except for enterprises where there is no collective agreement in force and for which there is no workers' representation that is empowered to conclude a collective agreement or an agreement between the two sides of industry on the issue, this ensures a certain protection of the individual worker, compensating in part his/her vulnerability in the face of pressures which the employer might be tempted to exert. At the same time, it will be recognized that the representatives of workers themselves may be subjected to certain pressures linked to the need for the undertaking concerned to remain competitive in comparison not only with its competitors in other countries of the Union, but also with competitors in third countries in sectors exposed to international competition.
>
> It should be remembered in this respect that, according to the OECD Guidelines for Multinational Enterprises, approved by all governments of the OECD Member States, Member States should encourage multinational enterprises to abide by the principle that "In the context of bona fide negotiations with representatives of employees on conditions of employment, or while employees are exercising a right to organise", they must not "threaten to transfer the whole or part of an operating unit from the country concerned nor transfer employees from the enterprises' component entities in other countries in order to influence unfairly those negotiations or to hinder the exercise of a right to organise" (Chapter IV, par. 7 of the Guidelines).[624] (…) Moreover, Article 2(1) of the Revised European Social Charter provides that "With a view to ensuring the effective exercise of the right to just conditions of work, the Parties undertake: (..) to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit." The European Committee of Social Rights considers that the law must require that collective agreements set a daily or weekly limit to working time and that the

[622] *Report on the situation of fundamental rights in the European Union in 2004*, pp. 115-116.
[623] SEC(2004) 1154, pp. 26-27.
[624] This principle is cited in paragraph 52 of the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977).

possibility of reaching collective agreements at the enterprise level must be surrounded by specific guarantees.[625]

(…) Since Article 31(2) of the Charter of Fundamental Rights of the European Union is based on Article 2 of the European Social Charter, it should be read in conformity with the latter provision, taking into account the interpretation given thereof by the European Committee of Social Rights.

On 31 May 2005, the Commission presented an Amended proposal for a Directive of the European Parliament and of the Council amending Directive 2003/88/EC concerning certain aspects of the organisation of working time.[626] The proposal takes into account, in particular, the amendments proposed by the European Parliament[627] to the initial proposal presented by the Commission on 22 September 2004.[628] From the point of view of fundamental rights, the most significant choices of the Commission have been the following. First, the Commission accepted amendment (No 12) of the Parliament adding a provision concerning compatibility between work and family life.[629] Although the formulation of this guarantee is very cautious, insisting on the balance between the needs for flexibility respectively of the employer and the worker, this nevertheless should be seen as an improvement. Second, the Commission accepted an amendment (No 24) of the Parliament concerning the validity of opt-out agreements signed prior to the entry into force of the Directive.[630] Third, while the Commission rejected an amendment proposed by the Parliament (No 20) on the individual opt-out, providing for the repeal of the possibility of individual opt-out 36 months after the entry into force of the directive, the Commission did retain the substance of that amendment by incorporating the principle of a precise date for the end of the opt-out.

The debate concerning the revision of the Working Time Directive takes place in the context of a converging – and general – tendency of undertakings to impose more flexibility and longer working hours on employees, which moreover may occur without overtime work being always adequately compensated. For instance, in **the Netherlands**, the August 2005 report of the *Centraal Bureau voor de Statistiek* (CBS) [Central Bureau of Statistics] on working in overtime in the Netherlands in the year 2004 (CBS, *'Overwerken in Nederland',* 2005) shows a wide variation in practice concerning the way employers dealt with overtime compensation. Present Dutch law does not require employers to pay for work in overtime. It is up to employers and employees to conclude agreements about compensation either in time or in payment. The only legal limit is imposed by the *Arbeidstijdenwet* [Working Time Act], which holds that employees cannot be required to work for more than 54 hours a week. According to the CBS report, around 37% of Dutch employees regularly worked in overtime in 2004. Of this group, almost a third did not receive any compensation at all, neither in time nor in payment. The report shows furthermore that male employees work in overtime more often than female employees, that female employees receive compensation more often than male employees and that highly educated employees work in overtime more often than others. In **Portugal**, the General Inspectorate at Work (IGT - *Inspecção-geral do Trabalho*) has registered several situations of disrespect for the norms concerning daily and weekly resting pauses, with usual practices of working time extension, affecting the worker's plans on the conciliation of work, family life and leisure.

[625] European Committee of Social Rights, Decision on the merits of Collective Complaint No. 9/2000, *Confédération francaise de l'Encadrement CFE-CGC v. France*, 16 November 2001; and Concl. 2003-1 (France), p. 101.
[626] COM(2005) 246 final, 31.5.2005.
[627] Rep. A. Cercas, doc. PE 333.651v02-00, 25.4.2005.
[628] COM(2004) 607 final, 22.9.2004.
[629] This translates in the insertion of a new provision (Article 2b) in the proposal, under the heading 'Compatibility between working and family life'. The provision states that : 'The Member States shall encourage the social partners at the appropriate level, without prejudice to their autonomy, to conclude agreements aimed at improving compatibility between working and family life.
The Member States shall take the measures necessary to ensure that:
– employers inform workers in good time of any changes in the pattern or organisation of working time;
– workers may request changes to their working hours and patterns, and that employers are obliged to examine these requests taking into account employers' and workers' needs for flexibility'.
[630] Consisting in the addition of Article 22(1c) to the initial proposal, worded thus : 'Member States may lay down that any agreement given by a worker before the date laid down in Article 3 of Directive [2005/--/EC], and still valid on that date, shall remain valid for a period not exceeding one year from that date'.

During the first semester of 2005, IGT visited 2388 working places on several activities and 951 on the road transports sector, which gave origin to the application of 746 sanctions (372 of which on the transports sector). Three Individual Observations by the Committee of Experts on the Application of Conventions and Recommendations (CEACR) of the International Labour Organization regarding **Spain** were also concerned with this question.

Health and safety at work

A number of positive developments may be reported. During the period under scrutiny, **Cyprus** has sought to harmonise its legislation with the requirements of Directive 2002/44/EC of the European Parliament and of the Council on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents (vibration) (sixteenth individual Directive within the meaning of article 16(1) of Directive 89/391/EEC) by the adoption of the Security and Health at Work (Protection from Vibration) Regulations in July 2005,[631] pursuant to the Security and Health at Work Laws of 1999 up to 2003.[632] In **Italy**, the implementation of the same directive has been ensured by Legislative Decree no 187 of 19 August 2005.

The reinforcement of the powers and resources of the labor inspectorates is of course crucial to the effective implementation of occupational health and safety laws. The Network welcomes the fact that in **Latvia**, after 1 January 2007, expenditure for special examination of accidents at work will be disbursed by the state, drawing on the resources assigned to the State Labour Inspectorate (SLI), in accordance with the Regulations on procedure for examination and account of accidents at work developed by the Ministry of Welfare and accepted by the Cabinet of Ministers.[633] Although this constitutes an encouraging development, the SLI is however not capable of investigating all accidents and illegal acts in the sphere of health and safety of employees, especially in small and medium sized enterprises. The Government of the **Slovak Republic** approved by its Resolution no. 775 of 5 October 2005 the draft of new *zákon o inšpekcii práce* [Act on work inspection]. If adopted by the National Council, the new legislation should replace the current 2000 Act on work inspection[634] and further improve the protection of employees by the reinforcement of the powers of the labour inspectorate.

The Network also welcomes the entry into force in **The Netherlands**, on 1 July 2005, of a number of amendments to the *Arbowet* [Working Conditions Act]. The reform primarily is a response to the European Court of Justice judgment that the Working Conditions Act was not in conformity with Council Directive 89/391/EEC on the safety and health of workers at work,[635] insofar as the amendments to the Working Conditions Act – while still holding that a number of tasks related to working conditions still need to be provided by certified experts – no longer require undertakings to hire the external services of an *arbodienst*. Companies are free to hire other external experts, or train internal employees to perform these tasks. The amended Working Conditions Act however also stipulates that all companies with at least 15 employees must appoint one or more *preventiemedewerkers* [prevention employees]. The prevention employee is responsible for the daily supervision on health and safety issues within the company, must advise both the employer and the employees council on working conditions-policies and should serve as intermediary in contacts between the undertaking and external experts. In the **Slovak Republic**, the Government approved by Resolution no. 774 of 5 October 2005 the proposal of the new *zákon o bezpečnosti a ochrane zdravia pri práci* [Act on safety and protection of health at work]. If the draft law is adopted by the National Council, it should replace and improve on the current Act on health and safety protection at work of

[631] *Οι Περί Ασφάλειας και Υγείας στην Εργασία (Προστασία από τους Κραδασμούς) Κανονισμοί,* Κ.Δ.Π. 332/2005, 22 July 2005.
[632] *Οι περί Ασφάλειας και Υγείας στην Εργασία Νόμοι του 1996 έως 2003*.
[633] Ministru kabineta *Noteikumi Nr. 585 Nelaimes gadījumu darbā izmeklēšanas un uzskaites kārtība*, adopted 9 August 2005, in force since 12 August 2005.
[634] *Zákon č. 95/2000 Z. z. o inšpekcii práce a o zmene a doplnení niektorých zákonov v znení neskorších predpisov* [Act no. 95/2000 Coll. on labour inspection, amending and supplementing certain other laws as amended].
[635] Case C-441/01, *Commission v. the Netherlands*, judgment of 22 May 2003.

1996.[636]

The Network also has certain reasons for concern, however. In **Ireland**, in April 2005, in a report compiled by the Department of Enterprise, Trade and Employment, Labour Inspectors, who are charged with investigating breaches of employment laws as outlined (above) in relation to the Gama case, made clear their position that lack of resources in terms of staff training and support were making it impossible for them to carry out their functions correctly.[637] The report was prepared as part of the Government's commitments under the *Sustaining Progress* Agreement and relied heavily on information provided by Inspectors working within the Department. Issues addressed by the paper include the confusion resulting from inspectors having different roles under different legislation; their limited powers under legislation such as the Organisation of Working Time Act; or the inadequacy of penalties. One of the crucial problems faced by the Labour Inspectorate in performing its functions is the chronic understaffing that persists in the office. The Report advocates the number of Inspectors be raised to between 38 and 51 and that a comprehensive training scheme be introduced to allow Inspectors to carry out their tasks competently and that proper support services be put in place in order to retain staff in this area, which has been a recent problem. In response to the report and growing concerns about the treatment of migrant workers in Ireland the Minister for Enterprise, Trade and Employment announced the appointment of a further 10 labour inspectors, which would be followed by further increases in staffing and resources for the Inspectorate.[638] The announcement was made at a meeting with union leaders and coincided with an escalation of calls for justice from the Turkish workers who had been exploited by the Gama Corporation.

Due partly to the insufficient capacities of the labour inspectorates, and partly to the vulnerable situation of illegally employed foreign workers, exploitative practices persist. In **Austria**, according to the data displayed in the latest available annual report on 2003 of the Office of Labour Inspection, violations of health and safety provisions as well as of general and group specific provisions on working hours and rest periods (in particular protecting children, youth, pregnant women) are most often registered in fields where the percentage of alien employment is above average. These fields include tourism, trade, the construction industry and business oriented services.[639] A similar concern – exploitative practices against foreign workers – has been expressed by the authorities in **Finland**, although no statistics have been identified which highlight the precise extent of the problem.[640] Since violations of the law on health and safety at work have been reported in sectors employing illegal workers, who are particularly vulnerable to abuses, the Network welcomes the fact that in **France** the new Central Office for the Fight against Illegal Labour (OCLTI)[641,] attached to the subdirectorate of the judicial police of the Directorate-General of the National Gendarmerie, was officially opened on 16 May 2005. This central office of judicial police will be entrusted with combating infringements connected with illegal labour in all its forms. As was discussed earlier, it may eventually be necessary to contemplate the possibility of allowing illegal immigrants who are subjected to practices of economic exploitation by their employer to denounce those practices without having to fear an immediate removal order, after the example of what has been set up in order to encourage cooperation with the police by victims of trafficking in human beings. Furthermore, the Network points out that the relaxation of conditions for granting work permits to immigrant workers and the shortening of the time needed for the public authorities to issue such permits help to create the necessary environment to combat illegal exploitation practices. It also notes with interest in that respect that the Union of

[636] *Zákon č. 330/1996 Z. z. o bezpečnosti a ochrane zdravia pri práci v znení neskorších predpisov* [Act no. 330/1996 Coll. on safety and protection of health at work as amended].
[637] *The Irish Times,* 8th April 2005
[638] *The Irish Times,* 13th April 2005
[639] Information provided upon request by the Austrian Focal Point of the EUMC in November 2005. Original Source: Tätigkeitsbericht der Arbeitsinspektion im Jahr 2003, *Bundesministerium für Wirtschaft und Arbeit*,Wien, pp. 174-177, 182-183, available at:
http://www.arbeitsinspektion.gv.at/NR/rdonlyres/4EAA3C47-9390-49F9-BC48-723C01D3ECB4/0/jb2003.pdf, (05.10.2005).
[640] Helsingin Sanomat, 23.11.2005.
[641] See Decree No. 2005-455 of 12 May 2005 establishing a Central Office for the Fight against Illegal Labour, OJ No. 110 of 13 May 2005 p. 8268.

Luxembourg Industries (UEL) has criticized the excessively protective nature of legislation in **Luxembourg** on the conditions for granting work permits to non-EU nationals, a situation which does not allow export-minded Luxembourg businesses to develop their activities. In the UEL's view, fundamental reforms are necessary in this area: "In order to help businesses from different sectors to acquire the necessary skills to carry out their activities which are often situated in an international context, those reforms must focus on a relaxation and acceleration of the procedure for granting work permits."[642] The UEL holds the view that the criteria for granting work permits should be relaxed, and that the mechanisms of entry for third-country nationals should be simplified and made more transparent by the granting of a single permit, with the work permit serving as residence permit and the residence permit giving free access to employment; the time for granting permits should be shortened; the person concerned must be able to request the granting and renewal of the permit, and finally the requirement of a bank guarantee as provided for in the legislation currently in force should be abolished.

The Network takes note of the observation by the European Committee of Social Rights that the situation in **France** is not satisfactory with regard to Article 2(1) and (5) of the Revised European Social Charter. The decision on the merits of Complaint No. 22/2003, *Confédération générale du travail (CGT) v. France*, published on 21 January 2005, 005, leads to the conclusion that certain provisions of Act No. 2003-47 of 17 January 2003 on wages, working time and employment development violate those provisions. The Committee holds that the assimilation of on-call periods (*périodes d'astreinte)* to rest periods constitutes a violation of the right to reasonable working time provided in Article 2(1) of the Charter, since the obligation to carry out work "unquestionably prevents the employee from the pursuit of activities of his or her own choosing […]'; furthermore, insofar as those *périodes d'astreinte* can be on Sundays, there is also a violation of Article 2(5).[643]

Harassment on grounds of gender or any other prohibited ground for discrimination must be considered a specific form of discrimination in accordance with Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin,[644] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation,[645] and Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002[646] amending Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.[647] The Network considers it particularly noteworthy and encouraging that in **Spain**, a judgment of the High Court of Justice of Galicia found that there was a case of sexual harassment between two persons of the same sex in a situation where a worker who refused to accede to the sexual advances of a management staff member of the company was dismissed, it being irrelevant that the two persons were of the same sex.[648]

Article 32. Prohibition of child labour and protection of young people at work

The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations. Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to

[642] Merkur, October 2005, p. 96.
[643] Collective Complaint No. 22/2003 was the subject of a resolution adopted by the Committee of Ministers on 4 May 2005 (ResChS(2005)8).
[644] OJ L 180 of 19.7.2000, p. 22.
[645] OJ L 303 of 2.12.2000, p. 16.
[646] OJ L 269 of 5.10.2002, p. 15.
[647] OJ L 39 of 14.2.1976, p. 40.
[648] High Court of Justice, Galicia, Social Chamber, judgment of 29 April 2005. In the Court's view, the responsibility of the company was also involved, since it had failed to adequately protect the worker against the harassment.

interfere with their education.

This provision of the Charter must be read in accordance with the requirements formulated by Article 10(3) of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 32 of the Convention on the Rights of the Child (1989), by ILO Convention (n° 138) concerning Minimum Age for Admission to Employment (1973), by ILO Convention (n° 182) concerning the prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999), and by Article 7 of the European Social Charter (1961) and Article 7 of the Revised European Social Charter.

Few developments are to be reported for the period under scrutiny. The Network welcomes, however, the establishment in **Latvia** of the State Inspection for Protection of Children's Rights, which is due to start from 1 December 2005, and whose main tasks will be to supervise and control implementation of legal standards of child protection.[649] In the **Slovak Republic**, Section 211 of the new *Trestný zákon* [Criminal Code][650], which will come into force on 1 January 2006, criminalizes the corrupting of the morals of youth; under para. 2 of Section 211, the employment of a child younger than fifteen years, impeding the child from compulsory school attendance, may lead to being sentenced to a term of imprisonment of up to 2 years. In **Denmark**, Parliament adopted Act (2004:1186) amending the Criminal Code in Greenland (child pornography)][651] in December 2004, introducing in section 56 a of the Criminal Code a prohibition against production, possessing and spreading of pornographic material and the use of children as porn models. This act improves the children against sexual exploitation, contributing to the implementation of ILO Convention (no. 182) concerning the worst forms of child labour.

The Network also has certain reasons for concern under this provision of the Charter. The European Committee of Social Rights concluded that the situation in **Greece** was not in conformity with Article 7(5) of the European Social Charter, which recognizes the right of young workers and apprentices to a fair wage, on account of the fact that, during the reference period, the minimum wage that is paid to young workers and that serves as a basis for calculation of apprentices' allowances was too low and that the Government failed to provide evidence that tax and social security benefits ensured young workers and apprentices a decent standard of living.[652] In its concluding observations on **Austria** the Committee on the Rights of the Child reiterated its concerns that domestic legislation continues to permit children form the age of 12 to be involved in light work. The Committee recommended that the relevant legislation should be amended by raising this age limit to that set in ILO Convention (n° 138) concerning Minimum Age for Admission to Employment (1973), which was ratified by Austria in 2000.[653] The European Committee of Social Rights found that the situation in Spain was not in conformity with Article 7 (1) of the European Social Charter on the grounds that work of children in family enterprises was excluded from the scope of the Workers' Statute which prohibits work by persons under 16 years of age, and no explicit statutory prohibition on the access to self-employment exists for persons under 16 years of age.[654] Furthermore, the Committee considered that the situation in Spain was not in conformity with Article 7(5) of the European Social Charter because young workers' wages and apprentices' allowances were indexed to the national statutory minimum wage, which was itself too low and therefore not in conformity with Article 4(1) of the Charter. Upon examining the report of the **United Kingdom**, the European Committee of Social Rights has noted that there had been no

[649] Information published in the official gazette *Latvijas Vēstnesis*. Available at http://lv.lv/index.php?left_mode=PR&mode=DOC&id=122364

[650] *Zákon č. 300/2005 Z. z. Trestný zákon* [Act no. 300/2005 Coll. Criminal Code].

[651] Lov (2004:1186) om ændring af kriminallov for Grønland. (Børnepornografi).

[652] The Committee deferred its conclusion with regard to the minimum age of admission to employment and the prohibition of employment for children of compulsory school age.

[653] Concluding Observations on Austria, Committee on the Rights of the Child, 38th session, CRC/C/15/Add.251, 31.03.2005, para 49, 50.

[654] Conclusions XVII-2 (Spain) 2005. The Committee deferred its conclusions on several other issues not mentioned here pending additional information from Spain.

change in the insufficiency of the mandatory rest period during the summer holidays for children still subject to compulsory education because it did not equal half the holiday period and it concluded that the situation in the United Kingdom was not in conformity with para. 3 of Article 7 of the European Social Charter on the ground that it did not ensure that children might fully benefit from such education. The European Committee of Social Rights also concluded that the situation in the United Kingdom was not in conformity with para. 5 of Article 7 of the European Social Charter on the ground that there was no evidence that, during the reference period, young workers' lowest wages were fair compared to adult workers' minimum wages, which were themselves unreasonably low compared to the average wage in industry and services (the minimum wage of 1,076 euros was 34.4% of the average wage). As from 1 October 2004 a minimum hourly wage of 4.36€ (62% of the adult minimum wage) had been introduced for 16-17 year old workers (*Conclusions XVII-2*). Moreover, in an Individual Direct Request concerning ILO Convention (No. 182) Worst Forms of Child Labour, 1999, submitted in 2005, the Committee of Experts on the Application of Conventions and Recommendations noted that Regulation 19 of the Management of Health and Safety at Work Regulations, 1999 places a duty on the employer to protect young persons (ie, a person under 18 years of age) from risks to their health and safety and provides for a detailed list of occupations that young workers shall not perform. However, according to the TUC, the provisional list of hazardous work prohibited for children under 18 was not satisfactory; it argued that underwater and underground work, manual handling of heavy loads, work in confined spaces, work at dangerous heights, and deep-sea fishing are not included therein. The Committee encouraged the Government to adopt, for the sake of clarity, a single comprehensive document compiling the types of work, likely to harm the health, safety or morals of children under 18. It also trusted that, when reviewing the types of hazardous work, the Government would take due consideration of the types of work enumerated in Paragraph 3 of the Worst Forms of Child Labour Recommendation, 1999 (No. 190).

Article 33. Family and professional life

1. The family shall enjoy legal, economic and social protection.
2. To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Parental leaves and initiatives to facilitate the conciliation of family and professional life

Article 8 of the Revised European Social Charter provides that:

> With a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:
> 1. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks;
> 2. to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;
> 3. to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;
> 4. to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;
> 5. to prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by

reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.

As to Article 27 of the Revised European Social Charter, it states:

With a view to ensuring the exercise of the right to equality of opportunity and treatment for men and women workers with family responsibilities and between such workers and other workers, the Parties undertake:

1. to take appropriate measures:

1. to enable workers with family responsibilities to enter and remain in employment, as well as to reenter employment after an absence due to those responsibilities, including measures in the field of vocational guidance and training;

2. to take account of their needs in terms of conditions of employment and social security;

3. to develop or promote services, public or private, in particular child daycare services and other childcare arrangements;

2. to provide a possibility for either parent to obtain, during a period after maternity leave, parental leave to take care of a child, the duration and conditions of which should be determined by national legislation, collective agreements or practice;

3. to ensure that family responsibilities shall not, as such, constitute a valid reason for termination of employment.

As illustrated by the conclusions recently adopted by the European Committee of Social Rights on these provisions, a number of situations remain problematic with regard to these articles, whose implementation would represent an important contribution to fulfilling the objective of reconciling family with professional life.

The European Committee of Social Rights concluded that the situation in **Cyprus** was not in conformity with para. 3 of Article 8 of the Revised European Social Charter on the issue of maternity leave, because of the exceeding short period during which time off for nursing is permitted.[655] This period is currently of 6 months. The Committee considers that 'in principle nursing breaks should be granted until at least the child reaches the age of nine months'. The Committee of Social Rights also examined the situation of **Spain** with regard to Article 8 of the European Social Charter on the right of employed women to protection[656]. It concluded that the situation in that country was not in conformity with Article 8(2) on protection against dismissal during maternity leave, since pregnant women or women on maternity leave can be dismissed in the context of collective redundancy even where the undertaking has not ceased to operate. Another reason for non-conformity with this provision is the fact that an employer may terminate a domestic worker's contract through withdrawal before the expiry and without alleging any motive. Furthermore, the situation in Spain is not in conformity with Article 8(3) of the Charter on time off for nursing mothers, since domestic workers do not have the right to time off for breastfeeding. The European Committee of Social Rights also concluded that the situation in **Denmark** was not in conformity with para. 1 of Article 8 of the European Social Charter[657] in relation to the right to maternity leave. The Committee recalls that while Denmark provides for a generous system of maternity leave (30 weeks), the compulsory period of postnatal leave is less than six weeks, which the Committee considers to be too short. A similar problem was seen to exist in **Lithuania** and in **Sweden** under para. 1 of Article 8 of the Revised European Social Charter.[658] Moreover, also in its conclusions on **Lithuania**, the European Committee of Social Rights also noted that the situation in Lithuania is not in conformity with para. 2 of Article 8 of the Revised Charter on the grounds that national law did not, for at least part of the reference period, ensure that adequate damages were payable to a woman dismissed in violation of this provision. Finally, the Committee concluded that the situation in Lithuania was not in conformity with para. 5 Article 8 of the Revised Charter on the grounds that pregnant women, women who have recently given birth and

[655] Conclusions 2005 (Cyprus).
[656] Conclusions XVII-2 (Spain) 2005.
[657] Conclusions XVII-2 (Denmark).
[658] Conclusions 2005 (Lithuania) ; Conclusions 2005 (Sweden).

breastfeeding women who were obliged to take leave due to the health and safety risks at work were not remunerated or compensated during this period. As regards Article 27 (right of workers with family responsibilities to equal opportunities and treatment), the Committee concluded that the situation in Lithuania is not in conformity with para. 1 of Article 27 of the Revised European Social Charter on the grounds that fathers who are not single are discriminated against with regard to the right to work part-time. In its examination of the situation in **Greece,** the European Committee of Social Rights found that the situation in that country during the period under scrutiny was in conformity with the European Social Charter as regards the length of maternity leave and time off for breastfeeding, but that it was not in conformity with Article 8(1) of the Charter (right to adequate benefits), on the ground that periods of unemployment are not taken into account when calculating periods of employment needed to qualify for maternity leave. The Committee deferred its conclusion on the consequences of unlawful dismissal, pending additional information to be provided on levels of compensation to be awarded where a woman unlawfully dismissed does not wish to be reinstated or where this is not possible. In its Conclusions on **Sweden**, whereas the European Committee of Social Rights had previously taken the view that para. 3 of Article 8 of the Revised European Social Charter (time off for nursing mothers) did not allow a system under which women reducing their daily working time in order to nurse their children were not remunerated for these periods as working time, even where the loss of income is compensated by parental benefit, it now takes the position that 'where loss of income is compensated by parental benefit, the situation is in conformity with the Revised Charter'. Finally, the European Committee of Social Rights has concluded that, in the absence of a compulsory period of six weeks post natal leave (of the twenty-six weeks maternity leave only two weeks post natal was compulsory except in the case of factory workers for whom the compulsory period is four weeks), the situation in the **United Kingdom** was not in conformity with para. 1 of Article 8 of the European Social Charter, notwithstanding the Government's position that in practice nearly all women availed themselves of six weeks post natal leave. The Committee also concluded that the situation was not in conformity with this provision of the ESC in that the standard rates of Statutory Maternity Pay and Maternity Allowance were inadequate during the reference period (*Conclusions XVII-2)*.

The adoption of Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC[659] has constituted an important contribution of Community law to the implementation of the guarantee of Article 33(2) of the Charter of Fundamental Rights, by ensuring to men and women workers, on a non-transferable basis in order to promote equal opportunities and equal treatment between men and women, an individual right to parental leave on the grounds of the birth or adoption of a child to enable them to take care of that child, for at least three months, until a given age up to 8 years to be defined by Member States and/or management and labour (clause 2 of the Framework Agreement on Parental leave). The European Commission instituted infringement proceedings against **Luxembourg** with regard to the provisions of the Act of 12 February 1999 substituting maternity leave for parental leave in the event of pregnancy or adoption of a child during parental leave, and the date from which an individual right to parental leave is granted. It asserts that those provisions do not comply with Council Directive 96/34 of 3 June 1996. In its judgment, the Court of Justice of the European Communities considers on the first point that maternity leave and parental leave have two different purposes, namely to protect a woman's biological condition and the special relationship between a woman and her child, and to take care of a child respectively. It follows that each parent is entitled to parental leave of at least three months' duration and that this may not be reduced when it is interrupted by another period of leave which pursues a purpose different from that of parental leave. The Court inferred from this that, by requiring that parental leave come obligatorily to an end at the date on which it is interrupted by maternity leave or adoption leave without its being possible for the parent to defer the portion of that parental leave which he or she was not able to take, the Grand Duchy of Luxembourg has failed to fulfil its obligations under Directive 96/34. On the second point, the Court sets forth that since the same

[659] OJ L 145, 19.6.1996, p. 4. See also Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 10, 16.1.1998, p. 24.

Directive provides that entitlement to parental leave is available during a certain period until the child has reached the age set by the Member State concerned, the fact that the child was born before or after the time-limit laid down for the implementation of that directive is not relevant in this regard. By imposing a time-limit, Luxembourg has made it impossible for parents to avail themselves of such a right, and this is not authorized by the Directive.[660]

Certain positive developments also should be reported. In particular, the Network welcomes the ruling no 385 of 14 October 2005 adopted in **Italy** by the Constitutional Court, which finds invalid Articles 70 and 72 of Legislative Decree 151/2001, which expressly recognize maternity benefit to professional women workers only, and does not permit the extension of this right, as an alternative, to male self-employed professionals, thus extending the right to parental benefits to the self-employed male. The Italian Constitutional Court also made a statement on art 42, paragraph 5 of Legislative Decree 151/2001, in ruling no 233 of 8 June 2005. The Network underlines the importance of this ruling for its contribution to the reconciliation of professional and family life, in situations where a person with a disability it to be taken care of by a family member. Indeed, in this ruling the Court states that brothers or sisters living with a seriously handicapped person may be granted an extraordinary paid leave not only if the parents are dead or absent (*scomparsa*), but also where the parents, although still alive, find it impossible to look after their handicapped son or daughter because they are totally unable to do so and possess the necessary requisites under art 1 of Law no 18/1980.[661] As illustrated by this latter judgment, the contemporary understanding of the right to reconcile professional and family life should be seen to include the right to take care of parents, siblings or children with a disability, in accordance with the applicable legislation which should provide for the possibility of a leave in order to ensure this possibility. Reference is made in this regard to the comments made in this report under Article 26 of the Charter.

The conciliation of professional and family life would be improved if fathers were encouraged to make a more frequent use of their right to a parental leave. Much progress remains to be done in this area. The evolution is positive in **Portugal**, where the number of fathers enjoying paternity leave is increasing in a significant way year after year. In 1999, 112 men took parental leave, in 2003 the number increased up 40 577, and in 2004 up to 41 423 (to be compared with 78 273 women having taken parental leave during the same period). The situation in **Poland** is more ambiguous. According to the State Labour Inspection (*Państwowa Inspekcja Pracy* - PIP) report, women much more often than men use the parental leave rights associated with raising children. At the same time, the number of women benefiting from the possibility of taking maternity leave is decreasing. According to the data from 2003, only 1 in 25 women took maternity leave. Even fewer women use the right to unpaid extended post-maternity leave. As part of the National Programme for Women, actions are undertaken in order to improve the situation of women in the job market, including publishing information about workers rights – especially rights related to maternity – as well as actions to increase the availability of care institutions for children (day care centres, pre-schools, after-school clubs).[662] In **Lithuania,** although the men have equal rights as women to take a maternity / paternity leave, according to the statistics, men are still reluctant to make use of this right. According to the information of the fund of social insurance on the year 2004, 18590 women had used the right to maternity leave but only 0.952 % of men had taken a paternity leave. On the first quarter of the year 2005 the right to maternity leave was used by 19612 persons, 1.228 % of them were men. In **Malta,** the Department for Women in Society has published a report on the 'Impact Of Parental Leave, Career Break And Responsibility Leave In The Maltese Public Sector' which shows that 98.4% of persons taking parental leave and career breaks are female, the government, however, appears determined to tackle this issue. The survey shows that parental leave would increase in popularity amongst men, if they were given some form of remuneration for the period spent in leave. On the basis of the report, the National Council of

[660] ECJ, 14 April 2005, Commission v. Luxembourg, C-519/03.
[661] In a circular dated 29 September 2005, the Istituto Nazionale di Previdenza Sociale (National Social Security Institute), already took steps to clarify the implementation aspects of the ruling.
[662]Informacja Rządu dotycząca realizacji Krajowego Programu Działań na Rzecz Kobiet – II etap wdrożeniowy [Government information concerning the implementation of the National Programme for Women - the second phase of implementation] http://www.rownystatus.gov.pl/pl/index.php?m=dokumenty&kat=12 (07.11.2005)

Women has made a number of proposals as to how the current system should be updated, but as yet there have been no legislative developments. The introduction of a compulsory parental leave for male parents, as currently under discussion in **Denmark**, may however be necessary to accelerate the evolution towards a more balanced division of tasks within the family, in order thus to facilitate the possibility for the mother to reconcile her professional and her family life.

The Network welcomes the fact that in **Slovak Republic,** following the Amendment to the *zákon o rodičovskom príspevku* [Act on parental allowance Amendment][663], which came into effect on 1 July 2005, the personal care taking of the child by parent is not required as necessary condition for providing of parental allowance. The allowance is provided to the parent in both cases, when he/she takes care of the child in person or when he/she ensures the care taking of the child by other natural or legal person while he/she is performing gainful activities. The parental allowance is a social benefit through which the State contributes for providing proper care taking of the child. The parental allowance is provided for a child till his/her 3 years of age, for a child with long-term bad state of health till his/her 6 years of age or for a child who is under custodianship of foster parents. In case of foster care the longest period of providing of the allowance is 3 years from the date of judgment of fosterage. The provision of the parental allowance is not dependent on the level of parent's earnings.

Incentive measures have been adopted during the period under scrutiny in order to encourage women to take up employment after a maternity leave. In **Malta**, the Tax Credit (Women Returning to Employment) Rules, 2005 (Legal Notice 110 of 2005) seek to incentivize women who have been out of employment for a period of more than 5 years, to resume working. They provide for a tax credit to be set-off with the tax on the gains from employment. One crucial element of this debate concerns the availability of child care institutions and the regime of child care benefits, particularly whether the provision of child care benefits may be combined with part-time work. According to a study by the European Centre for Social Welfare Policy and Research there are 46,000 child care places missing in **Austria**, in particular for children below three years of age[664]. The access to another 40,000 places should be improved in regard to opening hours[665]. The Employment Service (AMS) supports women re-entering the labour market after maternity leave via subsidies for the costs of child care. According to the AMS the lack of child care facilities is particularly evident in rural areas[666]. Another study commissioned by the Chamber of Labour (*Arbeiterkammer)* indicates that child care benefit (*Kinderbetreuungsgeld*) has a negative impact on the employment rate of young mothers. The extension of the time frame during which child care benefits are paid without adequate accompanying measures lead to a considerably higher unemployment rate of women. The low earning threshold allowed for additional income (*Zuverdienstgrenze*) deters well qualified women from taking part time work. Both the Chamber of Labour and the Federation of Austrian Industrialists (*Industriellenvereinigung*) started a common initiative demanding more flexible regulations in regard of the possibility of earning additional income and concerning the timeframe during which benefits are paid. A more flexible system would facilitate women's re-entry into the labour market and encourage men to make use of paternity leave while being able to earn additional income[667].

Article 34. Social security and social assistance

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age,

[663] Zákon č. 244/2005 Z. z., ktorým sa mení a dopĺňa zákon č. 280/2002 Z. z. o rodičovskom príspevku v znení neskorších predpisov a o zmene a doplnení niektorých zákonov [Act no. 244/2005 Coll. amending and supplementing the Act no. 280/2002 Coll. on parental allowance as amended, amending and supplementing certain other laws].
[664] 'Kinderbetreuungsplätze. Zwischen 10.000 und 100.000', European Centre for Social Welfare Policy and Research, finalized in October 2005, not yet published.
[665] „Probleme in der Kinderbetreuung', press release of the *Arbeiterkammer*, 08.11.2005.
[666] „Beitrag des Vorstandes des AMS Österreich für das Nationale Reformprogramm 2005-2008', 21.07.2005, p. 7.
[667] Initiative Vereinbarkeit von Familie und Beruf, for further information see: http://wien.arbeiterkammer.at/www-397-IP-24920-IPS-1.html (19.11.2005).

and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights (1966), by Articles 26 and 27 of the Convention on the Rights of the Child (1989), by ILO Convention (n° 168) concerning Employment Promotion and Protection against Unemployment (1988), by Article 12, 13 and 17 of the European Social Charter (1961) and by Articles 12, 13, 30 and 31 of the Revised European Social Charter.

Social and medical assistance for asylum seekers

Article 13 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[668] provides that the Member States shall ensure that 'material reception conditions are available to applicants when they make their application for asylum'. It imposes on the Member States to make provisions on material reception conditions to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. In particular, the Member States shall ensure that that standard of living is met in the specific situation of persons who have special needs,[669] as well as in relation to the situation of persons who are in detention. The Member States may make the provision of all or some of the material reception conditions and health care subject to the condition that applicants do not have sufficient means to have a standard of living adequate for their health and to enable their subsistence ; and they may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in the Directive if the applicants have sufficient resources, for example if they have been working for a reasonable period of time. Article 13(5) states that material reception conditions may be provided in kind, or in the form of financial allowances or vouchers or in a combination of these provisions.

Certain developments during the period under scrutiny relate to the implementation of this provision. In **Lithuania**, the Minister of Health adopted on 28 October 2005 the Security Order on Hygiene Provisions and Rules in the Foreigners Registration Centre,[670] establishing detailed hygiene requirements for the premises, the distribution of hygiene items to foreigners, the nutrition and the health assistance systems in the Centre. In **Poland**, the amendment to the Act on granting protection to aliens on the territory of the Republic[671] changed the rules for granting social benefits to aliens applying for refugee status. For aliens who received permission for a tolerated stay the amendment prolonged the period of stay in reception centres up to three months after receiving a final decision on their status. Before that, such a possibility was limited only to aliens who received refugee status. The Act extended the benefits granted to asylum seekers to include the provision of didactic materials for children attending public educational institutions and schools and covering the related costs. It also

[668] OJ L 31 of 6.2.2003, p. 18.
[669] These are vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (Art. 17 of the Directive).
[670] 2005 10 28 LR sveikatos apsaugos ministro įsakymas Nr. V-836 'Užsieniečių registracijos centras. Higienos normos ir taisyklės' [28 October 2005 Minister of Health Security Order No. V-836 on Hygiene Provisions and Rules in the Foreigners Registration Center] // Valstybės žinios, 2005, Nr. 135-4863
[671] Ustawa z dnia 22 kwietnia 2005 o zmianie ustawy o cudzoziemcach oraz ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej oraz niektórych innych ustaw, (Dz.U. z 2005 r. nr 94, poz. 788) [The Act of 22 April 2005 amending the Act on aliens and the Act on granting protection to aliens within the territory of the Republic of Poland (The Official Journal of 2005, No. 94, item. 788)]

gave the children the right to receive funds for buying food at school. In the **Slovak Republic**, according to the Amendment to the *zákon o azyle* [Act on Asylum][672], which came into force on 1 February 2005, the asylum-seeker in the course of the procedure for the determination of the claim to asylum is granted with accommodation, food or food allowance, basic sanitary material and other things necessary for survival. During the stay in asylum facility or integration centre, the applicant for asylum is also provided with spending money. According to the Asylum Act Amendment the spending money is not provided to the applicant who attempted of unauthorised entry to the territory of other state or who voluntarily left the territory of the Slovak Republic and was returned back by the authorities of neighbouring state or in the case of repeated application when the previous asylum granting procedure was discontinued because of reasons listed in the law. In **Lithuania**, in 2005 the Lithuanian Red Cross implemented the social assistance project to asylum seekers in the Foreigners Registration Centre funded by the European Refugee Fund and the Ministry of Internal Affairs, which was aimed to fill the gap of social assistance and help to satisfy basic social, medical and psychological needs of asylum seekers.[673]

A number of problems remain, however. The reception of asylum seekers in **Lithuania** would not seem to comply with the requirements of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, particularly Article 13 thereof. Asylum seekers are placed in the Foreigners Registration Centre in town of Pabrade, which is the only accommodation facility for all asylum seekers except for unaccompanied minors. However, the medical unit, located in the Foreigners Registration Centre, provides only necessary health care services, while access to the hospitals and services of specialists is available only in emergency cases. Neither psychological, nor mental health services are available in the Centre. Moreover – and more specifically related to Article 13 of Council Directive 2003/9/EC – The amount of 25 Litas (approx. 7 Euro) is insufficient to allow asylum seekers to satisfy even their basic needs (e.g., proper food, health care, clothing, school necessities). A shadow report on **Austria** submitted to the Committee on Economic Social and Cultural Rights (CESCR) points out the significant gap between the amounts of social assistance received by Austrian citizens and asylum seekers living in private flats. In Styria, for example, an Austrian citizen would receive 479 euros, whereas an asylum seeker would receive only 180 euros. Except for Salzburg and Vienna, social assistance may have to be repaid once the emergency situation has ended. In Vienna, asylum seekers are entitled to a maximum reimbursement of 110 euros per month while the maximum subsidy for Austrian citizens is 220 euros.[674]

Social and medical assistance for undocumented foreigners

Whereas the comments above refer only to the situation of asylum-seekers, other categories, especially illegally residing third-country nationals, are also in a particularly vulnerable situation as regards their access to the welfare benefits which allow them to lead a dignified life. In **Italy**, it appears increasingly difficult for persons who are illegally resident in Italy to apply to public health facilities,[675] principally due to the poor capacity of the public health system to adapt to immigrant users and also to a fear of expulsion (regulated at the end by Law no 271 of 12 November 2004 and by Legislative Decree no 12 of 10 January 2005, implementing Directive 2001/40/EC relating to reciprocal recognition of decisions to remove citizens from third countries) with inevitable public health risks. In **Sweden**, the Swedish Section of Doctors without Borders (*Läkare utan gränser*) has expressed its great concern about the exclusion of undocumented migrants in practice from all health care services in Sweden. Such access exists with regard to emergency health care. Nevertheless, these migrants have to pay the full cost of such a treatment, including for childbirth which may cost

[672] *Zákon č. 1/2005 Z. z., ktorým sa mení a dopĺňa zákon č. 480/2002 Z. z. o azyle a o zmene a doplnení niektorých zákonov v znení neskorších predpisov a o zmene a doplnení niektorých zákonov* [Act no. 1/2005 Coll. amending and supplementing the Act no. 480/2002 Coll. on asylum, amending and supplementing certain other laws].
[673] Projekto aprašymas [Description of the Project] www.redcross.lt
[674] „Implementation on the International Covenant on Economic, Social and Cultural Rights in Austria. Comments to the Third and Fourth Periodic Report of the Republic of Austria based on Selected Issues' published by FIAN Austria & Protestant Development Co-operation, September 2005, p. 52.
[675] 39th CENSIS Social Research Institute Report.

approximately 2 000 euros. Moreover, there is a risk that this practice may be consolidated into Swedish legislation.[676]

The Network recalls in this regard the decision on the merits adopted by the European Committee of Social Rights in the Collective Complaint n° 14/2003 *International Federation of Human Rights Leagues (FIDH) v. France*, where the Committee concluded that Section 57 of Part II – "Other Provisions" – of the 2002 Finance (Amendment) Act, No. 2002-1576 of 30 December 2002 was not in conformity with Article 17 of the Revised European Social Charter, on the right of children and young persons to social, legal and economic protection. This provision states that 'with a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities', the States Parties who have agreed to this provision undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1. to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
2. to protect children and young persons against negligence, violence or exploitation;
3. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
4. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

Recalling that Article 17 of the Revised Charter is directly inspired by the United Nations Convention on the Rights of the Child and that it protects in a general manner the right of children and young persons, including unaccompanied minors, to care and assistance, the Committee noted that 'a) medical assistance to the above target group in France is limited to situations that involve an immediate threat to life; b) children of illegal immigrants are only admitted to the medical assistance scheme after a certain time'; it therefore concluded that the situation in France was not in conformity with Article 17 of the Revised European Social Charter. This conclusion is particularly remarkable in the light of para. 1 of the Appendix to the Social Charter, which provides that 'the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned', as the abovementioned restrictions to medical assistance only concerned children who were illegally staying in France. The Committee concluded however in this respect that in the particular case it was confronted with, the right is 'of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment' (§ 30). It therefore held that 'legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter' (§ 32). As a result of this decision, the European Social Charter has extended its protection to all persons under the jurisdiction of the States parties, with respect to the rights which may be considered to be essential for human dignity, including presumably the right to protection against poverty and social exclusion (Art. 30 of the Revised European Social Charter).

The views adopted by the European Committee on Social Rights are complementary to those which have been adopted on the basis of the Convention of the Rights of the Child, to which the Committee referred in *FIDH v. France*. Thus in the **Netherlands**, the *Centrale Raad van Beroep* [Central Appeals Tribunal] held in summary injunction proceedings that the *Wet Werk en Bijstand (WWB)*

[676] These views were expressed during the hearing of the EU independent experts in fundamental rights with representatives for a number different NGOs and civil society on 17 October 2005 in Brussels. See also the paper 'PICUM's main concerns with respect to the situation of fundamental rights in 2005', p. 2, www.picum.org

[Employment and Social Assistance Act] is not in conformity with Article 27 of the International Convention on the Rights of the Child (8 August 2005, LJN AU0687). Article 11 of the Act provides that all Dutch nationals and non-Dutch nationals who are legally present in the Netherlands are to be provided with the necessary means to ensure an adequate standard of living. Minors are excluded from the right to social assistance under this provision, unless they have pressing needs, in which case city boards can decide to provide assistance to minors as well. This exception is formulated in art. 16 (1) of the Act. Paragraph 2, however, expressly stipulates that persons without a valid residence permit cannot be the beneficiary of such an exception. The city board of Zaanstad had based a refusal to grant social assistance to two minor asylum seekers – who clearly had pressing needs – on this exclusion clause. The *Centrale Raad van Beroep* held that by doing so, the city board had violated article 27 (3) CRC, which obliges States Parties to provide assistance to minors in case of need. The *Centrale Raad van Beroep* made clear that in a case like this, no effect could be given to the exclusion clause of article 16, paragraph 2 of the Employment and Social Assistance Act.

Beyond the question of the benefits recognized to asylum-seekers or to third-country nationals who are illegally residing on the territory of a Member State, the Network notes the concerns raised in **Ireland** by the Social Welfare Appeals Office (SWAO), in its annual report of August 2005, about government restrictions on welfare benefits for non-Irish persons. The measures, known as the habitual residency condition, had been introduced by the Government in 2004 amid fears that the large number of new accession States to the EU would lead to 'welfare tourism'. Under the conditions a person may not receive a number of social welfare benefits, including unemployment assistance and Child Benefit, unless they can show that they have been resident in the State for at least two years. In particular the report raised questions about whether or not the habitual residency condition was compatible with Community law and, is it related to the Child Benefit Scheme, the UN Convention on the Rights of the Child.[677] The Network welcomes the fact that, following emerging evidence that the habitual residency condition was resulting in hardship and poverty for a number of migrant workers and in response to the doubts about the compatibility of the habitual residency requirement with Community law, it was reported that the Government proposed to relax the current regulations.[678] The Network notes moreover that figures made available in October 2005 show that only 1% of the EU accession state nationals who have travelled to Ireland since May 2004 have applied for unemployment benefits. The figures revealed that 133,248 people from accession countries have moved to Ireland between May 2004 and September 2005, of this figure only 1,300 had applied for unemployment benefit or unemployment assistance, and of this number only 625 were in receipt of such benefits. The figures indicate that concerns of 'welfare tourism', which animated the decision to introduce the habitual residency condition in the first place, were misplaced or exaggerated.[679]

Article 35. Health care

Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.

[677] SWAO, *Annual Report 2004* (August, 2005) at p.10.
[678] *Irish Times*, 30 September 2005 at p.1.
[679] *Irish Times*, 24 October 2005 at p.4.

This provision of the Charter must be read in accordance with the requirements formulated by Article 12 of the International Covenant on Economic, Social and Cultural Rights (1966), by Article 24 of the Convention on the Rights of the Child (1989). The interpretation of this provision of the Charter must also take into account Articles 11 and 13 of the European Social Charter of 1961 and Articles 11 and 13 of the Revised European Social Charter, regarding the right to protection of health and the right to medical assistance.

While referring, with respect to the rights of patients, to the conclusions formulated under Article 3 of the Charter, and with respect to the right to health care to the conclusions formulated under Article 34 of the Charter, the Network draws attention to Article 35 of the Charter in connection with the two following situations:

• In **Latvia**, as the medical care system is still in a critical state because of structural problems and lack of necessary financing, the government has taken some unpopular decisions, which essentially affect the right to access to health care, particularly of those with low incomes. Since 1 April 2005, a fee for an unfounded call for an emergency ambulance was introduced in many locations in Latvia.680 A call is considered founded where a person's life is endangered. In Riga, the fee can vary from 6 to 48 lats (8.5 to 68 EUR), and no exemptions or reductions are foreseen for particular groups, while the average salary in Latvia is 173 lats (246 EUR), and the average pension is 68.83 lats (98 EUR)[681]. After the fee was introduced, a number of complaints were lodged on charging a fee where a patient suffered acute health problems, as well as on refusal to provide emergency aid, in some cases allegedly leading to the death of the patient. In several cases the control institutions found misconduct. Since 15 November, cases of emergency are defined in more detail, so as to avoid such situations.[682]

• In **Greece**, the non-governmental organization *Marangopoulos Foundation for Human Rights (MFHR)* filed a collective complaint to the European Committee of Social Rights with regard to Article 11 (right to protection of health), Article 2(4) (right to reduced working hours or additional holidays for workers in dangerous or unhealthy occupations), Article 3(1) (safety and health regulations at work) and Article 3(2) (provision for the enforcement of safety and health regulations by measures of supervision) of the European Social Charter. The MFHR alleges that in the main areas where lignite is mined, more particularly in the Prolemais area, the State has not adequately prevented the impact for the environment nor has developed an appropriate strategy in order to prevent and respond to the health hazards for the population. It is also alleged that there is no legal framework guaranteeing security and safety of persons working in lignite mines and that the latter do not benefit from reduced working hours or additional holidays[683].

Article 36. Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaty establishing the European Community, in order to promote the social and territorial cohesion of the Union.

[680] Ministru Kabineta *Noteikumi Nr. 1036 Veselības aprūpes organizēšanas un finansēšanas kārtība* [*Regulation issued by the Cabinet of Ministers on Order of organization and financing of Health Care*], adopted on 21 December 2004, in force since 1 April 2005.
[681] Data of Central Statistical Bureau of Latvia on 2005.
[682] Ministru Kabineta *851. Noteikumi Grozījumi Ministru kabineta 2004. gada 21. decembra noteikumos Nr.1036 Veselības aprūpes organizēšanas un finansēšanas kārtība*, [*Regulation issued by the Cabinet of Ministers No 851*] adopted on 8 November 2005, in force since 17 November 2005.
[683] The complaint was declared admissible: European Committee of Social Rights, Collective Complaint No. 30/2005, *Marangopoulos Foundation for Human Rights v. Greece*, admissibility decision of 10 October 2005.

This provision of the Charter must be read in accordance with the requirements formulated by Article 11 of the International Covenant on Economic, Social and Cultural Rights (1966), as developed in the General Comment n°4 (1991) of the UN Committee on economic, social and cultural rights. The interpretation of Article 36 of the EU Charter of Fundamental Rights should also take into account Article 31 of the Revised European Social Charter, which recognizes the right to housing.

Access to services of general economic interest

The Network has commented previously the Green Paper on services of general interest presented by the European Commission on 21 May 2003,[684] which launched a consultation on the need for a Framework Directive laying down the principles relating to services of general interest underlying Article 16 EC[685] and on the content of such legislation[686]. In 2004, the Commission built on that consultation[687] to present a White Paper where it presented its proposals in the field of services of general economic interest – performed by enterprises of an economic nature exempted from the application of the rules of the EC Treaty because of the general interest mission they are to fulfil[688] – and the respective roles of the Member States and Union law in defining their status[689].

Article III-122 of the Treaty establishing a Constitution for Europe not only recognizes the principle of an intervention of the European legislator to establish the operating principles of services of general economic interest; it also emphasizes that the definition of the services of general interest is left to the Member States. It provides that:

> … given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services.

Although the Treaty establishing a Constitution for Europe has not been ratified and may never come in force in its present form, the adoption of a framework directive should not be excluded on the basis

[684] COM(2003)270 final.

[685] In the wording of Article 16 EC: "Without prejudice to Articles 73, 86 and 87, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions".

[686] See already the Communication from the Commission on the Status of Work on an Examination of a Proposal for a Framework Directive on Services of General Interest (COM(2002)689 final of 4.12.2002).

[687] For the results of the public consultation, see Report on the public consultation on the Green Paper on services of general interest, Commission Staff Working Paper, SEC(2004) 326, 15.03.2004, available at: http://europa.eu.int/comm/secretariat_general/service_general_interest

[688] The distinction between services of general non-economic interest and services of general economic interest has been clarified by the case-law. Are not considered as "economic" the activities carried out by bodies whose functions are essentially of a social nature, which do not make profit and whose purpose it is not to carry out an industrial or commercial activity, but have solidarity as their goal. Economic activities, on the other hand, are activities that consist of providing goods or services on a given market. See ECJ, 17 February 1993, *Poucet and Pistre*, joined cases C-159/91 and C-160/91, *ECR* I-637, recital 18; ECJ, 16 November 1995, *Fédération française des sociétés d'assurance and others*, C-244/94, *ECR* I-4013; ECJ, 22 January 2002, Cisal, C-218/00, ECR I-691, Recital 22; Communication from the Commission, "Services of General Interest in Europe", COM(2000)580 final, of 20/9/2000, OJ C 17 of 19/1/2001, here par. 28-30. The rules of the EC Treaty on competition law, freedoms of movement or aids granted by States only apply to services of general economic interest. Article 86 §2 EC was designed to allow Member States to develop a policy geared to the general interest where the market does not produce the desired results. This provision provides that the application of the rules of the Treaty to those economic activities, but invested with an obligation of public service, "does not obstruct the performance, in law or in fact, of the particular tasks assigned to them".

[689] COM(2004) 374 final, of 12.5.2004.

of the current treaties. Indeed, this would be fully compatible with the seventh principle put forward by the Commission in its Communication, according to which, although any Community policy in the area of services of general interest must take due account of the diversity that characterises different services of general interest and the situations in which they are provided, this does not mean that it is not necessary to ensure the consistency of the Community's approach across different sectors or that the development of common concepts that can be applied in several sectors cannot be useful. The Commission thus proposed to re-examine the feasibility of and the need for a framework law for services of general interest on the entry into force of the Constitutional Treaty and submit a report in principle before the end of 2005. The Network recognizes that, as noted by the European Economic and Social Committee in its opinion on the abovementioned Communication, 'there is a clear need to consolidate services of general interest as a whole, including social and health services of general interest, bearing in mind their specific features, as far as they relate to competition law, financing, the implementation of the subsidiarity principle and their role in European integration'.[690]

The problems which have arisen in certain Member States concerning the accessibility of services of general interest without discrimination, illustrate the relevancy of these issues. In **Hungary** for instance, the Parliamentary Commissioner for Citizen Rights (hereinafter: Ombudsman) issued various recommendation concerning anomalies occurred in supplying services of general economic interest. In case No. OBH 1036/2005 (5 July 2005)[691] the Ombudsman examined the provision of electricity in a remote part of the county capital Tatabánya, where the applicants complained of the lack of sufficient service supply due to the failure of certain customers to pay for the services. The service supply equipment is often damaged and all the maintenance and reparation require huge investments of the supplier. The Ombudsman found that there are serious concerns arising in relation to the right of social security, but underlined: both the local authority and the electricity service provider try to fulfil their obligations to the extent, which is required by the constitutional right of social security. In **Portugal**, whereas in terms of geographic accessibility, the vast majority of citizens have access to all services of general economic interest, and whereas there has been a big improvement during the past few years in the coverage of water and sanitation services, certain exceptions remain. The provision of natural gas, that still covers only part of the country, due to the fact that in Portugal this activity only started a few years ago (there are, however, alternatives for other types of gas supply). Interurban public transport is almost inexistent in some rural areas, due to the closure of several railways and the insufficiency of appropriate public service bus connections. A major problem during 2005, which will probably last during the years to come, is the lack of water in some parts of the country, as a result of extreme and severe draught. Supply of water for human consumption is limited or even non-existent in certain areas in the interior and southern Portugal during the summer. Besides that, the lack of adequate water reserves has also negative effects in the quality of drinkable water. Moreover, there are no common, nation-wide, criteria for the tariffs of water. Local authorities set the prices according to local (sometimes parochial) concerns, which lead to large inequalities in the access of this essential public service. Moreover, some recent measures and policies taken by the Government and regulators are causing some concern because it their impact on the accessibility of certain SGEI is still uncertain, such as the full liberalization of the energy markets in 2006. The public energy sector may face problems of financing the public service obligations as a result of the possible change of consumers to private suppliers. In the postal sector, the closing-down of postal stations in certain rural areas has led to a smaller geographic coverage of these services, which can be problematic if it continues. There are already problems regarding the quality of service provided because of the decreasing number of stations per capita. Finally, broad-band telecommunication services are not considered essential services and, even though they had a considerable growth during 2005, there are concerns that for a long time these services will be available only in large urban centres and not for the entire population.

These evolutions illustrate the importance of permanent evaluation as an integral component of any policy for the promotion of services of general interest. Indeed, in its 2004 White Paper, the

[690] Opinion of the European Economic and Social Committee on the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the White Paper on services of general interest (COM(2004) 374 final), OJ C 221 , 8.9.2005, p. 17 (para. 4.4).
[691] The recommendation is available at: www.obh.hu.

Commission recognizes the importance of assessing the results and evaluating performance, and it has submitted its first horizontal evaluation on services of general interest on the basis of its evaluation methodology in 2004. As emphasized again by the European Economic and Social Committee in its opinion cited above, the role of the European Union is to 'establish a common methodology and common criteria, in particular with regard to quality, and to stimulate a process of objective and independent evaluation, which must be conducted in accordance with the principle of subsidiarity' (para. 4.3.). The Network would recommend that, when the Commission will review its evaluation mechanisms in 2006, the requirements of fundamental rights be explicitly taken into account, in particular by seeking inspiration from the way the UN Committee on Economic, Social and Cultural Rights has defined the conditions of access of certain essential services under the International Covenant on Economic, Social and Cultural Rights. The Committee has gradually identified the essential characteristics of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights that the State can be required to provide with a view to their full realization. Through the general comments it has devoted to the right to adequate housing[692], the right to adequate food[693], the right to education[694], the right to the highest attainable standard of health[695], or the right to water[696], the Committee has thus worked out the criteria allowing it to assess the adequacy or inadequacy of the manner in which the rights are guaranteed and to identify any shortcomings in order to remedy them. The attempt to identify the essential characteristics of those rights has resulted in an analytical grid containing criteria such as *availability* (each person must be able to have a sufficient quantity of the commodity in question according to his or her needs); *quality; accessibility* in its four overlapping dimensions (non-discrimination, economic accessibility (affordability), physical accessibility (with special attention being given to the most vulnerable sections of the population, such as children and older persons, persons with disabilities, displaced persons, and the poorest population groups), information accessibility (actual accessibility of goods or services presupposing sufficient information as to the means to obtain those goods or services)); and *acceptability* to each person from the perspective of their cultural or religious values.

Article 37. Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

This provision of the Charter must be read in accordance with the requirements formulated by Articles 2 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

The Network is concerned about the lack of cooperation of the Member States with the Commission in identifying potential instances of violation of Community environmental legislation, and about the failure of the Member States to adopt within the prescribed time limits the legislative, regulatory and administrative measures required to implement this legislation. The right of access to information in environmental matters and the right to public participation in respect of the drawing up of certain plans

[692] Committee on Economic, Social and Cultural Rights, *General Comment No. 4: The right to adequate housing (Article 11(1) of the Covenant),* adopted at the sixth session (1991) (doc. ONU E/1992/23), para. 8.
[693] Committee on Economic, Social and Cultural Rights, *General Comment No. 12: The right to adequate food (Article 11 of the Covenant),* adopted at the twentieth session (1999) (doc. ONU E/C.12/1999/5), para. 8-12.
[694] Committee on Economic, Social and Cultural Rights, *General Comment No. 13: The right to education (Article 13),* adopted at the twenty-first session (1999) (doc. ONU E/C.12/1999/10), para. 6.
[695] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health (Article 12),* adopted at the twenty-second session (2000), para. 12.
[696] Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water (Art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, adopted at the twenty-ninth session (2002) (doc. ONU E/C.12/2002/11, 20 January 2003), para. 12.

and programmes relating to the environment may serve as illustrations, as both have led to the adoption of directives which were to be transposed during the period under scrutiny.

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC[697] is based on the idea that 'Increased public access to environmental information and the dissemination of such information contribute to a greater awareness of environmental matters, a free exchange of views, more effective participation by the public in environmental decision-making and, eventually, to a better environment' (Preamble, Recital 1). This Directive also seeks to ensure the compatibility of EC law with the UN/ECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, which the EC signed on 25 June 1998 together with the fifteen Member States[698]. Article 3(1) of the Directive states its governing principle : 'Member States shall ensure that public authorities are required (…) to make available environmental information held by or for them to any applicant at his request and without his having to state an interest'. Any limitation to the right to have access to environmental information must be restrictively interpreted. Even where exceptions may be invoked in accordance with the directive[699], public authorities should make environmental information available in part where it can be separated from the information falling within the scope of the exceptions (Recital 17).

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC[700] also seeks to ensure the compatibility of EC Law with the UN/ECE Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. Indeed, this Convention seeks, *inter alia*, to 'guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being' (Preamble, Recital 6). Directive 2003/35/EC therefore amends Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[701], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control[702], to ensure their full compatibility with the provisions of the Århus Convention.

Directive 2003/4/EC on public access to environmental information was to be implemented by the Member States by 14 February 2005 (Art. 10). Directive 2003/35/EC on public participation was to be implemented by the Member States by 25 January 2005 (Art. 6). However, these are still areas on which a number of deficiencies are found to persist.

Of course, much progress has been made, under the need to implement these directives within the prescribed time limit. In **Germany**, the Gesetz zur Neugestaltung des Umweltinformationsgesetzes of

[697] OJ L 41, 14/2/2003, p. 26. The Directive replaces Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment (OJ L 158, 23/6/1990, p. 56). Directive 90/313/EEC is repealed with effect from 14 February 2005.
[698] The Convention entered into force on 1 October 2001. It is now published in the OJ L 124, 17.5.2005, p. 4.
[699] Article 4(2) f) includes among the exceptions the need to protect personal data, as provided, i.a., by Directive 95/46/EC.
[700] OJ L 156, 25/6/2003, p. 17.
[701] OJ L 175, 5/7/1985. The Court of Justice of the European Communities considered that this Directive could be relied upon directly by individuals before the national judicial authorities against the public authorities, which will allow the latter to compensate for the consequences of an incomplete or deficient transposition: ECJ, 24 October 1996, *Kraaijeveld et al.*, C-72/95, *ECR* I-5403; ECJ, 16 September 1999, *WWF et al.*, C-435/97, *ECR* I-5613; ECJ, 19 September 2000, *Linster*, C-287/98, *ECR* I-6917. This reliance is one way only, i.e. it cannot justify, conversely, that the public authorities impose obligations on individuals directly by virtue of the Directive in order to compensate for the deficient or incorrect transposition. This reliance does not apply vis-à-vis other individuals. However, the fact that the Directive can be relied upon against the public authorities and can consequently have an impact on the rights and interests of other individuals does not derogate from this principle: see the opinions of Mr Advocate General Ph. Léger of 25 September 2003, presented in the case C-201/02, *The Queen, ex parte Wells*.
[702] OJ L 257, 10/10/1996.

22 December 2004703 [Act on the reorganization of the Act on public access to Environmental Information] not only implements Directive 2003/4/EC on public access to environmental information,[704] but also replaces the former Act on public access to Environmental Information rather than to amend it, for the benefit of an increased transparency. The new Act enlarges the conditions of public access to environmental information. It clarifies the definition of environmental information. It imposes on the public authorities an obligation to make available and disseminate environmental information to the public. Simultaneously the Federal Law is adapted to the requirements of the abovementioned UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environment Matters.

As illustrated for example by the case of **Italy**, whose failure to implement Community directives in the field of environmental protection and whose lack of cooperation with the Commission is a source of concern, the priority in this area is the effective implementation and enforcement of existing Community legislation. In **Hungary**, the two directives remain unimplemented. The Commission has threatened infringement proceedings against **Belgium**, **France**, **Greece**, **Hungary**, **Italy, Luxembourg** and **Spain**, for the failure of these States to implement Directive 2003/4/EC on public access to environmental information, and it has launched infringement proceedings against certain of these States. In **Luxembourg**, Bill No. 5217 on public access to environmental information was amended in 2005 by the Environment Commission[705], and those amendments were the subject of an additional opinion from the Council of State.[706] In October 2005, the Environment Commission issued a report on the bill[707], so that this instrument has still not been finally adopted. In any case, it would be advisable if the new law were to offer a solution to the problem which the Environment Commission pinpointed in February 2005, when it noted that it is unusual for an appeal to be brought before an administrative court in case of a refusal decision by the public authorities [to comply with a request for information on environmental protection]. Although this is general procedure, it believes that the cost of hiring a lawyer would necessarily be disproportionate to what is at stake. Moreover, the text of the bill is not compatible with European Directive 2003/3/EC, which in Article 6(1) stipulates that "any such procedure shall be expeditious and either free of charge or inexpensive".

In **Poland**, while the Sejm amended the Environmental Protection Law in 2005[708] (along with the Water Law[709], and the Act on the trading of the allowances to emit greenhouse gases and other substances into the atmosphere[710]), in particular with a view to implement Directive 2003/35/EC regarding public participation, the Act amending the Environmental Protection Law also introduced a restriction in the public's participation in two ways: it limited the number of persons who are entitled to have the status of a party in proceedings; and it limited the opportunity for social organisations to benefit from the rights of a party in proceedings. Thus, in the proceedings to grant permission for the emission of substances and energy into the environment, the status of a party is currently only granted to, apart from the mover, the entities administering the territory within the area where the above-standard effects are believed to occur. The Act also limited the rights of social organisations to

[703] BGBl. 2004 I p. 3704.
[704] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41/26 of 14 February 2003.
[705] Environment Commission, Amendments No. 5217 (10) of 4 February 2005 to the bill on public access to environmental information
706 Council of State, Additional Opinion No. 5217 (9) of 5 July 2005 on the bill on public access to environmental information
[707] Environment Commission, Report No. 5217 (10) of 20 October 2005 on the bill on public access to environmental information
[708] Ustawa z dnia 18 maja 2005 r. o zmianie ustawy - Prawo ochrony środowiska oraz niektórych innych ustaw, (Dz. U. Z 2005 r. nr 113, poz. 954) [Act of 18 May 2005 on the amendment of the Act – Environmental Protection Law and chosen other acts (The Official Journal of 2005, No. 113, item 954)]
[709] Ustawa z dnia z dnia 3 czerwca 2005 r. o zmianie ustawy - Prawo wodne oraz niektórych innych ustaw (Dz. U. z 2005 r. nr 130, poz. 1087) [Act of 3 June 2005 on the amendment of the Act – The Water Law and chosen other acts (The Official Journal of 2005, No. 130, item 1087)]
[710] Ustawa z dnia 22 grudnia 2004 r. o handlu uprawnieniami do emisji do powietrza gazów cieplarnianych i innych substancji (Dz. U. z 2005 r, nr 281, poz. 2784) [Act of 22 December 2004 on the trading of the allowances to emit greenhouse gases and other substances into the atmosphere (The Official Journal of 2005, No. 281, item 2784)]

participate as a side in proceedings. In accordance with the amendment, only those environmental organisations may participate in a proceeding, which have expressed such a will and have additionally submitted their comments and conclusions. The social organisations' participation was also restricted in cases concerning the environmental conditions of the programmes and projects associated with environmental protection, as well as in proceedings for granting an emission permit.

The Network also takes note of the judgment delivered by the Court of Justice of the European Communities on 21 April 2005[711] in a case featuring an implied refusal decision by the public authorities in **Belgium.** In accordance with Directive 90/313/EEC of 7 June 1990, "A public authority shall respond to a person requesting information as soon as possible and at the latest within two months. The reasons for a refusal to provide the information requested must be given". This two-month time limit is mandatory. Furthermore, although this Article 3 does not preclude national legislation according to which the failure of a public authority to respond within a period of two months is deemed to give rise to an implied refusal, such a decision must be accompanied by reasons when the two-month time-limit expires. Consequently, the Court of Justice considers that, in the absence of such reasons, the implied refusal must be regarded as unlawful.

Article 38. Consumer protection

Union policies shall ensure a high level of consumer protection.

Protection of the consumer in contract law and information of the consumer

Organisation representing consumers, litigating on behalf of their collective interests, or assisting them in filing their claims in administrative or judicial settings, have a crucial role to play in the defence of consumers' interests, as they alone can overcome the collective action problems which arise from the fact that these interests are diffuse and spread over a large number of individuals. The Network therefore welcomes the fact that in **Austria**, a study was commissioned by the Federal Ministry of Social Security, Generations and Consumer Protection on the organisational structure of consumer protection in Austria. The study, whose results were presented in October 2005, concludes that there is presently no need for further organisations providing legal advice on consumer protection issues, but that the links between consumer protection organisations and authorities could be improved; moreover, in order to make better use of synergy effects, the co-ordination of consumer protection policies should be improved. Following one of the study's recommendations the Ministry is currently elaborating a handbook on consumer protection providing information on consumer protection institutions and consumer's rights[712]. Institutions such as consumers' ombudspersons could also play an important role: in **Denmark** for instance, the Danish Consumer Ombudsman has recently published guidelines for industry regarding the Marketing Practices Act Section 6a and spamming, and has set up an e-mail address, to which consumers can direct their complaints regarding spam[713]. Another encouraging development during the period under scrutiny is the establishment of the European Consumer Centre[714] in **Lithuania**, the result of an agreement of the European Commission and the National Consumer Rights Protection Board under the Ministry of Justice. This centre aim is to spread the information on consumers' rights, provide consumers with information, and provide advice to the citizens of Lithuania when they have purchased faulty goods or services within the EU, help consumers to resolve disputes under out-of-court settlement procedure, provide information on the Internet[715]. The National Consumers Right Protection Board *(Nacionalinė vartotojų teisių apsaugos*

[711] ECJ, 21 April 2005, *Pierre Housieaux*, C-186/04.
[712] For further information see: http://www.bmsg.gv.at/cms/site/detail.htm?channel=CH0036&doc=CMS1130158260264 (28.11.2005)
[713] See www.forbrug.dk.
[714] Europos vartotojų centras, European Consumer Center, http://www.ecc.lt.
[715] See Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes (OJ C 155, 6.6.2000, p. 1) (inviting the Member States to encourage the activities of bodies for the out-

tarnyba prie Teisingumo ministerijos) has the right to protect consumers (citizens of Lithuania), when they purchased faulty financial services in other EU member states. This is related to the obtained membership of the Consumer Complaints Network for Financial Services (FIN-NET)[716].

The information of the consumers about their rights of course also is essential to effectiveness of consumer protection. In **Poland**, according to the President of the Office of Competition and Consumer Protection (Urząd Ochrony Konkurencji i Konsumentów - UOKiK), two thirds of consumers in Poland are not familiar with their rights. Similarly, business persons do not know their obligations with regard to the consumers. Entities which have a dominant position on the market, i.e. those, which in the past operated in sectors closed to competition such as Telekomunikacja Polska, energy companies, or transport companies, are trying to eliminate competitors or prevent them from entering the market. The report of the UOKiK on the results of inspections of activities of construction and real estate development companies showed that many of them use forbidden clauses in their contracts. Among the 137 companies inspected throughout Poland, almost two thirds used contracts in which there were forbidden clauses, and almost one in three companies made only oral contracts with their clients. According to the information from UOKiK, most of the companies removed the forbidden clauses from the contract forms soon after the inspection of the Office.[717]

Regulation (EC) No 2006/2004 on consumer protection cooperation[718] defines the conditions under which the competent authorities in the Member States designated as responsible for the enforcement of the laws protecting the interests of consumers shall cooperate with each other and with the Commission in order to ensure compliance with those laws and the smooth functioning of the internal market and in order to enhance the protection of consumers' economic interests. The Regulation states that the competent national authorities should be recognized under national law certain investigation and enforcement powers necessary for the application of the Regulation (Art. 4(3)), including at least the following powers where there is a reasonable suspicion of an intra-Community infringement (Art. 4(6)):

> (a) to have access to any relevant document, in any form, related to the intra-Community infringement;
> (b) to require the supply by any person of relevant information related to the intra-Community infringement;
> (c) to carry out necessary on-site inspections;
> (d) to request in writing that the seller or supplier concerned cease the intra-Community infringement;
> (e) to obtain from the seller or supplier responsible for intra-Community infringements an undertaking to cease the intra-Community infringement; and, where appropriate, to publish the resulting undertaking;
> (f) to require the cessation or prohibition of any intra-Community infringement and, where appropriate, to publish resulting decisions;
> (g) to require the losing defendant to make payments into the public purse or to any beneficiary designated in or under national legislation, in the event of failure to comply with the decision.

In the **Netherlands**, the Government announced on 21 June 2004 a 'strategic action programme' for consumer policy (*Kamerstukken II,* 2003-2004, 27879, No. 9). In order to implement abovementioned Regulation No. 2006/2004 on consumer protection cooperation, the Dutch Government will put forward a bill in Parliament with a view to establishing a new 'Consumer Authority'. This authority

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of-court settlement of consumer disputes, also as regards transborder transactions, and where appropriate, the setting-up of such bodies, on the basis of Recommendation 98/257/EC).

[716] http://www.delfi.lt/archive/article.php?id=7757128

[717] Daily *Rzeczpospolita* of 29 September 2005 p.C1

[718] Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 9.12.2004, p. 1.

would be entitled to take enforcement measures so as to stop or prohibit infringements of consumer law. On 29 April 2005, the Government submitted a blueprint for this new bill and the envisaged Authority (*Kamerstukken II,* 2004-2005, 27879, No. 11). A formal proposal was to be submitted late 2005.

As also recalled in Regulation (EC) No 2006/2004 on consumer protection cooperation, for these consumer protection authorities to be effective and for the system of mutual assistance to function adequately and thus contribute to the protection of consumers in the internal market, these authorities must be adequately funded. In **Latvia**, the most urgent problem is the lack of financial and administrative resources to ensure all the competencies of the Consumer Protection Rights centre (CRPC). In particular, in order to ensure that only safe products are available for consumers, regular testing should be provided; however, considering the high costs of the different tests, funding for these purposes is insufficient. The provision of information to consumers also may require important resources, which the Consumer Protection Rights centre would not seem to have.

CHAPTER V. CITIZENS' RIGHTS

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

This provision of the Charter must be read in accordance with the requirements formulated by Article 25 of the International Covenant on Civil and Political Rights (1966) and by Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952).

As already mentioned in previous reports of the Network, after a number of residents of Aruba and the Netherlands Antilles, of Dutch nationality, wanted to vote in the 2004 elections for European Parliament, they were refused the possibility to register as voters, since they did not meet the requirement of having lived in the Netherlands (that is, the Kingdom in Europe) for at least ten years. This requirement imposed by the **Netherlands** initially applied to national elections only, but it was later extended to elections for European Parliament. The regulation was challenged as arbitrary and discriminatory, in breach of EU citizens' rights, and in violation of the right to vote as guaranteed by Article 3 of Protocol No. 1 to the European Convention of Human Rights. On 13 July 2004 – a month after the elections for European Parliament had taken place – the *Afdeling bestuursrechtspraak van de Raad van State* [Administrative Litigation Division of the Council of State] decided to refer the matter for a preliminary ruling to the European Court of Justice (LJN AQ 3775). The preliminary questions related to the applicability of Title II of the EC Treaty to Aruba and the Netherlands Antilles as well the meaning of Articles 17 and 19 EC in conjunction with the right to vote as protected by Article 3 of Protocol No. 1 to the ECHR (Case C-300/04, *Eman & Sevinger)* [719].

The Network recalls in this regard that, while Article 3 of Protocol No. 1 to the ECHR is fully applicable to the elections at the European Parliament, the European Court of Human Rights has delivered a judgment relating to **France,** concerning a similar situation[720]. Following the process of self-determination of New Caledonia since 1988, the local Congress obtained partial legislative powers as well as certain powers in the area of criminal legislation. The applicant complained about his being refused registration in the local electoral roll with a view to the Congress elections because he did not satisfy the condition of ten years' residence necessary for taking part in those elections. In its judgment of 11 January 2005, the European Court of Human Rights considered that, despite its somewhat disproportionate nature, the imposition of this condition does not infringe the Convention, given the 'local requirements' of the territorial community and the fact that this provision is part of a process of decolonization that can require a special application of the Convention.

The importance of the right to vote as guaranteed under Article 3 of Protocol No. 1 to the ECHR was again highlighted during the period under scrutiny in the case of *Hirst v. the United Kingdom (No. 2)* on which the European Court of Human Rights delivered a judgment on 6 October 2005[721]. The

[719] A first request for an accelerated procedure was rejected on 23 August 2004. With a view to the then up-coming referendum on the European Constitution, to be held on 1 June 2005, the Administrative Litigation Division made a second request for an accelerated procedure. On 18 March 2005 this request was rejected as well, since : the request was prompted by an issue that was not related to the main proceedings ; the entitlement to participate in the referendum as such was an issue not directly connected to Community law ; and the subject matter was so complicated and sensitive that it was uncertain if an accelerated procedure would enable the Court to reach a timely decision.
[720] Eur. Ct. HR, *Py v. France*, judgment of 11 January 2005 (Appl. No. 66289/01).
[721] Eur.Ct.H.R. (GC) *Hirst v. the United Kingdom (No. 2)* (Appl. no 74025/01) judgment of 6 October 2005.

Representation of the People Act 1983, s 3 imposed a blanket ban on convicted prisoners voting in parliamentary or local elections. It was accepted that restrictions on electoral rights might be imposed on an individual who had, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations but it was emphasised that the severe measure of disenfranchisement was not to be undertaken lightly and the principle of proportionality required a discernible and a sufficient link between the sanction and the conduct and circumstances of the individual concerned. Although the present measure might have the legitimate aim of preventing crime, a general, automatic and indiscriminate restriction on a vitally important right - which applied automatically to convicted prisoners in prison, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances - had to be seen as falling outside any acceptable margin of appreciation of the State.

Article 40. Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

This provision of the Charter must be read in accordance with the requirements formulated by Article 25 of the International Covenant on Civil and Political Rights (1966), by Article 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (1952) and by Article 10 of the European Convention on the Participation of Foreigners in Public Life at Local Level (1992). Article 15 of the Council of Europe Framework Convention on the Protection of National Minorities (1995) may also be taken into account, insofar as the implementation of the rights mentioned in Article 40 of the Charter must be combined with the prohibition of any discrimination based, *inter alia*, on the membership of a national minority, as stipulated by Article 21 of the Charter.

With respect to the possibilities for EU citizens to establish political parties or become members of existing political parties in the Member States where they reside but whose nationality they do not possess, the Network refers to its Conclusions adopted under Article 12 of the Charter. It makes two further comments:

• Article 15 of the Council of Europe Framework Convention on the Protection of National Minorities states that the Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them. As regards **Denmark,** the Advisory Committee on the Framework Convention for the Protection of National Minorities[722] welcomes the willingness of the Government in the proposals published on 1st December 2004 to provide special measures to safeguard the interests of the German minority. It expressed its concern, however, about the effective participation of the German minority in those municipalities where they reach the 25 % threshold to have a seat but without the right to vote. The Advisory Committee considers that without the right to vote, the room for political manoeuvre is considerably weakened and represents a reduction in the level of political influence for the German minority by comparison with the situation they currently enjoy. The Network encourages the Danish authorities to follow upon the recommendation of the Advisory Committee to pursue consultations with the German minority, in particular on the issue of voting rights at municipal level, in order to find appropriate solutions to ensure that effective participation guaranteed under Article 15 of the Framework Convention is not undermined by the proposed administrative reforms.

• The Network recalls that, in its *Aziz v. Cyprus* judgment of 22 June 2004 (Appl. no. 69949/01), the European Court of Human Rights has held unanimously that **Cyprus** had violated Article 3 of Protocol No. 1 of the Convention, by not allowing a member of the Turkish-Cypriot

[722] Second Opinion on Denmark, adopted on 09 December 2004.

community residing in the government-controlled area of Cyprus to express his opinion in the choice of the members of the House of Representatives. The Network notes that the relevant bill providing for the right to vote for Turkish Cypriots citizens of the Republic, and residents in its territory, has not been enacted as yet. The situation is particularly alarming bearing in mind that parliamentary elections are coming up in 2006.

Article 41. Right to good administration

1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.
2. This right includes:
a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;
b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;
c) the obligation of the administration to give reasons for its decisions.
3. Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.
4. Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.

No Conclusions have been adopted under this provision of the Charter.

Article 42. Right of access to documents

Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents.

In a judgment of 26 April 2005[723], the Court of First Instance has adopted a restrictive interpretation of the right of access to documents, in the context of the international cooperation in the fight against terrorism. This judgment rejected applications for annulment of the three Council decisions of 21 January, 27 February and 2 October 2003 refusing access to documents relating to Council Decisions 2002/848/EC, 2002/974/EC and 2003/480/EC of 28 October 2002, 12 December 2002 and 27 June 2003 respectively implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decisions 2002/460/EC, 2002/848/EC and 2002/974/EC respectively. These decisions had included the applicant in the list of persons whose funds and financial assets were to be frozen pursuant to Regulation (EC) No 2580/2001. The applicant had requested access to the documents which had led the Council to adopt the abovementioned decisions, but that request was denied by the Council.

Article 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) provides:

> 1. The institutions shall refuse access to a document where disclosure would undermine the protection of:
> (a) the public interest as regards:
> – public security,
> – …

[723] Joined Cases T-110/03, T-150/03 and T-405/03, *Sison v. Council of the European Union*, judgment of 26 April 2005.

– international relations,

…

2. The institutions shall refuse access to a document where disclosure would undermine the protection of:

– …

– court proceedings and legal advice,

– …

unless there is an overriding public interest in disclosure.

…'

The Court considers that its review of the legality of decisions of the institutions refusing access to documents on the basis of the exceptions relating to the public interest provided for in Article 4(1)(a) of Regulation No 1049/2001 must be limited to 'verifying whether the procedural rules and the duty to state reasons have been complied with, the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers' (para. 47). Concerning the plea of the applicant that the refusal of the Council to give him access to the documents requested was in breach of the general principles of law relating to the rights of the defence – the applicant submitted that his inclusion on the list at issue was tantamount to a criminal charge and that the refusal to grant access to the documents requested constitutes an infringement of the right to a fair trial and particularly of the guarantees provided for by Article 6(3) of the ECHR –, the Court considers that, since the Council relied on the exceptions provided for by Article 4(1)(a) of Regulation No 1049/2001 in the first decision refusing access, 'it cannot be accused of not having taken into account any particular need of the applicant to have the requested documents made available to him' (para. 54). Indeed, these exceptions are mandatory in nature: they 'are framed in mandatory terms. It follows that the institutions are obliged to refuse access to documents falling under any one of those exceptions once the relevant circumstances are shown to exist' (para. 51).

On the more specific question of the right of access to documents and the justification of the refusal by the Council to provide to the applicant access to the documents he requested, the Court considers, first, that the Council did not make a manifest error of assessment in refusing access to certain documents for reasons of public security:

... it must be accepted that the effectiveness of the fight against terrorism presupposes that information held by the public authorities on persons or entities suspected of terrorism is kept secret so that that information remains relevant and enables effective action to be taken. Consequently, disclosure to the public of the document requested would necessarily have undermined the public interest in relation to public security. In that regard, the distinction put forward by the applicant between strategic information and information concerning him personally cannot be accepted. Any personal information would necessarily reveal certain strategic aspects of the fight against terrorism, such as the sources of information, the nature of that information or the level of surveillance to which persons suspected of terrorism are subjected (para. 77).

The Court arrives at the same conclusion with respect to the protection of the public interest as regards international relations. It notes, about Decision 2002/848 and Regulation No 2580/2001, that

... its purpose, namely the fight against terrorism, falls within the scope of international action arising from United Nations Security Council resolution 1373 (2001) of 28 September 2001. As part of that global response, States are called upon to work together. The elements of that international cooperation are very probably, or even necessarily, to be found in the document requested. In any event, the applicant has not disputed the fact that third States were involved in the adoption of Decision 2002/848. On the contrary, he has requested that the identity of those States be disclosed to him. It follows that the document requested does fall within the scope of the exception relating to international relations (para. 79).

That international cooperation concerning terrorism presupposes a confidence on the part of States in the confidential treatment accorded to information which they have passed on to the Council. In view of the nature of the document requested, the Council was therefore able to consider, rightly, that disclosure of that document could compromise the position of the European Union in international cooperation concerning the fight against terrorism (para. 80).

The Court also denies the action of the applicant insofar as it challenged the refusal of the Council to grant at least a partial access to the documents requested, on the basis of which the Council took its decisions (para. 86 to 89). And it excludes that the Council might be obliged to indicate the identity of the third States which submitted documents relating to Decision 2002/848 as well as the exact nature of those documents in order to enable him to make applications to their authors for access to those documents (para. 90 to 99).

Article 43. Ombudsman

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role.

No Conclusions have been adopted under this provision of the Charter.

Article 44. Right to petition

Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to petition the European Parliament.

No Conclusions have been adopted under this provision of the Charter.

Article 45. Freedom of movement and of residence

1.Every citizen of the Union has the right to move and reside freely within the territory of the Member States.
2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State.

This provision of the Charter must be read in accordance with the requirements formulated by Article 12 of the International Covenant on Civil and Political Rights (1966), by Article 2 of Protocol n° 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than those already included in the Convention and in the First Protocol (1963) and by the European Convention on Establishment (1955).

Freedom of movement of citizens of the Union and of their family members

While it would be neither possible within the framework of these Conclusions, nor even justified, to summarize the developments of the free movement of persons during the period under scrutiny, the Network does consider that it should highlight certain judgments which are particularly illustrative and which usefully clarify the scope of the obligations of the Member States now codified under Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member

States[724].

In the judgment it delivered on 2 June 2005 in the case of *Dörr and Ünal*[725], the European Court of Justice interpreted Article 9(1) of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health as precluding legislation of a Member State under which appeals brought against a decision to expel a national of another Member State from the territory of that first Member State have no suspensory effect and, at the time of examination of such appeal, the decision to expel can be the subject only of an assessment as to its legality, inasmuch as no 'competent authority' within the meaning of that provision has been established : 'the intervention of such an authority must make it possible for the person concerned to obtain an exhaustive examination of all the facts and circumstances, including the expediency of the measure in question, before the decision is definitively adopted' (para. 55). Taking into account 'the objective of progressively securing freedom of movement for Turkish workers, as set out in Article 12 of the Association Agreement' (para. 66), the Court also concludes that the procedural guarantees set out in Articles 8 and 9 of Directive 64/221 apply to Turkish nationals whose legal status is defined by Article 6 or Article 7 of Decision No 1/80 of the Association Council of 19 September 1980 on the development of the Association. This clarification of the procedural guarantees in Articles 8 and 9 of Directive 64/221 should of course be taken into account in the implementation of the equivalent provisions of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, cited above, which now has replaced Directive 64/221.

In the case of *Oulane* (judgment of 17 February 2005, Case C-215/03), the European Court of Justice addressed the position of a citizen of the Union staying in another EU Member State, who does not show any evidence of his identity or nationality. After Mr Oulane was arrested in the **Netherlands** with no identity documents in his possession and detained for deportation, then finally expelled to France, he challenged the legality of the detention before the *Rechtbank* [Regional Court] of The Hague and claimed damages. In its ruling following the request for a preliminary ruling the European Court of Justice pointed out that a Member State may require recipients of services who are nationals of other Member States and who wish to reside in their territory to provide evidence of their identity and nationality. However, the Court added, one cannot require that such evidence be provided in all cases only by presentation of a valid identity card or passport, as this clearly goes beyond the objectives of Directive 73/148/EEC[726]. If the person concerned is able to provide unequivocal proof of his nationality by means other than a valid identity card or passport, the host Member State may not refuse to recognise his right of residence on the sole ground that he has not presented one of those documents.

Another aspect of the case related to the fact that Dutch legislation at the time did not provide for a universal, general identification requirement, but for limited requirements restricted to specific situations. Under existing case-law, a person who states in response to questioning that he has Netherlands nationality must provide proof of his identity. His identity may be established, apart from by means of an identity card, a valid passport or even a driving licence issued in the Netherlands, through a check of the data available from the local Netherlands authorities. However, if a person

[724] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158 of 30.4.2004, p. 77. The Member States are to ensure the implementation of the directive by 30 April 2006.

[725] Case C-136/03, *Dörr and Ünal*, [2005] ECR I-4759 (judgment of 2 June 2005).

[726] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services, OJ L 172 of 28.6.1973, p. 14 ; now repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158 of 30.4.2004, p. 77.

states that he is a national of another Member State but is not able to produce a valid identity card or passport, the national authorities detain him until he can produce those documents. The practical result was that nationals of other Member States residing in the Netherlands must always be in possession of proof of identity, whereas no such requirement was imposed on Netherlands nationals. The Court of Justice concluded that this obvious difference of treatment as between Netherlands nationals and nationals of other Member States was prohibited by the EC Treaty: Community law does not prevent a Member State from carrying out checks on compliance with the obligation to be able to produce proof of identity at all times, provided however that it imposes the same obligation on its own nationals as regards their identity card.

Finally the Court of Justice addressed the detention and deportation of Mr Oulane. The Court observed that these measures, when based solely on his failure to comply with legal formalities concerning the monitoring of aliens, impair the very substance of the right of residence directly conferred by Community law and are manifestly disproportionate to the seriousness of the infringement. A detention order can only be based on an express derogating provision, such as Article 8 of Directive 73/148/EEC, which allows Member States to place restrictions on the right of residence of nationals of other Member States in so far as such restrictions are justified on grounds of public policy, public security or public health. However, failure to comply with legal formalities pertaining to aliens' access, movement and residence does not by itself constitute a threat to public policy or security. On the other hand, it is for nationals of a Member State residing in another Member State in their capacity as recipients of services, to provide evidence establishing that their residence is lawful. If no such evidence is provided, the host Member State may undertake deportation, subject to the limits imposed by Community law.

Third country nationals who are spouses or dependents of citizens of the Union having exercised their right to free movement in a Member State whose nationality they do not possess not infrequently have to wait for long periods before they obtain a residence permit in the host State where they have joined their sponsor, and they may face unjustified administrative burdens. Under Article 5(1) of Directive 64/221/CEE, cited above, 'A decision to grant or to refuse a first residence permit shall be taken as soon as possible and in any event not later than six months from the date of application for the permit. The person concerned shall be allowed to remain temporarily in the territory pending a decision either to grant or to refuse a residence permit.' In a judgment it delivered on 14 April 2005[727], the European Court of Justice found that **Spain** had violated its obligations under Community because the result clearly prescribed by this provision had not been attained in the case of a third-country national who was the spouse of a Community national who has exercised his freedom of movement in Spain, and had only obtained her residence permit after a 10-months long procedure. The Court also found that Spain has violated Community law by making the obtaining of a residence permit, for members of the family of Community nationals who do not have the nationality of a Member State, that they submit, among other documents, a residence visa for family reunification stamped on their passport. The Court considered that the residence visa requirement laid down by the Spanish rules in order to obtain a residence permit constitutes a measure contrary to the provisions of Directives 68/360, cited above, as well as of Directives 73/148[728] and 90/365[729].

The Network also welcomes the sentence adopted in **Portugal** by the Supreme Court on 19 May 2005. This sentence confirmed the Opinion of the General Attorneys Consultative Board (*Conselho Consultivo da Procuradoria-Geral da República*) that European Union citizens can only be expelled from Portugal for compelling reasons relating to public order, public security and public health, in

[727] Case C-157/03, *Commission v. Spain*, [2005] ECR I-2911 (judgment of 14 April 2005).
[728] Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).
[729] Council Directive 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity (OJ 1990 L 180, p. 28).

conformity with Directive 64/221/CEE of 25 February 1964[730] and with articles 12 and 13 of Decree of Law 60/93, which transposed the Directive into the Portuguese legal order. The case concerned a Spanish citizen who was convicted for drug trafficking, and was only passing through without having any kind of specific link to Portugal. In order for the expulsion to be justified, however, the strict requirements referred above had to be verified, because while being a European Union citizen the mere conviction for drug trafficking was not enough to justify that decision, even though this could be the case with respect to third country nationals. Therefore, the Supreme Court concluded that article 34 of the Decreto-Lei nº 430/83 was incompatible with article 3(2) of the Directive, in the absence of evidence relating to the existence of a real risk to public order, public security or public health.

Finally, the Network is concerned that the difference in treatment resulting in **Austria** from the amendments made to the Aliens Law during the period under scrutiny, between different categories of EEA nationals depending on whether or not they has exercised their freedom of movement and whether they had been joined by their dependents when the legislation enters into force – a more restrictive definition of the family applying to those having exercised their freedom of movement and applying for family reunification after that date – may not be compatible with the requirements of Community law[731].

The free movement of workers from the new Member States

For workers from the Member States that joined the European Union on 1 May 2004, with the exception of nationals of Malta and Cyprus, a transitional period allows the older Member States to refuse free movement of workers until 30 April 2011 at the latest. Ireland, the United Kingdom and Sweden have chosen not to avail themselves of this exception. The other Member States who do avail themselves of this exception, as well as Hungary, Poland and Slovenia, which have also made an exception to the principle of free movement of workers by relying upon a reciprocity clause, must decide by 30 April 2006 whether or not they wish to prolong that transitional period.

According to a European Commission report published in February 2006[732], workers' mobility from the EU Member States in Central and Eastern Europe to the old Member States has been in most countries quantitatively less important than foreseen, and the countries that have not applied restrictions after May 2004 (UK, Ireland and Sweden) have experienced high economic growth, a drop of unemployment and a rise of employment. New Member State nationals represented less than 1% of the working age population in all countries except Austria (1.4% in 2005) and Ireland (3.8 % in 2005). Ireland has seen relatively the largest inflow of workers, which according to the report contributed to its very good economic performance. The report notes that workers from the new Member States brought in skills which were clearly in demand, and had a much lower percentage of unskilled workers than the national equivalent. As to the 12 EU countries using transitional arrangements, the report shows that where workers managed to obtain access legally, this has contributed to a smooth integration into the labour market, some of these countries may have encountered higher levels of undeclared work and bogus self-employed work – indeed, it should be recalled that the restrictions provided for a transitory period only concern workers, and not citizens having sufficient personal resources, self-employed, or retired citizens, students, or service providers.

Noting that Ireland, the United Kingdom and Sweden have seen no massive influx since 1 May 2004 of workers from the new Member States of the European Union, and that the opening of the right to

[730] Council Directive 64/221/EEC of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health, OJ 56 of 4.4.1964, p. 850; now repealed by Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, cited above.

[731] On the exclusion of temporal limitations set for the exercise of fundamental freedoms recognized under the EC Treaty, reference is made to Case C-195/98, *Österreichischer Gewerkschaftsbund*, [2000] ECR I-10497 (Judgment of 30 November 2000), para. 56 ; and to Case C-290/00, *Duchon*, [2002] ECR I-3567) (judgment of 18 April 2002), para. 36.

[732] Report on the Functioning of Transitional Arrangements provided for in the 2003 Accession Treaty (period from 1 May 2004 to 30 April 2006), 8.2.2006.

free movement for those workers has made it possible to regularize the situation of workers who were illegally residing in those States, the Network strongly encourages the twelve Member States of the European Union that have not yet fully opened up their labour market to job-seekers from the new Member States, as well as Hungary, Poland and Slovenia, to put an end to that transitional period as soon as possible. Irrespective even of considerations connected with the consequences for the domestic labour market of granting the right to free movement to workers from the new Member States, with which the above-mentioned report is concerned, this would be in conformity with the status of fundamental freedom assigned to the free movement of workers, which is one of the foundations of the Community.

Freedom of movement of third country nationals legally residing on the territory of a Member State

Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents[733] should be transposed by the Member States by 23 January 2006. The implementation of the Directive will mark a major step forward towards the free movement of persons within the European Union by essentially aligning the status of third-country nationals having legally resided in a European Union Member State for five years with the status of European Union citizens with regard to the exercise of that fundamental freedom.

Immigration and the integration of third country nationals

The implementation of this Directive is but one aspect of a wider debate on the immigration and integration of third-country nationals, which has seen major developments during the course of 2005. The presentation by the Commission of the Green Paper on an EU approach to managing economic migration[734] on 11 January 2005 relaunched the debate on economic migration. That debate had barely made any progress since the failure of the proposal for a Directive on that issue in 2001[735]. The Member States have maintained the scope of their powers in that area by preserving the system of unanimously adopted decisions. The Green Paper notes that the predicted demographic decline in the European Union "will entail a fall in the number of employed people of some 20 million by 2030", which makes it necessary for the European Union to overcome those obstacles by offering a legal status and a guaranteed set of rights to third-country nationals who are admitted onto its territory. The creation of such a status would seem to be a safeguard against illegal immigration.

The Green Paper proposes two major options for any future EU legislation: an approach by category of applicants and an approach by admission procedure. These two options could be combined. As regards the approach by category of applicants, the Commission can opt for a 'horizontal' approach along the lines of previous proposals for a Directive, or for a 'sectoral' legislative approach[736], which would focus more on the categories of applicants, following the example of the Directives on the admission of students and researchers[737]. On the other hand, as regards the approach by admission procedure and the importance of a harmonization of the procedural rules and the rules for the processing of applications, the Commission suggests introducing flexibility in that area, too, by distinguishing three types of procedures. The normal procedure would consist in stipulating the conditions of "Community preference" by a system of concentric circles: priority would be given, in decreasing order of preference, to European Union citizens, then to long-term residents, then job-seekers already residing on EU territory, and finally newly arriving job-seekers. A so-called fast-track procedure could be established to allow one or several Member States confronted with specific labour

[733] OJ L 16 of 23.1.2004, p. 44.
[734] COM(2004) 811 of 11 January 2005
[735] Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities, COM (2001) 386 final of 11.7.2001.
[736] This sectoral approach could be broken down in several ways: according to the manner in which the activity is carried out, such as in paid employment or self-employment; according to the type of activity in sectors/occupations where shortages exist; and according to geographical place of origin by agreements with third countries.
[737] In 2005, Council Directive 2005/71/EC of 12 October 2005 on a specific procedure for admitting third-country nationals for the purposes of scientific research (OJ L 289 of 3.11.2005, p. 15) was adopted.

or skills gaps accelerated access to third-country workers. This procedure would be subject to prior Council authorization by a so-called 'very swift' procedure. Finally, a mechanism of prior selection to anticipate skill shortages would allow job-seekers to enter without them having a job already. This selection, using schemes such as 'green cards', could attract workers in order to meet the short and long-term needs of the labour market. In that case, it would be necessary to dissociate work permit from employment contract.

The reactions of the national parliaments[738] and the European Parliament[739] to those proposals have been divided, in particular due to the vagueness surrounding the granting of rights to third-country nationals. Other difficulties concern the risk, by attracting qualified workers, of depriving the countries of origin of those workers – a risk which the reflection document on a 'third way' by the British Presidency seeks to overcome -, and the differences that exist in terms of labour needs between the different Member States with their different birth rates[740], which could explain their reluctance to give up their right to limit, through quotas, the number of immigrants they admit onto their national territory. The Commission has taken note of those considerations in its Communication of 30 November 2005[741] on priority actions for responding to the challenges of migration. As it announced in that Communication, the Commission on 21 December 2005 presented a Policy Plan on Legal Migration[742].

The Network notes in particular the viewpoint expressed by the Commission in its Communication of 30 November 2005 (p. 4) according to which

> Europe's commitment to support the development efforts of countries of origin and transit is an obvious response to these challenges [of migratory flows]. By helping create livelihood opportunities that offer alternatives to emigration, EU development policy, centred on the eradication of poverty and the achievement of the Millennium Development Goals, including through the promotion of economic growth and job creation and the promotion of good governance and human rights, helps address the root causes of migration. In this respect, the EU must honour its recent commitments to increase its development assistance effort both in quantity and in quality, as stated in the "European consensus on development" and in the May 2005 Council Conclusions on the Millennium Development Goals.

At the same time, the Network reiterates its concerns about the risks entailed for candidates to illegal immigration by the reinforcement of the surveillance at the external borders of the Union, particularly in the Mediterranean Sea, where immigrants seek to use routes of access which are longer and more dangerous in order to avoid interception. It emphasizes the commitment of the Commission to encourage the EU 'look into the technical feasibility of establishing a surveillance system to eventually cover the whole of the Mediterranean Sea, thereby providing the necessary tools to detect illegal immigration and save lives at sea in a timely and efficient way' (p. 5 - emphasis added). The Network also would emphasize that the reinforcement of the immigration liaison officers in the countries of origin of illegal migrants and the redefinition of their tasks should take into account the right of those fleeing persecution to request asylum: this right risks being violated by any measures which prevent the filing of an asylum claim by certain categories of persons, because of the suspicion that they might illegally enter into the Union.

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[738] House of Lords, European Union Committee, Fourteenth Report, Economic Migration to EU, 16 November 2005; Senate (France), Information Report by the delegation for the European Union on European immigration policy, 2005, n°385; Assemblée nationale (France), Information Report on the Green Paper on an EU approach to managing economic migration and on the experiences of certain OECD countries in the area of migration for employment purposes, 2005 n°2365.

[739] See the vote on the European Parliament Resolution on an EU approach to managing economic migration (COM(2004)0811 - 2005/2059(INI), 26 October 2005. The vote on the resolution in plenary session deviated from the terms proposed by the rapporteur.

[740] Germany, for instance, needs to integrate nearly 500,000 immigrants per year if it is to maintain its working population at its current level, whereas France would only need five times fewer immigrants.

[741] Communication of the Commission to the Parliament and the Council, Priority Actions for responding to the challenges of migration : First Follow-Up to Hampton Court, COM(2005) 621 of 30 November 2005.

[742] IP/05/1664 of 21 December 2005

The European policy on integration of third-country nationals

In accordance with the common basic principles set out in the Hague Programme, the Commission on 1 September 2005 presented a Communication on a 'Common Agenda for Integration' establishing a 'framework for the integration of third-country nationals in the European Union'[743]. The Commission develops the idea according to which the ten common basic principles formulated by the JHA Council are henceforth to take the form of an operational 'blueprint'. The Commission also recalls that integration is not an isolated issue and that it needs to be reflected in a whole range of policies and be evaluated to be constantly improved.

Article 46. Diplomatic and consular protection

Every citizen of the Union shall, in the territory of a third country in which the Member State of which he or she is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State.

No Conclusions have been adopted under this provision of the Charter.

[743] COM(2005) 389 final of 1.9.2005.

CHAPTER VI. JUSTICE

Article 47. Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Right to access to an independent and impartial court: the judicial review of sanctions adopted in the context of the fight against terrorism

In the case of *Sison v. Council of the European Union* referred to above in connection with the right of access to documents, the context of the fight against terrorism led the Court of First Instance of the European Communities to offer a particularly restrictive interpretation of that right. The Network notes that, in the cases of *Yusuf* and *Kadi*, the Court of First Instance also gave a particularly restrictive interpretation of the requirements of the right to access to a court as enshrined in Articles 6 and 13 of the European Convention on Human Rights and as recognized as one of the general principles of European Union law, compliance with which is enforced by the Court.

The case of *Yusuf and Barakaat International Foundation v. Council and Commission*[744] initially concerned an application for annulment of, first, Council Regulation (EC) No 567/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000 (OJ 2001 L 67, p. 1) and, second, Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Regulation No 467/2001 (OJ 2001 L 295, p. 16) and, subsequently, an application for annulment of Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Regulation No 467/2001 (OJ 2002 L 139, p. 9). Those measures were adopted on the basis of Articles 60 EC and 301 EC in implementation of Resolution 1333 (2000) of the Security Council of the United Nations and taking into consideration the consolidated list of persons and entities to be subjected to the freezing of funds pursuant to Security Council Resolutions 1267 (1999) and 1333 (2000) adopted by the Sanctions Committee of the United Nations.

While it is not for the Court to review indirectly whether the Security Council's resolutions are themselves compatible with fundamental rights as protected by the Community legal order (para. 338), the Court holds that in this action for annulment it has jurisdiction to review the lawfulness of the contested regulation and, indirectly, the lawfulness of the resolutions of the Security Council at issue, in the light of the higher rules of international law falling within the ambit of jus cogens, in particular the mandatory prescriptions concerning the universal protection of the rights of the human person (para. 337). However, although it concedes that "there is no judicial remedy available to the applicant, the Security Council not having thought it advisable to establish an independent international court responsible for ruling, in law and on the facts, in actions brought against individual decisions taken by the Sanctions Committee" (para. 340), the Court believes that "any such lacuna in the judicial protection available to the applicants is not in itself contrary to jus cogens" (para. 341). The Court points out in that regard:

[744] Court of First Instance, 21 September 2005, *Yusuf and Al Barakaat International Foundation v. Council and Commission*, T-306/01, not yet published. See also the judgment delivered on the same day in Case T-315/01, *Kadi v. Council and Commission*, which raises the same questions.

> "the right of access to the courts, a principle recognized by both Article 8 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966, is not absolute. On the one hand, at a time of public emergency which threatens the life of the nation, measures may be taken derogating from that right, as provided for on certain conditions by Article 4(1) of that Covenant. On the other hand, even where those exceptional circumstances do not obtain, certain restrictions must be held to be inherent in that right, such as the limitations generally recognized by the community of nations to fall within the doctrine of State immunity (…) and of the immunity of international organisations (…)" (para. 342).

However, the reference made by the Court to the case-law of the European Court of Human Rights to support the latter assertion is not very convincing. Apart from the question of the jurisdiction of the Court to rule on the compatibility or incompatibility with fundamental rights of a Community instrument implementing a Resolution of the United Nations Security Council should not be confused with the question of the immunity from jurisdiction of the United Nations Organization – which cannot be considered as respondent party before the Court of First Instance -, the interpretation that is proposed of the case-law of the European Court of Human Rights should be approached with caution. Indeed, although the case-law of the European Court recognizes the immunity from jurisdiction of States or international organizations, it only allows restrictions to the right of access to a court of law that may result therefrom insofar as there exists a reasonable proportionality between the legitimate aim of respecting those immunities to the extent that this is required by international law, and the extent of the restriction. This presupposes in principle that the person on trial can benefit from another method of settlement that eventually gives him equivalent guarantees. According to the European Court of Human Rights,

> … where States establish international organisations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to the courts in view of the prominent place held in a democratic society by the right to a fair trial (see, as a recent authority, the Aït-Mouhoub v. France judgment of 28 October 1998, *Reports* 1998-VIII, p. 3227, § 52, referring to the Airey v. Ireland judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24)[745].

Where it is impossible for the applicant to have access to the courts of a State Party to the Convention, as justified by the concern to recognize the immunity from jurisdiction of a foreign State or an international organization, the European Court of Human Rights examines "whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention"[746]. However, while the Court of First Instance notes the existence of "a body such as the Sanctions Committee and the opportunity, provided for by the legislation, of applying at any time to that committee in order to have any individual case re-examined, by means of a procedure involving both the 'petitioned government' and the 'designating government'", it is not in conformity with the case-law of the European Court of Human Rights to present this opportunity as constituting "another reasonable method of affording adequate protection of the applicants' fundamental rights as recognized by jus cogens" (para. 345).

[745] Eur. Ct. HR, 18 February 1999, *Beer and Regan v. Germany* (Appl. No. 28934/95), §57
[746] Ibid., § 58.

The order adopted on 18 November 2005 in the case of *Selmani*[747] creates a similar challenge. The applicant 'claims to be an Algerian national. He left his country of origin after being tortured a number of times by the Algerian police and, since 28 December 2002, has resided in Ireland where he was granted refugee status on 19 March 2004' (para. 1). Before the Court of First Instance, he requests in particular[748] the annulment of the common position CFSP which resulted in his inclusion and his maintenance on the list of persons involved in terrorist acts, resulting in the freezing of his assets[749]. That common position was adopted under Article 15 EU, falling within Title V of the EU Treaty containing the provisions on a common foreign and security policy (CFSP) and Article 34 EU falling within Title VI of the EU Treaty containing the provisions on police and judicial cooperation in criminal matters (JHA).

Reiterating its classical position on such actions, the Court of First Instance indicates that

> …no provision is made for any legal remedy before the Community Courts in connection with Title V of the EU Treaty on the CFSP. Under the EU Treaty, in the version arising from the Treaty of Amsterdam, the powers of the Court of Justice are exhaustively listed in Article 46 EU. That article makes no provision for any jurisdiction of the Court in respect of the provisions of Title V of the EU Treaty. In those circumstances, the Court of First Instance has jurisdiction to hear an action for annulment directed against a CFSP common position only strictly to the extent that in support of such an action the applicant alleges an infringement of the Community's powers (…) (para. 54-56).

The Network refers in this regard to the *Report on the situation of fundamental rights in the Union in 2004* (March 2005), which stated:

> It follows from Article 46 EU that at present the Court of Justice of the European Communities has no jurisdiction to ensure compliance with the law in the application and interpretation of the EU Treaty with respect to measures adopted under Title V of this Treaty. The Treaty establishing a Constitution for Europe should at least partly remedy this shortcoming in the judicial review, since although it provides in Article III-376 that "the Court of Justice of the European Union shall not have jurisdiction with respect to Articles I-40 and I-41 and the provisions of Chapter II of Title V concerning the common foreign and security policy and Article III-293 insofar as it concerns the common foreign and security policy", it adds "However, the Court shall have jurisdiction to monitor compliance with Article III-308 and to rule on proceedings, brought in accordance with the conditions laid down in Article III-365(4), reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V."
>
> The importance of this aspect was already underlined in Thematic Comment no. 1 of the Network of Independent Experts on the balance between freedom and security in the context of the measures adopted by the European Union and its Member States to combat the terrorist threat. It is illustrated by the registration of persons or movements in the anti-terrorist lists of the EU. The establishment of those lists is situated principally in the context of the common foreign and security policy of the Union (CFSP) (…). In the case of *Segi and others v. Council of the European Union* (…), the Court of First Instance made an order on 7 June 2004 in which it

[747] CFI, Order of 18 November 2005, *Selmani*, T-299/04, unpublished.

[748] The action was primarily an action for annulment of Article 2 of Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restricted measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70) and Article 1 of Council Decision 2004/306/EC of 2 April 2004 implementing Article 2(3) of Regulation No 2580/2001 and repealing Decision 2003/902/EC (OJ 2004 L 99, p. 28) and all decisions adopted by the Council on the basis of Regulation No 2580/2001 and having the same effect as Decision 2004/306, in so far as those measures apply to the applicant.

[749] Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93). On 12 December 2002, the Council adopted, under Articles 15 EU and 34 EU, Common Position 2002/976/CFSP updating Common Position 2001/931 and repealing Common Position 2002/847/CFSP (OJ 2002 L 337, p. 93). The appendix to that common position included the applicant.

acknowledged the deficit in judicial protection created by the present situation. It observes with regard to the inclusion of Segi in the list of "persons, groups or entities involved in terrorist acts" by virtue of Articles 1 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ L 344, p. 93), (…) that these persons, groups or entities:

> … probably have no effective judicial remedy, either before the Community courts or before the national courts, against the inclusion of Segi in the list of persons, groups or entities involved in terrorist acts. Indeed, (…) it would be of no avail to the applicants to implicate the individual responsibility of each Member State for national acts that are adopted in pursuance of Common Position 2001/931, while they are seeking to obtain compensation for the prejudice allegedly caused by the inclusion of Segi in the Annex to this Common Position. As for the implication of the individual responsibility of each Member State before the national courts for taking part in the adoption of the common positions in question, such an action seems to be of little effect. Moreover, questioning the lawfulness of including Segi in this Annex, more particularly by virtue of a reference for a preliminary ruling on validity, is made impossible by the choice of a common position instead of, for example, a decision under Article 34 EU. Nevertheless, the absence of a judicial remedy cannot of itself found a claim to Community jurisdiction proper in a legal system based on the principle of specific jurisdiction, as follows from Article 5 EU (see in this sense the judgment of the Court of 25 July 2002, *Unión de Pequeños Agricultores v. Council*, C-50/00 P, *ECR*, p. I-6677, points 44 and 45) (point 38).

The Report on the situation of fundamental rights in the Union in 2004 concluded in this regard:

> As the European Court of Human Rights itself suggests in connection with the same case of *Segi and others*[750], it is for the national courts, in their review of the national measures adopted to implement the Common Position, to ensure the effective judicial protection which the Community judicature seems unable to assume in view of how its jurisdiction is defined. It should be recalled that, according to the Court of Justice, it is for the Member States to organize the legal remedies that are available in their countries to ensure an effective judicial protection of the individual, in accordance with the principle of sincere cooperation governing the relations between the Member States and the institutions of the European Union[751]. Article I-29(1)(2) of the Treaty establishing a Constitution for Europe in fact sets up this obligation as a constitutional obligation. This solution, however, is likely to perpetuate unacceptable discriminations in the extent and effectiveness of judicial protection between Member States and, as a result, disrupt the unity of application of European Union law. Moreover, it does not answer the concern expressed in the above-mentioned Thematic Comment no. 1, where the mere fact of appearing in the list of "persons, groups or entities involved in terrorist acts" may constitute an infringement of the right to the presumption of innocence or, at the very least, an assault on a person's reputation as an aspect of the right to respect for private life, irrespective of any national measure adopted to implement the common position in question.

[750] Eur. Ct. H.R., decision (inadmissible) of 23 May 2002, *Segi and others* v. *Germany and others (15 Member States of the European Union)* and *Gestoras Pro-Amnistia and others v. Germany and others (15 Member States of the European Union)* (joined applications n° 6422/02 and n° 9916/02) ("Concrete measures such as those which have been adopted or might be in the future would be subject to the form of judicial review established in each legal order concerned, whether international or national. That is true more specifically of measures which might give rise to disputes under Articles 10 and 11 of the Convention. The same applies to Community acts such as the above-mentioned Council Regulation (EC) no. 2580/2001 (subject to review by the Court of Justice of the European Communities), other international instruments binding the member States or even any decisions that may have been taken by domestic courts which have referred to the common positions").

[751] ECJ, 10 December 2002, Imperial Tobacco, C-491/01.

The national courts have also been confronted with the question of the relationship between the resolutions of the United Nations Security Council and the protection of fundamental rights to be ensured in European Union law, which came up in the *Yusuf and Kadi* cases. In the **United Kingdom**, a claim for judicial review by a dual British/Iraqi citizen of the Secretary of State's decision to detain him in a divisional detention facility in Basra, Iraq without charging him and the refusal of the Secretary of State to transfer him from Iraq to the United Kingdom was dismissed on that basis. It was held in *R (Al-Jedda) v. Secretary of State for Defence* [2005] EWHC 1809 (Admin) that, as obligations under a United Nations Security Council resolution overrode obligations under the ECHR, resolution 1546 concerning the maintenance of security in Iraq overrode the extra-territorial application of the Human Rights Act 1998, giving effect to the ECHR in United Kingdom law. The United Kingdom was thus entitled to disapply Article 5 ECHR to the extent permitted by that resolution.

Right to access to an independent and impartial court

The Network points to several decisions of the European Court of Human Rights that have strengthened the right of access to a court of law as enshrined in Article 6(1) of the European Convention on Human Rights. For instance, in a case involving **France,** the Court considered that the fact of deleting from the cause-list of the Court of Cassation an applicant who had not paid the damages pursuant to a decision of the Court of Appeal was disproportionate bearing in mind the applicant's limited financial resources and the advanced age[752]. In a judgment of 27 January 2005[753], the European Court of Human Rights condemned **France** on account of the inability, at the time of the events[754], to challenge before a court an internal measure that was taken in a prison. In a case involving **Greece,** the European Court of Human Rights reaffirmed its case-law according to which the dismissal for lateness of an appeal to the Court of Cassation on the grounds that it was lodged in a period starting from the pronouncement of the judgment and not from the time a fair copy was made of it is contrary to Article 6(1) of the Convention[755]. It also deserves notice that the Court found a violation of Article 6 § 1 ECHR where prisoners subject to a so-called 'Article. 41-bis regime' in **Italy** were unable in practice to challenge the measures adopted under this regime, because of the substitution, to the decree delivered by the Department of Justice which was challenged in court, of another decree, leading the competent judicial authority to consider the challenge inadmissible because moot[756].

The most significant positive developments are the following:

- In **Italy**, the Law 22 April 2005 (n° 60), confirming into law the decree-law n° 17 of 2005 about appeal against sentences in absentia[757] provided the defendant with a possibility to appeal against sentences passed in absentia after he/she learns about the conviction, without having to prove, as previously, that he/she had ignored the existence of proceedings against him.

- In the **United Kingdom**, it was held in *Polanski v. Condé Nast Publications Ltd* [2005] UKHL 10, [2005] 1 All ER 945 (Lords Slynn and Carswell dissenting) that the administration of justice would not be brought into disrepute by allowing a claimant to give his evidence from France by means of a video conference link when he did not wish to come to the United Kingdom to give oral evidence in person at the trial of his action as he was a fugitive from justice in the United States and

[752] Eur. Ct. HR, *Carabasse v. France,* judgment of 18 January 2005 (Appl. No. 59765/00).
[753] Eur. Ct. HR, *Ramirez Sanchez v. France,* judgment of 27 January 2005 (Appl. No. 59450/00). This judgment is not final, however, since the request for referral to the Grand Chamber formulated by the applicant has been granted.
[754] Since then, the Council of State has accepted that such a measure can be referred to the administrative court (EC, Minister of Justice v. *Remli*, n° 252712, 30 July 2003).
[755] Eur. Ct. HR, *Agatianos v. Greece*, judgment of 4 August 2005. See also Eur. Ct. H. R. (3rd sect.), *Kaufmann v. Italy* (Appl. n° 14021/02) judgment of 19 May 2005 (final).
[756] Eur. Ct. H. R. (4th sect.), *Gallico v. Italy* (Appl. n° 53723/00) judgment of 28 June 2005 (final); Eur. Ct. H. R. (2nd sect.), *Bifulco v. Italy* (Appl. n° 60915/00) judgment of 8 February 2005 (final)
[757] Legge 22 aprile 2005 n° 60, *Conversione in legge, con modificazioni, del decreto-legge 21 febbraio 2005 n 17, recante disposizioni urgenti in materia di impugnazione delle sentenze contumaciali e dei decreti di condanna*, *Gazzetta Ufficiale* 23 April 2005, n° 94.

did not wish to run the risk of being extradited. It was considered that a fugitive from justice, despite his status, was entitled to invoke the assistance of the court and its procedures in protection of his civil rights and he should therefore be able to have recourse to a procedural facility flowing from a technological development readily available to all litigants.

- A number of Member States have improved the availability of legal aid and the right of access to courts during the period under scrutiny. In **Denmark**, the Act (2005:554) amending the Administration of Justice Act and several other acts (court fees, costs, legal aid and free access to the courts)][758] was adopted in June 2005 by Parliament, guaranteeing the free access to the courts. In **Ireland**, the Government announced in 2005 significant increases in funding for the scheme of civil legal aid administered by the Legal Aid Board. Important deficiencies in the system of civil legal aid, however, were detailed in a report published by the Free Legal Advice Centres (FLAC) Ltd., during the period under review[759]. In **Lithuania**, with the adoption of different amendments (in force since May 2005) to the existing Law on the State Guaranteed Legal Aid (in force since 2001)[760], legal aid was made available to every citizen of the Republic of Lithuania, and is not limited as previously to persons whose property and annual income do not exceed the limits of property and income established by the Government for receiving legal aid. In **Latvia**, on 1 June 2005, the new *Law on State-provided Legal Aid* came into force[761], providing State support in granting legal aid to all persons whose status is defined as low-income or poor. The Network notes however, that as the reward for providing legal aid is comparatively low for lawyers practising in the capital, and because of a lack of lawyers in rural areas, the number of lawyers willing to act on the basis of legal aid supported by the State is structurally insufficient : according to the information provided by the Ministry of Justice, up to the end of 2005, 38 sworn advocates were providing free legal aid, of whom 22 are practising in the capital ; in some regions in the country, no-one is providing legal aid paid for by the State[762].

- The Network expressed its concern at the independence of courts in **Finland** in its previous Conclusions. This was a consequence of interference by certain members of the Government (notably Minister of Justice, Johannes Koskinen), and of Parliament (First Deputy Speaker Markku Koski) in the exercise of judicial powers by independent courts of law. While there was no evidence to indicate that these interventions *de facto* influenced the decision-making of the courts in concrete cases, the interventions by key politicians gave the public the impression of a lack of independence of the judiciary. The UN Human Rights Committee in its concluding observations on Finland's fifth periodic report[763] noted with concern the overt attacks made by political authorities (members of the Government and Parliament) on the competence of the judiciary with a view to interfering in certain judicial decisions and recommended that Finland take action at the highest level to uphold the independence of the judiciary and to maintain public trust in the independence of the courts (Articles 2 and 14 of the ICCPR)[764]. While there has been some domestic discussion and debate over the issue, no legislative actions to protect the independence of the judiciary and maintain public trust in the independence of the courts were undertaken during the period under scrutiny. However, judicial authorities themselves, including Mr Leif Sevón, President of the Supreme Court, expressed fairly straightforward public objections against politicians interfering with the operation of the courts. In September 2005, as a part of a broader rearrangement of its representation in Government, the Social Democratic Party decided to replace Minister of Justice, Mr Johannes Koskinen by Mrs Leena Luhtanen.

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[758] Lov (2005:554) om ændring af retsplejeloven og forskellige andre love (sagsomkostninger, retshjælp og fri proces).

759 The report can be accessed via www.flac.ie/

760 Valstybės garantuojamos teisinės pagalbos įstatymas [The Law on the State Guaranteed Legal Aid],Valstybės Žinios, Nr. 30-827.

[761] *Valsts nodrošinātās juridiskās palīdzības likums* [*Law on State-provided Legal Aid*], adopted 17 March 2005, in force since 1 June 2005.

[762] See http://www.tm.gov.lv/lv/noderigi/advokati_saraksts.html

[763] UN Human Rights Committee, Concluding observations of the Human Rights Committee: Finland. 02/12/2004. CCPR/C/FIN/2003/5 (Concluding Observations/Comments), 2 December 2004, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6d5bb984e19b576ec1256f6b0052fe35?Opendocument.

[764] UN Human Rights Committee Concluding observations at its 2239th meeting (CCPR/C/SR.2239), held on 27 October 2004.

A number of reasons for concern also exist:

- On 28 March 2006, the enforcement of the prison sentence imposed in **Italy** on Paolo Dorigo, following proceedings held to be in breach of the European Convention on Human Rights, was suspended. The case was referred to the Constitutional Court, which shall take a position on existing Italian law which still does not allow re-opening of cases found to be in violation of the Convention. Although this is clearly a positive development, which the Committee of Ministers of the Council of Europe welcomed[765], it clearly only represents a provisional solution: the Italian authorities should for the future identify by which legal means the criminal proceedings which are found to have been conducted in violation of the requirements of the European Convention on Human Rights could be reopened on a systematic basis.

- According to Article 14(5) of the International Covenant on Civil and Political Rights, "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law". The Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to **Spain** (10-19 March 2005) (CommDH(2005)8) notes that the restrictions imposed on cassation appeals make it impossible to benefit from such a re-examination as is required by this provision of the International Covenant on Civil and Political Rights. The Commissioner recalled that the United Nations Commission on Human Rights has found on five occasions that Spain was in an irregular situation, and was of the opinion that that situation must cease immediately. Moreover, during the period under scrutiny, the United Nations Human Rights Committee found that **Spain** had violated Article 14, paragraph 5, of the International Covenant on Civil and Political Rights in the case of Bernardino Gomariz Valera[766]. The Committee considered that Article 14, paragraph 5, not only guarantees that the judgment will be placed before a higher court, as happened in the case of the author of the communication, but also that the conviction will undergo a second review. In the Committee's view, the circumstance that a person acquitted at first instance may be convicted on appeal by a higher court cannot in itself impair his right "to review of his conviction and sentence by a higher court".

- In **France,** the severity of the Council of State in the assessment of the admissibility conditions of appeals is such as to limit the right of access to a court of law. In the *Laurent* judgment, the starting point of the time limits for bringing actions was at issue. In French law, appeals against judgments of administrative courts can be lodged within two months from the notification of those judgments to the party concerned. However, a problem arose in the forwarding of the notification letter because the appellant had moved. The appellant had failed to notify the court of his change of address. As a result, he only received notification of the judgment concerning him after the time limit had expired, and so his appeal was dismissed because it was late. The appellant contends that he had notified the Post Office of his change of address, which was supposed to send on his mail. Although it admits that "the party concerned [had indeed taken] the necessary precautions to ensure that the letter would be sent to his new address since he [had notified] the Post Office of his new address and had asked for his mail to be sent on to that new address", the Council of State nevertheless ruled that in this case the appellant failed to furnish proof that he had indeed taken all the necessary steps with the Post Office to have his mail sent on to his new address. Consequently, the Council of State upheld the inadmissibility of the appeal[767].

- A further case of infringement by **France** was established by the European Court of Human Rights for violation of the principle of impartiality enshrined in Article 6 of the European Convention on Human Rights, on account of the presence of the Government Commissioner at the deliberations.

[765] The Committee of Ministers has in the past expressed its concern at this situation, resulting in the failure to implement the judgment delivered by the European Court of Human Rights in the case of *Dorigo* : see Provisional resolution n° 85 of 2005, *Dorigo v. Italy* (Appl. n° 33286/96), 12 October 2005.
[766] Communication Nº 1095/2002, 26/08/2005 (CCPR/C/84/D/1095/2002).
[767] CE, *Laurent*, n° 254040, 18 March 2005, Recueil Lebon p. 118.

The Court thereby confirms its judgment in the *Kress* case[768] by specifying that the 'mere presence' of the Government Commissioner, even if not actively participating, constitutes a violation of Article 6 of the Convention[769]. The Network expresses the hope that, almost five years after the adoption of the *Kress* judgment, France will at last bring the procedure before the Council of State into line with the requirements of the European Convention on Human Rights.

- In **Italy**, the Legislative decree 10 January 2005 n° 12 implementing Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third country nationals[770], has given the police authority the task to enforce the expulsions. The foreigner concerned may challenge the decision of expulsion before the Justice of the Peace. However, the Network notes that this is a non-professional judicial authority, which may in fact result in insufficient guarantees being afforded to the foreign national against whom a deportation order is adopted[771].

- The Network is also concerned that in **Italy,** certain provisions of the Law 25 July 2005 n° 150, Enabling act to the Government in order to reform the judicial machinery[772], may threaten the independency of courts, in particular by the hierarchical organization of judicial offices and by the creation of a directive council by the Court of Cassation, entrusted with the oversight of the judges' conduct.

- In **Poland**, a study carried out by scientists from the Jagiellonian University has shown that according to the survey's participants, judges are the most corrupt parts of the administration of justice. Every other survey participant does not believe in the fairness of courts. Poles believe that a significant number of judges take bribes, are influenced by political affiliation and give in to pressure from their superiors. The study shows that these opinions are shared by lawyers, as well as a significant group of judges. One in every five declares that he/she is aware of the fact that his/her colleagues take bribes[773]. These are extremely worrisome features, as they seem to indicate that corruption is an endemic feature of the Polish judicial system.

Reasonable delay in judicial proceedings

Article 47 of the Charter of Fundamental Rights provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. In a great number of judgments delivered during the course of 2005, the European Court of Human Rights has found that the reasonable time allowed in accordance with Article 6(1) of the European Convention on Human Rights for determining civil rights and obligations and criminal charges was exceeded. In some Member States of the European Union, the accumulation of such reported infringements, coupled with the absence of effective structural measures to remedy this situation, serves to undermine the very foundations of the rule of law, since persons on trial in practice are no longer able to obtain from competent courts a decision within a reasonable time to remedy their grievances. More particularly, in its ongoing examination of the execution of a great number of judgments delivered by the European Court of Human Rights regarding the excessive length of judicial proceedings in Italy, based on the fourth annual report by the Italian authorities presenting the efforts made to remedy this structural problem (CM/Inf (2005) 31 and addendum), the Committee of Ministers of the Council of Europe concluded that, despite those efforts, the problem of the excessive duration of proceedings in Italy still remains to be resolved. The Committee also discussed the measures announced by the Italian

[768] Eur. Ct. HR, Grand Chamber, *Kress v. France*, judgment of 7 June 2001, Appl. No. 39594/98, *ECR* 2001-VI.
[769] Eur. Ct. HR, *Marie Louise Loyen v. France*, judgment of 5 July 2005, Appl. No. 55929/00.
[770] Decreto legislativo 10 gennaio 2005 n° 12, *Attuazione della direttiva 2001/40/CE relativa al riconoscimento reciproco delle decisioni di allontanamento dei cittadini di Paesi terzi, Gazzetta Ufficiale* 16 February 2005 n° 38.
[771] See also Procuratore generale della Repubblica presso la Corte Suprema di Cassazione, *Report about the Administration of Justice in the year 2004*.
[772] Legge 25 luglio 2005 n° 150, *Delega al Governo per la riforma dell'ordinamento giudiziario di cui al regio decreto 30 gennaio 1941, n. 12, per il decentramento del Ministero della giustizia, per la modifica della disciplina concernente il Consiglio di presidenza, della Corte dei conti e il Consiglio di presidenza della giustizia amministrativa, nonché per l'emanazione di un testo unico*, *Gazzetta Ufficiale* 29 July 2005 n° 175, *Supplemento Ordinario* n° 134.
[773] http://wiadomości.onet.pl of 18 July 2005 p. C1.

authorities in a special action plan for civil cases and in the criminal courts (CM/Inf (2005) 39) in order to remedy this situation. It believed that this plan did not offer a sufficiently complete response to the problem and discussed the possibility of setting up an *ad hoc* commission in Italy to analyze the problem and to propose an adequate comprehensive solution (CM/Inf (2005) 31).

Other Member States facing the same structural problems seem to be well on the way to identifying certain solutions. The Committee of Ministers of the Council of Europe has adopted three resolutions concerning the execution by **Greece** of a series of judgments delivered by the European Court of Human Rights with respect to the excessive length of civil, criminal and administrative proceedings. With respect to civil proceedings, Greece in 2001 adopted a series of new rules aimed at providing the parties and the court with sufficient time to prepare a case so that they avoid adjournment of a hearing on such a ground. Other provisions concern the setting of hearing dates and the overall length of hearings, the extrajudicial settlement of cases, increase of judicial posts, and improvement of courts' infrastructure. The government considers that first-instance civil proceedings are now concluded within one and a half years maximum, while in the past they used to last up to four years[774]. Initiatives have also been taken to accelerate criminal proceedings: the changes introduced concerned changes in courts' jurisdiction, organization and case management, changes in preliminary investigation and prosecution procedure, limitation of trial adjournments, and measures reducing court backlogs[775]. As concerns administrative proceedings, the Committee of Ministers pointed out that comprehensive legal reforms have already been adopted, such as the rearrangement of administrative courts' jurisdiction, increases in the posts of judges and administrative staff, and improvement of the courts' infrastructure. Further reforms are under way[776].

Other Member States also show encouraging signs of an improvement in this area. In **Latvia**, the entry into force of the Criminal Procedure Law[777] implies, in particular, that the time limits for preparing and hearing a case at first instance under the criminal procedure are reduced, and differ accordingly to the gravity of the crime. Moreover data show that the time required for reviewing cases under the criminal procedure in the appeal instance court is gradually decreasing. In the first half of 2005, appeal instance courts reviewed 71,4% of criminal cases within 3 months, 11,9% within 6 months, and 8,4% within 12 months, although some cases were under review since about 3 years. All cases involving minors were reviewed within a period not exceeding 18 months[778]. On the other hand, the Administrative Court in Latvia is seriously overburdened, due to the insufficient number of judges in administrative courts, as well as to the fact that only one administrative court is operating reviewing cases submitted from all regions of the State. In **Poland** also, the situation is generally improving with regard to the length of judicial proceedings : according to statistics of the Ministry of Justice, the current arrears amount to 1.5 million and are lower than during the same period of the previous year by around 300 000 cases. The computerisation of the courts is under way. The Ministry of Justice passed regulations which provide for, among other things, the possibility for the President of the court to establish a two-shift work system at courts, the extension of the hours for receiving clients, the shortening of the holiday break and the adoption of explicit principles regarding the sequence of admitting cases[779]. Moreover, two Acts of 28 July 2005 amend the Code of Civil Procedure with

[774] Resolution ResDH(2005)64 concerning cases concerning the excessive length of civil proceedings in Greece (Academy Trading Ltd and others against Greece and other cases), adopted by the Committee of Ministers on 18 July 2005.
[775] Resolution ResDH(2005)66 concerning cases relating to excessive length of criminal proceedings in Greece (case of Tarighi Wageh Dashti against Greece and 7 other cases), adopted by the Committee of Ministers on 18 July 2005.
[776] Resolution ResDH(2005)79 concerning cases relating to length of proceedings mainly before administrative courts in Greece (cases of Vitaliotou, judgment of 30 January 2003, Mentis, judgment of 20 February 2003, Halatas, judgment of 26 June 2003) (Friendly settlements), adopted by the Committee of Ministers on 18 July 2005; see also Resolution ResDH(2005)65 concerning cases relating to the excessive length of proceedings before administrative courts in Greece (Pafitis and others against Greece and 14 other cases), adopted by the Committee of Ministers on 18 July 2005.
[777] *Kriminālprocesa likums* [*Criminal Procedure Law*], adopted 21 April 2005, in force since 1 October 2005, with amendments announced to 28 September 2005.
[778] Information available at website of the Ministry of Justice
http://www.tm.gov.lv/lv/ministrija/imateriali/tiesu_statistika/jaunaakie/06_Krim_2005P1.xls
[779] Daily *Rzeczpospolita* of 9 August 2005 p.C3

respect to arbitration jurisdiction[780] and in order to introduce mediation into civil procedure[781]. The changes thus introduced should facilitate the resolution of disputes, and thus accelerate their treatment with economizing judicial resources.

The Network reiterates that it would welcome the setting up in **Austria** of regional Administrative Courts in the Provinces with comprehensive jurisdiction in administrative matters allowing a further appeal to the Administrative Court solely on a point of law, in order to alleviate the burden of the Administrative Court, which in many cases decides as first independent tribunal within the meaning of Article 6 ECHR. During 2004, proceedings before the Court took on average 22 months, 545 applications had been pending for more than 3 years and 7173 applications were still outstanding.782

The right to an effective remedy against the unreasonable length of judicial proceedings

In the *Kudla v. Poland* judgment of 26 October 2000 (Appl. 30210/96), the European Court of Human Rights affirmed the right to an effective remedy against the unreasonable length of judicial proceedings. In its Recommendation Rec(2004)6 to the member states on the improvement of domestic remedies (adopted by the Committee of Ministers on 12 May 2004, at its 114th Session), the Committee of Ministers of the Council of Europe built upon *Kudla*, stating in particular:

> 21. In their national law, many member states provide, by various means (maximum lengths, possibility of asking for proceedings to be speeded up) that proceedings remain of reasonable length. In certain member states, a maximum length is specified for each stage in criminal, civil and administrative proceedings. The integration of the Convention into the domestic legal systems of member states, particularly the requirement of trial within a reasonable time, as provided for in Article 6, has reinforced and completed these national law requirements.
>
> 22. If time limits in judicial proceedings – particularly in criminal proceedings – are not respected or if the length of proceedings is considered unreasonable, the national law of many member states provides that the person concerned may file a request to accelerate the procedure. If this request is accepted, it may result in a decision fixing a time limit within which the court – or the prosecutor, depending on the case – has to take specific procedural measures, such as closing the investigation or setting a date for the trial. In some member states, courts may decide that the procedure has to be finished before a certain date. Where a general remedy exists before a Constitutional Court, the complaint may be submitted, under certain circumstances, even before the exhaustion of other domestic remedies.

The Network emphasizes however that, in contrast to Article 13 ECHR[783], Article 47 of the Charter of Fundamental Rights guarantees the right to an effective remedy *before a tribunal*, to everyone whose rights and freedoms guaranteed by the law of the Union are violated. Therefore, in procedures which are brought before the European Court of Justice, the Court of First Instance, or the Civil Service Tribunal, a judicial remedy must be made available to complain about the length of proceedings and to have the procedure accelerated if the delay becomes unreasonable. Similarly, where Union law is applied by national jurisdictions, such a remedy against unreasonable delays of judicial proceedings

[780]Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy – kodeks postępowania cywilnego (Dz.U. z 2005 r. nr 78, poz. 1478) [Act of 28 July 2005 on the amendment of the Act – The Code of Civil Procedure (The Official Journal of 2005 No. 78, item 1478)]

[781] Ustawa z dnia 28 lipca 2005 r. o zmianie ustawy – kodeks postępowania cywilnego oraz niektórych innych ustaw (Dz.U. z 2005 r. nr 172, poz. 1438) [Act of 28 July 2005 on the amendment of the Act – The Code of Civil Procedure and some other acts (The Official Journal of 2005 No. 172, item 1438)]

[782] Activity report of the Administrative Court for the year 2004 of May 2005, available at the website http://www.vwgh.gv.at/presse/taetigkeitsbericht2004.pdf (18.11.05).

[783] Under Article 13 ECHR, the "authority" referred to in that provision does not necessarily have to be a judicial authority, although the remedy required by Article 13 must be "effective" in practice as well as in law (see, for example, *İlhan v. Turkey* [GC], no. 22277/93, § 97, ECHR 2000-VII), and although the European Court of Human Rights has emphasized that if the authority before which the remedy is to be exercised is not a judicial authority, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.

must exist. Such remedies must be 'effective': the authority (or the authorities) before which it is brought should have the power not only to offer compensation for the damage, both pecuniary and non-pecuniary, suffered as a result of the unreasonable delay, but also to put an end to the violation by imposing on the authorities responsible for the proceedings that they adopt the measures required to speed up the proceedings[784]. In order for the remedy to be effective, it should be capable of both preventing the continuation of the alleged violation of the right to a hearing without undue delays and of providing adequate redress for any violation that has already occurred. Moreover, the authority (or authorities) before which the complaint is brought must not be left with the choice whether or not to examine the complaint[785]. The remedy must stipulate in non ambiguous terms that it is designed to address the issue of the excessive length of proceedings before the domestic authorities. While the right to exercise a remedy in respect to the length of judicial proceedings may be subject to certain restrictions, these should only be allowable if they pursue legitimate objectives and are not disproportionate786. Finally, the imposition of a maximum available amount of just satisfaction to be awarded to the complainant is only acceptable to the extent that, in addition to the just satisfaction which can be awarded under the specific remedy availably for unreasonable delays in judicial proceedings, the complainant has a right to lodge a civil claim against the State and thus seek full compensation[787].

The situation in the Member States with regard to this requirement is contrasted. In some Member States, such as **Greece** and the **Netherlands,** no effective remedy exists against excessive length of proceedings, even though the civil liability of the State may, where appropriate, be involved if it is proven that the conduct of the courts is wrongful, and even though the excessive length of criminal proceedings may be taken into account in the setting of penalties. In **Poland** by contrast, during the first six months of the 2005, 2652 complaints[788] were submitted to the upper level courts on the basis of the new Act on a complaint against excessive length of the court proceedings[789]. In the first 10 months since the entry into force of this Act, 366 complaints were submitted to the High Administrative Court against the excessive length of administrative court proceedings[790]. However, there are situations in which the courts considering cases against the excessive length of a proceedings merely declare that the case is being prolonged, but do not grant any compensation.

In the **Czech Republic**, although Sec. 174a of the Act on Tribunals and Judges[791] entitles an individual to ask the superior court to set a date by which a certain procedural act must be completed, there is no provision in the Czech legal order that would stipulate a right to reparation from the State for the damage caused by the delay, except for the material damage clearly linked to the wrongful act. The Network encourages amending the Act on Liability for Damage caused by Exercise of Public Power[792], in order to make it possible for the applicants to receive a financial compensation from the Ministry for moral damage due to the unreasonable delays in judicial proceedings. It seems that a similar problem exists in **Denmark**, insofar as the Danish rules on State liability for human rights violations appear too restrictive with respect to the possibility to obtain compensation for non-

[784] See, eg, Eur. Ct. HR (4th sect.), *Charzynski v. Poland* (Appl. no. 15212/03), admissibility dec. of 1 March 2005, § 39.

[785] Comp. *Horvat v. Croatia* (Appl. no. 51585/99, judgment of 26 July 2001, on the one hand, with, on the other hand, *Slaviček v. Croatia* (dec.), (Appl. no. 20862/02), 4 July 2002, and *Nogolica v Croatia* (dec.), (Appl. no. 77784/01) 5 September 2002.

[786] Thus, court fees may be imposed if they are not unreasonably high, especially if they are reimbursed if it is found that Article 6 § 1 ECHR has been violated ; and temporal restrictions may be imposed, for instance one-year intervals between each complaint for unreasonably delays in the proceedings (Eur. Ct. HR (4th sect.), *Charzynski v. Poland* (Appl. no. 15212/03), admissibility dec. of 1 March 2005, §§ 37-39).

[787] Eur. Ct. HR (4th sect.), *Charzynski v. Poland* (Appl. no. 15212/03), admissibility dec. of 1 March 2005, §§ 37-39.

[788] Statistical data obtained in the Ministry of Justice, http://www.ms.gov.pl

[789] Ustawa z dnia 17 czerwca 2004 r. o skardze na naruszenie prawa strony do rozpoznania sprawy w postepowaniu sądowym bez uzasadnionej zwłoki, (Dz.U. z 2004 r. nr 179, poz. 1843) [Act of 17 June 2004 on a complaint against infringement on a party's right to have its case heard by a court without undue delay (The Official Journal of 2004, No. 179, item 1843)]

[790] Daily *Rzeczpospolita* of 1 August 2005 C2

[791] Zák. č. 192/2003 Sb., kterým se mění zákon č. 6/2002 Sb., o soudech a soudcích, (Law No. 192/2003 Coll. of Laws, which changes the Law No. 141/1961 Coll. of Laws, On Tribunals and Judges), See Sec. 174a

[792] Zák. č. 82/1998 Sb., o odpovědnosti za škodu způsobenou při výkonu veřejné moci rozhodnutím nebo nesprávným úředním postupem [Act No. 82/1998 Coll., on Liability for Damage caused by Exercise of Public Power].

pecuniary damages.

Insofar as national courts are entrusted with the application of Union law, the Union should encourage the Member States to ensure both that they provide their national jurisdictions with the personnel and resources which they require in order to respect the requirement of reasonable delays in judicial proceedings, and that they have the power to remedy any situations where this requirement would not be respected, in accordance with the case-law of the European Court of Human Rights. This should be seen as a matter of efficacy and uniformity of application of Union, as well as as a condition of compliance with Article 47 of the Charter where the national courts are entrusted with the application of Union law or of national rules which implement Union law.

Article 48. Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

The rules governing the evidence in criminal matters

According to Article 2(2) of the draft Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union proposed by the Commission on 28 April 2004[793], a suspected person has the right to receive legal advice before answering questions in relation to the charge. The decision adopted in May 2005 in the case of *O'Brien v. DPP*[794] by the Supreme Court in **Ireland** on the pre-trial right of reasonable access to legal advice illustrates the importance of this issue and the usefulness the definition of minimum common rules throughout the Union would present. The case raised the issue of whether evidence obtained through the effective denial of access to legal advice is admissible in court. O'Brien was arrested under s.4 of the Criminal Justice Act 1984 and was detained for questioning at a Garda station. He requested access to a solicitor although he could not name a solicitor. The Gardaì recommended a solicitor that was a considerable distance away from the station. There was a significant lapse in time prior to the arrival of the solicitor and by the time the solicitor had arrived the accused had made inculpatory statements. After receiving legal advice from the solicitor the interview with the Gardaì continued during which O'Brien made further inculpatory statements. The trial judge found that the Gardaì knew that the solicitor was busy and therefore must have foreseen that there would be a significant delay in the arrival of the solicitor. O'Brien was found guilty of conspiracy to defraud[795]. He appealed to the Court of Criminal Appeal and subsequently, to the Supreme Court. The Supreme Court found, affirming the decisions of the Court of Criminal Appeal and the Circuit Court, that there was a deliberate and conscious breach of the accused's constitutional right to pre-trial legal advice. It therefore held that the statements made prior to the arrival of the solicitor were inadmissible, although the statements after the arrival of the solicitor were admissible even in situations where inculpatory statements made prior to legal advice are referred to in inculpatory statements made post legal advice and have an impact on the subsequent admissions the breach. Generally, the O'Brien case highlights the problem of accessing legal advice while being detained in a Garda station. There is no duty solicitor scheme in place in Ireland and a recent report by the Criminal Legal Aid Review Committee concluded that the establishment of such a scheme would lead to a lack of continuity for clients[796]. The Committee believed that an individual detained should be entitled to choose a solicitor rather than having a solicitor that happens to be available on the day.

The Network is concerned about reports that in **Poland**, not all rules concerning gathering of evidence

[793] COM(2004)328 final of 28.4.2004.
[794] Unreported Supreme Court, 5 May 2005, *per* McCracken J.
[795] contrary to the common law and possession of a document relating to an offence under the *Larceny Act, 1916*.
[796] *Final Report of the Criminal Legal Aid Review Committee* February 2002 (Chapter 3)

in the criminal cases are being respected, in particular during pre-trial proceedings carried out by the police and the public prosecutor. The most frequent problems would appear to arise during the presentation for identification of the alleged perpetrator and questioning of the suspect. Also, in too small number of cases DNA material collected at the scene of the incident was used as evidence. In some cases statements of so-called crown witnesses were the only basis for the conviction of the accused.

The Network also recalls that under Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made'. In the **United Kingdom**, the Joint Committee on Human Rights has expressed its concern about the possible use of torture evidence by United Kingdom authorities. It has concerns about whether the Government has any system in place for ascertaining whether intelligence which reaches it in relation to people allegedly involved in terrorism-related activity has been obtained by torture. It observed that the Prevention of Terrorism Bill (now the 2005 Act) was silent on this question, despite the obvious concern that the material relied on by the Government to obtain control orders may well include material which has been obtained by torture. It recommended that the Government takes the opportunity presented by this Bill to implement the recommendation of the UN Committee against Torture that it give some formal effect to its expressed intention not to rely on or present in any proceedings evidence which it knows or believes to have been obtained by torture. This recommendation was not followed (*Prevention of Terrorism Bill*, HL 68/HC 334, 4 March 2005).

However, evidence obtained by torture was held in *A v. Secretary of State for the Home Department (No 2)* [2005] UKHL 71 not to be admissible against a party to proceedings in a British court irrespective of where, by whom or on whose authority the torture had been inflicted and the cases of the appellants - who had been certified under the Anti-terrorism, Crime and Security Act 2001, s 21 as persons whose presence in the United Kingdom was a risk to national security and who were suspected of being a terrorist - were remitted to the Special Immigration Appeals Commission for reconsideration of the refusal to cancel the certificates, the commission having previously concluded that the fact that evidence relied upon for the purpose of issuing them had or might have been procured by torture inflicted by foreign officials without the complicity of the British authorities was relevant to its weight but did not render it inadmissible. All the Law Lords accepted that it was for an applicant to raise a plausible argument (but not to prove) that evidence may have been obtained through torture, with it then falling to the court to make necessary enquiries. However, while a strong dissenting minority of three Law Lords considered that evidence is inadmissible unless it can be proved that it was *not* obtained through torture, the majority (four Law Lords) held that where there remained *doubt* as to whether evidence is obtained through torture, it may be admitted, with no account being taken of this doubt. The ruling does not resolve the question of the extent to which, if at all, the executive can take account of evidence obtained by torture in actions that it might take but it is likely to preclude any reliance on such evidence in proceedings concerned with the legality of those actions.

The right to freely choose one's defence counsel and the right to an interpreter

Both the Council of Europe's Committee for the Prevention of Torture (CPT)[797] and the United Nations Committee against Torture[798] welcomed the amendment of the in **Austria** Criminal Procedure Code[799] *(Strafprozessordnung),* entering in force on 1 January 2008 granting the access to a lawyer during police custody, in particular during the interrogation, following the decision of the

[797] Report to the Austrian Government on the visit to Austria carried out by the European Committee fort he Prevention of Torture ands Inhumane or Degrading Treatment or Punishment (CPT) of July, 21, 2005, CPT/inf(2005) 13, para 24, 25.
[798] Conclusions and recommendations of the Committee against Torture –Austria of November 24, 2005, CAT/CAUT/CO/3/CPR.1, art. 11.
[799] Bundesgesetz, mit dem die Strafprozessordnung 1975 neu gestaltet wird (Strafprozessreformgesetz), Federal Law Gazette (BGBl.) No. 19/2004.

Administrative Court of September 2002[800]. At the same time, the Network joins those bodies in the concerns they expressed regarding the provided exceptions to this right. According the Secs 57-63 and 164, the police may decide that contacts between a detained person and his/her lawyer be supervised (and limited to the provision of general legal advice) during police custody and/or deny the presence of a lawyer during interrogations, 'insofar as it is considered necessary to avoid that the investigation or the gathering of evidence are adversely affected by the lawyer's presence.' The CPT recommended granting in such a case access to an independent lawyer who can be trusted not to jeopardise the legitimate interest of the investigations, while the Committee against Torture urged Austria to 'take all necessary legal and administrative guarantees to ensure that this restriction will not be misused, that it should be restricted to very serious crimes and that it shall always be authorized by a judge.

A number of positive developments may be reported for the period under scrutiny. In **Greece,** Article 13 of Act No. 3346/2005 (Acceleration of Proceedings before Civil and Criminal Courts and Other Provisions) has extended to all categories of offences (including crimes) the possibility for the accused to have himself represented by a lawyer instead of appearing in person. This brings the Greek legal system into conformity with Article 6(3)(c) of the European Convention On Human Rights, which makes no distinction according to the category of offences. In **Ireland**, the Criminal Justice (Legal Aid) (Amendment) Regulations 2005[801] provide for an increase in the fees payable under the criminal legal aid scheme to solicitors for attendance in the District Court and for appeals to the Circuit Court. It also provides for an increase in fee in respect of necessary visits to prisons and places of detention[802]. It also includes increases for bail applications.

Article 49. Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

According to Article 49(1) of the Charter, third sentence, 'If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable'. In the judgment it delivered on 3 May 2005 in the case of *Berlusconi and Others*, the European Court of Justice confirmed that the principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States, and that this principle therefore must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law[803]. The following comments of the Network focus on another guarantee provided by Article 49 of the Charter, that of the legality of criminal offences and penalties.

Legality of criminal offences and penalties

The Network expresses the following concerns about the situation in the Member States under this

[800] VwGH 17.09.2005, 2000/01/0325.
[801] Statutory Instrument 389 / 2005.
[802] Other than Garda Stations.
[803] Joined Cases C-387/02, C-391/02 and C-403/02, *Berlusconi and Others*, [2005] ECR I-3565, para. 68-69.

provision of the Charter:

- In **Cyprus**, according to the Penal Code, the Assizes Court arriving at the conclusion that there has been murder has to impose the sentence of life imprisonment, without having any discretion to impose a sentence corresponding to the particular circumstances surrounding the offence, or to the relevant and applicable attributes of the convicted. This automaticity of the sanction is problematic, and it may be the case that such penalty is per definition disproportionate.

- In the **Netherlands,** the *Wet DNA-onderzoek bij veroordeelden* (*Staatsblad* 2004, 465; see *Kamerstukken* 28685) entered into force on 1 January 2005, providing for the taking of DNA from all persons who are convicted for criminal offences of a certain gravity carrying a punishment of imprisonment of four years or more (Article 67 of the Criminal Code). The Network acknowledges that the mere existence of the database may deter convicts from committing new offences once they are released, and that the database may be useful in solving crimes committed in the past where the perpetrators could not be found so far. The Network is concerned, however, about Article 8 of the new Act, which provides for the taking of DNA samples from all persons already sentenced to imprisonment at the moment that the Act entered into force, unless they had already served their time in prison. This is in violation of the principle of legality, as individuals who were convicted before the entry into force of the new Act are confronted with an interference with their privacy which was not foreseen by law at the time they committed their offence nor indeed when they were tried. In **France,** a similar problem arose following the introduction by the Minister of Justice on 5 October 2005 of several amendments to the bill on the treatment of repeated criminal offences, then discussed during its second reading by the French National Assembly. The purpose of one of those amendments is to allow the court that determines the penalties to impose a surveillance measure[804] on a person who has been given a prison sentence of 10 years or longer for a sex-related crime or offence. Although the Chancery, in a communication of 6 October 2005, specifies that this is not a new kind of penalty, but simply a manner of enforcement of a penalty pronounced by the judgment court, the Network – which regrets the remarks made by the Minister of Justice calling upon the Members of Parliament to take the risk of adopting an unconstitutional provision – has doubts in that respect.

- In **Denmark**, Act (2005:366) amending the Criminal Code adopted in May 2005 in order to implement Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering[805] amends section 20 b of the Casino Act, obliging every employee at casinos to be aware of transactions which may have some relation to money laundering. Several duties are imposed on the employees in case of a suspicion. Violations of this obligation may lead to the imposition of a fine. However, the Network is concerned that the duty of being aware of transactions which may have some relation to money laundering attention may not be in compliance with Article 7 ECHR, because of the lack of precision of this obligation.

<u>The element of 'terrorism' in criminal offences</u>

In previous Conclusions, the Network had noted that the replication, in national law, of the definition of terrorism provided by the Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164 of 22.6.2002, p. 3), may not comply with the principle of legality. This view was confirmed by the United Nations Human Rights Committee in the Concluding Observations it delivered upon examining the report submitted by **Belgium** (CCPR/CQ/81/BEL (point 24)). More recent developments do not allow to formulate decisive conclusions on this issue: they show neither that such fears are without foundation, nor that the risk of criminal convictions being imposed in violation of the principle of legality because of an overbroad understanding of 'terrorism' leading to an arbitrary and

[804] Such measure could take the form of electronic tagging.
[805] Lov (2005:533) om ændring af straffeloven og visse andre love. (Berigelseskriminalitet rettet mod offentlige midler, kriminalitet i juridiske personer, klagebegrænsning og hvidvaskning i spillekasinoer m.v.) (Act (2005:366) amending the Criminal Code etc. (financial crime headed at public funds, crime committed by a legal person, appeal limitations and money laundering in casinos)).

unpredictable reliance on that notion have materialized. It will be noted that this problem concerns not only the implementation of the Council Framework Decision of 13 June 2002 on combating terrorism as such, but also other criminal offences based on the qualification of 'terrorism'[806].

On the one hand, a decision such as that adopted in **Italy** by the Court of Cassation (2nd sect., judgment 21 December 2004 – 17 January 2005 n° 669/05), which held that the crime of association with terrorist purposes (art. 270-bis) requires very frequent and systematic organizing connections between members, does not entirely delimit this crime, since such an association can coexist with relationships based on cultural groups, which are linked to Islamic religious fundamentalism. Similarly, concerns have been raised when **Ireland** included in Part 2 of the Criminal Justice (Terrorist Offences) Act 2005 definitions of 'terrorist activity' and 'terrorist linked activity' incorporating the offences included in the Framework Decision, created in Part 4 an offence of financing terrorism, and made in Part 6 of the Act a number of amendments to the Offences Against the State Act 1939 including creating an offence of knowingly assisting an unlawful organisation in the furtherance of an unlawful objective. The Irish Human Rights Commission highlighted a number of concerns in its observation of the Criminal Justice (Terrorist Offences) Bill 2002 in March 2004[807]. It noted that it was, in essence, emergency legislation to deal with terrorist-type offences. Considering that Ireland already had substantive legislation to deal with these matters the IHRC questioned the need for further legislation. The Bill was a significant expansion of the powers of police and law enforcement agencies and the IHRC recommended that a specific time limit should be placed on its operation. Specific concerns highlighted by the Commission were that the definition of 'terrorist offences' and 'terrorist groups' is unnecessarily broad and includes in the terrorist category activities that would not necessarily be commonly understood as being a form of terrorism[808]; and that the offence of financing terrorism contained in section 13 can potentially include a broad range of activities, for example militant anti-globalisation, anti-war, environmental protests or funds raised for groups opposing dictatorial regimes. In **Belgium,** the Act of 19 December 2003 on terrorist offences, which transposes into Belgian law Framework Decision 2002/475/JHA of 13 June 2002, has been challenged before the Court of Arbitration (Constitutional Court), which nevertheless dismissed the appeal on 13 July 2005[809]. The Court of Arbitration refused to grant the request made by the parties for a reference to the Court of Justice of the European Communities for a preliminary ruling on the matter of compliance with the principle of legality of the offences defined by the Council of the European Union, or the violation of that same principle by the Framework Decision of 13 June 2002.

On the other hand, there are examples where the 'terrorist' nature of the offence appears to have been relied upon in a convincing manner. In the **Netherlands,** the Dutch *Wet terroristische misdrijven* [Terrorist Offences Act], entered into force on 1 September 2004, introducing as separate offences recruitment for the *Jihad* as well as conspiracy with the aim of committing serious terrorist offences, and increasing by 50% maximum sentences for a number of offences (including manslaughter, grave assault, hijacking and kidnapping) if these offences are committed with a terrorist intention (see *Staatsblad* 2004, Nos. 290 and 373; see also *Kamerstukken* 29754). Subsequently the new provisions were applied by the Dutch courts on three occasions:

1° On 14 February 2005 the *Rechtbank* [Regional Court] of Middelburg convicted an 18-year old on three counts: preparing a terrorist attack; threatening two Members of Parliament, Ms Hirsi Ali and Mr Wilders; and incitement to hatred (LJN AS5730). Taking into account his age and reduced criminal responsibility, the court sentenced him to 140 days youth detention and, also taking into

[806] For instance, in **Italy**, the legge 31 luglio 2005, n. 155, *Conversione in legge, con modificazioni, del decreto-legge 27 luglio 2005, n. 144, recante misure urgenti per il contrasto del terrorismo internazionale* (Confirmation into law, with modifications, of decree-law 27 July 2005 n° 144, concerning urgent measures against international terrorism), extended the catalogue of offences of terrorist nature, which now includes the crime of recruitment with terrorist purposes (art. 270-quarter) and the crime of training in activities with terroristic purposes (art. 270-quinquies).
[807] Human Rights Commission : Comments on the Criminal Justice (Terrorist Offences) ACt 2005, March 2004.
[808] The IHRC state : 'the definition adopted is impermissibly wide and runs the risk of categorising groups opposing dictatorial or oppressive regimes, anti-globalisation, anti-war or environmental protestors, or even militant trade unionists, as terrorists, with all the legal consequences envisaged by the other provisions of the Bill then attaching to them.' at p.3.
[809] Court of Arbitration, judgment no. 125/2005 of 13 July 2005, available at Internet site http://www.arbitrage.be

account psychiatric assessments of the suspect, imposed placement in a corrective institution for juveniles. As to the first count, the suspect had been found in possession of chemical substances that can be used to make explosives; he had been experimenting with these substances; he had repeatedly stated to friends and on the internet that violence should be used to establish an Islamic *kalifaat* [empire] in the Netherlands; when he was arrested he was in possession of maps of governmental buildings and embassies; he was also carrying a farewell letter stating that he accepted all responsibility for his (unspecified) act and that he had died as a martyr. The Court concluded that the suspect had made all these preparations with a view to cause major disturbances to the political and constitutional structures of the Netherlands. The court did take into account that the preparatory acts had remained limited to the gathering of information and substances, and that the substances had not been treated in a way that they could cause a major explosion.

2° The second application of the *Wet terroristische misdrijven* concerned Mr Mohammed B., who was suspected of killing Mr Theo van Gogh on 2 November 2004. In its judgment of 26 July 2005, the *Rechtbank* [Regional Court] of Amsterdam convicted B. and imposed a sentence of life–imprisonment (LJN AU0025). Neither B. nor the public prosecutor appealed. B. was convicted on several counts: attempted murder of several police officers and bystanders, possession of a gun and ammunition; threatening and obstructing a Member of Parliament, Ms Hirsi Ali, in her activities. The major conviction, however, was for murdering Mr Van Gogh *with a terrorist intent* within the meaning of Article 83a of the Dutch Criminal Code.

3° Finally, on 7 November 2005 the *Rechtbank* [Regional Court] of Amsterdam tried a 17-year old who was found in possession of explosives and who had twice sent threatening e-mails to Mr Wilders MP. The Court found the suspect guilty and, taking into account psychiatric assessments of the suspect, imposed placement in a corrective institution for juveniles (LJN AU5675).

It cannot be said that the qualification of certain offences as 'terrorist' was arbitrary or unpredictable in the cases above. The more controversial question is to what extent a person may be convicted for preparatory acts, as happened in the Middelburg case. On the one hand the combination of facts (the presence of explosives, detailed maps, statements made to third persons, farewell letters and so on) may give very strong indications that an attack is being prepared. On the other hand, where there is no information available about the precise object of this attack, or where the preparations were in an early stage, there is necessarily an element of speculation which is difficult to reconcile with a criminal conviction. This dilemma played a key role in the highly publicised case of *Samir A.,* a 17-year old Samir A. who was arrested and charged in July 2004. The trial courts (the Regional Court of Rotterdam and the Court of Appeal of The Hague) accepted that he was in possession of materials to make bombs, as well as detailed maps of Parliament and the Ministry of Defence in The Hague, Schiphol Airport, the AIVD headquarters and a nuclear power plant. The trial courts had little doubt that Samir A., possibly with the help of others, was preparing a terrorist attack. However, the Regional Court of Rotterdam observed, it was not clear what the object of the attack would be. Hence Samir A. was acquitted (6 April 2005, LJN AT3315). The Court of Appeal of The Hague noted that the preparations were in such an early stage that an attack was not imminent; it confirmed the acquittal (18 November 2005, LJN AU6181).

The Network encourages the States adopting legislation implementing the Council Framework Decision of 13 June 2002 on combating terrorism or otherwise including the element of 'terrorism' in their criminal legislation, to ensure that the legislation be subject to an annual review by an independent expert to assess the necessity for the continued use of the legislation, as proposed by the Ireland Human Rights Commission, and to propose any amendment to the legislation where abuses in its application by law enforcement authorities are identified.
In previous conclusions, the Network noted the uncertainties resulting from the definition of terrorism under the Council Framework Decision of 13 June 2002 (Thematic Comment n°1 of the EU Network of independent experts on fundamental rights, at pp. 7, 11 and 16; see also Concluding Observations on Estonia, 15.4.2003, CCPR/CO/77/EST). It referred in that regard to the wording chosen by the UN Security Council Resolution 1566(2004) of 8 October 2004 and by the High-level Panel on Threats,

Challenges and Change mandated by the Secretary General of the United Nations in para. 164 of its report 'A more secure world: our shared responsibility' (UN Doc. A/59/565, 2 December 2004), noting that – as an alternative to the definition provided in the Council Framework Decision – terrorism might be defined as any criminal action that is intended to cause death or serious bodily harm to civilians or non-combatants, or the taking of hostages, when the purpose of such an act, by its nature or context, is to intimidate a population by provoking a state of terror in the general public or in a group of persons or particular persons, or to compel a Government or an international organization to do or to abstain from doing any act.

Finally, the Network notes that the Act of 19 December 2003 on the European arrest warrant[810], which in **Belgium** transposes the Framework Decision of 13 June 2002 on the European arrest warrant, was the subject of an action for annulment before the Court of Arbitration (Constitutional Court). By a judgment of 13 July 2005[811], the Court of Arbitration made two references for a preliminary ruling to the Court of Justice of the European Communities: firstly, it questioned the compatibility of the Framework Decision with Article 34(2)(b) of the Treaty on European Union, which limits the role of framework decisions to an approximation of the laws and regulations of the Member States; secondly, it questions the compatibility of the abolition, even partial, of the condition of double criminality provided for by the Framework Decision with the principle of legality in criminal matters.

Article 50. Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

Right not to be tried or punished twice

The Network welcomes that in **Ireland**, Section 46 of the Criminal Justice (Terrorist Offences) Act, 2005 states that '[a] person who has been acquitted or convicted of an offence outside the State shall not be proceeded against for an offence under this Act consisting of the acts that constituted the offence of which that person was so acquitted or convicted.' This is clearly a positive development, which is fully in line with the mutual trust on which the area of freedom, security and justice is based.

[810] *Moniteur belge,* 22 December 2003.
[811] Court of Arbitration, judgment no. 124/2005 of 13 July 2005, available at Internet site http://www.arbitrage.be

APPENDIX: Tables of ratification

Appendix 1. Main instruments of the United Nations
Appendix 2. Main instruments of the International Labour Organization
Appendix 3. Main instruments of the Council of Europe

United Nations' main instruments
(status of ratifications on 6 January 2006)

- International Covenant on Economic, Social and Cultural Rights, 16th December 1966 (CESCR)
- International Covenant on Civil and Political Rights, 16th December 1966 (CCPR)
- Optional Protocol to the International Covenant on Civil and Political Rights, 16th December 1966 (CCPR-P1)
- Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, 15th December 1989 (CCPR-P2)
- International Convention on the Elimination of All Forms of Racial Discrimination, 21st December 1965 (CERD)
- Convention on the Elimination of All Forms of Discrimination against Women, 18th December 1979 (CEDAW)
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6th October 1999 (CEDAW-P)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10th December 1984 (CAT)
- Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18th december 2002 (not in force)(CAT-P)
- Convention on the Rigths of the Child, 20th November 1989 (CRC)
- Optional Protocol to the Convention on the Rigths of the Child on the Involvement of Children in Armed Conflict, 25th May 2000 (CRC-P1)
- Optional Protocol to the Convention on the Rigths of the Child on the Sale of Children, Child Prostitution and child pornography, 25th May 2000 (CRC-P2)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18th December 1990 (MWC)
- Rome Statute of the International Criminal Court, 18th July1998 (ICC)
- Convention relating to the Status of Refugees, 28th July 1951 (CSR)
- Protocol relating to the Status of Refugees, 31 January 1967 (CSR-P)
- Convention relating to the Status of Stateless Persons, 28th September 1954 (CSA)
- Convention on consent to Marriage, Minimum Age for Marriage and Registration of Marriages, 10th December 1962 (CCM)
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 21st March 1950 (CRTEH)
- Slavery Convention, 25th September 1926 (CE)
- Protocol amending the Slavery Convention, 7th December 1953 (CE-P)
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, 7th September 1956 (CSAE)
- Convention on the Political Rights of Women, 31st March 1953 (CDPF)

NOTE : The changes that have occurred during the period under scrutiny are highlighted in bold characters.

	CESCR	CCPR	CCPR-P1	CCPR-P2	CERD	CEDAW	CEDAW-P	CAT	CAT-P	CRC	CRC-P1	CRC-P2	MWC
Austria	10/09/78	10/09/78[i]	10/12/87[ii]	02/03/93	09/05/72[iii]	31/03/82[iv]	07/09/00	29/07/87[v]	*s. 09/03*	06/08/92[vi]	01/02/02	06/05/04	-
Belgium	21/04/83[vii]	21/04/83[viii]	17/05/94	08/12/98	07/08/75[ix]	10/07/85[x]	17/06/04	25/06/99[xi]	***s. 10/05***	16/12/91[xii]	06/05/02	*s. 09/00*	-
Cyprus	02/04/69	02/04/69	15/04/92	10/09/99[xiii]	21/04/67[xiv]	23/07/85	26/04/02	18/07/91[xv]	*s. 07/04*	07/02/91	-	*s. 02/01*	-
Czech R.	01/01/93[xvi]	22/02/93[xvii]	22/02/93	15/06/04	22/02/93[xviii]	22/02/93	27/02/01	01/01/93[xix]	*s. 09/04*	22/02/93[xx]	30/11/01[xxi]	***s. 01/05***	-
Denmark	06/01/72[xxii]	06/01/72[xxiii]	06/01/72[xxiv]	24/02/94	09/12/71[xxv]	21/04/83	31/05/00	27/05/87[xxvi]	25/06/04	19/07/91[xxvii]	28/08/02	24/07/03[xxviii]	-
Estonia	21/10/91	21/10/91	21/10/91	30/01/04	21/10/91	21/10/91	-	21/10/91	*s. 09/04*	21/10/91	*s. 09/03*	03/08/04	-
Finland	19/08/75	19/08/75[xxix]	19/08/75	04/04/91	14/07/70[xxx]	04/09/86	29/12/00	30/08/89[xxxi]	*s. 09/03*	21/06/91	11/04/02	*s. 09/00*	-
France	04/11/80[xxxii]	04/11/80[xxxiii]	17/02/84[xxxiv]	-	28/07/71[xxxv]	14/12/83[xxxvi]	09/06/00	18/02/86[xxxvii]	***s. 09/05***	08/08/90[xxxviii]	05/03/03	05/02/03	-
Germany	17/12/73	17/12/73[xxxix]	25/08/93[xl]	18/08/92	16/05/69[xli]	10/07/85[xlii]	15/01/02	01/10/90[xliii]	-	06/03/92[xliv]	13/12/04	*s. 09/00*	-
Greece	16/05/85	05/05/97	05/05/97	05/05/97[xlv]	18/06/70	07/06/83	24/01/02	06/10/88[xlvi]	-	11/05/93	22/10/03	*s. 09/00*	-
Hungary	17/01/74[xlvii]	17/01/74[xlviii]	07/09/88	24/02/94	01/05/67[xlix]	22/12/80	22/12/00	15/04/87[l]	-	08/10/91	S. 03/02	s. 03/02	-
Ireland	08/12/89[li]	08/12/89[lii]	08/12/89[liii]	18/06/93	29/12/00[liv]	23/12/85[lv]	08/09/00	11/04/02	-	28/09/92	18/11/02	*s. 09/00*	-
Italy	15/09/78	15/09/78[lvi]	15/09/78[lvii]	14/02/95	05/01/76[lviii]	10/06/85	22/09/00	12/01/89[lix]	*s. 08/03*	05/09/91	10/05/02	10/05/02	-
Latvia	14/04/92	14/04/92	22/06/94	-	14/04/92	15/04/92	-	14/04/92	-	15/04/92	**19/12/05[lx]**	*s. 02/02*	-
Lithuania	20/11/91	20/11/91	20/11/91	28/03/02	10/12/98	18/01/94	S. 09/00	01/02/96	-	31/01/92	20/03/03	05/08/04	-
Luxembg	18/08/83	18/08/83[lxi]	18/08/83[lxii]	12/02/92	01/05/78[lxiii]	02/02/89[lxiv]	01/10/03	29/09/87[lxv]	**13/01/05**	07/03/94[lxvi]	04/08/04	*s. 09/00*	-
Malta	13/09/90[lxvii]	13/09/90[lxviii]	13/09/90[lxix]	24/12/94	27/05/71[lxx]	08/03/91[lxxi]	-	13/09/90[lxxii]	24/09/03	30/09/90[lxxiii]	10/05/02	*s.09/00*	-
Netherlands	11/12/78[lxxiv]	11/12/78[lxxv]	11/12/78	26/03/91	10/12/71[lxxvi]	23/07/91[lxxvii]	22/05/02	21/12/88[lxxviii]	***s. 06/05***	06/02/95[lxxix]	*s. 09/00*	**23/08/05**	-
Poland	18/03/77	18/03/77[lxxx]	07/11/91[lxxxi]	*s. 03/00*	05/12/68[lxxxii]	30/07/80	22/12/03	26/07/89[lxxxiii]	**14/09/05**	07/06/91[lxxxiv]	**07/04/05**	**04/02/05**	-
Portugal	31/07/78	15/06/78	03/05/83	17/10/90	24/08/82[lxxxv]	30/07/80	26/04/02	09/02/89[lxxxvi]	-	21/09/90	19/08/03	16/05/03	-
Slovakia	28/05/93[lxxxvii]	28/05/93[lxxxviii]	28/05/93	22/06/99	28/05/93[lxxxix]	28/05/93	17/11/00	28/05/93[xc]	-	28/05/93[xci]	*s. 11/01*	25/06/04	-
Slovenia	06/07/92	06/07/92[xcii]	16/07/93[xciii]	10/03/94	06/07/92[xciv]	06/07/92	23/09/04	02/02/94[xcv]	-	06/07/92[xcvi]	23/09/04	23/09/04	-
Spain	27/04/77	27/04/77[xcvii]	25/01/85[xcviii]	11/04/91	13/09/68[xcix]	05/01/84[c]	06/07/01	21/10/87[ci]	***s. 04/05***	06/12/90[cii]	08/03/02	18/12/01	-
Sweden	06/12/71[ciii]	06/12/71[civ]	06/12/71[cv]	11/05/90	06/12/71[cvi]	02/07/80	24/07/03	08/01/86[cvii]	**14/09/05**	29/06/90	20/02/03	*s. 06/00*	-
UK	20/05/76[cviii]	20/05/76[cix]	-	10/12/99	07/03/69[cx]	07/04/86[cxi]	17/12/04	08/12/88[cxii]	10/12/03	16/12/91[cxiii]	24/07/03	*s. 09/00*	-

	ICC	CSR	CSR-P	CSA	CCM	CRTEH	CE	CE-P	CSAE	CDPF
Germany	11/12/00[cxiv]	01/12/53[cxv]	05/11/69	26/10/76[cxvi]	09/07/69	-	12/03/29	29/05/73	14/01/59	04/11/70[cxvii]
Austria	28/12/00[cxviii]	01/11/54[cxix]	05/09/73	-	01/10/69	-	19/08/27	16/07/54	07/10/63	18/04/69
Belgium	28/06/00[cxx]	22/07/53[cxxi]	08/04/69	26/05/60	-	22/06/65	23/09/27	13/12/62	13/12/62	20/05/64
Denmark	21/06/01[cxxii]	04/12/52[cxxiii]	29/01/68	17/01/56[cxxiv]	08/09/64[cxxv]	*s. 02/51*	17/05/27	03/03/54	24/04/58	07/07/54[cxxvi]
Spain	24/10/00[cxxvii]	14/08/78[cxxviii]	14/08/78	12/05/97[cxxix]	15/04/69	18/06/62	12/09/27	10/11/76	21/11/67	14/01/74[cxxx]
Finland	29/12/00[cxxxi]	10/10/68[cxxxii]	10/10/68	10/10/68[cxxxiii]	18/08/64[cxxxiv]	08/06/72[cxxxv]	29/09/27	19/03/54	01/04/59	06/10/58[cxxxvi]
France	09/06/00[cxxxvii]	23/06/54[cxxxviii]	03/02/71	08/03/60[cxxxix]	*s. 12/62*	19/11/60[cxl]	28/03/31	14/02/63	26/05/64[cxli]	22/04/57
Greece	15/05/02	05/04/60[cxlii]	07/08/68	04/11/75	*s. 01/63*	-	04/07/30	12/12/55	13/12/72	29/12/53
Ireland	11/04/02	29/11/56[cxliii]	06/11/68	17/12/62[cxliv]	-	-	18/07/30	31/08/61	18/09/61	14/11/68[cxlv]
Italy	26/07/99	15/11/54[cxlvi]	26/01/72	03/12/62[cxlvii]	*s. 12/63*	18/01/80	25/08/28	04/02/54	12/02/58[cxlviii]	06/03/68[cxlix]
Luxembg	08/09/00	23/07/53[cl]	22/04/71[cli]	27/06/60	-	05/10/83	-	-	01/05/67	01/11/76
Netherlands	17/07/01	03/05/56[clii]	29/11/68[cliii]	12/04/62[cliv]	02/07/65[clv]	-	07/01/28	07/07/55[clvi]	03/12/57[clvii]	30/07/71
Portugal	05/02/02[clviii]	22/12/60[clix]	13/07/76[clx]	-	-	30/09/92	04/10/27	-	10/08/59	-
UK	04/10/01[clxi]	11/03/54[clxii]	04/09/68[clxiii]	16/04/59[clxiv]	09/07/70[clxv]	-	18/06/27	07/12/53	30/04/57[clxvi]	24/02/67[clxvii]
Sweden	28/06/01[clxviii]	26/10/54[clxix]	04/10/67	02/04/65[clxx]	16/06/64[clxxi]	-	17/12/27	17/08/54	28/10/59	31/03/54
Cyprus	07/03/02[clxxii]	16/05/63[clxxiii]	09/07/68	-	30/07/02	05/10/83	21/04/86[clxxiv]	-	11/05/62	12/11/68
Estonia	30/01/02[clxxv]	10/04/97[clxxvi]	10/04/97	-	-	-	16/05/29	-	-	-
Hungary	30/11/01[clxxvii]	14/03/89[clxxviii]	14/03/89	21/11/01[clxxix]	05/11/75[clxxx]	29/09/55	17/02/33	26/02/56	26/02/58	20/01/55
Latvia	28/06/02[clxxxi]	31/07/97[clxxxii]	31/07/97[clxxxiii]	05/11/99[clxxxiv]	-	14/04/92	09/07/27	-	14/04/92	14/04/92
Lithuania	12/05/03[clxxxv]	28/04/97[clxxxvi]	28/04/97	07/02/00	-	-	-	-	-	-
Malta	29/11/02[clxxxvii]	17/06/71[clxxxviii]	15/09/71[clxxxix]	-	-	-	03/01/66[cxc]	-	03/01/66	09/07/68[cxci]
Poland	12/11/01[cxcii]	27/09/91[cxciii]	27/09/91	-	08/01/65	02/06/52	17/09/30	-	10/01/63	11/08/54[cxciv]
Czech R.	*s. 04/99*	11/05/93[cxcv]	11/05/93	19/07/04	22/02/93	30/12/93	22/02/93	-	22/02/93	22/02/93
Slovakia	11/04/02[cxcvi]	04/02/93[cxcvii]	04/02/93	03/04/00[cxcviii]	28/05/93	28/05/93	28/05/93	-	28/05/93	28/05/93
Slovenia	31/12/01	06/07/92[cxcix]	06/07/92	06/07/92	-	06/07/92	-	-	06/07/92	06/07/92

International Labor Organization's main Instruments
(status of ratifications on 6 January 2006)

- Convention (n°29) concerning Forced or Compulsory Labour, 28th June 1930
- Convention (n°87) concerning Freedom of Association and Protection of the Right to Organise, 9th July 1948
- Convention (n°98) concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1st July 1949
- Convention (n°100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 29th June 1951
- Convention (n° 105) concerning the Abolition of Forced Labour, 25th June 1957
- Convention (n°111) concerning Discrimination in Respect of Employment and Occupation, 25th June 1958
- Convention (n° 122) concerning Employment Policy, 9th July 1964
- Convention (n°135) concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 23rd June1971
- Convention (n°138) concerning Minimum Age for Admission to Employment, 26th June1973
- Convention (n°154) concerning the Promotion of Collective Bargaining, 19th June 1981
- Convention (n°168) concerning Employment Promotion and Protection against Unemployment, 21st June 1988
- Convention (n°182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 17th June 1999

NOTE : The changes that have occurred during the period under scrutiny are highlighted in bold characters.

	Forced Labor		Freedom of Association				Discrimination		Child Labor			
	C.29	C.105	C.87	C.98	C.135	C.154	C.100	C.111	C.138[cc]	C.182	C.122	C.168
Germany	13/06/56	22/06/59	20/03/57	08/06/56	26/09/73	-	08/06/56	15/06/61	08/04/76	18/04/02	17/06/71	-
Austria	07/06/60	05/03/58	18/10/50	10/11/51	06/08/73	-	29/10/53	10/01/73	18/09/00	04/12/01	27/07/72	-
Belgium	20/01/44	23/01/61	23/10/51	10/12/53	-	29/03/88	23/05/52	22/03/77	19/04/88	08/05/02	08/07/69	-
Denmark	11/02/32	17/01/58	13/06/51	15/08/55	06/06/78	-	22/06/60	22/06/60	13/11/97	14/08/00	17/06/70	-
Spain	29/08/32	06/11/67	20/04/77	20/04/77	21/12/72	11/09/85	06/11/67	06/11/67	16/05/77	02/04/01	28/12/70	-
Finland	13/01/36	27/05/60	20/01/50	22/12/51	13/01/76	09/02/83	14/01/63	23/04/70	13/01/76	17/01/00	23/09/68	19/12/90
France	24/06/37	18/12/69	28/06/51	26/10/51	30/06/72	-	10/03/53	28/05/81	13/07/90	11/09/01	05/08/71	-
Greece	13/06/52	30/03/62	30/03/62	30/03/62	27/06/88	17/09/96	06/06/75	07/05/84	14/03/86	06/11/01	07/05/84	-
Ireland	02/03/31	11/06/58	04/06/55	04/06/55	-	-	18/12/74	22/04/99	22/06/78	20/12/99	20/06/67	-
Italy	18/06/34	15/03/68	13/05/58	13/05/58	23/06/81	-	08/06/56	12/08/63	28/07/81	07/06/00	05/05/71	-
Luxembg	24/07/64	24/07/64	03/03/58	03/03/58	09/10/79	-	23/08/67	21/03/01	24/03/77	21/03/01	-	-
Netherlands	31/03/33	18/02/59	07/03/50	22/12/93	19/11/75	22/12/93	16/06/71	15/03/73	14/09/76	14/02/02	09/01/67	-
Portugal	26/06/56	23/11/59	14/10/77	01/07/64	31/05/76	-	20/02/67	19/11/59	20/05/98	15/06/00	09/01/81	-
United King.	03/06/31	30/12/57	27/06/49	30/06/50	15/03/73	-	15/06/71	08/06/99	07/06/00	22/03/00	27/06/66	-
Sweden	22/12/31	02/06/58	25/11/49	18/07/50	11/08/72	11/08/82	20/06/62	20/06/62	23/04/90	13/06/01	11/06/65	18/12/90
Cyprus	23/09/60	23/09/60	24/05/66	24/05/66	03/01/96	16/01/89	19/11/87	02/02/68	02/10/97	27/11/00	28/07/66	-
Estonia	07/02/96	07/02/96	22/03/94	22/03/94	07/02/96	-	10/05/96	**17/08/05**	-	24/09/01	12/03/03	-
Hungary	08/06/56	04/01/94	06/06/57	06/06/57	11/09/72	01/01/94	08/06/56	20/06/61	28/05/98	20/04/00	18/06/69	-
Latvia	-	27/01/92	27/01/92	27/01/92	27/01/92	25/07/94	27/01/92	27/01/92	-	-	27/01/92	-
Lithuania	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	26/09/94	22/06/98	29/09/03	03/03/04	-
Malta	04/01/65	04/01/65	04/01/65	04/01/65	09/06/88	-	09/06/88	01/07/68	09/06/88	15/06/01	-	-
Poland	30/07/58	30/07/58	25/02/57	25/02/57	09/06/77	-	25/10/54	30/05/61	22/03/78	09/08/02	24/11/66	-
Czech R.	01/01/93	06/08/96	01/01/93	01/01/93	09/10/00	-	01/01/93	01/01/93	-	19/06/01	01/01/93	-
Slovakia	01/01/93	29/09/97	01/01/93	01/01/93	-	-	01/01/93	01/01/93	29/09/97	20/12/99	01/01/93	-
Slovenia	29/05/92	24/06/97	29/05/92	29/05/92	29/5/92	-	29/05/92	29/05/92	29/05/92	08/05/01	29/05/92	-

Council of Europe's main instruments
(status of ratifications on 9 January 2006)

- Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November 1950 (STE005)
- Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20th March 1952 (STE009)
- European Convention on Establishment, 13th December 1955 (STE019)
- European Social Charter, 18th October 1961 (STE035)
- Protocol n°4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the first Protocol thereto, 16th September 1963 (STE046)
- Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, 28th January 1981(STE108)
- Protocol n°6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, 28th April 1983 (STE114)
- Protocol n° 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 22nd November 1984 (STE117)
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26th November 1987 (STE126)
- Additional Protocol to the European Social Charter, 5th May 1988 (STE128)
- Protocol amending the European Social Charter, 21st October 1991 (not in force) (STE142)
- European Charter for Regional or Minority Languages, 5th November 1992 (STE148)
- Framework Convention for the Protection of National Minorities, 1st February 1995 (STE157)
- Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 9th November 1995 (STE158)
- European Convention on the Exercise of Children's Rights, 25th January 1996 (STE160)
- European Social Charter (revised), 3rd May 1996 (STE163)
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine : Convention on Human Rights and Biomedicine, 4th April 1997 (STE164)
- Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings, 12th January 1998 (STE168)
- Protocole n° 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 4th November 2000 (not in force)(STE177)
- Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personnel Data, regarding supervisory authorities and transborder data flows, 8th Novembre 2001 (not in force) (STE181)
- Convention on Cybercrime, 23rd November 2001 (not in force)(STE185)
- Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, 24th January 2002 (not in force)(STE186)

- Protocol n°13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of th Death Penalty in All Circumstances, 3rd May 2002 (STE187)
- Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, 28th January 2003 (not in force) (STE189)
- Protocol n°14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the Control System to the Convention (not in force) (STE194)
- Additional Protocol to the Convention on Human Rights and Biomedecine, concerning Biomedical Research (not in force) (STE195)
- Convention on Action against Trafficking in Human Beings (not in force) (STE197)

NOTE : The changes that have occurred during the period under scrutiny are highlighted in bold characters.

	STE005	STE009	STE019	STE035	STE046	STE108	STE114	STE117	STE126	STE128	STE142	STE148	STE157
Austria	03/09/58[cci]	03/09/58[ccii]	*s. 12/57*	29/10/69[cciii]	18/09/69[cciv]	30/03/88[ccv]	05/01/84	14/05/86[ccvi]	06/01/89	*s. 12/90*	13/07/95[ccvii]	28/06/01[ccviii]	31/03/98[ccix]
Belgium	14/06/55	14/06/55	12/01/62[ccx]	16/10/90[ccxi]	21/09/70	28/05/93[ccxii]	10/12/98	***s. 05/05[ccxiii]***	23/07/91	23/06/03[ccxiv]	21/09/00	-	*s. 07/01[ccxv]*
Cyprus	06/10/62	06/10/62	-	07/03/68[ccxvi]	03/10/89[ccxvii]	21/02/02[ccxviii]	19/01/00	15/09/00	03/04/89	*s. 05/88*	01/06/93	26/08/02[ccxix]	04/06/96
Czech R.	18/03/92[ccxx]	18/03/92	-	03/11/99[ccxxi]	18/03/92	09/07/01[ccxxii]	18/03/92	18/03/92	07/09/95	17/11/99[ccxxiii]	17/11/99	*s.11/00*	18/12/97
Denmark	13/04/53	13/04/53	09/03/61	03/03/65[ccxxiv]	30/09/64	23/10/89[ccxxv]	01/12/83	18/08/88[ccxxvi]	02/05/89	27/08/96[ccxxvii]	-	08/09/00[ccxxviii]	22/09/97[ccxxix]
Estonia	16/04/96[ccxxx]	16/04/96[ccxxxi]	-	-	16/04/96	14/11/01[ccxxxii]	17/04/98	16/04/96	06/11/96	-	-	-	06/01/97[ccxxxiii]
Finland	10/05/90[ccxxxiv]	10/05/90	-	29/04/91[ccxxxv]	10/05/90	02/12/91[ccxxxvi]	10/05/90	10/05/90	20/12/90	29/04/91[ccxxxvii]	18/08/94	09/11/94[ccxxxviii]	03/10/97
France	03/05/74[ccxxxix]	03/05/74[ccxl]	*s. 12/55*	09/03/73[ccxli]	03/05/74[ccxlii]	24/03/83[ccxliii]	17/02/86	17/02/86[ccxliv]	09/01/89	*s. 06/89[ccxlv]*	24/05/95	*s. 05/99[ccxlvi]*	-
Germany	05/12/52[ccxlvii]	13/02/57[ccxlviii]	23/02/65[ccxlix]	27/01/65[ccl]	01/06/68[ccli]	19/06/85[cclii]	05/07/89[ccliii]	*s. 03/85[ccliv]*	21/02/90[cclv]	*s. 05/88*	-	16/09/98[cclvi]	10/09/97[cclvii]
Greece	28/11/74	28/11/74[cclviii]	02/03/65[cclix]	06/06/84[cclx]	-	11/08/95	08/09/98	29/10/87	02/08/91	18/06/98	12/09/96	-	*s. 09/97*
Hungary	05/11/92	05/11/92	-	08/07/99[cclxi]	05/11/92	08/10/97[cclxii]	05/11/92	05/11/92	04/11/93	**01/06/05[cclxiii]**	04/02/04	26/04/95[cclxiv]	25/09/95
Ireland	25/02/53[cclxv]	25/02/53[cclxvi]	01/09/66[cclxvii]	07/10/64[cclxviii]	29/10/68[cclxix]	25/04/90[cclxx]	24/06/94	03/08/01	14/03/88	-	14/05/97	-	07/05/99
Italy	26/10/55	26/10/55	31/10/63	22/10/65[cclxxi]	27/05/82[cclxxii]	29/03/97[cclxxiii]	29/12/88	07/11/91[cclxxiv]	29/12/88[cclxxv]	26/05/94[cclxxvi]	27/01/95	*s. 06/00*	03/11/97
Latvia	27/06/97	27/06/97[cclxxvii]	-	31/01/02[cclxxviii]	27/06/97	30/05/01[cclxxix]	07/05/99	27/06/97	10/02/98	*s. 05/97*	09/12/03	-	**06/06/05[cclxxx]**
Lithuania	20/06/95[cclxxxi]	24/05/96	-	-	20/06/95	01/06/01[cclxxxii]	08/07/99	20/06/95	26/11/98	-	-	-	23/03/00
Luxembg	03/09/53	03/09/53[cclxxxiii]	06/03/69[cclxxxiv]	10/10/91[cclxxxv]	02/05/68	10/02/88[cclxxxvi]	19/02/85	19/04/89[cclxxxvii]	06/09/88	*s. 05/88*	*s. 10/91*	**22/06/05**	*s. 07/95[cclxxxviii]*
Malta	23/01/67[cclxxxix]	23/01/67[ccxc]	-	04/10/88[ccxci]	05/06/02	28/02/03[ccxcii]	26/03/91	15/01/03	07/03/88	-	16/02/94	*s. 11/92*	10/02/98[ccxciii]
Netherlands	31/08/54[ccxciv]	31/08/54[ccxcv]	21/05/69[ccxcvi]	22/04/80[ccxcvii]	23/06/82[ccxcviii]	24/08/93[ccxcix]	25/04/86[ccc]	*s. 11/84[ccci]*	12/10/88[cccii]	05/08/92[ccciii]	01/06/93[ccciv]	02/05/96[cccv]	**16/02/05[cccvi]**
Poland	19/01/93	10/10/94	-	25/06/97[cccvii]	10/10/94	23/05/02	30/10/00	04/12/02	10/10/94	-	25/06/97	*s. 05/03*	20/12/00[cccviii]
Portugal	09/11/78[cccix]	09/11/78[cccx]	-	30/09/91[cccxi]	09/11/78	02/09/93[cccxii]	02/10/86	20/12/04 [cccxiii]	29/03/90	-	08/03/93	-	07/05/02
Slovakia	18/03/92[cccxiv]	18/03/92	-	22/06/98[cccxv]	18/03/92	13/09/00[cccxvi]	18/03/92	18/03/92	11/05/94	22/06/98	22/06/98	05/09/01[cccxvii]	14/09/95
Slovenia	28/06/94	28/06/94	-	*s. 10/97*	28/06/94	27/05/94[cccxviii]	28/06/94	28/06/94	02/02/94	*s. 10/97*	*s. 10/97*	04/10/00[cccxix]	25/03/98[cccxx]
Spain	04/10/79[cccxxi]	27/11/90[cccxxii]	-	06/05/80[cccxxiii]	*s. 02/78*	31/01/84[cccxxiv]	14/01/85	*s.11/84*	02/05/89	24/01/00	24/01/00	09/04/01[cccxxv]	01/09/95
Sweden	04/02/52	22/06/53[cccxxvi]	24/06/71[cccxxvii]	17/12/62[cccxxviii]	13/06/64	29/09/82[cccxxix]	09/02/84	08/11/85[cccxxx]	21/06/88	05/05/89	18/03/92	09/02/00[cccxxxi]	09/02/00[cccxxxii]
United King.	08/03/51[cccxxxiii]	03/11/52[cccxxxiv]	14/10/69[cccxxxv]	11/07/62[cccxxxvi]	*s. 09/63*	26/08/87[cccxxxvii]	20/05/99[cccxxxviii]	-	24/06/88[cccxxxix]	-	*s. 10/91*	27/03/01[cccxl]	15/01/98

	STE158	STE160	STE163	STE164	STE168	STE177	STE181	STE185	STE186	STE187	STE189
Austria	*s. 05/99*	*s. 07/99*	*s. 05/99*	-	-	*s. 11/00*	*s. 11/01*	*s. 11/01*	-	12/1/04	*s. 01/03*
Belgium	23/06/03	-	02/3/04 [cccxli]	-	-	*s. 11/00*	*s. 04/02*	*s. 11/01*	-	23/06/03	*s. 01/03*
Cyprus	06/08/96	**25/10/05**[cccxlii]	27/09/00[cccxliii]	20/03/02	20/03/02	30/04/02	17/03/04	**19/01/05**	-	12/03/03	**23/06/05**
Czech R.	*s. 02/02*	07/03/01[cccxliv]	*s. 11/00*	22/06/01	22/06/01	*s. 11/00*	24/09/03	***s. 02/05***	-	02/07/04	-
Denmark	*s. 11/95*	-	*s. 05/96*[cccxlv]	10/08/99[cccxlvi]	*s. 01/98*	-	*s. 11/01*	**21/06/05**	-	28/11/02[cccxlvii]	**21/06/05**[cccxlviii]
Estonia	-	-	11/09/00[cccxlix]	08/02/02	08/02/02	*s. 11/00*	-	12/05/03[cccl]	17/09/03	25/02/04	*s. 01/03*
Finland	17/07/98[ccccli]	*s. 01/96*	21/06/02[ccclii]	*s. 04/97*	*s. 01/98*	17/12/04	*s. 11/01*	*s. 11/01*	-	29/11/04	*s. 01/03*
France	07/05/99	*s. 06/96*	07/05/99	*s. 04/97*	*s. 01/98*	-	*s. 11/01*	*s. 11/01*	-	*s. 05/02*	*s. 01/03*
Germany	-	10/04/02[ccccliii]	-	-	-	*s. 11/00*	12/03/03[ccccliv]	*s. 11/01*	-	11/10/04	*s. 01/03*
Greece	18/06/98	11/09/97[ccclv]	*s. 05/96*	06/10/98	22/12/98	*s. 11/00*	*s. 11/01*	*s. 11/01*	*s. 01/02*	**01/02/05**	*s. 01/03*
Hungary	*s. 10/04*	-	*s. 10/04*	09/01/02	09/01/02	*s. 11/00*	**04/05/05**	04/12/03[ccclvi]	***s. 05/05***	16/07/03	-
Ireland	04/11/00	*s. 01/96*	04/11/00[ccclvii]	-	-	*s. 11/00*	*s. 11/01*	*s. 02/02*	-	03/05/02	-
Italy	03/11/97	04/07/03[ccclviii]	05/07/99[ccclix]	*s. 04/97*	*s. 01/98*	*s. 11/00*	*s. 11/01*	*s. 11/01*	*s. 02/02*	*s. 05/02*	-
Latvia	-	30/05/01[ccclx]	-	*s. 04/97*	*s. 01/98*	*s. 11/00*	-	*s. 05/04*	-	*s. 05/02*	***s.05/04***
Lithuania	-	-	29/06/01[ccclxi]	17/10/02	17/10/02	-	02/03/04	18/03/04[ccclxii]	-	29/1/04	***s. 04/05***
Luxembg	-	*s. 01/96*	*s. 02/98*	*s. 04/97*	*s. 01/98*	*s. 11/00*	*s. 02/04*	*s. 28/01*	*s. 01/02*	*s. 05/02*	*s. 01/03*
Malta	-	*s. 01/99*	**27/07/05**[ccclxiii]	-	-	-	-	*s. 01/02*	-	03/05/02	*s. 01/03*
Netherlands	*s. 01/04*	-	*s.01/04*	*s. 04/97*	*s. 05/98*[ccclxiv]	28/07/04[ccclxv]	08/9/04[ccclxvi]	*s. 11/01*	*s. 02/02*	*s. 05/02*	*s. 01/03*
Poland	-	28/11/97[ccclxvii]	***s. 10/05***	*s. 05/99*	*s. 05/99*	-	**12/07/05**	*s. 11/01*	-	*s. 05/02*	*s. 07/03*
Portugal	20/03/98	*s. 03/97*	30/05/02[ccclxviii]	13/08/01	13/08/01	*s. 11/00*	*s. 11/01*	*s. 11/01*	*s. 02/02*	03/10/03	*s. 03/03*
Slovakia	*s. 11/99*	*s. 06/98*	*s. 11/99*	15/01/98	22/10/98	*s. 11/00*	24/07/02	***s. 02/05***	-	**18/08/05**	-
Slovenia	*s. 10/97*	28/03/00[ccclxix]	07/05/99[ccclxx]	05/11/98	05/11/98	*s. 03/01*	-	08/09/04	*s. 01/02*	04/12/03	08/09/04
Spain	-	*s. 12/97*	*s. 10/00*	01/09/99	24/01/00	-	-	*s. 11/01*	-	*s. 05/02*	-
Sweden	29/05/98	*s. 01/96*	29/05/98[ccclxxi]	*s. 04/97*	*s. 01/98*	-	08/11/01	*s. 11/01*	-	22/04/03	*s. 01/03*
UK	-	-	*s. 11/97*	-	-	-	*s. 11/01*	*s. 11/01*	-	10/10/03[ccclxxii]	-

	STE194	STE195	STE197
Austria	*s. 11/04*	-	***s. 05/05***
Belgium	***s. 04/05***	-	***s. 11/05***
Cyprus	**17/11/05**	**-**	***s. 05/05***
Czech R.	***s. 06/05***	-	-
Denmark	10/11/04	***s. 01/05***	-
Estonia	*s. 05/04*	-	-
Finland	*s. 11/04*	-	-
France	*s. 05/04*	-	-
Germany	*s. 11/04*	-	***s. 11/05***
Greece	**05/08/05**	***s. 01/05***	***s. 11/05***
Hungary	**21/12/05**	***s. 09/05***	-
Ireland	10/11/04	-	-
Italy	*s. 05/04*	***s. 10/05***	***s. 06/05***
Latvia	*s. 05/04*	-	-
Lithuania	**01/07/05**	***s. 03/05***	-
Luxembg	*s. 05/04*	***s. 01/05***	***s. 05/05***
Malta	04/10/04	-	***s. 05/05***
Netherlands	*s. 05/04*	-	***s. 11/05***
Poland	*s. 11/04*	-	***s. 05/05***
Portugal	*s. 05/04*	***s. 02/05***	***s. 05/05***
Slovakia	**16/05/05**	**23/09/05**	-
Slovenia	**20/04/05**	***s. 01/05***	-
Spain	***s. 05/05***	-	-
Sweden	**17/11/05**	***s. 01/05***	***s. 05/05***
UK	**28/01/05**	-	-

[i] Reservations : art. 9, 10(3), 12(4), 14, 19, 21, 22 and 26 ; Declaration : art. 41
[ii] Reservation : art. 5(2)
[iii] Reservations : art. 4(a), 4(b) and 4(c)
[iv] Reservation : art. 11
[v] Reservations: art.5(1)(c)and 15 ; Declarations: art. 21 and 22
[vi] Reservations : art. 13, 15,17, 38(2), 38(3)
[vii] Reservations : art. 2(2) and (3)
[viii] Reservations : art. 10(2)(a), 10(3), 14(1), 14(5), 19, 20, 21, 22 and 23(2) ; Declaration : art. 41
[ix] Reservation: art. 4 ; Declaration : art. 14
[x] Reservations : art.15(2) and (3)
[xi] Reservations : art. 21 and 22
[xii] Reservations : art. 2(1), 13, 14(1), 15 and 40(2)(b)(v)
[xiii] Reservation : art. 2(1)
[xiv] Declaration : art. 14
[xv] Declarations : art. 21 and 22
[xvi] Reservation : art. 26
[xvii] Reservation : art. 48 ; Declaration : art. 41
[xviii] Reservation : art. 17 ; Declaration : art. 14
[xix] Declarations : art. 21 and 22
[xx] Reservation : art. 7(1)
[xxi] Reservation : art. 3(2)
[xxii] Reservation : art. 7(d)
[xxiii] Reservations : art. 10(3), 14(1), 14(5), 14(7) and 20(1) ; Declaration : art. 41
[xxiv] Reservation : art. 5(2)(a)
[xxv] Declaration : art. 14
[xxvi] Declarations : art. 21 and 22
[xxvii] Reservation : art. 40(2)(b)(v)
[xxviii] Declaration
[xxix] Reservations : art. 10(2)(b), 10(3), 14(7) and 20(1) ; Declaration : art. 41
[xxx] Declaration : art. 14
[xxxi] Declarations : art. 21 and 22
[xxxii] Reservations : art. 6, 8, 9, 11, 13
[xxxiii] Reservations : art. 4(1), 9, 13, 14, 20(1), 21, 22 and 27
[xxxiv] Reservations : art. 1, 5(2)(a) and 7
[xxxv] Reservations : art. 4, 6 and 15 ; Declaration : art. 14
[xxxvi] Reservations : §11 of the Preamble, art. 5(b), 9, 14(2)(c), 14(2)(h), 16(1)(d), 16(1)(g) and 29(1)
[xxxvii] Reservation : art. 30(2) ; Declarations : art. 21 and 22
[xxxviii] Reservations : art. 6, 30 and 40(2)(b)(v)
[xxxix] Reservations : art. 2(1), 14(3)(d), 14(5), 15(1), 19, 21 and 22 ; Declaration : art. 41
[xl] Reservation : art. 5(2)(a)
[xli] Declaration : art. 14
[xlii] Reservations : §11 of the Preamble, art. 7(b)
[xliii] Reservations : art. 3, 21 and 22
[xliv] Reservations : art. 18(1), 38(2), 40(2)(b)(ii) and (v)
[xlv] Reservation : art. 2
[xlvi] Declarations : 21 and 22
[xlvii] Reservations : art. 26(1) and 26(3)
[xlviii] Reservations : art. 48(1) and 48(3) ; Declaration : art.41
[xlix] Reservations : art. 17(1) and 18(1) ; Declaration :art. 14
[l] Declarations : art. 21 and 22
[li] Reservations : art. 2(2) and 13(2)(a)
[lii] Reservations : art. 10(2), 14, 14(7), 19(2) and 20(1) ; Declaration : art. 41
[liii] Reservation : art. 5(2)
[liv] Reservations : art. 4(a), (b), (c) ; Declaration : art. 14
[lv] Reservations : art. 13(b), 13(c), 16(1)(d) and 16(1)(f)
[lvi] Reservations : art. 9(5), 12(4), 14(3), 14(5), 15(1) and 19(3) ; Declaration : art. 41
[lvii] Reservation : art. 5(2)
[lviii] Reservations : art. 4(a), 4(b) and 6 ; Declaration : art. 14
[lix] Declarations : art. 21 and 22
[lx] Declarations : art. 17(1) et (2)
[lxi] Reservations : art. 10(3), 14(3), 14(5), 19(2) and 20 ; Declaration : art. 41
[lxii] Reservation : art. 5(2)
[lxiii] Declaration : art. 14
[lxiv] Reservation : art. 7 and 16(1)(g)
[lxv] Reservation : art. 1(1) ; Declarations : art. 21 and 22
[lxvi] Reservation : art. 3, 6, 7 and 15
[lxvii] Reservation : art. 13
[lxviii] Reservations : art. 13, 14(2), 14(6), 19, 20 and 22 ; Declaration : art. 41
[lxix] Reservations : art. 1 and 5(2)
[lxx] Reservations : art. 4 and 6
[lxxi] Reservations : art. 11, 13, 15 and 16
[lxxii] Declarations : art. 21 and 22
[lxxiii] Reservations : art. 26
[lxxiv] Reservation : art. 8(1)(d)
[lxxv] Reservations : art. 10(2), 10(3), 12(1), 12(2), 12(4), 14(3)(d), 14(5), 14(7), 19(2), 20(1) ; Declaration : art. 41
[lxxvi] Declaration : art. 14
[lxxvii] Reservations : § 10 and 11 of the Preamble
[lxxviii] Reservation : art. 1(1) ; Declarations : art. 21 and 22
[lxxix] Reservations : art. 14, 22, 26, 37, 38, 40
[lxxx] Declaration : art. 41
[lxxxi] Reservation : art. 5(2)(a)
[lxxxii] Reservations : art. 17(1) and 18(1) ; Declaration : art. 14
[lxxxiii] Reservations : art. 20 and 30(1) ; Declaration : art. 21 and 22
[lxxxiv] Reservations : art. 7, 12 à 16, 24(2)(f) and 38
[lxxxv] Declaration : art. 14
[lxxxvi] Declarations : art. 21 and 22
[lxxxvii] Reservation : art. 26
[lxxxviii] Reservation : art. 48 ; Declaration : art. 41
[lxxxix] Reservation : art. 17 ; Declaration : art. 14
[xc] Declarations : art. 21 and 22
[xci] Reservation : art. 7(1)
[xcii] Declaration : art. 41
[xciii] Reservations : art. 1 and 5(2)(a)
[xciv] Declaration : art. 14
[xcv] Declarations : art. 21 and 22
[xcvi] Reservation : art. 9(1)
[xcvii] Declaration : art. 41
[xcviii] Reservation : art. 5(2)
[xcix] Declaration : art. 14
[c] General Declaration
[ci] Declarations : art. 21 and 22
[cii] Reservations : art. 21(d), 38(2) and 38(3)
[ciii] Reservation : art. 7(d)
[civ] Reservations : art. 10(3), 14(7) and 20(1) ; Declaration : art. 41
[cv] Reservation : art. 5(2)
[cvi] Declaration : art. 14
[cvii] Declarations : art. 21 and 22
[cviii] Reservations : art. 1, 2(3), 6, 7(a)(i), 9, 10(2), 13(2)(a) and 14

[cix] Reservations : art. 1, 10(2)(a), 10(2)(b), 10(3), 11, 12(1), 12(4), 14(3)(d), 20, 23(3), 24(3) ; Declaration : art. 41
[cx] Reservations : art. 1(1), 4(a)(b) and (c), 6, 15 and 20
[cxi] Reservations : art. 2, 4(1), 9, 11(2), 15(3) and 15(4), 16(1)(f) ; General Declaration
[cxii] General Declaration ; Declaration : art. 21
[cxiii] Reservations : art. 22 and 37(c) ; General Declaration
[cxiv] Reservation : art. 87
[cxv] Reservation : art. 1B
[cxvi] Reservations : art. 23 and 27
[cxvii] Reservation : art. III
[cxviii] Reservation : art. 87(2)
[cxix] Reservations : 1B, 17 , 22, 23 and 25
[cxx] Reservations : art. 31(1)(e), 21(1)(b)(c), 87
[cxxi] General declaration; Reservations : art. 1B and 15
[cxxii] Reservation : art. 87
[cxxiii] Reservations : art. 1B and 17(1)
[cxxiv] Reservations : art. 24 and 31
[cxxv] Reservation : art. 1(2)
[cxxvi] Reservation : art. 3
[cxxvii] Reservations : art. 87 and 103
[cxxviii] General declaration; Reservations : art. 1B, 8, 12 and 26
[cxxix] Reservation : art. 29(1)
[cxxx] Reservations : art. I, II and III
[cxxxi] Reservation : art. 87
[cxxxii] Reservations : general, art. 1B, 7(2), 8, 12(1), 24, 25 and 28(1)
[cxxxiii] Reservations : general, art. 7(2), 8, 24(1)(b), 24(3), 25 and 28
[cxxxiv] Reservation : art. 1(2)
[cxxxv] Reservation : art. 9
[cxxxvi] Reservations : art. III
[cxxxvii] Reservations : art. 8, 87 and 124 ; General Declaration
[cxxxviii] Declaration : art. 29(2) and 17 ; Reservation : art. 1B
[cxxxix] Reservation : art. 10(2)
[cxl] General declaration
[cxli] General declaration
[cxlii] Reservations : art. 1B and 26
[cxliii] Declaration : art. 32 ; Reservations : art. 1B, 17, 25 and 29(1)
[cxliv] Declarations : art. 31, general ; Reservation : art. 29(1)
[cxlv] Reservation : art. III
[cxlvi] Reservation : art. 1B
[cxlvii] Reservations : art. 17 and 18
[cxlviii] General declaration
[cxlix] Declaration : art. III
[cl] Réservations : art. 1B, general
[cli] General Reservation
[clii] Reservation : art. IB
[cliii] Declaration : art. VII
[cliv] Reservations : art. 8 and 26, general
[clv] General declaration
[clvi] General declaration
[clvii] General declaration
[clviii] Declaration : art. 5(1)
[clix] Reservation : art. 1B
[clx] General declaration
[clxi] Reservations : art. 8 and 87
[clxii] Reservation : art. 1B
[clxiii] Declaration : art. VII(4)
[clxiv] Declarations : art. 36, 38 and general ; Reservations : art. 8, 9, 24(1)(b) and 25(1) and(2)
[clxv] Declarations : art. 1 and general
[clxvi] Declaration general
[clxvii] Reservations : art. III, general
[clxviii] Reservation : art. 8 and 87
[clxix] Reservation : art. 1B
[clxx] Reservations : art. 8, 12(1), 24(1)(b), 24(3) and 25(2)
[clxxi] Reservation : art. 1(2)
[clxxii] Reservation : art. 87
[clxxiii] General Declaration ; Reservation : art. 1B
[clxxiv] Ratification of the Convention as amended by the Protocol
[clxxv] Reservation : art. 87
[clxxvi] Reservations : art. 1B, 23, 24, 25 and 28(1)
[clxxvii] Reservation : art. 87
[clxxviii] Reservation : art. 1B
[clxxix] Reservations : art. 23, 24 and 28
[clxxx] Reservation : art. 1(2)
[clxxxi] Reservation : art. 87
[clxxxii] Reservations : art. 1B, 8, 17, 24, 26 , 34 and general
[clxxxiii] Declaration : art. VII(2)
[clxxxiv] Reservations : art. 24(1)(b) and 27
[clxxxv] Declaration : art. 103(1) ; Reservation : art. 87
[clxxxvi] Reservation : art. 1B
[clxxxvii] Declaration : art. 20(3) ; Reservation : art. 87
[clxxxviii] Reservation : art. 1B
[clxxxix] Declaration : art. VII(2)
[cxc] Ratification of the Convention as amended by the Protocol
[cxci] Reservation : art. III
[cxcii] Reservation : art. 87(2)
[cxciii] Reservation : art. 1B
[cxciv] Reservation : art. VII
[cxcv] Reservation : art. 1B
[cxcvi] Declaration : art. 103(1)
[cxcvii] Reservation : art. 1B
[cxcviii] Declaration : art. 27
[cxcix] Reservation art. 1B
cc[cc] Minimum age specified: 15 years : Germany, Austria, Belgium, Denmark, Finland, Greece, Ireland, Italy, Luxembourg, Netherlands, Sweden, Cyprus, Poland, Slovakia, Slovenia ; 16 years : Spain, France, Portugal, United-Kingdom, Hungary, Lithuania, Malta.
[cci] Reservations : art. 5 and 6
[ccii] Reservation : art. 1
[cciii] Declaration : art. 20
[cciv] Reservation : art. 3
[ccv] Declarations : art. 2, 3, 5, 9 and 13
[ccvi] Declarations : art. 2, 3, 4
[ccvii] Declaration : art. 4
[ccviii] Declarations : art. 2 and 3
[ccix] Declaration
[ccx] Declaration : art. 12
[ccxi] Declaration : art. 20
[ccxii] Declarations : art. 3, 13 and 14
[ccxiii] Declaration : art. 1
[ccxiv] Declaration : art. 5
[ccxv] Reservation
[ccxvi] Declarations : art. 2, 7, 20, 37
[ccxvii] Declaration : art. 4
[ccxviii] Declaration : art. 13
[ccxix] Declarations : art. 1 and 7
[ccxx] Reservations : art. 5 and 6
[ccxxi] Declaration : art. 20
[ccxxii] Declaration : art. 13
[ccxxiii] Declaration : art. 5

[ccxxiv] Declarations : art. 20 and 34
[ccxxv] Declarations : art. 13 and 24
[ccxxvi] Reservation : art. 2 ; Declarations : art. 2 and 6
[ccxxvii] Declaration : art. 9
[ccxxviii] Declarations : art. 2, 3, 4 and 15
[ccxxix] Declaration
[ccxxx] Reservation : art. 6
[ccxxxi] Reservation and Declaration : art. 1
[ccxxxii] Declarations : art. 3 and 13
[ccxxxiii] Declaration
[ccxxxiv] Reservation : art. 6
[ccxxxv] Declaration : art. 20
[ccxxxvi] Declaration : art. 13
[ccxxxvii] Declaration : art. 5
[ccxxxviii] Declarations : art. 2, 3, 7, 8, 9, 10, 11, 13, 14
[ccxxxix] Reservations : art. 5, 6 and 15 ; Declarations : art. 10 and 56
[ccxl] Declarations : art. 1 and 4
[ccxli] Reservations : art. 2 and 13 ; Declarations : art. 12 and 20
[ccxlii] Declaration : art. 5
[ccxliii] Declarations : art. 3, 9, 13
[ccxliv] Reservations : art. 2, 3, 4, 5, 6 ; Declaration : art. 2
[ccxlv] Reservation : art. 9 ; General Declaration
[ccxlvi] Declarations : art. 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14
[ccxlvii] Reservation : art. 7 ; Declaration : art. 56
[ccxlviii] Declarations : art. 1, 2 and 4
[ccxlix] Réserve : art 4 ; Declaration : art. 30
[ccl] Declarations : art. 6, 20 and 34
[cccli] Declaration : art. 5
[ccclii] Declarations : art. 8, 12, 13, 24
[ccliii] General Declarations
[ccliv] Declarations : art. 2, 3, 4
[cclv] Declaration : art. 20
[cclvi] Declarations : art. 2, 3, 7, 8, 9, 10, 11, 12, 13, 14
[cclvii] Declaration
[cclviii] Reservation : art. 2
[cclix] Declarations : art. 12 and 33
[cclx] Declaration : art. 20
[cclxi] Declaration : art. 20
[cclxii] Declarations : art. 3 and 13
[cclxiii] Declaration : art. 5
[cclxiv] Declarations : art. 2, 3, 8, 9, 10, 11, 12, 13
[cclxv] Reservation : art. 6
[cclxvi] Declaration : art. 2
[cclxvii] Reservations : art. 9 and 21 ; Declaration : art. 12
[cclxviii] Declaration : art. 20
[cclxix] Declaration : art. 3
[cclxx] Declarations : art. 3 and 13
[cclxxi] Declaration : art. 20
[cclxxii] Reservation : art. 3
[cclxxiii] Declarations : art. 3 and 13
[cclxxiv] Declarations : art. 2, 3, 4
[cclxxv] Declaration : art. 16
[cclxxvi] General Declaration
[cclxxvii] Reservation : art. 1
[cclxxviii] Declaration : art. 20
[cclxxix] Declarations : art. 3 and 13
[cclxxx] Declarations : General, art. 10 and 11
[cclxxxi] Reservation : art. 5
[cclxxxii] Declaration : art. 13
[cclxxxiii] Reservation : art. 1
[cclxxxiv] Reservations : art. 16 and 18 ; Declarations : art. 12
[cclxxxv] Declaration : art. 20
[cclxxxvi] Declarations : art. 3 and 13
[cclxxxvii] Reservation : art. 5
[cclxxxviii] Declaration
[cclxxxix] Reservation : art. 10 ; Declaration : art. 6
[ccxc] Declaration : art. 2
[ccxci] Declaration : art. 20
[ccxcii] Declarations : art. 3, 8 and 13
[ccxciii] Reservation : art. 15 ; Declarations : art. 24 and 25
[ccxciv] Declaration : art. 56
[ccxcv] Declarations : art. 2 and 4
[ccxcvi] General Declaration
[ccxcvii] Declarations : art. 20 and 34
[ccxcviii] Declarations : art. 3 and 5
[ccxcix] Declarations : art. 3, 13 and 24
[ccc] Declarations: general , art. 2
[cccci] Declaration : art. 2
[cccii] Declaration : art. 20
[ccciii] Declarations : art. 9
[ccciv] General Declaration
[cccv] Declarations : general, art. 2 3, 7, 8, 9, 10, 11, 12, 13, 14
[cccvi] Declarations : General, art. 10 and 30
[cccvii] Declaration : art. 20
[cccviii] General Declarations and art. 18
[cccix] Reservations : art. 5 and 7
[cccx] Reservations : art. 1 and 2
[cccxi] Declarations : art. 6 and 20
[cccxii] Declaration : art. 13
[cccxiii] Declaration : art 2 and 4
[cccxiv] Reservations : art. 5 and 6
[cccxv] Declaration : art. 20
[cccxvi] Declaration : art. 13
[cccxvii] Declarations : general, art. 1, 2, 3, 8, 10, 12, 13
[cccxviii] Declaration : art. 13
[cccxix] Declarations : art. 2 and 7
[cccxx] Declaration
[cccxxi] Reservation : art. 17 ; Declarations : art. 5, 6, 10 and 15
[cccxxii] Reservation : art. 1
[cccxxiii] Declaration : art. 31 and 37
[cccxxiv] Declaration : art. 13
[cccxxv] Declarations : art. 2, 3, 7
[cccxxvi] Reservation : art. 2
[cccxxvii] Reservations : art. 3, 11 and 23 ; Declaration : 12
[cccxxviii] Declaration : art. 20
[cccxxix] Declaration : art. 13
[cccxxx] Declaration : art. 1
[cccxxxi] Declarations : art. 2, 8, 9, 10, 11, 12, 13, 14
[cccxxxii] Declaration
[cccxxxiii] Declarations : art. 5 and 6
[cccxxxiv] Reservations : art. 2 and 4 ; General Declarations and art. 1
[cccxxxv] Reservations : art. 9, 15 and 21
[cccxxxvi] Declarations : art. 20, 34 and 37
[cccxxxvii] Declarations : art. 3, 13 and 24
[cccxxxviii] Declaration générale
[cccxxxix] Declarations : art. 20
[cccxl] Declarations : art. 1, 2, 3
[cccxli] Declaration : art 1-22 and 25, 26, 29, 30.
[cccxlii] Declaration, art. 1
[cccxliii] Declaration : art. A
[cccxliv] Declaration : art. 1
[cccxlv] Declaration : art. A
[cccxlvi] Reservation : art. 10§2 ; Declarations : art. 20§2ii and 35

[cccxlvii] Declaration : art. 4
[cccxlviii] Reservations : art. 3 et 5
[cccxlix] Declaration : art. A
[cccl] Declaration : art. 24, 27 and 35
[ccccli] Declaration : art. 2
[ccclii] Declaration : art. A
[ccccliii] Declaration : art. 1
[ccccliv] Declaration : art. 1
[ccclv] Declaration : art. 1
[ccclvi] Declaration : art. 27 ; Reservation : Art. 9
[ccclvii] Declaration : art. A
[ccclviii] Declaration : art. 1
[ccclix] Declaration : art. A
[ccclx] Declaration : art. 1
[ccclxi] Declaration : art. A
[ccclxii] Reservations and Declarations.
[ccclxiii] Declaration : art. A
[ccclxiv] Declaration : art. 1
[ccclxv] Territorial Application
[ccclxvi] Territorial Application
[ccclxvii] Declaration : art. 1
[ccclxviii] Reservations : art. 2§6 and 6
[ccclxix] Declaration : art. 1
[ccclxx] Declaration : art. A
[ccclxx] Declaration : art. A
[ccclxxi] Declaration : art. 4