E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS
(CFR-CDF)

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2002

This report has been drafted upon request of the European Commission, Unit A5, "Citizenship, Charter of fundamental rights, Racism, Xenophobia, Daphne program", of DG Justice and Home Affairs. It has been submitted on March 31 2003 , by the EU network of independent experts in fundamental rights (CFR-CDF). This report does not reflect an opinion of the European Commission nor does it bind it.

E.U. NETWORK OF INDEPENDENT EXPERTS IN FUNDAMENTAL RIGHTS
(CFR-CDF)

REPORT ON THE SITUATION OF FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION AND ITS MEMBER STATES IN 2002

TABLE OF CONTENTS

INTRODUCTION

In its resolution of 5 July 2001 on the situation as regards fundamental rights in the European Union (2000) (rapporteur Thierry Cornillet), the European Parliament recommended "that a network be set up consisting of legal experts who are authorities on human rights and jurists from each of the Member States in order to ensure a high degree of expertise and enable Parliament to receive an assessment of the implementation of each of the rights laid down in the European Union Charter of Fundamental Rights, taking into account developments in national laws, the case law of the Luxembourg and Strasbourg Courts and any notable case law of the Member States' national and constitutional courts".

This Network was set up by the European Commission in September 2002[1]. It was given the task of preparing an annual report on the situation of fundamental rights in the European Union. Its responsibility also includes assisting the Commission and the Parliament in developing European Union policy relating to fundamental rights. With this aim in mind, it delivers opinions, which it formulates fully independently, on implementing the rights set out in the European Union Charter of Fundamental Rights[2]. In general terms, this network should enable the implementation of the European Union Charter of Fundamental Rights to be assessed, both by the Union's institutions and by the Member States. The judgements expressed by the network of independent experts should not under any circumstance be attributed either to the European Commission or the European Parliament.

I. The European Union Charter of Fundamental Rights: reference instrument for a fundamental rights policy in the Union

Article 51 of the European Union Charter of Fundamental Rights, which was adopted at the opening of the Nice Summit in December 2000, lays down the scope of the Charter in strict terms: its provisions "are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity, and to the Member States only when they are implementing Union law". The Charter imposes certain restrictions on the Union's institutions in exercising the competences allocated to them by the treaties, as well as on the States when acting within the scope of Union law, i.e. when implementing Union law or applying it, or indeed when making use of an exception reserved for them by a provision of the treaties or which Community case law brings about in their favour. The Charter therefore sets the frame for the exercise of. It does not create new competences.

However, the political meaning of the Charter is not restricted to its legal scope, as determined above. As a receptacle for values considered to be fundamental within the Union, the Charter is also intended to guide the direction in which Union law is developed. Not only will the Charter restrict the way in which competences are exercised, it will also help determine the objectives in order to carry out which the competences allocated will be exercised, within the existing constitutional framework. In this way, beyond calling on constitutional safeguards to restrict the operation of the authority, the Charter's

[1] The network is made up of the following members in alphabetical order: Mrs Florence Benoît-Rohmer (Strasbourg), Mr Olivier De Schutter (Brussels/Louvain-la-Neuve), Mrs Maja Eriksson (Uppsala), Mrs Teresa Freixes (Barcelona), Mr Wolfgang Heyde (Bonn/Munich), Mr Morten Kjaerum (Copenhagen), Mr Henri Labayle (Bayonne), Mr Rick Lawson (Leiden), Mr Vital Moreira (Coimbra), Mr Jeremy McBride (Birmingham), Mr Bruno Nascimbene (Milan), Mr Manfred Nowak (Vienna), Mr Donncha O'Connell (Galway), Mr Tuomas Ojanen (Helsinki), Mr Linos Alexandre Sicilianos (Athens) and Mr Dean Spielmann (Luxembourg). The network is co-ordinated by Mr Olivier De Schutter, who is assisted in this task by Mrs Valérie Verbruggen. The network is managed by Mr Alain Brun, Unit Head, and Mrs Maria-José Rocha de Gouveia, Administrator, Unit A5, Directorate A (movement of persons, citizenship, fundamental rights), DG Justice and Home Affairs of the European Commission. Members of the network and its co-ordinator in particular would like to thank Mr Brun and Mrs Rocha de Gouveia for the excellent contribution they have made to setting up the network.

[2] OJ C 364 of 18.12.2000, p. 1.

natural aim is to influence the development of European Union secondary legislation. It must constitute the basis for a genuine *fundamental rights policy* within the European Union. The institutions of the Union are already obliged to *respect* fundamental rights but, by exercising the competences allocated to them, they must also ensure the *progressive development* thereof, by building on fundamental rights as a source of inspiration to guide their initiatives.

Furthermore, already in its communication of 11 October 2000 on the nature of the European Union Charter of Fundamental Rights, the European Commission considered that "the Charter will produce all its effects, legal and others, (...) whatever its nature (...). It is clear that it would be difficult for the Council and the Commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert"[3]. The aim of the assertion was not only to relativise what was at stake in the debate which, at the time of the Communication, was turning to the advantage of those who supported a Charter proclaimed in the form of a solemn political declaration, rather than written down in the treaties. It also underlined the fact that the Charter's value did not boil down to its formal legal value. As a receptacle for values recognised as fundamental within the Union, the Charter is required to permeate all of its policies, and also to influence the debates on its future[4].

The contribution made by the Network of independent experts on fundamental rights is based on this understanding of the European Union Charter of Fundamental Rights, which constitutes its reference instrument. The network was set up with four objectives in mind, of which this initial report constitutes an implementation tool:

- Within the limits of the competences allocated by the treaties to the Community or the Union as regards fundamental rights, it can recommend that these competences be exercised in such a way that the protection of fundamental rights within the European Union is strengthened (II below).
- The Network of independent experts can also play a part in monitoring respect by Member States for the principles of freedom, democracy, respect for human rights and fundamental freedoms, as well as the rule of law, on which the Union is founded[5] (III below).
- It can ensure that the Charter of Fundamental Rights is indexed to international and European instruments for the protection of human rights (IV below).
- Finally, the Network of independent experts can gradually promote the sharing of experiences and mutual learning between Member States relating to the implementation of the safeguards found in the Charter of Fundamental Rights (V below).

The following paragraphs detail each of these objectives briefly, before linking the working method which was followed in drafting this report to these objectives (VI below).

II. The Charter of Fundamental Rights and the issue of competences

Neither the Community nor the Union are generally considered to have the competence required to make a contribution towards achieving human rights in the European Union. The European Court of Justice asserted this very clearly: "no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international

[3] Communication from the Commission on the legal nature of the European Union Charter of Fundamental Rights, 11.10.2000 (COM (2000) 644 final), point 10.
[4] Given the similar role played by the *Grundgesetz* in Germany, it should not be surprising that the author with the best insight into this is from a German legal background: see A. von Bogdandy, "The European Union as a Human Rights Organisation? Human Rights and the core of the European Union", *C.M.L. Rev.,* vol. 31 (2000), p. 1307.
[5] Article 6 § 1 EU.

agreements in this field"[6]. Nevertheless, since the Community was created, considerable progress has been made. In the original version of the Treaty of Rome of 25 March 1957, only equal pay for men and women for equal work (Article 119 EEC (now, after amendment, Article 141 § 1 EC)), and the freedom of workers to seek employment in another Member State, understood as the abolition of any discrimination on the grounds of nationality (Articles 7 and 48 EEC (now, after amendment, Articles 12 and 39 EC)), were guaranteed . However, significant advances have been made since. No less than six legal bases could be relied on to support the institutions of the Union exercising the competences they have in the field of fundamental rights.

Combating discrimination

The principle of equal pay for men and women has gradually developed into a general right to equal opportunities and treatment for men and women as regards employment and occupation, firstly following the adoption of directives in the 1970s and influenced by the case law relating to Article 119 EEC, then, when the Treaty of Amsterdam was adopted on 2 October 1997, by amending the wording of this provision (Article 141 EC). The competence of the European Community to take measures to combat discrimination based not only on sex, but also on "race" or ethnic origin, religion or belief, disability, age or sexual orientation, has been recognised by the Treaty of Amsterdam (Article 13 EC)[7]. As regards combating discrimination, the Community's competences have therefore been extended considerably although, so far, the Community still does not have general competence in this area, and can only act with due regard for the principle of subsidiarity. The report highlights why adopting a directive which aims to ensure school integration and integration into the labour market for gypsies would be a legitimate and desirable part of exercising this competence. Due to both their lifestyle and the socio-economic marginalisation they have to endure, they should be subject to a specific approach, the framework directive on equal treatment as regards employment and occupation not being sufficient in this regard. The report also shows why a policy aimed at combating discrimination suffered by persons with disabilities calls for the equal treatment requirement to be extended beyond the fields currently covered by this framework directive. It calls for a community initiative in this regard. Today, in general terms, through Articles 141 and 13 EC, the European Community has the competence needed to implement most of the safeguards contained in Articles 21 (Non-discrimination), 22 (Cultural, religious and linguistic diversity), 23 (Equality between men and women) and 26 (Integration of persons with disabilities).

Social Europe

Since 1957, Social Europe has advanced considerably, as conveyed by the addition of a section "Social policy, education, vocational training and youth" to the EC treaty by the Maastricht Treaty of 7 February 1992, then, with the entry into force of the Treaty of Amsterdam on 1 May 1999, adding to this section by extending the Community's ability to support action by Member States in this area. As regards rights such as access to the labour market by nationals of third countries residing legally within the Community (Article 15, §§ 1 and 3 of the Charter), workers' right to information and consultation within the undertaking (Article 27), protection in the event of unjustified dismissal (Article 30), certainty of fair and just working conditions (Article 31), the prohibition of child labour and protection of young people at work (Article 32), the reconciliation of family and professional life (Article 33), or social security for migrant workers (Article 34 § 2), the Community can now act. With regard to the rights which have just been mentioned, most of which appear in Chapter IV of the Charter ("Solidarity"), this report has been guided by two concerns. Firstly, it has tried to index the reading of the European Union Charter of Fundamental Rights as closely as possible to the case law of the European Committee of Social Rights, which monitors respect, and therefore the interpretation of

[6] ECJ, 28 March 1996, Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *ECR.,* p. I-1763, para. 27.

[7] See Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ* L 180 of 19.7.2000, p. 22, and Directive 2000/78/EC of the Council of 27 November 2000 establishing the general framework for equal treatment in employment and occupation, *OJ* L 303 of 2.12.2000, p. 16; as well as the Community Action Programme to combat discrimination (2001-2007), *OJ* L 303 of 2.12.2000, p. 23.

the European Social Charter (see IV below). Secondly, it has tried to identify the "best practices" developed within certain Member States, in order to encourage other States, where applicable, to draw inspiration from them, over and above the minimum thresholds constituted by the standards which are currently binding on all States (see V below).

Asylum, immigration and policies linked to the free movement of persons

In the fields of the free movement of persons, asylum and immigration, Title IV ("Visas, asylum, immigration and other policies linked to the free movement of people") of Part Three of the Treaty of Rome provides for the adoption of a set of secondary legislation before 1 May 2004. However, measures which aim to ensure solidarity between Member States from the point of view of the reception of refugees and displaced persons, which lay down the conditions for entry and residence and for issuing residence permits to nationals of third countries, or which lay down the rights of nationals of third countries residing legally in a Member State to stay in another Member State, are not subject to this five year limit following the entry into force of the Treaty of Amsterdam. Nevertheless, 2003 and the first half of 2004 may be expected to give rise to the adoption of a considerable amount of secondary Community legislation, which will have a profound effect on the right to respect for family life (Article 7)[8], the right to asylum (Article 18 of the Charter) and the protection of foreigners in the event of removal (Article 19). The report proposes an initial analysis of the initiatives which have been taken in this field during the period in question. It attaches considerable importance to the case law of the European Court of Human Rights, particularly as regards the right of foreigners to have their privacy and family life respected, prohibition on removal where there is a risk that fundamental rights would be seriously violated, and the prohibition on collective expulsions of foreigners.

Breakdown of theunity of the internal market in the absence of co-ordination between the policies of Member States in the field of fundamental rights

Wherever the decentralised implementation of certain safeguards identified in the Charter of Fundamental Rights remains, i.e. carried out at the level of each Member State, we run the risk of obstacles to trade between Member States appearing due to the unrelated development of national legislations. Article 95 EC authorises the adoption of measures which aim to reconcile Member States' legislations, when the purpose of these measures is the establishment and functioning of the internal market. Admittedly, these measures must "have as their object the improvement of the conditions for the establishment and functioning of the internal market and actually contribute to eliminating obstacles to the free movement of goods or to the freedom to provide services, or to removing distortions of competition"[9]. However, provided that the conditions for recourse to this legal basis are met, the Community lawmaker cannot be prevented from relying on that legal basis on the ground that public health protection is a decisive factor in the choices to be made (Article 35 of the Charter)[10] or, for example, preservation of a high level of protection for a right such as the right to respect for privacy (Article 8 of the Charter).

[8] With regard to the conditions for exercising the right to family reunion, see Article 63, 3), a), EC.The conditions for family reunion can also affect Article 9 of the Charter (right to marry and right to found a family). The report tries to illustrate the dilemmas faced in this regard by an approach based on fundamental rights, caught between the obligation to respect the right to marry and the right to family reunion, on the one hand, and the need to combat the fraudulent evasion of statutory provisions constituted by sham marriages or the infringement of the freedom to marry constituted by forced marriages on the other.

[9] ECJ, 10 December 2002, *The Queen and Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd***,** C-491/01, para. 60 (reference to the court for a preliminary ruling on the validity and interpretation of Directive 2001/37/EC of the European Parliament and of the Council, of 5 June 2001, on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco products (OJ L 194, p. 26)). With regard to the limits established regarding the possibilities of recourse to Article 95 EC (ex Article 100 A of the EC treaty), see ECJ, 5 October 2000, *Germany v. Parliament and Council*, C-376/98, *ECR.* p. I-8419.

[10] ECJ, 10 December 2002, *The Queen and Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd***,** C-491/01, para. 62.

This hypothesis can be illustrated by two examples. One of the most remarkable instruments that the European Community has adopted in the field of fundamental rights is Directive 95/46/EC of 24 October 1995 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and the free movement of these data[11]. Although its legal basis is ex Article 100 A of the EC treaty (now, after amendment, Article 95 EC), the explicit purpose of this directive is to *protect individuals with regard to the processing of personal data*. More precisely, the purpose of the directive is twofold: not only to facilitate the free movement of personal data between Member States, which can promote the free movement of goods and the provision of cross-border services, but also to avoid the protection given to privacy by national regulations being gradually eroded under the pressure of these freedoms of movement[12]. The imposition of certain common standards as regards the processing of personal data, guaranteeing a minimum threshold for the protection of privacy as regards the types of processing referred to in the directive, makes fundamental rights requirements compatible with those of the internal market. Leaving it up to the States to set the level of protection desired would, on the contrary, have run the risk either that different levels of protection between national legislations would hinder the exchange of data between Member States, or that the protection of privacy enjoyed by the individual would have been reduced to the highest common denominator in terms of national legislations, i.e. it would have aligned itself with the national law offering the poorest guarantees[13].

The risk for the unity of the Common Market brought about by excessively different levels of protection for fundamental rights from one Member State to the next, is due to the fact that Community case law accepts that Member States can feature concern for the protection of fundamental rights among the imperative reasons of general interest able to justify restrictions on the free movement of goods or the freedom to provide services, provided that the state measures are proportionate to the objective to protect fundamental rights and that this objective cannot be met by measures bringing about a lesser restriction on intra-Community trade[14]. By analysing the conduct of States in the light of the Charter of Fundamental Rights, we can achieve more objectivity in terms of identifying the conditions in accordance with which the Member States may be deemed to meet "imperative reasons", whenever these States claim to be imposing a restriction on a fundamental freedom of movement. Through such an examination, we can also show the need for certain Community initiatives. Consider, for example, the case of a Member State which, using as an

[11] *OJ* L 281/31 of 23.11.1995. See also, supplementing the first directive as regards the telecommunications sector, Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ L 24 of 30.1.1998), now repealed and replaced by 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, known as "privacy and electronic communications" (OJ L 201 of 31.7.2002, p. 37). Due to the lack of accuracy of Directive 46/95/EC on issues such as the applicability of its stipulations on video surveillance without recording images – i.e. by simply picking up images without "processing" them – or on the significance of processing consents given in an employment context, a Community initiative is now needed in order to harmonise protection for the worker as regards processing personal data. Using information from various Member States, the report gives arguments to support such an initiative.

[12] The Preamble to the Directive clarifies the link between Community intervention for the purposes of guaranteeing a uniform level of protection of privacy and the objective of an "area without internal frontiers in which the free movement of goods, persons, services and capital is ensured" (Article 14 § 2 EC): "the difference in levels of protection of the rights and freedoms of individuals, notably the right to privacy, with regard to the processing of personal data afforded in the Member States may prevent the transmission of such data from the territory of one Member State to that of another Member State; (...) this difference may therefore constitute an obstacle to the pursuit of a number of economic activities at Community level, distort competition and impede authorities in the discharge of their responsibilities under Community law (...)" (Preamble to the Directive, 7th whereas clause).

[13] In reality, this level would have been that laid down by the Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data, treaty open for signature in the context of the Council of Europe (ETS No. 108). Directive 95/46/EC specifies that it is aiming for a higher level of protection than that afforded by this convention, in force with regard to all Member States of the Union.

[14] As regards the freedom to provide services, see ECJ, 25 July 1991, *Commission vs. Netherlands*, 353/89, *ECR* p. 4089, para. 30; ECJ, 25 July 1991, *Stichting Collectieve Antennevoorziening Gouda and others vs. Commissariaat voor de Media*, 288/89, *ECR* p. 4007, para. 23; also ECJ, 3 February 1993, *Vereniging Veronica Omroep Organisatie vs. Commissariaat voor de Media*, 148/91, *ECR* p. 513, paras. 9 and 10. As regards the free movement of goods, see ECJ, 26 June 1997, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH vs. Heinrich Bauer Verlag*, C-368/95, *ECR* p. I-3689, paras. 18 and 19.

argument the need to guarantee human dignity and, perhaps, combat trafficking in human beings – referring to Articles 1 and 5 § 3 of the Charter - decides to prohibit the distribution in its territory of periodicals deemed to contain offers of prostitution: the risk of compartmentalising the internal market could justify the use of Article 95 EC in such as situation, in order to lay down in a harmonised fashion the degree of balance between freedom of expression and measures intended to safeguard those values which the Charter recognises as being fundamental[15]. This example is not pure fantasy: given the increasingly differing approaches adopted by Member States as regards prostitution, which range between the Dutch position in favour of regulation and the Swedish position in favour of prohibition[16], it is not out of the question that we will find ourselves faced with such a situation in the future, either in this field or in some other.

The report also presents several initiatives by Member States which aim to impose certain obligations on companies as regards human rights, or which create incentives in this regard. Discrepancies which are too wide between the regulations States impose on economic operators, particularly from the point of view of the "ethical" conduct which these regulations demand from companies, may constitute disparities liable to distort competition conditions within the common market, and lead to Community intervention[17]. The same is true of the introduction of ethical clauses in fields such as procurement contracts and granting loans or export incentives[18].

The Community's implicit powers

A fifth possibility of intervention by the institutions of the Union in order to implement the Charter's fundamental rights rests on putting human rights and fundamental freedoms on the same footing as an objective of the Community, which the latter may, subject to certain conditions, want to carry out. There is nothing particularly revolutionary in this. The most important of the directives on equal treatment between men and women, Directive 76/207 of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocation training and promotion, and working conditions, relied – in the same way as the third directive which extends it as regards social security – on Article 235 of the EC treaty (now Article 308 EC), which enables the Council to exercise certain powers "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this treaty has not provided the necessary powers". According to the Preamble to Directive 76/207, it is "in so far as the harmonisation of living and working conditions while maintaining their improvement are inter alia to be furthered" that the use of this clause of the treaty is justified in order to implement the principle of equal treatment between men and women in fields linked to employment. So as to remove any confusion in this regard, it should be recalled that Opinion 2/94 delivered on 28 March 1996 by the European Court of Justice only concluded that the Community lacked competence to accede to the European Convention on Human Rights due to the "constitutional significance" of this project which, according to the Court, would lead to "a substantial change in the present Community system for the protection of human rights, in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the

[15] As regards the freedom to provide services, includes ECJ, 24 March 1994, *Schindler*, C-275/92, *ECR* p. I-1039, para. 61 (regulating lottery activities according to the socio-cultural characteristics of each Member State). It emerges from the ruling of 5 October 2000 that in such a situation, the risk of the internal market being compartmentalised could justify recourse to Article 95 EC by the Community legislature: ECJ, 5 October 2000, *Germany vs. Parliament and Council*, C-376/98, aforementioned, para. 98 (in which the Court notes that Article 95 EC "could (...), in principle, allow the adoption of a directive prohibiting the advertising of tobacco products in periodicals, magazines and newspapers, in order to ensure the free movement of these press products"). A Member State submitting that prohibiting periodicals containing advertisements deemed prejudicial to dignity constitutes an imperative need could only adopt such a measure in any case provided that it did not undermine the freedom of expression recognised by Article 10 of the European Convention on Human Rights: ECJ, 26 June 1997, *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH vs. Heinrich Bauer Verlag*, C-368/95, *ECR* p. I-3689, paras. 24 and 25.

[16] See the commentary on Article 5 of the Charter of Fundamental Rights below.

[17] See Article 96 EC.

[18] See the commentary on Article 16 of the Charter (freedom to conduct a business) and the examples given.

Community legal order"[19]. On the other hand, this opinion did not dispute the fact that the protection of human rights could constitute an "objective" of the Community, exercising which could justify recourse to Article 308 EC, if applicable, wherever the EC treaty did not provide the necessary powers[20]. Moreover, it is in accordance with the meaning recognised by the Court of Justice, particularly, to Article 6 § 2 EU (then Article F § 2 TEU), that this provision could be used, together with Article 308 EC (then Article 235 of the EC treaty), to justify the adoption of a regulation laying down the requirements for implementing certain Community operations making a contribution within the framework of Community co-operation policy "to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries"[21]. From the point of view of revising treaties, it could clarify things to add to the objectives of the European Union (currently in Article 2 TEU) or to those of the European Community (currently in Articles 2, 3, 4 and 6 EC) – the lists of which will be combined in a fundamental treaty of the Union – the objective to implement and promote the rights, freedoms and principles listed in the Charter. Such an addition would essentially only be confirming the existing situation[22].

Strengthening of mutual trust as regards judicial co-operation in criminal matters

Finally, when it appears necessary to improve judicial co-operation in criminal matters, Article 31, c), EC lays down that common action can be taken for the purposes of "ensuring compatibility in rules applicable in the Member States". In its Green Paper on Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union[23], the European Commission gives the following reading of this clause: "Mutual recognition rests on mutual trust and confidence between the Member States' legal systems. In order to ensure mutual trust, it is desirable for the Member States to confirm a standard set of procedural safeguards for suspects and defendants. (...) [the common action referred to in Article 31 c) EU] should not necessarily take the form of intrusive action obliging Member States substantially to amend their codes of criminal procedure, but rather as 'European best practice' aimed at facilitating and rendering more efficient and visible the practical operation of these rights"[24].

*
* *

[19] ECJ, 28 March 1996, Opinion 2/94, Accession by the European Community to the European Convention for the Protection of Human Rights, *ECR.,* p. I-1759, point 34.

[20] Opinion 2/94 notes in this respect that it is "appropriate to recall first of all that the importance of respecting human rights has been underlined in various declarations by the Member States and Community institutions (...). Reference is also made to it in the preamble to the Single European Act, as well as in the preamble and in Articles F, paragraph 2, J1, paragraph 2, fifth dash, and K2, paragraph 1, of the Treaty on European Union [now respectively Article 6 § 2 TEU, Article 11 § 1, fifth dash, TEU, Article 30 TEU]. Moreover, Article F specifies that the Union respects fundamental rights, as guaranteed, in particular, by the Convention. Article 130u of the EC Treaty lays down, in paragraph 2 [now Article 177 § 2 EC], that Community policy, in the field of development co-operation, contributes to the objective of respecting human rights and fundamental freedoms" (para. 32).

[21] Regulation (EC) 976/1999 of the Council, of 29 April 1999, laying down the requirements for the implementation of Community operations, other than those of development co-operation, which, within the framework of Community co-operation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries (*OJ* L 120 of 8.5.1999). This regulation was adopted at the same time as Regulation (EC) 975/1999 of the Council, of 29 April 1999, laying down the requirements for the implementation of development co-operation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms. The legal basis for Regulation 975/1999 is Article 130w of the EC treaty (now Art. 179 EC), this latter article referring to the objectives of Community policy in the field of development co-operation, among which Article 130u of the EC treaty (now Art. 177 EC) mentions "the general objective of developing and consolidating democracy and the rule of law" and that of "respecting human rights and fundamental freedoms".

[22] Such a clarification would bring about greater transparency in the division of competences between the Union and its Member States. As part of a fundamental treaty, it could strengthen the capability of the Union or the Community to intervene when such intervention seems necessary to ensure effective protection of the Charter's values, through the mediation of a clause granting implicit powers in order to achieve one of their objectives when the treaty has not provided the necessary powers – a clause for which, as things stand, Article 308 EC provides the model.

[23] COM(2003) 75 final, Brussels, 19.2.2003.

[24] Point 1.7.

Thus it is possible to identify six tools available to the European Community or Union to enable them to conduct a genuine fundamental rights policy, which in short would go beyond a simple concern – which is certainly commendable, albeit inadequate – not to violate them. However, this progress has remained sketchy and these developments patchy and, as things stand, exercising these competences is not backed by any global vision of fundamental rights policy within the European Union. We share the opinion of the group of experts on fundamental rights which, in the report it submitted to the European Commission in February 1999, at the same time as it recommended the adoption of a catalogue of fundamental rights affirming the European Union's attachment to these rights, noted that "restricting the European Union's competence as regards fundamental rights contrasts with the paramount relevance of these rights. To combine their recognition with a proviso expressly restricting their application impairs the credibility of the commitment to fundamental rights"[25]. The lack of a general European Community or Union competence to implement fundamental rights and freedoms has again appeared among the main deficiencies revealed in a study prepared by Florence European University Institute for the Comité des Sages responsible for drafting the report "Leading by an example: a programme of action on human rights for the European Union for 2000"[26]. However, in terms of priority, the deficit does not in fact exist where it is generally placed, i.e. in the scope of competences available to the Community and the Union. These competences exist, to some extent, and the policies remain within their potentialities. The deficit exists primarily in a representation of fundamental rights which identifies them with *limits* restraining the adopting of certain policies, a task which would be the main responsibility of the judicial power. This is what fundamental rights are, but they are also more than that: they must appear among the *levers* of legislative initiative and, from when they are first devised, permeate policies. They are part of a type of governance which wants to place the individual at the centre.

By using these competences with a view to the realisation of the fundamental rights, a negative view of their function would change to a positive view; one could design, in short, a policy for fundamental rights. *Mainstreaming* of fundamental rights puts them in an intermediate position of these negative and positive views of their functions. When, in March 2001, the Commission decided that each proposal of the Commission would be the object of a prior test of its compatibility with the Charter of fundamental rights[27], it showed its desire to encourage a *preventive* approach, based on the integration of the scruples of the fundamental rights in putting forward each legislative proposal – thus *transversal* integration, including when the link with the question of fundamental rights appears at first glance to be secure –, and so to go further than an approach that is both purely *reactive* and *sectoral* to the fundamental rights. In this area, as in many others, the right to equality of treatment beween men and women may indicate the road to follow. As amended by the Amsterdam Treaty that came into force on May 1st 1999, Article 2 EC specifies equality between men and women among the European Community objectives. Article 3 EC, devoted to the Community's missions, specifies at present that "For all initiatives planned [in this provision], the Community seeks to eliminate inequalities, and to promote equality, between men and women". This desire for equality between men and women must cross all policies, including those that are led in the area of fundamental rights. But, in addition, the fundamental rights of the Charter must be a transversal concern to the different sectoral policies that the European Community and the Union conduct. The impact on equality between men and women, like the impact on fundamental rights in general, must be the object of an assessment prior to the adoption of any legislation or the implementation of any policy that may undermine it. Finally, this could signify that it is necessary to add a procedural dimension – of governance, specifically – to this transverse consideration of the fundamental rights: the extension of consultations with the

[25] *Affirming Fundamental Rights in the European Union. Time to Act*, Report by the Group of experts on fundamental rights (chaired by S. Simitis), European Commission (Employment, industrial relations and social affairs), Brussels, February 1999, here p. 13.
[26] J.H.H. Weiler and S.C. Fries, "A Human Rights Policy for the European Community and Union: The Question of Competences", in Ph. Alston (ed.), *The EU and Human Rights*, Oxford Univ. Press, 1999, p. 147.
[27] Memorandum from the presidency and Mr. Vitorino: Application of the Charter to the fundamental rights of the European Union, SEC(2001) 380/3.

organisations of civil society may indeed constitute a condition for *mainstreaming* in the area of human rights[28].

III. Monitoring respect for the rights of the Charter of Fundamental Rights by the Member States

The lack of *general* competence for the European Community or Union in the field of human rights and the limits on the invocability of the European Union Charter of Fundamental Rights as laid down in its Article 51, do not in any way call into question the legitimacy of *monitoring* the policy followed by the Member States in the field of human rights. The primary reason for this is that such *monitoring* will only in exceptional circumstances result in imposing obligations as regards human rights on Member States which they have not already agreed to. Most of the rights and freedoms laid down in the Charter either already appear in the international treaties acceded to by most or all Union Member States[29], or appear in the primary or secondary legislation of the Union. Respect for these rights and freedoms is therefore already imposed on Union Member States, not only in situations which come within the scope of Union law, but also in any situation which comes under the jurisdiction of these States[30]. Moreover, since the Treaty of Amsterdam came into force moreover, the Treaty on European Union lays down that "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States" (Article 6 § 1 EU); and it provides for a specific mechanism guaranteeing that respect by each Member State for these principles will be monitored.

Article 7 TEU, introduced by the Treaty of Amsterdam, provides the Council with the possibility of determining that "there is a serious and persistent breach by a Member States of principles mentioned in Article 6 (1)"[31]. Since the Treaty of Nice of 26 February 2001 came into force on 1 February 2003, Article 7 TEU also enables the Council to intervene in a preventive way in order to determine "that there is a clear risk of serious breach by a Member State of principles mentioned in Article 6 (1)", which authorises the Council to address "appropriate recommendations" to this State. The second role of the Network of independent experts resides in its contribution to this mechanism.

The setting up of a Network of experts able to provide an assessment of the changes that occur in the protection of fundamental rights within each Member State can contribute to the operation of this policy monitoring. The Charter constitutes the appropriate reference in this respect[32]. The existence of

[28] Voy. The example of Northern Ireland: C. McCrudden, "Mainstreaming Equality in the Governance of Northern Ireland", *Fordham Inter. L. J.,* vol. 22 (1999), p. 1696.

[29] See in the annexes to this report, the table of ratifications by Member States of the main international instruments for the protection of human rights open for ratification in the framework of the United Nations Organisation, the International Labour Organisation and the Council of Europe.

[30] We can also underline the spillover effect from which the rights laid down in the Charter benefit, including into situations with no link whatsoever with European Union law. The spillover effect will take place simply as a result of the tendency Member States will have not to want to give more favourable treatment to persons in a situation considered to come under the scope of European Union law, and to whom the Charter's safeguards must be recognised, than to other persons in a situation which is comparable in all other respects, but with no link with Union law. The issue of this "spillover effect" of Community law into national law has thus far been discussed in doctrine with regard to access to justice (see in particular W. van Gerven, "Bridging the Gap Between Community and National Laws: Toward a Principle of Homogeneity in the Field of Legal Remedies?", *C.M.L. Rev.,* 1995, p. 695, here p. 701; R. Caranta, "Judicial Protection Against Member States: A New Jus Commune Takes Shape", *C.M.L. Rev.*, 1995, p. 703, here pp. 717-718; O. De Schutter, *The judicial function and fundamental rights*, Brussels, Bruylant, 1999, pp. 263-268). However, there is no reason to limit ourselves to these.

[31] Regarding this provision, A. Verhoeven, "How Democratic Need European Members Be? Some Thoughts After Amsterdam", *E.L.R.*, 1998, p. 223; E. Bribosia, O. De Schutter, Th. Ronse and A. Weyembergh, "Control by the European Union of respect for democracy and human rights by its Member States", *Journal of the Courts – European Law*, 2000, p. 61.

[32] The Three Sages asked to report to the Council about the situation in Austria, when use of Article 7 TEU was envisaged with respect to this State, referred to the Charter as early as this, at a time moreover when its final wording was not yet known: see Report (of 8 September 2000) on Austria mandated by 14 Member States of the European Union, by M. Ahtisaari, J. Frowein and M. Oreja, *Revue universelle des droit de l'homme*, 2000, vol. 12, no. 3-5, p. 154, para. 8 of the

a "clear risk of serious breach by a Member State of principles mentioned in Article 6 (1)"[33], or a "serious and persistent breach by a Member State" of these principles[34], may emerge from the study of these changes which this network must, in principle, carry out on an annual basis. This is not calling into question the essentially political logic of this procedure[35], nor the discretion which must be left to the Member States and institutions of the Union in the context of recourse to Article 7 TEU. It goes without saying that any reference to the rights and freedoms which appear in the Charter must take into account the context in which it appears. In order to facilitate the assessment of whether or not it is opportune to implement the policy monitoring mechanism this provision provides for, all of the rights set out in the Charter should not be given the same weight, and the option should undoubtedly be left open to rely on other criteria, better adapted to the specific nature of these examinations.

Even so, despite all of these reservations, we must underline the contribution that might be made by the information forwarded by the network of experts to the institutions of the Union responsible for having recourse to the procedure laid down in Article 7 TEU, where justified by exceptional circumstances. This information may guarantee the objectivity of the assessment, by the institutions of the Union, of the developments which take place within each State. In this way, it may contribute to equal treatment for all Member States as regards the Union's legal requirements. In the hands of the European Parliament and the European Commission, the network of experts therefore constitutes an instrument which may help them to carry out better the two roles allotted to them by Article 7 TEU: for the European Parliament, that of giving an assent so that the Council can establish the existence of a serious and persistent breach by a Member State of principles laid down in Article 6 § 1 TEU; for the Parliament and the European Commission, that of taking the initiative to propose that the Council of Ministers establish that there is a "clear risk of serious breach" of these principles by a Member States, to which State the Council may then "address appropriate recommendations"[36].

Enlargement of the Union to include ten new Member States on 1 May 2004 may give this clause the sort of visibility is has not had thus far. Most of the new Member States have been members of the Council of Europe for about ten years: the Statute of the Council of Europe came into force with regard to Hungary on 6 November 1990, with regard to Poland on 26 November 1991, with regard to Slovenia, Lithuania and Estonia on 14 May 1993 and with regard to the Czech Republic and Slovakia – which have been independent from each other since 1 January 1993 – on 30 June 1993[37]. Only Latvia's entry into the Council of Europe occurred at a late stage: it took place on 10 February 1995. These accessions to the Council of Europe are based on the abilities and desires of the States to

report. The report's authors referred to the Charter, among many others, after having noted: "Our mandate consists (...) of evaluating the Austrian government's commitment to common European values in particular areas. It is therefore of importance to clarify *the generally accepted standards for common European values*" (para. 1). With regard to the use of the Charter of Fundamental Rights within the framework of Article 7 TEU, see A. von Bogdandy, "The European Union as a Human Rights Organisation? Human Rights and the core of the European Union", *C.M.L. Rev*., vol. 31 (2000), p. 1307, here pp. 1318-1319.

[33] According to Article 7 § 1 TEU, as amended following the entry into force of the Treaty of Nice of 26 February 2001.

[34] According to the phrase which appears in Article 7 § 2 TEU after this provision was amended by the Treaty of Nice.

[35] In fact, no judicial intervention is provided for within the framework of recourse to Article 7 TEU, despite the proposals made along these lines at the Intergovernmental Conference which lead to the Treaty of Amsterdam, both by the Commission and certain Member States (Greece, Luxembourg, Finland) (see O. De Schutter and E. Bribosia, "Safeguarding human rights in the revised European Union", in: *For a Europe of civic and social rights. Proceedings of the National Conference of 18-19 April 1997*, League for Human Rights, 1997, here pp. 194-196).

[36] Inspired by the episode which followed the formation of a governmental coalition in Austria including the FPO, the drafters of the Treaty of Nice also laid down that before establishing the existence of a clear risk of serious breach of the principles set out in Article 6 § 1 TEU, the Council of Ministers "may call on independent persons to submit with a reasonable time limit a report on the situation in the Member State in question" (Article 7 § 1, para. 1, TEU, as amended by the Treaty of Nice). Undoubtedly, it would not be in line with the philosophy of the new procedure, which implies that the various institutions of the Union may form an independent judgement as to the seriousness of the situation within a Member State, for the network of experts on fundamental rights to be subject to such consultation by the Council, if it is also called on to help the European Parliament either to motivate its initial proposal, or to give its assent in the context of this procedure. On the other hand, nothing prevents the Council of Ministers taking into account the observations delivered by the network of experts in making its determination.

[37] The Republic of Cyprus and Malta have been members of the Council of Europe since 24 May 1961 and 29 April 1965 respectively.

comply with the principles of the rule of law and to guarantee human rights to any person under their jurisdiction[38]. They went hand in hand with commitments specific to each State, particularly that of ratifying the European Convention on Human Rights and other Council of Europe instruments[39]. At the time of these accessions, the regulations and practices of these States were examined from the point of view of their compatibility with the standards of the Council of Europe, by means of so-called compatibility exercises in which they took part[40]. Many laws relating to the protection of fundamental freedoms were revised, or even completely rewritten, often with the assistance of the Council of Europe, in order to avoid the risk of the Convention being undermined. Monitoring was put in place by both the Committee of Ministers of the Council of Europe and the Organisation's Parliamentary Assembly, which used a "monitoring committee", to ensure on each occasion that the Member States respected the commitments made within the framework of the Council of Europe[41]. Nevertheless, the Regular Reports 2002 on the progress achieved on the path to membership, which were published on 9 October 2002 and which convinced the Heads of State and government which met at the Copenhagen Summit of December 2002 to declare the way open for accession by ten new States in 2004, emphasised the work which still needed to be done, particularly from the point of view of respecting the rights of minorities – gypsies in particular. In its subsequent work, the Network of independent experts should closely monitor changes in the situation as regards fundamental rights in the new Member States, paying particular attention to the difficulties raised by the Regular Reports 2002 on the progress achieved in the run up to membership, in terms of the so-called "policy" criteria laid down at the European Council in Copenhagen in June 1993, or by the "collective evaluation" working party of the Council of Ministers of the European Union. However, it will be careful to respect scrupulously the principle of non-discrimination between States which has guided its work from the outset: it will be no more acceptable for current Member States to be exempt from respecting the obligations which are imposed on Candidate Countries in accordance with the Copenhagen policy criteria than it would be for new Member States to be subject to less demanding criteria than those which apply to the Union's current Member States[42].

IV. Indexing the Charter of Fundamental Rights to international and European human rights law

It is vital for all of the provisions of the Charter of Fundamental Rights, the wording of which takes its inspiration from existing standards in international and European human rights law, to be read taking into account the interpretation given to them in the legal systems from which these standards stem. This solution is demanded explicitly by the Charter, as regards the rights it contains which correspond to the rights guaranteed in the European Convention on Human Rights[43]. However, this same solution is essential as regards the international instruments for the protection of human rights acceded to by all

[38] See Articles 3 and 4 of the Statute of the Council of Europe, signed in London on 5 May 1949 (ETS no. 1). Regarding the criteria for accession to the Council of Europe, see J.-Fr. Flauss, "Entry conditions for Central and Eastern European Countries to the Council of Europe", *European Journal of International Law,* vol. 5 (1994), pp. 401-422; B. Haller, "The Parliamentary Assembly and conditions for accession to the Council of Europe", in B. Haller, H.-C. Krüger and H. Petzold (eds.), *Laws in Greater Europe. Towards a Common Legal Area. Studies in Honour of H. Klebes*, 2000, pp. 27-79; T. Meron and J.S. Sloan, "Democracy, Rule of Law and Admission to the Council of Europe", *Israël YB on Human Rights*, vol. 26 (1996), pp. 137-157; E. Gelin, "Entry criteria for new independent States to the Council of Europe", *Review of international law and compared law*, 1996, pp. 339-367.

[39] See respect for the commitments made by the Member States: commitments made by acceding to the Council of Europe, Monitor/Inf (99) 1 of 18 February 1999 and Addendum.

[40] See Council of Europe document H(96)12 (by P. Titiun), on these compatibility exercises.

[41] A. Drzemczewski, "The prevention of human rights violations: monitoring mechanisms of the Council of Europe", *Quarterly review of human rights,* 2000, p. 385; A. Drzemczewski, "Monitoring by the Committee of Ministers of the Council of Europe: A Useful 'Human Rights' Mechanism?", *Baltic YB of International Law*, vol. 2 (2002), 83-103.

[42] It is therefore paradoxical that Latvia has been strongly urged to ratify the Framework Convention of the Council of Europe for the protection of national minorities, when, at the beginning of 2003, France had neither signed nor ratified this instrument, and Belgium, Greece, Luxembourg and the Netherlands, which have signed this text, had still not ratified it.

[43] Article 52 § 3 of the Charter.

Member States, indeed even with regard to instruments which are not in force as regards all Member States but which are widely recognised internationally.

The main reference instruments of international and European human rights law

The main instruments are the United Nations' six basic treaties in the field of human rights[44]:
• the International Covenant on civil and political rights (1966)
• the International Covenant on economic, social and cultural rights (1966)
• the International Convention on the elimination of all forms of racial discrimination (1965)
• the International Convention on the elimination of all forms of discrimination against women (1979)
• the Convention against torture and other cruel, inhuman or degrading treatment or punishment (1984)
• the International Convention on the rights of the child (1989).

The interpretation of the Charter of Fundamental Rights must also be guided by the basic conventions of the International Labour Organisation, whose principles are summarised in the Declaration adopted by the International Labour Conference on fundamental principles and rights at work of 19 June 1998:
• Convention (29) concerning forced labour, 28 June 1930
• Convention (87) concerning freedom of association and protection of the right to organise, 9 July 1948
• Convention (98) concerning the right to organise and collective bargaining, 1 July 1949
• Convention (100) concerning equal remuneration for men and women workers for work of equal value, 29 June 1951
• Convention (105) concerning the abolition of forced labour, 25 June 1957
• Convention (111) concerning discrimination in respect of employment and occupation, 25 June 1958
• Convention (138) concerning minimum age for admission to employment, 26 June 1973
• Convention (182) concerning the prohibition of the worst forms of child labour, 17 June 1999.

Finally, among those instruments negotiated within the Council of Europe, in addition to the European Convention on safeguarding human rights and fundamental freedoms and its Additional Protocols[45], at least the following instruments must be mentioned:
• the European Social Charter of 18 October 1961 (ETS no. 35) and the European Social Charter (revised) of 3 May 1996 (ETS no. 163)
• the Convention for the protection of individuals with regard to the automatic processing of personal data of 28 January 1981 (ETS no. 108)
• the Framework Agreement for the protection of national minorities of 1 February 1995 (ETS no. 157)[46]
• the European Convention for the prevention of torture and inhuman or degrading treatment or punishment of 26 November 1987 (ETS n° 126)
• the 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 of 4 April 1997 (ETS no. 164)[47]

Of course this list of reference instruments may be disputed, both by those who will consider that it is too limited and by those who consider that it goes beyond what is laid down in the Charter of

[44] Cf. tables of ratifications which appear in the annex to this report.
[45] Although these have not been ratified by all Member States of the European Union: Protocol no. 4 (ETS no. 46) has not been ratified by Spain, Greece or the United Kingdom; Protocol no. 7 (ETS no. 117) has not been ratified by Belgium, Spain, the Netherlands, Portugal or the United Kingdom. Protocol no. 12 (ETS no. 177) has not been ratified by any Member State. As it is only recent, it has only been possible to date for Denmark to ratify Protocol no. 13 (ETS no. 187).
[46] See note 40, above.
[47] However, this Convention has only been ratified by four Member States: Denmark, Spain, Greece and Portugal. It has been signed by Finland, France, Italy, Luxembourg, the Netherlands and Sweden. The additional Protocol banning human cloning of 12 January 1998 (ETS no. 168), has only been ratified by three Member States: Spain, Greece and Portugal. Six other Member States have signed it. They are Denmark, Finland, France, Italy, Luxembourg, the Netherlands and Sweden.

Fundamental Rights, to the detriment of the autonomous interpretation this Charter should be subject to. However, the important thing is not so much identifying the relevant instruments exactly – essentially, reference to the instruments mentioned to provide an interpretation of the corresponding rights in the European Union Charter of Fundamental Rights should not be a matter of debate – as the very principle of such indexing. Reading the provisions of the Charter in the light of international and European human rights law seems to us to be opportune primarily because it is objective, which avoids the institutions of the European Union or the Member States being surprised by the interpretation given to them.

However, this indexing presents other advantages, which is why the report has chosen this means of interpreting the character. It reduces the risk of conflicts between the obligations imposed on Member States by Community law or European Union law, on the one hand, and the obligations which arise for the States from certain instruments for protecting human rights which they are party to, on the other. Since the institutions of the European Union must comply with the same material standards as those already imposed on Member States in the international legal system – these standards being identified, for the institutions of the Union, by the Charter of Fundamental Rights, as interpreted in accordance with European and international law – it is prohibited for them to adopt secondary legislation with regard to Member States which would force the States to choose between their loyalty to Union law and respecting other international commitments.

Moreover, such a reading of the Charter avoids the uniform of application of European Union law being jeopardised by States referring too frequently to other international obligations which they have taken on prior to their accession to the Community or the European Union. In this regard, it must be recalled that in order to facilitate the setting up of the European Economic Community in 1957 and, subsequently, accession by new States, Article 307 EC (ex Article 234 EC Treaty) lays down that "The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third States on the other, shall not be affected by the provisions of this Treaty" (paragraph 1). Intended to facilitate the accession by States to the European Community, by guaranteeing these States that, following this accession, contradictory international obligations would not be imposed on them, the rule formulated by Article 307 para. 1 of the Treaty of Rome is essential, moreover, in accordance with general public international law, which lays down – with regard to succession of treaties over time – that a State cannot free itself from prior international obligations by concluding a later treaty with other States (Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969).

Finally, a reading of the Charter of Fundamental Rights which aims to preserve harmony between it and international and European human rights law which was its inspiration, paves the way for the Union to accede to these international instruments for protecting human rights. Today, Member States and they alone are bound by these instruments. Article 307 para. 1 EC has just been mentioned with regard to the European Community's obligation not to impede the faithful performance of these commitments. However, the effect of this article is not to impose new obligations on the European Community in the international legal system[48]. On the contrary, while preserving the ability of Member States of the European Union to respect the international agreements concluded by them beforehand, the Treaty of Rome also wanted to avoid the continuation of situations where, due to the existence of prior international obligations, a Member State was exempted from respecting all of the obligations imposed on other Member States in accordance with Community law. Consequently, Article 307, para. 2, EC, adds: "To the extent that such [prior] agreements are not compatible with this

[48] The European Court of Justice has already had occasion to lay down, with regard to Article 234 of the EEC treaty (now Art. 307 EC), that this provision implies that the institutions of the Community have "a duty (…) not to impede the performance of the obligations of Member States which stem from a prior agreement. However, that duty of the Community institutions is directed only to permitting the Member State concerned to perform its obligations under the prior agreement and does not bind the Community as regards the Member State in question" (ECJ, 14 October 1980, *Attorney General vs. Juan C. Burgoa*, 812/79, *ECR* p. 2787 (para. 9); see also ECJ, 18 October 1982, *Dorca Marina*, joined cases 50-58/72, *ECR* p. 3949 (paras. 6 and 7)).

Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibility established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude". Article 307 EC introduces an exception to the principle of uniformity of application of Community law in all Member States, an exception with regard to which it expresses its deepest suspicion at the same time[49] and which, for this reason, it sees as only able to be temporary[50]. If such an incompatibility remains, Article 307, para. 2, EC can go so far as to make the State denounce the international treaty concluded by it before its accession to the European Community[51].

We are about to recognise the international legal personality of the Union[52]. The Union will succeed the European Community within the framework of eight Council of Europe treaties to which the Community acceded. Subsequently, plans should rapidly be made for the Union to accede to all of the international instruments for protecting human rights which may be relevant for the material fields in which it exercises the competences given to it by the States. After the European Convention on Human Rights[53], the Geneva Convention of 28 July 1951 relating to the status of refugees and the revised European Social Charter of 3 May 1996 constitute priorities. European Union law already exerts considerable influence on the right of asylum, as granted by the Member States, and as regards their capacity to ensure social rights, even indeed often as regards the content of the measures adopted by the Member States in the fields covered by the European Social Charter[54].

Conclusions must be drawn from this. The Union has a profound effect on the powers of discretion Member States enjoy in certain fields where they have concluded international agreements to respect human rights. In turn, the Union must agree to take on these commitments. It cannot lose interest in the obligations imposed on its Member States. It cannot place itself outside the international legal system which it is subject to. The first stage is to read the Charter of Fundamental Rights in accordance with the material content of these commitments. For the Union, the second stage will be to submit itself to the monitoring mechanisms which the Member States have themselves already accepted. Failing this, we will see a proliferation of situations where the undermining of human rights which has its origin in European Union activities can only be determined, in the international legal system, by mediating the international responsibility of Member States[55] – a situation which is, at best, inconsistent and, at worse, which ends up in imposing respect of contradictory obligations on the State.

---

[49] See Article 302, para. 3, EC.

[50] Regarding the whole issue, see L. Besselink, "Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union", *C.M.L.R.*, 1998, p. 629.

[51] See ECJ, 4 July 2000, *Commission vs. Portugal*, joined cases C-62/98 and 84/98 and, in doctrine, P. Manzini, "The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law", *European Journal of International Law*, vol. 12, no. 4, September 2001, p. 781. France opted for such a solution following the *Stoeckel* ruling by the Court of Justice (ECJ, 25 July 1991, *Stoeckel*, case C-345/89, *ECR* p. I-4047), without waiting for sentencing by the European Court of Justice, by denouncing Convention no. 89 of the International Labour Organisation of 26 February 1992. This denouncement occurred before the *Lévy* ruling was delivered (ECJ, 2 August 1993, *Lévy,* C-158/91*, ECR* p. I-4287), in which the Court of Justice acknowledged for the first time that Article 307 EC prevented the State party to said agreement from being reproached for not respecting Directive 76/207, on the point where there was incompatibility. On this matter, see the findings of the Advocate General G. Tesauro of 16 January 1997 mentioned above ECJ, 13 March 1997, *European Commission versus French Republic*, case C-197/96, *ECR*, pp. I-1491-1495.

[52] Final Report of Working Party III on Legal Personality, Doc. CONV 305/02 of 1.10.2002, §§ 8 et seq.

[53] This accession was recommended unanimously by members of Working Party II of the Convention, on the integration of the Charter and accession to the ECHR (Doc. CONV 354/02 of 22.10.2002).

[54] In fact, the wording of several of the rights added to the European Social Charter of 18 October 1961, firstly by the Additional Protocol of 5 May 1988 (ETS no. 128), then by the revised European Social Charter of 3 May 1996 (ETS no. 163), were drawn from primary or secondary Community legislation.

[55] In the *Matthews* ruling of 18 February 1999, the European Court of Human Rights found a breach by the United Kingdom, in substance, for having agreed, along with the other Member States of the European Union when it was created in 1992, to an extension of the powers of the European Parliament without concomitantly making provision for an extension of the right to vote in the European Parliament for the residents of Gibraltar, who still found themselves excluded from it: according to the Court, the European Convention on Human Rights "does not exclude the transfer of competences to international organisations provided that Conventional rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer" (European Court of Human Rights, *Matthews vs. United Kingdom* ruling of 18 February 1999, § 32).

V. An open method of co-ordination in implementing the fundamental rights set out in the Charter

The main contribution of the Network of independent experts is in implementing a form of *monitoring* of fundamental rights in the European Union, which should be useful for guiding policies in a more systematic manner in such a way that they are drawn up to take into account the objective of implementing fundamental rights. In a document prepared for the Comité des Sages Men responsible for drafting "Leading by example: a programme of action on human rights for the European Union for 2000", Ph. Alston and J.H.H. Weiler insisted on the *function* which could be exercised by a monitoring centre for human rights within the European Union[56]. Fundamental rights policy cannot boil down solely to organising *a posteriori* checks that rights have been respected, such as may be exercised by a court of law with the competence to remedy breaches of rights once they have taken place. Systematically and rigorously monitoring the changes established in the various Member States and in the policies of the Union itself must enable the challenges which these developments pose from the point of view of fundamental rights to be anticipated. It therefore has an essential preventive function. It can help to reflect upon the need for certain Union initiatives, in order to avoid the establishment of the internal market – and, now, the achievement of the area of freedom, justice and security – leading to an erosion of fundamental rights within the Union. It can alert the Member States and the institutions of the Union to the discrepancies there may be between the standards of the European Union and those which the Member States must comply with in accordance with the commitments they have entered into under the United Nations Organisation, the International Labour Organisation or the Council of Europe. It may also highlight certain discrepancies between States which take differing paths on issues covered by the Charter of Fundamental Rights, which runs the risk of leading to compartmentalisation within the internal market, or breaking the mutual trust on which the area of freedom, justice and security is founded.

In the aforementioned document, Ph. Alston and J. H. H. Weiler wrote:

> *Systematic, reliable, and focused information is the starting point for a clear understanding of the nature, extent, and location of the problems that exist and for the identification of possible solutions.*

In the resolution which it adopted based on the Cornillet report on the situation as regards fundamental rights in the European Union, the European Parliament recommended to the Council that:

> *a mutual evaluation procedure be set up between the Member States in order to enable respect for fundamental rights to be monitored, innovations incorporated into the Member States' laws to be assessed, sound practices to be identified, a high degree of harmonisation in the protection of fundamental rights in the EU to be achieved and any threatened infringement of those rights to be prevented (point 14).*

The report has been devised in accordance with these viewpoints. The purpose of the Network of independent experts is to promote this mutual evaluation, which is a source of collective learning. Systematically comparing States in terms of common issues will sometimes result in "best practices" being identified as regards fundamental rights, the circulation of which should be encouraged, and will sometimes call for reactions by the institutions of the Union, in exceptionally serious circumstances through the mechanism of Article 7 EU, but generally by resting on the various legal bases which have been mentioned above (II above) so as to promote the emergence of a harmonised solution when gaps which are too wide appear between Member States, to the detriment of the unity of the internal market or that of the area of freedom, justice and security.

[56] Ph. Alston and J. H. H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in Ph. Alston, with M. Butselo and J. Heenan (eds.), *The European Union and Human Rights*, Fr. trans. Brussels, Bruylant, 2001, p. 3, here pp. 56-60.

The open method of co-ordination has two objectives in mutually observing the practices of Member States. Firstly, identifying the practices which show most respect for the requirements of fundamental rights, in order to promote the circulation thereof once it has been possible to determine the reasons for the success of these practices in the contexts in which they were first tried. This also means avoiding States refusing to co-operate with each other when, in the absence of co-ordination, each State is reluctant to take initiatives which, although they are likely to promote the achievement of fundamental rights, run the risk of putting it in a difficult position if the other States do not act likewise – for example, because these initiatives run the risk of encouraging secondary movements by asylum applicants searching for the regime which will process their claim most favourably[57], or because they run the risk of discouraging certain companies from setting up in a State which imposes respect for certain ethical criteria on the legal entities based in its territory. However, setting up an open co-ordination method such as this in the field of fundamental rights implies a set of conditions of which only some, in the current mechanism, have been met. These conditions may be listed as follows[58]:

• *Comparability* of the data collected with respect to the situation as regards fundamental rights within each State is essential for establishing a diagnosis of this situation and, if applicable, the initiatives it calls for. This comparability implies firstly that the same evaluation method should be applied with regard to each State. It was precisely to ensure this uniformity in the evaluation carried out that instructions were sent to the Experts in November 2002, at the same time as they received their mandate. Secondly, comparability implies that this evaluation should not depend on the quality or wealth of information which has been made public, but that this information should be searched for and updated wherever it is not immediately available. This requires co-operation between the independent expert responsible for covering the State in question and the national authorities, non-governmental organisations and relevant research centres.

• The evaluation should not relate solely to changes in the legislative, regulatory or case law framework of a State during a reference period. It must also relate to the *practices* of the authorities, and it must give an account of the situation on the ground. For this reason too, it is essential for the independent experts to make the necessary contacts with the actors concerned – public authorities, unions and community-based organisations. Moreover, in order to give an assessment on the effectiveness of the policies implemented at the level of each State with a view to improving the protection of fundamental rights or on the impact of other policies on the enjoyment of these rights, the use of *indicators* is vital. However, except with regard to issues such as education, health or the situation as regards the labour market, indicators are not always available. Even when they do exist, their degree of reliability is questionable. Techniques for collecting statistical data may differ widely from State to State. In addition, interpreting these data must take into account the context specific to

[57] The development of minimum standards regarding the procedure for granting and withdrawing refugee status in the Member States is justified as follows in the Explanatory Memorandum which the Commission attached to the Proposal for a Council Directive which it submitted in this field: "Minimum Community standards … will help to limit secondary movements of asylum applicants as resulting from disparities in procedures in Member States. Henceforth, applicants for asylum will decide on their country of destination less on the basis of the procedural rules and practices in place than before. The continued absence of standards on the procedures for granting and withdrawing refugee status would have a negative effect on the effectiveness of other instruments relating to asylum. Conversely, once minimum standards on asylum procedures are in place, the operation of, inter alia, an effective system for determining which Member State is responsible for considering an asylum application is fully justified" (Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM(2000) 578 final, *OJ* C 62 of 27 February 2001, p. 231)).

[58] These considerations should be explored thoroughly in the light of two experiences: firstly, that of the European Monitoring Centre on Racism and Xenaphobia in Vienna (see Regulation (EC) 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151 of 10.6.1997, p. 1; for a comparison with the tasks of a European Human Rights Monitoring Agency, see Ph. Alston and J.H.H. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", mentioned above, here section XIII, pp. 56-60); secondly, that of the open co-ordination method implemented in monetary fields, and economic and social policies, applications of which are currently being explored in the field of asylum (Communication from the Commission to the Council and the European Parliament on the common asylum policy, introducing an open co-ordination method (COM(2001) 710 of 28.11.2001)).

each State[59]. Finally, where such indicators are to be used in the annual report on the situation as regards fundamental rights in the Union, there is a problem regarding chronology since this annual report will only be able to rely on data which are generally older, given the time needed to collect and process the data gathered by the authorities so as to facilitate the development of their policies.

• The objective of the open method of co-ordination in the field of fundamental rights is not only to clarify the position as regards fundamental rights within the Union for the *institutions of the Union* – and the initiatives which that may call for on their part – but also to promote mutual learning by the *Member States*. Therefore it is by involving national authorities more in evaluating and interpreting their results that exchanging experiences and comparing practices can contribute to collective intelligence. Similarly, for proposals to emerge which truly meet their expectations, both the national authorities with competence in the field of human rights (consultative councils on human rights, independent authorities, ombudspersons, etc.) and community-based actors (non-governmental organisations and unions) must be involved in regular meetings about the information collected by the network of independent experts. Even if the network of independent experts manages to collect comparable, precise and objective information, this information needs to be interpreted – which interpretation depends on the specific context of each State – with the involvement of other actors, and for the discussion to give rise to certain guidelines.

• Co-ordination involves comparing practices and exchanging experiences. However, it is not limited to that aspect. It also requires the sort of monitoring that is more oriented towards standard-setting, by adopting recommendations and guidelines or by competent institutions identifying best practices. For this reason, better interaction between the network of independent experts and the competent authorities, who have the political responsibility to take initiatives in order to improve the protection of fundamental rights in the European Union, is highly desirable.

VI. The working method followed to draw up the report on the situation as regards fundamental rights in the Union in 2002

Drafting reports on the respect of fundamental rights in 2002

This report has been drawn up on a short period of time. The network of independent experts held its first meeting in Brussels on 16 October 2002. That was when its working method was define. The experts making up the network were asked to gather information regarding respect for the rights, freedoms and principles set out in the Charter of Fundamental Rights, both by the Member States and by the institutions of the European Union. So as to ensure comparability between the information collected and so as to ensure that the analysis of each one was based on the same understanding of the Charter's requirements, instructions were worked out for members, providing a means of interpreting the changes established.

Instructions for drafting national reports

These instructions appear in the form of breaking the material provisions of the Charter (Articles 1 to 50) into a set of questions for analysing the changes within each Member State and within the European Union. The analyses relate to four types of data:
• *international case law and observations by international control boards*: this means giving a general survey of the concerns which emerge from the observations of the treaty monitoring bodies of the United Nations, the International Labour Organisation and the Council of Europe, which is likely to promote consistency between the approach carried out by the network of independent experts based on

[59] For example, statistical data showing an increase in the number of complaints made against the police for ill-treatment may indicate a worsening in the conduct of the police, but also protestors or people under arrest being better informed about the possibility of complaining, or better quality in recording the complaints made.

the Charter of Fundamental Rights and the approach by other bodies, based on instruments containing rights corresponding to the rights set out in the Charter,
• *national legislation, regulations and case law*: this means examining the changes in a State's legal framework during the period under examination,
• *practices by the national authorities*: this information was gathered from non-governmental organisations or from unions and management, if necessary by consultation with these organisations, based on progress reports by the control boards within the State (committees for supervising police services, prisons, advisory committees, independent authorities for monitoring privacy matters, progress reports by arbitrators/ombudspersons etc.), or reports issued by the State to international control boards, particularly within the framework of UN treaties,
• *grounds for concern*: with respect to each provision of the Charter analysed in the light of the previous three points, each expert was invited to express grounds for concern suggested by his examination.

The information requested as a result of sending these instructions was collected at the end of January 2003. The annual report is the result of summarising this information.

The reference period of this report is 2002. Based on the data relating to the past year, this report has therefore sought to identify certain trends seen from analysing international case law as well as changes in national legislation and case law. A fairly strict selection was made from the wealth of information collected by the experts, each as regards the State or subject for which he/she was made responsible. Three selection criteria were used in order to enable it to be assessed whether it would be relevant to feature this information in the report.

1. Firstly, the report pays particular attention to *situations within the scope of European Union law* – in the sense in which Article 51 § 2 of the Charter of Fundamental Rights mentions those situations where a State is "implementing" Union law, a wording which may be too restrictive, or in the sense in which the European Court of Justice considers that it may impose respect for the general principles of Union law, of which fundamental rights are a part. In fact, in such situations, when fundamental rights are breached or run the risk of being breached, the institutions of the Union are affected directly: breaching fundamental rights is breaching European Union law itself.

2. Secondly, where, in a sufficiently representative number of States, significant changes concerning a same issue have taken place during the reference period, we are in a position to identify certain *common trends* or, conversely, the establishment of significant *discrepancies between States*. It was considered necessary to report these. The fact that several States are moving in the same direction – for example, attempting to clarify the legal status of detained persons or to tackle the issue of mobbing in labour legislation – may provide the institutions of the Union with an indication as to which direction to follow if they are envisaging an initiative within the framework of their competences. Such initiative may also be essential if significant differences emerge – for example, as regards approaches to prostitution, the extent of patients' rights to refuse vital medical treatment, or measures taken with regard to the gypsy population – due to the threat which such discrepancies, if allowed to remain or become more pronounced, may have on the common market unit or the mutual trust States have for each other in a single area of freedom, justice and security.

3. Thirdly, even when the data collected do not permit comparisons between States, certain practices have been identified as being worthy of being presented in the report, due to the fact that, as experiments carried out within a State or a limited number of States, they may inspire the policy of other States. For example, these "*best practices*" include positive discrimination policies carried out in **Belgium** in the field of education, the suggestions of the Austrian Advisory Board on Human Rights concerning the information given in **Austria** to foreigners detained in order to prevent them entering its territory illegally or in order to ensure their removal, or even the measures taken in **Portugal** to promote school integration for the children of gypsies.

The Thematic Comment: The balance between liberty and security and the response of the Union and its Member States to the terrorist threat

In 2002, concerns regarding respect for fundamental rights emerged mainly in relation to the measures taken by Member States and the European Union in response to the terrorist threat. The network of independent experts examined this issue specifically. A questionnaire was drawn up for this purpose. The answers were summarised and have resulted in an analysis which tries to review measures, from the point of view of respecting fundamental rights, which share in common the fact that they constitute a direct response to the terrorist threat or, as a kind of windfall gain, are part of the climate generated within public opinion by the events of 11 September 2001. This special comment is appended to this report.

*
* *

In drawing up the report, the information about **Germany** was collected by W. Heyde. The information about **Austria** was collected by M. Nowak, H. Tretter and A. Lubich from the Ludwig Boltzmann Institut für Menschenrechte. The information about **Belgium** was collected by O. De Schutter, with L. Andre, I. Cusi Leal, V. Van der Plancke and V. Verbruggen. The information about **Denmark** was collected by M. Kjaerum and B. Kofod, as well as other researchers from the Danish Centre for Human Rights. The information about **Finland** was collected by T. Ojanen, from the Abo Akademi University. The information about **France** was collected by Fl. Benoît-Rohmer and A. Klebes-Pelissier, with the assistance of researchers from the Institute for Advanced European Studies at Robert Schuman University. The information about **Spain** was collected by T. Freixes. The information about **Greece** was collected by Linos-Alexandre Sicilianos, assisted by Y. Ktistakis. The information about **Ireland** was collected by D. O'Connell. The information about **Italy** was collected by B. Nascimbene and A. Sonaglioni, with the assistance of researchers and professors of different Italian universities. The information about the **Grand Duchy of Luxembourg** was collected by D. Spielmann. The information about the **Netherlands** was collected by R. Lawson, with the assistance of H. Kranenborg and researchers from the Europa Instituut of the University of Leiden. The information about **Portugal** was collected by V. Moreira and Ana Luisa Santos Riquito. The information about the **United Kingdom** was collected by J. McBride. The information about **Sweden** was collected by M. Eriksson, with the assistance of K. Ahman and H. Nilsson. Contributions regarding specific issues were requested by H. Labayle. The special theme was drawn up, on the basis of national reports, by O. De Schutter, V. Van der Plancke and V. Verbruggen. The consolidated report was co-ordinated and drawn up by O. De Schutter. Finally, this introduction was written by O. De Schutter. For reasons relating to the timetable, it could not be discussed collectively by the network of independent experts. Consequently, it should not be seen as binding on members as a whole.

CHAPTER I - DIGNITY

Article 1. Human dignity

The significance of the notion of human dignity lies in the fact that it is relied upon by the legislator, in particular when called upon to intervene in order to protect vulnerable persons, even to protect "values" that go beyond all free individual disposal.

In **Spain,** basic law no. 41/2002 of 14 November 2002 on the autonomy of patients and the rights and obligations in the area of medical information and documentation - which it is up to the independent Communities to implement - adopts human dignity as its guiding principle: "The dignity of human beings and the respect for the autonomy of his will and intimacy will guide every activity aimed at collecting, using, recording, keeping and transmitting all medical information and records" (Art. 1 of the law).

In **France**, Article 4 of Act no. 2002-303 of 4 March 2002 concerning the rights of patients and the quality of the health service[1] introduces a new Article L.1110-2 into the Public Health Code, indicating that "a patient is entitled to respect for his dignity", while the new Article L.1110-5 paragraph 4 states that "healthcare professionals shall employ all means at their disposal to ensure for every person a dignified life until death".

The Act of 4 March 2002 agreed to reconsider, in the name of the equal dignity of handicapped or other children, and under the joint pressure of the associations for the defence of handicapped persons and their families and of the medical profession, the *Perruche* case law adopted by the Court of Cassation on 17 November 2000. By this ruling, the Court of Cassation had actually agreed to indemnify a child whose handicap had not been detected during the pregnancy of his mother, following the wrongful failure of a prenatal diagnosis. This case was vehemently criticized because it seemed to admit that the birth of a child, whether it is deformed or not, may constitute a prejudice. Section 1 of the Act of 2 March 2002, entitled "Solidarity with handicapped persons", reconsidered this case law by stating that "no one can claim a prejudice for the sole reason of being born". Thus a child whose handicap does not result directly from a medical error cannot claim compensation. Furthermore, the law strictly limits the compensation for parents by limiting the right to compensation of parents who are the victim of a "blatant error" to moral wrong[2].

Article 2. Right to life

During the period under scrutiny, the main developments relating to the right to life may be grouped under five themes. After a presentation of the evolution in the euthanasia debate, the report deals with the prohibition of all assault on the right to life, in particular by the law-enforcement officials. More concise remarks concern the deaths linked to the fight against human trafficking, as well as the obligation of the State to protect the individual against criminal acts by other persons. The protection of women against violence is the subject of special analysis. The issue of the death penalty is not discussed. Although Article 2 §2 of the Charter opportunely mentions this prohibition, capital punishment has been effectively abolished in the European Union, and no significant developments in this issue have been recorded in 2002.

Euthanasia

The issue of euthanasia – more particularly voluntary active euthanasia, or the possibility of voluntarily inflicting death on a person who, under certain circumstances, has manifested such a wish – was very much the topic of debate in 2002. The *Pretty vs United Kingdom* ruling of 29 April 2002 is the first in which the European Court of Human Rights pronounces on the question of knowing

[1] J.Off.Rép.fr., 5 March 2002, p. 4118.
[2] See below, article 26.

whether the penal prohibition of assisted suicide (in this case formulated by the 1961 *Suicide Act* in the United Kingdom) constitutes an interference with the rights acknowledged by the European Convention on Human Rights. The applicant, suffering from a neuro-degenerative illness, was being prevented from committing suicide without the assistance of another person, feared an undignified end to her life if it was not cut short. She criticized the British authorities for refusing to commit themselves not to prosecute her husband if he helped put an end to her life. The European Court of Human Rights, however, dismissed the application. By doing so, it dismissed the idea that Article 2 of the European Convention on Human Rights, which guarantees the right of every person to life, also guarantees "the right to choose to continue or stop living", in other words, the "right to die". It also considers that Mrs Pretty's predicament as a result of the refusal by the prosecuting authorities of the United Kingdom to undertake not to prosecute her husband if he helped her to commit suicide does not constitute a violation of Article 3 of the Convention, which prohibits in absolute terms the infliction of inhuman or degrading treatment. The Court also considers that, if this situation constitutes an interference in the right to respect for the private life of the applicant – "the notion of personal autonomy" underlying, according to the Court, the interpretation of Article 8 of the Convention (§61) and possibly even extending to "the meaning of the right to make choices about one's own body" (§ 66) or allowing the individual "to avoid what, in his eyes, would constitute an undignified and painful end to his life" (§67) –, such interference may nevertheless be justified in the name of the protection of the rights of others, given "the risk of abuses and the possible consequences of abuses that may be committed which a relaxation of the general prohibition of assisted suicide or the creation of exceptions to the principle would entail" (§74).

At the end of a broad consultation[3], **Belgium** has become, one year after the **Netherlands**[4], the second country in the world to partially legalize *active voluntary euthanasia* – the fact of causing the death of another person by granting his request – while strictly regulating the practice. According to the Belgian Act of 28 May 2002 concerning euthanasia[5] (effective on 20 September 2002), a doctor who practices euthanasia, defined as the act committed by a third person who intentionally puts an end to the life of a person at the latter's request, does not commit an offence from the moment his adult or independent underage patient, afflicted by "constant and unbearable physical or mental suffering that cannot be alleviated" as a result of an "accidental or pathological disorder", finds himself in a "serious and incurable" situation. The doctor will verify the patient's capacity to express his request, ascertain that the patient is of age and conscious, and that his request is formulated voluntarily, repeatedly and carefully considered (notably in an interview during which the doctor informs him of the therapeutic options that are still conceivable) and is not the result of outside pressure. This request must be formulated in writing, either at the moment itself, or beforehand (the validity of such a declaration made in advance is limited to 5 years), and may be revoked or changed at any time.

A federal Commission to supervise and evaluate the application of the law is sent the files of patients who have received euthanasia, specifying the conditions of the act and the procedure that was followed. The Commission verifies whether the rules were observed, and if this was not the case, passes the file on to the prosecuting authorities.[6] It will also draw up for the attention of the legislative Chambers a report containing a description and evaluation of the application of the law as well as, where appropriate, recommendations that may lead to an initiative to make changes or additions to the law.

[3] Namely opinion no. 9 of 22 February 1999 of the Belgian Advisory Committee on Bioethics concerning the active termination of the life of persons incapable of expressing their wishes.

[4] *Wet van 12 april 2001 houdende toetsing van levensbeëindiging op verzoek van hulp bij zelfdoding en wijziging van het wetboek van strafrecht en van de wet op lijkbezorging* - effective on 1 April 2002.

[5] Act of 28 May 2002 on euthanasia, *M.B.*, 22 June 2002.

[6] It should be noted that, alongside the adoption of the law on euthanasia, Belgium, unlike the Netherlands, did not provide for any specific penalty in case of euthanasia practised outside the legal conditions (12 years imprisonment in the Netherlands, subject to verification).

At the political level, the analysis of the Belgian law on euthanasia cannot be considered separately from the Act of 14 June 2002 on palliative care[7]. The latter law imposes on the public authorities the obligation to guarantee equal access to palliative care for incurable patients, both in terms of the provision of such care and the reimbursement thereof. The aim is clearly to avoid disadvantaged, isolated or vulnerable patients being tempted to request suicide for financial reasons. Any doctor to whom a request for euthanasia is addressed must, in this spirit, inform the patient that such palliative care exists. As to the effectiveness of the law on palliative care, special attention must be paid to the budgets that are allocated to the implementation of the right it establishes to benefit from the said care.

The partial decriminalization of active voluntary euthanasia as operated by Belgian law does not appear to be contrary to the *Pretty* ruling of the European Court of Human Rights. This ruling refuses to identify in the Convention a "right to die", which would be the corollary of the right to life. However, it remains silent on the conditions in which a State party to the Convention may allow certain situations in which death is inflicted on a person at his/her request, without violating its obligation to protect the right to life, notably by adopting an appropriate penal legislation. When certain members of the government of the **Netherlands** were asked whether the *Pretty* case should not lead to an amendment of the Dutch law on euthanasia, they replied that in their view the Dutch law is compatible with the requirements of Article 2 ECHR. They recalled that there is no 'right to euthanasia' as such under Dutch law and that doctors cannot be obliged to accede to requests for euthanasia. Euthanasia and assisting another to commit suicide continue to be criminal acts, but the culpability of a doctor can be removed if certain requirements are met[8]. The ministers further pointed out that the Court in *Pretty* has expressly refused to give an opinion on the state of law in any other country than the UK. In addition the Court underlined the importance of a careful balance between the protection of the right to life and personal autonomy. According to the ministers, the Dutch legal regime requires such a balance to be struck[9].

On 20 January 2003, the Council of Europe published a study on euthanasia and assisted suicide in the laws and/or practices concerning euthanasia and assisted suicide in 34 of the Council's member countries and in the United States, which has observer status with the Organisation (see http://www.coe.int/euthanasia-report). According to the press release announcing the publication of this study, prepared by the Steering Committee on Bioethics (CDBI) as a follow-up to Recommendation 1418 on the protection of the human rights and dignity of the terminally ill and the dying, adopted by the Council of Europe Parliamentary Assembly in 1999 "the results of the questionnaire reveal that euthanasia is only legally possible in one country: Belgium (9 countries did not give specific replies). Assisted suicide is legally possible in two countries: Estonia and Switzerland (10 countries did not give specific replies)". But the Netherlands, for instance, the 2001 legislation of which is close to the Belgian which it in fact inspired[10], did not specify whether the existing legislation made euthanasia possible, shows the difficulty of such comparisons, especially when they may be based on different understandings of the meaning of the term "euthanasia" and, for instance, as including non-voluntary euthanasia as well as euthanasia on the request of the patient, or as referring to euthanasia performed upon the will of the patient, whether or not other conditions are satisfied.

[7] Act of 14 June 2002 on palliative care, *M.B.*, 26 October 2002.

[8] The mere expression of the patient's wish does not suffice to lift the penal prohibition, since the absence of penal responsibility supposes that certain objective conditions are fulfilled. In this sense, Dutch law does not actually recognize a "right to euthanasia" or assisted suicide, and the right to personal autonomy does not absolutely prevail over the protection of the right to life. In December 2002 the *Hoge Raad* [Supreme Court] gave a ruling in the so-called *Brongersma* case. In this case a doctor had assisted an 87-year old person, at his repeated request, to terminate his life. The patient, a former senator, was not terminally ill according to any medical classification but was "tired of living". The doctor had been convicted for assisting another to commit suicide, since the Dutch law on euthanasia does not anticipate removal of culpability in these circumstances. The *Hoge Raad* confirmed this conviction (*Hoge Raad*, no. 00797/02, 24 December 2002).

[9] *Handelingen II* 2002/03, aanhangsel 183.

[10] One important difference should nevertheless be noted: the Dutch legislation is applicable to minors from 12 years on (although parental consent is required between 12 and 15 years old), whilst the Belgian legislation only provides for a request from conscious adults.

For the moment, the Dutch and Belgian experiences do not appear to be copied in the other Member States of the European Union. An analysis of the parliamentary debates[11] in **Austria** to which the presentation of the government bill for a Family Care Leave Act (*Familienhospizkarenzgesetz*), proposing the possibility of leave from work for employees in order to care for dying family members, has given rise seems on the contrary to indicate that the consent given to this bill by all the parties represented in Parliament is a kind of response to the partial decriminalization of euthanasia in the Netherlands and Belgium. In **Spain**, Parliament adopted the basic law 41/2002 of 14 November 2002 on the autonomy of patients and the rights and obligations in the area of medical information and records. This law recognizes neither direct nor indirect euthanasia, but allows for the possibility of a life will (*testamento vital*) allowing the patient to express his wish not to be submitted to therapeutic relentlessness. It is up to the independent Communities to implement this basic law.

In **France**, if the Act of 4 March 2002[12] is aimed to protect the dignity of patients, it does not concern itself (besides palliative care) with the "right to die with dignity" claimed by a section of public opinion and by the associations concerned. In **Luxembourg**, the Prime Minister informed the press on 10 January 2003 that the government was to draw up a bill regulating the end of life following a mandate given by the Ethical Commission of the House of Representatives, but he expressly ruled out that the government was preparing a law legalizing active euthanasia[13].

Prohibition of all assault on the right to life

The prohibition imposed on the States by Article 2 of the European Convention on Human Rights to violate the right to life implies that the use of arms by law-enforcement officials is strictly regulated and subject to precise conditions in accordance with the principles established by the United Nations[14], and that in case of death an effective and impartial inquiry be conducted within a reasonable time in order to determine the responsibilities[15]. Each of these points has known certain developments in several Member States during the course of the period under scrutiny.

In **Greece**, a bill on the use of firearms by police officers was submitted at the end of 2002 and is currently being examined by the National Human Rights Commission. This bill is aimed at renewing the legislative framework (dating from 1943) and is based on four main themes: i) the conditions under which firearms may be carried, ii) the conditions for the use of firearms, iii) the practical training of police officers and the effective monitoring of their conduct, and iv) the sanctions if police officers fail to observe the above-mentioned conditions. The improvement of the regulatory framework is all the more justified since two NGOs, *Amnesty International* and *International Helsinki Federation*, have revealed in a report published in September 2002[16] seven cases in which police officers had fired at people, mortally wounding them, although there was no imminent risk of death or serious injury, or under circumstances where the existence of such a risk was highly debatable. In order to avoid other people getting killed, the two NGOs advised the Greek authorities to improve police training by emphasizing non-violent methods of law enforcement, training them in the use of firearms and in the application of a risk assessment procedure.

[11] Cf. www.parlinkom.gv.at (German).
[12] Act n°2002-303 of 4 March 2002 concerning the rights of patients and the quality of the healthcare system.
[13] j-lo, « Eingeschränkte Zustimmung zum therapeutischen Klonen und strikte Ablehnung der aktiven Sterbehilfe », *Luxemburger Wort* of 11 January 2003, p. 3.
[14] See in particular the United Nations principles concerning the effective prevention of extrajudicial, arbitrary and summary executions and the means to conduct inquiries into such executions, adopted on 15 December 1989 by the General Assembly of the United Nations, and the basic principles on the use of force and the use of firearms by law enforcement officers, adopted on 7 September 1990 by the eighth United Nations Conference on crime prevention and the treatment of delinquents.
[15] See during the period under scrutiny, European Court of Human Rights, *Orak v.* Turkey judgment of 14 February 2002, § 81; European Court of Human Rights (4th section), *Sabuktekin v. Turkey* judgment of 19 March 2002, § 97; European Court of Human Rights (2nd section), *Semse Önen v. Turkey* judgment of 14 May 2002, § 87; European Court of Human Rights (1st section), *Anguelova v. Bulgaria* judgment of 13 June 2002, § 136; European Court of Human Rights (1st section), *Orhan v. Turkey* judgment of 18 June 2002.
[16] See report entitled "Greece: In the shadow of imunity. Ill-treatment and the misuse of firearms", of 24/9/2002, http://web.amnesty.org/ai.nsf/Index/EUR250222002?OpenDocument&of=COUNTRIES\GREECE.

In **Ireland**, the need to review the legislative framework of criminal investigations became more and more obvious. For the past number of years there has been an ongoing review within the Department of Justice, Equality and Law Reform of the law on inquests. The current status for that review is unclear[17]. The main concern is, however, the lack of an effective and independent mechanism for investigating alleged breaches of the right to life by Irish security forces. This will probably be addressed in the context of the establishment of an independent Garda Inspectorate to replace the Garda Siochana Complaints Board but the details of that proposal remain to be seen and it is therefore impossible to say, at this stage, whether a proper system will be put in place. This problem was mentioned in the last set of Concluding Observations of the UN Human Rights Committee on Ireland's Second Periodic Report under the ICCPR[18].

In **Luxembourg**, the case of *Pereira Henriques and others v. Luxembourg*, currently pending before the European Court of Human Rights, raises the question of the impossibility, under Article 115 of the Social Insurance Code, for a victim of an industrial accident to bring the case before an ordinary court, and the compatibility of this situation with the procedural requirements deduced from Article 2 of the European Convention on Human Rights[19]. Another case, which has also been brought before that court, concerns a death that occurred at the Penitentiary Centre of Luxembourg under circumstances that have not been cleared up yet[20].

During its examination of **Sweden**'s fifth periodic report under the CCPR (CCPR/C/SWE/2000/5) which took place in April 2002, the Human Rights Committee noted with concern several cases of excessive use of force by the police personnel and prison guards, which led to serious injury and death of persons in, *e.g.*, custody or during the Gothenburg (Göteborg) summit.[21] And the UN Committee against Torture mentions in its concluding observations from May 2002 on the Swedish periodic report that there have been allegations of imprecise, often subjective and inadequate guidelines and lack of training given to police personnel and prison guards regarding the use of force.[22] Although the Human Rights Committee expressed its satisfaction with the fact that a special commission was set up in December 2000 to study the manner in which the criminal investigation into the 1995 death in detention of Osmo Vallo was led[23] – although it still in not clear whether this case constitutes part of a pattern of deaths in custody in which the manner of restraint and/or excessive use of force may have caused asphyxia or whether it is just an isolated case of excessive use of force by the police officers[24], it felt it necessary to emphasize that:

---

[17] The legal problems with inquests came into focus in November, 2002 in relation to an inquest into two unsolved murders from 1997. The Coroner, expressing dissatisfaction at the refusal of the chief suspect in the case to attend the inquest, referred to "glaring anomalies" in the framework legislation, the Coroner's Act, 1962. See further: November 21st 2002, *The Irish Times*, p.4.

[18] Concluding Observations of the Human Rights Committee: Ireland 24/07/2000, A/55/40, at para. 14.

[19] Petition no. 60255/00. On this problem, see D. Spielmann, «De la double nature de la constitution de partie civile et de son incidence en droit social luxembourgeois», *Bull. dr. h.,* 7 (1997), pp. 98 et seq.

[20] Notably for violation of Articles 6, 2, 3 and 13 of the Convention.

[21] Concluding observations: Sweden. 24/04/2002, CCPR/CO/74/SWE, § 10.

[22] Concluding observations of the Committee against Torture: Sweden, 07/05/2002, CAT/C/XXVIII.CONCL.1, § 6 (d).

[23] The death of Osmo Vallo has been under continuous debate in Sweden since this tragic event occurred. On 30 May 1995, two police officers decided to take Vallo into custody. He was under influence of drugs and behaving violently. According to several sources when arresting Vallo, the police officers used a manner of restraint that may have contributed to his death. In the hospital doctors established that Vallo had 39 wounds. They consisted of injuries in the face, underarms and thighs. The police officers in question were convicted of assault. It has been argued that the evidence is not enough to convict them of gross assault and manslaughter.

See Alternative Report to the Committee against Torture regarding Sweden's fourth periodic report, Participating organizations: Save the Children Sweden, Swedish Helsinki Committee, Swedish Iran Committee, Swedish NGO Foundation for Human Rights, Swedish Red Cross and Swedish Section of the Women's International League for Peace and Freedom, Stockholm May 2002, p. 20. The report contains references to another case of death of a person in custody, Peter Andersson, which case has been reopened by the Prosecutor General. In addition, a few cases have been reviewed illustrating the use of weapons in situations when it cannot be deemed necessary or proportionate to the exposed threats, and when individuals have died as a result of being shot. Id., pp. 21-22.

[24] Amnesty International, Sweden, Osmo Vallo Commission: further action needed, 31 October 2002, AI EUR 42/001/2002, pp. 1-5. AI continues to be concerned that the Vallo death was not an isolated incident. By the time the investigative commission had begun its work in 2000, at least 16 deaths, in which the circumstances were disputed, had taken place. B.Malmström, *Amnestykritik mot Valloutredning*, SvD 4 November 2002, p. 6. The case has been commented upon also by

> *"The State Party should ensure the completion of investigations into such use of force, in conditions of total transparency and through a mechanism independent of the law enforcement authorities. Depending on the results of the investigations, it should expedite the prosecution of law enforcement officers implicated. The State party should also guarantee better human rights training of police officers[25]. During demonstrations, the State party should ensure that no equipment that can endanger human life is used" (§ 10).*

In **Italy**, the inquiry into the death of Carlo Giuliani, which happened during the G8 summit in Genoa on 20 July 2001, and which was presumably committed by a police officer, was closed at the end of 2002. The public prosecutor requested that the case be closed without result since he considered that the officer had acted in lawful self-defence. On 18 February 2003, the examining magistrate should give a verdict on the public prosecutor's request. The case has sparked off a lot of debate and controversy. It is hoped that it will urge reflection on the conditions for the use of firearms by the forces of order as well as on the necessary training of law-enforcement officers.

With respect to the **United Kingdom**, the Committee on the Rights of the Child has expressed concern at the continued use of plastic baton rounds as a means of riot control in Northern Ireland as it causes injuries to children and may jeopardize their lives[26]. During the period under scrutiny, the European Court of Human Rights also found a violation of a breach of the obligation to conduct an effective investigation both with regard to the investigation into the death of a demonstrator when dispersal action was taken and the conduct of the subsequent inquest[27]. On the other hand, the UK courts have held that the rules governing inquests should be construed as permitting a verdict of neglect as the inability to bring in such a verdict (without identifying any individual as being involved) may otherwise significantly detract in some cases from the capacity of the investigation to meet the obligations arising under the right to life[28].

Deaths linked to human trafficking

In its Activity Report for 2001, which it submitted for review to the House of Representatives and the Senate on 26 September 2002, the Standing Committee for the Supervision of the Police Services (Committee P) in **Belgium** voiced its concern about the risks which certain means employed in the fight against human trade incurred for the people concerned. The Committee P points out that if the use of sophisticated techniques (such as the use of CO2 measuring devices) has strongly increased the chances of discovering illegal immigrants, it also "leads to a sharp increase rather than a decrease in the phenomenon, while new the new forms of transport used entail greater risks for the illegal immigrants. We are thus faced with a paradox: more effective controls by the police services - which is not only part of the fight against human trafficking, but also follows upon the incident at Dover and is inspired by the concern to increase the safety of illegal immigrants - appear precisely to urge the latter to take even greater risks" (p. 14.).

This analysis ties up with a judgment given by the 2nd chamber of the Supreme Court of **Spain**, convicting the accused who had transported a group of candidates for illegal immigration from Morocco in a dingy and for payment. The Court based its sentence on the observation that this enterprise presented a serious threat to the health and safety of the passengers.

Government officials in K.Hedlund Thulin, *Rättigheter för alla, En kompletterande skrift till filmen Rättigheter för alla*, Överstyrelsen för civil beredskap, Stockholm 2002, p. 28.

[25] On the training of police officers, see Uppsala Universitet, Juridiska fakulteten, Remissyttrande 2002-08-20, Dnr UFV 2002/1085, Osmo Vallo-utredning om en utredning (SOU 2002:37), p. 4. The publication of a *Handbook of Police Procedures and Actions of Self-defence* is a first step in the right direction.

[26] CRC/C/15/Add.188, 9 October 2002, para 27. Although concern has been expressed about the use of baton rounds (plastic bullets) in Northern Ireland, no deaths have occurred during 2002 : Northern Ireland Human Rights Commission, *Annual Report 2002*.

[27] Eur.Ct.H.R., *McShane v. United Kingdom*, 28 May 2002.

[28] *R (on the application of Amin) v Secretary of State for the Home Department* [2002] 4 All ER 336.

Obligation to protect against assaults on a person's life

In its *Mastromatteo v. Italy* ruling of 24 October 2002, the European Court of Human Rights rejected the allegation of violation of Article 2 of the European Convention on Human Rights, whereas the applicant claimed that the Italian authorities were responsible for the death of his son, who was killed by prisoners who had been released on parole in accordance with the Gozzini Act no. 663 of 10 October 1986 amending the Prison Act (Act no. 354 of 26 July 1975) with a view to facilitating the social rehabilitation of the offenders. It admits that "under certain well-defined circumstances, Article 2 may impose upon the authorities the positive obligation to take preventive practical measures to protect individuals whose lives are threatened by criminal acts of others" (§ 67). This obligation must however be interpreted "in such a manner as not to lay an unbearable or excessive burden on the authorities, taking into account the difficulties for the police to carry out their duties in modern societies, as well as the unpredictability of human behaviour and the operational choices to be made in terms of priorities and resources" (§ 68). Therefore, according to the Court, a positive obligation exists only "if it has been established that the authorities knew of, or should have known of, the existence of a real and immediate threat to the life of one or several individuals and that they did not take, within the scope of their authority, the measures which it is reasonable to expect would have undoubtedly overcome that risk" (ibid.). Finding that "the system implemented in Italy [with a view to facilitating the social rehabilitation of offenders through parole schemes] provides for sufficient measures to ensure the protection of society" and that, according to the figures supplied by the defendant State, "the percentage of crimes committed by prisoners out on parole is very low, as is the percentage of escapes during release on parole" (§ 72), the Court concluded that in this case there was no violation of Article 2 of the Convention.

In **Finland**, the Act amending the Act on the enforcement of punishments (*Laki rangaistusten täytäntöönpanosta annetun lain muuttamisesta*, Act No198 of 2002) provides in the new section 12 of the Act that an injured party or some other person may be notified of the release of a prisoner or of the fact that a prisoner has left or has been granted permission to leave the prison, if there is reasonable cause to suspect that the prisoner will commit an offence against the life, health or personal liberty of the injured party, some other person or anyone close to these persons. A similar amendment concerning prisoners on remand was made to section 14a of the Detention Act (amending Act No. 199 of 2002).

The protection of women against violence

A special aspect of the obligation of the State to protect the right to life lies in its obligation to take measures against domestic violence committed against women. In **Spain** in 2002, 70 persons were killed by their spouses. With respect to **Sweden**, the Human Rights Committee expressed its concern under Article 6 of the Covenant on Civil and Political Rights, i.e., breaches of the right to life, about the persistence of domestic violence despite legislation adopted in this area. It recommends the Swedish Government to "take more effective measures to prevent it (violence) and assist the victims of such violence".[29] The Human Rights Committee also felt that the government should do more to fight the so-called crimes of honour, "honour killings", which have taken place in Sweden in the past years and which involve girls and women of foreign descent.[30] In consequence of an intensively reported and discussed murder in January 2002 of a 26-year-old Swedish woman (Nadime) with Kurdish roots, the Government has promised to review the special needs of women from immigrant backgrounds encountering the Swedish judicial system[31]. Well-established NGOs are, however, concerned about the widespread assumption in society that immigrants are more prone to violence

[29] CCPR/CO/74/SWE, § 7.
[30] Ibid., § 8.
[31] The HRC has also remarked in its principal subjects of concern with regard to Sweden's most recent periodic report under the Covenant (Article 7) that there continue to appear cases of female genital mutilation in the country involving girls and women of foreign extraction (CCPR/CO/74/SWE, § 8 ; see also Alternative Report to the Human Rights Committee, p. 25). The Minister for Children's Affairs convened a conference in Spring of 2002 on preventive efforts to counter female genital mutilation.

than Swedes. Statistics and various studies show that violence against women is as common among Swedes as among immigrants, but sometimes it takes a different form.[32]

The extent of the phenomenon of domestic violence against women in **Spain** would explain the number of initiatives that have been taken in that country to deal with the problem. Several independent Communities have taken measures to meet this challenge: elaboration of plans to prevent sexual violence and to provide care to female victims (Catalonia), plans to prevent crime, including sexual violence (Rioja), organization of training courses for lawyers representing victims of domestic violence (Andalusia), publication of guidebooks on domestic violence (Valence). At Spanish government level, a watchdog committee on domestic violence was set up on 26 September 2002 by the Ministry of Justice and the General Council of the Judiciary. Other initiatives, relating in particular to access for victims of domestic violence to the courts through the creation of simplified procedures before specialized bodies, were proposed by the Ombudsman (*Defensor del Pueblo*). At the same time, the proposal of an organic law to fight sexual violence - the aim of which was to bring together in a single text a wide range of existing initiatives in this area - was rejected by Congress in September 2002.

In **Belgium**, the Council of Ministers approved on 11 May 2001 the Plan to combat violence against women, of which one of the priority areas of action is that of domestic violence.[33] A preliminary draft aimed at better protecting the victims of marital violence (adopted by the Council of Ministers on 18 January 2002) provides for a doubling of the sentences for violence between spouses (assault and battery, manslaughter, rape, attempted murder, assassination or poisoning), which will permit the courts to issue an arrest warrant and to order, where appropriate, the removal of the perpetrator from the marital home. In case of separation or divorce, the family home will be allocated to the victim of acts of violence committed by the partner. A doubling of the number of centres for aid to victims was also provided for on 1 January 2002.

Article 3. Right to the integrity of the person

After having set out the principle of the right to the physical and mental integrity of the individual, Article 3 of the Charter sets forth the resulting consequences in the area of medicine and biology. It lays down four principles in that respect. The first principle is that, in the context of medical care, "the free and informed consent of the person is required in accordance with the conditions defined by law". In this connection, the report addresses the question of the rights of patients and that of the balance to be preserved between the autonomy of the patient and the obligation for the doctors to protect life, in the case of the refusal by Jehovah's Witnesses to agree to a life-saving operation. The three following principles set out by Article 3 of the Charter are the prohibition of eugenic practices, the prohibition to use the human body or paths thereof as a source of profit, and the prohibition of reproductive human cloning. The report gives an account of the translation of these principles into initiatives taken by the Member States during the course of 2002, while examining the limits that have been imposed on medical research and the prohibition of reproductive human cloning.

The 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) of 4 April 1997[34] is the principal international instrument in this area. This Convention of the Council of Europe is complemented by an Additional Protocol of 12 January 1998 on the prohibition of cloning human beings[35], followed by an Additional Protocol of 24 January 2002 on transplantation of organs and

[32] See A.Wergens, *Ett viktimologiskt forskningsprogram*, Presenterat 2002, Brottsoffermyndigheten Umeå 2002, pp. 46-49; Alternative Report to the Human Rights Committee, p. 22.
[33] See « Evaluation de la mise en œuvre du Plan national de lutte contre la violence à l'égard des femmes », Belgian Senate, session 2001-2002, 18 July 2002, *DOC 2-950//1.* The Report also mentions that statistical tools will be developed to measure the phenomenon of marital violence.
[34] *S.T.E.*, n° 164.
[35] *S.T.E.,* n° 168. This protocol became effective on 1 March 2001.

tissues of human origin[36]. By 15 January 2003, only four Member States of the Union had ratified the Convention on Human Rights and Biomedicine: **Denmark**, **Spain**, **Greece** and **Portugal**. Six other States had signed this text. The Additional Protocol of 12 January 1998 was in force by the same date in **Spain**, **Greece** and **Portugal**.

Rights of patients

Belgium has neither signed nor ratified the Council of Europe Convention on Human Rights and Biomedicine of 1997. Nevertheless, the principle according to which any intervention in the health field is subject to the free and informed consent of the person concerned, who receives adequate appropriate information beforehand (Article 5 of the Convention on Human Rights and Biomedicine), is contained in the Act of 22 August 2002 concerning patient rights[37]. By adopting this Act, Belgium has become the sixth Member State of the European Union to adopt a specific legislation on patient rights. The new law guarantees the right of the patient to be informed about the state of his health (Article 7), and provides in particular that any medical intervention is subject to his prior consent, which must be enlightened by complete information about "the purpose, nature, degree of urgency, duration, frequency, contraindications, side-effects and risks inherent in the intervention and relevant to the patient, follow-up care, the alternatives that are available, and the financial implications" as well as "the possible consequences in case of refusal or withdrawal of consent" (Article 8 §2). This same law guarantees the patient the quality of the treatment that is given to him, as well as the right to have his medical records kept in a safe place and to be able to consult them, except for the "personal notes made by a professional practitioner and data concerning third parties" (Article 9 §2)[38]. Article 10 of the Act concerning patient rights adopts a formulation that also appears in Article 10 of the Convention on Human Rights and Biomedicine, which guarantees that "the patient is entitled to the protection of his private life during any intervention by a professional practitioner, notably in relation to information about his or her health". The Act also acknowledges that the patient has a right to lodge complaints through the competent office of mediation with respect to all the rights that the Act grants to the patient. Finally, a federal Commission on Patient Rights has been set up in order to oversee the application of the Act concerning patient rights, and also to receive complaints relating to the office of mediation. One of the tasks of this Commission is to "collect and process national and international data concerning matters relating to patient rights" (Article 16 §2).

In that same spirit, Act no. 2002-303 of 4 March 2002 relating to patient rights and the quality of the healthcare system was adopted in **France**. This law emphasizes in particular the obligation to obtain the free and informed consent of the patient before any medical act or treatment is administered to him. The Act introduces into the Public Health Code a new Article L.1111-4, which sets out the principle according to which "every person, together with the healthcare professional and taking into account the information and recommendations he furnishes, shall take the decisions about his health. The doctor must respect the wishes of the person, after having informed him about the consequences of his choice. If a person's wish to refuse or interrupt a treatment puts his life in danger, the doctor must do everything possible to convince him to accept the essential treatment. No medical act or treatment may be administered without the free and informed consent of the person concerned, and this consent may be withdrawn at any time […]".

The principle according to which "an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it" (Article 5 of the Convention of Human Rights and Biomedicine) may be made subject to restrictions, provided that such restrictions are provided for by law and constitute necessary measures to achieve certain goals enumerated in the

[36] *S.T.E.,* n° 186. This protocol has not become effective yet, since the number of five ratifications (including those of four Member States) has not been attained yet. **Greece**, **Luxembourg**, the **Netherlands**, **Portugal**, and **Italy**, in chronological order, have signed this treaty. No Member State of the European Union has ratified it yet.

[37] *Mon. b.*, 26.9.2002; *erratum, Mon. b.,* 20.12.2002.

[38] Although in principle the patient is entitled to receive a copy of his medical records, "the professional practitioner shall refuse to give such a copy if there are indications that the patient is being put under pressure to communicate a copy of his medical records to third parties" (Article 9 §3).

Convention, such as "for the protection of public health and for the protection of the rights and freedoms of others" (article 26, §1). In **Portugal**, Oporto's Court of Appeal decided on 6 February 2002 the compulsory internment of a citizen carrier of tuberculosis, as he refused to follow treatment and was creating a concrete danger of contagion for third persons, his relatives and co-habitants and could become a danger to public health. Law nº 2036 states that tuberculosis is a contagious disease and determines that the General Health Direction shall determine compulsory internment of the patient. This solution seems to be in accordance with article 5, 1, e) of the ECHR, and to be justifiable under Article 26(1) of the Convention on Biomedicine. However, the referred law seems to be in violation of the Portuguese Constitution in relation to the process of compulsory internment, as its application should not be decided upon by an executive organ, such as the National Health Service, but be reserved to a judicial body, according to art. 27(3) of the Constitution.

In **Portugal**, a question also arises which brings into play Article 6 of the Convention on Human Rights and Biomedicine concerning the protection of persons who are not able to consent. Physicians are relatively often confronted with the sterilisation of minors and incapable adults, suffering from deep mental disturbance. This question is not expressly regulated by the Portuguese legislation. The National Ethics Council for Life Sciences considered that sterilisation is possible if : 1) it is the ultimate possibility ; 2) the decision is taken by the Family Court, after taking into consideration medical, psychological and social reports and 3) parents or legal representatives agree with the solution[39]. Bearing in mind the character of this measure, which curtails an important dimension of the free development of human personality, the absence of a clear, binding legislative act on the matter is regrettable. And the proportionality of allowing sterilisation, at least in the case of minors, may be questioned.

Refusal of life-saving treatment

In **Belgium**, the Advisory Committee on Bioethics on 25 March 2002 delivered an opinion no. 16 on the refusal of blood transfusion by Jehovah's Witnesses. The Committee started from the observation that "the right to refuse treatment, even vitally necessary treatment, is generally recognized by the different national and international medical ethics codes". However, respect for the patient's autonomy (established in Belgium since the date of the Committee's opinion by Article 8 of the Act on patient rights) does not always apply in an absolute manner. It assumes first of all that the patient has the required effective capacity to judge. Analytically distinct from legal capacity, this notion means the capacity to take decisions on the basis of "good reasons" which incorporate the value systems and life plans of each person, in regard to which one must be careful not to pass patronizing judgments. It also supposes the necessarily free and voluntary nature of the choice made. What at first sight may seem "a free and voluntary act" may, on closer scrutiny, be a more or less pronounced form of surrender to an environment that induces individual preferences and values, and therefore the opposite of autonomy.

For the cases of refusal of vitally necessary blood transfusion (refusal in other cases is accepted except for children who have not yet reached the age of discretion), the Committee concludes its opinion with the four following recommendations: 1° in the case of *Jehovah's Witnesses who are of age and competent in law and in fact*, the medicine is obliged to respect the refusal of vitally necessary blood transfusion, even if this means the death of the patient, provided that certain conditions relating to the nature of the consent have been verified (maintenance of the refusal after being informed of the consequences, possibility of a private conversation between the doctor and the patient, allowing the latter to express his wish in a calm and independent environment, written release of liability, medically verified capacity of judgment); 2° in the case of *Jehovah's Witnesses unable to express their wish* – which typically presents itself in cases of extreme urgency –, if the refusal of vitally necessary blood transfusion formulated by a third party (spouse, relatives or other companions) cannot suffice in the presence of a declaration written and signed beforehand by the patient, the Committee is of the opinion that the doctor must take this into account in his deliberation and is even obliged, according to some members of the Committee, to consider that such a declaration is equivalent to a refusal

[39] Opinion 35CNECV/01, from 3.4.2001.

presently expressed by the patient (hypothesis of the "equivalence to the expressed opinion"); 3° in the case of *minors having the capacity of discretion*, the Committee is of the opinion that one should act in the presumption of strong pressure exercised by their environment; while some members feel that the refusal of a minor can never be taken into account, other members feel that the doctor can respect the minor's refusal, but only after having verified his capacity of discretion and the nature of the consent he has given; 4° in the case of *minors not having the capacity of discretion,* and whose parents who are Jehovah's Witnesses do not give permission for a vitally necessary blood transfusion, the doctor must not respect the parents' wishes, provided that, except in cases of emergency, the verdict of vital necessity is confirmed, that there is consultation with the parents, and that the public prosecutor's office is notified, which will take measures of educational assistance.

The solution chosen by the Belgian Advisory Committee on Bioethics follows that which the Constitutional Court in **Spain** opted for. In a judgment no. 154/2002 of 18 July 2002, the Spanish Constitutional Court annulled the legal action for murder that had been initiated against a couple of Jehovah's Witnesses who had felt they had to urge respect for the refusal of blood transfusion by their son - a 13-year-old child - which eventually resulted in his death[40]. On the other hand, these solutions based on the primacy of personal autonomy and the freedom of religion contrast with the solutions that emerged from several judgments by French courts prior to Act no. 2002/303 of 4 March 2002 concerning patient rights and the quality of the healthcare system. In **France**, the Administrative Court of Appeal in Paris dismissed a claim for damages filed by a Jehovah's Witness as well as an action for damages brought by the family of a Jehovah's Witness who died following the administration of a life-saving blood transfusion against the express wishes of the patient: these two judgments of 9 June 1998 have generally given priority to the survival of the patient over the respect for his wishes, and this by virtue of the unavailability and inviolability of the human body and of the general aim of medicine, which is to save human lives[41]. One of these judgments was quashed by a judgment of 26 October 2001 given by the Council of State[42]. The latter, however, seems above all to have decided that there was a miscarriage of justice owing to the fact that *general* priority had been given to the duty of the physician to save lives, without having examined the *actual circumstances of the case*. The quashing of this judgment does not mean therefore that the French courts share the broad concept of patient autonomy that characterizes the position of the Belgian Advisory Committee on Bioethics and, in general, the European and international trend[43].

The French Act of 4 March 2002 reinforces the autonomy of the patient's wishes in the face of the decision-making power of the physician. It makes no clear statement on the question of knowing whose wishes prevail in the event that the patient refuses medical treatment, and this refusal threatens to result in his death. Article L.1111-4 provides that, in case of such refusal, the doctor must do everything possible to persuade the patient to accept treatment. In case of persistent refusal, however, it does not seem that the doctor can disregard this refusal in the name of his duty to save a person's life. In an emergency interim ruling of 16 August 2002[44] – in the case of blood transfusion administered to a Jehovah's Witness despite his refusal –, after having reiterated the fundamental nature of the right of an adult patient to give, while he is capable of doing so, his consent to a medical treatment, the Council of State admitted that the physician who, after having done everything possible to convince his patient to accept essential treatment, performed an act that was indispensable to his survival and in proportion to his condition, did not commit a "serious and manifestly unlawful breach of this basic liberty". Thus the case law prior to the Act of 4 March 2002 is maintained.

[40] STC 154/2002, 18 July 2002, recurso de amparo 3468/1997, *Asunto Pedro Alegre y Liva Vallès frente al Tribunal Supremo*.
[41] *Dall.*, 1999, 19th volume, p. 277.
[42] C.E. fr., judgment no. 198546, *Senanayake, Les Petites Affiches*, 15 January 2002, obs. C. Clément.
[43] H. Nys, *Patiënt in Europa. Op zoek naar een Europees geneeskundig diensverleningrecht*, Universiteit Limburg, Maastricht, 2000, p. 18. The courts in the United Kingdom have held that the right of a competent patient to request the cessation of treatment prevail over the natural desire of the medical and nursing profession to try to keep him or her alive: *Re B (adult: refusal of medical treatment)* [2002] 2 All ER 449.
[44] Emergency interim ruling of 16 August 2002 Mrs Valérie F. and Mrs Isabelle F., n° 249552.

The limits of medical research and the prohibition of the reproductive cloning of human beings

The Convention of the Council of Europe on Human Rights and Biomedicine of 1997, which is aimed at protecting the dignity and identity of the human being with regard to the application of medicine and biology, regulates the principle of the freedom of scientific research (Article 15). It provides that where the law allows research on embryos, it must ensure adequate protection of the embryo, and that the creation of human embryos for research purposes is prohibited (Article 18). The Convention also lays down rules concerning the removal of organs and tissues from living persons for transplantation purposes, the general rule being that such removal may be carried out solely for the therapeutic benefit of the recipient, where no other alternative therapeutic method exists, and on condition that the donor has given his express and specific consent (Article 19). Moreover, according to the Convention, "the human body and its parts shall not, as such, give rise to financial gain" (Article 21). The Additional Protocol to this Convention on the prohibition of cloning human beings prohibits all cloning of human beings, defined as "any intervention seeking to create a human being genetically identical to another human being, whether living or dead". Finally, the Additional Protocol to the Convention on Human Rights and Biomedicine on transplantation of organs and tissues of human origin was made available for signing at the Council of Europe on 24 January 2002. This Protocol contains among its general principles the principle of equitable access to transplantation services for patients, transparency in the allocation of organs and tissues, the definition of safety standards, non-remuneration of donors, as well as adequate information for the recipients, health professionals and the public. It also contains specific provisions relating to organ and tissue removal from living or deceased persons, the use of organs and tissues, the prohibition of financial gain, confidentiality, as well as sanctions and compensation.

Article 3 §2 of the Charter of Fundamental Rights sets forth four principles that must be respected in the fields of medicine and biology: the free and informed consent of the person concerned, the prohibition of eugenic practices, the prohibition of making the human body and its parts as such a source of financial gain, and the prohibition of the reproductive cloning of human beings. These principles appear in the Convention on Human Rights and Biomedicine or its additional protocols, although the prohibition of eugenic practices has a broader scope. They do not call into question the possibility of therapeutic cloning or the possibility of research on supernumerary embryos[45]. However, since these regulations leave the States a broad margin of interpretation, they have progressed in varying degrees in this area. As the National Ethics Commission in **Luxembourg** has emphasized[46], finding a solution at European Union level may be justified, particularly on the issue of therapeutic cloning or research on embryonic stem cells. It would indeed not be justified for the ethical debate to be overshadowed by economic interests.

Events in 2002 illustrate the urgency of the question. In **Germany,** the Federal Parliament adopted the Gesetz zur Sicherstellung des Embryonenschutzes im Zusammenhang mit Einfuhr und Verwendung menschlicher embryonaler Stammzellen (Stammzellgesetz) [Act ensuring Protection of Embryos in connection with the Importation and Utilization of Human Embryonic Stem Cells – Stem Cell Act][47], on the basis of a report[48] presented on 14 May 2002 by up an Enquete-Commission "Rights and Ethics of Modern Medicine"[49]. Section 1 of the Act states its guiding principle[50] : "In consideration of the State's obligation to respect human dignity and the right to life and to guarantee the freedom of research, the purpose of the present act is 1. to ban, as a matter of principle, the importation and

[45] In **Spain**, a large number of the complaints that were lodged in 2002 with the national Ombudsman originated from organizations of diabetic patients who were concerned that research carried out on human embryos should not be interrupted.
[46] See opinion 2002.3 on *Research on human embryos. Stem cells and therapeutic cloning.* In this opinion, the National Ethics Commission decided in favour of a set of rules, since it thought that the regulation of practices by an ethical code was not sufficient.
[47] Act of 28 June 2002 (BGBl. 2002 I p. 2277).
[48] Bundestags-Drucksache 14/9020.
[49] This Commission was set up by the Federal Parliament in the spring of 2001. It had already presented a partial report "Research on Stem Cells" on 21 Nov 2001 (Bundestags-Drucksache 14/7546 [Parliamentary Document]).
[50] A good overall view of the problematic nature with fundamental rights summary can be found in C. D. Classen, Die Forschung mit embryonalen Stammzellen im Spiegel der Grundrechte [Searching with embryonic stem cells in reflection of the fundamental rights], *Deutsches Verwaltungsblatt* 2002 p. 141 [German Administration Journal].

utilization of embryonic stem cells, 2. to prevent demand in Germany from causing the derivation of embryonic stem cells or the production of embryos with the aim of deriving embryonic stem cells, and 3. to determine the requirement for permitting, as an exception, the importation and utilization of embryonic stem cells for research purposes." According to section 4 (1) the import and the use of embryonic stem cells are prohibited. Section 4 (2) in connection with section 5 and 6 in detail regulates the requirements that have to be met if importing and using for the purpose of research shall be admissible nevertheless[51].

In **Finland**, it was in the light of Article 1 of the Constitution concerning the inviolability of human dignity[52] that the Constitutional Law Committee of the Finnish Parliament[53] examined a government proposal for a new Act on the use of gametes and embryos in fertility treatment54. The Committee took the view that, by and large, the bill succeeds in preventing the use of fertility treatments in a manner that might amount to a violation of human dignity. The bill prohibits the use of such embryos and gametes in fertility treatments which have been used in scientific research or whose hereditary qualities have been altered. Furthermore, it bans the possibility of trying to influence on the qualities of the child by selecting embryos and stem cells[55]. The bill is in harmony with the prohibition of eugenic practices, in particular those aiming at the selection of persons, and the prohibition of the reproductive cloning of human beings. The main controversies surrounding the Act have to do with the right of a child born from a donated gamete to know the donor's identity, and with the extent to which, if any, fertility treatments are also allowed to single women and same-sex couples.

In **France**, Article 15 of the bill on bioethics, which is currently under parliamentary discussion, and which is to lead to a review of the two Acts of 1994 on bioethics, provides for the prohibition of reproductive cloning and is accompanied with penal sanctions[56]. Research on embryos for therapeutic purposes, which was not initially called into question by the bill, might eventually be prohibited in the finally adopted text[57]. The bill on bioethics is aimed at changing the current rules on organ donations by extending, in the therapeutic interest, the circle of living donors. Article 7 of the bill plans to amend Article L.1231-1 of the Public Health Code so that the circle of living donors would then comprise all persons having a close and stable relationship with the recipient[58]. The bill contains guarantees to ensure the consent of the donor. The donor's consent must be expressed by the President of the District Court or, in urgent cases, collected by the public prosecutor, before the removal of organs or tissues is finally authorized by a committee of experts. Furthermore, always with a view to respecting the consent of the person concerned, the option to refuse organ donation *post mortem* is facilitated.

[51] The permission is given by a federal control office, the Robert Koch Institut in Berlin.

[52] See PeVL59/2002vp.

[53] This is charged with delivering an opinion on the constitutionality and the compliance with the international commitments of Finland of the legislative bills submitted to Parliament for approval. Although its members are MPs, this Committee is considered to be an authorized interpreter of the Finnish Constitution and it takes care to deliver motivated and quasi-jurisdictional opinions on the compatibility of the legislation in preparation with the constitutional and international requirements: see Article 74 of the new Finnish Constitution (Act No 731 of 1999) which became effective on 1 March 2000: www.om.fi/constitution .

[54] HE 76/2002vp laeiksi sukusolujen ja alkioiden käytöstä hedelmöityshoidossa ja isyyslain muuttamisesta. The government proposal also includes some amendments to the Paternity Act (Act No 700 of 1975). This proposal lapsed because of the end of the electoral term in February 2003 with a view to new elections in March 2003.

[55] However, an exception is made by the possibility of selecting "healthy" embryos and stem cells for the purpose of preventing a serious disease of a child born (section 5, paragraph 2).

[56] At his hearing before the Social Affairs Committee of the Senate on 12 December 2002, the Minister of Health declared himself against therapeutic cloning as "opening the door to reproductive cloning". He also wants a new criminalization to be established: the crime against the dignity of human beings, covering the prohibition of reproductive cloning and eugenic practices.

[57] The parliamentary debate is not closed yet at the time of completion of this report. It may be pointed out that in a decision entitled *Alliance for the right to life* of 13 November 2002, the Council of State, ruling on appeal, suspended the authorization to conduct experiments on imported embryonic stem cells.

[58] At his aforementioned parliamentary hearing, the Health Minister nevertheless opposed the extension of the circle of living organ donors. He wanted the list of living donors to be extended only to include restrictively enumerated persons in order to avoid commercial aberrations and pressures on potential donors. He also underlined the inconsistency of Article 12b ("An isolated element of the human body or otherwise produced by a technical process, including the sequence or partial sequence of a gene, cannot constitute a patentable invention") with Article 5 of the Community Directive 98/44/CE.

The refusal may be expressed by "all means and notably by registration in an automated register set up for this purpose"[59].

In **Greece**, Parliament adopted Act 3089/2002 on medically assisted reproduction[60]. Very permissive on the whole, this law legalizes a number of artificial reproduction methods, notably *in vitro* fertilization (IVF), surrogate mothers, fertilization by sperm donor, even out of wedlock, and *post mortem* fertilization. The law also provides for the possibility of using supernumerary embryos for medical purposes or for medical research. However, the law does prohibit reproductive cloning. For the rest, the law applies the principles of the Convention on Human Rights and Biomedicine[61]**.**

In **Denmark**, an Intergovernmental working group was set up in November 1999 by the Ministry of Interior and Health, for the preparation of report on the regulation of the so-called biobanks, defined as a structured collection of human biological material that is accessible under certain criteria, and where information contained in the biological material can be traced back to individuals. In May 2002 the working group released their report[62]. The Ministry of Interior and Health expect to present a bill to Parliament about biobanks in the autumn 2003.

In **Italy**, too, major developments have taken place during the period under scrutiny. In June 2002, the House of Representatives approved a law concerning medically assisted fertilization, which is now being examined by the Senate (ref. S-1514). This law allows access to assisted fertilization for heterosexual couples of childbearing age, either married or living together. The fertilization methods must be chosen according to the criterion of the gradual nature of the intervention. The couple must be informed about all the risks and consequences of the intervention, as well as about the existence of other ways to become parents, notably by adoption. The law prohibits heterologous fertilization, and also prohibits experimentation on human embryos. This prohibition covers the production of human embryos for research or experimentation purposes, any form of selection of embryos or gametes for eugenic purposes, cloning of human embryos and fertilization of a human gamete with a gamete of animal origin. Clinical and experimental research on embryos is permitted on condition that it is carried out with a view to protecting the health and development of the embryo, and that no other methods are available.

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

The first theme discussed under this article is that of persons deprived of their liberty. These persons are in a particularly vulnerable situation in regard to the risk of torture or ill-treatment. The report discusses - notably in the light of the work of the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment (CPT) – the situation of persons being detained in penitentiary establishments in terms of their conditions of detention, devoting specific paragraphs to the issue of prison overpopulation as well as to the treatment of prisoners requiring psychiatric care. Furthermore, it examines more briefly the situation in other places of detention, such as police stations and civil psychiatric establishments.

The two other themes that are addressed are the behaviour of the police, in particular during arrests or during demonstrations, and the penal protection of the individual against torture. The second theme is that of the forcible removal of foreign nationals. The third theme is the exercise by a State of its extraterritorial normative power for the purpose of contributing to the fight against the impunity of perpetrators of torture. The questions raised under Article 4 of the Charter of Fundamental Rights are not the only ones that came up in 2002, but they were the ones that were discussed by the majority of national reports[63].

[59] Article 7 of the bill amending paragraph 3 of Article L.1232-1 of the Public Health Code.
[60] Act no. 3089/2002, medically assisted reproduction.
[61] See the favourable position of the National Bioethics Commission, <www.bioethics.gr>.
[62] Report No.1414/2002.
[63] The reports of the subsequent years will undoubtedly deal with other issues. Those will probably include the ill-treatment of children in their homes or in educational establishments. During the period under scrutiny for instance, the **United**

Besides the European Convention on Human Rights, the two principal international instruments to protect the individual against torture and other inhuman or degrading treatment or punishment – the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment (CAT) of 10 December 1984, and the European Convention for the Prevention of Torture and inhuman or degrading treatment or punishment of 26 November 1987[64] – are applicable to all Member States of the European Union. The Member States are not only subject to the same substantial regulations. They have also agreed to submit themselves to the same monitoring mechanisms, including - in the case of the CPT - independent visits to places where persons are deprived of their liberty.

On 18 December 2002, the United Nations General Assembly adopted the optional Protocol to the Convention against torture and other cruel, inhuman or degrading treatment or punishment of 10 December 1984. The object of this Protocol is to establish a system of regular visits to places of detention in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. This principle of preventive visits was established in Vienna in 1993 during the World Conference on Human Rights, and it was conceded that the efforts aimed at eliminating torture should above all be focused on prevention[65]. The Optional Protocol also provides for the establishment of a "Sub-Committee on Prevention" dependent on the Committee Against Torture (CAT), and, at the level of each State party, for the establishment of a national preventive mechanism, consisting of one or two independent bodies to visit places where persons are deprived of their liberty. It is still too early to evaluate the attitudes of the Member States to this new mechanism to monitor their international obligations.

The situation of prisoners

In the examination of the material conditions of detention and the legal guarantees from which prisoners may benefit – who would be neither subject to a regime of "favours" where neither their rights nor their obligations are clearly defined during the time of detention, nor be unable to effectively file complaints against harassment during detention or disciplinary sanctions that are inflicted on them –[66], the doctrine of the CPT constitutes an authorized reference. Two important rulings given by the European Court of Human Rights during the period under scrutiny against the **Netherlands** and **France** illustrate the significance which the observations made by the European Committee for the Prevention of Torture and inhuman or degrading treatment or punishment have assumed for the application of Article 3 of the European Convention on Human Rights [67]. In the case of *A.B. v. the Netherlands* the applicant complained about his treatment in detention facilities in the Netherlands Antilles. In finding a breach of Article 13 (because Mr A.B. did not have an effective remedy available in respect of the conditions of his detention)[68], the European Court of Human Rights

---

Kingdom was found in violation of Article 3 of the ECHR because of lack of investigation, communication and co-operation on the part of welfare authorities that contributed to children suffering sexual abuse at the hands of their stepfather: *E and others v. United Kingdom*, 26 November 2002. And with respect to the same State, the Committee on the Rights of the Child expressed its concern that the prohibition on corporal punishment does not yet extend to private schools in Northern Ireland and that there is no legislation in place prohibiting all corporal punishment in the context of day care, including childminding, in England, Scotland or Northern Ireland. Furthermore it is concerned about the continued defence of 'reasonable chastisement' and the absence of any significant action taken towards prohibiting all corporal punishment of children in the family (CRC/C/15/Add.188, 9 October 2002, para. 35-36).

[64] *E.T.S.,* n° 126. On 1 March 2002, Protocols 1 and 2 to the European Convention on the Prevention of Torture and inhuman or degrading treatment or punishment, which became available for signing on 4 November 1993, became effective for all the State parties which ratified the Protocols on that date.

[65] In its resolution, the General Assembly requested the Secretary-General to make the said Protocol available for signing, ratification and accession as from 1 January 2003.

[66] The inability of prisoners to have legal representation in disciplinary proceedings before the prison governor at which they could be sentenced to additional periods of detention has been found to be a violation of the right to defend oneself in criminal proceedings through legal assistance : Eur.Ct.H.R., *Ezeh and Connors v. United Kingdom (Appl. n°* 39665/98 et n°40086/98),15July2002.

[67] See also the *Kalashnikov v. Russia* judgment (petition no. 47095/99) of 15 July 2002, in which the Court (3rd section) makes reference to the criterion of seven square metres per prisoner put forward by the CPT to assess the adequacy of the cell space of detainees.

[68] The Court also found a violation of Article 8 (because Mr A.B.'s correspondence with his lawyer was intercepted).

criticised "the unacceptable shortcomings of penitentiary facilities" and the authorities' "failure to implement the urgent recommendations of the CPT". The Court was "struck" by the fact that "the authorities of the Netherlands Antilles have remained totally passive for more than a year in complying with six injunctions to repair rather serious shortcomings of an elementary hygienic and humanitarian nature in prison facilities"[69].

In the *Mouisel v. France* judgment of 14 November 2002, faced with the situation of an applicant suffering from leukaemia who complained about the conditions under which he had to undergo his chemotherapy sessions (namely the wearing of handcuffs), the Court based itself in particular on the Report by the Government of the French Republic on the visit to France carried out by the CPT from 14 to 26 May 2000 to consider that in the absence of a significant risk of escape or violence and given the physical weakness of the applicant, the wearing of handcuffs during chemotherapy had constituted for the latter a particularly painful ordeal and had caused him a degree of suffering well beyond that inevitably entailed by a prison sentence and an anticancer treatment[70]. In that same ruling, the Court, taking into consideration the state of health of the prisoner and the absence of measures taken by the national authorities, judged that the latter "had not taken into account the state of health of the applicant, allowing him to avoid treatment contrary to Article 3. Keeping him in detention… undermined his dignity… "[71]. The ruling of the Court refers in this regard to the Third General Report on the activities of the CPT covering the period from 1 January to 31 December 1992, which cites in its chapter on the health situation in prisons among the cases of "incapacity for detention" "prisoners presenting a fatal prognosis in the short term, those suffering a serious disorder which cannot be treated properly in conditions of detention, as well as those who are seriously handicapped or of an advanced age". The Court concludes that this is a case of inhuman and degrading treatment on account of the fact that the applicant is being kept in detention in conditions that are not appropriate to the treatment of cancer. It should be noted, however, that France should in future be in a position to avoid such condemnations. The Act of 4 March 2002 concerning patient rights[72] has in fact introduced a new Article 720-1-1 into the Code of Criminal Procedure with regard to dying persons and persons whose state of health is in the long term incompatible with detention. This Article provides that a suspension of sentence may be ordered, whatever the nature of the penalty still to be undergone, and for an unspecified duration, for convicted persons of whom it has been established that they are affected by an illness jeopardizing their life expectancy or that their state of health is incompatible with continued detention[73].

The contribution of the CPT since 1989 illustrates the importance of specific procedural mechanisms for the effective protection against ill-treatment of persons deprived of their liberty, and whose situation is therefore particularly vulnerable: the establishment at the national level of a system of regular visits by an independent authority, such as that suggested by the CPT in the report following its visit in September and October 2001 to **Greece**[74], and such as that provided for in this country by the new Act 3090/2002 anticipating the creation of a "Body for the inspection and monitoring of detention facilities"[75], constitutes a particularly promising development in this respect, without it being necessary to await the coming into effect of the Optional Protocol to the United Nations Convention against Torture of 1984.

Generally speaking, the transparency of prisons – their openness to outside scrutiny – can but limit the risk of degrading conditions of detention, which are liable to constitute an inhuman or degrading

[69] Eur. Ct. H.R., *A.B. v. the Netherlands* (judgment), no. 37328/97, 29 January 2002.
[70] Eur. Ct. H.R., *Mouisel v. France* judgment of 14 November 2002, § 47.
[71] Eur. Ct. H.R., *Mouisel v. France* judgment of 14 November 2002, § 48.
[72] See also the implementing order of 26 April 2002.
[73] The Act was potentially liable to concern, as at 1 september 2002, 1683 detainees aged over 60, 369 aged over 70, 39 aged over 80 and 2 aged over 90: *Le Monde* 1 January 2003. This new guarantee for sick detainees has already benefited Maurice Papon (see Paris Court of Appeal, 18 September 2002: the judge added a new condition to the law, namely the absence of risk to the public order linked to the suspension of sentence).
[74] CPT/Inf (2002) 31, 20 November 2002.
[75] See Act no. 3090/2002 "Establishment of a Body for the inspection and monitoring of detention facilities and other provisions": this new body is empowered to inspect detention conditions and the application of the Prison Code at any time.

treatment of prisoners. A situation such as that of **Ireland** is unsatisfactory in this regard. While Prison Visiting Committees are appointed by the Minister for Justice, Equality and Law Reform and their reports are appended to the *Annual Reports on Prisons and Places of Detention* the quality of the information contained therein is of minimal value; and there have been no such reports published since 2000[76]. **Austria**, on the other hand, has set up an Advisory Board on Human Rights, which regularly visits places of detention, and formulates recommendations to the authorities aimed at preventing ill-treatment of prisoners. In 2002, the Advisory Board on Human Rights gave a report on the status of medical care for detained persons.[77] Since a number of deficiencies could be found in the present system, the board delivered a long list of recommendations to ameliorate the current situation. One big problem is thought to be located in the self-conception of public health officers who generally stop at diagnosis and tend to refrain from curative treatment. This could be remedied by inserting a clear legal statement into the rigid internal service directives that also emphasises the curative aspect of the officer's duties. The paramedic training of prison wards should be intensified, so that at any given time at least one medically trained person is on duty. The board suggests to offer tuberculosis examinations for all detainees on a voluntary basis and to inform about the reasons behind the measures. Detainees should always receive free copies of their medical reports. Medical examinations should be carried out in offices resembling a practice of a general practitioner and, if necessary, in the presence of an interpreter. Special attention was dedicated to the issue of hunger strike. If someone starts a hunger strike, the board suggests that the authorities promptly inform local caretaking organisations and only take decisions under the guidance of a physician. In no case should the authorities adopt disciplinary measures or sanctions against a detainee solely because of a hunger strike. As a general aim the methods of treatment of individuals in hunger strike should be harmonised throughout the country and internally revised on a regular basis. The board considers force-feeding as being a disproportionate interference with fundamental rights but instead proposes to offer psychological counselling to people inclined to harm themselves. In the **United Kingdom**, the Police Reform Act 2002 provides a statutory basis for existing voluntary arrangements for the independent custody visitors for places of detention, allowing volunteers from the community to inspect and report on the way in which arrested persons are dealt with by the police and the conditions in which they are held.

The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) visited **Denmark** in the period 28 January to 4 February 2002. The delegation visited police establishments, prisons and psychiatric establishments. The CPT found it open to criticism that the use of restrictions (e.g. supervised visits, withholding or monitoring of correspondence etc.) vis-à-vis remand prisoners continued to be widespread and to lie within the sole discretion of the police, who had received no instruction on the circumstances under which such restrictions can be applied.The CPT also found the frequent recourse to physical immobilisation of patients open to criticism. The psychical immobilisation could last for several days, or even a week or more. Physical restraint for days cannot have any medical justification and amounts to ill treatment. In regard to the prisons, the CPT noted that the Danish authorities – in order to combat the phenomenon of inter-prisoner violence and intimidation – had created special units within the prisons for inmates classified as "negatively strong". Although this precaution in general offer better material conditions of detention, CPT found it open to criticism that only a small number of inmates were accommodated in each unit and prisoners were subject to a higher degree of supervision and enhanced security. The CPT recommended further that a decision to classify a prisoner as negatively strong be reviewed at regular intervals (e.g. every three months). The CPT also made it clear that female detainees only should be held in cells or dormitories within male accommodation areas with their unequivocal agreement; this requirement was not being met at several of the prisons. Furthermore, CPT recommended medical screening on admission of all newly arrived prisoners, as well as a strengthening of the psychiatric services available in the prisons.

[76] See generally: I. O'Donnell, "Prison Matters", (2001) *Irish Jurist* (n.s.), Vol.36, pp153-173. One may also regret in this respect the fact that the Minister for Justice, Equality & Law Reform refused permission to Amnesty International to visit prisons in **Ireland** for the purpose of carrying out a study on racism in Irish prisons. For details of this controversy, including extracts from correspondence between Amnesty and the Minister, see the website of the Irish Section of Amnesty International: www.amnesty.ie/.

[77] Cf. http://www.menschenrechtsbeirat.at/index_berichte.html (German).

In July 2002, the European Committee for the Prevention of Torture published its report on a visit carried out in **Portugal** in April 1999 to several police establishments and prisons, where it expressed a great deal of concern about the level of inter-prisoner intimidation and violence, qualifying drug-relating problems in jail as "dramatic" and concluding that prison authorities are sometimes not in a position to guarantee the physical and mental well-being of the prisoners. The Interim and Follow-Up reports by Portugal outlined a series of measures undertaken to decrease overcrowding of prisons and increase custodial staff members, as well as to improve medical facilities for inmates. In the year 2002, however, it is a fact the situation has not improved, as no strategic plan has been adopted on a field that cannot be improved by isolated legislative acts. The situation in jails remains virtually explosive, with the percentage of HIV bearers in some jails reaching 80% of the prison population[78].

In its Report of April 2002 following a visit in the **United Kingdom** of February 2001[79], the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment found that much remained to be done to achieve the stated objective of holding all prisoners in a 'safe, decent and healthy environment', noting some allegations of ill-treatment, inter-prisoner violence and bullying, as well as problems of overcrowding, proper partitioning of in-cell lavatories and maintaining an adequate state of repair and cleanliness. Furthermore it found that work and educational facilities were not available for all prisoners and that out-of-cell and outdoor exercise entitlements were not always respected because of staff shortages. It recommended that provision be made in the rules governing military prisoners who undergoing disciplinary segregation to be offered at least an hour's out-door exercise each day. It also encouraged the pursuit of strategies regarding the management of drug-related problems and underlined the importance of ongoing monitoring systems for prisons managed by private sector contractors.

Belgium is moving towards the definition of a real law of penalty enforcement. In a spectacular evolution of its case law, the administrative court agreed to verify the compatibility of a disciplinary sanction imposed on a prisoner with the requirements of both international and domestic law[80]. The Belgian Council of State indeed considered that neither the principle of the separation of powers, despite the fact that the Belgian Constitution (Art. 40) entrusts the enforcement of penalties to the executive, nor the argument according to which the said sanction constitutes a "measure of internal order without any effect on the legal situation" of the prisoner forms an obstacle to the exercise of this control[81]. Moreover, the Council of State considered that Article 6 of the Convention applies to the objections to certain disciplinary sanctions imposed on prisoners, since the right to liberty is of a civil nature within the meaning of the Convention[82]. Furthermore, since the "respect for the rights of defence is a general principle of Belgian law which is of public order and is binding on all administrative authorities deciding on disciplinary matters", it must be respected by the penitentiary authorities when they impose sanctions on prisoners.

This position should not obscure a major deficiency in the legal status of prisoners in Belgian penitentiary establishments, which lies in the legal insecurity of the prisoners and the absence of effective recourse when disciplinary sanctions are imposed on them, as long as the "Law of principles concerning the penitentiary administration and the legal status of prisoners" has not been adopted[83]. At

[78] See, *e.g. Estudo do Observatório da Justiça em Portugal*, 1999.
[79] Report to the Government of the United Kingdom the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 4 to 16 February 2001, CPT/Inf (2002) 6, 18 April 2002.
[80] See on this subject R. de Béco and S. Cuykens, "La prison et les droits des détenus", *Journ. des Procès*, n° 432, 8 March 2002, p. 27, and n° 433, 22 March 2002, p. 14.
[81] See E.C. (11th ch., ref.), n° 102.343, *Wadeh*, 21 December 2001, *J.T.,* 2002, p. 190 (suspension for lack of sufficient justification for a decision to place in solitary confinement for nine days and three months of strict regime, adopted by the governor of a prison); as well as in the same case: E.C., judgment no. 102.420 of 7 January 2002, upheld by judgment no. 102.527 of 15 January 2002.
[82] The Council of State relies on the *Aerts v. Belgium* ruling given on 30 July 1998 by the European Court of Human Rights, § 59.
[83] See the Report of the Belgian Government on the visit carried out in Belgium by the European Committee for the Prevention of Torture and inhuman or degrading treatment of punishment (CPT) from 25 November to 7 December 2001, published in Strasbourg on 17 October 2002 (CPT/Inf (2002) 25), par. 96.

present, only the executive has intervened to regulate the legal status of prisoners, and only in a partial and not very transparent way: besides the Royal Decree of 21 May 1965 concerning the general regulation of penitentiary establishments, there exists a Ministerial Decree of 12 July 1971 containing general instructions for the penitentiary establishments, not published in the *Moniteur belge* (official journal), as well as hundreds of ministerial circulars, often contradicting one another, not systematically listed, and largely insufficient to offer prisoners legal security, even on essential points concerning life in detention. Already in 1994, following its visit to Belgium in November 1993, the CPT raised the problem created by this legal insecurity, in the absence of formalization in the law on the rights of prisoners. In 1998, reporting on its visit in September 1997, the CPT insisted on the necessity of establishing an effective complaints procedure for the benefit of prisoners. These recommendations have still not yielded any effects. There exists an important text on this matter, prepared at the request of the Belgian Minister of Justice by Professor L. Dupont, and currently under discussion in the Justice Committee of the House of Representatives[84].

The "Dupont" draft bill proposes to fill the gap in the law currently characterizing the detention penalty by truly recognizing the prisoner as a citizen with rights, rather than subject to the arbitrary system of "favours" granted by the penitentiary administration without any possibility of supervision of the latter. This reform starts from the principle that the prison trauma associated with deprivation of liberty should be limited as much as possible by bringing the condition of the prisoner as close as possible to that of the free citizen to an extent that is fully compatible with the deprivation of liberty (normalization), and by defining rehabilitation, correction and reintegration - rather than punishment - as the objectives of deprivation of liberty. This ambition of a forward-looking kind of penalty is reflected in the idea that "the prisoner is not subject to any restriction of his political, civil, social, economic or cultural rights other than the restriction resulting from his criminal conviction or the measure of deprivation of liberty, those that are indissociable from the deprivation of liberty and those that are determined by or in accordance with the law" (Article 6 of the draft bill). It is also reflected at the level of disciplinary procedure, which the draft bill aims to surround with a whole set of guarantees (Articles 139 to 141), and by the introduction of a right of complaint (Articles 142 to 161) before a complaints committee: the draft bill provides that this committee is given the power to suspend the challenged measure, to cancel all or part of this measure, to alter it or to charge the prison governor to take a new decision; its decisions are also open to appeal before the appeal commission of the central council.

Bearing in mind in particular the insistence of the CPT on this point - although the conclusions reached by the Committee against Torture in 2002 concerning **Denmark** show that this question also applies with regard to the United Nations Convention against Torture of 1984[85] –, we may regret the lack of support for this draft bill in Belgium from both the government and the House of Representatives, to which the bill has currently been referred. What is at stake in the draft bill of principles concerning the penitentiary administration and the legal status of prisoners goes well beyond the question of the formalization of the legal status of prisoners[86]. This draft bill would make it possible to enhance the material living conditions in order to raise the condition of prisoners in Belgium up to the level of the European penitentiary rules and the criteria established by the European Committee for the prevention of torture. For example, in the report on its last visit to Belgium, the Committee for the prevention of torture advised the Belgian authorities to re-examine the appropriateness of the regime consisting at certain penitentiary establishments in the total ban on the possession of personal effects, either during the visits which a prisoner receives, or when he returns

[84] Since the government had abandoned the submission of a draft bill to that effect, the draft bill of principles concerning the penitentiary administration and the legal status of prisoners was adopted in a Proposal for a law with the same title, submitted on 17 July 2001 by all the leaders of the parliamentary groups of the democratic parties (doc. 50 1365/001). For a detailed examination and criticism, see Network for a comprehensive reform of the prison regime, *Le prisonnier, un citoyen ! Vers une réforme du régime pénitentiaire*, March 2002.

[85] See CAT/C/CR/28/1: upon examining the periodic report of **Denmark**, the CAT criticized the lack of effective recourse procedures against decisions imposing solitary confinement upon persons serving sentences.

[86] The study of the external legal situation was entrusted to a separate commission from the Dupont commission. By a Royal Decree of 10 February 2000, the "Commission for the establishment of penalty enforcement courts, the external legal status of prisoners and the determination of penalties" (called the Holsters Commission).

from authorized release or penitentiary leave (the zero option) (see par. 76 of the above-mentioned report). This regime is aimed at excluding all trafficking in the prisons. The CPT, however, has observed the utter failure of this policy, seeing that drugs are widely circulating in the prisons that have adopted the "zero option". Moreover, this option is counterproductive, since it obliges the prisoners to stock up with personal effects at the prison canteen only, which adopts prices that are prohibitive considering the kind of income most of the prisoners have, and this will only encourage all sorts of trafficking. Moreover, this regime goes totally against the "normalization" of the prisoner's situation as is sought by the Dupont draft bill.

The same kind of deficiency characterizes the situation in **Ireland**, where the Prisons Service still exists on a non-statutory basis and the essential framework for the organisation of prison life is the 1947 Prison Rules despite the publication of draft revised rules in 1994. A similar kind of legal deficit characterizes in that country the definition of the external legal status of the prisoner: the Parole Board (previously, the Sentence Review Group) continues to operate on a non-statutory basis despite a decision of the Courts condemning the non-statutory scheme for sentence reviews. By adopting a penalty enforcement act[87], Belgium and Ireland would bring their situation closer to that of **Germany** since the Prison Act came into effect there on 1 January 1977 (*Strafvollzugsgesetz*). The Prison Act – which identifies the resocialisation of inmates as one of the goals of detention (section 2) – stipulates that inmates are only to be subject to such restrictions on their liberty as are laid down in that Act (section 4 subs. 2). Unless specifically provided in the Act, only such restrictions may be imposed on inmates which are indispensable for maintaining security or to prevent a serious disturbance to the order in the prison. This means that the inmates' general legal position may not be worse than that of individuals living outside prison. Thus, the Fundamental Rights granted to individuals by the Basic Law of the Federal Republic of Germany apply equally to prison inmates, unless the Prison Act connects restrictions on liberty with incarceration. This guarantee of legal protection means that inmates are not under an obligation to accept measures on the part of the prison authorities which they regard as having been to their detriment in an inadmissible manner without having them examined. Firstly, the Prison Act provides in this respect that inmates are to be afforded the right to approach the prison governor with requests, suggestions and complaints on matters concerning themselves (section 108). If a representative of the controlling authority inspects the prison, it is to be ensured that inmates can also approach them. Beyond this, any inmate who feels that his or her rights have been violated by a measure carried out by the prison authority, or by its refusal, has the right to apply for a court decision (section 109)[88]. Written and oral communication with defence counsel is not subject to restriction. Correspondence with counsel and visits by the same are therefore also not monitored.

During the period under scrutiny, the CPT visited (in February 2002) the **Netherlands** and the Netherlands Antilles. The CPT's report (CPT/Inf (2002) 30) states that the delegation received no credible allegations of ill-treatment by law enforcement officials. Further, most persons interviewed stated that they had been correctly treated at the time of their apprehension and during their custody. However, the CPT expressed extreme concern by the numerous cases of inter-prisoner violence in the Netherlands Antilles reported to the delegation. As to the *Extra Beveiligde Inrichting (EBI)* [Maximum Security Prison] in Vught, the CPT made some recommendations but it did not repeat its harsh findings from 1997, when it found that the isolationist regime amounted to inhuman treatment.

[87] The development of a legal framework for penalty enforcement is a fairly general trend within the European Union (see O. De Schutter and D. Kaminski, *L'institution du droit pénitentiaire. Enjeux et limites de la reconnaissance de droits aux détenus*, Brussels-Paris, Bruylant-L.G.D.J., 2001). During the period under scrutiny, the Supreme Court (2nd chamber) in **Spain** ruled in a judgment of 9 July 2002 that appeals against penalty enforcement courts should be able to be lodged before the court that passed the original sentence. It should also be pointed out that, starting from the observation that a large disparity in the criteria of application of the regulations governing conditional release or penitentiary leave, the General Council of the Judiciary - advisory body on justice, composed of magistrates and lawyers - has called, with the favourable opinion of the national council, for the establishment of a new penalty enforcement court, which would have jurisdiction over the whole national territory.

[88] In two decisions of 27 February 2002 – 2 BvR 553/01 – and of 13 March 2002 – 2 BvR 261/01 – (Neue Jurist. Wochenschrift 2002, 2699 und 2700) the Federal constitutional Court reminded the observing of the fundamental right to effective remedy : it considered that the housing of a prisoner might violate human dignity, and that he or she has the right to a decision by a judge even if the claimed condition already is redressed.

Regarding the Bloemendaal Special Detention Facility, the CPT considered that the practice of obliging detainees to strip and walk naked through a corridor to the shower area should be abandoned and steps should be taken to ensure that all consultations with members of the establishment's health care team are conducted out of the hearing and – unless the health care professional concerned requests otherwise in a given case – out of the sight of custodial staff. This Detention Facility is one of the centres for the detention of the increased number of drug couriers. After a sudden and sharp increase in the number of drug traffickers arrested at Schiphol international airport, led to serious capacity problems, an act was adopted so as to allow their detention in more basic accommodations: the *Tijdelijke Wet Noodcapaciteit Drugskoeriers* [Temporary Act on Emergency Capacity Drug Couriers]. The measures were challenged with reference to Articles 3 and 8 ECHR and Article 26 ICCPR. On 14 August 2002 the President of the Regional Court of The Hague, in interim proceedings, rejected these claims[89]. He observed that the measures pursued a legitimate aim, taking into account the exponential growth of the number of drug traffickers and the serious impact of this growth on the entire law enforcement machinery. Although one of the factors which the judgment relied upon was that the measures were only of a temporary nature, on 9 October 2002 a bill was tabled seeking to prolong the applicability of the Temporary Act with another two years, i.e. until 8 March 2005. The detention regime, however, will be improved in some respects[90].

The CPT points out, in connection with prisoners placed in high-security facilities on account of the risks they present, that these prisoners "must, within their detention unit, be given a regime with relatively few restrictions so as to compensate for the severity of their prison situation"; "The existence of a satisfactory programme of activities is equally, if not more, important in a high-security facility than in an ordinary facility. Such a programme would do much to counteract the pernicious effects on the personality of the prisoner of life in the confined atmosphere of such a facility"[91]. The idea behind these considerations is very simple: if certain prisoners may present greater risks and if the prison regime can take this into account in terms of the contacts with the outside world, vexatious measures do not contribute to security, and may on the contrary make it more difficult to maintain security. In **Italy**, Act no. 279/2002[92] was adopted during the period under scrutiny. This Act amended Article 41b of the Act on Penitentiary Administration (Act no. 354/1975), by making permanent the discipline of exceptional penitentiary treatment provided for detainees accused or convicted of serious violations of the penal code, notably for terrorist activities or organized crime[93]. The new Article 41b provides that, in the presence of serious reasons of public order and security, the Minister of Justice may suspend, by reasoned decree, the ordinary penitentiary treatment of prisoners or inmates accused or convicted of such crimes, if there are elements to suggest that the detainee has links with a criminal, terrorist or subversive organization. Insofar as this exceptional regime comprises, for example, the exclusion from bodies representing the prisoners or the restriction of the time of walks outside, in other words, measures that bear no relation whatsoever to the objective of security, we may question its compatibility with the approach advocated by the CPT.

During the period under scrutiny, the situation of prisoners in **Italy** also received attention on the occasion of the *Messina* judgment given by the European Court of Human Rights on 24 October 2002. This judgment noted a violation of Article 8 of the European Convention on Human Rights with regard to the censoring of a prisoner's correspondence with the European Court of Human Rights. It is regrettable that since 15 November 1996, when the first judgments were given in this case by the European Court of Human Rights[94], Italy has still not amended its legislation.

[89] LJN no. AE6513.
[90] *Kamerstukken II* 2002/03 28627, nos. 1-3.
[91] European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT), 11th general activity report, covering the period from 1 January to 31 December 2000, 3 September 2001 (CPT/Inf(2001) 16), par. 32.
[92] Legge 23 dicembre 2002 n. 279, Gazzetta ufficiale del 23 dicembre 2002 n. 300.
[93] As at 27 July 2002, 645 prisoners were subjected to the penitentiary treatment provided for by Article 41b of the Act concerning the penitentiary administration (before its amendment), of whom 79 had still not been judged in the first instance (source: website of «Radicali italiani» www.radicali.it).
[94] Eur. Court H.R., *Calogero Diana v. Italy* judgment of 15 November 1996, Vol. 1996-V and *Domenichini v. Italy* judgment of 15 November 1996, Vol. 1996-V.

The issue of prison regimes imposed on persons presenting a high security risk is also touched upon in a report published on 12 February 2003 by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment, in which it evaluated the treatment of foreign nationals detained in the **United Kingdom** by virtue of the 2001 Act concerning the fight against terrorism, crime and security. The report concerns a visit carried out in February 2002. At the time of the visit[95], the persons detained by virtue of the 2001 Act were treated as class A prisoners, in other words, the class listed as presenting the highest security risk. According to the CPT, if the material conditions of detention were adequate, the situation left much to be desired in terms of the time spent out of the cells and on activities. With regard to health care, the CPT recommended that the specific needs for psychological support and/or psychiatric care - both present and future - of persons detained by virtue of the 2001 Act be closely monitored. In their reply, the authorities of the United Kingdom underlined the commitment shown by the nursing staff to giving the detainees an adequate level of care.

During the period under scrutiny, another aspect of the penitentiary in the **United Kingdom** was highlighted by the judgment of the Eur. Ct. H.R. of 14 March 2002 in the case of *Paul and Audrey Edwards v. United Kingdom*. In this case, the failure to pass on information to the prison authorities about one prisoner who killed another placed in the same cell and the inadequate screening processes of those authorities was found to be a breach of the obligation to protect the second prisoner's life. A private inquiry into this death which lacked the power to compel witnesses was held to amount to a breach of the obligation to conduct an effective investigation[96].

Prison overpopulation

Prison overpopulation constitutes a degrading treatment[97]. However, it is not inevitable. It remains extremely worrying in Greece, as the CPT underlined in a report published on 20 November 2002[98]. It has recently increased in Sweden on account of the higher number of prison sentences[99], obliging the authorities to derogate from the custom that only 90% of the places available in prison should be effectively occupied. In **Spain**, prison overpopulation is one of the main concerns expressed by the national Ombudsman in his 2001 report[100]. It is also a source of concern in the **United Kingdom**[101]. On the other hand, it virtually does not affect **Germany**, which on 31 March 2002 numbered 74,904 prisoners for 77,887 available places[102].

A solution that consists in increasing the number of places in prison – as was done in **France** in the Act no. 2002-1138 of 9 September 2002 for the orientation and planning for Justice[103], called the Perben Act, which contains a programme for the construction of 11,000 prison places, of which 7,000 by way of net increase[104], or as is planned in **Sweden** with a programme for the creation of 1,429

[95] In their reply, the authorities of the United Kingdom informed the CPT that the persons detained under the 2001 Act had been transferred to facilities that offered more activities and that their regime is constantly reviewed.

[96] During the period under scrutiny, there has also been concern about the rising number of suicides in British prisons and the lack of resources to identify those at risk :*Annual Report of HM Chief Inspector of Prisons for England and Wales 2000-2002*.

[97] To identify the conditions under which prison overpopulation may merit such a characterization, see Eur. Court H.R. (3rd section), *Kalashnikov v. Russia* judgment (Application no. 47095/99) of 15 July 2002.

[98] CPT/Inf (2002) 31, 20 November 2002. The issue of prison overpopulation was also at the centre of the talks which the Council of Europe Commissioner for Human Rights held with the Greek authorities during his visit to Greece from 2 to 5 June 2002 (see report CommDH(2002)5, 17.7.2002).

[99] Kriminalvårdsstyrelsen (The Prison and Probation Service), Verksamhetsstatistik, 27 November 2002, www.kvv.se. In October 2002 the average number of persons in prison and custody was 4291, which is 614 more compared with data for the year 1999.

[100] *El Defensor del Peublo. Resumaen del Informe a las Cortes Generales correspondiente a 2001*, juin 2002, pp. 2-3.

[101] See the *Annual Report of HM Chief Inspector of Prisons for England and Wales 2000-2002*.

[102] But the capacity of the open prisons is not fully used (12,856 places and only 6,337 inmates). This means that some prisons are indeed overcrowded (65,031 places with 68,567 inmates).

[103] OJ of 10 September 2002, p. 14934.

[104] The programme also provides for 4,000 replacement places, allowing the closure of the oldest cells. See J.-P. Céré, " La loi n°2002-1138 du 9 septembre 2002 et l'amélioration du fonctionnement et de la sécurité des établissements pénitentiaires ", *Dalloz*, n°43, 5 December 2002, p. 3324.

additional places over the next four years – can only be a temporary solution that is necessarily precarious since there is a general tendency for the prisons to fill up at the rate of increase of their accommodation capacity[105]. This is particularly to be feared in the current context, where there is a trend towards re-emphasizing the deterrence value of prison sentences, particularly when the term of imprisonment is sufficiently long: in **Ireland**, Provisions of the Criminal Justice (Drug Trafficking) Act, 1996, which allow for periods of extended detention for those arrested in connection with certain drug trafficking offences, were continued in operation until 31st December, 2004[106]; in **Spain** – as regards persons convicted of terrorist offences or other particularly serious offences[107] – or in **Belgium**[108], a debate has been reopened on the reinstatement of irreducible sentences; in the **United Kingdom**, an indeterminate life sentence has been held not to be inhuman or degrading or a breach of the liberty[109].

More worthy of attention are undoubtedly the so-called alternative measures to prison sentences, thereby extending the range of penalties which are liable to result from criminal convictions, such with a view to emphasizing the rehabilitation function of the penalty and to abandoning the idea that prison is the outcome of every penal sanction or constitutes the paradigm thereof. This is the approach advocated by Recommendation R (99) 22 of the Ministerial Committee of the Council of Europe on prison overpopulation and prison inflation. During the period under scrutiny, **France** took a step in that direction with the Decree of 3 April 2002 amending the Code of Criminal Procedure and relating to the placing under electronic surveillance[110], which allows the court of liberty and the detention of persons on remand, or the court of penalty enforcement to replace imprisonment by electronic surveillance measures; the application of this mechanism is supervised by a magistrate. **Belgium** has also made progress in this area with the incorporation in the Penal Code of forced labour as a new penalty imposed by magistrate's courts[111] – not, like electronic surveillance, as a modality of penalty enforcement, but as a distinct penalty as such. Particular care must be taken, however, that the development of these so-called alternative measures does not result in an enlargement of the penal net, in other words, that offenders are sentenced to an alternative penalty there where, before, prosecution would have ended in a suspended sentence or a non-execution of short prison sentences[112]. A monitoring of these mechanisms, notably a statistical evaluation of the use made of them by the criminal courts and the possible consequences of the non-observance of certain conditions attached to the adoption of alternative measures to imprisonment[113], should therefore be regarded as an essential measure accompanying the introduction of these measures.

[105] European Committee for the prevention of torture and inhuman or degrading treatment or punishment (CPT), 11th general activity report, covering the period from 1 January to 31 December 2000, 3 September 2001 (CPT/Inf(2001) 16), par. 28.
[106] Statistical details regarding the operation of this legislation during the period 18th November, 2000 to 22nd November, 2002 is contained in a report to the Minister for Justice, Equality and Law Reform available at: http://www.justice.ie/ .
[107] Regarding the draft organic law prepared by the government, see *Iustel. Diario del Derecho*, 27 December 2002.
[108] See the bill for the introduction into Belgian penal law of irreducible sentences for serious crimes, 12 November 2001, House of Rep., *Doc. parl.,* sess. ord. 2001-2002, 1500/001.
[109] Indeed, the court reasoned that it was not arbitrary for the assessment of whether release would endanger the public to be postponed until the end of the tariff prescribed for retribution and general deterrence; *R v Lichniak* [2002] 4 All ER 1122.
[110] Decree n° 2002-479 of 3 April 2002, *J. off. Rép. fr.* of 10 April 2002.
[111] Act of 17 April 2002 instituting forced labour as a distinct penalty imposed by magistrate's courts, *Mon. b*., 7 May 2002. See C. Gillain, "La peine de travail, peine autonome?", *J.T.,* 2002, p. 641; M. De Rue and I. Wattier, "Une nouvelle peine correctionnelle et de police dans le Code pénal: la peine de travail", *J.D.J.* n° 220, December 2002, p. 12.
[112] In Belgium, the introduction of two Acts of 10 February 1994 on penal arbitration (making it possible to avoid initiating prosecution) and community service (as a condition of probation) has been said to lead to the "de facto recriminalization of petty crime, in the context of a criminal justice system that remains essentially based on retribution": Ph. Mary, "Le travail d'intérêt général et la médiation pénale face à la crise de l'Etat social: dépolitisation de la question criminelle et pénalisation du social", in *Travail d'intérêt général et médiation pénale : socialisation du pénal ou pénalisation du social,* Brussels, Bruylant, 1997, p. 331.
[113] When the non-observance of certain conditions attached, for example, to a sentence consisting in community service or house arrest, leads to imprisonment, the development of alternative measures does not necessarily represent a solution to the problem of prison growth. In **Italy**, the Constitutional Court declared manifestly unfounded a question of constitutional validity concerning measures to restrict personal liberty (ruling of 6 March 2002, n° 40), while what was at issue was a provision of the code of criminal procedure aimed at automatically converting house arrest into preventive detention in case of violation of the prohibition to leave the house, without the magistrate being able to take into account the specific motives and circumstances of the violation.

Detainees requiring psychiatric care

During its visit to **Belgium** at the end of 2001, the CPT had immediately made an observation to the authorities, requesting information about measures adopted in order to give appropriate treatment - both quantitatively and qualitatively - to detainees held in the psychiatric wings of several penitentiary establishments (Lantin, Antwerp and Andenne). Since the CPT had reported serious shortages of treatment staff and infrastructure, the Belgian government informed the CPT of its intention to increase the budgetary resources and to group together the prisoners requiring psychiatric care in the penitentiary or social protection facilities, of which the standards in terms of nursing staff should be identical to those in civil psychiatric hospitals. The Belgian authorities also informed the CPT that the psychiatric wing of Lantin prison was to close on 15 April 2002 at the latest, and that its forty patients would be transferred to the Social Protection Facility (EDS) of Paifve[114].

In **France**, Section V of Act no. 2002-1138 of 9 September 2002 for the orientation and planning for Justice[115] provides for the establishment of specially designed psychiatric facilities in order to cope with the growing population of prisoners suffering from mental illnesses, given the inadequacy of the old system. The Act also adds new articles to the Public Heath Code (Articles L.3214-1 to L.3214-5) concerning the hospitalization of mentally ill detainees. Article L.3214-1 provides henceforth that "a detainee suffering from mental problems may be hospitalized, with or without consent, in a health facility within a specially designed unit". These new provisions make it possible to improve prison conditions which, up to then, were unsuitable for the treatment of often serious mental illnesses.

In **Ireland**, the Minister for Justice, Equality & Law Reform announced in December 2002 his intention to discontinue the use of "padded cells" to detain prisoners experiencing mental illness and psychiatric problems in response to a campaign organised by the Irish Penal Reform Trust.

Other detention facilities

Detention conditions should also be satisfactory in other detention facilities than the penitentiary establishments. After its February 2002 visit in the **Netherlands**, the CPT made a number of recommendations concerning the Phillips Central Police Station in Sint-Maarten (including a recommendation to ensure that all detainees are provided with mattresses and appropriate bed coverings at night). In its 2002 Report on the **United Kingdom**, the CPT reported allegations of ill-treatment (punches, kicks and verbal abuse) by the police in Wales and that contact with a lawyer by some detained persons had been refused or obstructed. It also found police cells to be dirty and poorly ventilated. It also expressed concern about the suitability of the vehicles used for transporting prisoners – especially children - to and from courts where long journeys are involved. In the report that was published on 17 October 2002 following the visit carried out by the CPT to **Belgium** at the end of 2001, the CPT delivered specific recommendations concerning the detention conditions offered by the police and the judiciary. The CPT urges the Belgian authorities to adopt by *urgent necessity* and without delay the legal and regulatory standards, taking into account the criteria listed by the CPT concerning the detention conditions at those establishments (§§ 39 to 50). The cell unit of the Court of Liège was the subject of the first observation that was communicated at once, by which the CPT charged the Belgian authorities on 7 December 2001 to decommission the 0.72m² wire-netted cages in the cell unit of the Court of Liège within three months. The Minister of Justice was unable to comply with the injunction by the appointed deadline. Only the measures aimed at reducing the overpopulation could be adopted in time. In reply, the CPT "appealed to the Belgian authorities to immediately enlarge or, if this is not possible, to decommission the cells" (§ 50). Other establishments of the police and the judiciary are also targeted by the CPT.

[114] See Report to the Belgian Government concerning the visit to Belgium carried out by the European Committee for the prevention of torture and inhuman or degrading treatment or punishment from 31 August to 12 September 1997, CPT/Inf (98) 11, § 61 and §§ 206 to 239. The idea of a transfer to the EDS in Paifve left the CPT sceptical, given the inadequacy of the treatment infrastructure which the CPT found at that establishment.
[115] OJ of 10 September 2002 p. 14934.

Detention at civil psychiatric facilities

During its visit to **Belgium** at the end of 2001, the CPT went to a civil psychiatric hospital, the Centre Hospitalier Jean Titeca (in Brussels). The CPT first observed that in 90% of the cases, the involuntary patients had been the subject of forced hospitalization – provided for by the Belgian Act of 26 June 1990 concerning the protection of the mentally ill – on the basis of an emergency procedure with less respect for the rights of the defence than in the ordinary procedure. The CPT recommended that the medical report that is necessary for forced hospitalization (and continued hospitalization) should always be drawn up by a psychiatrist and that the law should provide in the future for the automatic and regular review of the forced hospitalization (for example every 3 or 6 months). The CPT makes it clear that "this review procedure is meant to offer guarantees of independence and impartiality, as well as of objective medical expertise, and should apply to all forms of involuntary placing, whatever the reasons" (§ 148). The CPT delegation has not reported any allegations of ill-treatment of patients by nursing staff, but would nevertheless emphasize its serious concern about the recurrent, frequent and known use by the staff of means of physical restraint (straps, straitjackets, etc.), the prolonged use of which *cannot have any medical justification* and is similar to inhuman or degrading treatment (§§ 139 to 142). The CPT points out that the principle of free and informed consent to treatment - recently established in Belgium by the Act of 22 August 2002 on patient rights - applies to involuntary patients, and emphasizes that the possibility offered to patients to lodge confidential complaints with a clearly designated body constitutes an essential guarantee against ill-treatment.[116]

In **Ireland**, the Report of the Inspector of Mental Hospitals (for the year ending 31st December, 2001[117]) detailed a variety of concerns both of a general and particular nature regarding places of psychiatric detention and standards of psychiatric care[118]. According to figures supplied to the Department of Health and Children by service providers, there were 4,256 patients resident (including those on parole) in public and private psychiatric hospitals and acute psychiatric units on 31st December, 2001. During that year there were 26,037 admissions to these facilities of which 2,597 were involuntary. While some improvements (such as the appointment of a Mental Health Commission in 2002) were introduced in the Mental Health Act, 2001 (no. 25) much of that Act has yet to be implemented as a consequence of which many of those in psychiatric detention continue to be detained pursuant to the Mental Health Act, 1945. The deficiencies of that legislative instrument have been acknowledged by Government (by the passing of the 2001 Act) and constituted the basis for a friendly settlement in relation to an application before the European Court of Human Rights[119].

Police conduct

On 17 October 2002, the Belgian Government demanded that the report prepared by the European Committee for the prevention of torture (CPT) following its third periodical visit in **Belgium** from 25 November to 7 December 2001 to certain detention facilities be made public. In its report, the CPT mentioned that it had received a small number of eyewitness accounts of ill-treatment (such as the excessive use of teargas and truncheons) inflicted principally during arrests. Moreover, the CPT, having read the 2000 report of the Committee P[120], found an increase in the number of complaints and inquiries on account of acts of violence and abuse of authority[121]. The CPT also underlined that the Committee P mentioned deficiencies in administrative and judicial inquiries (rarity of legal proceedings and inertia of the disciplinary authorities), thus throwing doubt on the preventive function of such procedures. The CPT concludes that "the risk for a person of being ill-treated during his

[116] The mediation body established by the Act of 22 August 2002 on patient rights should be able to perform this function.
[117] No report has yet been issued by the Inspector for the period January-December 2002.
[118] For a full copy of the Report with statistical appendices see: www.doh.ie/pdfdocs/inspect01.pdf
[119] *Croke v. Ireland*, Application no.33267/96, December 2000.
[120] Activity Report 2000 of the Standing Committee for the Supervision of the Police Services, 13 July 2001*, DOC 50 1360/001* (House of Representatives).
[121] This trend is confirmed in the later reports of the Committee P (2001 and 2002).

detention by the police cannot be avoided" and it advises the Belgian authorities to "keep showing vigilance in this area". [122]

The CPT has also found the absence in Belgian legislation of certain basic guarantees against the risk of ill-treatment inflicted by the police, such as the right of access to a lawyer while in police custody and to a doctor of one's choice, as well as the right to notify a counsellor, but also information about rights, the initiation of a questioning procedure and the electronic recording of interrogation sessions, the introduction of an independent complaints investigation mechanism, the keeping of a single and complete detention register, and finally the minimum material conditions of detention (quality of hygiene, food and bedding). Despite a request made in this sense by the CPT on its previous visits, the non-compliance by Belgium with those recommendations continues and constitutes a "serious source of concern" for the CPT. Although in practice certain rights are being respected (such as the right to notify a person or to contact a doctor of one's choice when this is materially possible), these guarantees ought to be established by law rather than based on practice. It emerges from the initial report submitted by Belgium in the context of the United Nations Convention against torture and other cruel, inhuman or degrading treatment or punishment (pp. 44-47)[123] that a legislative initiative will be taken in order to offer a uniform solution in these areas, as is required by Article 11 of the United Nations Convention against torture. With regard to those same guarantees, the Committee P, while confirming the lack of access to a lawyer during police custody and that, faced with the need for medical treatment, the doctor is generally chosen by a police officer rather than by the person being detained, lists positive initiatives with regard to the notification of detainees of their rights (presentation of a document or personalized information)[124].

Access to a lawyer from the start of police custody constitutes not only an essential guarantee against the risk of ill-treatment, but also a guarantee of the rights of defence, notably the right of the accused to remain silent. The CPT addressed to the **Netherlands**, in its report following its visit in 2002[125], recommendations concerning this particular issue. The CPT recommends that the right of access to a lawyer should be guaranteed during the initial period of detention by the police for interrogation purposes. The right to notify a third party immediately should in principle be guaranteed. Exceptions designed to protect the legitimate interests of the police investigation should be clearly circumscribed and made subject to appropriate safeguards. The current wording of Section 62 (2) of the Dutch Code of Criminal Procedure, which may be interpreted as permitting, *inter alia*, postponement of notification "in the interests of the investigation", is not sufficiently precise.

The recommendations which the United Nations Committee against Torture (CAT) made to **Spain** on 19 November 2002[126], are along the same lines as those which the CPT made to Belgium and the Netherlands. The CAT recommends that situations that are conducive to torture or ill-treatment, such as solitary confinement for 5 days under the cover of the Antiterrorist Act should be remedied. It also points out that complaints of ill-treatment must be investigated quickly, effectively and impartially, and it encourages the recording of police interrogations as well as the recourse to joint medical expertise (including by a doctor chosen by the accused).

The delivery to all detainees of a statement of their rights, as is envisaged by the European Commission Green Paper on "procedural safeguards for suspects and defendants in criminal

[122] See paragraph 15 of the CPT report. The CPT further considers that the following principles should imperatively *and in an appropriate form* be impressed upon the police: "when making an arrest, the use of force should be limited to what is strictly necessary. Once a person has been restrained, there is no justification for police brutality" (§ 16). These rules may be established in a code of conduct, the compilation of which is effectively provided for in the Royal Decree of 30 March 2001 concerning the legal position of the personnel of the police services.

[123] Belgium submitted the report on 17 August 2001. It will be discussed at the meeting of the Committee against Torture starting on 28 April 2003.

[124] See *Rapport d'activités 2001 du Comité permanent de contrôle des services de police, soumis à l'examen de la Chambre des Représentants et du Sénat le 26 septembre 2002*, more particularly Part III, Section I, chapter I, section I, p. 5.

[125] CPT/Inf (2002) 30.

[126] CAT/C/XXIX/Misc.3.

proceedings in the European Union"[127], would constitute an appreciable protection of the individual against the risk of ill-treatment. Such a statement should formulate in simple language that can be understood by everyone, and in several languages, at least the following rights: the right to remain silent in order not to incriminate oneself; the right to be informed as soon as possible of the reasons for one's arrest; the right to appeal to a lawyer; the right to complain against perpetrators of ill-treatment or intimidation; the right to receive from the arresting officers a certificate stating the time and place of one's arrest.

Acts of violence committed by the police

Violence committed by the police remains a source of concern in all the member States of the European Union:

- A petition filed by seventeen presumed sympathizers of the Catalonian independence movement, who allegedly suffered physical and mental ill-treatment during their arrest and detention in Catalonian and in the offices of the General Directorate of the Guardia Civil in Madrid was communicated to **Spain** by the European Court of Human Rights[128].
- *Amnesty International* and the *International Helsinki Federation* have collected many cases of ill-treatment inflicted by police officers on persons detained by the police in **Greece**. These NGOs also deplore the *de facto* impunity which they claim the police officers enjoy who allegedly committed reprehensible acts against prisoners. The Greek authorities seem aware of the need to eradicate this phenomenon[129] – concerning the extent of which there is no unanimity – by imposing disciplinary and/or penal sanctions on the officers responsible and by making police officers aware of the problem through education programmes on human rights.
- In **Finland**, the Office of Chancellor of Justice received 179 complaints against police authorities for the year 2002; the Parliamentary Ombudsman, in turn, registered 439 complaints. 18 cases gave rise for measures by the Ombudsman or the Deputy Ombudsman (2 reprimands and 16 views).
- With respect to **Portugal**, the report presented by Amnesty International to the Committee Against Torture of the UN, in 2000[130] summarized its concerns about deaths in police custody, ill-treatment and illegal detention by police officers, ill-treatment of prisoners and the issue of effective impunity. The report by Amnesty International for the year 2002[131] refers to new deaths, ill treatment and inter-prisoner violence, reporting in detail the death of a citizen of Cabo Verde, following a police shooting from a patrol car, ill-treatment in police custody of two French nationals, only the latter being still under judicial investigation.
- In the **United Kingdom**, the Police Complaints Authority recorded that 9 out of 163 allegations of sexual and serious non-sexual assaults led to disciplinary action against the police officers concerned[132].

It is in any case essential that an effective complaints procedure exists to allow any abuses committed to be penalized, without necessarily having to follow a judicial procedure. In **Ireland**, the Garda Siochana Complaints Board repeated in its last published report its previously expressed concerns about its own powers and functions under the Garda Siochana Complaints Act, 1986 and welcomed the decision, announced by Government, to replace the Board with an independent Garda Inspectorate[133]. In **Sweden**, the impartiality of the internal investigation of complaints against the police has been questioned, on the basis that there is little transparency in the process. The criticism

[127] COM(2003) 75 final, of 19.2.2003.
[128] European Court H.R. (4th section), *Martinez Sala et al. v. Spain* (Application n° 58348/00), decision of 2 July 2002.
[129] See Instructions from the Greek Chief of Police, entitled "Conduct of police officers towards persons being checked, arrested or detained - measures to eliminate the phenomenon of violence committed by police officers against citizens", dated 19 June and 12 July 2002, *supra* (note 11), p. 13.
[130] Published in July 2001, AI Inex: EUR 38/002/2001
[131] http://web.amnesty.org/ai.nsf/Index/EUR012002
[132] *Annual Report and Accounts of the independent Police Complaints Authority April 2001-31 March 2002*.
[133] See generally: Walsh, *The Irish Police: A Legal and Constitutional Perspective*, (Dublin: Round Hall Sweet & Maxwell, 1998).

comprises also cases when complaints have been dismissed as the result of lack in police education.[134] The UN Committee against Torture refers in its subjects of concern with respect to Sweden to "the allegations of imprecise, often subjective and inadequate guidelines and lack of training given to police personnel and prison guards regarding the use of force".[135] In **Portugal**, a new deontological Code of Conduct for the Police and GNR was finalised in 2002: its article 4 provides for police officers to have special regard to the physical and mental integrity, honour and dignity of the persons in custody, to ensure that no act of torture is committed and no other form of punishment or cruel, inhuman or degrading treatment is carried out[136]. It is an example of self-regulation by which the police services are binding themselves to the respect of the Constitution, of the Universal Declaration of Human Rights, of the European Convention on Human Rights, of International and of European rules, and of the law in general. On the other hand, however, allegations of torture, ill-treatment and abuse by police officers, in principle do not constitute a "public offence": its investigation is not automatic, depending upon the filing of a complaint by the victim. In the **United Kingdom**, the Police Reform Act 2002 establishes an Independent Police Complaints Commission for England and Wales, with power to supervise and manage complaints about the police. It will have powers of investigation and a body of independent investigators at its disposal and will also have referred to all serious cases regardless of whether a complaint is made. It also enables inferences to be drawn from a failure to mention a fact when questioned or charged in police disciplinary proceedings.

Demonstrations during international summits

Police conduct at demonstrations organized on the occasion of big international summit meetings constitutes a source of particular concern. In its Concluding Observations on **Sweden** of April 2002, the HRC recommended that there should be guarantees that during demonstrations no equipment that can endanger human life is used.[137] It should be mentioned in this regard that the police was authorised to use live ammunition during the EU summit in June 2001 in Gothenburg. During the demonstrations, for which alleged rioters have been recently convicted by the Supreme Court (Högsta domstolen (HD)) in highly contested circumstances[138], three people were shot by the police officers. It has been alleged that shots were fired directly at people without any warning. These circumstances are currently under investigation.[139] **Italy** is still awaiting the results of several inquiries into clashes between police and demonstrators at the World Conference on technology and government, which took place in Naples on 17 and 18 March 2001 (whereupon eight police officers were arrested in Naples and held on remand for fifteen days), and into acts of violence committed on 21 July 2001 by the police at Diaz College in Genoa, which accommodated 93 participants in the demonstrations against the G8[140], as well as at the Bolzaneto barracks where arrested demonstrators were taken.

[134] The Swedish NGO Foundation for Human Rights and the Swedish Helsinki Committee for Human Rights, Alternative Report to the Human Rights Committee, Stockholm 2002, p. 8. See also Alternative Report to the Committee against Torture, p. 17.
[135] CAT/C/XXVIII.CONCL.1, 07/05/2002, § 5 (d).
[136] *Resolução do Conselho de Ministros* 37/2002, of 28th February, which take notice of the adoption of a Police Service Deontological Code (Public Security Police and National Guard have adopted it).
[137] CCPR/CO/74/SWE, § 10.
[138] It has been claimed that the presented evidence did not show that the young persons in question really had the intention to further violent rioting. See e.g. R.Fjellström, *HD osäkrar rättssamhället*, SvD 23 November 2002, p. 5. See also, E.Wijk, *Likhet inför lagen, HD!,* SvD 27 September 2002, p. 2.
[139] Alternative Report to the Committee against Torture, p. 22.
[140] 62 participants were injured during police charges, of whom at least fifteen journalists. According to information supplied by the press and also reported by Amnesty International, it would appear that the two bombs found in the courtyard of the establishment had been planted there by the police. One policeman also claimed to have been stabbed with a knife.

Forcible removal of aliens

Like other member States of the European Union, **Belgium** has known serious incidents in this area[141]. During its visit to Belgium at the end of 2001, the CPT wanted to make the use of force and means of constraint during the removal of foreign nationals by air a priority question. While taking note of the numerous measures that have been taken by the Belgian authorities to reduce the risk of ill-treatment (such as the definitive abandonment of any method liable to obstruct breathing), the CPT points out that the removal operations continue to present a manifest risk of inhuman and degrading treatment, both during the preliminary stages of repatriation and during the flight itself (§ 34). It therefore recommends that additional guarantees be taken into consideration when examining the new draft directive on operations of forcible removal (§ 36). The following recommendations are made: prohibition of physical aggression or threats used in order to persuade the person concerned to board the plane, or to punish the person for not doing so; rendering exceptional the use of means of constraint that are liable to provoke "postural asphyxia" or so-called "economy class syndrome" (illness resulting from prolonged immobility during a flight), for which guidelines should be laid down; request to submit to a prior medical examination any person undergoing forcible removal, and the automatic imposition of such an examination following a failed attempt; continued use of audiovisual monitoring during forced departure under escort or secure flights, and installation of surveillance cameras in the dedicated areas of the Repatriation Department.

In **Finland**, the rapid increase in the number of forcible removals – at the end of November 2002, 633 people had been forcibly removed since the beginning of the year – led to the setting up of a think tank in the spring of 2002 with the task of suggesting ways to encourage voluntary departure. The conclusions of this think tank are not yet known.

Protection against torture

On 28 May 2002, the UN Committee Against Torture gave its conclusions on the periodic report submitted by Denmark (CAT/C/CR/28/1). The CAT expressed its concern that the criminal law still lacks a definition of torture as provided in Article 1 of the Convention142 and does not punish torture by appropriate penalties as required by article 4 (2) of the Convention against Torture. The CAT has expressed a similar regret on the occasion of the current drafting of Article 174 of the Penal Code in the conclusions adopted on 19 November 2002 with regard to Spain. Belgium, for its part, had wanted to bring itself into line with the United Nations Convention of 10 December 1984 against torture and other cruel, inhuman or degrading treatment or punishment, by adding to the Penal Code certain provisions[143] criminalizing – as a distinct offence – torture, inhuman and degrading treatment. Contrary to the definitions used in Articles 1 and 16 of the United Nations Convention, the new criminalizations are not limited in Belgian law by considerations relating to the official capacity of the perpetrator, the requirement of special intent or the legal context in which the criminalized conduct is situated; they are thus given an extended scope. Furthermore, it is expressly stipulated in the provisions relating to torture and inhuman treatment that the perpetrator is prohibited from justifying his act by referring to the orders of his superior or the command of the authority. In **Ireland**, where the Constitution of 1937 was already interpreted as offering protection against torture[144], Section 11 of the Criminal Justice (UN

[141] On 18 March 2002, the Chambre du Conseil in Brussels referred five police officers to the Magistrate's Court, of whom three were charged with having committed acts that led to the death of Semira Adamu, who suffocated on 22 September 1998 while she was taken to Brussels national airport to be expelled, and two were charged with having organized the repatriation. The Magistrate's Court in Brussels has not yet ruled on this case (see 4th Report of the Belgian Government (October 2002) to the Human Rights Committee, in the context of the supervision of the compliance with ICCPR, p.30).

[142] See also Res. 2002/38 adopted by the UN Commission on Human Rights during its latest session and according to which torture must be made an offence under domestic law.

[143] See the introduction of Articles 417*b* to 417e into the Penal Code by the Act of 14 June 2002, bringing Belgian law into conformity with the Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted in New York on 10 December 1984, *M.B.,* 14 August 2002. The Act also amends the articles concerning hostage taking (article 347*b* of the Penal Code) and indecent assault or rape (article 376 of the Penal Code) by introducing torture as an aggravating circumstance in those offences.

[144] *State (C) v. Frawley* (1978) IR 326.

Convention Against Torture) Act, 2000 (No. 11) came into force in May 2002. Although the right to physical integrity is protected in **Sweden** by the Instrument of Government (RF) Chapter 2, Sections 4-6, the Committee against Torture observed in its Concluding observations of 1 May 2002 that the Swedish domestic law does not contain a definition of torture in keeping with Article 1 of the Convention and recommended that the Swedish law should identify torture and cruel, inhuman and degrading treatment as specific crimes, punishable by appropriate sanctions in domestic criminal law (CAT/C/XXVIII.CONCL.1, § 5).[145]

Fight against impunity by the adoption of legislation with extraterritorial scope

It is classic for a State to adopt legislation criminalizing certain kinds of conduct of its nationals or persons permanently residing on its territory, according to a broader understanding of the principle of active personality. On 11 July 2002, the Danish Minister of Justice entrusted a commission of experts with the task of considering the need to revise the rules of the Penal Code (Straffeloven (2000:849)) regarding the territorial applicability of the criminalizations provided for by the Code. This reflection has come at a time when the Committee on the Elimination of Discrimination against Women, when it examined the Danish fourth and fifth periodic reports on 12 June 2002[146], expressed its concern that Danish residents who arrange for female genital mutilation abroad are not liable to prosecution unless such mutilation is a crime in the country in which is performed and hence, urged to penalize all Danish residents who initiate such violations. Like Joint Action 97/154/JHA of the Council of 24 February 1997 to combat trafficking in human beings and the sexual exploitation of children, the Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA) provides that the States in principle establish their competence with regard to the acts defined in this basic decision when the perpetrator of the offence is one of their nationals, even if the offence was not committed on their territory. The examples may be legion.

In addition, there exist situations where international law, far from prohibiting, obliges the States to exercise competence - notably through prosecution - with regard to situations with which they have no connection, neither by the nationality or place of residence of the perpetrator, nor by that of the victim, nor by the place where the offence occurred: such is in fact the requirement imposed by the principle *aut dedere aut judicare* which is enshrined in Article 5 of the United Nations Convention of 10 December 1984 against torture and other cruel, inhuman or degrading treatment or punishment, by compelling the state where the alleged author of torture has been found to introduce proceedings against him when this accused person cannot be extradited to another State that is a party to the convention. Belgium sought to respond to this hypothesis with the Act of 18 July 2001. This replaces Article 12b of Chapter II of the Preliminary Section of the Code of Criminal Procedure, which presently reads as follows: "... the Belgian courts of law are competent to take cognizance of offences committed outside the territory of the Realm and intended by an international convention binding Belgium, when this convention obliges it, in whatever manner, to refer the case to its competent prosecuting authorities".

The peculiarity of the Belgian Act of 16 June 1993 (amended by the Act of 10 February 1999) concerning the suppression of serious violations of international humanitarian law, however, is that it asserts a "universal jurisdiction" of the Belgian courts, even when the alleged author is not present in Belgium, without such assertion being obligatory under international law. This Act earned Belgium a condemnation by the International Court of Justice, in its judgment given on 14 February 2002 in the case concerning the arrest warrant of 11 April 2000, which brought the Democratic Republic of Congo (DRC) into conflict with the Kingdom of Belgium.[147]

[145] It would also be required to clearly establish that the use of statements obtained by methods of torture as evidence in legal proceedings is illegal : Id., § 7(h).
[146] CEDAW C/2002/II/CRP.3/Add.3.
[147] Following the issue on 11 April 2000 by a Belgian examining magistrate of an international warrant for the arrest of Mr Abdulay Yerodia Ndombasi (who in the meantime has been appointed minister of foreign affairs) for war crimes and crimes against humanity, - and this on the basis of the Belgian Act of 16 June 1993, as amended by the Act of 10 February 1999 -, the DRC filed a petition on 17 October 2000 with the International Court of Justice against Belgium claiming a violation of

The International Court of Justice has found that a provision of the Act of 16 June 1993 authorizing the prosecution of persons having immunity by virtue of their official capacity was not in accordance with international custom. In the opinion of the Court, by issuing an international warrant for the arrest of Abdulay Yerodia Ndombasi, Belgium had ignored the immunity of criminal jurisdiction and inviolability which ministers of foreign affairs and heads of State in office enjoy from any act of authority by a body of a foreign state, even if they are suspected of serious violations of international humanitarian law. The submission on 18 July 2002 of a private bill specifying that the application of the Act of 16 June 1993 should respect the limits set by international law is meant to draw lessons from this judgment.[148]

The judgment of the International Court of Justice of 14 February 2002, however, did not call into question the actual principle of universal jurisdiction for certain serious crimes under international law, nor the extraterritorial scope of the Belgian law. It was, however, called into question by three judgments pronounced on 16 April 2002[149] and on 26 June 2002[150] by the indictment division of the Court of Appeal in Brussels. In these judgments it was considered - despite the information that was yielded by the preparatory work on the 1993 Act[151] - that, according to Article 12 par. 1 of the Act of 17 April 1878 (Preliminary Section of the Code of Criminal Procedure), the prosecution of the offences enumerated in the Act of 16 June 1993 concerning the suppression of serious violations of international humanitarian law can only take place if the accused is in Belgium. In order to end the legal uncertainty created by these decisions – the effect of which was to suspend a whole series of complaints filed in Belgium on the basis of the Act of 16 June 1993 –, an "interpretative" private bill was submitted on 18 July 2002[152]. It provides that the proceedings instituted on the basis of the "universal jurisdiction" act should be judged admissible without consideration of the place where the presumed perpetrator of the crime may be found153. This private bill was voted the Senate on 30 January 2003.In a judgement dated February, 12, 2003, the Supreme Court (Cour de Cassation) stated that the law of June, 16, 1993 excludes the application of article 12 of the Preliminary Section of the Code of Criminal Procedure and confirmed that the admissibility of proceedings related to serious violations of international humanitarian law is not subordinated to the presence of the suspect on the Belgian territory.[154]

---

the principle of the sovereign equality of the member States of the United Nations (Article 2§1 of the Charter) as well as a violation of the principle of immunity of jurisdiction which ministers of foreign affairs should enjoy by virtue of an international regulation of customary origin, while questioning the validity of the extent of the universal jurisdiction claimed by Belgium. The International Court of Justice, however, did not explicity pronounce itself on the question of the "validity" with regard to international law of the absolute universal jurisdiction (principle according to which a person presumed accountable may be prosecuted for acts committed abroad, while neither the victim nor the perpetrator have any connection with the prosecuting country and the presumed perpetrator is not on his territory) which the Belgian courts have been given in this area.

[148] See Article 4 of the private bill of 18 July 2002 amending the Act of 16 June 1993 concerning the suppression of serious violations of international humanitarian law (Senate, session 2001-2002, doc. 2-1256/1).

[149] Decision concerning the admissibility of the complaint against Abdulay Yerodia for violation of international humanitarian law.

[150] It concerns two judgments given on the admissibility of the complaints against Ariel Sharon and Laurent Gbagbo. See Brussels (10th ch., indictment), 26 June 2002, *J.T.*, 2002, p. 539.

[151] *Doc. parl.,* Senate, sess. 1990-1991, 1317-1, p.16 (providing jurisdiction for the Belgian courts to suppress serious violations of the International Geneva Conventions of 12 August 1949 and Additional Protocols I and II of 8 June 1977 to these Conventions, even if the perpetrator is found on Belgian territory). See, confirming this reading of the intention of the legislator, P. d'Argent, "La loi du 10 février 1999 relative à la répression des violations graves du droit international humanitaire*", J.T.,* 1999, p. 554; H.-D. Bosly and D. Vandermeersch, *Droit de la procédure pénale,* Bruges, La Charte, 1999, p. 63 ; A. Andries, E. David, C. Van den Wijngaert and J. Verhaegen, "Commentaire de la loi du 16 juin 1993 relative à la répression des infractions graves au droit international humanitaire", *Rev.dr.pén.crim.,*1994, p. 1173.

[152] Another private bill, submitted on the same day, is aimed at amending the Act of 16 June 1993 in order to root it more firmly in international law. The idea is to organize the relationship of complementarity between the Belgian courts and the International Criminal Court for the prosecution of acts committed after 1 July 2002. The principle of universal jurisdiction is essentially preserved by the planned amendment.

[153] See Article 2 of the interpretative private bill (of 18 July 2002) of Article 7, par. 1, of the Act of 16 June 1993 concerning the suppression of serious violations of international humanitarian law (Senate, session 2001-2002, doc. 2-1255/1).

[154] Judgement following the appeal introduced against the decision of June, 26, 2002 (Ariel Sharon case) by the indictment division (Chambre des mises en accusation) of the Court of Appeal of Brussels.

Neither the judgment of 14 February 2002 of the International Court of Justice, nor the aforementioned judgments of the Court of Appeal in Brussels - which are based solely on an interpretation of the Belgian law of criminal procedure - allow us to presume that the maintenance of such a universal jurisdiction, even in cases where it is not obligatory under international law**,** would be contrary to this, and notably to the principle of the sovereign equality of States.

In fact this is not an isolated example. **Greece** has adopted Act no. 3064/2002 to combat trafficking in human beings, violations against sexual liberty, pornography featuring minors, and more generally the economic exploitation of sexual life and the aid to victims of these acts, which provides for the competence of the Greek courts to take cognizance of offences linked to the trafficking in human beings, irrespective of the place where the offences were perpetrated, the nationality of the presumed perpetrator or of the victim155.

Article 5. Prohibition of slavery and forced labour

Prostitution, domestic slavery and clandestine labour are the forms taken by modern slavery[156]. Since most of the member States have no specific criminalizations that are adapted to these forms of slavery[157], it is through "relay" offences such as procuring, imposition of housing or working conditions that are contrary to human dignity, arbitrary detention or assisting unlawful entry and residence of foreign nationals on the territory, or abuse of vulnerability and dependence, that the phenomenon of modern slavery can be suppressed. One difficulty that is frequently encountered, however, is that the persons being exploited are perceived as criminals, given that they are often illegally on the territory[158], which naturally discourages the victims of economic or sexual exploitation from denunciating the perpetrators[159]. We must take care, in the context of the fight against trafficking in human beings for labour or sexual exploitation, not to confuse the victims of trafficking with the perpetrators of these offences. This contradiction, which is the main obstacle to an effective fight against human trafficking, will only be overcome if the victims are given real guarantees, such as that of being allowed to stay on the territory if they help the judicial authorities in their efforts to dismantle a network[160].

[155] Article 11 § 2 of this Act has added a paragraph h) to Article 8 of the Penal Code, which is worded as follows: "The Greek penal laws apply to Greek and foreign nationals, no matter what the laws of the place where the offence was perpetrated say, for acts committed abroad: … h) trafficking in slaves, trade in human beings, or sexual relations (obscenity') with a minor for payment".

[156] Certain data illustrate the extent of the phenomenon. In **Spain**, for example, according to the Minister of the Interior, 475 clandestine immigrant labour networks have been dismantled, and 2070 persons in charge of such networks have been arrested; only in the first six months of 2002, 101 procuring networks were dismantled, and 439 persons arrested in connection with forced prostitution. See *La Vanguardia*, 31 December 2002. For **Portugal**, the figures presented by the IOM are impressive, as well as those coming from SOS Racism: with small variations they speak of 400 000 Eastern Europeans, which add to traditional migrant communities coming from African Portuguese speaking countries and Brasil (See, *Boletim do Alto Comissário para a Imigração e Minorias Étnicas*, of the years 1998, 1999, 2000, 2001). In **Ireland**, the National Consultative Committee on Racism and Inter-culturalism (NCCRI), in association with the Equality Authority, organised a seminar on migrant workers on 10th December, 2002, which served as an opportunity to disclose illegal situations that could be classed as enforced labour, such as the withholding of passports or retention of work permits by employers.

[157] In **Italy**, however, the Government on 18 September 2001 submitted a bill to Parliament to amend the provisions of the penal code concerning the reduction or maintenance in slavery, the buying and selling of slaves and the introduction of an article prohibiting trafficking in human beings (Ddl S-885). The aim of the bill is to improve the protection of the victims and to penalize trafficking in human beings more severely. The House of Representatives is currently examining the bill.

[158] But not only in such a situation. The Committee on the Rights of the Child has expressed concern that, in the **United Kingdom**, trafficking of children for sexual and other exploitation is still a problem and that sexually exploited children are still criminalized by law: CRC/C/15/Add.188, 9 October 2002, para 57.

[159] In **Ireland**, for example, this situation was attacked by trade unions and by NGOs. See generally: Communication to Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights by Dr. Pauline Conroy of July 2001; Conroy, "Protecting Children in Europe – the Berlin or Boston Approach?", European Union – International Organisation for Migration STOP Conference on Preventing and Combating Trafficking in Human Beings – A Global Challenge for the 21st Century, (18-20 September, 2002), Brussels.

[160] We should also ask ourselves if the fact of having been the victim of sexual exploitation cannot be understood as a form of persecution, within the meaning of the Geneva Convention of 28 July 1951, undergone on account of belonging to a specific social group, namely that of women. See European Parliament Resolution on the situation of fundamental rights in the European Union (2000), of 5 July 2001 (2000/2231(INI)(A5-0223/2001)): the European Parliament recommends that the

With regard to embassy personnel, there is the specific problem of the diplomatic immunity enjoyed by their employers. This immunity puts them beyond all prosecution as well as all action for damages brought by a private servant: Article 31 of the Vienna Convention of 18 April 1961 on diplomatic relations guarantees diplomatic officials immunity from criminal jurisdiction of the State to which they are accredited, and also guarantees them immunity from civil and administrative jurisdiction except for a limited number of actions[161], which does not include actions brought by a private servant[162].

Abuse of victims of trafficking in human beings

The Council framework decision of 19 July 2002 on combating trafficking in human beings (2002/629/JAI)[163], which the member States are expected to transpose by 1 August 2004, provides that the member States must make punishable all acts relating to the trafficking in human beings, notably because they are characterized by an "abuse of authority or of a situation of vulnerability, which is such that the person has no real and acceptable alternative but to submit to the abuse involved", when such acts are performed for the purpose of exploitation of their labour or sexual exploitation[164]. The use of the notions of "abuse" or "vulnerability" leads us to expect difficulties of interpretation. In **Belgium**, there has been some controversy recently surrounding the interpretation of Article 77b of the Act of 15 December 1980 on the access to the territory, residence, establishment and removal of foreign nationals. This provision, introduced by the Act of 13 April 1995 containing provisions aimed at suppressing trafficking in human beings and child pornography[165], penalizes any person who aids the entry, transit or residence of a foreign national in Belgium either by making use towards the foreigner of "fraudulent manoeuvres, violence, threats or any form of constraint", or by abusing the particularly vulnerable situation of the foreigner "on account of his administrative or precarious situation or his minority state, state of pregnancy, illness, disability or physical or mental deficiency" (Article 77b, § 1). The Supreme Court has given a restrictive interpretation of this criminalization by considering that non-compliance in regard to the foreigner with social legislation, despite the precarious situation of the foreigner, and, consequently, his vulnerability, should not necessarily lead to the conclusion that the perpetrator of these offences is guilty of violating Article 77b of the Act of 15 December 1980[166].

---

harmonized definition of the status of refugees is based "on an interpretation *lato sensu* of the Geneva Convention, concerning acts of persecution committed by persons other than officials of the State and persecution based on gender" (§ 59).

[161] It concerns real actions concerning a property situated on the territory of the accrediting State, an action concerning a private succession, an action concerning a professional or commercial activity exercised by a diplomatic agent outside his official functions.

[162] Unlike the immunity granted to States, the immunity defined here makes no distinction between acts of public authority (*jure imperii*) and acts of management (*jure gestionis*). It should be noted, however, that in a judgment of 1 March 2002, the Court of Appeal in Brussels considered that the Vienna Convention of 18 April 1961 applying to diplomatic officials and members of their family and granting them immunity from prosecution cannot be interpreted as ruling out that the national courts can take restrictive educational and protective measures towards children benefiting from diplomatic protection when they find themselves in a problematic situation concerning their education or in a situation where they are in danger (*R.W.,* 2002, p. 301). Alternatively, the Court of Appeal upholds the view that if, however, *quod non*, Articles 31 and 37 of the said Vienna Convention should not be able to be interpreted as such, those provisions would be contrary to the Convention of 20 November 1989 relating to the rights of children. The latter treaty prevails over the Vienna Convention in accordance with the rule by which the provisions of an earlier treaty can only apply if they are compatible with those of a later treaty.

[163] OJ L 20 of 1/8/2002, p. 1. The framework directive abrogates joint action 97/154/JHA of the Council of 24 February 1997 to combat trafficking in human beings and the sexual exploitation of children (OJ L 63 of 4/3/1997, p. 2), insofar as it concerns trafficking in human beings.

[164] See Article 1, § 1, of the framework decision. More precisely, these acts must be committed "for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography".

[165] *Mon. b.*, 25 April 1995.

[166] Cass., 9 janvier 2002, *J.D.J.*, n° 218, octobre 2002, p. 36. See also, Appeals Court Liège, 25 avril 2001, *J.D.J.,* n° 218, octobre 2002, p. 35. On this, see P. Lecocq, "Travail clandestin et traite des êtres humains, où est la limite ?", *J.D.J.,* n°218, octobre 2002, p. 14.

In **Denmark**, the Government launched on 2 December 2002 Action Plan to combat Trafficking in Women. The action plan contains a number of initiatives to support victims and to prevent trafficking in women. These initiatives include among others the development of a model for prepared return of women living in Denmark as victims of trafficking. An element in this model will be the establishment of shelters for victims where the women can stay for a maximum of 15 days while their situation can be clarified and their return be prepared. Furthermore, the plan includes the establishment of a hotline for the victims, establishment of teams of fieldworkers and an advertising campaign targeted at potential clients. An amendment to the Danish Penal Code[167] moreover has strengthened criminal protection against human trafficking: in line with the EU framework decision of 19 July 2002, the provision covers all aspects of human trafficking and any underlying abuse.

In **France**, Act no. 2001-434 of 21 May 2001, recognizing trafficking and slavery as a crime against humanity, was a major step forward. However, the offence only concerns crime syndicates and not cases of individual exploitation. The private bill was submitted, under the Socialist majority, on 8 January 2002 to the French National Assembly, and proposed to define the notion of "trafficking" on the basis of the first Additional Protocol to the United Nations Convention against transnational organized crime to prevent, suppress and punish trafficking in persons (15 December 2000)[168], by providing for appropriate sanctions. The bill wanted to allow a residence permit to be granted to the victim if he or she agreed to work together with the police and the judiciary to prosecute the perpetrators of trafficking, as well as the strengthening of the repressive machinery. It received no further treatment, however.

Greece has often been criticized[169] for not having effective legislation to combat human trafficking. In 2002, the Greek Parliament took action to fill this gap by adopting, for the first time, comprehensive legislation to combat this scourge. The new Act 3064/2002[170] came to supplement the arsenal of criminal law in this area and contained provisions concerning aid to victims of human trafficking. The law criminalizes the most hideous forms of trafficking in human beings, namely the removal of human organs, exploitation of the labour of others, as well as the recruitment of minors to be deployed in armed conflicts. Also punishable as a specific offence is the trafficking in human beings with a view to their sexual exploitation. Also a crime is the fact of forcing the victim to give his or her consent by fraud, deceit or abuse of a situation of vulnerability, by offering promises, payment or other benefits. The fact of committing the said crimes against minors or feeble-minded persons, or in connection with the unlawful entry, residence or departure of the victim from the country is considered an aggravating circumstance.

The law also provides for the compulsory, temporary or definitive withdrawal of the licence of an establishment or firm on whose premises crimes of pornography featuring children or trafficking in human beings have been committed. Furthermore, the new law establishes the competence of the Greek courts to take cognisance of offences related to trafficking in human beings, irrespective of the place where the said offences have been perpetrated or of the nationality of the presumed perpetrator

[167] Section 262 was added in Straffeloven (2000:849) [Danish Penal Code 2000:849]. This incrimination goes in hand with far-reaching investigatory powers. The new provision and the maximum penalty of eight years of imprisonment allow the police – when the conditions contained in the Danish Retsplejelov (2002: nr.777) [Act 2002: nr. 777 On Administration of Justice] for such imprisonment are met – to break the confidentiality of communications, including phone tapping, etc. when they investigate cases involving trafficking in human beings.

[168] The French National Assembly adopted the Act authorizing the ratification of this Convention on 24 July 2002 after its last reading.

[169] See the Report on trafficking in human beings of the State Department of the United States, dated 5/6/2002, <http://www.state.gov/g/tip/rls/tiprpt/2002/>, as well as the report entitled Memorandum of Concern: "Trafficking of Migrant Women for Forced Prostitution into Greece" of the NGO Human Rights Watch, <http://www.hrw.org/backgrounder/eca/greece/greece_memo_all.pdf>.

[170] Act no. 3064/2002 "To combat trafficking in human beings, violations against sexual liberty, pornography featuring minors, and more generally the economic exploitation of sexual life and the aid to victims of these acts"]. It should be pointed out that the Act in question has amply taken into account the proposals contained in a report by the National Commission of Human Rights (28/2/2002).

or the victim. The second part of Act 3064/2002 is devoted to measures to help victims and to repatriate them.
In **Ireland**, the decision adopted in July 2002 by the Department of Enterprise, Trade and Employment (Migrant Work Permits Division) to suspend the issuing of work permits for certain classes of entertainment occupations, e.g. hostesses and entertainers in lap-dancing clubs leads us to ask the question of knowing when abuse of victims may be presumed. The same problem is encountered in **Finland** with regard to the interpretation to be given to the prostitution of Estonian or Russian women: there is some controversy on the question of knowing to what extent they have given their free consent to their arrival in Finland and their prostitution, or to what extent they are the victims of human trafficking.

Although it did not ratify the Additional Protocol on trafficking in persons to the United Nations Convention against transnational organized crime[171], **Sweden** since 1 July 2002 recognizes an offence specifically connected with trafficking in human beings for the purposes of sexual exploitation[172]. The Criminal Code (BrB) was amended to include the offence of trafficking in persons for sexual purposes[173]. The penal provisions now entail that anyone who, with the help of certain improper means, induces a person to make her/his way to or allow herself/himself to be transported to another country for the purpose of being subjected to certain sexual crimes or in any other way be exploited for sexual purposes, can be sentenced to prison for trafficking in humans for sexual purposes for not less than two years and no more than ten years. The legislative changes have been criticised by members of the Parliament for, among other things, the too restrictive conception of "trafficking" in humans.[174] Measures should also be adopted to protect victims of trafficking in human beings. According to the proposals on changes in the Aliens Act, these victims may be given the possibility to obtain temporary residence permits in Sweden if it is deemed necessary in order to conclude proceedings against the perpetrators. There might be, in addition, occasions when the victim's situation can constitute due cause to grant a permanent residence permit on humanitarian grounds.[175]

Prostitution

Although the multiplication of European and international instruments aimed at suppressing trafficking in human beings for the purposes of sexual exploitation leads us to anticipate a harmonization of the national laws in this area, the States act in dispersed order if the activity of prostitution is not linked to trafficking and constitutes an activity carried out voluntarily by the person offering sexual services. In **Belgium**, a private bill regulating prostitution was submitted on 7 February 2002 in the House of Representatives (doc. 50 1630/01). The authors consider that, in the world of prostitution, there exist certain abuses which can only be combated effectively if legislation is made in this area. They suggest licensing the running of a prostitution establishment, and the granting of such licences should be subject to certain conditions, such as the physical and mental integrity of the person practising prostitution, and the prevention of nuisance to the neighbours. The bill also subjects to special rules persons who practise prostitution on a self-employed basis and those who practise it under the direction of a third party. A standard employment contract is provided for the second category.

[171] However, Sweden did implement the EU Council Framework decision on measures to combat trafficking of human beings. See Government Bill, prop. 2001/02:99, Sveriges antagande av rambeslut om åtgärder för att bekämpa människohandel.
[172] Government Bill, prop. 2001/02: 124 Straffansvaret för människohandel.
[173] BrB Chapter 4, §1a - Lag om ändring i brottsbalken (SFS 2002:436)) (Law on Changes in the Criminal Code (SFS 2002:436).
[174] H.Bargholtz, *Otillräcklig lag mot trafficking*, SvD 12 January 2003, p. 31.
[175] SOU 2002:69, Människosmuggling och offer för människohandel, Slutbetänkande av Anhörigkommittén, pp. 30-31. The Swedish Red Cross has underlined the importance of adopting legal provisions which shall guarantee the victims of trafficking access to health care, medical attention and psychological help during their stay in Sweden. See Svenska Röda Korset, yttrande över Människosmuggling och offer för människohandel,, Slutbetänkande av Anhörigkommittén SOU 2002:69, 17 December 2002, p. 2. It is expected that the committee's proposals shall be put into effect on the first of July 2003.

In its Activity Report for 2001, the Standing Committee for the Supervision of the Police Services offers an argument which shows that the fight against trafficking in human beings may win by a regulatory approach to prostitution[176]. Following an analysis of prostitution in several Belgian cities (Antwerp, Ostend, Ghent, Schaerbeek, Saint-Josse-Ten-Noode and Liège), the Committee P found that the majority of female prostitutes were of foreign origin (70% in Antwerp, mainly of European origin; 51% in Ghent, of European and African origin, etc). The Committee P also pointed to the absence of a social status for persons practising prostitution; the absence of a uniform approach by the authorities with regard to the question of knowing whether prostitution can be considered a profession has been pinpointed as well. The Committee P believes that a recognition of prostitution as a profession would offer a number of advantages, such as the regulation of the access to the profession and the conditions under which it is practised, the imposition of control mechanisms (periodical medical checkups, inspection of the workplace, etc), the provision of a firmer social network and legal security; it would also allow the police to combat abuses more effectively. The Committee P argues that properly controlled prostitution will give prostitutes a regular legal situation[177], and considers that by making them less vulnerable, they will become less liable to fall victim to the practices of procurers, whatever their origin.

If the private bill to regulate prostitution succeeds, **Belgium** will move from an abolitionist model, based on the criminalization of the organization of prostitution, to a regulatory model, as was adopted by the **Netherlands** – and which makes a distinction between "forced" prostitution, which can be penalized, and "freely consented" prostitution[178]. It should be remembered that the European Court of Justice, feeling that "it is not up to the Court to substitute its appraisal for that of the legislators of the member States where an allegedly immoral activity is practised lawfully"[179], already had the opportunity to consider that the practice of prostitution could constitute a provision of services within the meaning of Community law, or an unsalaried activity practised on a self-employed basis[180]. The regulation in a member State of this activity – which the Belgian private bill defines as "the voluntary performance by an adult person of sexual acts with adult third parties, for payment, in whatever form, the parties having agreed on the conditions and the form of such acts" – consequently means that this State would offer a legal framework permitting the provision of services which are prohibited in other States or for which they offer no legal framework.

On the question of prostitution, the position of **Sweden** is poles apart from the regulatory position, with the Swedish Act of 1998 on violence against women criminalizing the simple purchase of sexual services. This is a clearly different direction from the regulatory position which **France** also seems to be favouring since the new majority came to power there. The bill on internal security, adopted after Act no. 2002-1094 of 29 August 2002 for the orientation and planning of internal security[181] and currently under discussion in Parliament, focuses, among other things, on the question of modern slavery. It only considers prostitution from a repressive point of view, with regard to both the procurers and the prostitutes, although the latter are often the victims of organized crime networks[182]. Article 18, creating the new Article 225-10-1 of the Penal Code, extends the notion of soliciting to passive soliciting and makes it an offence punishable with 6 months imprisonment and a fine of 3,750 euros. The associations fear that these measures will make prostitution go clandestine, which in turn

[176] See for what follows Part III, Section I, Chapter I, section III of the Report.
[177] The report of the Committee P only talks about female prostitutes.
[178] Such a distinction appeared in the final Peking declaration adopted on 15 September 1995 at the 4th World Conference for Women (A/Conf. 177/20 (1995), § 114b). It also appears in Recommendation 1325 (1997) of the Parliamentary Assembly of the Council of Europe concerning the trade in women and forced prostitution in the member States of the Council of Europe (23 April 1997). It is also featured in the Additional Protocol to the United Nations Convention against transnational organized crime.
[179] In the same sense, see regarding the voluntary interruption of pregnancy the judgement of 4 October 1991, *Society for the Protection of Unborn Children Ireland*, C-159/90, *ECR.* I-4685, point 20, and, regarding lotteries, the judegement of 24 March 1994, *Schindler*, C-275/92, *ECR*. I-1039, point 32.
[180] C.J.C.E., 20 November 2001, *Aldona Malgorzata Jany e.a.*, C-268/99.
[181] J. off. Rép. fr., 30 August 2002, p. 14398.
[182] See the Opinion of 14 November 2002 of the National Consultative Commission of Human Rights, commentary on the bill: www.commission-droits-homme.fr .

will increase the risk of violence and public health problems. Clients may be prosecuted if they use the services of prostitutes who are particularly vulnerable (minors, handicapped, etc: Article 18 intended to complete Article 225-12-1 of the Penal Code). Article 29 of the bill also provides for the issue of a temporary residence permit to foreign prostitutes who denounce their procurers. However, nothing has been provided to protect victims against possible reprisals. On the other hand, a temporary residence permit may be withdrawn from foreign nationals who are guilty of soliciting or procuring.

In **Spain**, the trend within the independent Communities – under pressure from the local authorities and neighbourhood associations – is to confine prostitution and to remove it from the city centres or from certain areas, notably by preventing it from being set up in the proximity of schools. The decree of the *Generalitat de Catalunya* of 1 August 2002[183] provides that prostitution establishments must not be located in the proximity of establishments that are visited by minors, that they must have a special operating licence, and must offer certain guarantees in terms of hygiene (room with lavatory, shower, bidet, ventilation, approved contraceptives). The regulation was widely criticized for not granting any rights to prostitutes while seeking to diminish their presence on the public highway.

In **Finland**, although prostitution is tolerated - except for the purchase of sexual services from minors aged under 16 -, the question of its prohibition has been put openly, although we are still awaiting the submission of a bill on this matter. A controversial issue is that of the prostitution in Finland of women from Russia or Estonia. It is estimated that, each year, 4000 to 6000 women prostitute themselves in Finland, many of whom come from those States since the ties between Finland and the Baltic States have been strengthened. The number of prosecutions for procuring has also increased: from 14 prosecutions in 1997 to 64 in 2001[184]. A declaration adopted on 31 October 2002 in Helsinki by 68 of the 78 parliamentary members of the Nordic Council delivered a call to combat trafficking of women and to reduce the demand for prostitutes. It is in this context that the programme of the Finnish Ministry of Social Affairs and Health is situated, which is aimed at combating sex tourism and trafficking in prostitutes by supporting programmes favouring the education and professional integration of women in the countries from which the victims of trafficking originate[185].

[183] Decreto 217/2002, de 1 de agosto, por el que se regulan los locales de pública concurrencia donde se ejerce la prostitución.
[184] Ministry of the Interior, 8 April 2002.
[185] Press release from the Ministry of Social Affairs and Health of 12 February 2002.

CHAPTER II. FREEDOMS

Article 6. Right to liberty and security

The main hypotheses in which, according to Article 5 §1 of the European Convention on Human Rights, a person may be deprived of his liberty are the detention on remand of a person for the purpose of bringing before the competent legal authority on suspicion of having committed an offence, the detention of a juvenile for the purpose of educational supervision or lawful detention for the purpose of bringing him before the competent legal authority, and the detention of a foreign national to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition. The commentary which the report devotes to Article 6 of the Charter of Fundamental Rights is structured around these three hypotheses: detention on remand, detention of minors and specific detention of foreign nationals.

Article 5 §4 of the Convention, however, provides for every situation of detention the right to a judicial review, so that a court may decide speedily on the lawfulness of his detention and order his release if the detention is not lawful. This essential guarantee against the risk of arbitrary detention, the substance of which varies according to the type of detention concerned, has given rise to an important case law of the European Court of Human Rights. During the period under scrutiny, the European Court of Human Rights has found that this provision has been violated by **Austria**, because it did not guarantee the right to defence in the proceedings concerning the lawfulness of the detention on remand[1]. On several occasions during that same period, **France** was condemned because of the excessively long time to examine applications for immediate release, filed by persons interned in psychiatric institutions[2]. The European Court of Human Rights also found that **Portugal** had violated this provision because of the time elapsed between the application for release of a person placed in psychiatric confinement after having been found not criminally responsible, and the review by the court of the person's continued confinement, as well as because of the time elapsed between the drawing up of a medical report on the condition of the applicant and the decision adopted as to his continued confinement[3]. An action that was brought against the **Netherlands** by a foreign national threatened with expulsion, one of whose applications for release had not, in his view, been treated with proper diligence, led to a friendly settlement[4]. The **United Kingdom** has been condemned by the European Court of Human Rights because the inability of persons sentenced to terms of discretionary life imprisonment to have their continued detention reviewed by a judicial body with power to release them after they had served the period prescribed for deterrence and retribution has been found to be a violation of the right to have the lawfulness of one's detention speedily determined by a court[5]. The British courts have found that the arrangements for determining whether a person serving a life sentence should be released after serving the tariff prescribed for retribution and general deterrence because he or she was no longer a danger do not meet the requirement for a speedy determination of the legality of detention as they imposed delays that were unrelated to the nature or the difficulty of the particular case[6].

---

[1] European Court of Human Rights, *Lanz v. Austria* (application no. 24430/94) judgment of 31 January 2002.

[2] European Court of Human Rights, *Delbec v. France* judgment of 18 June 2002; *L.R. v. France* and *D. M. v. France* judgments of 27 June 2002; *Laidin v. France* judgment of 5 November 2002.

[3] European Court of Human Rights, *Magalhaes Pereira v. Portugal* (application no. 44872/98) judgment of 26 February 2002.

[4] European Court of Human Rights, *Samy v. Netherlands* (application no. 36499/97) judgment of 18 June 2002 (friendly settlement).

[5] European Court of Human Rights, *Benjamin and Wilson v. United Kingdom* (application no. 28212/95) judgment of 26 September 2002. See also European Court of Human Rights, (GC), *Stafford v. United Kingdom* (application no. 46295/99) judgment of 28 May 2002.

[6] *R (on the application of Noorkoiv) v Secretary of State for the Home Department* [2002] 4 All ER 515.

Detention on remand

The excessive recourse to detention on remand is one of the main causes of prison overpopulation. The figures collected at the request of the Council for Penological Cooperation (PC-CP) of the European Committee on Crime Problems (CDPC) of the Council of Europe show that, on 1 September 2001, 39.2% of detainees in **Luxembourg** had not been sentenced yet, not even in the first instance[7]. High levels are also found in **France** (28.5%), **Greece** (27.4%), **Austria** (24.9%) and in **Italy** (24.6%). **Belgium** (22.9%), **Spain** (21.7%) and **Denmark** (20.3%) are in the middle league, though hardly in a more favourable position. Only **England** and **Wales**[8] have a considerably lower number of detentions on remand (10.5%)[9].

In **Belgium**, the matter of detention on remand is regulated by an Act of 20 July 1990, which had been adopted at the time for the principal purpose of limiting the recourse to this form of detention[10]. Moreover, detention on remand and its duration are subject to the conditions stipulated in Articles 5 §§ 1, c), and 3 of the European Convention on Human Rights. The legislator wished to confine its use within strict bounds by emphasizing the exceptional nature of detention on remand and by raising the penalty threshold from which it may be applied. The legislator has also strictly regulated judicial arrests and summonses, and watches over the respect for the rights of the defence and the independence of the investigating judge. It also wanted to guarantee the judicial review at regular intervals of the term of detention on remand, so that it should be limited to what is strictly necessary. From the point of view of the necessity of not extending the term of detention on remand beyond what is strictly necessary, the obligation of justification imposed on the examining courts charged with supervising the detention on remand[11] is of particular significance: where the existence of serious indications of guilt on the part of the accused may justify the initial deprivation of liberty, this no longer suffices to prolong the detention on remand, which is only acceptable if there are additional reasons to justify the prolongation. In several decisions, the Supreme Court had the occasion to insist that the justification for the decisions of the examining courts should no longer be automatic, but should instead be well-reasoned and in accordance with the essentially individual and evolutionary nature of detention on remand[12].

In **Spain**, several judgments passed by the Constitutional Court during the period under scrutiny were inspired by the Court's concern to keep detention on remand to the strictest minimum necessary, as is required by Article 5 §3 of the European Convention on Human Rights: according to the Constitutional Court, an extension of detention on remand requires a specially motivated judgment, distinct from the initial decision to deprive the person concerned of his liberty[13]; the motivation must

[7] SPACE I (Annual Penal Figures of the Council of Europe), 2001 survey, PC-CP (2002) 1 rev., Strasbourg, 12 June 2002. These data were prepared by Pierre V. Tournier (CNRS – France). The data given here appear in table 4.2.1. (Population detained at 1 September 2001: legal structure (level)).

[8] As regards the United Kingdom, no data are available for Scotland and Northern Ireland.

[9] The member States that are not mentioned did not supply any figures for the Council of Europe study. With respect to **Portugal**, some statistics revealed in 2002 have confirmed an intense use of preventive imprisonment (remand in custody) by Portuguese courts. The figures would locate Portugal in the average of the EU. In 2000, there were a total of 106 693 accused people. 18 693 of them were arrested before their final judgement. 3521 of those arrested were in remand in custody at the time of the Final Judgement (in the proceedings – 2329; due to a different proceedings – 1192). In 2001, 3687 accused people were in remand in custody at the time of the Final Judgement (in the proceedings – 2478; due to a different proceedings – 1209). These figures were publicised by *Gabinete de Política Pegislativa do Ministério da Justiça* – www.mj.gov.pt

[10] See R. Declercq and R. Verstraeten, *Voorlopige hechtenis – De wet van 20 juli 1990*, Louvain, Acco, 1991; B. Dejemeppe (dir.), *La détention préventive*, Brussels, Larcier, 1992.

[11] The committals division of the magistrate's court decide for the first time within five days of the depreviation of liberty, then month by month, and appeal is possible before the indictment division of the Court of Appeal.

[12] Cass., 3 February 1999, *Pas.,* 1999, I, n°65; Cass., 26 January 2000, *Pas.*, 2000, I, n°70. On the application of the Act of 20 July 1990, see chapter IV of the 2000-2001 report of the Supreme Court and the summary prepared by H.-D. Bosly and C. Vandresse, "La jurisprudence de la Cour de cassation en matière de détention préventive", *J.T.*, 2002, p. 417.

[13] See STC 144/2002, judgment of 15 July 2002, *Asunto Antonio Muñoz c. Audiencia Provincial de Malaga*, recurso de amparo 5033/1997; STC 8/2002, judgment of 14 January (enero) 2002, *Asunto Antoinio Luque c. Audiencia Provincial de Almeira,* recurso de amparo 1496/2000.

be individualized and based on the specific circumstances of the accused[14]. The Constitutional Court also gave an important judgment on the extent of the recourse d'*amparo* against a decision of an investigating judge who rejected the request for a judicial review of *habeas corpus*, concerning the lawfulness of the deprivation of liberty[15].

Detention of minors[16]

In **Belgium**, Article 53 of the Act of 8 April 1965 on youth protection provides for the possibility of placing in custody a juvenile suspected of having committed an act classified as an offence punishable by a one-year principal prison sentence or a severer penalty, and aged at least 14 years at the time when he or she committed the offence, if no other institutional care is materially possible, and for a duration of fifteen days at the most. This option has been widely criticized. The CPT found that "neither the penitentiary personnel nor the environment were suitable for this category of detainees" (see also par. 101 of the above-mentioned report, published on 17 October 2002). The repeal of Article 53 of the 1965 Act by the Act of 4 May 1999[17], which became effective on 1 January 2002, has led to the adoption of the Act of 1 March 2002 concerning the detention on remand of juveniles having committed acts classified as offences[18]. Adopted after an agreement between the Federal State and the Communities, this Act provides for the option of detention in a centre administered by the Federal State of juveniles aged at least 14 at the time of the offence, and against whom there exist serious indications of guilt, and provided that the offence has a certain degree of seriousness. This measure of detention in a closed centre, which may be extended up to 2 months and 5 days at the most, is designed to be a strictly provisional measure, of as short a duration as possible, and which may only be imposed if no other institutional care is possible and insofar as urgent, serious and exceptional circumstances exist, connected with the need to ensure public safety. The actual purpose of this law is to remedy the inadequacy of the structures to accommodate juvenile offenders, particularly in the French-speaking part of the country (Communauté française), and this despite the efforts that have been made to increase the number of places available in accommodation facilities (from 27 places in July 1999 to 50 places in 2001). In pursuance of the Act of 1 March 2002, a Royal Decree of the same day established a Centre for the provisional detention of juveniles having committed acts classified as offences[19], situated at Everberg-Kortenberg.

The fear voiced by two associations, who brought an action for annulment against the Act of 1 March 2002 before the Court of Arbitration, is that this law ultimately offers a solution to juvenile delinquency purely from a security point of view, and this to the detriment of the objective of the Act of 8 April 1965 on youth protection which, on the contrary, provided for a regime of supervised education, and that this development took place under the pretext of an insufficient number of places available at the public institutions for youth protection (I.P.P.J.). It is true that the adoption of the Act of 1 March 2002 appears to remove Belgium from the objective established by Article 40 §1 of the Convention on the Rights of the Child, according to which "the States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account

[14] STC 138/2002, judgment of 3 June 2002, *Asuntos promivodos por Freddy Mederos y otros c. Audiencia Provincial de Santa Cruz de Tenerife,* recurso de amparo 1234/2000, 1281/2000 y 1344/2000.
[15] STC 224/2002, judgment of 25 November 2002, Asunto Guido Anibal Pino Iturralde c. Juzgado de Instrucción de Barcelona, recurso de amparo 104/2002.
[16] Only the most significant developments of 2002 are shown here, as in the rest of the report. The fact that certain States are not mentioned should not lead us to conclude that there is no debate at all in those States on the question of detention of juveniles. In its reports of 1993 and 1998, the CPT voiced major criticisms on the detention of juveniles at the Penitentiary Centre of Schrassig in **Luxembourg** (see the report of 3 December 1998, CPT/Inf (93) 16 rev., and the 1993 report, CPT/Inf (93) 19). In response to the criticism expressed by the CRC, **Sweden** changed its system for detention of juveniles in 1999. They are as a rule accommodated separately from adults, in purpose-built detention centres. Still, there is a need for improvement of activities designed to prevent maladjustment, and an investigative commission should present a report on these issues in September 2004 (Sveriges tredje rapport till FN:s kommitté för barnens rättigheter, Stockholm 2002, p. 101).
[17] *Mon. b.*, 2 June 1999.
[18] *Mon. b.*, 1 March 2002.
[19] *Mon. b.,* 1 March 2002, 3rd ed.

the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society". This impression is reinforced by the fact that the term of temporary detention provided for in the new law is considerably longer than that of detention in a prison as provided for in Article 53 of the Act of 8 April 1965, which stipulates a maximum period of fifteen days[20]. It is also reinforced by the prison aspect of the closed centre in Everberg: members of Parliament of the French-speaking Community of Wallonia and Brussels who visited the centre on several occasions noted "the omnipresence of guards, rules and operational culture as is encountered in a prison, while the educational character is subordinate to the repressive approach"[21]; and in the final observations it made with regard to Belgium during the period under scrutiny, the Committee on the Rights of the Child said it was concerned about the fact that "the interim law of 1 March 2002 on the temporary detention of juvenile delinquents and the creation of the Everberg Centre effectively replaced article 53 of the 1965 Act on youth protection with a similar, if not more restrictive, regime"[22]. In addition, the Act of 1 March 2002 creates a risk of discrimination: a juvenile aged over 14 who commits an offence will either benefit from a regime at an IPPJ where priority is given to education, or will have to submit to a regime where emphasis is on security, depending on whether or not there is room at a special community institution that can care for him[23]. Finally, the associations requesting the annulment of the Act note that, while the temporary detention of a minor in fact constitutes a form of detention on remand, several of the guarantees surrounding the detention of adults on remand in the Belgian Act of 20 July 1990 are totally absent from the Act of 1 March 2002.

The criticisms that have been expressed with regard to the Act of 1 March 2002 contest the repressive nature - protection of society - of the measure of locking up junvenile delinquents, while this temporary detention is presented by the legislator merely as an emergency solution, which must be kept as short as possible, and not departing from the essentially educational ambition of the Act of 8 April 1965 on youth protection. The grave shortage of appropriate infrastructure to accommodate juvenile delinquents ultimately lies at the root of the situation being criticized. Therefore we can but express the hope that, in the context of the elaboration of a new law offering a response to the delinquent behaviour of minors - which already exists in a preliminary draft version -, there will be sufficient room for the budgetary dimension of the question of how to take care of minors who have committed offences. Another priority concern in the elaboration of this new law should be to provide for procedural guarantees for the benefit of juvenile delinquents placed in a regime of supervised education as part of disciplinary procedures that might be imposed on them[24].

Ireland appears to be encountering the same difficulties as Belgium in putting in place the means to accommodate juvenile delinquents in conditions that are favourable to the educational purposes which a regime of supervised education should provide for. Ireland was found to be in violation of Article

[20] The European Court of Human Rights has found that Belgium violated Article 5 of the European Convention on Human Rights by several times extending the detention of a minor in prison: European Court HR, *Bouamar v. Belgium* judgment of 29 February 1988 (repeated application to a minor of Article 53 of the Act of 8 April 1965). This judgment has urged the Belgian courts to consider that the temporary detention of a juvenile delinquent under Article 53 of the Act of 8 April 1965 can only be deemed compatible with Article 5 §4 of the Convention insofar as it soon leads to the application of a regime of supervised education in an open or closed specialized environment which has sufficient resources in accordance with its function.

[21] F. Lahssaini and D. Smeets, "Rapport après une deuxième visite au centre d'Everberg le 2 mai 2002", 31 May 2002, *J.D.J.*, 2002, n° 216, p. 22. However, the disciplinary dimension is also found in the public institutions for youth protection (IPPJ). In its report on its visit to Belgium in November and December 2001, the CPT was surprised to find that the total term of solitary confinement to which a minor in an IPPJ may be committed is 17 days, which it considered excessive. The CPT has recommended that the maximum term of solitary confinement to which a minor in an IPPJ may be committed should be reduced to 9 days, which is the maximum term currently in force in the penitentiary system for adults. (Report to the Belgian Government on the visit carried out in Belgium by the CPT from 25 November to 7 December 2001, published in Strasbourg on 17 October 2002 (CPT/Inf (2002) 25), par. 114).

[22] CRC/C/15/Add. 178.

[23] While at the same time certain courts do not hesitate to observe that the public authorities shun their civil responsibility by not providing adequate establishments with closed regime: see Brussels, 7 December 1993, *R.G.A.R.,* 1995, n° 12416; Civ. Nivelles, 28 September 1983, *R.G.A.R.,* 1985, n° 10946; Civ. Nivelles, 19 August 1997, *J.D.J.,* 1997, p. 406.

[24] See Report to the Belgian Government on the visit carried out in Belgium by the CPT from 25 November to 7 December 2001, published in Strasbourg on 17 October 2002 (CPT/Inf (2002) 25), par. 117.

5(1) and 5(5) ECHR in the case of *D.G. v. Ireland*[25]. This application was made by a young man who, while still a minor, had been detained in St. Patrick's Institution (a penal institution) by order of the Irish courts due to the lack of appropriate secure detention facilities for certain juvenile offenders. The Irish Government's submission that his detention in such circumstances was justified under Article 5(1)(d) ECHR for the purpose of providing educational supervision was rejected by the Court. The facts in *D.G.* are similar to a series of cases involving disturbed minors that have come before the Irish courts due to the lack of suitable accommodation of a non-penal nature for detention. While this problem is now being addressed by Government repeated concerns have been expressed at the slow rate of progress in developing suitable facilities. The parts of the Children Act, 2001, which may address this problem, are unlikely to be implemented before 2006 and only those parts of the Act that contain more punitive measures have been implemented thus far[26].

Upon examining the situation of the **United Kingdom**, the Committee on the Rights of the Child has reiterated its concern that it has not been possible to withdraw a reservation to Article 37(c) of the Convention on the Rights of the Child and that children are thus still detained with adults, as well as expressing concern about them in certain circumstances being tried in adult courts[27]. It is also concerned about the level of injuries sustained by children as a result of restraints and measures of control applied in prison, as well as about the frequent use of physical restraint in residential institutions and in custody and the use of solitary confinement in prisons[28]. An additional concern relates to the age at which children enter the criminal justice system (8 in the case of Scotland and 10 for the rest of the country)[29]. Moreover the Committee is extremely concerned at the conditions that children experience in detention and that children do not receive adequate protection or help in young offenders' institutions (for those aged 15-17). The Northern Ireland Human Rights Commission has expressed its concerns as well on detention of juveniles, reporting that allegations of a child protection nature by boys in juvenile justice centres are not properly investigated. In addition it has found the applicable rules for the centres to be prison-like rather than care-oriented and that the location of the centres impedes contact by children with their families[30].

In **France**, there is a clear trend towards a repenalization of juvenile delinquents. Section III of Act no. 2002-1138 of 9 September 2002 concerning the orientation and planning for Justice[31] reforms criminal law for minors. It provides for the establishment of closed educational centres, which often constitute a last chance before being committed to the conventional prison system. These centres will be intended to accommodate minors who have been placed under court supervision or have been given a suspended sentence with probation, and who will receive reinforced educational and pedagogical supervision. The act also provides that the temporary detention of juveniles aged 13 to 16 will happen in facilities that guarantee total separation from adult detainees as well as the presence of educators in conditions that will be established by decree. The idea is to prevent juveniles from coming under the influence or threat of adult delinquents or criminals. Finally, specialized penitentiary establishments for juveniles will be set up. The National Advisory Committee on human rights contests the current trend of extending the cases of detention of minors, which "will aggravate the current trend of imprisoning minors" and which is contrary to the International Convention on the rights of the child[32].

Specific detention of aliens

The detention of foreign nationals may be admitted in international law insofar as such detention is limited to the period strictly necessary to adopt a decision to authorize their access to the territory or to

[25] Eur. Ct H.R. (3d Sect), *D.G. v. Ireland* (Appl. no. 39474/98) judgment of 16 May 2002.
[26] Shannon, "The Children Act, 2001: The Implications for Child Care Practice and Juvenile Justice", (2003) *Irish Journal of Family Law*, Vol.2 (*forthcoming*).
[27] CRC/C/15/Add.188, 9 October 2002, paras 6 and 60.
[28] para 33.
[29] para 59.
[30] *In Our Care: Protecting the Rights of Children in Custody*.
[31] J. off. Rép. fr. of 10 September 2002, p. 14934.
[32] Opinion of the CNCDH of 16 July 2002, Internet site: www.commission-droits-homme.fr .

effectively remove them from the territory, and such detention is adequately justified by the risks of refusal to comply with an order to leave the territory. The **United Kingdom** courts have determined that detention at a reception centre of asylum-seekers whose claims were capable of speedy resolution has been found to be authorised by Article 5(1)(f) of the ECHR as detention to prevent unauthorised entry[33]. In the case of *Jalloh*, the UN Human Rights Committee reviewed the detention of a young asylum seeker for three and a half months. Mr Jalloh applied for asylum in the **Netherlands** in 1995 and was received and accommodated at an open facility. In 1996, he absconded from his reception facility and went into hiding out of fear of an immediate deportation. Later, following an interview with the Aliens Department, his detention was ordered. When examining the complaint that this detention was in violation of, *inter alia*, Article 9 ICCPR, the HRC noted that it was lawful under Dutch law, and that the author had his detention reviewed by the courts on two occasions, once twelve days after the beginning of his detention, and again two months later. On both occasions, it was found that the author's continued detention was lawful, because he had evaded expulsion before, because there were doubts as to his identity, and because there were reasonable prospects for expulsion, as an identity investigation was still ongoing. In the circumstances of the case, the Committee found that the author's detention was not arbitrary and thus not in violation of Article 9 ICCPR[34].

Given their unfamiliarity with internal procedures, notably those governing the introduction and examination of applications for asylum, their isolation, and their unfamiliarity with the language, it is particularly important that the information given to foreigners being detained when they arrive on the territory or in the context of expulsion procedures be complete, of good quality, accessible and honest, notably with respect to the means of recourse that they have and the support to which they are entitled. The report on "Information of detained persons"[35], which the **Austrian** Advisory Board on Human Rights[36] made public in March 2002, contains a long list of detailed recommendations directed to improve the often marked lack of information among asylum-seekers or immigrants in police custody. Most importantly it is recommended to create uniform information sheets on topics of interest (such as detention pending deportation, arrest, in-house rules, interrogation by the authority) that should be accessible via a central server in a sufficient number of translations, and of which a copy each should be handed out to the detainee. Alternative information methods like audio and video tapes should be introduced on a medium-term basis. When preparing these information sheets, emphasis should be put on the use of simple and understandable language instead of merely restating the relevant sections of the statute. What is also strongly argued by the board is the promotion of language training for officials working in that area and the set-up of a list of frequently used terms in different languages. In addition it is envisaged to serve the highly standardised administrative decisions on the applicant together with a translation he understands. According to the board, flexible visiting hours should be introduced for caretaking organisations, as should be improved the general cooperation of the authorities with such organisations. Furthermore, any person released should be provided with a list of social aid/caretaking organisations in order not to be left alone on the streets.

The main decision which the European Court of Human Rights delivered with regard to **Belgium** in connection with Article 5 of the European Convention on Human Rights[37] concerned the conditions of the arrest of Slovakian nationals of Romany origin whose application for asylum had been turned down by the Belgian authorities, and who were expelled to Slovakia on 5 October 1999 together with

[33] *R (on the application of Saadi and others) v Secretary of State for the Home Department* [2002] 4 All ER 785.
[34] Human Rights Committee, *Jalloh v. the Netherlands*, Comm. No 794/1998, 15 April 2002.
[35] Cf. http://www.menschenrechtsbeirat.at/index_berichte.html (German)
[36] The board is an independent body advising the Federal Ministry of the Interior that was established in 1999 after the tragic death of Marcus Omofuma in police custody on a deportation flight to Bulgaria. Its tasks are to supervise and examine the activities of the security authorities with a view to ensuring the observation of human rights and to give recommendations.
[37] See also European Court of Human Rights (1st section), *Grisez v. Belgium* judgment of 26 September 2002 (application no. 35776/97). The Court rejects the alleged violation of Article 5 §3 of the Convention (reasonable duration of detention on remand). The applicant had been detained on remand for 2 years and 3 months, between the time of his arrest and his conviction by a criminal court. The Court considers that "the total duration of detention on remand in this case – two years, three months and nineteen days – does not appear excessive, taking into account the seriousness of the offences in the case and the great number of investigative acts involved" (§ 53). In this case, the delays were due in particular to the expert appraisals which the investigation required.

70 other Slovakians of Romany origin as part of a collective repatriation. In its *Conka v. Belgium* judgment of 5 February 2002 (application no. 51564/99), the third section of the Court found that Article 5 §1 of the Convention had been violated to the detriment of the applicants on account of the misleading nature of the invitation that had been addressed to the applicants to report to the police headquarters "with a view to completing their application for asylum", whereas in actual fact the intention was to arrest them and to repatriate them: according to the Court, "even as regards aliens who were in breach of the immigration rules, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty was not compatible with Article 5" (§ 42)[38].

On 2 August 2002, a Royal Decree was adopted establishing the regime and operating rules applicable to places situated on the Belgian territory, run by the Aliens Office, where a foreigner is detained, handed over to the government, or maintained, in pursuance of the provisions of Article 74/8, §1, of the Act of 15 December 1980 concerning the access to the territory, the residence and establishment and the expulsion of foreigners[39]. The adoption of this Decree is of course welcome, since it clarifies the legal position of foreign nationals held at certain closed centres. The text, however, does not offer all the desired guarantees. It contains no provisions assuring that the lawyer of the foreigner who is being detained at the centres intended by this Decree will be notified of the presence of his client and of his detention, while the circumstances of the *Conka* case show that it is an illusion to rely on the personal initiative of the foreigner who is being detained with a view to his repatriation, especially when the foreigner does not have the guarantee of having an interpreter in order to facilitate communication with the lawyer, or of being able not only to telephone the lawyer, but also to communicate with him by fax, notably in order to ensure the transmission of documents allowing an appeal to be lodged with the committals division[40].

A particularly problematic situation[41], for which the above-mentioned Royal Decree of 2 August 2002 does not offer any remedy, is that of the detention of juvenile asylum-seekers in closed centres. On several occasions, the Belgian courts have been led to establish the incompatibility of such a form of detention with the requirements of the International Convention on the Rights of the Child of 20 November 1989, more particularly with its Article 3 §1, which provides that the best interests of the child shall be a primary consideration in all decisions concerning children[42]. Called upon to formulate an opinion on the draft of the Royal Decree of 1 August 2002, the Council of State (legislation section) considered that the detention of minors at closed centres for foreigners was contrary to Article 37 of the International Convention on the Rights of the Child.

In **Finland**, a new Act on the treatment of detained aliens and detention facilities for aliens (Laki säilöön otettujen ulkomaalaisten kohtelusta ja säilöönottoyksiköstä, Act No 116 of 2002), which entered into force on 1 March 2002[43], prescribes separate detention facilities for aliens who have been deprived of their liberty under the Aliens' Act[44]. Such persons shall be accommodated in their own facilities, separate from the facilities intended for prisoners and remand prisoners. Temporary accommodation in a police station is allowed in exceptional cases mentioned in the Act. The Act

[38] The same judgment reports a violation of Article 5 §4 of the Convention, which provides that everyone who is deprived of his liberty may lodge an appeal with a court, since the applicants were unable to effectively request a judicial review of the depreviation of their liberty: between the time of their arrest and their expulsion to their country of origin, the competent committals division had been unable to meet and decide on the application for release. By 31 December 2002, no measure had been taken by Belgium in pursuance of the Decree of 5 February 2002 in order to avoid a repetition of such a situation.
[39] *Mon. b.,* 22 October 2002.
[40] The latter limitation as to the available means of communication between a foreigner deprived of his liberty and his lawyer has been criticized by the Council of State, legislation section, in the opinion it delivered on the draft Royal Decree that had been submitted to the Council for examination.
[41] See the letter which three Senators addressed to the Minister of the Interior on 21 November 2002, the day after they visited the children being detained at the Centre 127b.
[42] Committals division, Brussels, 16 October 2002, *Tabita M., J.D.J.,* November 2002, p. 58; Committals division, Brussels, 30 October 2002, *Sarah M., J.D.J.,* November 2002, p. 58.
[43] See also PeVL 54/2001vp.
[44] Because of the new Act, certain amendments to the Aliens' Act were also necessary (amending Act No 117 of 2002).

contains provisions on the treatment of aliens in the detention facility, on the rights of the detained as well as the necessary limitations to these rights. For example, there are provisions concerning correspondence and the use of a telephone, visits and other contacts to persons and authorities outside the detention facility. There are also provisions concerning security control, processing of personal data and the use of force. The Act provides for the possibility of appeal to a court of first instance against decisions limiting the most essential rights.

In **Italy**, Act no. 189/2002, of which the entry into force is awaiting the adoption of a set of implementing rules by the Council of Ministers, anticipates two possible situations of retention of asylum-seekers: optional retention at "identification centres" for those whose identity or nationality needs to be verified because they have no documents or have forged documents; compulsory retention at "centres of temporary accommodation and assistance", like for foreigners awaiting expulsion, those who have tried to elude border checks, those who are on the territory unlawfully, or against whom an expulsion order has been issued. In both cases, the centres are accessible to representatives of the HCR, lawyers and non-governmental organizations authorized by the Ministry of the Interior.

A similar initiative was taken in **Luxembourg** with a view to clarifying the legal situation of foreigners being detained while awaiting their expulsion or a first decision authorizing their access to the territory. The handing over to the government of persons who are due to be expelled from the territory (64 cases in 2002) has given rise to an abundant case law from the Administrative Court which, in the past, had put an end to such handing over measures[45]. The conditions of such measures have also been regularly criticized by the NGOs, who considered that measures of administrative detention should no longer be carried out at penitentiary establishments, that they should be able to visit the persons being detained, and that psychological counselling should be organized for persons held in administrative detention. In order to meet those criticisms and to ensure conformity with the requirements of the Administrative Court, a Grand-ducal Regulation of 20 September 2002 established a Centre for the temporary accommodation of illegal foreigners[46]. At the Luxembourg Penitentiary it set up a special section for detainees who have been deprived of their liberty in accordance with Article 15 of the amended Act of 28 March 1972 on the entry and residence of foreigners, the medical examination of foreigners and the employment of foreign workers. During their stay at the centre, the detainees are strictly separated from the other prisoners and subjected to a special regime that is adapted to their specific situation (information on the administrative situation and on the rights and obligations, medical examination, prohibition of enforced labour, permission to participate in activities under certain conditions, unlimited right of written correspondence, right to follow radio and television broadcasts, access to telephone within the limits to be determined by the Minister of Justice, visiting right on the authorization of the Minister of Justice). With the exception of married couples, men and women are accommodated in separate quarters within the centre.

The question of the detention of asylum-seekers has been particularly sensitive too in the **Netherlands** during the period under review. Two NGO's, the *Vereniging Asieladvocaten en –Juristen Nederland (VAJN)* and the *Nederlands Juristen Comité voor de Mensenrechten (NJCM)* [the Dutch Association of Asylum Lawyers and the Dutch section of the International Commission of Jurists], brought proceedings against the State, claiming a breach of Article 5 ECHR. They challenged the lawfulness of the "48 hours procedure", whereby newly-arrived asylum seekers are detained for a period of 48 hours in a reception facility in order to make a first assessment of their chances to obtain asylum. The *Vreemdelingenwet* [Aliens Act] only provides for an initial detention of 24 hours; in practice this period had been extended to 48 hours. In a judgment of 31 October 2002, the *Gerechtshof Den Haag*

[45] Leaving aside the decisions that simply considered that the handing over should be done elsewhere than at the Penitentiary of Schrassig, there were at least three decisions that were annulled, namely T.A., 22 February 1999, n° 11121, *Atu Amos*; T.A., 1 March 1999, n° 11132, *Mavric*; 24 March 1999, n°11200, *Mende Konga,* None of these judgments have been quashed. For a complete overview of the case law covering the period from 1 January 1997 to 31 December 2001, see *Pas. adm.,* 2002, n°173 et seq.

[46] Grand-ducal Regulation of 20 September 2002 establishing a Centre for the temporary accommodation of illegal foreigners, amending the amended Grand-ducal Regulation of 24 March 1989 concerning the administration and internal regime of the penitentiary establishments, *Mém.* A, 2002, 2836.

[Court of Appeal, The Hague] agreed with the two NGO in finding that there was no basis in domestic law for the "48 hours procedure". The State was ordered to return to the use of 24-hour periods[47]. Despite this judgment, the Minister of Immigration Affairs, in a notice sent to parliament the next day, announced that he would continue to apply the "48 hours procedure" despite the judgment of the Court of Appeal. Instead he would slightly adjust the conditions in the reception facilities where the asylum-seekers are held, so that their stay in these centres would no longer qualify as 'deprivation of liberty'. The Chairman of NJCM understandably commented that this attitude is incompatible with the respect for the rule of law that one would expect from a Cabinet Minister[48].

In **Sweden**, the question of detention of asylum-seekers has received considerable attention by various NGOs[49] and the UNHCR. It has rightly been pointed out that a detention can further traumatize already traumatized individuals and cause infringement of their human dignity. Moreover, there are still no formal restrictions and no established routines such as suggested by the UNCHR when it comes to detention of vulnerable persons and victims of trauma or torture. The UNHCR has also expressed its concerns about the lack of a maximum time of detention for asylum-seekers, although the decision to keep a person in detention must be reviewed every two months. Even though there are review procedures, there is nothing preventing a detention order from being perpetually renewed.

Article 7. Respect for private and family life

Article 7 of the Charter of Fundamental Rights covers a particularly wide range of issues, even though the compilers of the Charter have chosen to devote specific articles of this Charter to the protection of personal data and environmental protection in order to give them a distinct treatment (see below, Articles 8 and 37)[50]. Although in reality the notions of the right to respect for private life, family life, inviolablity of the home and secrecy of communications overlap in many places and may be combined with each other in order to guarantee a specific protection - such as on the subject of the expulsion of foreigners (private and family life), interception of communications (private life and secrecy of communications), or the environment (private life, family life, inviolability of the home) -, the report discusses the right to respect for private life and the right to respect for family life separately. A choice is also made among the issues being examined within each of these rights. The analysis focuses on the questions that were of topical interest during the period under scrutiny.

Right to respect for private life

The study of the right to respect for private life deals successively with the evolution that the extension *ratione materiae* of this protection has known during the year 2002, followed by three practical questions: the compatibility of private life and the public's right to information; questions of identity (patronymic and knowledge of one's origins); the powers of surveillance and investigation, more paticularly the legality requirements in this respect.

Scope of the protection

On the occasion of a judgment in the case of *Colas Est and others* in which it found that France had committed a violation of Article 8 of the Convention by allowing inspectors to carry out searches on the business premises without the prior authorization of a magistrate – according to the system of Order no. 45-1484 of 30 June 1945, which the French legislator has remedied since[51] –, the European Court of Human Rights aligned itself with the position of the European Court of Justice[52] by affirming

[47] LJN-nr. AE9573.
[48] *NJB* 2002, p. 2240.
[49] Alternative Report to the Human Rights Committee, p. 8. See also Kristdemokraterna, motion till riksdagen 2001/02:kd183, p. 10.
[50] Article 8 of the European Convention on Human Rights, on the other hand, does include these two areas of protection.
[51] The contentious facts occurred one year before the adoption of the Order of 1 December 1986, which contains additional guarantees. At present, see Act no. 2001-420 of 15 May 2001 concerning new economic regulations.
[52] ECJ, 21 September 1989, *Hoechst AG v. Commission of E.C.,* joined cases 46/87 and 227/88, ECR 2859, points 18 and 19.

that the rights guaranteed under Article 8 of the Convention may be interpreted as "including for a company the right to respect for its registered office, its agency or its professional premises"[53]. Legal persons are therefore protected in the same way as natural persons in the respect for their private life, which should be interpreted as including the inviolability of their professional premises[54].

This evolution in the case law of the European Court of Human Rights does not impose additional restrictions on the powers of inspection that are recognized to the European Commission with a view to investigating any violations of the competition rules applicable to companies. This trend was in fact anticipated by Community case law, which already interpreted the requirements of Article 8 of the European Convention on Human Rights as the judgment in the case *Sociétés Colas Est* does at present. In an important judgment of the period under scrutiny, given on 22 October 2002 on a preliminary question from a French court[55], the European Court of Justice specified the modalities of the balance to be maintained between the obligation for the national authorities of the member States not to hamper the effectiveness of the action of the Commission – which follows from their obligation of loyal cooperation as enshrined in Article 10 EC – and the obligation for the national courts, when they are empowered by internal law to authorize visits and seizures on the premises of companies suspected of violating the competition rules, to examine whether the measures of constraint requested following a request for assistance addressed by the Commission to the national authorities by virtue of Article 14, par. 6, of Council Regulation 17/62 of 6 February 1962, do not threaten to result in an arbitrary or disproportionate intervention by the public authorities in the private sphere of activity of a company. Since the obligation of loyal cooperation rests not only upon the member States but also on the Community institutions, the Court of Justice specified in this judgment the extent of the obligation for the Commission to supply the national court with the necessary elements to allow the latter to exercise the control that is incumbent on it. Nevertheless, it has expressly ruled out that the Commission my be obliged to reveal elements and clues appearing in the Commission records and on which the latter's suspicions are based: such a requirement could not only create risks for the informers, but the transmission of such elements to the national authorities could harm the effectiveness of the Community action, particularly in cases where parallel investigations have to be conducted simultaneously in different member States.

Right to respect for private life and the public's right to information

During the period under scrutiny, **Germany** continued to seek an appropriate balance between the right to respect for the private life of persons mentioned in the files of the security services (Stasi) of the former GDR, including the right to reputation, and the public's right to information. Article 32 of the 1991 Act concerning the Stasi documents (*Stasi-Unterlagen-Gesetz*) provides, as regards the use of the documents collected by the former Stasi for research purposes and by the media, that the Commissioner General for Stasi documents may transmit these documents for such purposes insofar as neither the interests of the persons concerned nor those of third parties are affected. Since the Federal Administrative Court (*BundesVerwaltungsGericht – BVerwG*) upheld an action by the former Chancellor H. Kohl who opposed the disclosure of documents concerning him[56], the legislator intervened to amend the 1991 Act, with a view to identifying more precisely the balance to be struck

[53] European Court of Human Rights, *Société Colas Est and others v. France* judgment (application no. 37971/97) of 16 April 2002, § 41.

[54] Taking into account how the protection of private life and the inviolability of the home has been extended in the case law of the European Court of Human Rights – which since 1989 guarantees the inviolability of professional premises, based on a broad interpretation of the notion of "home" –, one may question the choice which the Constitutional Court of **Spain** appears to have made in adhering to a more restrictive interpretation. It is true that the judgment in which this interpretation comes up notes the unconstitutionality of Article 557 of the Criminal Procedure Act in that this provision authorized the searching of hotel rooms without a court order (STC, judgment no. 10/2002 of 17 January 2002, *Cuestión de Inconstitucionalidad* 2829/1994, *planteada por la Sección Cuarta de la Audiencia Provincial de Sevilla*). On the other hand, during the period under scrutiny, the Federal Constitutional Court of **Germany** (Bundesverfassungsgericht) confirmed the protection which professional premises enjoy in regard to searches that have been carried out there: judgment of 6 March 2002, 2 BvR 1619/00, Neue Jurist. Wochenschrift 2002, 1941.

[55] ECJ, 22 October 2002, *Roquette Frères SA*, C-94/00.

[56] Judgment of 8 March 2002, BVerwG 3 C 46.01.

between the interests of the individual and the public's right to historical knowledge and information[57]. According to the legal regime of Article 32 resulting from this amendment, documents with person-related information about individuals of contemporary history, holders of political functions or office holders may be handed over as far as the information concerns their role in contemporary history, the execution of their function or office. But through the publications no predominant and protection worthy interests (*überwiegenden schutzwürdigen Interessen*) of the concerned individuals may be affected. In weighing the interests involved, it has to be taken into consideration especially whether the data investigation is based on a discernible violation of human rights. The same question of conflict between the protection of the reputation of the individual and the public's right to information is raised by the Act on domestic violence of the Community of Castilla la Mancha, in **Spain**, which allows the publication of judgments convicting persons responsible for ill-treatment in this autonomous Community[58]. It is this same conflict that characterizes a case involving **Italy**, in which a magistrate complained about the disclosure of a report by a parliamentary commission of inquiry into organized crime, which quoted him by name: the European Court of Human Rights, before which the magistrate in question claimed a violation of Article 8 of the Convention since he suffered an unwarranted interference in his private life, concluded that his application was manifestly unfounded, since the disclosure of the report had a legitimate purpose within the meaning of the Convention, and that the facts concerning the applicant were not presented in the report in a manner that was arbitrary or manifestly contrary to reality[59].

During the period under scrutiny, the question of the balance to be struck between the journalist's freedom of expression and the protection of the private life of the individual was raised in numerous cases. In **Finland**, the conflict appeared at the centre of a debate surrounding an order by the Helsinki District Court to impose a temporary ban on the popular magazine (Hymy), as well as other publications of the United Magazines Group, on publishing any details about the private life of a former beauty queen. The order, which was made without hearing the publisher, was reinforced with the threat of a fine of EUR 20,000 if the ban were violated.[60] However, three weeks later the same local court handed down a new decision which withdrew the temporary ban.[61] In its new decision, the Helsinki District Court referred to the principle of freedom of expression, noting that it is an unconditional principle that the expression of opinions cannot be subjected to any kind of advance inspection by officials. Although the court also acknowledged the possibility of restricting the publication of information on the private lives of individuals by virtue of Section 10 of the Finnish Constitution on the right to privacy, it nevertheless ended up taking the view that the balance scale tilted in the direction of the freedom of the press in the case at hand. In **Greece**, concerning an application for annulment of sanctions imposed by the Authority for the protection of personal data on a television station and a journalist who revealed details about the sexual life of two celebrities, the Council of State considered in a judgment given on 4 December 2002 that the freedom of expression and the right to information did not include the right to disseminate information about a person's private life; it also considered that the broadcasts at issue involved a treatment of sensitive data which is prohibited by law, consisting in the conservation, use and dissemination of files[62]. In the **United Kingdom** by way of contrast, a prohibition on publication of details about a professional footballer's extra-marital affairs was refused on the basis that it was considered unlikely that at the full trial his interest in confidence would be found to outweigh the newspaper's right to freedom of expression[63]. In **Denmark**, the body that regulates the media (the Press Council established pursuant to Lov (1991: 348) om Medieansvar [Act (1991: 348) on Media Liability]), which deals with approximately 130 complaints annually, considered that mentioning the nationality of two persons in a newspaper article

[57] Fünftes Gesetz zur Änderung des Stasi-Unterlagen-Gesetzes [Fifth Act concerning the Modification of the Act concerning the Stasi Documents] of 2 Sep 2002 (BGBl. 2002 I p. 3446).
[58] The geographically competent Agency for the protection of data considered that, since the publication was done on a physical medium that could not be subsequently be processed by computer, it would exceed its brief by reviewing this legislation, which does not concern the processing of personal data.
[59] European Court of Human Rights (1st section), *Montera v. Italy* judgment of 9 July 2002.
[60] *Johanna Paulapuro v. Yhtyneet Kuvalehdet* Oy, Helsingin käräjäoikeus, decision 26300, 02/25828, 2.10.2002
[61] *Johanna Paulapuro v. Yhtyneet Kuvalehdet Oy*, Helsingin käräjäoikeus, decision 28770, 02/25828, 24.10.2002.
[62] Judgment no. 3545/2002 of 4 December 2002.
[63] *A v B (a company)* [2002] 2 All ER 545.

– which dealt with a case of violent rape – was not relevant at all, and that the newspaper by doing so had acted contrary to the guidelines for sound press ethics (Somalia case (No. 23/2000)). The decision, adopted by a majority vote[64], has been much debated. Following the decision the Danish prime minister, Mr. Anders Fogh Rasmussen, publicly dissociated himself from the decision, which caused criticism by the Danish Association for Journalists. Currently there is a case pending before the European Court, *von Hannover v. Germany*, which might lead the Court to give a judgment on the possible violation of private life constituted by the publication in the press of photos showing, without their consent, a princess and members of her family in public places[65].

During 2002, the European Court of Human Rights found on two occasions that the application in **Austria** of Section 1330(2) of the Austrian General Civil Code (*Allgemeines Bürgerliches Gesetzbuch*), which provides that compensation can be claimed "if anyone disseminates statements of fact which jeopardise another person's credit, gain or livelihood and if the untruth of the statement was known or must have been known to him. In such a case the retraction of the statement and the publication thereof may also be requested [...]". While the Austrian courts regarded the published political comments as statements of fact requiring some proof as to their truth, the European Court of Human Rights on the other hand found that these had to be qualified as value judgements, the truth of which being as a matter of definition not susceptible of proof. Given that the statements in issue had at least some – albeit thin – factual substance, the injunctions were not necessary in a democratic society and consequently violated the applicants' freedom of expression[66]. In accordance with the importance that the European Court of Human Rights attaches to the journalist's freedom of expression, these judgments illustrate that, in such situations, the reputation of the individual must be able to give precedence to the public's right to be informed about issues of general interest[67].

In **Luxembourg**, the bill on the freedom of expression in the media[68], which the Minister of Communications presented on 5 February 2002, is aimed at specifying where exactly this balance between the journalist's freedom of expression and the rights of persons implicated by a public communication over the media.

Personal identity

Since judgments of 1993 and 1994, the European Court of Human Rights conceded that a person's name as personal means of identification of an individual should benefit from the kind of protection within the meaning of Article 8 of the European Convention on Human Rights. In **Germany**, the Federal Constitutional Court (*Bundesverfassungsgericht*) delivered a judgment on this question on 30 January 2002, in which it considers that German law, which – while prohibiting parents from giving their child a name that is made up of the father's name and the mother's name – obliges parents to give

[64] One member of the council found however that there was not sufficient ground for criticizing the newspaper taken into account the ongoing public debate on crimes committed by refugees and immigrants.
[65] Application no. 25680/94.
[66] European Court of Human Rights (3rd section), *Dichand et al. v. Austria* (application no. 29271/95) judgment of 26 February 2002 (concerning a press article criticizing the conflict of interests in which the chairman of a legislative partliamentary committee finds himself by continuing to practise as a lawyer); and *Unabhängige Initiative Informationsviewalt v. Austria* (application no. 28525/96) judgment of 26 February 2002 (concerning a pamphlet denouncing Mr Haider, then head of the Austrian Liberal Party, as being guilty of racist agitation, the Court notes that the degree of accuracy necessary to establish the validity of an accusation in penal matters cannot be compared with that which a journalist must respect who expresses his view on an issue of public interest, namely in the form of a value judgment).
[67] A similar lesson is drawn from a judgment in the case of *Krone Verlag GmbH & Co. KG* (application no. 34315/96) of 26 February 2002, given against **Austria** by the European Court of Human Rights. The judgment found a violation of the freedom of journalistic expression for a court order based on Article 78 of the Copyright Act (Urheberrechtsgesetz), prohibiting the publication of a photograph of a local politician of the Carinthia region, who is also a member of the Austrian Parliament and the European Parliament. The Court considered that the person concerned was a public figure and should therefore bear the consequences; there was therefore no valid reason to stop the newspaper from publishing his picture, particularly as it was already available on the Internet site of the Austrian Parliament.
[68] *Doc. parl.,* n° 4910.

their child either the father's name of the mother's name, is contrary neither to the right of the parents to raise their children, nor to any other constitutional or international regulation[69].
In **France**, after an appeal was made to the European Court of Human Rights by P. Odièvre – who claimed that the refusal by the administration to reveal the identity of his mother, who asked to remain anonymous at the time of birth, constituted an interference in his private and family life –, the legislator adopted on 22 January 2002 the Act on the access to their origins by adopted persons and children in care. This Act was supplemented by an implementing decree on the National Council on Access to Information about Personal Origins and the counselling of women giving birth in secret[70]. This legislative and regulatory provision is aimed at facilitating the access of adopted children and children in care to information concerning their natural parents so that they can get to know their identity insofar as those parents do not expressly oppose it. Its aim is also to improve the information to women giving birth in secret as to their rights and the possibility of lifting the secret. In **Finland**, the Constitutional Law Committee has based itself on Section 10 of the Constitution of Finland (private life) when it considered, upon examining a Government proposal for an Act on the use of gametes and ambryos in fertility treatment, that it would be incompatible with Section 10 if the child born of the gamete donation has no access to such information on his biological origins which is in the possession of the authorities. The Committee thus held that the child must have the right of access to public documents and other information concerning donor's identity after she or he has attained eighteen years of age.[71] In the **Netherlands**, following more than ten years of preparation, the Act on the storage, management and access to data concerning artificial donor insemination entered into force. In principle the new Act puts an end to the possibility for donors to remain anonymous: the interest of donor children to know about their descent is considered to take precedence[72].

The extent of the individual's right to know his origins remains, however, a subject of discussion. In its concluding observations concerning the **United Kingdom**, the Committee on the Rights of the Child has expressed concern that children born out of wedlock, adopted children or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents[73]. The Adoption and Children Act 2002 provides however, for a more consistent approach to the protection and disclosure of sensitive information about adopted people and their birth relatives. It also makes provision for assisting adopted adults to obtain information about their adoption and to facilitate contact between them and their birth relatives where the person was adopted before the Act comes into force. However, in its judgment of 13 February 2003 in the above-mentioned case of *Odièvre v. France*, the Grand Chamber of the European Court of Human Rights concluded that there was no violation of Article 8 of the Convention. Therefore the right of the applicant to know his origins competes not only with "a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions" (§ 44), but also with the right to respect for the private and family life of third parties (adoptive parents and other members of the natural family) and the concern to protect life – the possibility of giving birth "under X" aimed at avoiding illegal abortions or children being abandoned other than under the proper procedure (§ 45) –, the Court considered that France had not exceeded the margin of appreciation which the Convention grants it in an area where there is a diversity of approaches (§ 47).

Powers of investigation and surveillance

An examination of developments during the period under scrutiny shows that we are in a period of reflux: the boundaries of private life are receding, while the powers of surveillance of the authorities are expanding. Most of the developments that are seen during the period under scrutiny are linked to the fight against the threat of terrorism; these developments are dealt with in more detail in the thematic observation that is featured in the annex to this report. However, we can also identify certain expansions of the powers of investigation and surveillance of the authorities that bear no relation to the

[69] BVerfGE 104, 373; I BvL 23/96.
[70] Decree no. 2002-781 of 3 May 2002, JORF 5 May 2002.
[71] See PeVL 59/2002vp.
[72] *Staatsblad* 2002, nr. 240.
[73] CRC/C/15/Add.188, 9 October 2002, para 31.

fight against terrorism. In **Germany**, the *Gesetz über das Zollkriminalamt und die Zollfahndungsämter (Zollfahndungsdienstgesetz)* [Act about the Customs Criminal Office and the Customs-Investigation Offices] [74] contains extensive specific data protection regulations for dealing with collection of data. It regulates the requirements that have to be met by the customs criminal office and the customs-investigation offices for collecting data within the scope of their duties. Belonging to these are long-term observations, pictures taken undercover and the use of bugging systems. As well, the customs criminal office and the customs-investigation offices are obliged to pass on the raised data to secret services and the Federal Criminal Police Office (BKA). In the **Netherlands**, an act expanding police powers to search individuals allows the burgomaster to define as 'security risk areas' those neighbourhoods where public order is threatened by the presence of arms, or where there is a real risk for such a threat. In these areas the police may search everyone who happens to be present, even if there is no suspicion of an offence[75]. The new Act entered into force on 15 September 2002 and was immediately applied in Rotterdam. In the **United Kingdom**, the Police Reform Act 2002 confers a power of entry on community support officers to enter property for the purpose of saving life or limb or preventing serious damage to property. It also enables designated persons other than police officers to obtain and exercise search warrants and for designated detention officers to carry out searches, fingerprinting, photographing and examinations of detained persons, as well as to take samples from such persons.

One of the conditions which Article 8 §2 of the European Convention on Human Rights imposes on the lawfulness of interference in private life[76] or the secrecy of correspondence is that this interference is "provided for by law", that is to say, not only in accordance with internal law, but also that it is sufficiently precise and detailed in such a way as to afford protection against arbitrary violations[77]. When measures of secret surveillance or interception of communications are taken, the requirement of foreseeable nature means that internal law must "use sufficiently clear terms to adequately indicate to everyone in what circumstances and under what conditions the public authorities have taken such measures". Internal law must at least define the categories of persons that are liable to be subject to such surveillance; the nature of the offences may necessitate it; a limit must be set to the duration of the measure; internal law must stipulate rules governing the archiving of the information collected and the precautions to be taken to communicate this information completely with a view to verification by the court and the defence; it must also contain rules concerning the deletion of the data that are collected in this way.

Spain had already been condemned by the European Court of Human Rights in 1988 for deficiencies in the legal framework surrounding phone tapping practised at the request of an investigating judge[78]. In April 2002, the same court declared admissible the application from a person who had been sentenced on the basis of phone tapping carried out by the police at the request of the chief

[74] Which is part of the Gesetz zur Neuregelung des Zollfahndungsdienstes [Act concerning the Revision of the Customs Investigation] of 16 Aug 2002 (BGBl. 2002 I p. 3202).
[75] *Staatsblad* 2002, 429 and 459.
[76] The notion of private life is particularly broad and cannot be restricted to the sphere of intimacy surrounding the individual and from which he can exclude others. According to the European Court of Human Rights, even a person who visits a public place, openly and publicly, benefits according to the right to respect for his private life from a protection against the recording of his acts and gestures and the ultimate use that may be made thereof (European Court of Human Rights, *P.G. and J.H. v. United Kingdom* Judgment of 25 September 2001, §57). The interception of communications, however, is a more restricted concept, which does not cover all forms of interference in private life. In **Italy**, by a judgment of 2 May 2002, the 5th section of the Court of Cassation affirmed that the remote surveillance of the movements of a person on the territory by means of satellite receivers cannot be classed as interception of a communication (it concerns in essence a specific form of tailing) and, consequently, to do so the police does not require the authorization of the investigating judge required for interceptions.
[77] During the period under scrutiny, see, e.g., a case in the **Netherlands** where the social security authorities anticipated that a person would apply for a benefit, and decided to systematically monitor his house in order to gather data concerning his whereabouts. Noting there was no legal basis for this measure, the President of the Central Appeals Tribunal found a violation of Article 8 ECHR (*Pres. Centrale Raad van Beroep*, *AB* 2002, 32, 9 October 2001).
[78] European Court of Human Rights, *Valenzuela Contreras v. Spain,* judgment of 30 July 1998, *Vol.* 1998-V, pp. 1910-1938.

investigating judge of the Audiencia Nacional, but the legal basis of which could not be sufficient[79]. What is at issue is the wording of Article 579 of the Code of Criminal Procedure, amended by the organic Act 4/1988 of 25 May 1988, which provides that the judge may order the interception of communications, namely "where there is evidence that it is possible to secure by these means the discovery or verification of facts or circumstances that are important for the proceedings". This formulation, even when complemented by further explanations supplied by case law, does not appear to offer the justification required for interference in the secrecy of communications of an individual. The **United Kingdom** has been condemned duirng the period under scrutiny for the same kind of violations. The European Court of Human Rights has found that the absence of any statutory system for regulating covert audio surveillance, the interception of pager messages or covert recordings made by the police are a violation of the right to respect for private life[80].

In terms of the quality of the law that must surround all restriction to private life, we may ask ourselves whether the situation is satisfactory in **Ireland**. In 1993, Ireland adopted a law on the interception of correspondence and telecommunications (*Interception of Postal Packets and Telecommunication Messages (Regulation) Act*, 1993) offering certain guarantees when communications are intercepted for the purposes of criminal investigation or national security. However, since the protection of the right to respect for private life comes within the scope of case law and its outlines are not adequately defined, it is not certain that the guarantee it offers is sufficiently foreseeable: this deficiency was highlighted in 1988 by the Law Reform Commission Report on Privacy[81]; it is regularly criticized by the non-governmental organizations for the defence of human rights[82].

In **Belgium**, Articles 151 and 152 of the Programme Act of 30 December 2001[83] have made certain amendments to the Act of 21 March 1991 on the reform of certain public corporations (called the Belgacom Act). Article 151 restores in the 1991 Act a provision (Article 111) which provides that "no one may, in the Kingdom, using the telecommunications infrastructure, make or try to make communications that impair the observance of the law, the security of the State, public order or morality, or constituting an offence against a foreign State". Article 152 of the Programme Act provides for the penalization of persons violating Article 111 of the above-mentioned Act of 21 March 1991 with 1 to 4 years' imprisonment (amendment of Article 114, §8, of the Act of 21 March 1991). This legislative amendment appears to be a simple extension to telecommunications of a similar provision already existing in Belgian law but applying only to radio communications (see Article 4 of the Act of 30 July 1979). However, it creates a disquieting legal insecurity for any telecommunications user (thus it is not excluded, though it is not certain, that a call made over the Internet for an action of civil disobedience falls under this offence). In particular, undoubtedly due to a careless mistake on the part of the legislator[84], it allows the authorities to resort to phone tapping in order to establish the offence in question[85], which, bearing in mind the inaccuracy of the law, does not seem compatible with the requirement of a sufficiently solid legal basis for any interference in the secrecy of communications[86].

Although **Sweden** appears to practice certain forms of interference in private life of which the legal basis is either fragile or non-existent – which the Ministry of Justice has undertaken to remedy

[79] European Court of Human Rights, *Prado Bugallo v. Spain* (application no. 58496/00) decision of 16 April 2002 (admissibility).
[80] Eur.Ct. H.R., *Armstrong v. United Kingdom*, 16 July 2002, Eur.Ct. H.R., *Taylor-Sabori v. United Kingdom*, 22 October 2002 and Eur.Ct. H.R., *Allan v. United Kingdom*, 5 November 2002 respectively.
[81] *Report on Privacy; Surveillance and the Interception of Communications* (LRC 57-1998) (juin 1998).
[82] Notably the Irish Council for Civil Liberties, www.iccl.ie/
[83] *M.B.,* 31 December 2001.
[84] M. Nihoul and C. Visart de Bocarmé, "The increased risk of legislation in penal law: a recent example in the area of phone tapping", *J.T.,* 2002, p. 318.
[85] Due to the referral to Article 114, § 8, of the Act of 21 March 1991 by Article 90c of the Criminal Investigation Code, concerning tapping, interception and recording of private communications and telecommunications.
[86] The League of Human Rights brought before the Court of Arbitration an action for annulment against Articles 151 and 152 of the Programme Act of 30 December 2001.

shortly[87] –, that State seems to be faced with a different kind of problem. The HRC included in its principal subjects of concern with regard to Article 17 CCPR during the review of the Swedish periodic report under the Covenant in 2002 in particular the frequent recourse to telephone tapping of persons of foreign extraction. The Committee also paid attention to the atmosphere of latent suspicion towards individuals of foreign origin.[88] According to the Special Control of Aliens Act (SFS 1991:572), (Lag om särskild utlänningskontroll (SFS 1991:572)) the Swedish police can, in certain cases, use secret wiretapping and secret wire-surveillance to eavesdrop on (exclusively) foreign citizens. The purpose of the act is to prevent politically motivated (criminal) acts of violence, threats and compulsion. It is for the Government or the Stockholm City Court to decide if the above cited Act is applicable to the foreigner in question. Since the legal provisions give the criminal investigation authorities considerably greater powers than those offered by other legislation in this field, it has been criticised for being discriminatory by several Swedish NGOs and practicing lawyers.

Right to respect for family life

The 2002 report focuses on the situation of foreigners, from the point of view of the right to respect for family life, of which the topical interest is more in evidence. The States can only decide on the expulsion of foreigners with respect for their private and family life[89]. On the other hand, they must take into account the requirements of the right to respect for family life in their decisions concerning family reunion.

Private and family life and the expulsion of foreigners

According to a case law of the European Court of Human Rights which was inaugurated more than ten years ago, the expulsion of a person from the State in which he resides together with the members of his family or in which he has developed a social network or professional relations may constitute a violation of his private and family life. An expulsion measure will therefore only be admissible under restrictive conditions, if it is based on an urgent social need and remains proportionate o the objective of protecting public order and security or public health[90]. Moreover, Article 1 of Additional Protocol no. 7 to the European Convention on Human Rights[91] contains certain procedural guarantees in the case of expulsion of foreigners. Nine member States (**Austria**, **Denmark**, **Finland**, **France**, **Greece**, **Ireland**, **Italy**, **Luxembourg** and **Sweden**) have ratified this Protocol, without any reservation being voiced concerning Article 1[92]. Moreover, Article 19 par. 8 of the European Social Charter provides that the States which agreed to be bound by this provision[93] undertake to guarantee to migrant workers lawfully residing within their territories that they "cannot be expelled unless they endanger national security or offend against public interest or morality". As regards the expulsion of nationals of State

[87] Metro, Lagändring på gång för polisens spaning, 13 January 2003, p. 2; SvD, Spaningsmetoder kräver ny lag, 13 January 2003, p. 8.

[88] CCPR/CO/74/SWE, § 12. The Swedish media has touched upon this issue and it has reported an increase in telephone tapping despite the unsatisfactory result of such intrusive measures. O.Billger, *Ökning av hemlig telefonavlyssning trots dåligt resultat*, SvD 4 December 2002, p. 6. Meanwhile, the Minister of Justice has announced that there are plans envisaged to make a proposal for the introduction of a legal counsel in cases dealing with telephone tapping. O.Billger, *Rätssäkerheten stärks*, SvD 18 December 2002, p. 4.

[89] Regarding the risks of ill-treatment associated with forced expulsion, see commentary on Article 4 of the Charter.

[90] European Court of Human Rights, *Moustaquim v. Belgium* judgment of 18 February 1991; European Court of Human Rights, *Beldjoudi v. France* judgment of 26 March 1992; European Court of Human Rights, *Nasri v. France* judgment of 13 July 1995; European Court of Human Rights, *Mehemi v. France* judgment of 26 September 1997; European Court of Human Rights, *Ezzoudhi v. France* judgment of 13 February 2001.

[91] *E.T.S.*, n° 117. The protocol became open for signature and ratification on 22 November 1984. It became effective on 1 November 1988.

[92] **Sweden** has made a declaration concerning this Article.

[93] Within the framework of the revised European Social Charter, the following countries agreed to be bound by this provision: **Denmark**, **Finland**, **France**, **Ireland**, **Italy**, **Portugal** and **Sweden**. Within the framework of the European Social Charter, **Belgium**, **Germany**, **Greece**, **Spain**, **Luxembourg** and the **United Kingdom**. However, neither **Austria** nor the **Netherlands** accepted this provision.

parties to the European Social Charter, this provision may reinforce the protection offered by Article 8 of the European Convention on Human Rights[94].
In its Recommendation Rec(2000)15 to the member States, concerning the security of residence of long-term migrants[95], the Committee of Ministers of the Council of Europe considered that three categories of long-term immigrants[96] should be protected against expulsion. According to the Recommendation, the following categories should be protected against expulsion (principle 4, b and c of the Recommendation): those who have resided in the State of residence for at least twenty years ("after twenty years of residence, a long-term immigrant should no longer be expellable"); second-generation immigrants or immigrants who arrived before the age of ten in the State of residence and are still residing there at the moment they reach the age of eighteen ("long-term immigrants born on the territory of the member State or admitted to the member State before the age of ten, who have been lawfully and habitually resident, should not be expellable once they have reached the age of eighteen"); finally, minors ("long-term immigrants who are minors may in principle not be expelled"). These categories of long-term immigrants are protected against expulsion, except if their presence constitutes "a serious threat to national security or public safety" (principle 4, d., of the Recommendation).

Moreover, the same Recommendation provides (principle 4) that any decision on expulsion of a long-term immigrant should "take account, having due regard to the principle of proportionality and in the light of the European Court of Human Rights' constant case law (...): the personal behaviour of the immigrant; the duration of residence; the consequences for both the immigrant and his or her family; existing links of the immigrant and his or her family to his or her country of origin" (4, a.). The Recommendation stipulates in this regard that, in order to duly take into consideration the length or type of residence in relation to the seriousness of the crime committed by the long-term immigrant, the member States may provide that "a long-term immigrant should not be expelled:
- after five years of residence, except in the case of a conviction for a criminal offence where sentenced to in excess of two years' imprisonment without suspension;
- after ten years of residence, except in the case of a conviction fo a criminal offence where sentenced to in excess of five years' imprisonment without suspension" (4, b.).

As this Recommendation suggests[97], the mere formal criterion of nationality does not suffice to make the expulsion of a foreigner admissible. From the moment the latter has developed close ties with the State of residence on account of the length of his residence, or if he has no more ties with the State of which he bears the nationality on account of the fact that he was born on the territory of the State of residence or that he arrived there when he was still a child, he should be protected against expulsion, unless he represents a serious threat to public safety or national security[98].

This Recommendation is of particular interest due to the difficulty that the States parties to the Convention often experience, basing themselves solely on the case law of the European Court of

[94] During the period under scrutiny for example, the European Committee on Social Rights found that the liability to expulsion from the **United Kingdom** of the family members of a migrant worker who are nationals of Contracting States that are not members of the EU or parties to the EEA, as well of the children of a migrant worker who are themselves nationals of EU member States or parties to the EEA but are aged under 17, following the deportation of the migrant worker concerned is not in conformity with Article 19(8) of the European Social Charter : Conclusion XVI-1, p. 30.
[95] Adopted by the Committee of Ministers on 13 September 2000 at the 720th meeting of the Ministers' Delegates.
[96] The Recommendation defines as long-term immigrant a person who has resided lawfully and habitually for a period of at least five years and for a maximum of ten years on its territory otherwise than exclusively as a student throughout that period; or has been authorised to reside on its territory permanently or for a period of at least five years; or is a family member whose residence on the territory of the member state has been authorised for a maximum period of five years for the purpose of family reunification with a national of the member state or an alien as defined in the two first categories of long-term immigrants.
[97] See also Recommendation no. R (84) 9 of the Committee of Ministers on second-generation migrants.
[98] In **Luxembourg**, in an opinion of 15 November 2002 addressed to the Prime Minister, the Advisory Committee on Human Rights pondered over "the justifiability of the decision taken to order the expulsion of families who have been living in Luxembourg for several years and whose children have become integrated in the Luxembourg school system and would have the greatest difficulty in becoming integrated in the school system of their country of origin, thus seeing their fundamental right to education being seriously prejudiced".

Human Rights[99], in precisely identifying the limits imposed by Article 8 of the European Convention on Human Rights[100]. During the period under scrutiny, however, the European Court of Human Rights has had the opportunity to specify that, when there is a defendable grievance concerning a violation of Article 8 of the European Convention on Human Rights through the expulsion of a foreigner, the guarantee of an effective recourse as stipulated by Article 13 of the Convention requires that the State grants the individual the effective possibility of challenging his expulsion before an independent and impartial body deciding at the end of a procedure offering adequate guarantees. According to the Court, even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires as a minimum that the competent independent appeals authority be informed of the reasons for the decision, even if such reasons are not publicly available due to their sensitive nature. The authority has to be competent to reject the executive's assertion that there is a threat to national security where it finds it arbitrary or unreasonable. There has to be some form of adversarial proceedings, if need be through a special representative who would represent the interests of the person being expelled[101].

Despite the limitations, including procedural limitations, imposed on the States when they adopt an expulsion measure with regard to a foreigner and thus may disrupt his private and/or family life, the principle remains that of their freedom to grant or refuse the foreigner the right to stay on their territory. A foreigner may be expelled for reasons of public order even if it ultimately obliges the family members having the nationality of the State of residence to leave this State and to return to the State of origin if they want to continue their family life[102]. The injustice associated with the "double punishment"[103] inflicted on the foreigner who, following a criminal conviction, is faced with an order to leave the territory or with a prohibition to enter the territory for reasons of public order if his behaviour is considered sufficiently serious – although such a measure cannot be taken against a national – is being criticized with growing vigour by associations for the defence of human rights.

In **France**, 6405 persons were subjected to a "double punishment" in 2000. Following statements by the Minister of the Interior, who declared himself in favour of a modification of the regime of double punishment, a private bill aimed at abolishing the double punishment was presented and discussed by the French National Assembly on 28 November 2002. The government, however, preferred the

[99] For instance, the European Court of Human Rights does not formally rule out that a foreigner can be expelled while he is married to a national of the State taking such a measure: although the adoption of such a measure obliges the husband or wife having the nationality of that State to leave the national territory in order to continue family life somewhere else, it cannot be ruled out in principle, if the couple has an alternative. In **France**, the Council of State considered, in a judgment in the case of *Préfet du Cher v. M. Chelli* of 28 September2001, that the adoption of an expulsion measure with regard to a foreigner who was married to a French woman with whom he was to have a child could not be ruled out (*A.J.D.A.,* 2002, p. 522). A decision by the Supreme Court of **Ireland** is expected soon with regard to the compatibility with the Constitution of the adoption of an expulsion measure involving a family of which the parents are foreigners but who have a child born in Ireland.

[100] The member States of the European Union have been guilty of several violations of the European Convention during the period under scrutiny for the disproportionate disruption of private and/or family life caused by an expulsion order: see for example the judgments in *Amrollahi v. Denmark* (application no. 6811/00) of 11 July 2002; *Yildiz v. Austria* (application no. 37295/97) of 31 October 2002.

[101] European Court of Human Rights (4th section), *Al Nashif v. Bulgaria* judgment (application no. 50963/99), § 123.

[102] In **Sweden**, statistics from the Crime Prevention Council (Brottsförebyggande Rådet - (BRÅ)) show that about 200 children are annually affected (forcefully separated) as a consequence of the expulsion/deportation of one of the parents on the grounds of a criminal act (Utvisning på grund av brott. De dömda och deras barn; BRÅ-rapport 2000:18, in Ds 2002:41, Barnperspektivet i mål om utvisning på grund av brott, p. 9). A proposal has, therefore, been made by an investigative commission to improve the quality of the basic data available to the courts in order to make them more sensitive to the repercussions for any eventual children in cases of possible expulsion/deportation with the aim to safeguard the child's right of access to both parents. On the other hand, the commission has not proposed the introduction of a legal guarantee for the expulsed/deported parent to visit his/her child in Sweden (Ds 2002:41, p. 11).

[103] The expression is used here for the sake of linguistic convenience, and because it has entered the political debate. Technically speaking, exclusion from the territory is an administrative police measure, rather than a criminal conviction. In a judgment in the case *Maaouia v. France* of 5 October 2000, the European Court of Human Rights upheld the viewpoint initially adopted by the European Commission of Human Rights, according to which Article 6 of the European Convention on Human Rights, applicable only to disputes concerning civil rights and obligations or a criminal charge, cannot be invoked by a foreigner who is due to be expelled - whether it concerns deportation or expulsion, handing over or extradition, or turning back.

establishment of an interministerial working group, and no vote took place on the bill[104]. It seems that there is a preference for a relaxation of the regime of double punishment rather than an abolishment pure and simple.

In **Belgium**, too, a debate is unfolding on the "double punishment". The Act of 15 December 1980[105] makes it possible to issue an expulsion order against foreigners who seriously undermine public order. Such a decision, which is usually taken when the foreigner is serving a prison sentence, is accompanied by a 10-year prohibition of residence at the moment of release. On 19 July 2002, the Council of Ministers adopted a (unpublished) circular determining the cases in which expulsion is ruled out: 1) foreigners who have been living legally on Belgian territory for at least 20 years; 2) foreigners born in Belgium or who arrived there before the age of 12; 3) householders who have been given a prison sentence of less than 5 years. Although such a circular is a step forward, it is still faint and confidential, especially as all the signs are that the Aliens Office refuses to apply this circular[106].

In **Italy**, the period under scrutiny saw the adoption of Act no. 189/2002 modifying the provisions concerning immigration and asylum[107]. This law makes it possible for the penalty enforcement magistrate to replace a prison sentence given to a foreigner by an expulsion order. This option is only available if the prison sentence does not exceed two years and if it does not concern a conviction for serious offences or for trafficking in illegal immigrants. This text clearly illustrates the penal nature - although it is still an alternative to the deprivation of liberty - of the expulsion measure adopted with regard to delinquent foreigners.

The right to family reunification

When family life cannot be continued elsewhere without resulting in a violation of the right to respect for private and/or family life on account of the disruption of the living environment of the persons concerned, Article 8 of the European Convention on Human Rights guarantees the right to family reunification. The European Court of Human Rights observed the incompatibility of the practice pursued by the **Netherlands** with the requirements of the Convention in this area in the *Sen* case. The case was brought by a Turkish couple living in the Netherlands with two of their children, who were born in the Netherlands and have always lived there with their parents. They applied for a residence permit for their oldest daughter, who had initially stayed in Turkey when the parents left for the Netherlands. The request was rejected, however, on the ground that the family bond between them and their daughter had been broken. The Court found a violation of the right to respect for their family life. In reaching this conclusion, the Court noted that there was a major obstacle to the rest of the family's return to Turkey. The first two applicants had settled as a couple in the Netherlands, where they had been legally resident for many years, and two of their three children had always lived in the Netherlands and went to school there[108].

In July 2002 the European Committee of Social Rights published its conclusions concerning the 14th report of the **Netherlands** (September 2001). As to the scope of family reunion, the Committee noted that for children of migrant workers who are nationals of Contracting Parties not belonging to the European Union and not parties to the Agreement on the European Economic Area, the cut-off age in the Netherlands for authorising family reunion is eighteen years. As an exceptional measure, family reunion may be authorised where children aged 18 to 21 are still financially and morally dependent on their parent who reside in the Netherlands. The Committee recalled that the Appendix to Article 19 § 6 ESC requires family reunion to be secured to children of migrant workers up to the age of twenty-one years. It nevertheless emphasises that where the national legislation prescribes a lower age, it suffices in practice that applications for reunion in respect of children up to 21 years of age should be generally

[104] See *Le Monde* of 29 November 2002.
[105] Act of 15 December 1980 on the access to the territory, the establishment, residence and expulsion of foreigners, *M.B.*, 31 December 1980, Art. 20 and 21.
[106] See the report by the watchdog platform for refugees and illegal aliens, November 2002.
[107] Legge 30 luglio 2002 n. 189, Supplemento n. 173/L alla Gazzetta Ufficiale del 26 agosto 2002 n. 199.
[108] Eur. Ct. H.R., *Sen v. the Netherlands* (judgment), no. 31465/96, 21 December 2001.

accepted. In its previous conclusion, the Committee found the situation inconsistent with the Charter on the ground that children aged 18 to 21 were not only disqualified in law from family reunion but were also denied it in practice. This fact had proved particularly evident in the case of Turkish nationals. The statistics provided by the 14th Netherlands report bring led Committee to confirm this assessment. Indeed, according to a study covering the period 1999-2000, out of a total 2 032 applications submitted by nationals of eight non-EU, non EEA Contracting Parties, only 1 409 applications (69 %) were accepted. The Committee considers that the proportion of children aged 18 to 21 refused family reunion is too high and that consequently the situation is not in conformity with Article 19§6 in this respect. In addition the ECSR criticised the fact that welfare support benefits do not enter into the assessment of the income stipulated for approval of family reunion, and that consequently any request from persons without other income is refused[109]. During the period under scrutiny, the European Committee on Social Rights has also found with respect to the **United Kingdom** that the legislative provision for family reunion for the dependent children of migrant workers only up to the age of 18 is not in conformity with Article 19(6) of the European Social Charter insofar as it affects nationals of other Contracting States[110].

During the period under scrutiny, it is in **Denmark** that the right to family reunion has been most seriously restricted. The new Law on Aliens (Lov (2002: 365) om Udlændinge) of 6 June 2002 stipulates that spouses will not be granted reunification if one of the spouses is under the age of 24. Moreover, reunification will be denied if it must be considered doubtful that the marriage was contracted or the cohabitation was established at both parties' desires. These rules seek to limit the risk of "forced marriages" leading to family reunification. Spouses or cohabitants can only be granted reunification in Denmark if the spouses or cohabitants' aggregate ties with Denmark are stronger than the spouses' or cohabitants' aggregate ties with another country. Reunification with parents over the age of 60 will also denied according to the new provision of the Aliens Act. It is made a condition for issue of family reunification that the person living in Denmark undertakes to maintain the person applying for reunification. A financial security of DKK 50,000 (6,670 Euro) must be provided by the person living in Denmark to cover any future expenses for assistance granted to the applicant as public benefits under the Act on Active Social Policy or the Integration Act. It is also made a requirement that the person living in Denmark has not received assistance under said Acts for a period of one year prior to the date when the application is submitted. The Aliens Act further lays down requirements for the individual already resident in Denmark. Thus, the individual residing in Denmark must be a Danish citizen or a citizen of one of the other nordic countries: Norway, Sweden, Finland and Iceland; or be a refugee or have protection status in Denmark; or have had a permanent (unlimited) residence permit in Denmark for more than at least 3 years. Besides, the person residing in Denmark must reside permanently in the country and have an accommodation of reasonable size at his or her disposal : this latter requirement (the so called housing requirement) is in fact difficult to comply with, because of the precision with which it is defined. At last, it should be noted that entering into marriage in Denmark is conditioned upon citizenship or the lawful stay of both spouses in Denmark. Consequently, the entering into marriage in Denmark does not lead to automatic granting of residence permit to the foreign spouse, *pro forma* marriages does not give access to family reunification; and asylum seekers cannot get married in Denmark.

Although the evolution in Danish law is notable, **Italy** has also clearly restricted the possibilities for family reunification in the course of the period under scrutiny. Act no. 189/2002 modifying the provisions governing immigration and asylum provides that reunification with parents being kept by the State is now only possible if they have no children in their country of origin or provenance or, if the parents are aged over sixty-five, the child or children in the country of origin cannot look after them due to health problems (previously, reunification was always possible provided that income and housing conditions were adequate). Reunification with family members who are totally disabled according to the criteria stipulated by Italian law, which used to be possible for every relative up to the third degree, is now only possible for adult children.

[109] Conclusion XVI-2.
[110] Conclusion XVI-1, p 28.

In **Finland**, the courts have drawn an interesting conclusion from the requirements of Article 8 of the European Convention on Human Rights, in that the separation of spouses could lead the authorities to doubt the existence of the family unit created between them. A, who was legally residing in Finland where he was granted asylum, had applied a residence permit for his wife on the basis of a family tie, but the Directorate of Immigration had refused to grant the permit. In its reasoning, the Directorate of Immigration relied upon Section 18 c of the Finnish Alien's Act, concerning preconditions for issuing a residence permit abroad on the basis of a family tie. This provision provides, inter alia, that a family member of an alien residing in Finland with a residence permit issued on the basis of refuge shall be issued a residence permit unless there are reasons relating to public order or safety or other weighty reasons against issuing the permit. The Directorate of Immigration found out that the spouses had hardly met at all since A had left Iran and that they had only kept in touch by writing letters and making phone calls. In fact, A had met his wife only one month before he had left Iran about five years ago. The Directorate of Immigration concluded that there was no genuine family tie between the spouses with the outcome that there were "other weighty reasons" against issuing the permit within the meaning of Section 18 c f the Finnish Alien's Act. On appeal before the the administrative court and later the Supreme Administrative Court, A especially underscored the cultural characteristics of his and his wife home country, effectively prohibiting cohabiting and the like prior to marriage. In addition, A referred to his status as a refugee because this had also contributed to the outcome that he had not been able to have a real family ties with his wife. In its decision, the Supreme Administrative Court referred, among other provisions, to Article 8 of the ECHR. In particular, the Court took notice of the fact that A's own culture had imposed significant limitations on his possibility to have a family life prior to their marriage. The Court also pointed out that A's status as a refugee had further limited his possibilities to see his wife after marriage in his home country. Therefore, the Court concluded that there had been no weighty reasons within the meaning of Section 18 c of the Finnish Alien's Act against issuing a residence permit on the ground that the spouses had failed to have a real family life.

The right to family reunification also benefits citizens of the European Union by virtue of Community law[111]. In a judgment delivered on a preliminary question submitted by the Council of State of **Belgium**[112], the European Court of Justice considered that, according to Community law, a member State may not send back at the border a third country national who is married to a national of a member State and attempts to enter its territory without being in possession of a valid identity card or passport or, if necessary, a visa, where he is able to prove his identity and the conjugal ties and there is no evidence to establish that he represents a risk to the requirements of public policy, public security or public health[113]. The Court also ruled that a member State is not permitted to refuse issue of a residence permit and to issue an expulsion order against a third country national who is able to furnish proof of his identity and of his marriage to a national of a member State on the sole ground that he has entered the territory of the member State concerned unlawfully. Furthermore, a member State may neither refuse to issue a residence permit to a third country national who is married to a national of a member State and entered the territory of that member State lawfully, nor issue an order expelling him from the territory, on the sole ground that his visa expired before he applied for a residence permit.

The principal action had its origin in the application of the circular of 28 August 1997, under the terms of which an application for residence by a third country national married to a national of the European Union, or married to a third country national allowed or authorized to stay in Belgium by virtue of Articles 10 and 40 of the Act of 15 December 1980, is refused if the applicant is unable to produce a valid national passport or a travelling ticket, bearing a visa or equivalent authorization. Following the judgment of the European Court of Justice, the Minister of the Interior issued a circular dated 21 October 2002, the scope of which is limited to family reunification for Community nationals only. Apart from the fact that its legal effect remains uncertain, this circular is considerably deficient. For example, appeal is open to the applicant only in the event of his identity being disputed, excluding a

[111] See Article 10 of Regulation (EEC) no. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L 257, p. 2.
[112] ECJ, 25 July 2002, *MRAX v. Belgium*, C-459/99.
[113] See Articles 3, 4 and 10 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ L 257, p. 3)

possible questioning of the conjugal ties.[114] In addition, it is not specified that the document intended to prove the family connection need not be legalised in advance via the Belgian consular or diplomatic post in the State of origin, although exemption from this obligation would appear to be a logical consequence of the decree pronounced by the European Community Court of Justice on July 25th 2002: this decree seems to state that the documents issued in Belgium by the representation of the State concerned should be sufficient.

More fundamentally, the distinction that is made for the purposes of family reunification between family members of Belgian citizens and Community nationals on the one hand and family members of non-EU nationals admitted to Belgium on the other could be considered an unjustified violation of the right to private and family life of the persons concerned. It runs counter to the political objectives that have been established by the European Council at Tampere (15 and 16 October 1999) and Laeken (14 and 15 December 2001) of offering third country nationals legally residing on the territory of the Union member States "rights and obligations comparable to those of European Union citizens"[115].

Article 8. Protection of personal data

The comparative assessment of the evolution within the member States of the protection of personal data during the period under scrutiny is facilitated by the important common basis that is constituted not only by Article 8 of the European Convention on Human Rights and the Convention of the Council of Europe for the protection of individuals with regard to automatic processing of personal data of 28 January 1981[116] – instrument ratified by all member States – but also by the experience which the European Community has acquired in this area.

It is true that the harmonization is not complete yet. More than four years after the deadline of 24 October 1998 fixed for its transposition, Directive 95/46/EC 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[117] has still not been implemented in all member States of the European Union. After the European Commission on 11 January 2000 made public its decision to take legal action against France, Luxembourg, the Netherlands, Germany and Ireland for failing to notify their national measures to transpose Directive 95/46/EC, the Dutch, German, Luxembourg and Irish legislation came into effect[118].

In the **Netherlands**, the *Wet Bescherming Persoonsgegevens*[119] of 6 July 2000 (Dutch Personal Data Protection Act), became effective on 1 September 2001. It was amended by the *Wet van 5 april 2001 tot wijziging van bepalingen met betrekking tot de verwerking van persoonsgegevens*.[120] **Germany** transposed Directive 95/46/EC by amending the Federal Data Protection Actof 1990 (*Bundesdatenschutzgesetz*) on 18 May 2001[121], which became effective on 23 May 2001.[122] All the

[114] See the report by the watchdog platform for refugees and illegal aliens, November 2002, pp. 15-16.
[115] For a development of this question, see the report by the *Plateform de vigilance pour les réfugiés et les sans-papiers*, November 2002, pp. 15-18.
[116] *E.T.S.,* n° 108.
[117] *OJ* L 281 of 23/11/1995, p. 31. While Convention no. 108 of the Council of Europe set a minimum level of protection of private life with regard to the automatic processing of personal data, Directive 95/46/EC establishes a common level of protection of personal data for all the Union member States; on several points, it goes further than the minimum requirements of the Convention of 28 January 1981. It also extends the scope of the protection of private life, since it is based on a particularly broad definition of "processing" and is no longer limited to "automatic" processing (Article 2, b), of the Directive).
[118] In **Italy**, legislative decree no. 467/2001 concerning the provisions for the correction and integration of the regulations in the area of protection of personal data became effective on 1 February 2002 (*Decreto legislativo 28 dicembre 2001 n. 467, Gazzetta Ufficiale del 16 gennaio 2002*). This decree has simplified the procedures for the notification of data processing to *l'Autorità garante della sicurezza del trattamento dei dati personali*, reduced the number of cases where notification is compulsory, and extended and reinforced the powers of the supervisory authority.
[119] *Stb.* 2000, 302.
[120] *Stb.* 2001, 180.
[121] Bundesgesetzblatt I Nr. 23/2001, p. 904, 22 May 2001.
[122] http://www.bfd.bund.de/information/bdsg_hinweis.html

Länder (with the exception of Saxony and Bremen) also adopted new legislation on the protection of personal data in order to give effect to the Directive.[123] **Luxembourg** also finally transposed the Directive in the Act of 2 August 2002 on the protection of individuals with regard to the processing of personal data[124]. In the opinion of 11 June 2001 which it delivered on bill n° 4735 that was submitted to it, which has become the Act of 2 August 2002, the Advisory Committee on Human Rights expressed its fears concerning the risks to the freedom of expression represented by the requirements imposed by the bill on the processing of data for journalistic purposes, the extent of the powers of investigation and prosecution of the National Commission for Data Protection – potentially incompatible, in its view, with the requirements of a fair trial –, and the conditions of interconnection of personal databanks – an interconnection which, according to the Advisory Committee on Human Rights, takes place in conditions that are too vaguely defined. In **Ireland**, the protection of personal data was, until very recently, governed by the *Data Protection Act* (1988). New laws came into effect one after the other. The *European Communities (Data Protection) Regulations*, 2001, became effective on 1 April 2002. They transposed certain provisions of Directive 95/46/EC, namely those relating to the transfer of personal data to non-European Union countries and the requirement of an adequate level of protection in those countries (Articles 4, 17, 25 and 26 of the Directive). The *Data Protection (Amendment) Bill*, 2002, published on 25 February 2002, accomplished the transposition of Directive 95/46/EC in its entirety. Finally, we should also point out that on 8 May 2002, the *European Communities (Data Protection and Privacy in Telecommunications) Regulations*, 2002 were adopted, transposing into Irish law Directive 97/66/EC on the protection of data in the telecommunications sector, only a few months before it was repealed and replaced by Directive 2002/58 of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.[125]

In **France**, on the other hand, the bill concerning the protection of individuals with regard to the treatment of personal data is still being debated in Parliament. This bill is intended to transpose the Directive into French law with which it actually conforms to a very large extent. On 30 January 2002, the French National Assembly adopted the bill in its first reading. It is now up to the Senate to give its verdict on this text. Up to the present, the matter is regulated by Act no. 78-17 of 6 January 1978 concerning information technology, data files and freedoms. This Act was amended by Act no. 2002-303 of 4 March 2002 concerning patient rights and the quality of the healthcare system[126], which amended Article 40 concerning the exercise of the right of access to personal medical records: "Where the exercise of the right of access applies to personal medical records, these data may be communicated to the person concerned, as he chooses, either directly or through a doctor whom he has designated to this end, in accordance with the provisions of Article L. 1111-7 of the Public Health Code". Notwithstanding this specification, France remains the only country in the Union to have still failed to transpose the said Directive.

Restrictions on the protection of the individual with regard to the processing of personal data

Directive 95/46/EC provides that personal data must be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes. Article 7 of Directive 95/46/CE gives a restrictive list of purposes for which personal data may be processed. They concern

[123] **Baden-Württemberg**:Gesetz zum Schutz personenbezogener Daten (Landesdatenschutzgesetz - LDSG) vom 27. Mai 1991, zuletzt geändert durch Artikel 1 des Gesetzes zur Änderung des Landesdatenschutzgesetzes und anderer Gesetze vom 23. Mai 2000: http://www.baden-wuerttemberg.datenschutz.de/ldsg/ldsg-inh.html.
Bayern:Bayerisches Datenschutzgesetz (BayDSG) vom 23. Juli 1993, zuletzt geändert durch Gesetz zur Änderung des Bayerischen Datenschutzgesetzes vom 25.10.2000 (Inkrafttreten zum 01.01.2001): www.datenschutz-bayern.de/recht/baydsg_n.pdf. **Berlin** :Berliner Datenschutzgesetz vom 17.Dezember 1990 (GVBl. 1991, S. 16, 54), geändert durch Gesetz vom 3.Juli 1995 (GVBl. 1995, S. 404), zuletzt geändert durch Gesetz vom 30. Juli 2001(GVBl. I, S. 66) (Inkrafttreten zum 5.8.2001): http://www.datenschutz-berlin.de/recht/bln/blndsg/blndsg_nichtamt.htm. Brandenburg:Gesetz zum Schutz personenbezogener Daten im Land Brandenburg (Brandenburgisches Datenschutzgesetz - bgDSG) in der Fassung der Bekanntmachung vom 9. März 1999.

[124] Memorial, A-91, 13 August 2002, p. 1386.

[125] See also the Internet site of the Irish Commissioner for data protection: http:// www. dataprotection.ie

[126] *J. off. Rép. fr.* of 5 March 2002.

the purposes pursued by the person responsible for the processing. Article 13 of Directive 95/46/EC provides for the possibility of imposing certain restrictions on some of the rights provided for in the Directive, by the adoption of legislative measures by the State, for conventional reasons similar to those enumerated in Article 8 §2 of the Convention. Three cases brought before the Commission on Data Protection which, in **Austria**, is an independent authority charged with enforcing the Data Protection Act, illustrate the interpretation that is given of these exceptions.

In the first case[127], the complainant had himself examined by a public health officer for the purpose of an exceptional tax refund because of his disabilities, and finally got the desired expert medical opinion. However, the officer forwarded the collected medical data to the competent road traffic authority, who subsequently withdrew the complainant's driving licence on the basis of his bad physical condition. The Data Protection Commission held that bearing in mind that driving a car is an inherently dangerous activity the transmission of the complainant's medical data was justified by the fact that overriding interests of the concerned person such as his life and personal integrity were at stake.

Another complaint concerned a request of the Inland Revenue to an insurance company to disclose information on a life insurance policy to help levy substantial tax arrears accrued by the complainant, which was eventually met. This procedure was also deemed to be in full compliance with the law, as there exists a statutory authorisation for that request with the purpose of facilitating the collection of outstanding taxes, and this regulation was said to qualify as exemption to data protection for reasons of public interest admissible under Art 13(1)e of Directive 95/46/EC.

A third case before the Commission had in issue whether data on the yearly income of a physician, held by the social security service for business enterprises in its capacity as retirement pension insurance, could be used by the same social security service to justify the termination of a private law medical service contract entered into with the complaining physician. In looking at the relevant legal provisions the Commission found that the figures on income transmitted by the tax and revenue office were strictly reserved for use in connection with the doctor's pension insurance. It concluded that any use of such data beyond that field of competence would require a clear legal basis in order not to be considered invasive on the complainant's right to have his personal data protected.

Three questions draw our attention during the period under scrutiny. The report focuses first on the stakes of a specification of the protection of personal data in the context of employment. It thus contributes to an ongoing reflection on the adoption of a Community initiative in this area. It also devotes some comments on the question of the "blacklists" and video surveillance. Even though the connection between these issues and employment may be fairly weak, the news in 2002 show the urgency with which they need to be analyzed. The report then deals with the questions that came up in 2002 in regard to the processing personal data by the police. In this connection, reference is made to the access to the Schengen Information System (SIS) and the development of this databank. Finally, the report gives an overview of certain developments during the period under scrutiny in the definition of and the ways in which the independent supervisory authorities charged with data protection exercised their powers in the member States.

The protection of personal data in employment

The majority of the terms of Directive 95/46/EC of 24 October 1995 makes it applicable to a wide diversity of situations, and in a whole array of sectors: for example, it covers marketing to consumers, relations between citizens and public administration, labour relations, and insurance. However, the Directive provides that the principles set out in it "may be supplemented or clarified, in particular as far as certain sectors are concerned, by specific rules based on those principles"[128]. It is this kind of

[127] K120.766/004-DSK/2002, decision of 5 April 2002
[128] See Preamble to the Directive, 68th recital.

specification which Directive 97/66/EC of 15 December 1997 wanted to make[129] with regard to the protection of privacy in the telecommunications sector[130]. In order to respond to the new technological developments in this sector, this Directive has rcently been repealed and replaced by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 on privacy and electronic communications[131].

We are presently moving towards the adoption of a supplementary Directive, also in line with the principles established by Directive 95/46/EC, intended to specify the requirements of the protection of personal data of workers[132]. The importance of the question of the protection of personal data of workers is beyond dispute. For several years now, it has had the attention in the **Netherlands** of the *College bescherming persoonsgegevens (CBP)* [Dutch Data Protection Authority]: in 2002 the CBP issued a second updated edition of its report *Goed werken in netwerken* [Working Well in Networks], in which it seeks to strike the right balance between the legitimate interests of employers and the protection of employees' privacy[133]. In Portugal, the Data Protection Authority has approved in 2002 some important Recommendations regarding the monitoring of employees at the workplace[134], tending at stressing protection of privacy.

In **Spain**, only 2% of companies track the electronic communications (Internet access and electronic mail) of their employees in the presence of a union delegate, despite a legal obligation to this effect, but 45% track Internet access and 24,2% spy on electronic mails[135]. Moreover, according to the 2001 report of the Data Protection Agency, while notifications of processing are clearly increasing (35% in 2001), which shows the concern of industries to comply with the law on data protection, there are also more penalties[136], which may indicate ignorance on the part of these industries of the extent of their legal obligations. In **Finland**, the scandal surrounding the spying on telephone communications by Sonera, the country's biggest telecommunications company, perfectly illustrates the problem. Police suspects the security unit of Sonera of having committed an aggravated violation of privacy in communications, for the Sonera security personnel may have illegally monitored the telephone records of both Sonera employees and outsiders in the fall of 2000 and the spring of 2001, for the purpose of identifying the source of leaks about the company, including management disputes. At the moment, the suspicion is that Sonera security unit has checked the telephone records of hundreds of people. As each person has made calls to many different places, the records contained information of numerous phone numbers.

In **Denmark**, the Data Protection Agency, an underlying authority of the Ministry of Justice, exercises surveillance over processing of data to which Lov (2000:429) om beskyttelse af personoplysninger [Act (2000:429) on Processing of Personal Data] applies. In 2002 The Danish Data Protection Agency received a limited number of complaints about automatic processing of personal data, perpetrated by; intelligence services and police (2), employers (4), insurance companies or insurance agents (2), medical or care staff (2).

---

[129] See also Regulation (EC) n° 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, *OJ* L 8 of 12/01/2001, p. 1.

[130] *OJ* L 24 of 30/01/1998, p. 1.

[131] 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, *OJ* L 201 of 31/7/2002, p. 37.

[132] Article 138 §2 EC provides, "before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action". A first round of consultation of management and labour on the protection of personal data of workers was launched on 27 August 2001. On 31 October 2002, the second round of consultation of management and labour was initiated. At the time of writing, only the results of the first consultation round were known to the author.

[133] www.cbpweb.nl

[134] Which may be found on www.cnpd.pt.

[135] Data from a study carried out by the Research Centre of IESE Business School and PricewaterhouseCoopers, presented on 17 December 2002. The same study indicates that 10% of companies have penalized employees for improper use of electronic mail and 3% for improper use of the Internet.

[136] In 2001, 218 actions for violations were brought, representing a 25% increase, leading to the imposition of fines totalling 10 million euros. Agencia de Protección de Datos. Memoria 2001, Madrid, 2002.

In **Belgium**, developments in the right of workers to the protection of their personal data equally illustrate the usefulness of a clarification, in the sector of employment, of the general requirements laid down by Directive 95/46/EC. Collective Labour Agreement no. 81, adopted on 26 April 2002 by the National Labour Council, is intended to guarantee workers the right to respect for their private life in their work relation, by defining, taking into account the needs of proper functioning of the company, for what purposes and on what conditions of transparency the monitoring of electronic communication data in a network may be set up and the conditions in which the personalization of these data is authorized. This monitoring is authorized for specific, legitimate and exhaustively enumerated purposes only, namely the prevention of unlawful acts, the protection of economic, commercial and financial interests, the security of information systems and compliance with the rules for the use of network technologies laid down in the company. The collective agreement also insists in particular upon the necessary prior, collective and individual information to be provided to the workers. A personalization procedure may be employed without any other formality if the purpose of the monitoring is the prevention of unlawful acts, the protection of economic, commercial and financial interests, and the security of the information systems. On the other hand, if the purpose of the monitoring is to enforce respect for good faith and the rules for the use of technologies laid down in the company, an alert phase should be observed so as to notify the worker of an anomaly and to warn him of a personalization in case of a recurrence.

A private bill presented on 29 August 2001 aimed at regulating the use of means of telecommunication in the workplace is also intended to codify most of the principles applied to this day in industry with regard to the use of the Internet and e-mail. The adoption of Collective Labour Agreement no. 81 does not deprive this bill of its usefulness, since a legislative rule will in principle be required, given that the Collective Labour Agreement claims to depart from Article 109c D of the Act of 21 March 1991 reforming certain public corporations (called the Belgacom Act)[137].

A special situation occurs when the processing of personal data concerning a prospective employee as part of certain recruitment procedures is intended to enable him to occupy certain posts that are considered sensitive, notably when connected with national security. In **Finland**, Act no. 177 became effective on 1 September 2002 (*Act on background checks for security purposes* (Laki turvallisuusselvityksistä, Act No 177 of 2002). The purpose of the Act, as specified in section 2, is to protect national security and public economy as well as, in certain cases, significant private security and economic interests against espionage and data security offences. The Act provides for the possibility to investigate the trustworthiness of an employee or a potential employee. An investigation may also be made before granting a person access to specific places in connection with that person's work. In addition, the Government may decide on security classifications of tasks and on extended background checks with regard to persons working for state authorities. The investigations are carried out by the Security Police, the local police in case of restricted access to a place, or the General Staff of the Armed Forces in cases concerning defence administration. Those entitled to request for an investigation are listed in section 4 of the Act and include state or municipal authorities as well as private associations. The sources from which data may be gathered are also defined in the Act (sections 8 and 22). An investigation on a person's trustworthiness may only be made with the written approval of the person concerned. This person has a right to know what kind of data has been gathered, except in case of data from a register which a registered person is not allowed access to. The Data Protection Ombudsman has a right to acquaint himself or herself with the investigation report as a whole in order to examine its conformity to law. Section 3 of the Act provides that a person's right to privacy shall not be infringed with more than is necessary for reaching the purpose of the Act. Necessary amendments were also made to six other Acts (amending Acts 178–183), concerning

[137] *Mon. b.,* 27 March 1991. This Act has been amended several times since it was published in its original version. In its present wording, Article 109c D prohibits any person "from fraudulently taking cognizance of the existence (...) of signs, signals, writings, images, sounds or data of whatever nature, transmitted by telecommunications, originating from other persons and intended for other persons", and this "subject to the authorization of all other persons directly or indirectly concerned by the information, identification or the data in question". According to its terms, this provision would appear to hinder the employer in the exercise of his power to monitor the use by his workers of the communication tools he places at their disposal, including there where the conditions for the use of these tools have been clearly defined beforehand.

mainly various registers held by the authorities and the access to these registers by the police or the General Staff.

The nature of the job carried out can also influence the extent of the data that may be judged relevant and which may therefore be judged lawful to collect, since the job involves coming into contact with children. In **Finland**, on 1 January 2003, Act no. 504 on investigation of the criminal background of those who work with children became effective.[138] The purpose of the Act is to protect the personal integrity of children and to enhance their personal security. It provides for a procedure by which an employer shall check the criminal background of a person who is to be employed on a permanent basis in order to work continuously with minor children without the presence of their parents. The employer shall ask the person to present an extract from the criminal record. The document shall be returned to the person who has presented it, and it may not be copied. The Act also prescribes on the obligation to observe secrecy when handling the information on a person's criminal record. Section 6 of the Act on criminal records (Act No 770 of 1993, as amended by Act No 505 of 2002) lists the offences which are to be included in the extract from the criminal record for this particular purpose. In **Belgium**, a circular from the Minister of the Interior of 1 July 2002[139] has the same object. It provides for two types of certificates of good character according to the use for which they are intended. A special kind of certificate will be issued when such is required for access to an activity connected with education, psychological, medical and social counselling, youth care, child protection, entertainment or supervision of minors: in this case, the certificate lists all convictions and confinement orders for offences listed in Articles 354 to 360, 368, 369, 372 to 386c, 398 to 410, 422b and 422c of the Penal Code, which have been committed against minors; moreover, when such a certificate is required, the chief of the local police or the police officers appointed by him will give a reasoned opinion. This requirement gives rise to investigations that take place in obvious violation of the Act of 8 December 1992 concerning the protection of privacy: apart from the fact that nowhere does the circular specify the conditions in which the investigation must take place, the person concerned will have no access to his results. The risk of arbitrariness is real: the fact that a person is unable to consult his file implies that he is also unable to demand a rectification[140], deletion or prohibition of certain data.

Furthermore, where certain jobs imply particular risks, it may be acceptable to collect certain data from employees or prospective employees, notably with regard to their use of drugs. In **Finland**, a working group of the Ministry of Social Affairs and Health arrived at the conclusion that drug tests would only be acceptable in special circumstances, concerning specific tasks, work safety or a particular need for an intoxicant-free working environment. They should not be used to gauge an employee's overall trustworthiness. The working group underscored that drug tests involve interference with an individual's fundamental rights and should therefore be mostly voluntary. However, when a work involves a security risk or an employee is suspected of being intoxicated while at work drug tests can be obligatory. At present, a Ministry of Labour working group is considering the issue of workplace drug tests, and proposals for new legislation is expected after this working group has ended its investigation.[141]

[138] Laki lasten kanssa työskentelevien rikostaustan selvittämiseksi ja rikosrekisterilain 6 ja 7 § :n muuttamisesta, Act No 504 of 2002. See also PeVL 9/2002vp.

[139] Circular of the Minister of the Interior of 1 July 2002 amending and coordinating the circular of 6 June 1962 containing general instructions for certificates of good character (*Mon. b.,* 6 July 2002).

[140] The guarantee offered by the indivudual's right of access and rectification for the respect for the principle of accuracy of the data (principle according to which the data being processed must be accurate and regularly updated) is well illustrated by the decision of 17 January 2002 concerning the records of personal data held by the police which was delivered by the Data Protection Authority (*Autorità garante della sicurezza del trattamento dei dati personali*) in **Italy** during the period under scrutiny: the Authority draws attention to the necessity for the police stations to periodically verify the lawfulness of the processing of personal data and, if necessary, to modify, complete or delete data on the basis of updated information, in a case where the Authority had found that the complainant's data as processed by the police no longer reflected his present situation with regard to the law.

[141] Source : a press release of the Ministry of Social Affairs and Health, 11.4.2002. The Report of the Working Group was released on 27 March 2002.

It should be pointed out that the right to respect for the worker's private life does not amount to his right to protection with regard to the processing of registered data concerning him. In the very absence of the processing of character details, the worker has the right to respect for his private life, understood not only as the right to confidentiality of certain information, but also as the freedom of personal development. The Belgian Commission for the Protection of Privacy recalls that "the relationship that brings together the employer and the employee (...) is of a partial nature: the employer's authority must not extend to all aspects of the personality and activities of the employee"[142]. The criteria of the pertinence of the restriction to private life (is this justified by the nature of the job concerned?) and its proportionality (is it limited to what is necessary for the objective pursued?) will determine whether or not the restriction is acceptable.

Two examples taken from the case law of the courts in the **Netherlands** during the period under scrutiny illustrate the question. A Dutch army officer serving abroad on a NATO mission was sent back because he refused to cut his hair. He appealed to the Central Appeals Tribunal, relying on his right to respect for private life and invoking a Ministerial Decree from 1971 according to which the hair cut is, in principle, free. The Tribunal agreed, finding that in this case there were no compelling reasons to limit the applicant's freedom. The Tribunal observed that impact of his hair cut on the army's combat power was very limited, that the person whom he had replaced had had long hair and, finally, that in his function as guard he did not have any contact with foreign military[143]. By way of contrast, another applicant from within the army was less successful. The commander of a marine vessel imposed an alcohol ban on a member of the crew who had been found drunk. The ban applied also to the hours off duty. The Tribunal accepted that the ban interfered with the sailor's right to respect for private life, but decided that the interference was justified, taking into account his responsibilities aboard[144].

These examples concern public positions. They could have concerned the private sector. Taking into account the internationalization of economic activity and, more particularly, the fact that the staff of companies are often spread over several member States, excessive differences between these States in terms of the limits they impose in the name of privacy on the employer's power of supervision could make it difficult to manage the human resources of a company whose staff are spread over several member States. The unifying effect of Article 8 of the European Convention on Human Rights is therefore welcome.

Another area in which the individual's right to protection of his private life with regard to the processing of personal data comes into play is that of social security and National Insurance. In **Finland** for example, three laws came into effect on 1 October 2002 that deal with this issue. Act no. 682 amending the National Pensions Act (Laki kansaneläkelain muuttamisesta, Act No 682 of 2002) provides for access by the social security institutions to certain personal data, as well as the possibility for these institutions, in limited circumstances, to transmit certain data in their possession with a view to facilitating a criminal investigation or to combating the abuse of certain social benefits. Act no. 723 amending the Employment Accidents Insurance Act[145] governs the protection of personal data with regard to processing by the competent authorities in this area. Act no. 646 amending the Act concerning employment pension[146] defines the obligations of the Pensions Department in terms of the processing of personal data. These laws are in accordance with the Finnish Constitution and with Directive 95/46/EC, as transposed in Finland by the Personal Data Act (Act No 23 of 1999), as well as with Act No 621/1999 on the Openness of Government Activities.

[142] Opinion no. 10/2000 delivered on 3 April 2000, aforesaid.
[143] *Centrale Raad van Beroep*, LJN-nr. AE2857, 25 April 2002.
[144] *Centrale Raad van Beroep*, LJN-nr. AE4696, 3 May 2002.
[145] Laki tapaturmavakuutuslain muuttamisesta, Act No 723 of 2002.
[146] Laki työntekijäin eläkelain muuttamisesta väliaikaisesti, Act No 646 of 2002.

"Blacklists"

"Blacklists" are developing quickly within the Member States. They consist of "the collection and dissemination of specific information relating to a specific group of persons, which is compiled to specific criteria according to the kind of blacklist in question, which generally implies adverse and prejudicial effects for the individuals included thereon and which may discriminate against a group of people by barring them access to a specific service or harming their reputation"[147]. The phenomenon is widespread. It may concern records of debts, which are used in the commercial and financial sectors[148], or of criminal offenses. It may serve to detect fraud, or even to catalogue clients considered as presenting risks, as in the insurance sector, sometimes even when there is no responsibility of the individual client in the number of damages for which he sought compensation.

During the period under scrutiny, **Belgium** offered an example of the risks of a generalization of such blacklists. In November 2002, the National Association of Landlords published a draft computer register of defaulting tenants. The register is designed to allow professional and private landlords to consult a database on the Internet so that they can check, before concluding a new lease, whether a prospective tenant is not registered as a bad payer.[149] On 19 December 2002, the Commission for the Protection of Privacy delivered an unfavourable opinion on the project, having regard to the Act of 8 December 1992 on the protection of privacy.[150] The Commission for the Protection of Privacy adds that this kind of register is liable to violate the fundamental right of every individual to accommodation as enshrined in Article 23 of the Constitution. The conditions in which this right may be challenged belong to the exclusive competence of the legislator, who is empowered according to the Commission to appreciate the legitimacy and proportionality of this type of instrument.[151]

The examination which the Working Group "Article 29" has made of the development of these blacklists on the basis of information reported by the national supervisory authorities of the member States, has led the Group - which observes the wide diversity of solutions that are offered to the problems raised by the constitution of such lists - to propose a Community initiative in this area: "An effort to achieve the maximum harmonisation on this question would go some way towards eliminating the different criteria which exist at present in most Member States, ans would facilitate economic operators' work within the framework of the competition law, in line with Recital 7 of Directive 95/46/EC"[152]. It should be underlined, however, that, besides the observance of the principles of Directive 95/46/EC – principles which it may effectively be useful to point out that they concern the setting up of blacklists in certain specific sectors –, the fact of classifying certain individuals as having experienced debt problems in the past or as having filed a statistically high number of insurance claims, or as having failed in their obligation to pay rent, threatens to exclude them permanently from access to credit, access to insurance, which could affect their right to mobility, and therefore often to a job which requires them to travel, or access to accommodation. However, in situations like this, it should not be taken for granted that information about an individual's past is relevant to an assessment of the risks he presents in the future: the assessment of those risks requires more complete information, for instance, about the causes of the financial

[147] Working Group "Article 29", Working Document on Blacklists, WP 65, 11118/02/EN/final, 3 October 2002.
[148] Following numerous complaints about the processing of personal data by private bodies which collect data supplied by the financial institutions in order to be able to assess the risks attached to loans ("centrali rischi"), the Italian Supervisory Authority (*Autorità garante della sicurezza del trattamento dei dati personali*) on 31 July 2002 adopted a set of instructions in this area.
[149] See the website www.check4rent.com. To be able to register a tenant, the following conditions must be met: a registered letter must have been sent to the tenant first, giving notice of at least 3 full months' rent in arrears; absence of regularization or acceptable settlement proposal, a certificate from the landlord declaring that the payment default does not stem from a serious conflict between the tenant and the landlord.
[150] Commission for the Protection of Privacy: Opinion no. 52/2002 of 19 December 2002 concerning the constitution of an external register of defaulting tenants.
[151] The Commission for the Protection of Privacy had previously delivered an opinion expressing the same concerns about a plan by the insurance companies to set up a register. The Commission's recommendations were not followed, however (Opinion 21/2000 of 28 June 2000).
[152] Working paper, 3 October 2002, p. 11.

problems he experienced, the circumstances of the accidents in which he was involved, or the conflict he had with a landlord. If a harmonization is planned, it should be based on the necessity that blacklists do not deprive the individual of access to a range of social goods and services that are essential to his social and professional integration.

Video surveillance

The installation and operation of a video surveillance system are generally considered as constituting a form of processing applied to personal data, within the meaning of Directive 95/46/EC[153]. Such a form of surveillance comes, in any case, within the scope of Article 8 of the European Convention on Human Rights, as the European Court of Human Rights confirmed in its judgment in the case of *Peck v. United Kingdom* of 28 January 2003[154]: "The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life (see, for example, *Herbecq and Another v. Belgium*, applications nos. 32200/96 and 32201/96, Commission decision of 14 January 1998, DR 92-A, p. 92). On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations. Accordingly, in both the *Rotaru* and *Amann* judgments (...) the compilation of data by security services on particular individuals even without the use of covert surveillance methods constituted an interference with the applicants' private lives (*Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V, and *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II)."[155] It must therefore respect the criteria of legality, legitimacy and proportionality, as specified in Article 13 of Directive 95/46/EC as well as in Article 8 §2 of the European Convention on Human Rights.

It is by this criterion that the draft amendment to the Act which, in **Denmark**, governs the use of video surveillance should be assessed, and which needs to be relaxed in order to facilitate the surveillance of certain sensitive places[156]. In the **Netherlands**, the *College bescherming persoonsgegevens (CBP)* [Dutch Data Protection Authority] issued guidelines concerning the use of cameras in public areas (including shops and residential areas) in 2002. In **Sweden**, the Parliament decided on 31 January 2002 that the existing Act on secret camera surveillance (Lag om fortsatt giltighet av lagen (1995:1506) om hemlig kameraövervakning (SFS 2002:16)) shall continue to be in force until the end of 2004. The Government has to report annually to the Parliament on the implementation of the law. In its latest available report,[157] the Government considers the use of secret camera surveillance as a valuable method in combating heavy and organised crime. The review is based on information supplied by the Prosecutor-General (*Riksåklagaren*) and the National Police Board (*Rikspolisstyrelsen*). The NGO community has, however, expressed criticism as to the application of the regulations on the use of public camera surveillance during 2002. It is maintained that investigations show that only half of those licensed to use public camera surveillance meet the very

[153] Opinion no. 8/2001 on the processing of personal data for professional purposes, WP 48, 5062/01, 13 September 2001: the Working Group "Article 29" on data protection considers that "The processing of sound and image data for professional purposes comes within the scope of the Directive, and the video surveillance of workers is covered by its provisions" (p. 14).
[154] European Court of Human Rights (4th section), *Peck v. United Kingdom* (application no. 44647/9) of 28 January 2003, § 59.
[155] One may wonder about the compatibility with this interpretation of the requirements of Article 8 of the European Convention on Human Rights of the point of view adopted by the Constitutional Court of Italy in a judgment of 11 April 2002, n° 135, in which it rules on the compatibility of an investigative action conducted by the police using televised secret recordings made in a private home with the right to respect for the home. The Court considered this action compatible with the Constitution to the extent that its purpose was to record purely gestural messages. In all other cases it would be prohibited. Nevertheless, the request addressed to the legislator to review the matter constitutes an admission that, since the case concerned an interference in the private life of an individual, the absence of guarantees should not continue.
[156] Proposal for amendment of Lov (2002:257) om Forbud mod TV-overvågning (penge- og vekselautomater, pengetransportbiler) [Act (2002:257) on Prohibition of TV Surveillance (cash dispensers, coin changers, and money haulages). The amendment allows private parties access to surveillance of other private parties, who are in the immediate vicinity of cash dispensers, coin changers, and money haulages.
[157] The number of the report is 2000/01:41. See also Government Bill, prop. 2001/02:17, p. 9.

strict requirements for its use. It is believed that the County Administrative Board should more carefully consider the protection for personal integrity before granting new licences.[158] In **Portugal**, the issue of video surveillance led to a decision of the Portuguese Constitutional Court[159], which considered unconstitutional a regulation authorizing video surveillance for security reasons, as this regulation had been adopted by the government and not by the parliament or with a parliament authorisation. According to the Portuguese Data Protection Law[160], data which relate private life are sensitive data, and personal images are considered as a part of one's private life. Therefore, under Portuguese Law, the images on video surveillance – as sensitive data – can only be processed with a legal permission.

The processing of personal data by the police

In **France**, the bill on national security currently being debated in Parliament (already adopted by the Senate after its first reading) raises serious concerns. As it stands now, the bill authorizes the police to process by computer all recorded information "collected from investigation reports drawn up on the basis of legal procedures concerning any crime, offence or class 5 contravention constituting a threat to public security or peace, an assault on persons or property, or behaviour in relation to a form of organized crime or infringing the dignity of individuals"[161]. Since no age limit is specified (Article 9 par. 2), the danger lies in the possibility of registering minors[162]. Moreover, no judicial control is provided for with regard to the contents of these files, their purpose is not clearly defined, and the bill does not lay down sufficient conditions as to the ability to access, correct or delete the data. In addition, access to these files is very broad. What is criticized above all is the fact that the system would lead to the creation of criminal records alongside the official criminal records. The files in question may also be consulted for *security checks* of candidates for sensitive jobs[163].

Another aspect of the project concerns the extension of the possibilities for recording genetic fingerprints in the national register of genetic fingerprints (Article 15). This registration concerns convicted individuals, persons against whom there are one or several possible reasons for suspecting that they have committed an offence occasioning their inclusion in the register, or any other person concerned by the procedure. Refusal to have one's genetic fingerprint taken is punishable by a six-month prison sentence and a fine of 7500 euros. The conditions for the deletion of fingerprints[164] do not offer sufficient guarantees of protection. In the light of all these deficiencies, the National Commission on Information Technology and Freedoms (CNIL) believed it was necessary to draw the attention of MPs and experts to the risks of such a project to the fundamental freedoms[165]. This opinion merits all the more attention since a similar trend can be discerned in other States. In **Spain**, the Ministry of Justice is preparing an Act on the use of DNA tests in criminal investigation, one aspect of which is the creation of an organ for the management of genetic data and profiles[166]. In the **Netherlands**, the use of DNA in criminal investigation procedures is likely to expand considerably. A proposal that is currently pending in Parliament aims to increase the types of information that can lawfully be extracted from DNA[167]. Another proposal provides for the taking of DNA samples from all

[158] Alternative Report to the Human Rights Committee, pp. 11 and 50-53. The media has commented upon this issue recently. D.Nilsson, *3000 kameraögon vakar över Stockholm*, SvD 29 December 2002, pp. 6-7; *Kamera i provrum kritiseras*, SvD 30 December 2002, p. 8.
[159] Constitutional Court Decision n. 255/2002, of 12th July.
[160] The Data Protection Act (Law 67/98 of 26 October), and the Telecommunications Act (Act regulating the processing of personal data and the protection of privacy in the telecommunications sector, Law 69/98 of 28 October 1998), that have implemented into Portuguese legislation the provisions of Directives 95/46/EC and 97/66/EC. Directive 2002/58/EC has not yet been implemented by Portugal.
[161] Art.9 of the bill on national security.
[162] Provision contrary to the Order of 1945 prohibiting the creation of criminal records for minors.
[163] Public positions participating in the exercise of sovereignty missions of the State, or public or private positions in the field of security or defence.
[164] Despite the intervention of the Public Prosecutor in the procedure for the deletion of fingerprints.
[165] Opinion of the CNIL of 25 October 2002, at www.cnil.fr, opinion of the National Advisory Committee on Human Rights, at www.commission-droits-homme.gouv.fr
[166] *La Ley. Diario de Noticias*, 16-22 September 2002.
[167] *Kamerstukken I*, 2002-2003, 28072, no 13.

persons convicted for various categories of serious offences[168]. Under current legislation, DNA can only be taken if a person is actually suspected of a specific criminal offence. The proposed law would result in an considerable growth of the number of registered DNA profiles, which the Government believes would help prevent re-offenders and would be of assistance to investigate unsolved cases from the past. A controversial aspect of the proposal, however, is that DNA will also be taken from those detainees who have been convicted prior to the entry into force of the new act. Since the DNA samples will also be used to investigate unsolved cases from the time prior to the entry into force of the act, the act will have a 'double retroactive effect' – which is arguably incompatible with Article 7 ECHR and the rule laid down in Article 49 of the EU Charter.

Access to and development of the Schengen Information System (SIS)

The access of new partners to the SIS in the name of improved efficiency in the fight against terrorism or against organized crime was a constant topic in the initiative of the Kingdom of Spain aimed at adapting the SIS to new functions[169]. This theme was frequently debated during 2002, both on the Council – which did not succeed in reaching a final solution – and in the European Parliament[170]. The stakes are considerable in terms of the protection of fundamental rights. The Schengen database was set up for the purposes of verification rather than for investigation or prosecution. Access to the database by Eurojust and Europol leads us to question the use of these data for purposes other than those for which they have been collected.

As far as Eurojust is concerned, an informal agreement between member States led us to expect access by virtue of Articles 95 and 98 of the Schengen Implementation Convention. The case of Europol, on the other hand, raises totally different questions, even if the protection of data by virtue of Article 25 of the Europol Convention (Data Security) is compatible with its equivalent fixed by Article 118 of the Schengen Implementation Convention. The objective here is to process and arrange the information obtained in an operational perspective. The general added value of this access principally emerges in a repressive perspective to the extent that the arrangement of information is facilitated, notably on the basis of data supplied by third partners. Nevertheless, it is important that this access is strictly regulated and that it is in keeping with the objectives of the SIS. We should therefore have reservations about the claims of Europol in the name of "strategic necessity" to draw up a "comparison of the ethnic and demographic trends"[171].

If the objective as such, which is to rationalize and develop the use of the SIS with observance of the fundamental rights, must be achieved, it today clearly raises the question of a comprehensive approach and a common control of the structures that have multiplied in the past few years. The protection of data is as much at stake as the control procedures. The draft regulation following the Spanish initiative assigning new functions to the SIS in the fight against terrorism[172] contains useful references to the protection of fundamental rights and judicial control. On this account it received the approval of the European Parliament[173]. But it does not constitute that comprehensive instrument which needs to be adopted eventually.

Nevertheless, there are some encouraging signs. In **France**, a ruling by the Assembly of the Council of State, *Moon Sun Myung,* of 6 November 2002[174] has come to facilitate access to personal data contained in the Schengen Information System (SIS). Until then, the persons concerned by the SIS had no direct access to these data and had to apply to the CNIL in order to check whether they were registered and, if appropriate, whether the information concerning them was accurate. In the above-mentioned ruling, the Council of State acknowledged the divisibility of the information contained in

[168] *Kamerstukken II*, 2002-2003, 28685, nos 1-3.
[169] OJ C 160 of 4/7/2002 p. 7.
[170] Coelho Report of 3 December 2002 and opinion of the European Parliament of 17 December 2002.
[171] Document 5970/02 Europol 8 of 8 February 2002.
[172] OJ C160 of 4 July 2002 p.5
[173] Opinion of 17 December 2002
[174] Council of State, Assembly, 6 November 2002, Moon Sun Myung, application no. 194295, AJDA, 2002, p.1208.

the Schengen Information System. Henceforth, the person concerned can have direct access to certain data from the moment they do not threaten national security, defence or public safety. Members of the public can have indirect access to these data through the CNIL.

Independent supervisory authorities

Article 8 §3 of the Charter of Fundamental Rights provides that compliance with the rules concerning the protection of personal data shall be subject to control by an independent authority. Any initiative that reinforces the independence and the powers of surveillance of these authorities increases the protection of the rights of the individual. Article 1 §2 of the Additional Protocol to the Convention on the protection of individuals with regard to automatic processing of personal data regarding supervisory authorities and transborder data flows[175] provides in this respect that the supervisory authorities should have "powers of investigation and intervention, as well as the power to engage in legal proceedings or bring to the attention of the competent judicial authorities violations of provisions of domestic law [giving effect to the principles mentioned in Convention no. 108 of the Council of Europe]", and that they should be able to "hear claims lodged by any person concerning the protection of his/her rights and fundamental freedoms with regard to the processing of personal data within its competence". Article 1 §3 of the same Protocol provides that the supervisory authorities shall exercise their functions in complete independence.

We can therefore note with satisfaction the adoption in **Greece**, during the period under scrutiny, of Act no. 3051/2002 "Independent authorities guaranteed by the Constitution, modification of the recruitment system in the public sector and other provisions relating thereto", implementing Article 101A of the revised Constitution, embedding these independent authorities in the Constitution by providing that they shall be accountable to Parliament only, which also appoints their members[176]. However, Act no. 3501/2002 provides the possibility for the relevant Minister to appeal (in principle to the Council of State) against the enforceable acts of the independent auhorities.

In **Belgium**, a private bill of 15 July 2002[177] is intended to change the status and extend the powers of the Commission for the Protection of Privacy, which is the Belgian independent supervisory authority in the area of protection of the privacy of the individual with regard to the processing of personal data. The Commission for the Protection of Privacy found that it is not or no longer able to correctly carry out all the duties that the legislator has entrusted to him, considered in the light of the new developments and constraints of our society (explosion of the information technology scene, from video surveillance to e-government, growing awareness of citizens with regard to their rights, context of internationalization). Moreover, according to the author of the bill, the current institutional, administrative and financial dependence of the Commission on the Ministry of Justice will affect its necessary independence. It is therefore suggested that the Commission be transformed into a collateral organ of the House of Representatives and that the existing protection or authorization committees, as well as those which the legislator proposes to set up in specific areas, be incorporated, in the form of sectoral committees, into this collateral organ.

Article 9. Right to marry and right to found a family

Events of the past year urge us to examine two themes under Article 9 of the Charter of Fundamental Rights of the European Union. The first theme concerns the extension of the recognition of this right for every individual, irrespective of his sexual orientation or the gender conversion he has undergone.

[175] E.T.S., n°181. Protocol opened for signature at Strasbourg on 8 November 2001.
[176] Are concerned not only the Authority for the protection of personal data, but also the National Audiovisual Council, the Supreme Council for the selection of government personnel, the Ombudsman, and the Authority to guarantee the secrecy of communications, which is to be set up shortly.
[177] Private bill amending the Act of 8 December 1992 concerning the protection of privacy with regard to the processing of personal data and the Act of 15 January 1990 on the institution and organization of a crossroads bank for social security aimed at changing the status and extending the powers of the Commission for the Protection of Privacy, House of Rep., ordinary session, 2001-2002, Doc. Parl., 1490/001.

As is illustrated by the debates at the end of 2002 on the overhaul of the rules of Community law concerning the movement of European Union citizens and members of their families, this extension cannot fail to influence the development of Community law. This cannot base the notions of "marriage" or "spouse" to which it refers on ideas that are situated within the meaning that the member States want to give to them for their own nationals of whom they determine the personal status.

The second theme is that of the links between the right to marry and the access to the territory of the member States based on the rules concerning family reunification. Family reunification is, along with asylum, the main gateway to residence within the European Union for nationals of third countries. This situation reinforces the temptation of bogus or forced marriages. While it is legitimate for the States to give special attention to this and to combat this kind of fraud against the law, the measures that they adopt in this area must not lead to an unjustified restriction of the right to marry. This right is granted to every individual, even to foreigners who administratively are in an illegal or precarious situation.

The openning of marriage to same-sex couples

Since about a decade, the member States of the European Union adopted legislation which, under various designations (registered partnership[178], civil pact of solidarity[179], *Lebensgemeinschaft*[180], legal cohabitation[181], de facto marriage[182]...), aims to offer to same-sex couples who are unable to marry as well as to homosexual or heterosexual couples a legal framework which, without being identical to marriage, makes it possible to offer a certain stability to the relationship and to offer better protection to the partners who choose to endorse it. **Finland** followed the example of other States by adopting the Act on Registered Partnership *(*Laki rekisteröidystä parisuhteesta, Act No 950 of 2001), which became effective on 1 March 2002.[183] This new law allows same-sex couples to officially register their relationship[184], thereby putting them on a par with married couples in issues such as property rights, the right to receive maintenance from the other party, and inheritance.[185] Under the new law, same-sex couples, with a few exceptions, have the same rights and obligations as married couples. Yet, the parties to a registered partnership cannot together adopt a child, nor can they adopt a common surname on the basis of the registration. as well as the obligation to pay maintenance to the other party. The same rules apply to the dissolution of partnerships as to the dissolution of marriages. A partnership can be dissolved either when one of the parties dies or by a court order. When one of the parties of a registered partnership dies the same inheritance rules are applied to the surviving party as to a spouse. The surviving party is also entitled to a survivors' pension, and the provisions concerning spouses are applied to him or her for inheritance tax purposes. **Ireland** may follow: a statutory body, the Equality Authority, published a report *Implementing Equality for Lesbians, Gays and Bisexuals*[186] which, *inter alia*, dealt with partnership rights. It is expected that a Private Member's Bill on this matter will be published in 2003 by an Independent member of the Irish Senate, Senator David Norris. In **Germany**,

[178] See, in the **Netherlands**, the Act of 5 July 1997 amending Part I of the Civil Code and the Code of Civil Procedure, with a view to introducing provisions concerning registered partnerships (geregistreerd partnerschap), *Staatsblad* 1997 nr. 324; in **Denmark**, Act No. 372 of 7 June 1989 on registered partnerships (Lov om registreret partnerskab).
[179] See in France Act no. 99-944 of 15 November 1999 concerning civil pact of solidarity.
[180] See, in **Austria**, the Penal Code (Strafgesetzbuch) 1975, par. 72, amended in 1998.
[181] See, in **Belgium**, the Act of 23 November 1998 instituting legal cohabitation, *Mon. b.,* 12 January 1999.
[182] See, in **Portugal**, Act No. 7/2001 de 11 de Maio, Adopta medidas de protecçao das unioñes de facto, (2001) 109 (I-A), Diário da República 2797.
[183] See also HE 200/2000vp laiksi virallistetusta parisuhteesta. See also PeVL 15/2001vp. In 2002, 456 same-sex couples registered their partnership (statistics by Väestörekisterikeskus (Population Register Center), see http://www.vaestorekisterikeskus.fi/).
[184] The requirements for registration are that both parties are at least 18 years old and neither is a party to a registered partnership or married. Nor may the parties be close relatives.
[185] Before the Parliament, the law for same-sex couples raised great emotions in Autumn 2001, and the Parliament eventually only very narrowly approved the law. In the vote on 26 September 2001, 99 MPs had supported the measure and 84 had opposed. Basically, the debate over granting official status ultimately appeared to revolve around the question of fear of a weakening of the institution of marriage.
[186] www.equality.ie/

the Act on life partnerships became effective in 2001 (*Lebenspartnerschaften*)[187]. In a judgment of 17 July 2002, the Federal Constitutional Court concluded that this law was compatible with Article 6 §1 of the Basic Act, which places marriage under the protection of the State: according to the Court, life partnership does not compete with marriage or undermine it in any other way[188]. In **Spain**, the laws of several Autonomous Communities offer a certain legal framework for de facto marriages, including of persons of the same sex, under the concept of "stable couples" (*parejas estables*)[189], without however acknowledging complete similarity between homosexual and heterosexual couples, even among stable situations of cohabitation outside marriage. In **Portugal**, Law 7/2001, of 11 May 2001, gives some legal protection to heterosexual, as well as homosexual partnerships, for people who have been cohabiting for more than 2 years. Such a partnership is not registered. The main protection is in the field of tax law, labour law, and social security law. But there is also some protection of the home shared by such stable cohabitants, in case of death or separation. There is no protection in the field of succession law.[190] In a decision n° 275/2002 of 24 July 2002, the Constitutional Court considered that Art. 496(2) of the Civil Code, according to which compensation for non-pecuniary damages in case of death of someone is restricted to the spouse, the children or other descendants[191], is unconstitutional. Indeed, this clause has been interpreted as not offering any compensation to a partner in a *de facto* marriage.[192] This Constitutional Court considered that this was in violation of Art. 36 of the Constitution, which protects all kinds of families. Art. 496 Civil Code should not exclude partners (who have lived together for more than 2 years) from the right to be compensated for non-pecuniary damages for the death of the other.

However, we are on the eve of a second wave of developments which, in the name of a requirement of non-discrimination on the basis of sexual orientation, raises the question of opening up marriage to same-sex couples. In the **Netherlands**, the Act of 21 December 2000 amending Part I of the Civil Code[193] has, for the first time, opened up marriage to same-sex couples. In **Belgium**, the private bill opening marriage up to same-sex couples and amending certain provisions of the Civil Code was adopted by the legislative chambers at the beginning of 2003. Presented on 28 May 2002[194], this private bill resumes a bill that was presented and subsequently withdrawn by the government, which according to its recital was aimed at "the equal treatment, with regard to marriage, of homosexual and heterosexual couples". Like the bill it resumes, the private bill aims to put marriage of same-sex couples on an equal footing with marriage of persons of different sexes, with the exception, however, of the effects linked to the filiation, and without this opening of marriage producing consequences in the area of adoption. Marriage of persons of the same sex, however, shall only be open to Belgians or persons who meet the basic conditions prescribed by their personal status to contract a marriage[195]. In

[187] Act concerning the End of Discriminations concerning Same-Sex Couples: Life Partnerships of 16 Feb 2001 (BGBl. 2001 I p. 266). Art. 1 of this act contains the special "Act about the Registered Life Partnership (Act concerning Life Partnerships)".

[188] 1 BvF 1/01 and 2/01 -, BVerfGE 105, 313.

[189] For example, Ley relativa a prejas estables no casadas (26 March 1999) (Aragón); Ley 4/20002, de 23 de mayo, de Parejas Estables (Asturias); Llei 18/2001 de 19 de decembre, de parelles estables (îles Baléares); Llei 10/1998, de 15 de juliol, d'unions estables de parella, 10 July 1998 (Catalunya); Ley de Uniones de Hecho de la Comunidad de Madrid, 28 December 2001 (Madrid); Ley Foral 6/2000, de 3 de julio, para la igualdad jurídica de las parejas estables, 7 July 2000 (Navarre); Ley por la que se regulan las uniones de hecho, 9 April 2001 (Valencia).

[190] *See* Pereira Coehlo & Guilherme de Oliveira, *Curso de Direito da Família*, Coimbra, Coimbra Editora, 2001, pp.83 ff. Law 6/2001, of 11 May 2001, protects those who share a home and a domestic economy but do not necessarily have sexual relations: mere friends or, homosexuals, who do not wish to overtly publicise their relation. The legal effects are smaller than in the previous situation.

[191] Or, subsidiarily, to the ascendants, and at last to the brothers or nephews of the deceased person.

[192] See Supreme Court of Justice, 13-1-94, *CJ (STJ)*, I, 2000; Supreme Court of Justice 23-4-98, *CJ (STJ)*; Lisbon's Court of Appeal, 17-3-92, *CJ*, II, 167; and Supreme Court of Justice, 20-1-94.

[193] *Staatsblad* 2001, nr. 9.

[194] Senate, session 2001-2002, doc. 2-1173/1.

[195] Marriage between persons of the same sex is not open to all persons living in Belgium, even if they are citizens of the European Union. The question arises as to the compatibility of this situation with Article 7 of Regulation no. 1612/68 of the Council of 15 October 1968, OJ L 257, in the event that Community nationals had exercised their freedom in Belgium to take a job and should therefore benefit from all social benefits, the extension of which for their benefit would appear to encourage mobility within the Community; or, if the European Union citizen is not a worker, the compatibility of this restriction with the prohibition of all discrimination practised on the basis of nationality (Article 12 EC; see ECJ, 12 May 1998, *Martinez*

Austria, in the city of Vienna, the ruling social democrats presented on 7 November 2002 a package of legal measures that is intended to ensure equal treatment of all non-marital partnerships in all areas where the city is competent to pass legislation. In 2003 city laws shall be combed for provisions discriminating same-sex partners vis-à-vis heterosexual cohabiters with the emphasis put on issues such as city servants' rights to take special leave in case of their partner's illness, the granting of building allowances, social aid, and rights of access to documentation and information in the health service area.

Right to marry for transsexuals

Article 12 of the European Convention on Human Rights says, "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right". In a judgment of 11 July 2002, faced with the situation of a male to female transsexual who was prevented from marrying with the man with whom she had a relationship, the European Court of Human Rights interpreted this provision as securing "the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired"[196]. Moreover, by assigning special importance to the choice by the authors of the Charter of Fundamental Rights of the European Union to depart from the wording of Article 12 of the Convention when they drew up Article 9 of the Charter (absence of a reference to "men and women", according to the Court, "can only be deliberate"), the Court infers that the applicant is the victim of an "infringement of the very essence of her right to marry". The judgment dissociates the right to marry from the capacity to give birth and to found a family. Later developments cannot be ruled out[197].

In **Ireland**, the High Court gave a decision in relation to the rights of transsexuals on the eve of the *Goodwin* judgment[198]. The applicant in this case was a male-to-female transsexual previously married to a woman. While the High Court expressed sympathy with the plight of transsexuals it refused to order the amendment of the birth certificate of the applicant in this case suggesting instead that this was a legislative matter that should be kept under review by the Oireachtas. The case is now being appealed to the Supreme Court where the possibility of a conflict between provisions of the Irish Constitution and the ECHR (as interpreted in *Goodwin*[199]) is real. As the Irish Constitution will prevail over the ECHR in the event of such a conflict emerging there is strong chance that the applicant will eventually have to make an application to the European Court of Human Rights to fully vindicate her Convention rights. An immediate implementation of the *Goodwin* decision in Irish would obviate this consequence.

In the *Christine Goodwin* case, the European Court of Human Rights also found a violation against the applicant of the right to respect for private life, as guaranteed by Article 8 of the European Convention

Sala, C-85/96). It should be noted, however, that Article 12 EC only prohibits discrimination on the basis of nationality within the scope of the Treaty; the European Court of Justice considers that questions of civil status basically fall outside its scope (does not constitute a discrimination prohibited by Article 12 EC (Article 6 of the EC Treaty) the application of the national law of the ex-spouses in order to determine the consequences of divorce, as ordered by a rule of private international law of a member State: judgment of 10 June 1999, *Johannes*, C-430/97, specifically points 26 and 27).

[196] European Court of Human Rights (GC), *Christine Goodwin v. United Kingdom* (application no. 28957/95) judgment of 11 July 2002, §§ 98-99.

[197] It is worth noting that during the period under scrutiny, successful gender re-assignment has been held by a **United Kingdom** court not to have affected the registration of a person as male at birth so that 'his' marriage to a male had to be declared void; *Bellinger v Bellinger* [2002] 1 ALL ER 311.

[198] *Foy v. An t-Ard Chlaraitheoir, Ireland and the Attorney General and Others*, Unreported High Court decision of 9th July, 2002.

[199] The European Court of Human Rights, in the *Christine Goodwin* judgment quoted above, also observed a violation of Article 8 of the Convention on account of the inability for the applicant, in English law, to obtain legal recognition for her gender conversion.

on Human Rights, on account of the refusal by the authorities of the United Kingdom to legally recognize her new sexual identity. In **Finland**, the *Act on confirming the sexual identity of transsexual persons* (Laki transseksuaalin sukupuolen vahvistamisesta, Act No 563 of 2002) became effective on 1 January 2003. The new Act gives a transsexual person the right to receive, on certain conditions, from the public authorities a decision which certifies that the person belongs to the sex opposite to that which appears in the population records. The decision is made by the city administrative court (*magistrat*) on the person's application (section 3). Conditions for receiving the decision (section 1) include a medical certificate on the person's sexual identity and his or her sterilization, that the person has reached his or her majority, is not married or living in a registered relationship with a same-sex partner (with the exception of the consent of the spouse or partner as prescribed in section 2), and is a Finnish citizen or residing in Finland.

Bogus marriage and forced marriage

It is not always easy to strike the right balance between the necessity of penalizing bogus marriage with a view to family reunification, which is fraud against the law, on the one hand, and respect for the right to marry, which should be recognized for all without discrimination, on the other. In **Luxembourg**, an interim ruling considered that the refusal by an officer of the registry office to conclude a marriage between illegal foreigners constitutes a case of assault[200]. In **Belgium**, although the court may establish the bogus marriage, that is to say, the fact that "on the day of marriage, one of the spouses has no intention of creating a community with his or her partner"[201], and that the officer of the registry office may refuse to conclude the bogus marriage, the bogus nature must not be presumed, but based on precise evidence other than vague suspicions about the supposed purposes of the marriage[202]. In **Denmark**, on the other hand, the new Aliens Act of 2002 (Lov (2002: 365) om Udlændinge) provides for a prohibition to conclude marriages between illegal foreigners, and this with a view to discouraging bogus marriages. In **Italy**, Act no. 189/2002 amending the provisions in the area of immigration and asylum introduced a regulation whereby a residence permit issued to foreigners who, having resided lawfully on the territory for one year, are married in Italy to Italian citizens or citizens of a European Union country or to a lawfully residing foreign national may be withdrawn immediately if it is proven that the spouses have not effectively lived together since the marriage was concluded, unless children have been born to the couple. In **Spain**, the Attorney General issued a circular in order to update and harmonize the assessment criteria which the public prosecutors use in order to prevent bogus or forced marriages[203].

There is a risk that access to family reunification through marriage encourages recourse to this instrument in human trafficking in order to bypass the restrictions imposed on the entry into and residence on the territory. Moreover, the States should take measures to avoid all risks of forced marriage, concluded without the consent of each spouse: according to the Human Rights Committee, the concern to guard the reality of this consent may justify the imposition of a minimum age for marriage, although the Committee says that this age must be the same for men and for women[204]. The problem is not a theoretical one. Forced marriages (often child marriages) do occur in **Sweden** and they have been legalised in some circumstances. The Act on certain international legal procedures regarding marriage and guardianship (Lag om vissa internationella rättsförhållanden rörande äktenskap och förmynderskap (SFS 1904:26)) allows girls under the age of 18 years from other countries to marry in certain circumstances without the permission of the county administrative board as is required for Swedish citizens, as the domestic legislation prohibits forced and teenage marriages between Swedes. However, there is a proposal pending before the Parliament for the revision and adjustment of the 1904 Act so that minors are better protected in the matter of marriage in the future. It

[200] Ord. ref. Lux., 26 November 2002, n°897/2002, n° of cause list 78041, unpublished.
[201] Court of Appeal, Liège (1st chamber), 28 November 2001, *J.T.,* 2002, p. 131.
[202] Civ. Brussels (ref.), 12 March 2001, *J.T.,* 2002, p. 197.
[203] *La Ley. Diario de Noticias*, 11-17 March 2002.
[204] Human Rights Committee, General Observation no. 28 (2000), Equality between men and women, § 23. See also the Convention on consent to marriage, minimum age for marriage and registration of marriages, res. 1763 A (XVII) of the United Nations General Assembly of 7 November 1962.

has also been suggested by the members of Parliament representing the Christian Democrats (Kristdemokraterna) that there should be a total ban on child marriages.[205]

Some attempts to limit the risk of forced marriages, however, can be ill-conceived from the point of view of the law of international human rights. The Committee on the Elimination of Discrimination against Women, upon examining the fourth and fifth periodic reports by **Denmark** on 12 June 2002[206] expressed its concern about the introduction in the Aliens Act of an increase in the age limit for spousal reunification from 18 years to 24 years of age in order to combat forced marriages. Under the new Act on Aliens (Lov (2002: 365) om Udlændinge) of 6 June 2002, spouses will not be granted reunification if one of the spouses is under the age of 24, and reunification will be denied if it must be considered doubtful that the marriage was contracted or the cohabitation was established at both parties' desires. The Committee urges the Danish state to consider revoking the increase in the age limit for family reunification with spouses, and to explore other ways of combating forced marriages. At the same time, the problem of forced marriages is not an imaginary one in Denmark : the Minister for Gender Equality is preparing an initiative in that field, together with the Minister for Integration, and in consultation with NGOs.

Article 10. Freedom of thought, conscience and religion

Although during the period under scrutiny the European Court of Human Rights had in particular to deal with questions linked to the recognition and autonomy of religions in Greece, there are three other questions which the report addresses because of the close connection between these questions and Community authority. The issue of wearing a religious insignia as well as that of conscientious objection at work - of which refusal to serve in the armed forces is but one example - could elicit answers on the basis of Directive 2000/78/EC of 27 November 2000[207]. As regards the question of ritual slaughtering, from the moment that its prohibition extends to a prohibition to import meat from animals that have been slaughtered in conditions that are considered contrary to the requirements of animal protection, it could bring into play the range of constraints which the Union member States may impose upon the free movement of goods, in the name of the idea which they form of those requirements. The report, however, does not elaborate on those links. It merely records certain significant developments which these issues have seen in 2002.

Autonomy of religion

During the period under scrutiny, the European Court of Human Rights has given a judgment in the case of *Agga* versus **Greece**, which makes important specifications to the extent of the freedom of religious manifestation[208]. Mr Agga was elected by local believers as Mufti of Xhanti. When the Greek State proceeded to appoint another Mufti, Mr Agga refused to step down. Criminal proceedings were brought against him on the basis of articles 175 and 176 of the Penal Code for having usurped the functions of a minister of a "known religion" ("religion reconnue"). The European Court considered that Mr Agga's conviction amounted to an interference with his under Article 9 of the Convention , "in community with others and in public (...), to manifest his religion (...) in worship [and] taeching". In the Court's view, punishing a person for merely presenting himself as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democractic society. In the absence of any "pressing social need" justifying the conviction, the Court found Article 9 of the Convention to be violated.

In another case involving **Greece** in the period under scrutiny, the European Court of Human Rights declared inadmissible the applications of four Greek nationals who claimed that the prohibition of

[205] Motion till riksdagen 2001/02:kd183, p. 18. See also CEDAW, Gen. Rec. No. 21 (1994(§ 38) and HRC, Gen. Com. No. 28 (2000, § 23)).
[206] CEDAW C/2002/II/CRP.3/Add.3.
[207] See commentary on Article 21 of the Charter.
[208] European Court of Human Rights, *Agga (n° 2) v. Greece* (application no. 50776/99 et al.), judgment of 17 October 2002.

stating the religion, even optionally, on the identity card constitutes a measure that is incompatible with religious freedom [209].

Dress

In **Belgium**, the issue of wearing headscarves gave rise to Opinion n°54 of the Council for Equal Opportunities for Men and Women of 13 September 2002. The Opinion considers that a distinction should be made according to the significance attached to this dress: if wearing a headscarf is perceived - both by the person concerned and by third persons - as the expression of a personal choice, this would call for an attitude of tolerance, and *a fortiori* the same applies when the persons concerned wearing the veil is perceived as an instrument of emancipation; on the other hand, if wearing the veil is the manifestation of oppression by the environment of origin, the public institutions should provide necessary effective aid, without however satisfying themselves with a declaration of principle without practical application.

It is, however, in the context of employment and in connection with the requirement of non-discrimination that the issue of wearing religious insignia - notably the wearing of headscarves by Muslim women - manifests itself most acutely. The reply to the question ow knowing whether abandoning a particular dress code determined by religious conviction can be imposed in a particular context will depend on the legitimate requirements of that context. These requirements are diverse. It is not surprising that the solutions are equally diverse. In **Germany**, after the Land Baden-Württemberg refused to take into the public school a Muslim lady teacher who insisted on wearing a head scarf out of religious reasons as well during teaching, the Federal Administrative Court[210] agreed with the Land in accordance with the two previous instances. The public educational mission should be protected with the necessary religious neutrality[211]. The case is now pending at the Federal Constitutional Court. By way of contrast, the Federal Labour Court[212] decided in favour of a Muslim woman who worked as shop assistant in a department store in a small town. After she had told her employer that her religious ideas had changed and that the Islam forbade her to show in public without a head scarf, she was dismissed. The Federal Labour Court declared the dismissal as illegal. The entrepreneurial freedom of activity of the department store (fear of negative customer reactions) had to be balanced against the protection of the religious conviction of the shop assistant, and the Federal Labour Court considered that the department store could at least have waited if its fears would have proven to come true. This solution is all the more necessary, according to a judgment delivered in **Belgium** by the Industrial Tribunal in Brussels, since the employer unilaterally changed the employment terms of his Muslim employee, although the latter had clearly expressed her wish at the start of her contract not to be obliged to wear the "summer uniform" which the company imposes on its employees[213].

In **Sweden** – and this is part of a more general tendency towards increased intolerance and negative attitudes towards foreigners in the Swedish society –, Muslim women, who wear a veil, find it difficult to get employment. The Swedish Ombudsman against Discrimination (DO) decided on 25 November 2002 to begin investigations into the accusations placed against the Swedish Television (SVT) that a female journalist was not appointed as a television host because of her dress (scarf). The representatives of SVT claim that her way of appearance might distract the public in an inappropriate way during broadcasting.

[209] European Court of Human Rights, decision of 12 December 2002 on the admissibility of applications nos. 1988/02, 1997/02 and 1977/02 submitted by V. Sofianopoulos, K. Spaidiotis, G. Metallinos and S. Kontogiannis.
[210] Judgement, 4 Jul 2002 – 2 C 21.01 -, Deutsches Verwaltungsblatt 2002, 1645.
[211] This solution is in line with that which the European Court of Human Rights allowed with regard to the primary public instruction in Switzerland: European Court of Human Rights (2nd section), *Dahlab v. Suisse* (application no. 42393/98) judgment of 15 February 2001.
[212] Judgment of 10 Oct 2002 – 2 AZR 472/01 -.
[213] Industrial Tribunal, Brussels (7th chamber), 17 October 2002, *Rachida v. ONEM* (R.G. n° 40.571), *J.D.J.* n° 220, December 2002, p. 44.

Conscientious objection

A broad interpretation of freedom of religion[214] leads to a recognition of the right for believers not to perform acts that go against their beliefs, including there where those acts are demanded by their professional obligations. In the **Netherlands**, the possibility for same-sex marriages was introduced in 2001. Because of religious beliefs, a *buitengewone ambtenaar van de burgerlijke stand* [an extraordinary civil servant charged with the conducting of marriages] in the city of Leeuwarden refused to conduct same-sex marriages. As a consequence she was not re-appointed by the municipal authorities. She considered this discrimination on the basis of her religion and lodged a complaint with the *Commissie gelijke behandeling* [Equal Treatment Commission]. The Commission found that indeed a distinction was made that was not objectively justified. It took into account that there was a sufficient number of civil servants who did not have conscientious objections against same-sex marriages, so it ought to be possible to find practical arrangements under which same-sex marriages could take place without any difficulties and under the same conditions as other marriages creed[215].

Refusal of military service justified by conscientious objection

Although understood in the strict sense as the right to refuse to do military service or to bear arms, the right to conscientious objection, which has not been recognized by the European Court of Human Rights[216], is recognized by the Human Rights Committee on the basis of Article 18 of the International Pact on Civil and Political Rights[217]. Moreover, in the context of the European Social Charter, the European Social Rights Committee considered, with regard to a collective complaint filed by the Quakers Council on European Affairs (QCEA) against **Greece**, that the practical application of the Greek law authorizing alternative forms to military service for conscientious objectors does not comply with the prohibition of forced labour stipulated in Article 1 §2 of the Charter (complaint no. 8/2000). In the recommendations it addressed to **Greece** on 17 July 2002, the Human Rights Commissioner of the Council of Europe requested the Greek government to change its legislation on alternative non-military service for conscientious objectors so as to rectify its disproportionate nature and to consider the possibility of transferring the power to determine the status of conscientious objector from the Ministry of Defence to a civilian public authority[218].
Finland has also been frequently criticized for the status of conscientious objector in that country[219]. Differences in treatment that exist between citizens who complete normal military service and citizens who, expressing a conscientious objection, opt for alternative service may nevertheless be explained if the authorities want to save themselves the bother of checking the genuineness of the conviction invoked by an individual in order not to do military service: the sacrifice which this individual makes by opting for alternative service testifies to this conviction[220]. The resulting difference in treatment must remain proportional to this objective: the organization of a status of alternative service which - in terms of financial status, employment conditions, nature of the institutions in which this alternative service is performed - would manifestly be highly unfavourable for those who opt for it, thereby

[214] Which does not appear to be dictated by the case law of the European Court of Human Rights: see with regard to pharmacists who in the name of their religious beliefs refused to sell contraceptives, European Court of Human Rights (3rd section), *Pichon and Sajous v. France* (application no. 49853/99) judgment of 2 October 2001 (inadmissibility).
[215] *Commissie gelijke behandeling*, Oordeel 2002-25, www.cgb.nl, 5 March 2002.
[216] European Court of Human Rights, *Thlimmenos v. Greece* (application no. 34369/97) judgment of 6 April 2000, §43; the question also came up in the case of *Stefanov v. Bulgaria*, but this case resulted in a friendly settlement (judgment of 3 May 2001).
[217] Human Rights Committee. General Observation no. 22. The right to freedom of thought, conscience and religion (Art. 18) (30 July 1993) (forty-eighth session, 1993), § 11.
[218] CommDH(2002)5, 17.7.2002. See also in the same sense the report of the National Commission on Human Rights concerning religious freedom (annual report 2001). The other recommendations of the Human Rights Commissioner on the question of freedom of religion led the Greek government to accept the proposal of the National Commission on Human Rights to abolish the provisions in force on proselytism (Acts 1363/1938 and 1672/1939), to amend the current legislation on the establishment of places of worship and to speed up the procedure for the construction of a mosque and the provision of a cemetery reserved for practising Muslims living in Athens.
[219] This criticism has come from Amnesty International several times over the years. For a recent criticism, see e.g http://web.amnesty.org/ai.nsf/Index/EUR010022002?OpenDocument&of=COUNTRIES\FINLAND
[220] European Commission of Human Rights, decision of 6 December 1991, *Autio v. Finland*, application no. 17086/90.

discouraging them from expressing their conscientious objection, would constitute a discrimination in the exercise of freedom of religion. This does not appear to be the case in Finland: in this State, there is no examination of the reasons invoked by those declaring themselves conscientious objectors, and conscientious objectors to compulsory military service have the opportunity to perform 13 months of alternative service, while military conscripts can get by with as little as six months**,** although about 50 per cent of conscripts serve 12 months.

Ritual slaughter

In **Germany**, a Turkish and Muslim butcher had asked the public authorities for permission to slaughter animals without stunning/ anaesthetization (according to Jewish rules) after section 4a of the Act concerning Animal Protection. The Act concerning Animal Protection generally forbids this manner of slaughtering but allows exceptions. The authorities refused to give the permission. According to the Federal Constitutional Court to which the butcher appealed, however, it is sufficient for granting exceptional permissions for religious reasons that the person concerned belongs to a group of persons whose religious conviction imposes anaesthetization-free slaughter: the Federal Constitutional Court therefore granted the constitutional complaint [221].

In **Luxembourg,** a controversy on the ritual slaughtering of animals, provoked by a wave of public opinion in favour of animal protection, led the Prime Minister to issue a statement saying that ritual slaughtering was prohibited on Luxembourg territory as being contrary to the law on animal protection. Some demanded that imports of meat from ritual slaughtering should be banned, which would prevent this meat from being consumed on the territory. Such a prohibition would have indirect repercussions on ritual slaughtering as practised by the Jewish community.

Article 11. Freedom of expression and information

Reporters Without Borders published for the first time a worldwide index[222] of countries according to their respect for press freedom in October 2002. In general, the report showed that such freedom is under threat everywhere, with the 20 bottom-ranked countries drawn from Asia, Africa, Latin America and Europe. The top end of the list shows that rich countries have no monopoly of press freedom. Costa Rica and Benin are, however, examples of how growth of a free press does not just depend on a country's material prosperity. Right at the top of the list four countries share first place - Finland, Iceland, Norway and the Netherlands. Explaining its decision the non-governmental organization wrote : “These northern European states scrupulously respect press freedom in their own countries but also speak up for it elsewhere, for example recently in Eritrea and Zimbabwe.” In the member States of the European Union, the principal threat to the freedom of expression lies, especially in **Italy**, in an excessive concentration of the media, which could damage the pluralism of information to the public. Other problems concern the freedom of criticism for journalists in **Austria** with regard to certain political figures or groups, and the inadequate protection of journalistic sources in **Belgium** and in **Luxembourg**. The issue of the relations between the judiciary and the media, the difficulty of which has been highlighted by the media coverage of certain lawsuits, has also seen some developments. Finally, the report also addresses, under Article 11 of the Charter of Fundamental Rights, the issues of freedom of expression at work and the restrictions imposed on members of the professions, as well as, more incidentally, the debate on incitement to hatred or discrimination.

[221] Judgement, 15 Jan 2002 – 1 BvR 1783/99 -, BVerfGE 104, 337. See as well another case ruled positive by the Fed. Const. Ct. (chamber): Decision, 18 Jan 2002 – 1 BvR 2284/95 - , Neue Jurist. Wochenschrift 2002, 1485.

[222] The index was drawn up by asking journalists, researchers and legal experts to answer 50 questions about the whole range of press freedom violations (such as murders or arrests of journalists, censorship, pressure, state monopolies in various fields, punishment of press law offences and regulation of the media). The final list includes 139 countries. The others were not included in the absence of reliable information.

Concentration of the media and pluralism of information

Since Mr. Berlusconi came to power in **Italy** in May 2001 as head of government, a potentially dangerous situation has been created in terms of the concentration of power over radio and television companies at the national level, which is not impeded by any effective regulations governing possible conflicts of interests[223]. This situation has been criticized by the Parliamentary Assembly of the Council of Europe as an obstacle to reform the media sector[224]. On 25 September 2002, the Italian government submitted to Parliament a bill on radio and television broadcasting at the national and regional level. The purpose of this bill is to reform and harmonize legislation in this area. It gives the government the power to draw up a code for radio and television in accordance with the criteria listed in the same bill. It defines the duties of radio and television as a public service, and it establishes a reform programme for the RAI. At the hearing held on 3 December 2002 before the Culture and Communication Committees of the House of Representatives, the Italian Press Federation underlined that, although the basic principles underlying the reform proposed in the bill are commendable, they would be unenforceable as long as the problem of the conflict of interests on the part of the head of government has not been settled.

The problem of the lack of pluralism in the audiovisual media has been addressed indirectly by the Constitutional Court[225]. In a judgment of 20 November 2002, no. 466, the Court ruled that the legislative provisions that do not set a fixed and non-extendable time limit for the transitional regime governing the distribution of analogue terrestrial broadcasting frequencies are incompatible with the Constitution. While noting that "the formation of the present Italian national private broadcasting system originated in a situation of de facto occupation of the frequencies (unauthorized use of installations, beyond all logic of growth in pluralism in the planning and distribution of frequencies)", the Court observed that the ex post legitimisation of the situation that has become de facto established "does not guarantee the implementation of the principle of external pluralism of information, which represents one of the inevitable constraints that emerge from the constitutional case law in this area". On the contrary, it affirmed "the need to ensure access to the broadcasting system for the highest possible number of different voices (judgment no. 112/93)" and underlined "the insufficiency of the sole interaction between one public pole and one private pole to comply with the constitutional requirements linked to the right of information (judgments nos. 826/88 and 155/02)". This judgment implies that the programmes of the third television channel of the private group Mediaset, currently transmitted by analogue broadcast, must be transmitted by cable or by satellite from 1 January 2004 in order to free the terrestrial frequencies and give other broadcasters access to frequencies.

At the beginning of 2003, on the basis of an analysis of the allocation of funds (advertising) in the television sector in the years 1998-2000, the Board of the Authority on Guarantees in Communications opened a judicial inquiry into RAI and Mediaset for the purpose of establishing whether these two companies had not exceeded the upper limit provided by Act no. 249/97 in the allocation of funds.

---

[223] The 2002 report of Reporters without Borders on freedom of the press puts Italy in 20th place, at the bottom of the European Union league table, and expressed its concern that the head of the Italian government owns, through a holding, three national private channels and thus controls the public radio and television service.

[224] See Recommendation 1589 (2003), adopted on 28 January 2003 (rapporteur: Mrs Tytti Isohookana-Asunmaa), par. 12: "In Italy, the potential conflict of interest between the holding of political office by Mr Berlusconi and his private economic and media interests is a threat to media pluralism unless clear safeguards are in place, and sets a poor example for young democracies".

[225] In a judgment of 24 April 2002, no. 155, the Constitutional Court also ruled on the compatibility of certain provisions concerning the parity of access to the information media during the election and referendum campaigns and political broadcasting (Act no. 28 of 22 February 2000) with the Constitution. The Administrative Court of Latium raised three questions, "the legitimacy of the regulations that oblige radio and television broadcasters to ensure parity between the different political forces in the political broadcasts during the electoral campaigns and which prevent broadcasters from expressing their political persuasions; the legitimacy of the regulations that establish limitations in the area of electoral propaganda solely with regard to radio and television broadcasters and not the press; the legitimacy of the regulations which provide that self-managed political messages must be transmitted free of charge by the national broadcasters, while the local broadcasters receive payment from the State for the same messages". The Constitutional Court declared these questions unfounded.

Finally, one should not forget to give an account of the infringements of the freedom of the press in certain individual situations, as denounced by Reporters without Borders. Stefano Surace, 69, former Editor of the nonconformist newspaper Le Ore in the sixties, who was convicted in 1963 and 1967 for libel and obscene publications, was imprisoned between December 2001 and August 2002, and since then put under house arrest. Forza Italia senator Raffaele Jannuzzi was sentenced to two-and-a-half years' imprisonment for libel, in his capacity as Editor of the newspaper Il Giornale di Napoli, for articles that appeared between 1987 and 1993. In the autumn of 2002, the broadcasts of two journalists, Michele Santoro and Enzo Biagi, who in the past had criticized the present head of government, have been withdrawn from the programme schedule of RAI.

In **Greece**, in order to respond to the concerns about the inordinate impact of the press magnates on the conduct of the country's economic policy, Parliament adopted Act no. 3021/2002[226], implementing Article 14 par. 9 of the revised Constitution, which sets limits on the capacity for persons with a participating interest in audiovisual companies or who carry on their business activity in that field to conclude government contracts. The National Audiovisual Council (CNA) supervises and verifies the enforcement of the law and may impose administrative, penal or other sanctions. Any violation of the above-mentioned Act may entail the nullity of a government contract.

In **Portugal**, the government proposed to amend the *Lei da Televisão* (Act on Television), Lei nº 31-A/98 of 14 July 1998, limiting the competence of the *Conselho de Opinião*, the Advisory Board on Public Television, and replacing its former ability to give binding opinions on the composition – appointment and destitution – of the Board of Directors of Public TV Broadcasting channels by a merely consultative capacity. The Constitutional Court was requested to give its opinion on the compatibility of the proposal with Art. 38 § 6 of the Constitution, which guarantees the independence of the media. By 6 votes to 5, the Court ruled in Decision 254/02 that the proposed amendment would indeed, in the circumstance, amount to a violation of this provision. After this decision, and with the goal of reforming an economically unviable public service, the Executive decided to suppress the second public TV channel, which provides cultural programs. In response to the criticism this proposal met with, the government set up an independent group of reflection on the issue. The reflection group produced a document clarifying the obligations imposed on public service television. The authors stated the four principles that should guide it: universality (it should be provided and reach everybody), cohesion (it should ensure inclusiveness of all social groups), reference (it should provide quality service) and accessibility (it should be provided free of charge to everybody).

Freedom of expression for journalists

The situations that gave rise to three judgments delivered by the European Court of Human Rights against **Austria** on 26 February 2002[227] illustrate that this freedom remains fragile in this State, particularly on account of the actions brought against the press by certain political groups or figures which it challenges[228]. The lessons drawn from these judgments, however, go beyond the framework of relations between the press and public figures who voluntarily exposed themselves to the critical voice of public opinion. In a case that came before the Supreme Court the difficult balance between copyright and freedom of expression was tested on the basis of to the *Dichand* and *Informationsvielfalt* cases decided earlier in the year by the European Court of Human Rights.[229] A newspaper had published pictures of a youth suspected of arson, of which it held the copyright, on two

[226]Νόμος 3021/2002 «Περιορισμοί στη σύναψη δημοσίων συμβάσεων με πρόσωπα που δραστηριοποιούνται ή συμμετέχουν σε επιχειρήσεις μέσων ενημέρωσης και άλλες διατάξεις» [Act no. 3021/2002 «Restrictions on the conclusion of government contracts with persons who carry on their business activity or have a participating interest in audiovisual companies, and other provisions»].

[227] See above, commentary on Article 7 of the Charter (infringements of privacy by the media).

[228] A last case against Austria that was treated under Art 10 ECHR concerned an application of the Burgenland branch of the Freedom Party against the order to pay damages for the publication of an allegedly insulting caricature in its periodical. Before judgement could be delivered it was struck out of the list after the applicant accepted an offer for settlement by the respondent government in the amount of € 5,500 covering costs and compensation (Eur. Ct. HR, Appl. no. 34320/96, *Freiheitliche Landesgruppe Burgenland v. Austria*, judgment of 18 July 2002).

[229] OGH 4 Ob 120/02d, judgement of 28. May 2002, with reference to the *Dichand* and *Informationsvielfalt* cases

cover pages without protecting his identity. The defendant daily newspaper reprinted in small the two covers accompanied by a critical article headlined "We knew we were breaking the law", thus giving the impression that the statement was actually made by a responsible representative of the plaintiff, even though it clearly appeared from the full text that the headline was made up by the defendant's editor-in-chief. The Supreme Court, in giving judgement for the plaintiff, ruled that although the reprinting of copyright protected photographs was, in principle, permitted along the lines of the case law regarding the quotation from a copyright protected text, such interference with a person's copyright may never be justified – not even under the constitutional right of freedom of expression – if the statement supported by photographs is untrue and defamatory.

In **Spain**, the Constitutional Court had the opportunity to extend the freedom of expression for journalists by asserting a "conscience clause" on their own initiative, allowing them to terminate their employment contract if an ideological change should occur in their working environment, particularly when the media adopt extremist positions[230].

The secrecy of journalistic sources

On 8 March 2000, the Committee of Ministers of the Council of Europe adopted Recommendation no. R (2000) 7 to the member States on the right of journalists not to disclose their sources of information. This Recommendation purports to specify the lessons to be drawn from the *Goodwin v. United Kingdom* judgment of 27 March 1996 in which the European Court of Human Rights considered that "having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of sources disclosure (order obliging a journalist to disclose his sources of information) has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requiement in the public interest." (§ 39). In Recommendation no. R (2000) 7, the Committee of Ministers asks every member State of the Council of Europe to provide for clear and explicit protection of the right of journalists and persons who have professional relations with journalists not to disclose information that may identify a source. Disclosure may only be ordered if "there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature". The Principles adopted in the Appendix to the Recommendation stipulate, "search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work should not be applied if their purpose is to circumvent the right of journalists not to disclose information identifying their sources" (Principle 6, a).

Despite the adoption of this Recommendation, the secrecy of sources, an element of the freedom of journalistic expression, continues to be threatened. The courts in the **United Kingdom** have held that a publisher could be required to disclose the source through which it had obtained medical records of a patient at a security hospital so that the punishment of that person would deter further such wrongdoing that increased the difficulty and danger of caring for patients at the hospital[231]. On 12 March 2002, the European Court declared partially admissible the application submitted against **Luxembourg** by the journalist Robert Roemen and his lawyer, Anne-Marie Schmit[232], concerning searches carried out at the home and place of work of the first applicant and at the office of the second applicant. The first applicant contends that the investigation measures violate the journalist's right not to disclose his sources. Not long before that, the minister of state had presented a bill on the freedom of expression in the media[233], one of the objectives of which is to recognize the protection of

[230] STC, judgment no. 225/2002 of 9 December 2002, Recurso de amparo 2847/1998, *Asunto Francisco Escobar contra El Diario Ya*.
[231] *Ashworth Hospital Authority v MFG Ltd* [2002] 4 All ER 193.
[232] European Court of Human Rights, *Robert Roemen and Anne-Marie Schmit v. Luxembourg*, n° 51772/99 of 12 March 2002, *Bull. dr. h.,* n° 10 (2002), doc. 12.
[233] *Doc. parl.,* n° 4910.

journalistic sources. As it emerges from a District Court judgment of 25 February 2002[234], which annulled several search and seizure warrants which an investigating judge had issued in the context of a judicial investigation conducted against a journalist for breach of professional confidence and against persons unknown for breach of professional confidence[235], legislative action on this question could profitably determine the extent of the protection of journalistic sources and the limits it sets on criminal investigation.

In **Belgium**, too, the main threat to freedom of journalistic expression is to be found in infringements of the secrecy of sources. On 25 June 2002, the European Court of Human Rights adopted a decision establishing the admissibility of an application filed by four Belgian journalists, bringing into play these principles[236]. On 23 June 1995, as part of an inquiry into an alleged breach of professional secrecy by one or several magistrates of the public prosecutor's office of the Court of Appeal of Liège, acting on the authority of an investigating judge, the special unit charged with combating serious crime searched and seized documents at the offices of three Belgian newspapers – *De Morgen, Le Soir* and *Le Soir Illustré* – as well as on the premises of radio and television of the French-speaking community of Belgium (RTBF) in Liège and in Brussels. The offices of the four journalists-applicants were searched, and so were their private homes. Numerous documents, computer diskettes and hard disks of the applicants were seized. The complaints with claims for damages lodged by the journalists concerned were filed and disposed of. The European Court of Human Rights considered that the allegations of violation of Articles 8 and 10 of the European Convention on Human Rights were not manifestly unfounded.

This case illustrates that the protection of the secrecy of journalistic sources can not always be satisfactory in Belgian law as it stands now. A private bill was presented on 28 October 2002 at the House of Representatives (doc. 5.2102/001) in order to remedy this situation. It provides that a journalist - without this term being limited to professional journalists - cannot be obliged to disclose his sources or informants or to reveal the contents of the information and documents in his possession, and that searches, seizures, telephone recording or tapping by court order are not allowed, unless the information concerns offences that threaten to violate the physical integrity of one or several persons, the information is of crucial importance to identify or search for suspects or to prevent (such) offences, and the information requested cannot be obtained in any other way".

The judiciary and the media

A special situation where the freedom of journalistic expression may undergo restrictions is the coverage of certain court cases. The media coverage may impair the fairness of the trial, or infringe the presumption of innocence to which the accused is entitled in criminal cases, through the influence which a media campaign can exert on the jury, or even on professional magistrates[237]. In **Greece**, Article 8 of Act no. 3090/2002[238] provides that the live television or radio broadcasting and the recording of a trial (civil, criminal or administrative) are prohibited, unless, exceptionally, the court decides otherwise, following a certified opinion of the public prosecutor, and with the consent of the parties, in case of significant public interest. Without affecting the principle of a public trial, the Act aims to eradicate the phenomenon of "show trials", which had adverse effects on the serene conduct of the proceedings with respect for the rights of the defence, and notably the presumption of innocence. In this same State, and still during the period under scrutiny, the National Audiovisual Council was led to examine the way in which certain private media covered the arrest and detention of presumed

[234] District court (committals division), 25 February 2002, no. 196/2002, unpublished. It should be noted that by a decision of 1 July 2002, the committals division still annulled certain procedural acts subsequent to the acts annulled by order 196/2002 of 25 February 2002. District Court (committals division), 1 July 2002, no. 885/2002, unpublished.

[235] These searches were carried out at the head office of the firm *Letzebuerger Journal*, at the home of the journalist Robert Roemen, at the office of his lawyer, and at the Land Registry and State Property Office.

[236] European Court of Human Rights (2nd section), *Ernst and others v. Belgium* judgment of 25 June 2002 (application no. 33400/96).

[237] European Court of Human Rights, *Hendrikas Daktaras v. Lithuania* (application no. 42095/98) judgment of 11 January 2000.

[238] Act no. 3090/2002 « Establishment of an inspection and control body for the detention facilities and other provisions ».

members of the terrorist organization "17 November". It issued two directives[239] and one recommendation[240], in which it requested the television channels to avoid passing judgment on persons allegedly implicated or suspected, to respect the principle of presumption of innocence, not to broadcast pictures of persons or exhibits, unless this is necessary to solve those crimes and, in general, to avoid dramatization and sensationalism, and not to take the place of the judiciary. These recommendations, which are both obvious and sensible, were not always followed. Proof of this is that the CNA on several occasions imposed sanctions on television channels, notably for lack of respect for the privacy of presumed terrorists[241], as well as members of their families[242] (including the underage son of a suspect[243]).

In the **Netherlands**, it is also to the reconstitution of the relations between the media and the judiciary that the Board of Public Prosecutors (*College van procureurs-generaal*) wanted to respond with the adoption of the *Aanwijzing toepassing dwangmiddelen bij journalisten* [Directives for the Application of Coercive Measures to Journalists], which entered into force on 1 April 2002[244]. In response to the growing number of journalists that deal with police and justice matters, and in reaction to a certain change of atmosphere as a consequence of the introduction commercial television, the Board felt the need to define more in detail when measures against journalists should be considered. One such measure is the seizure of pictures and films. The Directives seek to strike a balance between the freedom of expression and the interests of criminal investigations and prosecutions.

Freedom of expression in employment[245]

In the case *De Diego Nafría* concerning the dismissal of a senior officer of the Bank of Spain for having sent the Deputy Director General of the Bank a letter informing him of various irregularities committed by other senior officers, the European Court of Human Rights concluded that there had been no violation of the freedom of expression, taking into account that the claims that led to the dismissal were not part of a debate in the general interest and constituted purely unwarranted claims[246]. Moreover, unlike the circumstances that gave rise to the *Fuentes Bobo* judgment, also given against **Spain**[247] – confronted with the case of the dismissal of an employee of Spanish State television for having insulted the directors during a radio broadcast, the Court concluded that there had been a violation of Article 10 of the Convention –, M. De Diego Nafría had expressed himself in writing, and therefore could have given the extent of his assertions mature reflection. Taking into account the parameters defined by this case law, we should approve the conclusion which the Constitutional Court of Spain arrived at in judgment no. 20/2002 of 28 January 2002, in which it observed a violation of the freedom of expression of a worker who had been dismissed for criticizing the management of his company, in terms which remained correct, at a general meeting of shareholders, and therefore outside the scope of the employment contract[248].

[239] Directives 2/2002 of 10/7/2002 and 3/2002 of 25/7/2002.
[240] Recommendation no 1 of 18/9/2002.
[241] Decisions no. 10 of 10/7/2002 and no. 69 of 14/10/2002 (concerning the broadcasting of the picture of a terrorist who was injured after the bomb he was carrying exploded).
[242] Decisions nos. 59 of 8/10/2002, 67 of 14/10/2002, 77 of 22/10/2002, 78 of 22/10/2002, 79 of 22/10/2002.
[243] Instruction no. 1 of 18/9/2002.
[244] *Staatscourant* [Official Gazette] 6 March 2002, 46.
[245] See also the case of *Strik*, in which the UN Human Rights Committee examined a complaint brought against the **Netherlands** by an employee of the municipality of Eindhoven, who was subject to disciplinary proceedings, later annulled by the competent courts, after he sent a critical memorandum about his employer to the Municipal Council of Eindhoven : the HRC considered that the author of the communication had no remaining claim under article 19 ICCPR (Human Rights Committee, *Strik v. the Netherlands*, Comm. No 1001/2001, 2 December 2002).
[246] European Court of Human Rights, *De Diego Nafria v. Spain* judgment of 14 March 2002.
[247] European Court of Human Rights, *Fuentes Bobo v. Spain* judgment of 29 February 2000.
[248] STCn judgment no. 20/2002 of 28 January 2002, Recurso de amparo 4342/1998, *Asunto José Velas Aroca frente al Tribunal Superior de Justicia de Madrid*.

Restrictions imposed on members of the professions[249]

In the *Stambuk* judgment of 17 October 2002[250], the European Court of Human Rights observed that **Germany** had been guilty of infringing the applicant's freedom of expression, an ophthalmologist who had been sentenced by a disciplinary tribunal to a fine of 1,000 DM for having violated the prohibition for physicians to advertise, after a newspaper had published an article accompanied by a photograph of Mr Stambuk on a laser operating technique which he used. The European Court of Human Rights noted that if the professional responsibilities of physicians in general may justify restrictions being imposed on advertising, their rules of conduct towards the press should be weighed against the legitimate interest of the public in obtaining information. The Court considered that the publicity effect of the article was small, and that the article offered the public information on a topic of general medical interest, giving a well-balanced description of the surgical technique.

Incitement to hatred or discrimination

In the **Netherlands**, the legal action taken against Mr El Moumni, an Imam living in Rotterdam, was a source of controversy during the period under scrutiny. Mr El Moumni said in an interview on Dutch television that homosexuality is "an illness that must be treated" and "a danger to Dutch society". Mr El Moumni was charged with publicly insulting others because of their sexual orientation (Article 137c Criminal Code) and inciting to hatred, discrimination or violence against others because of their sexual orientation (Article 137d CC). The *Rechtbank* [Court of First Instance] of Rotterdam found that the remarks as such could be regarded as insulting. However, the insulting nature of a statement can be removed if the statement is a direct expression of a religious conviction. Basing itself, *inter alia*, on the evidence of experts, the Court of First Instance accepted that Mr El Moumni was directly expressing his religious convictions. The Court also took into account that the translation of his statements (which were spoken in Arabic) into Dutch may have been partly incorrect. Finally the Court noted that Mr El Moumni had spoken out expressly against any use of violence against homosexuals – but these parts of the interview had not been broadcast on television. Consequently, Mr El Moumni was acquitted[251]. The public prosecutor appealed, but the *Gerechtshof Den Haag* [Court of Appeal of The Hague] confirmed the acquittal[252].

The fight against incitement to racial hatred or discrimination may also justify certain restrictions being imposed on the freedom of journalistic expression[253]. In **Greece**, the public prosecutor took legal action against the editors of five newspapers and magazines, by virtue of the Antiracist Act 927/1979, following a complaint lodged by the NGO *Greek Helsinki Monitor*. The complaint concerned the publication of allegedly racist letters of readers, as well as classified advertisements that excluded foreigners from the services they offered.

Article 12. Freedom of assembly and of association

Although the report has already addressed the question of the response by the authorities to the exercise of the freedom to demonstrate, notably on the occasion of international summits[254], it is useful to return to this topic in the discussion of Article 12 of the Charter. We will examine the way in which the freedom of civil association, the freedom of trade union association, and the freedom of political

[249] On the freedom of expression enjoyed by a lawyer in the defence of his client, when this freedom concerns insults directed at the judges or representatives of the public prosecution, see the differences between the situations that gave rise to the judgment given by the European Court of Human Rights in the case *Nikula v. Finland* on 21 March 2002 (violation of Article 10 of the Convention) and the decision in the case *Wingerter v. Germany* of 21 March 2002 (inadmissibility for manifest lack of foundation for the application).
[250] European Court of Human Rights (3rd section), *Stambuk v. Germany* (application no. 37928/97) judgment of 17 October 2002.
[251] *Rechtbank Rotterdam*, LJN-nr. AE1154, 8 April 2002.
[252] *Gerechtshof Den Haag,* LJN-nr. AF0667, 18 November 2002.
[253] See Article 4 of the United Nations Convention for the elimination of all forms of racial discrimination
[254] See above, commentary on Article 4.

association have evolved in certain States. The freedom of political association will be considered in the light of the prohibition of political parties.

The reference clause that serves as a basis for identifying the substance of the requirements of Article 12 of the Charter of Fundamental Rights of the European Union is Article 11 of the European Convention on Human Rights, which directly inspired the wording of par. 1[255]. However, the freedom to form and join trade unions is defined more precisely in Article 5 of the European Social Charter, which clause serves as the "hard core" of this text. **Greece** is the only member State of the Union not to consider itself bound by this provision. All European Union member States have ratified the Convention (n° 87) concerning freedom of association and protection of the right to organize, which was adopted by the ILO on 9 July 1948.

Freedom of peaceful assembly

During 2002, in response to the development of new forms of anti-establishment activity, the initiatives to better regulate the freedom to demonstrate have multiplied[256]. The way in which the confrontation between demonstrators and the police unfolded at certain international summits has often illustrated the fact that the police are often ill-prepared to deal with such situations. The repercussions of the demonstrations at Genoa in **Italy** in July 2001 have already been recalled. In **Sweden**, the riots during the Gothenburg (Göteborg) EU summit in June 2001 have revealed deficiencies in the procedures ensuring peaceful demonstrations. Both lawful and unlawful demonstrations erupted in clashes between civilians and between civilians and police officers. In consequence, a large number of reports were filed against the demonstrators (over 600 complaints) as well as the police (about 130) but as yet very few police officers have been prosecuted[257], while many demonstrators have been convicted and sentenced to for the Swedish legal system unusually long prison terms.[258] Some of the sentences were disproportionately harsher than the average in previous years for analogous offences. Most of the people convicted were sentenced to terms of imprisonment of between one and two years. In three cases, however, the Supreme Court reduced the sentences. Swedish NGOs demanded in their alternative report to the HRC in March 2002 that the inequitable approach towards the crimes committed during the riots be further investigated.[259] The Swedish Save the Children recently presented data revealing that 14 of the detained persons in connection with the above-mentioned riot were persons under the age of 18 years. One seventeen-year-old boy from Denmark was, for example, in detention for 28 days.[260]

In **Finland**, there has been public debate over a proposed ban on the use of hoods and masks during demonstrations because they make identification difficult. Unlike in Denmark or Norway, it is not illegal to take part in a demonstration wearing a mask under in Finland. After demonstrations on

[255] Article 12 §2 of the Charter, according to which "political parties at Union level contribute to expressing the political will of the citizens of the Union", is a summary of Article 191 EC. It will not be discussed in this report.

[256] It would be incorrect to present the development of the freedom to demonstrate during 2002 solely from this viewpoint. In **Finland**, Section 12, subsection 2, of the Assembly Act (Act No 530 of 1999), which required that a public event shall not be arranged during certain church feast days unless the police grant permission for the same upon request, was repealed by Act No 824 of 2002 (Laki kokoontumislain 12 §:n 2 momentin kumoamisesta, Act No 824 of 2002).

[257] The prosecutor cleared the police officer, who shot at demonstrators, of suspicion at an early stage. See The Alternative Report to the Human Rights Committee, p. 61. The four police officers who were accused of human rights violations (charges of misconduct) and who were in charge of the police operation at the Schillerska school, where people had, allegedly, been arbitrarily detained and ill-treated, were acquitted of the charges by the District Court in Göteborg (Gothenburg) on 2 December 2002. P.Carlberg, *Poliser friade för insats vid EU-kravaller*, SvD 3 December 2002, p. 7. On the other hand, charges for unlawful detention were brought against the commanding officer at the beginning of December 2002. F.Engström, *Polismästaren i Göteborg misstänkt för frihetsberövanden*, SvD 6 December 2002, p. 6.

[258] The investigations into the actions of the demonstrators had led to the conviction of 52 individuals, many of them on charges of violent rioting.

[259] It should be mentioned, however, that the Government has established a committee with the task to review the events in Göteborg (The Gothenburg Committee investigating the disturbances surrounding the summit). The report is due on 14 January 2003.

[260] Rädda Barnen, Barn, Tidningen om barns rättigheter, nr 6, 2002, p. 11. See also the report on this issue by Eric Östberg, www.shc.se.

Independence Day on 6 December 2002 during which a number of taxis were damaged by a group of masked protesters who tried to block the arrival of guests at the traditional President's reception, an initiative signed by 16 MPs – calling for a ban on using hoods during demonstrations – was sent to the Parliament's Administrative Law Committee by a full session of Parliament on 12 December 2002. In **Ireland**, although the 1937 Constitution guarantees freedom of assembly and association in Article 40 and although there have been relatively few controversies arising from the policing of major public events in Ireland the combination of the Public Order Acts and the Offences Against the State Acts provides a potentially draconian instrument for the restriction of the basic freedoms of association and assembly[261].

In **Luxembourg**, a bill "guaranteeing the peaceful use of the right of ownership and the freedom of movement" was presented on 20 December 2002[262]. Nicknamed by its opponents "the Greenpeace Act", the purpose of the bill is to prohibit, on pain of severe penalties, the occupation or blocking of private or public places. Already at present, the interim court chambers tend to impose restrictions on the freedom to demonstrate in the name of the same objectives. An interim ruling of 25 October 2002 (*Esso et al. v. Fondation Greenpeace Luxembourg et A.s.b.l. Greenpeace*)[263], given on the occasion of a demonstration by Greenpeace against the ExxonMobil oil concern, of which the company ESSO Luxembourg forms part, to protest against the non-ratification by the United States of the Kyoto Protocol, ordered the respondents to clear the premises on pain of a penalty. The protesters had intended to block 28 service stations belonging to or operated by the applicants.

The national courts of the member States frequently had to remind the public authorities that they had to guarantee the freedom to demonstrate, even when this required them to make certain reasonable efforts to control the expressions of hostility towards unpopular causes. In **France**, the Council of State annulled a refusal by a corporation under contract and control of the town of Annecy to lease a conference centre for the Summer School of the Front National[264]. In the **Netherlands**, the *Rechtbank* [Court of First Instance] of Rotterdam decided in January 2002 in summary proceedings that a demonstration of extreme right-wing groupings had to go ahead. Initially the burgomaster of Rotterdam had prohibited the demonstration out of fear for a hostile audience. The Court found that it would not be disproportionate to require the authorities to provide for the necessary police force. To prohibit the demonstration would violate Article 9 of the Constitution[265].

Nevertheless, the freedom of peaceful assembly is not absolute. It must not show slogans inciting to national, racial or religious hatred or discrimination. In the **Netherlands**, during a demonstration in Amsterdam in April 2002, under the name 'Stop the war against the Palestinians', some 75 swastikas were carried along and discriminatory texts were displayed. In Parliament, the Minister of Justice stated that arrangements had been made with the organisers of the demonstration, who would in first instance be responsible for the prevention of discriminatory statements. However, the organisers had been unable to remove all offensive statements. The police had recorded the demonstration and would try to find those responsible[266]. It should be noted, however, that although the *Wet Openbare Manifestaties* [Act on Public Demonstrations] allows measures to prevent serious disturbances, the police may only intervene if statements are discriminatory or incite to hatred: the responsible minister conceded that this was not the case where, in a demonstration to commemorate the Armenian genocide, on 24 April 2002 in Assen, the police ordered the participants to cut some words, such as 'Turkey' and 'Turkish government', from their banners[267].

---

[261] The extent of these powers is set out in great detail in the *Report of the Committee to Review the Offences Against the State Acts, 1939-1998* (the Hederman Report). See in particular, Chapters 6 and 10 of the Report.
[262] *Doc. parl.,* n° 5076.
[263] Réf. Lux., 25 October 2002, unpublished.
[264] Council of State, 19 August 2002, Front National, Institute for the training of local councillors, application no. 249666, AJDA, 2002, p.1017.
[265] *Rechtbank Rotterdam*, LJN-nr. AD8502; *KG* 2002, 42; 24 January 2002. Along similar lines, the *Rechtbank* of Zutphen decided in summary proceedings to suspend the prohibition of a demonstration "against the assassination of right-wing politicians", that was to take place days after Pim Fortuyn was shot (LJN-nr. AE2673; *KG* 2002, 136; 16 May 2002).
[266] *Kamerstukken II* 2001/02, aanhangsel 1249.
[267] *Handelingen II* 2001/02, aanhangsel 1304.

Freedom of civic association[268]

In **Belgium**, following the media coverage at the end of 2002 of the practices of the European Arab League, which consisted in observing and revealing the identity of police officers guilty of attitudes considered discriminatory towards the immigrant, especially Muslim, population of Antwerp, a private bill was presented in the House of Representatives (doc. 50 2196/001) for the amendment of the Act of 29 July 1934 prohibiting private militias with a view to prohibiting organizations of private individuals whose aim it is replace the bodies legally charged with supervising the police services or to substitute for them. In its original version, the Act of 1934 prohibiting private militias prohibits all organizations of private individuals whose aim it is to use force or to replace the army or the police, to interfere in their activity or to substitute for them. The object of the private bill is to avoid private individuals from substituting for the bodies that are charged by the law with supervising the police services (see the organic Act of 18 July 1991 on the supervision of the police and intelligence services). Presented on 16 December 2002, the bill sets out that "recent events have showed up the need to modernize the Act of 29 July 1934 prohibiting private militias in order to make it an effective instrument in combating movements, large or small groups which, by replacing the supervisory bodies of the police services and by substituting for them, represent a threat to public peace and the stability of the constitutional State". Irrespective of the kind of behaviour that motivated the presentation of this private bill, we may nevertheless ponder over the parallel on which it is based: while a citizen who claims to substitute for the police or the army in order to contribute in his own way to maintaining law and order does not exercise any fundamental freedom, a citizen who criticizes public officers who conduct themselves contrary to the law exercises his freedom of expression, and may contribute, through his vigilance, to the preservation of the law. The examination of this bill, along with a parallel private bill, was abandoned at the beginning of 2003.

Freedom of trade union association

The European Court of Human Rights found the **United Kingdom** to be in violation of Article 11 ECHR in the case of *Wilson a.o*.[269] Mr Wilson was a journalist employed by a British newspaper. In 1989 his employer gave notice that it intended to de-recognise his trade union and terminate all aspects of collective bargaining concerning employment terms and conditions. Personal contracts were to be introduced with a 4.5% pay increase for journalists who signed the personal contracts and accepted de-recognition. Mr Wilson refused to sign. In subsequent years his salary increased, but was never raised to the level of those who had received a 4.5% increase. A number of applicants, including Mr Wilson and two trade unions, complained of a violation of Article 11 ECHR. Although, according to the European Court of Human Rights, the absence under United Kingdom law of an obligation on employers to enter into collective bargaining did not give rise, in itself, to a violation of Article 11, the Court noted that the essence of a voluntary system of collective bargaining was that it had to be possible for a trade union which was not recognised by an employer to take steps – including, if necessary, organising industrial action – to persuade the employer to accept collective bargaining. Furthermore, it was of the essence of the right to join a trade union that employees should be free to instruct or permit their union to make representations to their employer or to take action in support of their interests. If workers were prevented from so doing, their freedom to belong to a trade union became illusory. The Court observed however that United Kingdom law did not prohibit the employers in the case in question from offering an inducement to employees who relinquished the right to union representation, even if the aim and outcome of the exercise were to end collective bargaining and substantially to reduce the authority of the union, provided the employer did not aim to prevent or deter the individual employee from being a trade union member. United Kingdom law therefore permitted employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership. Such conduct constituted a disincentive or

[268] In several member States (Austria, Belgium, Spain), the law on the establishment of associations was amended during the course of 2002. We did not deem it useful to summarize these amendments here, since they only marginally affect the extent of the freedom of association, and concern questions such as the responsibility of directors, or the accounting obligations of non-profit associations.

[269] Eur. Ct. H.R., *Wilson a.o. v the UK* (Appl. n° 30669/96 a.o.), judgment of 2 July 2002.

restraint on the use by employees of union membership to protect their interests, which amounts to a violation of Article 11 of the Convention. This aspect of the United Kingdom domestic law has been the subject of criticism by the Social Charter's Committee of Independent Experts and the International Labour Organisation's Committee on Freedom of Association. It should be urgently remedied.

In judgment no. 84/2002 of 22 April 2002[270], the Constitutional Court of **Spain** considered that the protection of workers against all forms of reprisal for their trade union activities entailed the reversal of the burden of proof in case of legal action concerning a measure adopted against these workers: once the worker adduces evidence leading to the presumption that a trade union activity has been penalized, it is up to the employer to disprove the presumption that he is guilty of an infringement of the freedom of trade union association.

In **Ireland**, although there is special protection for trade union membership in the Unfair Dismissals Acts 1977-1993, it is not among the nine prohibited grounds of discrimination covered by the Employment Equality Act, 1998. The exclusion of trade union membership as a prohibited ground of discrimination under the 1998 Act is a cause for concern. A proposal to change this feature of the 1998 Act has been made in a submission to Government by the Equality Authority and is supported by the trade union movement.

In the **Netherlands**, it is the so-called "negative" freedom of association – the right not to belong to a trade union – which appears to be insufficiently protected. The Netherlands report submitted to the European Committee of Social Rights in September 2001 states that the collective agreement covering printing and allied trades contains a closed shop clause. Although the clause does not apply if the employer or the employee has been granted a waiver – according to Dutch case law, the possibility of a waiver is a precondition for the validity of a closed shop clause –, and despite that, in practice, a waiver is always granted upon request, the Committee recalled that it has consistently held closed shop clauses or any other arrangement which entails an obligation to become or remain a member of a trade union to be contrary to Article 5 ESC. On this ground the ECSR found in its Conclusions of July 2002 that the situation in the Netherlands is not in conformity with the ESC[271].

Prohibition of political parties

The European Court of Human Rights does not rule out that it may be justified, under certain circumstances, to prohibit political parties whose objectives could go against those of the European Convention on Human Rights, although the mere fact that a political project calls into question the current structures of a State cannot as such justify such a prohibition[272]. In **Germany**, Art. 21 (2) Basic Law states that : "Parties that, by reason of their aims or the behavior or their adherents, seek to undermine or abolish the free democratic basic order … shall be unconstitutional. The Federal

[270] STC n° 84/2002, Recurso de amparo 2639/98, Asunto Isabel Velázques y otro contra la Sala de lo Social del Tribunal Superior de Justicia de Adalucia. See also STC no. 48/2002, judgment of 25 February 2002, Recurso de amparo 30/1999, Asunto Maria del Carmen Andrade frente al Tribunal Supremo (according to which the dismissal of workers belonging to a trade union is a violation of the freedom of association if the company is unable to justify this measure by economic reasons or reasons connected with staff restructuring); STC no. 29/2002 and 30/2002, judgments of 11 February 2002, Recurso de amparo 198/1998 and 1481/1998 (dismissal of a trade union member for discretionary reasons constitutes a violation of the freedom of trade union membership).

[271] Conclusion XV-I, Volume 2, Chapter 13, July 2002.

[272] European Court of Human Rights, *Party for Freedom and Democracy (ÖZDEP) v. Turkey,* judgment of 8 December 1999, *Rec.,* 1999, VIII, p. 333; European Court of Human Rights, *Yazar, Karatas, Aksoy and the Workers Party (HEP) v. Turkey* (application no. 22723/93 and others), judgment of 9 April 2002; European Court of Human Rights, *Dicle for the Party of Democracy (DEP) v. Turkey* (application no. 25141/94), judgment of 10 December 2002 (these three rulings conclude that the dissolution of political parties advocating a recognition of the Kurdish minotiry constitutes a violation of Article 11 of the Convention); European Court of Human Rights, *Prosperity Party (Refah Partisi) and others v. Turkey*, judgment of 31 July 2001 (the dissolution of the Islamic Prosperity Party does not violate Article 11 of the Convention). The latter judgment, in which the conclusion of non-violation was adopted by the narrowest possible majority (four votes against three), is currently pending before the Grand Chamber of the European Court of Human Rights, since the request for referral has been accepted. The judgment is expected for the beginning of 2003.

Constitutional Court shall rule on the question of unconstitutionality." With the Federal Constitutional Court a procedure is pending for prohibiting the right-wing Nationaldemokratische Partei Deutschlands [National Democratic Party of Germany] (2 BvB 1/01 v.a.). Applicants are the Federal Government, the Bundesrat and the Bundestag. In **Spain**, the organic Act no. 6/2002 of 27 June 2002 on political parties provides that a political party may be dissolved by a judicial decision if, by its activities, it continuously, repeatedly and sufficiently severely violates the democratic principles or if it aims to destroy or impair the regime of freedoms. The dissolution may be requested by the government and by the public prosecutor; the Congress and the Senate may request the government to take such an initiative. A special chamber of the Supreme Court, composed of 15 magistrates, is empowered to rule on such a request. In **France**, it is in pursuance of the Act of 10 January 1936, which is still in force, that the Mouvement Unité Radicale, an extreme right-wing group to which Maxime Brunerie belonged, who made an attempt on the life of Jacques Chirac at the military parade on 14 July 2002, was dissolved by Presidential decree at the end of July 2002.

Under Article 11 §2 of the European Convention on Human Rights, the dissolution of a political party can only be allowed if a careful examination of its project and its activities has shown that there is a "pressing social need" to prohibit it. In **Greece**, the case of *the Turkish Union of Xanthi* illustrates this requirement. In December 2000, the Court of Cassation, which heard the case, considered that the challenged decision of the Court of Appeal, which upheld the dissolution of the said association - composed of members of the Muslim minority in Thrace -, did not meet the criteria outlined in Article 11 of the Convention, since the pressing social need justifying the restriction of the freedom of association has not been duly motivated in this case[273]. Subsequently, the case was referred to the Court of Appeal in Thrace (sitting in a different composition) which in a judgment of 25 January 2002 reasserted the lawfulness of the dissolution of the association, this time taking care to establish on the basis of the facts the proportionality between the challenged measure and the objective pursued[274]. More particularly, the Court of Appeal took into account the status and certain concrete actions of the association. According to Greek law, these elements not only arouse mere suspicion, but also clearly prove that the association poses a substantial threat to public order and national security.

Article 13. Freedom of the arts and sciences

This right actually is but one aspect of the freedom of expression, exercised in the arts or in scientific research. The national reports therefore did not elaborate at length on this subject. We should note, however, that in **Italy**, by a judgment of 26 June 2002, no. 282, the Constitutional Court declared unlawful a law in the region of the Marches which was aimed at suspending the practice of electroshock therapy, prefrontal lobotomy and other similar operations throughout the territory of the region. The Court recalled that the legislator may only restrict medical activity if it has been scientifically proven that certain therapies or operations threaten the physical or mental integrity of the patients. In this particular case, the law was not based on scientific studies, but was merely the expression of a political choice.

Article 14. Right to education

During the period under scrutiny, there was no case law in respect of the European Convention on Human Rights, Protocol 1, Article 2 or of the International Covenant on Civil and Political Rights, Article 18(4). However, the Committee on Economic, Social and Cultural Rights has further elaborated on the requirements of the right to education under Article 13 of the International Covenant on Economic, Social and Cultural Rights - previously the subject of its General Comment No 13[275] - in the course of concluding observations made during 2002 on periodic reports submitted by a number of States Parties. It was especially concerned with a number of factors that were affecting access to education. It noted the way in which direct and indirect discrimination was affecting participation in

[273] Court of Cassation, judgment no. 1530/2000 of 8/12/2000.
[274] Court of Appeal in Thrace, judgment no. 31/2002 of 25/1/2002.
[275] E/C.12/1999/10, 8 December 1999.

education. The former could be seen in the inadequate provision made for some groups in society (e.g., those with physical and mental disabilities in the case of **Ireland**[276]) and the entirely inappropriate provision made for others[277]. Indirect discrimination arose from the fact that it was possible for children to work[278] and the failure to deal with high drop-out rates[279].

The right to education is also guaranteed under Articles 28 and 29 of the Convention on the Rights of the Child. The Committee on the Rights of the Child has provided some elaboration on the requirements of these provisions[280] in the course of concluding observations made during 2002 on periodic reports submitted by a number of States Parties. With respect to the Member States of the Union, the Committee was especially concerned about problems of access resulting from the lack of compulsion (**Netherlands Antilles**[281]), the low rate of transfer to or completion of secondary education (**Spain**[282] and **United Kingdom**[283]), armed conflict and terrorism (**Spain**) and the lack of provision (**Netherlands Antilles**), as well as from the exclusion both of pregnant girls (**Netherlands Antilles**) and of children with disabilities (**Netherlands Antilles**). It drew particular attention to the existence of such problems affecting especially or only certain parts of the country or certain groups, such as asylum-seekers[284], girls, ethnic minorities and those in detention (**Greece**[285], **Netherlands Antilles**, **Spain** and **United Kingdom**[286]). It also drew attention to the existence of high rates of illiteracy in respect of certain groups (**Greece**). Furthermore it was concerned about differences in educational outcomes according to socio-economic background and factors such as gender, disability, ethnic origin and care status (**United Kingdom**). The Committee on the Rights of the Child also expressed concern about the lack of a legislative requirement in the **United Kingdom** for the views of children to be taken into account in the provision of education[287]. Finally the Committee was concerned about both the fact that education in Northern Ireland continues to be largely segregated and the discrimination against children belonging to Irish and Roma travellers which is reflected in their segregation in education (**United Kingdom**).

The developments which the right to education has seen in the Union Member States in the course of the period under scrutiny are essentially centred around four questions.

Quality of education

The publication of the PISA study of the OECD is undoubtedly connected with the concern that is growing in several countries that the education system should meet the expectations of the knowledge society and, in the long term, guarantee the competitiveness of the European economies. In **Germany**,

[276] E/C.12/1/Add.77.
[277] E.g., the overrepresentation of Roma children in schools primarily designed for the mentally-retarded, Czech Republic, E/C.12/1/Add.76.
[278] E.g., Poland, E/C.12/1/Add.24.
[279] E.g., those of Roma children in the case of Slovakia, E/C.12/1/Add.81.
[280] Article 29 CRC was the subject of the General Comment No 1 of the Committee (CRC/GC/2001/1, 17 April 2001).
[281] CRC/C/15/Add.186.
[282] CRC/C/15/Add.185.
[283] CRC/C/15/Add.188.
[284] The issue of access to education for children who are illegally residing on the territory merits a specific comparative examination. As for juvenile asylum seekers, Article 10 of Directive 2003/9/EC of the Council 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) grants access to the education system under similar conditions as nationals of the host Member State. However, Member States should not wait until 6 February 2005, the transposition date, to grant underage asylum seekers or children of asylum seekers the right to education. The recognition of this right is already imposed from the outset by virtue of the Convention on the rights of the child. In its final observations concerning **Belgium** on 13 June 2002, the Committee on the Rights of the Child requests that the State guarantees access to education for unaccompanied minors during and after their stay at reception centres (§ 28, c). No such right is guaranteed at present.
[285] CRC/C/15/Add.170.
[286] The Northern Ireland Human Rights Commission has found education in juvenile justice centres to be inadequately resourced, especially in relation to children with learning disabilities : *In Our Care: Protecting the Rights of Children in Custody*.
[287] CRC/C/15/Add.188, 9 October 2002, para 47.

the Bundestag took an important resolution on 4 July 2002[288] regarding the reform of the education system and its surveillance by a reporting system supervised by a national expert's council. In **Spain**, the concern to improve the quality of primary and secondary education was the basis for the adoption of organic Act no. 10/2002 of 23 December 2002 on the quality of education[289]. In **Finland**, a debate on the nature of the final examination in secondary education led to the adoption of the Act amending section 18 of the Act on higher secondary schools[290], to insert more detailed provisions on the structure and contents of the final examination (matriculation examination) at higher secondary schools. The amended section 18 also prescribes that the Ministry of Education has the authority to decide that, as an experiment – to be carried out within a limited period of time (by 31 December 2007, as prescribed in section 18)[291] –, the matriculation examination is carried out in selected schools in a form which slightly deviates from the one provided by the Act.

Access to education

Access to education should be guaranteed to all without discrimination[292]. In the final observations which it formulated on 1 February 2002 concerning **Greece**[293], the Committee on the Rights of the Child (CRC) expressed its concern over the fact that the school dropout level and the level of illiteracy was high among Romany children. The CRC recommended a rigorous application of the legislation on compulsory education, in particular by making available the appropriate resources for this purpose, and steps to guarantee access to education for all children, notably by taking appropriate measures to increase the percentage of children in full-time education and to reduce the dropout rate, and by paying special attention to children from the Romany communities. The Greek authorities seemed to be aware of the urgent need to give the problem their fullest attention. They launched a comprehensive action programme for the social integration of the Greek gypsies for the years 2002-2008. It is an ambitious programme, for which substantial national and Community funds have been made available, under the responsibility and co-ordination of the Ministry of the Interior. The priority areas of this programme are the improvement of the infrastructure and services aimed at the Romany community. A total sum of 29,347,000 euros will be available for the education of Romany children[294].
Integration (inclusion) efforts should be targeted not only at the different ethnic groups in the population as a whole, but also at groups with special needs[295]. In the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights **Ireland** was encouraged to enact legislation extending the constitutional right to free primary education to all adults with special educational needs[296]. Moreover, non-discrimination in access to education should reach beyond the mere prohibition of forbidden criteria justifying the refusal of enrolment – including the fact that a child is HIV-positive[297] –, and comprise an obligation imposed on educational establishments to agree to enrol

[288] Bundestagsdrucksache 14/9269; plenary session 4 Jul 2002, minutes p. 25162 – 25 178.
[289] BOE, 24 December 2002.
[290] Laki lukiolain 18 § muuttamisesta, Act No 478 of 2002.
[291] PeVL 29/2001vp.
[292] With regard to the prohibition of discrimination based on "race" or ethnic origin in the area of education, see Article 3, § 1, g), of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180 of 19/7/2000. Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 of 2/12/2000, does not cover education, although it also encompasses "vocational training" (see Art. 3, §1, c)). The obligation to transpose this Directive in the area of education often required the Member States to adopt special legislation. In **Sweden**, the Equal Treatment of Students at Universities Act (Lag (SFS 2001:1286) om likabehandling av studenter i högskolan) has been amended with the aim to correspond with the requirements contained in the two EC Directives. The new act entered into force on 1 March 2002.
[293] CRC/C/15/Add. 170, of 2 April 2002.
[294] Comprehensive action programme for the social integration of Greek gypsies, 2002-2008.
[295] See also the observations concerning Article 26 of the Charter.
[296] At para. 36. This was a clear reference to the case of *Sinnott v. Minister for Education* [2001] 2 IR 545. For considered analyses of this case see: Whyte, *Social Inclusion and the Legal System: Public Interest Law in Ireland*, (Dublin: Institute of Public Administration, 2002), pp 340-363; and Quinlivan and Keys, "Official Indifference and Persistent Procrastination: An Analysis of Sinnott", (2002) *Judicial Studies Institute Journal*, Vol.2, No.2, pp 163-190.
[297] In the French-speaking Community of **Belgium**, a Ministerial Circular of 1 December 2002 concerning the reception of HIV-positive children (human immunodeficiency virus) reiterates the prohibition of discrimination, in reply to the eyewitness accounts (compiled by the AIDS Reference Centres) in which HIV-positive children are the victims of numerous incidents of

pupils who meet all the conditions that can be required: in **Belgium**, the French-speaking community made sure to harmonize the rules governing the refusal of enrolment in order to limit the risks of arbitrariness or social segregation.

Positive discrimination in education: the example of Belgium

Belgium offers a most interesting example of the implementation of a policy of positive discrimination in education in that two relatively contrasting traditions coexist: while the French-speaking Community bases its positive actions exclusively on socio-economic ratings, the Flemish Community tends to increase the human and budgetary resources for the benefit of target groups. The Decree of the French-speaking Community of 27 March 2002, applicable to primary and secondary education,[298] subdivides the territory into small sectors, each with a socio-economic rating based on the following criteria: 1° average income per inhabitant, 2° qualification level, 3° unemployment level, employment level and number of people on income support, 4° professional activities and 5° housing quality. On the basis of the socio-economic average of the pupils at a particular school[299], the latter will benefit from positive discrimination through additional contributions of human and material resources. On 26 September 2002, the government of the French-speaking Community drew up the list of establishments that will receive additional resources under this policy.[300] This reform entails a 32% increase in the budget for primary education and a 7% increase for secondary education.

In the same period, the Flemish-speaking Community adopted a decree[301] applicable to *primary education* and *secondary education*, providing that each local consultation platform should elaborate methods with which the schools with a limited number of pupils meeting at least one of the "equal opportunity indicators" are encouraged to increase the number of enrolments of those pupils thus identified. By virtue of Article VI.2, shall be considered as "indicators" the fact that the child's family is on income support (1°), that the child is temporarily or permanently accommodated outside his family, a structure or a social service (2°), that the parents are nomads (3°), that the mother does not hold a degree of vocational secondary education or equivalent (4°) or that the language used for everyday communication within the family is not Dutch (5°). Except for the indicator concerning the placement of the child, the other data must be certified true by the parents. The different indicators, which do not have the same weight, are weighted. The decree also provides that, within the limits of the budgetary credit available, additional resources will be furnished to schools where at least 10% of the pupils (regularly attending the establishment) meet one or several of the equal opportunity criteria. Moreover, schools that accommodate first arrivals or pupils who are at least two years behind at school will receive more resources. An evaluation will be made within three years after additional resources have been granted.

In Belgium, the positive discrimination decrees already promote the school integration of first-arrival foreigners. Moreover, both the French-speaking Community and the German-speaking Community[302] have adopted decrees providing for the organization of "orientation classes", which are educational structures aimed at ensuring the best possible reception, guidance and integration of young first arrivals in primary or secondary education. In 2002, secondary school orientation classes in the French-speaking Community hosted 735 pupils of different nationalities.

harassment such as being barred from swimming pools or other sports activities organized by the school. The circular asks the institutions in question to adopt special care and hygiene measures and to scrupulously observe professional secrecy and confidentiality.

[298] Decree of the French-speaking Community of 27 March 2002 amending the decree of 30 June 1998 aimed at guaranteeing to all pupils equal opportunities for social emancipation, notably through the implementation of positive discrimination measures, and containing various modifying measures, *Mon.B.,* 16 April 2002

[299] First arrivals get special attention in that they are assigned as socio-economic rating the arithmetical mean of the 100 neighbourhoods with the lowest socio-economic ratings in the French-speaking Community.

[300] See http://www.ministre-enfance.be/d+

[301] Decree of the Flemish Community of 14 September 2002 on equal opportunity in education (*M.B.*, 14 September 2002).

[302] Decree of 17 December 2001 on the schooling of young first arrivals *Mon.b.,* 4 April 2002 (establishment of a transition class for refugee or stateless children aged 3 to 18 years, as well as children from certain developing countries who do not master the language of education (children from a European Union country are therefore excluded from these structures)).

Affordability of education

In primary and secondary education, the absence of enrolment fees does not mean that the objective of free education has been fully achieved. This observation led the French-speaking Community in **Belgium** to adopt the Decree of 12 July 2001 aimed at improving the material conditions of primary and secondary educational establishments, which became effective on 1 January 2003[303]: the list of chargeable fees will be reduced (basically, photocopies and school magazine become free of charge); the schools must take into consideration the social and cultural backgrounds of the pupils; the optional expenses will be calculated at real cost; non-payment must never justify refusal of enrolment or exclusion. The accessibility of education also implies that, even beyond the level of compulsory education, education should be affordable for all. In its Concluding observations made during the course of 2002, the UN Committee on Economic, Social and Cultural Rights was generally concerned with the effect of constant decreases in the budget expenditure allocated to education[304]. Either States increase the tuition fees, and risk excluding certain socio-economic groups from access to higher education. In the **Netherlands**, tuition fees for pupils of 16 years and older in secondary education increased with 7% in 2002 (from 826 euro in 2000-2001 to 885 euro in 2002-2003). Tuition fees for universities rose 5% in 2002 (from 1329 euro in 2001-2002 to 1396 euro in 2002-2003). Or States impose certain quotas, and reserve access to certain specialties on the basis of lot or merit. In **Portugal**, the *numerus clausus* system is seen as the source of inequalities[305], and is the subject of heavy public debate. In other countries, such a system may create constitutional difficulties. In **Italy**, by a decree of 29 May 2002, no. 219, the Constitutional Court declared incompatible with the Constitution regulations governing the access to specialization courses in medicine, which totally prohibit access to such courses for those who have already obtained another specialization in medicine or hold a doctorate degree.

The issue of access to higher education should be addressed taking into account the free movement of students within the European Union. The approval by the government of the French-speaking Community of **Belgium** on 14 November 2002 of the abolition of various measures restricting access to medical and veterinary studies[306] has led some to express the fear that the future abolition of entry quota will provoke an influx of students from European countries (such as French students, for whom neither the language nor the geographical distance is an obstacle) that have maintained a restriction on access to these studies. The example of veterinary studies is typical. The large number of students from France enrolled at Belgian veterinary colleges[307] is explained by the fact that Belgium is the only country in Europe which does not place quotas on such studies. This situation appears to create administrative and educational problems which could have serious repercussions on the quality of education.[308] In October 2002, the Minister of Higher Education of the French-speaking Community therefore declared himself in favour of the institution, for a brief period fixed by decree, of a community competition. The Minister of Secondary Education of the French-speaking Community suggested in October 2002 the introduction of a certificate of aptitude as the outcome of secondary education: this would apply a kind of competence assessment at the end of compulsory education, and possession of this certificate would be necessary to access higher education.

[303] Decree of 12 July 2001 aimed at improving the material conditions of primary and secondary educational establishments, *Mon.b.*, 2 August 2001.
[304] Czech Republic, E/C.12/1/Add.76.
[305] Students who do not achieve the necessary mark to enter State University, end up resorting to private schools, where they pay much higher fees.
[306] Medical and dentistry students will thus be in an equivalent position to physiotherapists who are being faced with federal quotas imposed at the end of their studies, according to the need for healthcare personnel.
[307] Of the 1,900 veterinary students who enrolled at the University of Liège in 2002, two-thirds come from France. This proportion is 75% for the three first years of the course, which takes six years in all.
[308] On 27 February 2002, six veterinary students of the University of Liège brought an action before the civil court of Liège against the French-speaking Community, blaming it for the poor learning conditions at their faculty: cramped classrooms, inadequate training, etc.

Education and multiculturalism

In its Concluding Observations relating to **Belgium**, the Committee on the Rights of the Child emphasised the need for education to develop respect for human rights, tolerance and equality of the sexes and religious and ethnic minorities[309]. In the **Netherlands**, Islamic schools have been the subject of a public debate following reports, one of which drawn up by the *Algemene Inlichtingen en Veiligheidsdienst (AIVD)* [General Service on Intelligence and Security], stating that anti-constitutional views were taught on some of these schools. In response Parliament pressed for an expansion of the powers of the *Onderwijsinspectie* [the service charged with overall inspection of educational facilities], which should get more insight in the nature of religion lessons at religious schools in general.

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

The right to engage in work

Article 15 of the Charter of Fundamental Rights covers a particularly wide field, of which only one aspect will be discussed in depth here. The clause is subdivided into three paragraphs. Paragraph 1 of Article 15 guarantees the right to engage in work and to pursue a freely chosen or accepted occupation. This clause incorporates into the Charter of Fundamental Rights of the European Union Article 1 par. 2 of the European Social Charter, by the acceptance of which the Parties undertake to "protect effectively the right of the worker to earn his living in an occupation freely entered upon". Article 1 of the European Social Charter is one of the articles that constitute the "hard core". Paragraph 2 of Article 1 was accepted by all the Member States.

The European Committee of Social Rights considers that this clause has two effects: it prohibits forced labour, and it establishes the principle of the prohibition of all discrimination in access to employment. The abolition of all conditions imposed on access to employment should therefore be considered as contributing to compliance with this paragraph. In **Italy**, a judgment of 12 November 2002, no. 445, of the Constitutional Court annulled the provisions governing the recruitment of volunteers into the armed forces which restricted the access to the selection procedure for these jobs to single persons and widowers/widows. The Court considered that these provisions were contrary not only to the right of access to a public office in conditions of equality, but also to the right to marry and the right to respect for private life.

Occupation "freely" entered upon

We should, on the contrary, carefully consider with regard to Article 15 par. 1 of the Charter of Fundamental Rights any initiative which - penalizing in an unreasonably justified way the refusal to accept a job - may be interpreted as a step backward in the recognition for each person to "earn his living in an occupation *freely* entered upon". Thus, with respect to the **United Kingdom**, the European Committee on Social Rights has concluded that the loss of unemployment benefits for jobseeekers who refuse, even for a short period, to take up employment that does not correspond to their educational qualifications is not in conformity with Article 1(2) of the European Social Charter310. In its final Conclusions concerning Belgium, the European Committee of Social Rights for the same reasons questions the conditions under which the right to unemployment benefits is dependent on the acceptance of a job or training course, and the modalities according to which a refusal to accept a job can be penalized311. This tendency to "activate" social benefits by subordinating their allocation to the acceptance of a job that is proposed or another integration mechanism has been reinforced in Belgium by the Act of 26 May 2002 on the right to social integration312. This Act abolishes the allocation of income support ("minimex"), which had been provided by Belgian law since 1974.

[309] CRC/C/15/Add.178.
[310] *Concl. XVI*-1 (2002), p. 11.
[311] Concl. XVI-1 (2002), p. 98.
[312] M.B., 31 July 2002.

Instead, it introduces the "right to social integration". This may take the form of a *job* (with the Welfare Office or through its agency) and/or of an *integration income*, whether or not accompanied by a *personalized social integration project*. Individuals aged under 25 are entitled to social integration through a job that is "adapted to their personal situation and their abilities" within 3 months of their application: it may be an employment contract or a personalized social integration project[313] leading within a specific period to an employment contract and with entitlement to an integration income during the waiting period. If the beneficiary refuses to accept the job being offered, he loses all entitlement to a minimum income. Persons aged over 25 are entitled to social integration, either through the allocation of an integration income (which may be accompanied by a personalized social integration project), or through an employment contract.[314] An action for annulment has been brought against this law and is currently pending before the Belgian Constitutional Court (Court of Arbitration). [315]

Paragraph 2 of Article 15 of the Charter of Fundamental Rights guarantees only to the citizens of the European Union certain rights that are already granted to them under the EC Treaty: the freedom to accept offers of employment actually made in any Member State of the Community, and to move freely within the territory of Member States for that purpose (Article 39 EC); freedom of establishment within any Member State to pursue activities as a self-employed person (Article 43 EC); freedom to provide services within any Member State (Article 49 EC)[316]. Should be considered as infringing Article 15 par. 2 of the Charter, not only national measures that violate the provisions of primary Community law, but also the failure by Member States to ensure the transposition or application of derived law ensuring the continuation thereof[317]. Finally, paragraph 3 of Article 15 of the Charter of Fundamental Rights guarantees that nationals of third countries who are authorized to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Access to employment for third country nationals

The present report focuses on a special dimension of the right to engage in work as guaranteed by Article 15 §1 of the Charter. Paragraph 1 of Article 15 is addressed to "everyone", not just citizens of the Union. It must also benefit nationals of third countries residing on the territories of the Member States. The generally favourable trend towards a wider and more flexible opening of the labour market to nationals of third countries is a natural part of a broader reflection on the very access to the territories of the Member States by nationals of third countries for the purposes of seeking employment. Following the introduction by the Treaty of Amsterdam of Community authority in the areas of asylum and immigration, the European Council of Tampere in October 1999 underlined the need for "approximation of national legislations on the conditions for admission and residence of third

[313] The personalized project is based on the aspirations, abilities, qualifications and needs of the person concerned and the possibilities of the centre, and will focus on occupational integration or on social integration.

[314] The preamble mentions in this respect, "In order to receive the integration income, the person concerned must (...) in principle, as it already the case today, be willing to accept a job. If the occupational integration does not succeed, the person concerned is entitled to an integration income".

[315] See also the Real Decreto-ley 5/2002, called the Decretazo, (Real decreto-Ley 5/2002 dated May, 24, de medidas urgentes para la reforma del sistema de proteccion por desempleo y mejora de ocupabilidad. BOE of Mayo, 25 and June, 11, 2002; modified by the Ley 45/2002 of December, 12, de medidas urgentes para la reforma del sistema de proteccion por desempleo y mejora de ocupabilidad. BOE of December, 13, 2002

[316] In **Italy**, by a judgment of 30 January 2002, no. 505, the Council of State (5th section) considered as being contrary to Articles 48, 49 and 50 EC a legislative provision requiring a minimum turnover volume for an engineering firm to be able to tender for a contract.

[317] It should be noted that the European Court of Justice observed a failure on the part of **France** as well as **Ireland** to transpose Directive 98/5/EC of the European Parliament and the Council of 16/02/1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (ECJ, 26 September 2002, *Commission v. France*, C-351/01; ECJ, December 2002, *Commission v. Ireland*, C-362/01). In **Luxembourg**, the Act of 13 November 2002 for the transposition of this Directive (*Mém.* A, 2002, 3203) imposed new conditions, namely with respect to language, for access to the profession of lawyer: since the Act stipulates that lawyers must, to be able to register with the Bar, master the language of the legislation and the administrative and judicial languages within the meaning of the Act of 24 February 1984 on the use of languages, they are actually obliged to master the Luxembourg language.

country nationals, based on a shared assessment of the economic and demographic developments within the Union, as well as the situation in the countries of origin"[318]. The Communication of the Commission to the Council and the European Parliament on "A Community Immigration Policy", presented a year later, identified the initiatives to be taken in order to accomplish this approximation. These initiatives include the adoption of a Directive on the entry and residence conditions with a view to seeking paid employment or an economic activity on a self-employed basis. The European Parliament recently requested that the Commission proposal with a view to the adoption of this Directive be revised so as to facilitate the right of third country nationals to enter, live and work in the European Union[319]. It is in view of the topical interest of this debate - although it exceeds the scope of Article 15 §1 of the Charter of Fundamental Rights - that emphasis in this presentation of important developments in 2002 was laid on this particular aspect of the provision.

It is also Article 15 §1 of the Charter of Fundamental Rights that two major initiatives taken in **Italy** on the subject of access to employment for third country nationals relate to. The Act of 30 July 2002, no. 189/2002, amending the regulations governing immigration and asylum introduce certain restriction in comparison to the previously existing situation. The Act introduced a new type of employment contract called "residence contract for paid work", and provides that, under such a contract, the employer must guarantee accommodation meeting the standards of housing available for moderate rent and must bear the travelling expenses when the worker returns to his country of origin; failing such guarantees, the worker cannot obtain a residence permit[320]. The Act of 9 October 2002, no. 222/2002, containing urgent regulations in the regularization of illegal employment of non-Community foreign nationals[321] enabled all those who illegally employed non-Community workers during the three-month period prior to the effective date of the Act to regularize the position of these workers by 11 November 2002[322]. By the end of 2003, 700,00 files should be examined by the authorities competent for regularization. At the end of the process only will it be possible to offer an appraisal.

In **Germany**, too, a certain liberalization in the access to employment for third country nationals can be seen. Although it had to be reintroduced by the Government on 15 January 2003, after the initially introduced bill was annulled by the Federal Constitutional Court due to technicalities, the *Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungsgesetz)*[323] [Act for Steering and Limitation of Immigration and for the Ruling of the Residence and of the Integration of Citizens of the Union and Foreigners (Immigration Act)] aims, among other important objectives, to facilitate immigration to Germany of foreigners for reasons of employment.It was annulled by Federal Constitutional Court due to formal reasons[324], but it has been reintroduced as a new bill by the Government on 15th January 2003. In **Denmark**, the Parliament adopted the new Act (2002: 365) on Aliens [Lov (2002: 365) om Udlændinge] on 6 June 2002. The Act enables asylum seekers to gain residence, thus to be authorized to work, if important considerations regarding employment or occupation speak for accepting the application, for instance if the immigrant is able to obtain employment within subject area in need of qualified manpower. Furthermore, the up to now flexible green-card procedure in regards to applications from foreign information technology-specialists, doctors and other personnel from the health sector has now been enlarged and will include areas in need of qualified manpower. In **Spain**, the Supreme Court gave a judgment in November 2002 in which it demanded from the administration a detailed justification if it refuses to issue a work permit to a foreign worker: according to this judgment, a vague and general assertion that Spaniards are able to hold the job being offered does not

[318] Point 20 of the presidency conclusions.
[319] Resolution adopted on 12 February 2003 by 274 votes to 253 and 26 abstentions, on the report of Mrs A. Terrón i Cusí (Doc.: A5-0010/2003).
[320] The term of the residence permit must not exceed nine months for seasonal labour, one year for a specified term contract and two years for an unspecified term contract.
[321] Gazzetta ufficiale del 12 ottobre 2002 n. 240.
[322] According to figures supplied by the Ministry of the Interior, 702,156 requests for regularization of clandestine foreign workers were filed. 341,121 concerned domestic workers or home helps for elderly people.
[323] Bill of 20 June 2002 (BGBl. 2002 I p.1946).
[324] Judgment of 18 December 2002 – 2 BvF 1/02 -.

suffice to justify the refusal if the job advertisement does not contain a precise description of the job and the conditions which applicants must meet. In **Finland**, a government proposal for a new Finnish Aliens Act[325] includes some improvements in the residence permit practice for foreigners coming to work in Finland. At present, *legal* foreign labour force is rapidly increasing in Finland. Finland granted 15,000 residence and work permits to foreign workers in 2000, and this figure was expected to even double 2002, as the construction and engineering industry has difficulties in finding appropriate employees on the domestic labour market, especially in southern Finland. Most of these migrant workers are Russians and Estonians. Statistics for 2001 indicate that no other countries supplied more than a few hundred workers to the legal Finnish labour market.[326] At the same time, the flow of *illegal* foreign labour into Finland continues. The use of workers who lack work permits is particularly common in the construction industry, and the majority of the illegal workers arrive from Estonia and Russia.[327] A related trend also is that the ranks of Finnish blue-collar workers are shrinking within the next few years. According to calculations prepared by the Ministry of Labour, more workers will leave the workforce already in 2005 than will graduate from schools to replace them. The fear is that Finland faces shortage of blue-collar workers by 2005.[328]

Membership of workers' organizations or participation in the collective debate contributes to occupational integration. Therefore contributes to the guarantee of the "right to engage in work" for third country nationals, within the meaning of Article 15 par. 1 of the Charter, the elimination of conditions of nationality imposed on the exercise of certain functions within collective bargaining bodies. In a case involving **Austria**, Article 26 of the International Covenant on Civil and Political Rights was interpreted as prohibiting all discrimination on the basis of nationality in that context. On 4 April 2002 the UN Human Rights Committee delivered its views on a complaint[329] by a Turkish national, holding a permanent working permit, about his being removed from an elected position in the work-council by means of a court decision, which was based on a statutory provision prohibiting non-Austrian/European Economic Area nationals to run for such function. The Committee declared the claim admissible with regard to the different treatment of EEA nationals and third country nationals and proceeded with assessing the differentiation in the light of Article 26 of the International Covenant on Civil and Political Rights. For the Committee the key question was whether there were "reasonable and objective grounds justifying exclusion of the author from a close and natural incident of employment in the State party otherwise available to EEA nationals, namely the right to stand for election to the relevant work-council, on the basis of his citizenship alone." In rejecting the government's argument that, as a general rule, an international instrument privileging nationals of a State party to that agreement would in itself constitute an objective and reasonable ground for differentiation, it found that in view of the present facts no such justification could be established, and therefore the differential treatment constituted discrimination in violation of Article 26.

In **Belgium**, the Council of Ministers on 19 July 2002 approved the draft bill to amend the Act of 30 April 1999 and the implementing Royal Decree of 9 June 1999 on the occupation of workers of foreign nationality. The objective is to simplify the administrative formalities for employers, workers and the Regions with the authorities that are empowered to issue work permits and thus to guarantee better accessibility to the labour market.[330] Henceforth, all persons authorized to stay for an indefinite period will be exempt from a work permit. Moreover, persons who have a limited residence permit, but with a serious prospect of obtaining an indefinite residence permit (such as eligible candidate refugees, foreign nationals who have been regularized for a renewable one-year term, regularized foreign nationals subject to the condition of getting a job, victims of human trafficking, etc) will be

[325] Finland's present Aliens Act (ulkomaalaislaki, Act No 378 of 1991) is over ten years old, and has been amended several times. The attemp is now to turn Finland's aliens law and legislation on immigration into a unified whole.
[326] Source: Trade Union News from Finland, http://www.kaapeli.fi/unions/2002/20020524.htm
[327] Souce: Helsingin Sanomat, 28.2.2002.
[328] Source: Ministry of Labour, 13.2.2002.
[329] CCPR/C/74/D/965/2000, *Karakurt v. Austria*, views adopted on 4 April 2002
[330] As a reminder, the European Committee of Social Rights, in its Conclusions XV-2 2001(vol. 1) p.130, concerning the compliance by Belgium with Article 18 of the revised European Social Charter, considered that the Act of 30 April 1999 concerning the employment of foreign workers provided for an excessively restrictive access to the national labour market and that the formalities for obtaining a work permit should be relaxed.

entitled to a C permit, which is valid for all employers, but for a one-year renewable term. Other persons who qualify for this system are students who are authorized to work during the school year. Furthermore, spouses of persons authorized to stay in Belgium (for example to work or study there) will now be able to work under a B permit (valid for one particular employer), without there being required either the existence of a bilateral agreement between Belgium and the country of origin of the worker or a shortage of national workers on the labour market.

This is certainly not a general trend, however. In **Ireland**, a new system was introduced from 2nd January, 2002, in respect of work permits for non-EEA nationals. From that date preference has to be given in the distribution of employment to Irish and EEA nationals. All vacancies (for which a work permit might be sought) must first be registered with the state employment agency, FAS, which then broadcasts such vacancies to EEA employment services databases (EURES) and websites. An employer can only seek a work permit for non-EEA nationals once FAS has certified that there are no suitable Irish or EEA applicants. It should be noted, however, that Employers and Trade Unions have expressed dissatisfaction with the operation of the work permit scheme for immigrant workers and the Government has announced its intention to introduce statutory reforms[331]. In **Austria**, novel provisions to the Immigration Act coming into force on 1 January 2003 require immigrants to provide a health certificate in order to get a residence permit. In a draft implementing regulation of the Ministry for Social Affairs drawing on the Epidemic Act the concrete diseases have been listed that could result in the rejection of an application. Following 11 diseases are mentioned: tuberculosis (of the type requiring medical observation), leprosy, cholera, contagious poliomyelitis, paratyphus, plague, dysentery, typhus, hepatitis A, B, C, D, G, diphtherias, and pertussis. The mandatory medical examinations, which must not be older than 90 days, apply to all first-time applicants for a residence permit of more than 6 months but not to follow-up applications of aliens already resident in Austria.

The civil service should also be opened up more widely to third country nationals. There are some encouraging signs to be noted. In **France**, the public transport service in Paris, RATP, decided on 4 December 2002 to open up its statutory jobs to all nationalities, whereas up to the present these jobs had been reserved for French or European Union nationals. It is the first public corporation to take such a decision[332]. In **Belgium**, the Brussels Capital Region issued a Decree on 11 July 2002 which opens up to all persons, irrespective of their nationality, public functions which do not involve a direct or indirect participation in the exercise of public authority or functions which are not concerned with protecting the general interests of the State or of other public organizations.[333] The Flemish Government announced in December 2002 that the under-representation of foreigners in the public administration will be remedied shortly by the abolition of the clause of Belgian nationality for public functions, which will be accompanied by an awareness campaign for foreigners.

The liberalization of the access to employment for third country nationals is but one step towards full recognition of their "right to engage in work". All too often, discrimination still forms an obstacle to their full occupational integration. In Article 1, par. 1, of the European Social Charter, the European Committee of Social Rights regularly expresses its concern over this situation[334]. The Vienna-based European Observatory of Racist and Xenophobic Phenomena, in its 2001 report, observes that in **Belgium** the unemployment level among the foreign population (24%) is more than twice that of the Belgian population (11%)[335]. In **Sweden**, despite the improved labour market situation during 2002, the ratio of employment is still particularly low among non-Nordic citizens, compared to the

[331] The submissions made by various bodies in the course of a consultation process on new immigration legislation are available on the homepage of the Department of Justice, Equality & Law Reform which can be accessed via the website of the Irish Government: www.irlgov.ie/

[332] Le Monde, 6 December 2002.

[333] Decree of 11 July 2002 extending the nationality conditions for access to regional public functions in the Brussels Metropolitan Region, *Mon.B.,* 23 July 2002.

[334] Concl. XVI-1, vol. 1, 2002, p.93 (request for information from Belgium; the data from the Belgian report for the ESCR, showing that 15.4% of the unemployed were foreigners (the proportion of foreigners in the population is around 10%) dated from 1998).

[335] 2001 report (published on 10 December 2002) of the Vienna-based European Observatory of Racist and Xenophobic Phenomena (EUMC): «Diversity and equality for Europe ».

corresponding ratio for Swedish citizens[336]; after considering Sweden's periodic report under the ICCPR in April 2002, the HRC expressed its concern about the difficulties for foreigners in the employment market.[337] In **Finland**, although the unemployment rate for foreigners decreased from 53 % in 1994 to 31 % in 2000, the corresponding rate for Finns fell much more quickly over the same period. It is suspected that ethnic discrimination is partly responsible for the high unemployment rate for foreigners[338]. With respect to **Denmark**, the UN Committee on the Elimination of All Forms of Racial Discrimination expressed its concern after its March 2002 session about "the disproportionately high level of unemployment among foreigners, particularly groups of immigrants of non-European and non-North American descent. The State party is reminded that although it is not obliged to provide work permits to foreign residents, it should guarantee that foreigners who are entitled to a work permit are not discriminated against in their access to employment".

Another difficulty concerns the link that exists between the foreigner's right to stay and his job. The fact that the foreign worker depends on his keeping his job in order to be allowed to stay makes him particularly vulnerable to abuses, particularly as he will hesitate to report these abuses because of the consequences of becoming unemployed for a long period of time. However, any additional protection that would be offered to him to remedy this vulnerability will merely constitute a new obstacle to his right to work. The case of **Portugal** is a good example in this respect. Law No. 20/98 on foreign workers aims to combat illegal labor and protect foreigners from unfair employment practices. It provides for criminal penalties against employers who hire illegal workers and establishes a system for ensuring that foreign workers' employment contracts comply with the current legislation on health and safety and working conditions. Accordingly, any contract of employment concerning a foreign worker must be drawn up in writing and submitted to the Labor Inspectorate for prior approval. This arrangement, which does not apply when hiring Portuguese workers, is designed to protect foreign workers who are considered to be particularly vulnerable to any unfair clauses that may appear in the contract of employment. This commitment to combating unfair employment practices is coupled with the possibility of immediately allowing to register the worker for the purpose of benefiting from social welfare services. However, these additional formalities arising from Law No. 20/98 may have the effect of placing foreign workers at a disadvantage in relation to Portuguese workers[339].

This holds even more for the beneficiaries of the recent regularization of undocumented aliens in Portugal. After two waves of regularization in 1992-1993 and 1996, Legislative Decree No. 4/2001, adopted on 10 January 2001, entitled aliens without legal status, under certain conditions, to temporary residence permits. The stated purpose of this legislation was to ease residence requirements for aliens on Portuguese territory and counter the incidence of clandestine immigration. Since the law was passed, around 127,000 aliens without legal status have been granted temporary residence permits. The regularization procedure is closely linked to the employment situation in Portugal. In order to obtain temporary residence, aliens are obliged to show that they have been offered a contract of employment. Such contracts are subject to the same rules as contracts for aliens under the terms of Law No. 20/98, referred to above. Aliens receive a permit valid for twelve months and renewable five times, each time for a further year. The legislative decree expressly provides that, once the temporary residence permit has been renewed over a continuous period of five years beginning with issue of the first permit, the holder becomes automatically entitled to permanent residence. However, although this regularization procedure is of course very beneficial to undocumented aliens, aliens with a temporary residence permit still face many obstacles. Because of their insecure position, they may accept working conditions that Portuguese nationals would refuse, since failing to obtain work or losing a job

[336] Alternative Report to the Human Rights Committee, p. 73.
[337] CCPR/CO/74/SWE, § 13. See in addition the report "*Vardagsdiskriminering och rasism i Sverige-en kunskapsöversikt*", www.integrationsverket.se.
[338] See A. Forsander, *Conditions of trust: Immigrants in the 1990s Finnish labour market*. Helsinki 2002. See more about the thesis on http://www.artto.kaapeli.fi/unions/T2002/f29. Less than 2 % of people living permanently in Finland in 2001 were foreign citizens – a figure which is very low compared to most other industrialised countries. However, the Finland's foreign population is increasing quite rapidly at the moment, and Finland has clearly become a net receiver of migrants due to the growing immigrant flows in recent years.
[339] See, Riquito, "O Direito ao Trabalho dos Trabalhadores Migrantes", *in* Canotilho (org.), *Direitos Humanos, Estrangeiros Comunidades Migrantes e Minorias.*

could cause the residence permit to be withdrawn. Numerous abuses have been reported, including the failure to make monthly salary payments. Moreover, although aliens with temporary resident status enjoy the same right to health care as Portuguese workers according, inter alia, to Order No. 25 360/2001 of 16 November 2001, this right is not always effective since certain administration services refuse to recognise the validity of temporary residence permits. There have also been reports of failure to obtain access to unemployment benefits, university education and vocational training. Lastly, the situation of aliens with a temporary residence permit valid for one year remains insecure, largely because they face insuperable obstacles when applying for bank loans. At last, the excessive time often taken by the Aliens and Frontiers Service to renew temporary residence permits is also detrimental to their rights[340].

Article 16. Freedom to conduct a business

The freedom to conduct a business does not have an established status in international human rights law. It is not recognized in the European Convention on Human Rights. The European Social Charter makes no mention of it. Nor does it appear in the list established in the Declaration of Fundamental Rights and Freedoms of the European Parliament of 12 April 1989[341]. The Charter of Fundamental Rights of the European Union derives this freedom from the case law of the European Court of Justice, which itself is inspired in the first place by the doctrine of the German Federal Constitutional Court (*Bundesverfassungsgericht*).

Indeed, in **Germany**, the Federal Constitutional Court traditionally has an important case-law on freedom of enterprise or occupation. During the period under scrutiny, it declared incompatible with this freedom the Act concerning Closing Times, insofar as the Act excluded the pharmacies from the possibility to open on special all-day shopping on Sunday (four weekends per year). According to the Federal Constitutional Court[342], the prohibition for pharmacies to take part in all-day shopping on Sunday was disproportionate and not necessary for protecting the pharmacy employees of excessive working stress; moreover, the pharmacies had a legitimate interest in showing themselves customer-friendly and service-oriented. In another case, the Federal Constitutional Court[343] declared unconstitutional the sentencing to a fine of a veterinary surgeon for advertising, on the basis of the disciplinary rules of the veterinary surgeon's association Nordrhein.

As is known, it is also in the name of the freedom of enterprise that in **France** the Constitutional Council declared Article 107 of the Social Modernization Act of 17 January 2002 (no. 2002-73) incompatible with the Constitution. This provision contained a restrictive definition of redundancy, which only allowed a business to lay off workers if its durability was at risk, and therefore entailed a restriction for the business manager to take recourse to such redundancies[344]. The report will consider this decision in the examination of Article 30 of the Charter (protection in the event of unjustified dismissal).

In **Austria,** with a view to encouraging the start-up of new businesses, the Parliament passed on 13 June 2002 a completely new codification of the Trades Act (*Gewerbeordnung*), which went into effect as of 1 August 2002.[345] The new law rests on three main pillars. First, bureaucratic hurdles are removed : the exclusive competence and administrative procedure for the application of a trade is now bundled at the respective District Administrative Authority, who will ultimately issue a single decree. Any complementary issues such as the application for a tax identification number and the notification

[340] It is reported that aliens frequently receive replies concerning a permit's renewal after the date by which an application for the following renewal should in theory have been registered. Impossible situations have arisen in which authorization concerning family reunification has been closely followed by refusal to renew a residence permit. See Pereira, "A protecção jurídica da família migrante", in Canotilho (org.), , *Direitos Humanos, Estrangeiros Comunidades Migrantes e Minorias.*
[341] Declaration of Fundamental Rights and Freedoms of the European Parliament, OJ C 120 of 16/5/1989, p. 51.
[342] Judgement, 16 Jan 2002 – 1 BvR 1236/99 -,BVerfGE 104, 357.
[343] Decision (chamber), 18 Febr 2002 – 1 BvR 1644/01 -.
[344] Constitutional Council, decision n°2001-455 DC of 12 January 2002 "Social Modernization Act".
[345] Federal Law Gazette (BGBl.) I No. 111/2002

with the social security service will be forwarded to the relevant authorities. Moreover, it is now possible to apply for a trade licence on the Internet, which is interesting because the trade may be exercised from the day of notification. Second, access to trade is liberalized. Instead of the old list of trades with three different categories, there is now one uniform list containing 82 so-called regulated trades. General retail trading is entirely free and can be registered by anyone having reached the majority age who is not excluded from exercising a trade (e.g. for reasons of insolvency[346] or criminal conviction). For exercising one of the regulated trades the applicant must show a certain level of formal education depending on the trade in question, but following a positive expert opinion, for example by the Economic Chamber, the authority may also issue a licence on the basis of individual skills. As for the exercise of crafts it is still necessary to be a master craftsman, but the cumbersome admissibility criteria for the master's exam (*Meisterprüfung*) have been abolished and the examination itself made more transparent and objective. Third, the scope of licence is extended. Many trade licences will carry an extended bunch of additional and complementary rights that somewhat blur the boundaries to related trades. For example, it is hence allowed for pubs and restaurants to offer on a small scale also souvenirs and travelling goods, books, toiletry products, and so on.

In **Ireland**, there have been ongoing and, at times, heated discussions between the Irish Pharmaceutical Union and Government over the deregulation of retail pharmacies. The final report of the Liquor Licensing Commission (appointed by the previous Government) is due soon and will address a wide variety of issues of relevance to the drinks industry.

Although it only has a fragile basis in international human rights law, the freedom of enterprise may be derived from Article 6 of the International Covenant on Economic, Social and Cultural Rights (right to earn a living in a freely chosen or accepted occupation), of which Article 1 paragraph 2 of the European Social Charter is the equivalent. We may also interpret the freedom of enterprise as a development of the right to property, although this interpretation does not correspond to that which the European Court of Human Rights gives of Article 1 of the First Additional Protocol to the Convention. In **Belgium**, Article 23 of the Constitution guarantees "the right to work and free choice of a professional activity". In a judgment no. 41/2002 of 20 February 2002, the Constitutional Court (Court of Arbitration) considers that the Act of 15 December 1970 on the exercise of professional activities in small and medium-sized trading and craft businesses, although it restricts access to certain professions by imposing conditions, does not violate either Article 23 of the Belgian Constitution or Article 6 of the International Covenant on Economic, Social and Cultural Rights, or Article 1 of the Additional Protocol to the European Convention on Human Rights, in combination with Articles 10 (equality) and 11 (non-discrimination) of the Constitution, where the interest of consumer protection and the reinforcement and protection of the self-employment sector by imposing on the independent entrepreneur conditions of ability constitute a reasonable justification for the imposition of those conditions.

The imposition of ethical criteria on business

A noteworthy development in the period under scrutiny in **Belgium** concerns the imposition of certain ethical criteria on the freedom of enterprise. No fewer than three initiatives are worth mentioning in this respect. On 11 December 2002, the House of Representatives adopted a Resolution on the introduction of ethical, social and environmental criteria in public procurement in Belgium.[347] After it appeared that the new framework directive on public procurement, which was under discussion in the Internal Market Council, would not provide for the possibility of making the awarding of certain contracts dependent on the respect by the successful bidders of certain ethical clauses - whereas the

[346] Exclusion from trading because of insolvency has been relaxed. It is now only applicable if the assets were insufficient to cover the costs of liquidation. Since such information is indicated in the insolvency register merely for three years, anyone having gone bankrupt is rehabilitated after that time, provided there is no pertaining criminal conviction.

[347] Resolution on the introduction of ethical, social and environmental criteria in public procurement in Belgium, 11 December 2002, *DOC 50 1798/006* (House of Representatives).

inclusion of social or environmental clauses seemed far less of a problem[348], the House asked the Belgian Government to continue its commitment at the next Internal Market Council meetings to the inclusion in the Public Procurement Directive of the possibility for the awarding authorities to impose compliance with the conditions linked to respect for the fundamental rights, notably as regards the basic conventions of the ILO, either as condition for the awarding of the contract, or as exclusion clause in the context of the qualitative selection of businesses, or by including respect for ethical conditions among the conditions of performance of the contracts. The said Belgian Resolution of 11 December 2002 also recommends the establishment of an International Observatory charged with supervising the compliance by companies with these conditions and, where appropriate, introducing a certification mechanism for companies allowing their qualitative selection on an objective basis.

On 1 January 2002, the Office National du Ducroire (Belgian Export Credit Agency) (OND), which gives guarantees, insurance or funding for export or investment for the benefit of companies established in Belgium, decided to include environmental considerations for exports of capital goods[349]. A private bill was also presented aimed at ensuring that Belgian companies applying for *government support for overseas investment* (funding and other export guarantees are not targeted) meet a series of minimum standards in terms of fundamental rights[350]. The bill provides that a company that applies for government support undertakes to comply with these minimum standards, to ensure that its subcontractors do the same, and to agree to a survey being carried out at all its plants and at its subcontractors by an agency set up for this purpose. Companies that are found in default will have sanctions imposed by the relevant ministers, such as a refusal of all insurance for future investment.

Finally, following a controversy provoked by the granting of an export licence to a Belgian arms manufacturer for the supply of 5,500 machine guns to Nepal, the House of Representatives passed a bill aimed at tightening the criteria for the award of such a licence[351], by providing in the Act of 5 August 1991 for the prohibition to supply arms to countries that enlist child soldiers in the regular army, to countries at war or countries that systematically violate human rights, and by introducing the European Code of Conduct on Arms Exports[352]. Belgium is thus the first European country to incorporate the Code of Conduct in its domestic law and in this way to contribute to European harmonization in this area and to the control of arms movements.

Article 17. Right to property

In a notable judgment given on 16 April 2002, the European Court of Human Rights concluded that **France** had violated Article 1 of the First Additional Protocol to the European Convention on Human Rights, which guarantees the right to respect for a person's possessions, by refusing to grant the applicant the benefit of a Community Directive. Because of this refusal, the applicant failed to obtain the reimbursement of VAT, which, according to the Court, constitutes a debt which has "value as an asset", and should therefore be considered as a "possession" within the meaning of the said Article. The judgment illustrates how the law of the European Convention on Human Rights can strengthen

[348] See the interpretative communications of the European Commission on the Community law applicable to public procurement and the possibilities for integrating social and environmental considerations into public procurement: COM(2001) 566 final of 15.10.2001 and COM(2001) 274 final of 4.7.2001.
[349] See the Internet site of the OND: http://www.ondd.be .
[350] Article 8 §1 refers to the guiding Principles of the OECD for multinational companies, the basic conventions of the ILO, the directives of the International Chamber of Commerce with regard to misappropriation of public funds and corruption, the OECD convention on combating corruption of foreign public officials in international business transactions, and the Universal Declaration of Human Rights. Measures for the implementation of the law may be added to this list. The text of the bill is available at this address: http://s-p-a.uwmening.be .
[351] House of Representatives, Bill amending the Act of 5 August 1991 on the import, export and transit of arms, ammunition and equipment specially intended for military purposes, and the technology relating thereto, session 2002-2003, doc. 2083/008, 16 Janaury 2003.
[352] According to the Research and Information Group on Peace and Security (GRIP), the law - which essentially formalizes the practice already being followed by the Belgian government in the area of arms export licences - poses no direct threat to employment: L. Mampaey, «Le commerce des armes et l'emploi en Belgique», *GRIP*, analysis note G1034, 22 November 2002.

the effectiveness of Community law. While examining whether motives of general interest can justify this restriction on the right of the applicant company to respect for its property, the European Court of Human Rights explicitly noted that this company "would not be able to bear the consequences of the difficulties of taking into account Community law and the divergences between the different domestic authorities [with regard to the consequences of a Community Directive not being transposed within the set time limits]"[353].

Compensation due in case of expropriation

The litigation involving the right to property typically concerns the amount of compensation paid in case of expropriation. During the period under scrutiny, the European Court of Human Rights considered that, by reducing the amount of the compensation provisionally awarded to the applicants for the expropriation of their property by the added value resulting from works carried out without planning permission, in the context of an adversarial lawsuit provided for by law, **Belgium** did not violate Article 1 of the First Protocol to the Convention, insofar as such a reduction did not upset the right balance to maintained between the requirements of general interest and the necessities of protecting the fundamental rights of individuals[354]. On the other hand, **France** was condemned twice by the European Court of Human Rights for its application of the provisions of the Expropriation Code. In the first case, with regard to the expropriation of farmland, the Court considered that the compensation paid to the applicant was not in proportion to the value of the expropriated property since it did not specifically cover the loss of his tools and that the Code did not offer any possibility of remedy[355]. In the second case, also connected with the Expropriation Code, the Court considered that an expropriation carried out for the benefit of a local administration for the purpose of constituting land reserves, and which for more than fifteen years after was not used for the original purpose (construction of council housing) should be considered as "bearing no reasonable relation" to the public usefulness of the expropriation[356].

During the same period, **Greece** was condemned six times by the European Court of Human Rights for violation of Article 1 of the First Additional Protocol to the Convention. In three of these cases, the infringement resulted from a refusal by the authorities to comply with a court decision given against them or from procedural difficulties which the applicant encountered in asserting his rights[357]. The other cases where a violation was found on the part of Greece are linked to more conventional cases of expropriation which were either unjustified or for which the compensation was insufficient[358]. It should be underlined, however, that the Greek courts were at pains to take heed of the case law of the European Court of Human Rights. The Court of Cassation, for instance, considered that, under Article 1 of the First Additional Protocol to the Convention, all the - lawfully acquired - rights and interests are protected that have value as assets, including debts of which the persons concerned have a legitimate hope that they will be recognized[359]. Another judgment drew conclusions from the case law

[353] European Court of Human Rights, *SA Dangeville v. France* (application no. 36677/97), judgment of 16 April 2002, §58.
[354] European Court of Human Rights, *Marien v. Belgium*, n°46046/99, decision of 30 June 2002.
[355] European Court of Human Rights, *Lallement v. France* judgment of 22 April 2002, *AJDA*, 9 September 2002, p. 686.
[356] European Court of Human Rights, *Motais de Narbonne v. France* judgment of 2 July 2002, *AJDA*, 2002, p. 1226.
[357] See European Court of Human Rights, *Vasilopoulou v. Greece* judgment of 21 March 2002 (violation due to the refusal by the Greek administration to comply with a decision of the Audit Office granting the applicant a supplementary widow's pension); *Smokovitis v. Greece* judgment of 11 April 2002 (adoption of a law rendering inadmissible the request by interested persons to obtain payment of a research allowance); *Hatzitakis v. Greece* judgment of 11 April 2002 (violation due to the fact that the applicant had several times to request the State Immovable Property Reguistry to expedite the procedure aimed at determining whether the State had any property rights over the disputed land).
[358] See European Court of Human Rights, *Tsirikakis v. Greece* judgment of 17 January 2002 (violation found in respect of an expropriation decided with a view to the construction of an organic sewage treatment plant, of land belonging to the applicants); *Katsaros v. Greece*, judgment of 6/6/2002 (violation due to the fact that the State had deprived the applicant of the enjoyment of his possessions by prohibiting the use of the land); *Azas v. Greece* judgment of 19/9/2002 (procedural difficulty in reversing the refutable presumption according to which the added value of the roadworks constitutes sufficient compensation, and the limitation of the lawyer's fees which the State must pay).
[359] Court of Cassation, judgments nos. 43/2002 of 11/1/2002, 512/2002, 959/2002 of 12/2/2002. The extension to recoverable debts of the protection offered by Article 1 of the First Additional Protocol to the Convention to «possessions» resulted from a judgment given against Greece (*Stran Greek Refineries and Stratis Andreadis v. Greece* judgment of 8 December 1994).

of the European Court[360] by considering that the presumption according to which the owners of an expropriated property derive benefit from road improvement works is refutable[361].

In **Portugal**, the main difficulty lies in the delays incurred by the Administration in paying out the compensation due in case of expropriation[362]. Undue delay has continued to be a major problem in the year 2002: it is a result of the very lengthy judicial processes in Portugal, which is, in this domain, aggravated by the duality of jurisdictions intervening in processes of contested expropriation: it is up to the administrative courts to receive complaints on the lawfulness of such acts, but it falls within the competence of civil, ordinary courts the determination of adequate compensation.

On this same question concerning the conditions of expropriation, several significant decisions were delivered during that same period by the Supreme Court of **Denmark**. One of these concerned the exercise by a municipality of its pre-emptive right over a plot of land. When the municipality of Copenhagen sold property in Valby in 1918-19, there was an agreement and registration that the municipality would be able to repurchase the property. This would be possible firstly in 1980, then again in 1990, etc. E. bought the property in 1985, and even though the municipality gave notice of wanting to repurchase in 1990, E. was offered to pay a certain amount in return of a postponement of the repurchase. E. questioned the validity of the repurchase agreement and the municipality took legal action. The Supreme Court[363] decided that the agreement with the municipality of the repurchase-deal did not violate any part of public law; that the agreement was no equivalent to a tax and thereby did no violate the Constitution, par. 43; that E. was familiar with the agreement. Furthermore, the repurchase agreement did not violate Articles 14 ECHR and 1 of Protocol n°1.

In **Greece**, Parliament adopted Act no. 2985/2002[364]. This Act adds a new Article 7A to the Expropriation Code, allowing the State to take possession of the expropriated property before paying the compensation, this in order to facilitate the execution of works that are of general importance to the economy of the country, and more particularly works necessary with a view to holding the 2004 Olympic Games in Greece. The expropriations to which the new provision applies must be declared by an act of the Council of Ministers. Possession of the properties may only be taken following an authorization given by the competent court, on condition that the authorities have given the owner concerned the necessary guarantees that all the stages of the expropriation in question will be completed as a matter of priority.

In **Italy**, the Decree unifying the matter of public utility expropriation[365] is to become effective, following a postponement, on 30 June 2003. This decree unifies and simplifies the matter of expropriation. The institution of indirect expropriation (*occupazione acquisitiva*) is established in this decree, with the possibility for the public administration to use a property for public purposes without first having proceeded to the legal expropriation of the property (Article 43 of the Decree), the administration being obliged to compensate the owner for the prejudice he suffers. The texts legitimising *a posteriori* this form of expropriation, which resulted in two judgments by the European Court of Human Rights establishing a violation of Article 1 of the First Additional Protocol to the European Convention on Human Rights[366], have been repealed. Part of the doctrine, however, expressed its concern over the introduction of *occupazione acquisitiva,* which will allow the public administrations to act illegally and without regard for the right to property of private individuals[367].

---

[360] European Court of Human Rights, cases *Tsomtsos v. Greece* and *Katikaridis v. Greece* of 15/11/1996, Rec. 1996-V.
[361] Court of First Instance at Thesprotie, judgment no. 340/2002 of 30/7/2002.
[362] See Eur. Ct. HR, *Rodrigues Coelho Osório v. Portugal* (Appl. N° 36674/97), judgment of 23 March 2000 (friendly settlement).
[363] Supreme Court, U.2001.2493H.
[364] Act No. 2985/2002 «Bringing the Expropriation Code into conformity with the Constitution».
[365] Decree of the President of the Republic of 8 June 2001, no. 327.
[366] European Court of Human Rights, *Belvedere Alberghiera v. Italy* judgment of 30 May 2000 and *Carbonara and Ventura v. Italy* judgment of 30 May 2000.
[367] V. Carbone, Il nuovo t.u. in materia di espropriazione : scompare l'occupazione espropriativa ?, *Il Corriere Giuridico*, 2001, 10, 1265-1268 ; S. Benini, "L'occupazione appropriativa è proprio da epurare ?", *Il Foro Italiano*, 2002, I, 2591-2605.

Regulation of the use of property and social justice

A constitutional protection of the right to property, too strictly interpreted, may constitute an obstacle to the adoption of certain laws concerned with social justice, for example on account of the constraints they impose on an employer with a view to the professional integration of certain categories or because of the loss of income they incur for a property owner in the interest of ensuring better protection for the tenant. In **Ireland**, the 1937 Constitution was sometimes criticised for giving too much protection to private property rights but the qualification contained in Article 43 thereof based on principles of social justice and the exigencies of the common good attempts to inject some balance into the provision. While the interpretation of the private property provision of the Constitution proved to be an impediment to the original attempt to pass employment equality legislation and, in particular, to provide for the needs of disabled workers in a later case the Supreme Court upheld legislation for social housing despite its clear adverse implications for certain private property rights[368]. In **Finland**, some significant restrictions have been brought to the right to property for public interest reasons. The *Act amending the Interest Act* (Laki korkolain muuttamisesta, Act No 340 of 2002) modifies the Interest Act in certain cases be applied retroactively to debt relationships which existed before the entry into force on 1 July 2002 of the amending Act. According to section 2 of the amended Interest Act, the interest on overdue payments in case of certain consumer loans and housing loans is invalid, if the interest is higher than the interest rate specified in the Act. Section 11 prescribes on the adjustment of the interest on overdue payments. Even this provision may be applied to debts which existed before the entry into force of the amendment. The *Act on the Adjustment of the Debts of a Private Individual* (Lakiyksityishenkilönvelkajärjestelystä, Act No of 1993) – a legislation protective of individuals heavily in debt – has also been amended[369] Under the new provisions which enter into force on 1 January 2003, a voluntary repayment plan can be sought with all those who have accumulated significant amounts of debt, notably during the recession of the early 1990s. When the requirements of such a plan have been fulfilled, the debtor would be free of the obligations. Those getting by solely with social security benefits or national pension could see their debt load reduced considerably. The Constitutional Law Committee concluded that these amendments were not in violation of paragraph 1 of Section 15 of the Constitution of Finland ("the property of everyone is protected"), insofar as the debt adjustment does not unreasonable restrict the right of the creditors[370].

According to the interpretation which the European Court of Human Rights has given of Article 1 of the First Additional Protocol to the Convention, the latter should not form an obstacle to the adoption of regulations governing the use which each person makes of his property with a view to achieving certain objectives relating to social justice[371]. Furthermore, the balance of opposing interests must not be upset. In line with the *Immobiliare Saffi v. Italy* judgment of 28 July 1999[372] concerning the system for the eviction of tenants, the European Court of Human Rights pronounced 72 judgments against **Italy** during the period under scrutiny, of which 40 were dropped from the cause list following a friendly settlement between the parties[373]. At the same time, the Italian Act no. 185/2002[374] was adopted, which for the fourth time since 1998 suspended the eviction of tenants living in the big cities and belong to the following categories: households made up of elderly persons aged over sixty-five or handicapped persons who had no other accommodation or who did not have enough income to pay

[368] In both cases legislation was referred to the Supreme Court by the President under Article 26 of the Constitution to assess its constitutionality prior to promulgation.
[369] See also HE laeiksi yksityishenkilön velkajärjestelystä annetun lain ja verotusmenettelystä annetun lain 88 § :n muuttamisesta.
[370] See PeVL 33/2002vp.
[371] See European Court of Human Rights, *Mellacher v. Austria* judgment of 19 December 1989, Series A n° 169 (regulation of the rents with a view to dealing with the housing shortage and facilitating access to housing for households on low incomes).
[372] *Rec.* 1999-V.
[373] This dispute is one of the "repetitive" cases that increase the workload of the European Court of Human Rights, and plans to reform the European Convention on Human Rights are aimed at facilitating the handling of these cases. In addition - in accordance with the subsidiarity principle of international judicial control - these plans emphasize the obligation for the States to provide remedies against certain situations in their domestic judicial order.
[374] *Legge 1° agosto 2002 n. 185, Gazzetta Ufficiale del 19 agosto 2002 n. 193.*

rent at market rates. The law allows owners to appeal to the penalty enforcement judge to verify the existence of the conditions for the suspension. According to figures supplied by the tenants' association for the year 2001, of the 19,352 eviction orders that were issued by the courts, 11,596 were executed; in that same year, 71,170 eviction requests had been filed.

Article 18. Right to asylum

Article 63 of the EC Treaty stipulates that the Council shall adopt, within a period of five years, measures on "asylum, in accordance with the Geneva Convention of 28 July 1951…[and] other relevant treaties" as well as on "refugees and displaced persons". The progress made by the European Union in 2002 in the area of asylum cover five sections: the report successively addresses the question of determining the responsibilities for the handling of applications, the approximation of the rules and content of the status of refugees, identification of the common minimum conditions for receiving asylum seekers, working out common rules for a fair and efficient procedure, and the so-called "subsidiary" protection in accordance with the prohibition of removal imposed in certain cases by the European Convention on Human Rights or the United Nations Convention against Torture. A most scrupulous examination is necessary here, since, despite its declared wish to legislate in accordance with the relevant international standards which the Member States are obliged to comply with, neither the European Community nor the Union are as such parties to the relevant treaties, which makes it more difficult - even impossible - to oversee the compliance by European Union law with these international standards. After an analysis of the developments in European Union law, the report will examine the developments in the area of asylum and subsidiary protection in the Member States, where the issue of the co-ordination of Member State initiatives in this field is one of the more delicate points to resolve[375].

Determination of the State responsible for examining asylum requests

The adoption of the Council Regulation establishing the criteria and mechanisms for determining the State responsible for examining an asylum application lodged in one of the Member States by a third country national – called the "Dublin II Regulation" – implements the integration into Community law of the Dublin Convention of 19 June 1990[376], following the transfer of asylum to the first pillar of the Treaty on the European Union. The proposal for a regulation was drawn up by the Commission on 26 July 2001[377]. It received a favourable opinion from the European Parliament on 9 April 2002[378]. The JHA Council of 19 December 2002 finally arrived at a political consensus on the basis of the compromise reached by the Danish presidency.

Two questions made the adoption of the Regulation particularly delicate. The first is the result of a largely negative evaluation of the Dublin mechanism[379] linked to the growth in clandestine immigration. The slowness of replies, the phenomenon of "circulating refugees" or "asylum shopping", the abuse or selection of asylum procedures by the applicants[380] who are often advised by traffickers, and the impact of clandestine residence, the difficult question of family reunification in case of multiple requests are factors that have led to a review of the Dublin text. This necessity has been substantiated by the statistical weakness of its implementation. The second question arose from the opposition between Member States through which asylum seekers enter the Union and Member States on whose territory they are staying clandestinely, and the sharing of responsibilities between the States according to the duration of the illegal residence until the submission of the asylum request.

[375] See Commission Communication on asylum policy, introducing an open method of co-ordination, COM(2000)755 final of 22 November 2000.
[376] Effective on 1 September 1997.
[377] COM(2001)447, OJ C 304 of 30/10/2001 p. 192.
[378] L. Marinho Report, A5-0081/2002.
[379] See the Commission Working Document on the "re-examination" of the Dublin Convention and the elaboration of Community legislation making it possible to determine which State is responsible, SEC(2000)522 of 22 March 2000.
[380] In order to lodge an application in a State which they consider more beneficial to their interests.

The Dublin II Regulation substantially modifies the hierarchy of the criteria making it possible to establish the responsibility of the Member States. The family's place of residence is appears to be a decisive criterion (Article 6). But in order to make Member States who tolerate illegal immigration on their territory more responsible, the conditions of irregular residence are taken into account in the following articles: once the 12-month period during which the State of entry is responsible has expired, it will be the State of clandestine residence that will deal with the asylum request[381]. The new criteria are aimed at protecting family unity by trying to avoid separating members of a family, and a "humanitarian clause" introduced in the Regulation makes it possible to achieve this effect[382]. The latter actually shows up concerns that are absent from the Dublin Convention, such as the dependence on the help of another person, notably for reasons of serious illness or handicaps. A significant improvement has been made here.

The declared objective of this regulation, however, working from this viewpoint in conjunction with Regulation 2725/2000 establishing Eurodac - which became operational on 15 January 2003[383] -, is to combat clandestine immigration and not to guarantee the exercise the right to asylum. This is attested by the draft statement that is attached to the Council minutes, where it mentions the concern to "effectively combat" illegal immigration and to "take into account the concerns of certain Member States that are particularly exposed to illegal immigration"[384]. Certain provisions of the text justify a special attention, besides the pursuit for efficiency that inspires it and that may lead to taking decisions urgently, as is illustrated by the shortness of the procedures.

The whole organization of the mechanism rests on the notion of "safe country"[385], that is to say, on the presumption that each Member State of the European Union may examine an application for asylum initially lodged in another State, on the basis of how the regulation has attributed the responsibilities. However, each State remains *individually* obliged, in terms of international public law, to meet the commitments it has undertaken, notably in the context of the Geneva Convention on the status of refugees or the European Convention on Human Rights, without it being in principle sufficient for that State to rely on this presumption in order to shirk its obligations[386]. Certainly, the case of *T.I. v. United Kingdom* – which resulted in a decision of inadmissibility rendered by the European Court of Human Rights on 7 March 2000[387] – illustrates that it is compatible with the European Convention on Human Rights when a State (United Kingdom) sends an asylum seeker (in this case a Sri-Lankan national) to another State (Germany), if a co-operation agreement exists between the two States concerned. However, the fact that the removing State, responsible for examining the application for asylum, is a party to the European Convention on Human Rights, does not, in the Court's view, exempt the State removing the asylum seeker from complying with the Convention. With regard to the fears expressed by the applicant T.I. that his removal to Germany would eventually lead to his return to Sri Lanka where he fears ill-treatment, the Court notes, "...the indirect removal in this case to an intermediary country, which is also a Contracting State, does not affect the responsibility of the United Kingdom to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the convention. Nor can the United Kingdom rely automatically in that context on the arrangements made in the Dublin convention concerning the attribution of responsibility between European countries for deciding asylum claims. Where States establish international organisations, or mutatis mutandis international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the

[381] Article 10.
[382] Article 16.
[383] The Member States of the European Union (except Denmark, which is due to join Eurodac in 2003), as well as Norway and Iceland, co-operate in this system for the centralization of digital fingerprints of asylum seekers, aimed at avoiding the successive introduction of applications with several Member States.
[384] See Annex II to the Council document, 14990/02 of 29 November 2002
[385] Article 3.
[386] On this theme, see O. De Schutter, "L'espace de liberté, de sécurité et de justice et la responsabilité individuelle des Etats au regard de la Convention européenne des droits de l'homme", in G. de Kerchove and A. Weyembergh (ed.)*, L'espace pénal européen: enjeux et perspectives*, Brussels, ed. of ULB, 2002, p. 223.
[387] European Court of Human Rights (3rd section), *T.I. v. United Kingdom* (application no. 43844/98), decision of 7 March 2000.

purpose and object of the convention if Contracting States were thereby absolved from their responsibility under the convention in relation to the field of activity covered by such attribution". The principle of "safe country" is not condemned: however, an irrefutable presumption would not be inadmissible, since it could lead in certain cases to asylum seekers be removed to other States to have their application examined there, and where they risk being expelled under conditions that do not satisfy the requirements of Article 3 of the Convention. It may be inferred from the *T.I.* case[388], as well as from the *Conka v. Belgium* judgment of 5 February 2002, that a problem may arise in particular when the application for asylum is sent to a State which does not provide that judicial remedies brought against expulsion measures suspend the execution of those measures.

The negotiations on the Council also brought to light deficiencies in certain solutions which the Commission planned in its initial proposal. Where the proposal expressly provided for judicial remedies, although they do not suspend the execution of the transfer order, the new mechanism merely provides for an "appeal or review" and leaves it up to domestic law to decide on its suspensive nature.

On the one hand, this situation raises doubts about its compatibility with the case law of the European Court of Human Rights. In the *Conka v. Belgium* judgment which it delivered on 5 February 2002 with regard to a family of Slovakian asylum seekers of Romany origin, who were collectively expelled on 5 October 1999, the European Court of Human Rights concluded that there had been a violation of Article 13 of the Convention, since the applicants were unable to bring a suspensive appeal against the expulsion order issued against them: the Court considered that with regard to the removal of foreigners, the requirement of effective recourse "prevents such [expulsion] measures from being enforced before the national authorities have even completed their examination of its compatibility with the Convention" (§79). There it confirms what has already emerged from several positions that have been adopted within the Council of Europe[389]. In its second report on **Portugal** which it delivered in 2002, the European Commission on Racism and Intolerance (ECRI) expressed its concern that appeals of asylum-seekers against a negative decision on their claim to asylum to the administrative court do not have a suspensive effect, which means that the appellant can be deported. Should this happen and should the application for asylum subsequently be accepted, the individual concerned might not be able, for example, to afford to return to Portugal[390]. On the other hand, the range of options left to the Member States for setting up courses of appeal will lead to totally unacceptable disparities between Member States in the protection of asylum seekers, according to the judicial or non-judicial nature of the remedy and according to its scope. It is worth recalling the point of view expressed by the HCR on the occasion of the aforementioned *T.I.* case, saying that "while the Dublin convention may pursue laudable objectives, its effectiveness may be undermined in practice by the differing approaches adopted by Contracting States to the scope of protection offered".

The minimum standards for the conditions of the status of refugee or person needing international protection

The Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, and the

[388] The European Court of Human Rights took particular note of Germany's undertaking to comply with all directions given by the European Court of Human Rights by virtue of Article 39 of its regulations if a new expulsion order has to be issued from Germany against the applicant.

[389] See Recommendation 1236 (1994) of the Parliamentary Assembly of the Council of Europe on the right to asylum, in which the Assembly advises the Committee of Ministers to urge that procedures for granting asylum contain certain minimum legal guarantees, including the guarantee that an asylum seeker "cannot be expelled" during the appeal which he has lodged against a refusal of asylum; Recommendation 1327 (1997) on the protection and reinforcement of the human rights of refugees and asylum-seekers in Europe, in which the Assembly advises the Committee of Ministers to instantly ask the Member States "to provide in their legislation for the suspensive effect of all judicial remedies"[389]; finally, Recommendation no. R(98)13 of the Committee of Ministers of the Council of Europe 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 on 18 September 1998.

[390] Portugal produced observations to this report, stating that "the aim of the admission phase was to verify whether the application was manifestly ill-founded and to avoid fraudulent resort to a noble instrument."

content of this status, was the subject of a political agreement between the Member States at the JHA Council of 28 November 2002[391]. Taking up the spirit of a former common position adopted in 1996, the proposal for a directive strives first of all to include the criteria of the Geneva Convention in its first article. In this respect, it offers a series of definitions determining notions such as "refugee" or "subsidiary protection" and harmonizes the law favouring the convergence of modes of protection, as required by the Council of Europe[392]. The proposal also strives to make the protection offered to statutory refugees coincide with that based on other legal foundations, such as the European Convention on Human Rights or certain national constitutions[393], but of which the content is so far much less clearly defined[394]. First the positions of the Commission and Parliament, based on the argument of the United Nations High Commissioner for Refugees, and those of the Member States had to be approximated. If an agreement could have been reached on the principle of subsidiary protection despite certain national reserves to fully align this protection with the case law of the European Court of Human Rights[395], the alignment of the protection offered to two potential categories of refugees raised more difficulties[396].

The matter of "agents of persecution" is one of the noteworthy developments in the text. While the Geneva Convention only extends its protection to the victims of State persecution, leaving defenceless the victims of activities carried out by private individuals, the European Court of Human Rights extended the prohibition of expulsion to cases where the risk of infringements of fundamental rights in the State of origin results from the activities of private agents and the inability of the territorial State to control them[397]. The Directive aligns itself with this case law. It acknowledges that "serious and unjustified" harm (according to Article 15) may give entitlement to protection, and expressly mentions the fact that these persecutions may emanate from non-State actors where the lawful authorities are unable or unwilling to provide effective protection (Article 9).

In an even more innovative way, the Directive organizes the protection of two categories of particularly threatened beneficiaries, women and children, by providing specifically for the protection of unaccompanied minors[398]. The taking into account of the threats that may have been directed against them is specifically organized (Articles 7 and 11); Member States are asked to provide special care and treatment to minors for the traumas they have suffered (Articles 18, 27 and 28). These

[391] Doc. 14817/02 (Press 375) p. 8

[392] Recommendation no. R(2001) 18 of the Committee of Ministers of the Member States on subsidiary protection of 27 November 2001.

[393] For example, in **Ireland**, although the granting of humanitarian or temporary leave to remain by the Minister for Justice, Equality & Law Reform is so rare as to be negligible as a source of complementary protection, a peculiarity of the Irish system is that temporary leave to remain is usually granted to those asylum seekers or refugees with an Irish-born child on the basis of the Irish citizenship of that child and its constitutional right to the exercise of family rights within the jurisdiction of the state. 223 people were given temporary leave to remain in 2002. From 1996 to November 2002 7,732 people, all current or former asylum seekers, were granted leave to remain on the basis of having an Irish-born child. This practice may change depending on the outcome of a Supreme Court case which is awaited.

[394] In **Belgium**, no subsidiary protection is organized for the benefit of persons who, having no permission to stay on the territory, cannot be expelled if not by the practice of non-escort allowing compliance with the obligation of non refoulement translated into Belgian law by Article 63/5 par. 3 of the Act of 15 December 1980.

[395] See in this sense the informal meeting of JHA ministers on 13 and 14 September 2002 in Copenhagen, in particular the discussion papers on this theme (SI(2002)1009, annex 2)

[396] On this theme, see Odysseus, under the direction of D. Bouteillet-Paquet, *La protection subsidiaire des réfugiés dans l'Union européenne: un complément à la Convention de Genève*, ULB collection, Bruylant, 2002.

[397] European Court of Human Rights, *HLR v. France* judgment of 29 April 1997, *Rec.* 1997, p. 745; European Court of Human Rights, *D. United Kingdom* judgment of 2 May 1997, *Rec.* 1997, p. 777. The latter judgment concerned the situation of a person suffering from AIDS, whose return to his country of origin would threaten to accelerate the progress of his illness. The impossibility of expulsion on account of the risk to a person's health, coupled with the lack of adequate infrastructure in the country of origin, is regarded as wholly exceptional by the European Court of Human Rights (European Court of Human Rights, *Bensaïd v. United Kingdom* judgment of 6 February 2001). It should be noted, however, that the Dutch Council of State considered that the level of health care in Georgia is not so low that it would be contrary to Article 3 ECHR to deport an individual, who claims to have serious medical problems, to that country. Referring to case-law of the European Court, the Council of State observed that , as far as Article 3 is concerned, medical reasons will only pose an obstacle to expulsion in exceptional circumstances (*Raad van State, Afdeling bestuursrechtspraak, JV* 2002, 447; 1 November 2002).

[398] See below on unaccompanied minors.

specifications are welcome. They show an increased awareness of the specific problems facing women and children in the asylum process. In res. (A5-0285/2001) of 20 September 2001 on Female Genital Mutilation the EU Parliament calls for measures to be taken by the Member States for issuing residence permits to the victims of female genital mutilation, and the recognition of the right to asylum to women and girls at risk of being subject to these practices. Not all EU Member States, however, have included the risk of female genital mutilation in the grounds for granting asylum. A number of individual cases brought before the CAT against **Sweden** dealt with the rejection of granting protection in the country on this ground. In a case in which the applicant had been denied asylum and was threatened of being returned to Tanzania, where she feared to become a victim of Female Genital Mutilation as well as to be forcefully married against her will, the Swedish Aliens Appeal Board granted her asylum – motivated by "lack of practical protection of the applicant from being subjected to FGM", on December 12, 2002 after an application had been filed with the European Court of Human Rights.

Many questions remain, however. The main question[399] concerns the persistent refusal by Member States to align the two kinds of protection offered on the grounds that the first, that for refugees, takes precedence over the second, which is only "subsidiary". However, these two kinds of protection are complementary and not subordinated. There is nothing to justify establishing a hierarchy between the two with a view to setting up different statutory regimes: how do concerns experienced with regard to the Geneva Convention justify a more advantageous protection than concerns based on Article 3 of the European Convention on Human Rights?

The unequal treatment between the two kinds of protection is reflected in terms of residence (Article 21: five years for refugees, one year for other protected persons). It is also reflected in the access to employment. Access is immediate for refugees as soon as they have been granted refugee status, and after six months for the others (Article 24), while full access to integration facilities is only possible after one year for the latter category (Article 31). These distinctions are based on the idea that subsidiary protection is essentially only temporary and therefore does not call for the same degree of intervention. This may be doubted in view of certain forms of violence and persecution suffered.

Furthermore, the question of the right to have a normal family life, initially considered from the viewpoint of an extension of the protection granted to family members, is now simply dealt with under that of maintaining family unity (Article 21b). The views of the Member States manifestly poses a problem here with regard to Article 7 of the Charter and Article 8 of the European Convention on Human Rights, from the moment they want to impose restrictive regulations on family reunification. However, a difference in treatment is established between the right to a normal family life for statutory refugees and the same right granted to persons enjoying subsidiary protection. This difference results from the referral to future texts on family reunification and others. In the current state of affairs, since this text does not apply to persons enjoying subsidiary protection (Article 3 § 2, b)), this referral in actual fact means that the main responsibility for remedying this legal deficiency with regard to their European commitments rests upon the Member States[400]. The alignment of the two statuses, in terms of the right to family reunification, is undoubtedly effected by the case law of the European Court of Human Rights, of which the present report details the rules it imposes in the area of family reunification[401]. One may assume that persons who will be granted subsidiary protection, within the meaning of the Directive, cannot have a normal family life in their country of origin.

[399] The insertion into the Directive of themes concerning the cessation and exclusion of protective statuses raises a second series of questions. We should be careful to ensure that the fight against fraud or abuse does not become a pretext for subordinating the protection offered to political considerations. Furthermore, we should not only take into account the protection against refoulement as imposed by other international obligations (Article 17 § 4 of the Directive), but also provide for the possibility that the situation in the State of origin may worsen.

[400] See for example Recommendation R(99)23 of the Committee of Ministers on family reunion for refugees and other persons in need of international protection, of 15 December 1999.

[401] European Court of Human Rights, *Sen v. Netherlands* judgment of 21 December 2001 §§ 39 et seq.: above, under Article 7 of the Charter.

The differences in treatment that exist between the two statuses is all the more open to criticism since "subsidiary" protection is often granted to persons who, if they did not have this protection, would have deserved recognition as "refugees", in accordance with the evolution that can be discerned in the interpretation of the Geneva Convention over the last few years. In 1997, **Sweden** introduced a new provision to its refugee legislation (Chapter 3, Section 3 of the Aliens Act, Utlänningslagen) which provides residence permits to individuals who have a well-founded fear of persecution on the basis of sexual orientation or gender. This provision (protection on account of homosexuality) had its application, for example, to homosexual Iranians seeking asylum in Sweden. This would seem a positive development, but this additional provision has been criticised by the Ombudsman against discrimination on the basis of sexual orientation (HomO) as well as other bodies representing civil society and NGOs[402] on several occasions during 2002 as not serving any constructive purpose. It has been rarely applied and it offers simply inferior protection compared to the more favourable category of Convention refugee. Most women who apply for asylum in Sweden on account of gender persecution or as victims of sexual violence, are granted protection on humanitarian grounds despite the fact that the international legal development has moved in favour of including persons persecuted on account of their sexual orientation or gender in the refugee concept[403].

The minimum standards for the reception of asylum seekers in the Member States

The Council Directive laying down minimum standards for the reception of asylum seekers in the Member States was approved by the JHA Council on 19 December 2002[404]. It defines the conditions of reception which in principle must be guaranteed by the Member States for the benefit of asylum seekers, irrespective of the type of application and the stage of the procedure[405]. It establishes a minimum standard that will normally suffice to ensure them a dignified standard of living, hence the explicit reference that is made to Article 1 of the Charter of Fundamental Rights. The Directive also provides for a certain number of limits linked to the risk of abuse. In principle, the text only applies to persons requesting protection by virtue of the Geneva Convention. However, the States are requested to apply the principles of the Directive to all persons seeking refuge[406]. Since it is a minimum standard, it does not prohibit the Member States from arranging for a higher standard of protection and will certainly further the harmonization of the domestic laws because of the co-operation mechanisms that it provides for.

The Directive contains several new elements. It asks the States to guarantee the unity of the family life of asylum seekers, although it does not present a common approach to the members of the family unit but instead refers to the discretion of domestic law. It takes into account certain special situations linked to particularly vulnerable persons, minors or unaccompanied minors, victims of violence or torture. The States undertake to give them special attention and assistance in accordance wit the provisions of Chapter IV of the Directive. It is also very positive to see Union law harmonizing the material reception conditions for asylum seekers and that this reception is given judicial protection[407]. The final result of the negotiation was not equal to the stakes. The quality standard of the reception is aimed at ensuring the "subsistence" of the asylum seekers[408], there where the initial Commission proposal mentioned an "adequate level and the protection of their fundamental rights".

[402] Alternative Report to the Human Rights Committee, pp. 6 and 25.
[403] The Swedish Government established, however, an investigative commission on this issue in April 2002 (Kommittédirektiv, Flyktingstatus för personer som är förföljda på grund av kön eller sexuell läggning Dir. 2002:49).
[404] 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. The United Kingdom has expressed its intention to subscribe to the Directive, unlike Ireland and Denmark.
[405] In the context of the limitations provided for by Article 16 of the Directive, the Member States reserve the right to refuse the reception conditions on the grounds that the applicant has failed to file his application "as soon as reasonably practicable", a British suggestion which seems highly debatable having regard to the objective link between the reception conditions and the status of asylum seeker (for a criticism, see the Press Release of ECRE, 19 December 2002 (www.ecre.org)).
[406] See in this sense Article 3 §4 of the Directive.
[407] Article 21 of the Directive.
[408] Article 13 § 2.

The most delicate discussions concerned the freedom of movement of asylum seekers and the access to the domestic labour market. The Member States voluntarily adopted a different philosophy to that which originally prevailed, namely that of the principle of free movement, restricted only for specific reasons. The prohibition of the administrative detention of asylum seekers no longer features in the final version of the Directive. Moreover, Article 7 of the Directive acknowledges the principle of a restriction of free movement either within an assigned area or through house arrest[409] and for reasons that go beyond public order, for example the swift processing of the application, and by linking material assistance to such condition of residence. The significance of this last clause cannot be underestimated: in the **United Kingdom** for instance, the Nationality, Immigration and Asylum Act 2002 makes provision for the introduction of accommodation centres for asylum-seekers and their dependants who request and are eligible for support. Those which have refused the offer of a place, voluntarily cease to reside there or breach the conditions of residence will not qualify for other forms of support. The Act also enables reporting and residence requirements to be imposed on all asylum-seekers and allows for the discontinuation of support to asylum-seekers who fail without reasonable cause to report as required.

It was with some hesitation that the Member States agreed to grant asylum seekers access to the labour market; they maintained that this was an incentive to enter the territory of the Union irrespective of any persecution, and that it was tantamount to an invitation. Far from granting asylum seekers a right to work[410], even after a six-month period as suggested, Article 11 of the Directive leaves it to the discretion of the Member States to fix the period during which the applicant has no access to the labour market, even after one year of waiting for a decision on eligibility for the status. This Article as revised by the Council actually no longer mentions a "right of access", but speaks far more modestly of "conditions of access". In other words, a minimum approach has been adopted with regard to the access to the labour market.

A consultation of the report which the European Commission against Racism and Intolerance (ECRI) devoted to **Portugal** in 2002 illustrates the problems of such an approach. The ECRI is concerned that, contrary to legal provisions in force, applicants in the admissibility phase – who are not allowed to work – are not in practice guaranteed free legal aid and free medical treatment. It has been reported that some asylum seekers resort to working illegally while still in the admissibility phase, in order to support themselves. Also, even though it takes nine months on average, and in certain cases has taken two years, for the administrative court to decide an appeal, asylum seekers are in practice not entitled to appropriate social or medical assistance during this period and are not allowed to work. They are thus totally dependent on help from voluntary organisations and may be tempted to work illegally.

Unaccompanied minors

The issue of the examination of asylum applications from unaccompanied minors has received growing attention in recent years. Article 19 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in the Member States is specifically devoted to this matter[411]. On 31 January 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1596 (2003) on the situation of young migrants in Europe, in which it requests the Committee of Ministers of the Council of Europe to:

vii. facilitate the family reunification of separated children with their parents in other member states, even when parents do not have permanent residence status or are asylum seekers, in compliance with the principle of the best interests of the child;
viii. consider favourably requests for family reunification between separated children and family members other than parents who have a legal title to reside in a member state, are over 18 years of age and are willing and able to support them;

[409] Decision which is referred in a questionable way to domestic law, despite the intention of harmonization at European Unon level.
[410] The same applies for vocational training.
[411] See also Article 10 of the Directive, on schooling.

(…)
x. in any ordinary or accelerated procedure implying the return of separated children to their countries of origin or any other country, including procedures of non-admission at the border, comply with the following guidelines:
a. states should make sure that return is not in breach of their international obligations under the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, or the European Convention on Human Rights and other relevant instruments;
b. return should not be possible before a legal guardian for the child has been appointed;
c. before taking the decision to return a separated child, states should demand and take into consideration the opinion of the child's legal guardian as to whether return would be in the best interests of the child;
d. return should be conditional upon the findings of a careful assessment of the family situation that the child would find upon return, and of whether the child's family would be able to provide appropriate care. In the absence of parents or other family members, the suitability of childcare agencies in the country of return should be investigated. The assessment should be conducted by a professional and independent organisation or person and should be objective, non-political and aimed at ensuring the respect of the principle of the best interests of the child;
e. prior to return, states should obtain an explicit and formal undertaking from the child's parents, relatives, other adult carer or any existing childcare agency in the country of return that they will provide immediate and long-term care upon the child's arrival;
f. the decision to return a separated child should be reasoned and notified to the child and his/her legal guardian in writing, together with information on how to appeal against it;
g. the child and/or his or her legal guardian should have the right to lodge an appeal before a court against the decision to return. Such an appeal should have suspensive effect and be extended to the lawfulness and the merits of the decision;
h. during return, the child should be accompanied and treated in a manner in keeping with his or her age;
i. the well-being of the child following return should be monitored by appropriate authorities or agencies on the spot, who should liaise with, and report to, the authorities of the country from which the child has been returned;
j. migrants who arrived in a host country as separated children but who have reached the age of 18 at the time of return should be treated as vulnerable cases and consulted on the conditions required for successful reintegration into their country of origin.

The main developments in the Member States are the following:

• In **Austria**, the government bill for an amendment of the Immigration Act (*Fremdengesetz*) and the Asylum Act (*Asylgesetz*) led to the adoption of an important report by the Advisory Board on Human Rights[412], which focussed largely on the problematic issue of minor asylum-seekers. Regardless of earlier recommendations to prohibit without exception the detention of foreign minors under the age of 14 years, the government bill maintains that possibility. Secondly, the board suggested extending the obligation to consider less stringent means in securing deportation also to the person exercising parental custody rights over children under 14 years. Furthermore, the maximum duration of detention of minors is presently not lower than the 6 months applying to adults and also exceeds the limit of 3 months remand that is applicable if a minor commits a criminal offence that can be dealt with by a single judge without jury, a fact that is deemed to contravene the UN Convention on the Rights of the Child. A new provision that has been added in order to facilitate the determination of whether someone is a minor or not by means of X-raying raised equal concerns. According to the draft, the X-raying shall be performed only at the person's request and notably at his costs, but on the other hand any refusal to participate in the determination of his age shall be considered by the authority in the weighing of evidence. The report also aims at eliminating all different regulations between the Asylum Act and the Immigration Act that do not appear to have any factual basis. In particular, it is proposed to harmonise the immigration law provisions on an unattended minor's

[412] Cf. http://www.menschenrechtsbeirat.at/mrb-aktuell.html (German)

capacity to act in accordance with the relevant provisions in the Asylum Act to the end that as long as they are unrepresented minors may only perform legal acts to their benefit. In any way, they should only be interrogated in the presence of their legal representative, i.e. parent or youth welfare office. Finally, it was recommended to extend the principle of joint custody of parents and their minor children also to spouses, cohabitees (in credible cases), siblings, and parents and adult children.

• In **Belgium**, the Tabita case played a revealing role. On 17 October 2002, Tabita Mubilanzila, a Congolese national aged six, was expelled to Kinshasa on an airliner. She had arrived in Belgium two months earlier, in the hope of travelling on to Canada where her mother was, who had been granted refugee status in that country. Having arrived in Belgium unaccompanied, she was detained for two months in a closed centre that was not adapted to her age and her status. She was removed to Kinshasa without any relatives having had a chance to say they were willing to take care of her before she could travel to Canada at Belgium's expense.

This incident illustrates the consequences of the absence in Belgian law of a proper status for unaccompanied minors arriving in Belgium. Following this affair, several non-governmental organizations demanded that every unaccompanied child arriving in Belgium receives protection and a temporary residence permit until a long-term solution may be implemented in Belgium, in a third country or in the country of origin, insofar as the child can be properly taken care of there[413]. They also reiterated the appropriateness of providing, for the benefit of these unaccompanied minors, for the appointment of an independent guardian whose main task will be to ensure their best interests and respect for their rights. The Committee on the Rights of the Child, in its final comments of 7 June 2002 on Belgium, also insisted on this point.

This is the direction that is being followed now. On 24 December 2002, Parliament adopted a law establishing a guardianship for unaccompanied minors[414], which had been in preparation since 2000[415]. Under the terms of this law, a body is established that is independent of the authorities concerned with immigration. The purpose of this "guardianship service" is to ensure the protection and representation of minors - all persons aged under 18 - not accompanied by a person who has parental authority or legal guardianship over them, and to help work out a lasting solution[416]. The guardians must be professionals who are exclusively designated for this duty. They will carry out their assignment under the supervision of a magistrate and the guardianship service. This law, once it has been implemented, will be a first step towards the indispensable creation of a proper status for unaccompanied minors.

The question of determining the age of a minor is a constant concern which has not been settled yet in a satisfactory way. If specific protection measures have been put in place for persons aged under 18, it needs to be determined who will and who will not benefit from this protection. At present, the authorities use medical tests (X-rays of the bones, dental checkup) to try and determine the age. However, these tests are considered by scientists to be unreliable (the Council of State has already firmly asserted this[417]); we need to take into consideration a margin of assessment which must favour the young immigrant. Theoretically, the immigrant has the benefit of the doubt: such is the official position of the Aliens Office. It also the principle that is upheld in the Act of 24 December 2002 establishing a guardianship service. In practice, however, the margin of error is not often taken into consideration, and in general minors aged over 16 are treated as adults (the decisions concerning them state that "since the person concerned managed to arrive in Belgium alone, he can also manage to

[413] See B. Van der Meerschen and B. Van Keirsbilck, « Mineurs étrangers non accompagnés: quelle alternative à la procédure habituelle », in JDJ n° 219, p. 4 and seq.
[414] Programme Act of 24 December 2002, "Chapter 6 - Guardianship of unaccompanied foreign minors", *M.B*. 31/12/02.
[415] According to Article 28 of this Act, it will only become effective after the adoption of a Royal Decree by the Council of Ministers. Certain NGOs have expressed their fear that this Royal Decree will be a long time in coming, or worse, never materialize, since the political will and the budgets are lacking to really put this Act into practice; see the press conference of the platform "minors in exile", 12 March 2003.
[416] The Act of 24 December 2002 provides that «the guardian shall take all the necessary measures to look for the minor's relatives. He will make suggestions which he considers expedient in the search for a lasting solution in the minor's interest» (Article 11 §1).
[417] Council of State, judgment of 28 December 1998, unpublished.

return alone"). The guardianship act, when it comes into effect, will offer a solution, since it entrusts the guardianship service with determining the age of the minor (it will no longer be the prerogative of the Aliens Office) and gives the immigrant the benefit of the doubt.

Another problem that has repeatedly been criticized by the NGOs is the lack of an alternative procedure to asylum application. Foreign children arriving alone at the border has no other choice but to seek asylum if he does not want to be turned back immediately. This procedure, however, is not adequate in any of these cases; it is not adapted to children (children are treated as adults[418], at best by persons who are attentive to their particular situation; the asylum procedure, which is complicated and provides for many legal remedies, is hard to understand for children).

A large number of children arriving in Belgium alone are actually seeking to join a member of their family (either in Belgium or in a third country). Not all of them necessarily cite reasons linked to the Geneva Convention (even if children as such should constitute a particularly vulnerable category of persons likely to plead fear of persecution, the subjective aspect of this fear being experienced far more intensely as far as they are concerned). However, it is difficult for them to base their application on the principles governing family reunification, since this is generally restricted to parents and children of the first degree (in fact most often the child seeks to join uncles, aunts, grandparents, older brothers or sisters). The person whom the child seeks to join is himself not always residing on a regular and stable basis. Moreover, it is often difficult to prove a parent-child relationship.

In order to remedy this inconvenience, the Aliens Office has issued internal rules for handling applications from unaccompanied minors who are not seeking asylum[419]. This memorandum is complemented by a Ministerial Circular of 17 July 2001[420]. Even if these regulations represent a step towards a status for unaccompanied minors and a department of the Aliens Office is charged specifically with handling these cases, the NGOs still feel that this is clearly insufficient, arbitrary and discriminatory[421]. Under these provisions, all unaccompanied minors should obtain a declaration of arrival (document of temporary residence) valid for three months and renewable once, upon their first contact with the authorities. During this period, a "lasting solution" is sought, either in the country of origin or in Belgium. After that, the child must be issued with a certificate of registration in the Aliens Register, valid for one year and renewable. Finally, after three years and a half of temporary residence, he should be granted a definitive residence permit.

In actual fact, a large number of children who answer the definition of unaccompanied minor within the meaning of those provisions, do not receive these documents or keep a temporary status well beyond the limits that have been set. A lasting solution is all too often seen as a return to the country of origin, and the perspectives of permanent establishment in Belgium or in a third country are used very rarely. The arbitrary nature and the discretionary power of the administration have often been criticized.

One of the concerns of the Belgian government is the frequency with which unaccompanied juvenile asylum-seekers disappear. In order to keep better track of unaccompanied minors, a database should be established, which will retrace the movements of the minor from the submission of his asylum application until the moment when the minor leaves the country or he has been lost track of. To this end, a co-operation will be set up with all the partners or services that cross this path, such as the Welfare Offices (CPAS), the reception centres, the social services for juvenile asylum seekers, schools

418 "Demande d'asile, audition du mineur, tolérance zéro et intérêt de l'enfant … chronique d'un mensong annoncé", by F. Druant and J.-Y. Hayez, in *JDJ* n° 218, October 2002, p. 20;

419 Memorandum of 1 March 2002 from the Director-General of the Aliens Office concerning the handling of cases relating to the residence of unaccompanied immigrant minors (published in *JDJ* n° 216, June 2002, p. 28). This memorandum replaces that of 1 April 1999 on the same subject.

420 Specifications concerning the role of the municipal administration for the purposes of the application of the Act of 15 December 1980 on access to the territory, establishment and removal of foreign nationals, and the duties of certain departments of the Aliens Office (*M.B.,* 28 August 2001)

421 "Note du 1er mars 2002: "Tout ça pour ça?"", by Benoît Van der Meerschen, in *JDJ* n° 216, June 2002, p. 24.

etc, as well as the administrative authorities charged with examining the asylum application on its admissibility and on its substance. The Commission for the Protection of Privacy, however, delivered a negative opinion on this plan, by considering that it did not meet the requirements of respect for the privacy of juvenile asylum seekers with regard to the personal processing of their data, taking into account the difficulty for the minor of giving, fully independently, a consent that may be qualified as valid upon his arrival in Belgium when he starts a procedure to request the status of refugee. All the same, the Programme Act of 24 December 2002 establishing a guardianship service for unaccompanied minors has authorized Child Focus[422] to organize the monitoring of the movements of unaccompanied juvenile asylum seekers. The minors targeted by this monitoring and the scope of the investigation remain extremely vague (only asylum seekers are targeted and it is not clear when the investigation ends: at the end of the asylum procedure, as long as the minor is on the territory, after a possible expulsion, etc).

The NGOs fear[423] that the issue of disappearances serves as a pretext to step up the detention of minors; this is in fact the position that is repeatedly cited by the Government, which wants to set up an extraterritorial federal centre from which minors cannot leave, in order to prevent them from disappearing. However, numerous decisions taken by investigating courts recall that the detention of minors is contrary to Articles 3 and 37 of the International Convention on the Rights of the Child and Article 5 of the European Conventions on Human Rights and Fundamental Freedoms[424]. The French-speaking Community has set up a "hidden" centre, specializing in the reception of minors who are victims of human trafficking, which is a perfectly attractive alternative for minors who need special protection.

The NGOs also criticize the fact that the issue of minors disappearing is only really a problem for the Belgian authorities when this happens in Belgium and that this problem is not also considered disturbing when children go missing after they have been repatriated[425]. In an open letter to the Belgian Government, they ask that "an inquiry be opened into all minors who arrived in Belgium in the last two years, who have been turned back at the border, in order to determine the reasons for these expulsions and (...) the guarantees given to ensure that the child's family can receive and take care of the child in proper conditions"; that "an inquiry be opened in order to locate all the children who were expelled two years ago and to determine their present living conditions", and that, in the meantime, "the expulsion of minors should be stopped as long as the Act of 24 December 2002 has not become effective and a guardian has not been able to verify in each particular case whether the return of the child is decided in his greater interest, in accordance with Article 3 of the Convention on the Rights of the Child"[426].

• In **Spain**, faced with the difficulties encountered by the relevant administrative authorities in relying on the assessment of the asylum seeker's age by the medical services, the public prosecutor issued a circular[427] recommending that the lower age be taken into consideration within the age bracket indicated by these authorities. Other major problems persist, however. The legal aid which the minor can rely on for the purposes of his asylum application is most inadequate. The co-operation between the different relevant authorities leaves much to be desired.

[422] European Centre for Missing and Sexually Exploited Children, hereinafter called "the Centre", a public institution established by the Act of 25 June 1997 and recognized by Royal Decree of 10 July 1997.
[423] This was criticized at a press conference of the Platform "Minors in Exile", which was held on 22 August 2001 under the heading: "Detention is not protection".
[424] See civil court of Nivelles, 30 November 2002, in *JDJ* n° 221, January 2003, p. 42; Committals Division, Brussels, 16 October 2002, in *JDJ* n° 219, November 2002, p. 58; Committals Division, Brussels, 30 October 2002, in *JDJ* n° 219, November 2002, p. 58.
[425] This question was addressed, among others, at a press conference of the Platform "Minors in Exile", on 12 March 2003.
[426] Open letter addressed to the Prime Minister by the association "International Child Protection" on 5 March 2003.
[427] Instrucción de la Fiscalía General del Estado 2/2001, de 28 de junio de 2002 sobre la interpretación del actual artículo 35 de la Ley Orgánica 4/2000, sobre derechos y libertades de los extranjeros en España y su integración social. Boletín de Información del Ministerio de Justicia de 1 de marzo de 2002.

• Already in 2001, the non-governmental organization Save the Children criticized the situation in **Italy** of minors unaccompanied by their parents, who were repatriated without being consulted and without the possibility of appealing, contrary to the provisions of the International Convention on the Rights of the Child. The legislation in the area of unaccompanied young immigrants also contains deficiencies in that the residence permit for minors cannot be converted into a residence permit with a view to employment or education when the child comes of age. The Act of 30 July 2002, no. 189 amending the provisions in the area of immigration and asylum provides that a residence permit for minors may be converted into a permit for studies, employment or access to employment when the child comes of age, on condition that he arrived on the territory three years ago, that he has been attending an integration programme for at least two years, that he has accommodation, and that he works regularly or is pursuing studies.

• In **Sweden**, the practice of the authorities dealing with asylum cases have given rise to some criticism. Children's' own reasons for seeking protection in Sweden are, for example, seldom investigated. They are not routinely asked about their own experiences of violence or torture when arriving in the country.[428] Thus, children who are victims of torture or other cruel inhuman treatment in their countries of origin are thereby seldom granted refugee status in accordance with the 1951 Geneva Convention and they risk being returned to countries where acts of torture might be repeated. In the majority of cases children are thus granted residence permits on humanitarian grounds. In February 2002, the Government decided to commission the Swedish Migration Board and the National Board of Health and Welfare to improve the reception of lone child refugees not later than 31 March 2003.[429]

• Commenting on the **United Kingdom**, the Committee on the Rights of the Child has expressed concern about the detention of children claiming asylum and the use of a dispersal system that would impede better integration and lead to an escalation in racially related incidents. It is also concerned that a panel of advisers for children is not always adequately funded and that the ongoing reform of the asylum and immigration system failed to address the particular needs of asylum-seeking children[430].

The comparison between these national situations and the relevant provisions of Directive 2003/9/EC[431] suggests that if the latter answers a real need in terms of the reception of young asylum seekers, notably from the viewpoint of the guaranteed legal representation of minors and the access to education which it enshrines, it still falls short of what the situations described here seem to call for, particularly in terms of the detention of young asylum seekers at specialized centres[432].

The minimum standards for the procedure of granting and withdrawing refugee status in the Member States

The proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status is one of the final dossiers in the fulfilment of the mandate fixed at Tampere. The objective outlined at the European Council of Seville was to adopt the final version during 2003.

The aim of the Directive is the minimum harmonization of the procedures for granting and withdrawing refugee status, within the meaning of the Geneva Convention. It does not concern "subsidiary" protection. The structure of the text has changed very much since the initial proposal:

[428] Alternative Report to the Committee against Torture, p. 5; Motion till riksdagen 2001/02:fp1146, p. 2; Barnombudsmannens yttrande över regeringens rapport 2002, p. 40; Sveriges tredje rapport till FN:s kommitté för barnets rättigheter, p. 98.
[429] Förbättringar i mottagandet av barn från annat land som kommer till Sverige utan medföljande legal vårdnadshavare (s.k. ensamkommande barn) - Redovisning av regeringsuppdrag. Socialstyrelsen och Migrationsverket, Stockholm 2002.
[430] CRC/C/15/Add.188, 9 October 2002, par. 49.
[431] Particularly articles 10 (schooling and education of minors), 18 (minors), and 19 (unaccompanied minors).
[432] Reference is made on this point to the commentary on Article 6 of the Charter (right to liberty and security).

where the initial proposal was based on a distinction between the examination of the admissibility and of the substance, with a special procedure for asylum applications that have been judged inadmissible, the amended proposal is based on a so-called regular procedure and an accelerated procedure. The aim is to swiftly dismiss applications that are considered improper or delaying.

With regard to the procedural guarantees which the asylum seeker should enjoy, we may be surprised that there is talk of a "quasi-judicial" remedy[433] in the context of the accelerated procedures for handling asylum requests, while reference is made to Article 47 of the Charter of Fundamental Rights, which provides for an effective remedy "before a *tribunal*", as well as to the general principles of Community law, among which the right to judicial remedy[434].

These two criticisms were formulated by the UNHCR at the start of the consultations on the initial proposal of the Commission of 20 September 2000. The UNHCR stated its view that it was essential that the following key elements contained in the Commission proposal be preserved in the final text of the Directive to be adopted in Council: "[...] The establishment of a reviewing body which must be independent of and different from the authority responsible for first-instance decisions. [...] The applicant's right to lodge an appeal, with suspensive effect, against a negative decision taken on the admissibility or the substance of the application. [...] Applicants have the right to free legal assistance during appeal procedures. [...] The clear distinction between, on the one hand, admissibility procedures which do not examine the substance of an application and, on the other hand, procedures (whether regular or accelerated) that deal with the substantive aspects of the application; this distinction is fundamental to avoid that applications that are presumed to be manifestly unfounded, and, hence, merit a substantive examination, are considered inadmissible"[435]. It is clear that the UNHCR has not been heard on these points.

The use of concepts such as "safe country" and "first asylum country" should play a decisive role in the wording of the Directive[436]. We may question the compatibility of the international obligations of the Member States with these concepts. The United Nations High Commissioner for Refugees emphasized the need for a case-by-case examination of asylum requests, on pain of infringing the principle of non-discrimination in Article 3 of the Geneva Convention of 28 July 1951[437]. The same question has been posed already by the Additional Protocol to the Treaty of Amsterdam on asylum for nationals of Member States of the European Union, which deems inadmissible an application for asylum made to a Member State by a European Union citizen. Article 18 of the Charter guarantees the right to asylum "in accordance with the Treaty establishing the European Community". Consequently, it admits this restriction. The Declaration on asylum adopted on 15 October 2002 by the Ministers for Justice and Home Affairs[438] extends this presumption further, since the Member States express their determination to handle applications for asylum from nationals of States that are due to join the European Union "on the basis of the presumption that they are manifestly unfounded" since they are "safe countries of origin". The Member States of the European Union, however, cannot unilaterally release themselves of the obligations that are imposed on them by international law, whether by the Geneva Convention or by the European Convention on Human Rights. Every asylum seeker has the right to have his application examined according to a fair and efficient procedure, and with respect for the principle of non-discrimination.

---

[433] Conclusions of the JHA Council on the procedure for granting and withdrawing refugee status in the Member States, doc. 15107/01 of 7 December 2001.

[434] Moreover, in order to be totally effective, this remedy must be organized according to modalities that take into account the special situation of asylum seekers, notably in terms of access to an interpreter and of legal aid. The Committee on the Rights of the Child, in the final observations which it adopted with regard to **Greece** on 17 April 2002, regretted the inadequacy of public funding for legal aid to asylum seekers: CRC/C/15Add 170, of 2 April 2002.

[435] See UNHCR summary observations on the Commission proposal for a Council Directive on minimum standards on procedures for granting and withdrawing refugee status (COM(2000) 578 final, 20 September 2000).

[436] See Section II of the Draft Directive and the two annexes.

[437] See UNHCR, Executive Committee conclusions n°15(XXX), 1979 and n°58(XL), 1989. See also Recommendation R(97)22 of the Committee of Ministers of the Council of Europe to the Member States setting forth guidelines for the application of the concept of safe third country, 25 November 1997.

[438] Conclusions of the Council, press release of 15 October 2002, doc. n°12894/02

The fact of being a State party to the European Convention on Human Rights in particular does not mean that in every individual case it is a "safe" country where there is no persecution, and that expulsion to such a country is always admissible. In **Luxembourg**, a judgment given by the Administrative Court on 4 February 2002 confirms - with regard to the expulsion of applicants to Albania, which was planned by the authorities - that the expulsion order, which would incur a serious and proven risk of ill-treatment for the persons concerned in their country of origin, should be annulled on the basis of Article 3 of the European Convention on Human Rights, despite the fact that the threat does not come "directly from the public authorities, but rather seems to emanate from an independent group against which the public authorities are unable to protect the applicants effectively"[439]. If this decision is noteworthy, however, it is especially because the risk of ill-treatment has been sufficiently established, while the expulsion was planned to a State party to the European Convention on Human Rights, and against which, consequently, a petition could have been filed in case the risk materializes on the spot. This decision aptly illustrates not only the limits of the favourable presumption of their capacity to guarantee respect for the fundamental rights under their jurisdiction, which generally benefits the State parties to the European Convention on Human Rights, but also the preventive nature of the protection offered by the European Convention on Human Rights in cases where foreign nationals are expelled: Article 3 of the Convention demands that inhuman or degrading treatment *must not be inflicted*, and not only, but *a fortiori*, that the international responsibility of the State under whose jurisdiction such treatment is inflicted may be incurred from the moment it fails to prevent such treatment.

The option of considering as "safe countries" the States applying for membership of the European Union is therefore debatable. It substitutes a "State by State" approach for a "case by case" approach to the examination of the asylum request, which is contrary to the letter and the spirit of the Geneva Convention. Such an approach is not even justified by the figures we have on the number of asylum seekers being granted refugee status who come from countries applying for European Union membership. For instance, according to material presented to the House of Lords during debate on the Nationality, Immigration and Asylum Bill, up to 20% of Czech citizens (mostly Roma) requesting refugee status in the United Kingdom were being granted such protection as of mid-2002 – on appeal and after having been refused at first instance by the Home Office[440]. Refugee recognition rates for Roma from the countries included on the list in the 15 October 2002 Declaration are significantly higher outside Europe, giving rise to the suspicion that refugee recognition procedures in Europe may be infected by political concerns and the interest of expelling foreigners from Western Europe

The minimum standards on giving temporary protection in the event of a mass influx of displaced persons

During the period under scrutiny, several member States have begun, or have even completed, the transposition into domestic law of Directive 2001/55/EC of the Council of the European Union 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 [441]. In **Belgium**, the House of Representatives on 28 November 2002 adopted a bill to transpose this Directive by an amendment of the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals.[442] In **Finland**, the *Act amending the Aliens' Act*[443] entered into force on 1 March 2002: the Act adds new

[439] Administrative Court, 4 February 2002, n° 14209, *Zefi and Muharremi*, unpublished.
[440] See House of Lords debate, October 24, 2002, on the U.K. parliament website: www.parliament.uk.
[441] OJ L 212 of 7/8/2001, p. 12.
[442] Bill amending the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals, House, ordinary session, 2002-2003, Doc. Parl., 2044/003.
[443] Laki ulkomaalaislain muuttamisesta, Act No 130 of 2002. See also the *Act amending the Act on the Integration of Immigrants and Reception of Asylum Seekers* (Laki maahanmuuttajien kotouttamisesta ja turvapaikanhakijoiden vastaanotosta annetun lain muuttamisesta (Act No 118 of 2002), which entered into force on the same day, and concerns the reception of aliens who are granted temporary protection, either in reception centres where their treatment will be similar to that of asylum seekers, or in temporary organizing centres, where their rights will be more limited and where they shall be guaranteed only the primary commodities for their indispensable subsistence (section 19b).

provisions (sections 34d–34f) concerning temporary protection of aliens who cannot return to their country of origin or habitual residence because of an armed conflict or other situation involving violence or because of an environmental catastrophe which has led to a mass flight from that country or the surrounding areas. As an alternative to asylum or permanent protection, temporary protection suspends the examination of the application for asylum by the concerned person, unless there are well-founded grounds to do so. In **Sweden**, the proposal[444] to amend the Aliens Act to implement Directive 2001/55/EC has been opposed by the Swedish Red Cross, insofar as it introduces the possibility for the Swedish authorities to decide to postpone the asylum assessment procedure in situations of mass influx as contrary to the right to seek asylum according to the 1951 Geneva Convention.[445]

Progress made within the Union and developments in the M*ember States*

The various steps that have been described here have one thing in common: whether they designate a State responsible for examining an asylum application or whether they pursue a minimum harmonization of substance or procedural standards governing the process, these initiatives are intended to avoid a situation where, if the asylum seeker is free to choose the State where he will file his asylum application, and given regimes that differ from State to State, he will opt for the State that guarantees the most favourable treatment. The fear of "asylum shopping" has led several Member States to pass more restrictive legislation in recent years in the area of asylum in order to dissuade potential asylum seekers. In **Austria**, for instance, in response to a tremendous increase in the number of applications for asylum (by 29 December 2002 36.727 applications were counted for 2002 as compared to 20.000 the year before) from certain country nationals as a result of massive campaigning by traffickers in the countries of origin, a new directive issued by the Minister of the Interior ordered that immigrants and asylum-seekers from countries like India, Pakistan, Russia, the Former Yugoslavia and some others are no longer to be accepted into the federal caretaking programme[446]. According to figures for the **Netherlands** supplied by the *Immigratie- en Naturalisatiedienst (IND)* [Immigration and Naturalisation Service] in January 2003, the number of asylum seekers dropped considerably when compared to previous years. 18,667 individuals applied for asylum in 2002. In 2001 there were 32,579 asylum seekers, and in 2000 the number was 44,000. The IND suggested that the fall was partly due to the tougher *Vreemdelingenwet* [Aliens Act] which had entered into force in 2001 and which would discourage potential asylum seekers. The IND also announced that it was processing requests for asylum much faster. In 2001 the IND dealt with 22% of the applications in the "48 hours procedure". In 2002 the average was 45%, whereas the average of the last three months of 2002 was even 60%[447]. In **Greece**, the United Nations High Commissioner for Refugees was said to be concerned by the fact that the percentage of asylum applications filed in accordance with the Geneva Convention of 1951 which were eventually approved by Greece came to 0.4% for 2002, while the previous year (2001) it was still 11.2% - at a time when the Community average stands at 15.8%[448]. In **Sweden**, the number of persons who were granted refugee status is also very small: between January and October 2002, during which period 27,118 asylum applications were filed, only 336 asylum seekers were recognized as refugees[449]. This observation should be qualified, however, since subsidiary protection is granted much more generously.

The asylum scene in the Member States

During the period under scrutiny, the asylum scene has seen numerous developments in the Member States, of which only the main ones are outlined here:

[444] Prop. 2001/02:185 Uppehållstillstånd med tillfälligt skydd vid massflykt) (Government Bill 2001/02:185 on temporary residence permit in situations of mass influx).
[445] Svenska Röda Korset (Swedish Red Cross), Remissyttrande över departementspromemorian "Uppehållstillstånd med tillfälligt skydd vid massflykt" (Ds 2001:77), 25 February 2002, p. 1.
[446] It is very doubtful that this emergency measure would stand a possible test before the Constitutional Court.
[447] *NRC Handelsblad,* 9 January 2003.
[448] Press release of 10 December 2002, <www.unhcr.ch>.
[449] Statistik Migrationsverket, Integration i Fokus, 6/2002, p. 38.

• In **Denmark**, the Aliens Act has acquired an obviously more restrictive character (Lov (2002: 365 om Udlændinge [Act (2002: 365) on Aliens]) most of which took effect on 1 July 2002. The 2002 Act abolishes the *de facto refugee* status, which had previously supplemented the status of refugee as defined in the Geneva Convention of 28 July 1951. Instead, the so-called *protection status* has been introduced, making it possible to grant residence permits to asylum seekers who risk the death penalty, torture, inhumane or degrading treatment or punishment if they return to their country of origin. Yet other, less important, restrictions have been introduced. Foreigners can no longer apply for asylum in Denmark from another country through Danish representations. Permanent residence permit can only be obtained after seven years (earlier 3 years), and the conditions for this has been tightened. And the numbers of members of the Refugee Board (which is the instance of appeal) has been reduced from five to three, while the competence of the Chair of the Refugee Board has been increased to authorise him/her to make decisions in certain types of cases on his/her own and on a written basis.

• The concepts which the instruments proposed on the basis of 63 EC rely on have already their correspondants, or are quickly penetrating, national legislations on asylum. A typical example is **Finland**, where the government proposal submitted to Parliament on 20 December 2002 for a new Aliens Act quite precisely fits within the scheme of the above-mentioned directives[450]. The *fast-track processing of asylum applications* came into Finnish law in the summer of 2000, in the wake of the arrival of large numbers of Roma asylum-seekers from Eastern Central Europe[451]. At present, fast-track processing appears to be the rule, rather than an exception : of all the negative decisions made by Finnish authorities on asylum applications in recent years, 60-80 % has involved fast-track processing. According to the proposal, fast-track processing could be carried out in a week and, after a negative decision, the applicant can be deported even when he or she has submitted an appeal, unless the administrative court specifically decides about an interim stay order. Another contentious issue of the reform was that of unaccompanied minors – underage children arriving alone in Finland. According to the proposal submitted to Parliament on 20 December 2002, family re-unification is to take place primarily in the country where the parents are. It is only in special circumstances in which the interest of the child requires that the bill would allow family re-unification in Finland. The objective is thus to prevent the abuse of the asylum system. The proposal also includes provisions on legal sanctions to be placed on airlines and other transportation companies who bring passengers without proper documentation into Finland. And it relies on the concept of "a safe country of origin", although this cannot be said to be a novelty: the current Finnish Aliens Act (378/1991)[452] already includes the concepts of *safe country of asylum* (section 33 a) and *safe country of origin* (section 33 b), which were introduced by the amendments made in 2000 (Act No 648 of 2000) to the Finnish Aliens Act[453].

• In **Ireland**, the Immigration Bill, 2002 – which will amend the Refugee Act, 1996 in certain respects –, which had been initiated before the May 2002 General Election, has since been revived; it will provide for carriers' sanctions, resettlement quotas, procedural amendments and, in all likelihood, will formalise practice as regards safe third countries and safe countries of origin. The new Minister for Justice, Equality & Law Reform has also signalled his intention to introduce a "white list" system in the future, providing for speedy treatment of asylum requests from certain countries from which

[450] See HE 265/2002vp hallituksen esitys ulkomaalaislaiksi ja eräiksi siihen liittyviksi laeiksi. For reasons of calendar, however, the reform probably will not go through before the March elections. A new proposal, perhaps including certain changes, will to be made after the elections.

[451] However, the practice was subject to the arrangement according to which the Minority Ombudsman shall be given an opportunity to be heard when an application for asylum is being considered, unless so doing would be evidently unnecessary (see paragraph 2 of Section 33 of the Finnish Aliens Act, inserted in 2001, (Act on the amendment of the Finnish Aliens Act, Act No. 661 of 2001)).

[452] An unofficial translation of the Finnish Aliens Act can be found from http://www.uvi.fi/englanti/doc/laki/aliensact.pdf

[453] Section 33 c of the Act provides however that preconditions for granting asylum or residence permit shall be assessed individually for each applicant for asylum, taking account of the applicant's report on his circumstances in the State concerned and information on the situation in the country. It is required that the authority shall ask the applicant in particular to provide reasons for not considering the State concerned safe for him. Yet, in spite of these requirements, several organisations (e.g. UN Refugee Agency, UNCHR) have expressed their concern over asylum applications not being examined individually.

important percentages of asylum-seekers originate[454]. While this may not constitute collective expulsion it will lead to a diminution in focus on the substance of individual applications.

• In **Italy**, with a view to discouraging improper asylum requests, Act no. 189/2002 amending the provisions in the area of immigration and asylum, of which the entry into force with respect to asylum depends on the adoption of the necessary implementing rules, provides for a "simplified" procedure for applicants being held in "residence centres"[455]. The Act also stipulates very short time limits for the administrative phase. If these time limits are not observed, the authorities must grant the applicant a temporary residence permit, so that he may leave the residence centre. The applicant may lodge an appeal against a decision to turn down his asylum request with the civil court. This appeal procedure, however, does not suspend the execution of any expulsion order that has already been given against the asylum seeker. The Act does not provide for any maximum period of detention in identification centres, nor for any possibility of appealing to the court against a prolonged detention. On the other hand, voluntary expulsion from the centre is considered as a renunciation of the asylum application. However, since it concerns a measure that has repercussions on personal freedom, the asylum seeker should be able to benefit from the guarantees provided by Article 13 of the Italian Constitution (as upheld by the Constitutional Court in its judgment no. 105 of 2001), including the possibility of taking his case to court. Moreover, the decentralization of the examination of asylum requests by the establishment of territorial commissions within each prefecture – whereas until now the examination procedure was centralized in Rome – should make it possible to speed up the handling of applications.

• In **Belgium**, although the ambitious plan for a comprehensive reform of the asylum procedure seems to have been temporarily abandoned, significant improvements are in the process of being adopted. Two draft Royal Decrees[456] are intended to specify the guarantees of the asylum seeker during the procedure for the granting of refugee status before the two relevant bodies: the Aliens Office - dependent on the Ministry of the Interior - and the Commissioner-General for Refugees and Stateless Persons - an independent authority which is empowered to uphold the decision of inadmissibility taken by the Aliens Office, upon urgent appeal, or to grant or refuse refugee status, subject to appeal to the Permanent Appeal Commission for Refugees.

The first draft Royal Decree[457] provides that, during the stage in which the admissibility of the asylum application is examined, involving a hearing of the asylum applicant by officials of the Aliens Office, the applicant receives an information leaflet explaining the course of the procedure, the application of the Dublin Convention, the possibility of requesting the assistance of a lawyer and an interpreter, the reception facilities and the existence of associations specializing in assistance to foreign nationals. The obligations of the officers of the relevant service charged with hearing or examining the request for access to the territory are specified, notably by reference to the Handbook on Procedures and Criteria drawn up by the United Nations High Commissioner for Refugees (UNHCR). The draft Royal Decree stresses the neutrality which the officers must display. The basic and continuing training of these officers is also explained. The rights of the asylum applicant during his hearing are specified. For instance, he may dismiss the interpreter suggested for a valid reason. The report of the hearing is read out to the asylum applicant in order that he may rectify or clarify certain points. The officer conducting the hearing is also obliged to highlight any contradictions in the applicant's statement so as to allow him to explain himself. The decision taken on the admissibility of the application must be well reasoned. Finally, the way in which he will be notified of the decision will be explained, so as to make sure that the decision is actually brought to the knowledge of the asylum applicant.

[454] One-third of all asylum applicants in the past year came from Nigeria while at least 14% came from Romania.
[455] On detention at these centres, see commentary on Article 6 of the Charter.
[456] At the time of completion of this report, these two drafts were still submitted for an opinion to the legislation section of the Council of State.
[457] Draft Royal Decree establishing certain elements of the procedure to be followed by the Aliens Office charged with examining asylum applicants on the basis of the Act of 15 December 1980 on access to the territory, residence, establishment and removal of foreign nationals.

The second draft Royal Decree[458] is aimed at improving the way the Commissioner-General for Refugees and Stateless Persons (CGRA) works. A documentation and research centre, as well as a knowledge and learning centre charged with the (continuous) training of officers, will be set up. An ethical code will be drawn up for the officers of the CGRA, whose behaviour while hearing the asylum applicant must be neutral, impartial and in conformity with the said code. Bearing in mind the details of their private life which applicants supply in their statement, this information may only be brought to the knowledge of the relevant services. Guarantees concerning the communication of the decisions to the asylum applicant are put in place (notification by registered letter, election of domicile, etc). The course of the hearing and the rights and guarantees of the applicant during this hearing are defined and resemble those described above in connection with the procedure before the Aliens Office (right to assistance by a lawyer, role of the interpreter, inventory of documents received, establishment of a report of the hearing).

• In the **United Kingdom**, the Nationality, Immigration and Asylum Act 2002 clearly goes in a very restrictive direction. Thus for example, a refutable presumption has been created whereby someone convicted either of a crime and given a custodial sentence of two or more years or of certain specified offences is to be treated as having been convicted of a particularly serious crime and as being a danger to the community for the purposes of Article 33(2) of the 1951 Convention and thus cannot rely on that Convention to prevent their removal. In addition provision is made for asylum or human rights claims to be certified where the claim is clearly unfounded or the person is to be removed to a country of which he or she is not a national and the Minister has no reason to believe that their rights under the ECHR will be breached in that country, with the consequence that the person cannot generally appeal against an immigration decision while in the country.

In their next report, the experts will assess the implementation by the Member States of Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, OJ L 187 of 10/7/2001. The transposition measures must be adopted before 11 February 2003. This Directive imposes the adoption of sanctions of which the Directive determines the minimum level. Particular care must be taken that the national measures taken for the transposition of this Directive do not prejudice the commitments which the Member States have undertaken under the Geneva Convention of 28 July 1951 on the status of refugees. Furthermore, this Directive must be linked to the Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings[459], as well as to Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorized entry, transit and residence[460].

The developments that have been outlined above are of a legislative or regulatory nature. However, the national reports also give an account of practices by the authorities charged with examining asylum applications or with the judicial review of the decisions on these applications.

The scope of the judicial review of denials of asylum requests will play a decisive role in the effective protection of the rights of the asylum seeker. In **Ireland**, although the relatively restricted time limits for failed asylum seekers to make applications for judicial review are sometimes extended by the courts there are frequently quite serious problems for applicants whose cases are being handled by the Refugee Legal Service (legal aid). These are likely to be exacerbated by recent budget cuts. Most judicial reviews will be based on arguments as to the lack of 'reasonableness' on the part of the deciding authority but the courts, in applying the so-called "no evidence test", have narrowed the potential of this ground as a basis for a successful challenge. In other words, unless the applicant can show that there was no evidence whatsoever for the decision to reject his/her asylum application s/he is unlikely to succeed.

[458] Royal Decree establishing the procedure before the Commissioner-General for Refugees and Stateless Persons as well as its functioning.
[459] OJ L 303, 1.8.2002, p. 1.
[460] OJ L 328, p. 17.

On a number of occasions where it received applications against **Sweden**, the CAT has shown concern about the too strict evaluation of the asylum seeker's credibility. It appears that there is a general reluctance to believe in the statements of asylum seekers, i.e. there is a failure among the decision-makers at the Swedish Migration Board and the Aliens Appeal Board to implement the principle of the benefit of the doubt.[461] Sweden has, in addition, been criticized by practicing lawyers as well as by NGOs for letting the administrative authorities base their decision on confidential information that never reaches the person applying for asylum, i.e., the person is not permitted to challenge the allegations being made against him, as well as that the authorities render poor reasons for the decisions on the cases under their scrutiny.[462]

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

Article 19 §1 of the Charter of Fundamental Rights prohibits collective expulsions. This prohibition is identical to that formulated by Article 4 of the Fourth Additional Protocol to the European Convention on Human Rights. It means that each case must be examined and decided individually, before expulsion, be it grouped, can take place. The procedural guarantees contained in Article 1 of the Seventh Additional Protocol to the European Convention on Human Rights and Article 19 par. 8 of the revised European Social Charter may contribute to respect for this guarantee, although their object is different, the scope *ratione materiae* is more limited[463], and these provisions do not bind all the Member States of the European Union[464]. Article 19 §2 of the Charter of Fundamental Rights prohibits expulsion to a State where the individual runs the risk of serious violations of his fundamental rights. The two guarantees of Article 19 of the Charter are added to those which a foreign national may claim by virtue of Article 7 of the Charter (respect for private and family life), which was examined above.

Collective expulsions

On 5 February 2002, in a judgment concerning **Belgium**, the European Court of Human Rights found for the first time that a State had carried out a "collective expulsion of aliens", in violation of Article 4 of the Fourth Protocol to the European Convention on Human Rights[465]. The judgment does not call into question the traditional interpretation of this provision, according to which, in principle, the fact of compelling foreigners to leave a country in group is not a "collective" expulsion if this group expulsion was preceded by a reasonable and objective examination of the particular situation of each of the foreign nationals forming the group[466]. However, collective expulsion may in some cases, according to the judgment, oblige the State to furnish proof that such an individual examination has taken place when the circumstances of the expulsion raise certain doubts in this respect. Among these circumstances, the Court cites the fact that "prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind" (§ 62). The danger of collective expulsions of aliens to which the States may resort is that, from the moment a State has chosen to carry out such expulsions, especially when such operations are given a certain amount of publicity in order to have a dissuasive effect on future potential asylum seekers, its administration may be tempted to carry out a summary examination of each individual case, even to work solely on the basis of certain characteristics (nationality, ethnic origin), either during the examination of the asylum application, or when issuing the expulsion order proper.

---

[461] See the cases: *Kisoki v. Sweden*, HRC Communication No 41/1996, UN Doc. A/51/44 (1996) and *Haydin v. Sweden*, HRC Communication No 101/1997, 16/12/98. For some legalistic explanations of the Swedish approach, see H.Sandesjö, *Assessment of Evidence in Refugee Cases-Swedish Jurisprudence*, in Asylum in Europe: Strategies, Problems and Solutions, Raoul Wallenberg Institute, Report No. 33, Lund 2002, pp. 38-44.

[462] The Swedish NGO Foundation for Human Rights and the Swedish Helsinki Committee for Human Rights, Alternative Report to the Human Rights Committee, p. 7; Alternative Report to the Committee against Torture, p. 5.

[463] As a rule, the (revised) European Social Charter only protects foreigners insofar as they are nationals of other State parties.

[464] We refer to the commentary on Article 7 of the Charter (expulsion of foreigners and private and family life).

[465] European Court of Human Rights (3rd section), *Conka v. Belgium* (application no. 51564/99) judgment of 5 February 2002.

[466] See European Court of Human Rights (1st section), *Andric v. Sweden* (application no. 45917/99) decision of 23 February 1999, unpublished.

The circumstances that have rise to the judgment in the case of *Conka v. Belgium* are not exceptional. Even in **Belgium**, the number of group expulsions of foreigners has increased in the last three years, without there being any certainty that this working method has always been accompanied by guarantees as to the individual examination of asylum applications, in particular a hearing of each asylum seeker. According to SOS Racism, 37 Nigerians were expelled from **Spain** in May 2001 without their cases having been handled individually[467]. In **Italy**, the Regional Administrative Court of Apulia delivered a judgment on 20 March 2002, no. 261, annulling a series of measures whereby the Central Commission for the Granting of Refugee Status ordered that asylum seekers be escorted back to the border. Given the total absence of prior investigation and the speed with which these measures were adopted, the Court considered that they could be classed as collective expulsion. In the **Netherlands**, the number of illegal aliens who were deported grew from 24,000 in 2001 to 29,000 in 2002[468], and after the installation of the new Government, a number of 'mass deportations' of illegal aliens took place under massive publicity.

In **Luxembourg**, the issue of collective expulsions of aliens came up in a slightly different context. In August 2002, more than two hundred applicants challenged before the administrative courts a circular issued by the Ministers of Justice and of Family Affairs and addressed to 800 persons following an agreement of 19 July 2002 and concerning the readmission into their country of origin of persons who do not, or no longer, meet the conditions of entry and residence. In their application, the applicants complained that this circular constituted a collective expulsion contrary to Article 4 of the Fourth Additional Protocol to the European Convention on Human Rights. In a separate application, they requested the suspension of the measure and the institution of a safeguard. By an order of 12 August 2002, the President of the Administrative Court formally acknowledged the statement by the government representative, who said that "at present, no decision to expel the applicants has been taken yet and that in the present case the applicants will not be expelled before an individual decision has been taken and before each case has been examined". Following these declarations by the State representative, the counsels acting for the applicants concluded that their request no longer applied[469].

Risks linked to the expulsion

Although Article 19 §2 of the Charter only mentions among the obstacles to the expulsion of a person the risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment, it emerges from the case law of the European Court of Human Rights that the risk of other violations may also constitute such an obstacle. It is actually interesting to note that in the **Netherlands**, in a much publicised decision the *Rechtbank Den Haag* [Court of First Instance of The Hague], acting in summary proceedings, suspended the extradition of person who was suspected of drug-trafficking, to the United States of America. The applicant had argued that suspects in the USA are practically forced to accept an offer for 'plea-bargaining', where one confesses to be guilty in exchange to a lower sentence. To reject such an offer means that one has to stay in detention on remand, under dubious conditions. The applicant argued that this practice was incompatible with the presumption of innocence, guaranteed in Article 6 ECHR and Article 14 ICCPR. The Court of First Instance considered that more information was necessary and ordered the Minister of Justice, who had decided to extradite the applicant, to furnish additional information[470]. Likewise in **Denmark**, in the case of an extradition demanded by Brazil of a person accused of having committed a murder in Brazil in 1987, the Supreme Court eventually agreed that the extradition order be executed, taking into account in particular the fact that there was no reason to believe that the person concerned would not have the benefit in the applicant State of a fair trial within the meaning of Article 6 of the European Convention on Human Rights[471].

[467] *SOS Racismo. Informe anual 2002 sobre el racismo en el Estado español.*
[468] *NRC Handelsblad,* 9 January 2003.
[469] President of the Administrative Court, 12 August 2002, no. 15223, *Sabotic et al.* and 15228, *Babacic,* unpublished.
[470] *Rechtbank Den Haag,* LJN-nr. AF0505; 14 November 2002.
[471] Supreme Court, U.2002.555 HK.

Co-operation with an international criminal truibunal

While this Article 19 §2 of the Charter only explicitly concerns the expulsion or extradition to another State, the prohibition should in reality also extend to the handing over of a person to an international court[472]. An episode which **Belgium** has known during the period under scrutiny illustrates the interest which these guarantees may offer. Following the rejection of his appeal, N.J., who claimed that the International Criminal Tribunal for Rwanda could not decide within a reasonable time limit, and that therefore his transfer to this court would constitute a violation of Article 6 §1 of the European Convention on Human Rights[473], applied to the Council of State for the suspension of his transfer. The Belgian Council of State considered itself not competent to hear this request, since the transfer constituted "the pure and simple execution of the arrest warrant that was declared enforceable by the committals division" and would not alter the legal situation of the person concerned[474]. The refusal to offer provisional legal protection to the person whose expulsion would render him liable to the risk of violation of his fundamental rights is all the less understandable since Article 13 of the Belgian Act of 22 March 1996 recognizing the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and the judicial co-operation with these tribunals, provides that it is "in compliance with the European Convention safeguarding human rights and fundamental freedoms" that the Government transfers the person arrested to the Tribunal.

Since 1997, the Constitution of **Portugal** prohibits extradition to a State which does not promise that indefinite or life prison sentences will not be applied for a crime for which a request for extradition is made. Great controversy has emerged since 2000, stemming from the process of ratification of the Statute of Rome of the International Criminal Court as, though within the strict operation of the principle of complementarity[475] set out in art 17 of the Treaty, Portugal may be asked to "defer" a suspect to the Hague, who may end up being convicted to life imprisonment. The Amendment to the Constitution of 12 December 2001 was specifically designed to deal with this problem: in the view of the pressure for a speedy ratification, Portugal introduced in art. 7 of the Constitution dealing with "International Relations" a general clause recognising and accepting the jurisdiction of the ICC, as established by treaty and, at the same time, issued an "interpretative declaration", stressing that Portugal remains committed to trial anybody found in its territory, accused of statutory crimes, according to its own criminal laws, where life imprisonment does not exist.[476] The distinction between "extradition" and "surrender", the first being an horizontal mechanism and the second a vertical one does seem to be artificial for the purpose of arguing that in the case of the latter Portugal could lawfully allow transferral of a suspect who could be convicted to life imprisonment by the ICC.

The procedural guarantees surrounding the expulsion of aliens

The absence of guarantees of adequate procedures considerably increases the risk that a person is expelled to the territory of a country where he has serious and proven reasons for fearing a violation of

[472] On these two points, see European Court of Human Rights (4th section), *Naletilic v. Croatia* (application no. 51891/99) decision of 4 May 2000. The applicant, who was due to be handed over to the International Tribunal for the former Yugoslavia, claimed that this was not an "independent and impartial tribunal, established by law", within the meaning of Article 6 §1 of the Convention. The Court concluded that the application was inadmissible because it was manifestly unfounded, yet took care to point out that "involved here is the surrender to an international court which, in view of the content of its Statute and Rules of Procedure, offers all the necessary guarantees including those of impartiality and independence".

[473] According to the Supreme Court, the applicant did not back up his claim on this point, for "the delays he criticized in the judgment of certain cases submitted to the International Tribunal for Rwanda were not generally known" (Cass. (2nd Chamber), 23 January 2002, N° P020054F).

[474] Council of State (11th chamber, ref.), n° 104.877, 19 March 2002, *J.T.*, 2002, p. 342.

[475] On the operational character of the principle, Riquito, "Do Pirata ao General: velhos e novos *hostes humani generis"*, *Boletim da Faculdae de Direito,* 2000.

[476] Different views have been held on this, with some criticising harshly any solution that would not sufficiently ensure non surrender to the Court in case life emprisonment could be applied: see CAEIRO, *UT Puras Servaret Manus,* Revista Portuguesa de Ciência Criminal, 2001. RODRIGUES, "O Tribunal penal Internacional e a Prisão Perpétua: Que Futuro?", *Direito e Justiça,* 2001. On the constitutional obstacles, see also PALMA, "Tribunal Penal Internacional e Constituição Penal", Revista Portuguesa the Ciência Criminal, 2000.

his fundamental rights. For this reason, the distinction that is made in **Spain** between expulsion proper - by an administrative decision ordering the person concerned to leave the territory after he has been found to reside there illegally - and immediate return (*retorno inmediato*) may be a problem, notably on account of the inaccuracy which - despite the adoption of a resolution by the Attorney General aimed at defining the two cases more precisely[477] - continues to affect the use which is made of those two options. While expulsion involves an administrative procedure and a court order, and results in a prohibition to enter the territory for a specified period, "immediate return" is an administrative practice whereby the competent authority, finding that a person has unlawfully entered the territory, escorts him back to the border, without any procedure whatsoever being followed. In the case of immediate return, the foreign national has no opportunity to explain before a body independent of the Executive the risks that he runs by being taken back to the border. This practice may be incompatible with Articles 3 and 13 jointly of the European Convention on Human Rights.

The Spanish Association for the Defence of Human Rights has expressed its concern over the treatment of clandestine passengers arriving in the Spanish ports[478]. Despite what is provided by Article 22 of the Aliens Act (Organic Act no. 4/2000, amended by Organic Act no. 8/2000), which in principle grants the right to legal aid and the assistance of an interpreter, clandestine immigrants are most often deprived of their liberty and in practice prevented from filing an application for asylum with the Spanish authorities. The National Ombudsman (*Defensor del Pueblo*) had issued a recommendation in this respect on 28 May 2001. Following the adoption by the United Nations Committee against Torture of its draft conclusions concerning Spain[479], this administrative practice was abolished, and the Government Commission for foreign nationals established a series of guarantees concerning the right to legal aid in asylum or expulsion procedures.

The effect of a practice like that of "immediate return" in **Spain** is to prevent access to the asylum procedure. It is manifestly contrary to the Recommendation issued on 19 September 2001 by the Commissioner for Human Rights of the Council of Europe concerning the rights of aliens wishing to enter a Council of Europe Member State and the enforcement of expulsion orders, which provides that "On arrival [at the border of any Council of Europe Member State], everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which he or she understands, about the procedure to be followed. The practice of *refoulement* "at the arrival gate" thus becomes unacceptable"[480]. This is not an isolated practice, however. During his visit to **Greece**, the Commissioner for Human Rights of the Council of Europe received information from the Greek Council for Refugees concerning cases where entry was instantly refused without those concerned being given the opportunity to request asylum.[481]. On 6 June 2002, the National Commission of Human Rights published an in-depth report containing proposals to improve the reception of asylum seekers and to safeguard their right of access to the procedures for determining refugee status; however, no action has been taken yet in this respect[482].

---

[477] Consulta 1/2001, de 9 mayo de la Fiscalía General del Estado. Boletín de Información del Ministerio de Justicia de1 de marzo de 2002.

[478] See E/CN.4/2002/NGO/129, 6 February 2002. The communication has been transmitted in accordance with Resolution 1996/31 of the United Nations Economic and Social Council.

[479] *Comité contra la Tortura. Naciones Unidas. Proyecto de conclusiones y recomendaciones: Spain*. 19/11/2002. CAT/C/XXIX/misc.e. (Concluding Observations/Comments).

[480] CommDH/Rec (2001)1, 19 September 2001, point I.2.

[481] See the Report of the Commissioner for Human Rights, CommDH(2002)5, 17/7/2002.

[482] Another problem that Greece faced during the period under scrutiny resulted from the approval by Act no. 3030/2002 «Protocol on the application of the Agreement between the Greek Government and the Turkish Government against crime, notably terrorism, organized crime, illegal drug trafficking and illegal immigration» of this protocol, providing on a reciprocal basis between Greece and Turkey that illegal immigrants coming from third countries and entering the territory of one of the contracting States by the territory of the other State shall be returned to the latter State by which they had travelled. Since the National Commission on Human Rights had on 31 January 2002 delivered an opinion in which it expressed concern about the absence of all reference in the Protocol to the Geneva Convention on refugee status of 28 July 1951, the spokesman of the Greek Government declared that the text did not apply to asylum seekers (press release of 27 June 2002, www.minpress.org).

The opportunity to lodge an appeal that suspends the enforcement of an expulsion order constitutes an essential guarantee for the protection of individuals against the risks attached to expulsion[483]. In the conclusions it gave on the periodic report submitted by **Denmark** (CAT/C/CR/28/1), the Committee against Torture expressed its concern with respect to the amendment to the Aliens Act[484] which may imply that aliens that who been refused a residence permit must leave the country immediately after the rejection of their application. If strictly applied, this will frustrate the effectiveness of article 22. A similar problem exists in **Italy**. The Italian Act no. 189/2002 amending the regulations governing immigration and asylum provides that expulsion must be ordered by a well-reasoned decree, immediately enforceable, even if the person affected by the order has lodged an appeal against the order[485]. Although it does not deprive the foreigner being expelled of all opportunity of appeal[486], the absolute impossibility of obtaining a suspension of the enforcement of the expulsion order may in certain cases have serious and irreparable consequences. This situation is hardly mitigated by the opportunity offered to the asylum seeker whose application has been turned down to ask the prefect for an authorization to remain on the territory while his appeal against the rejection of his asylum application is being examined before the civil court. On the whole, this lack of provisional legal protection seems incompatible with both the Italian Constitution (Article 24) and Article 13 of the European Convention on Human Rights or Article 47 of the Charter of Fundamental Rights.

The provisional legal protection which the national courts should offer to the person threatened with expulsion should in principle make it exceptional for international supervisory bodies to have to issue provisional measures. However, the United Nations Committee against Torture and the Human Rights Committee, and more recently the European Court of Human Rights[487], consider that they have jurisdiction to order the suspension of an expulsion order that is liable to result in a serious and irreversible infringement of the fundamental rights of the person concerned. In **Austria**, the *Weiss* case led to the applicant being extradited to the United States on 9 June 2002, although an appeal was pending before the Higher Administrative Court (*Verwaltungsgerichtshof*) and the latter had ordered the provisional suspension of the extradition order, and despite the fact that the Human Rights Committee, in accordance with Article 86 of its Regulations, had also enjoined Austria not to go ahead with the expulsion[488]. It is not clear what justification there is for this practice of *fait accompli*.

In **Sweden**, although the domestic legislation concerning the expulsion or deportation of foreign citizens explicitly forbids the enforcement of such decisions where the individual risks torture or capital punishment in the state concerned[489], asylum-seekers, who have been suspected of terrorism in their country of origin, have been expelled to the country in question, where they run the risk of being subjected to torture or even executed. Two Egyptian citizens - Ahmed Hussein Mustafa Kamil Agiza and Muhammad Muhammad Suleiman Ibrahim El-Zari - who were arrested and immediately (the same day the decision was taken by the Swedish authorities) forcibly expelled from Sweden in December 2001. They were thus deprived of any opportunity to appeal the decision.[490] The Swedish

[483] See in this report the commentaries on Article 18 (asylum) and 47 (effective remedy) of the Charter.
[484] Lov (2002: 365) om Udlændinge [Act (2002: 365) on Aliens].
[485] The only exceptions to the principle of immediate expulsion are the accused in a criminal trial or persons being held on remand.
[486] The person against whom an expulsion order has been issued may lodge an appeal from another country, through the Italian embassy or an Italian consulate in the destination country.
[487] European Court of Human Rights, *Mamatkulov and Abdurasulovic v. Turkey* decision of 6 February 2003 (violation of Article 34 of the Convention (right of individual application) on account of the extradition to Uzbekistan of two persons being prosecuted for terrorism and an attempt on the life of the President of the Republic, without any account being taken of the provisional measures indicated by the European Court of Human Rights on the basis of Article 39 of its Regulations).
[488] The Human Rights Committee considers that a State that does not comply with this injunction violates the Optional Protocol to the International Pact on Civil and Political Rights: see decision of 19 October 2000 (*Dante Piandiong, Jesus Morallos and Archie Bulan v. Philippines)*.
[489] Article 8(1) of the Aliens Act, Utlänningslagen (SFS 1989:529).
[490] Among the subjects of concern of the HRC under Article 6 of the CCPR during the consideration of Sweden's report in April 2002 was the expulsion of asylum-seekers to countries where there are risks to their lives. The case in question is, however, not explicitly mentioned in the general observation. See CCPR/CO/74/SWE, § 12. AI (the Swedish Section) has, however, criticised the decision of the Swedish authorities. UNCHR has also expressed its concern with respect to the current Swedish practice of expulsion of asylum seekers.

Government has claimed that the guarantees furnished by the Egyptian government that the persons in question would not be tortured, were enough to satisfy its obligations under international human rights law. More generally, it is obvious that Sweden has difficulties with fulfilling its obligations under Article 3 of the UN Convention against Torture. Sweden has been criticized on nine occasions[491] by the UN Committee against Torture for violating the *non-refoulement* principle in asylum cases where there is risk for the persons in question to be exposed to an irremediable situation of objective danger (e.g. torture and/or inhuman and degrading treatment), outside its jurisdiction. As shown by a recent case of expulsion of a woman (Farida) to Bangladesh, who has been subjected to a particularly brutal gang-rape for political reasons and who had well-grounded fear for the repetition of this act of violence should she be returned, part of the difficulty in Sweden lies in a profound lack of knowledge within the administrative authorities about the function of rape and about current international law, i.e.that this offence actually constitutes an element of the internationally accepted definition of violence against women and under certain circumstances is comprised within the term torture.[492]

Allegedly, asylum-seekers have, against their will, been deported to countries completely unknown to them and to which they have no connection[493]. This practice or "refugee-dumping" has occurred in situations where, following the rejection of their asylum application, asylum-seekers refused to divulge their country of origin and the Swedish administrative authorities made a wrongful assessment of their nationality, most often on the basis of their language. This procedure has been criticised by experts on the languages in question.

[491] For an analysis of the cases until 1999 see B. Gorlick, *The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees*, in International Journal of Refugee Law 1999, Vol. 11, No. 3, pp. 479-495 and for cases up to 2001 J.Nilsson, *Committee against Torture*, *Communication No. 149/1999: A.S. v. Sweden*, NJIL 2001, Vol. 70, pp. 257-261.

[492] M.K.Eriksson, *Reproductive Freedom In the Context of International Human Rights and Humanitarian Law*, The Hague 2000, pp. 324-329; 369-375. On the other hand, the Swedish Migration Board issued in February 2001 guidelines on gender-based persecution-grounds for residence permit - "Förföljelse på grund av kön - grunder för uppehållstillstånd".

[493] See the Concluding observations of the Committee against Torture (CAT) on Sweden's periodic report under the UN Convention against Torture : CAT/C/XXVIII/Concl.1.

CHAPTER III. EQUALITY

Article 20. Equality before the law

The principle of equality, which is recognized by all the constitutions of the Member States, prohibits the differentiated treatment of groups of persons where the distinction between them is not based on an objective and reasonable justification, and proves excessive in relation to the objective it pursues. In this respect, the principle of equality before the law is but one component - albeit essential, though not sufficient - of the protection of the individual against discrimination. Even at the constitutional level, the requirement of equality before the law most often implies that of *de facto* equality, i.e. the prohibition of subjecting to the same legal regime situations that call for a differentiated treatment on the basis of what sets them apart. That is why it was deemed more appropriate to analyse Articles 20 and 21 together so as to take their complementarity into account. This approach is also based on the fact that several legislations on the prohibition of discrimination at the same time guarantee equality before the law and protection against other forms of discrimination.

Article 21. Non-discrimination

By 15 January 2003, none of the Member States had ratified Additional Protocol No. 12 to the European Convention on Human Rights[1], which seeks to extend the prohibition of discrimination beyond situations where the enjoyment of rights and liberties recognized by the Convention or its Additional Protocols is at stake. Moreover, several States have expressed their intention not to start the procedure for the ratification of this instrument.[2] It seems that this reticence is explained by the fear held by the States that the European Court of Human Rights sets itself up as the judge of the expediency of the economic and social policies conducted by the States. This reluctance does not seem entirely justified. Most States have established a mechanism to verify the constitutionality of laws, focusing in particular on the requirements of equality and non-discrimination. They are all parties to the International Covenant on Civil and Political Rights, of which Article 26 stipulates, as does Additional Protocol No. 12 to the European Convention on Human Rights, a general condition[3] of non-discrimination. Finally, the case law of the European Court of Human Rights itself, by the broad scope which it acknowledges for pleading Article 14 of the Convention, already allows this Court to review compliance with the rule of non-discrimination in extremely diverse areas, particularly by the combination of this provision with the right to respect for private and family life or the right to respect for property as guaranteed by Article 8 of the Convention[4] and Article 1 of the First Additional Protocol[5] respectively, but also because Article 14 of the Convention is considered to be applicable from the moment discrimination is claimed in connection with the exercise of a fundamental freedom recognized by the Convention[6]. It can therefore be affirmed that the ratification by the Member States of Additional Protocol No. 12 to the Convention will not impose additional obligations on them compared with those which they are already bound to observe today. It will simply allow the European

[1] Protocol open to signature by the State parties to the European Convention on Human Rights in Rome, 4 November 2000 (*S.T.E.*, n° 177).
[2] I. Cameron, *An Introduction to the European Convention on Human Rights*, Uppsala 2002, p. 129.
[3] That is to say, not limited to the enjoyment of the rights and freedoms recognized in the Pact. Compare in this connection the wording of Article 26 of the Pact with that of Article 2 §1.
[4] See for example European Court of Human Rights, *Petrovic v. Austria* judgment of 27 March 1998 (granting of parental leave).
[5] For example, in the judgment in the case of Willis v. United Kingdom of 11 July 2002, the European Court of Human Rights considered contrary to Articles 14 and 1 of the First Additional Protocol the British legislation which reserves only for women the benefit of widow's pensions and widowed mother's benefits. The Court considers that social security benefits for which contributions are paid, such as those at issue in this case, may be classed as "property" within the meaning of Article 1 of the First Additional Protocol (European Court of Human Rights (4th section), *Willis v. United Kingdom* judgment of 11 June 2002).
[6] For example freedom of religion (European Court of Human Rights, *Thlimmenos v. Greece* judgment of 6 April 2000) or the freedom to live in accordance with one's sexual orientation (European Court of Human Rights, *Fretté v. France* judgment of 26 February 2002).

Court of Human Rights to harmonize, at the level of all the European States, the significance of these requirements.

Since the insertion of Article 13 EC into the Treaty of Amsterdam, which became effective on 1 May 1999, the European Community is empowered to adopt certain measures aimed at combating discrimination based on sex, race or ethnic origin, religion or beliefs, disability, age or sexual orientation. The report will follow the thread of this enumeration, although the developments specific to the equal treatment of men and women and the treatment of disabled persons are discussed in this report under Articles 23 and 26 of the Charter, which are specifically devoted to these issues. The comments given below deal with the developments that led in all the European Union Member States to the adoption of the Directives of 29 June 2000 and 27 November 2000, both based on Article 13 EC. More specific remarks are devoted to the procedural dimensions of the protection against certain forms of discrimination that these Directives aimed to offer individuals, as well as to the question of so-called "trend" businesses. The report then addresses specific questions linked to the protection against discrimination based on religion, age and sexual orientation. The relatively recent appearance of sexual orientation among the prohibited motives for discrimination (in the same way as age or disability, which is addressed under Article 26 of the Charter) will explain why the report elaborates more particularly on the latter form of discrimination. The wealth of developments which the latter area of protection has seen during the period under scrutiny justified this choice. Finally, the commentary on this article of the Charter comprises a paragraph on combating incitement to hatred or to racial, national or religious discrimination.

Directives based on Article 13 EC

On the basis of Article 13 EC, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[7] and Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation[8] were adopted. Each of these Directives must be transposed within three years of their publication in the Official Journal[9]. Most of the developments seen in the Member States during the period under scrutiny are linked to the transposition efforts that have already begun[10]. The situations differ considerably from one Member State to another in terms of the nature of the measures taken with a view to the transposition.

Belgium has adopted the Act of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up the Centre for Equality of opportunity and the Fight against Racism. This Act transposes at the Federal level Directives 2000/43/EC and 2000/78/EC, of which it exceeds the requirements on two points: it adds to the prohibited distinction criteria identified in the two Directives other bases for discrimination, such as marital status, birth, wealth, current or future state of health, and physical appearance; it also extends the guarantee against direct and indirect discrimination, for all these categories, to the exercise of any economic, social, cultural or political activity that is open to the public. Furthermore, the Belgian legislator provides in civil matters for the reversal of the burden of proof and allows that proof may be furnished in the form of figures or by using "situation tests", the modalities of which will be established in a set of rules. In its penal provisions, the Act provides that an aggravating circumstance in certain offences shall be the "abject motive" of the intention to commit discrimination. On the whole, this Act is satisfactory, despite certain hesitations, namely regarding the possibility of justifying "direct" discrimination. However, it only governs what falls within the scope of the federal legislator. In order for the transposition of the above-mentioned Directives to be satisfactory, the Act of 6 January 2003 needs to be complemented

[7] OJ L 180 of 19/7/2000.
[8] OJ L 303 of 2/12/2000, p. 16.
[9] However, the States are entitled to a three-year extension to implement the provisions of Directive 2000/78/EC concerning age and disability, in order to take account of "special conditions".
[10] Harassment is considered a form of discrimination by Directives 2000/43/EC and 2000/78/EC (see Article 2 §3 of each of these instruments). The issue of harassment is discussed under Article 31 of the Charter, which in particular guarantees for every worker the right to working conditions which respect his dignity.

by legislative initiatives by the Regions and Communities, notably with regard to the civil service of the federated entities and access to vocational training. While the Flemish Community has adopted the Decree of 8 May 2002 on equal participation *(evenredige participatie*) in the labour market[11], neither the French-speaking Community nor the Walloon Region have so far worked out any equivalent regulations.[12]

In **Denmark**, a Committee on implementation of the Directive in Danish law (the Equal Treatment Committee) published its recommendations in September 2002. The Committee proposes that Directive 2000/43/EC be implemented in the form of a new act on equal treatment irrespective of ethnic origin, which is to apply to the areas covered by the Directive, except for the labour market. Indeed, the provisions of the Directive prohibiting unequal treatment in the labour market should be implemented by an amendment to the Act on the Prohibition of Differential Treatment on the Labour Market[13]. This latter amendment, a proposal for which has been circulating since October 2002, introduces "belief" as a new criteria. It also provides for a new sharing of the burden of proof in cases concerning differential treatment on the labour market.

In **Spain**, a multidisciplinary working group was set up on 5 July 2002 in order to reflect on the measures to be taken in the Spanish legal system with a view to the transposition of Directives 2000/43/EC and 2000/78/EC, as well as Directive 2002/73/EC on equal treatment for men and women[14]. A draft bill emerged from this consultation, aimed at changing certain regulations in force in order to guarantee equal treatment in employment and work.

In **Finland**, a Government proposal for a new Act on the protection of Equality[15] is currently before the Parliament. The new Act would implement Council Directives 2000/43/EC and 2000/78/EC by going beyond the prohibition of discrimination under Section 6 of the Constitution of Finland. The new law would ban discrimination, beyond the sphere of employment, in the provision of goods and services, including situations involving housing, education, social benefits, and health care. It will also facilitate the proof of discrimination[16] by authorizing a reversal of the burden of proof in civil matters, in favour of the plaintiff victim of discrimination. In addition, the bill would help the victims by setting specific monetary compensations for acts of discrimination. There is also a proposal for the establishment of a special discrimination board, which could impose conditional fines on service providers who act in a discriminatory manner. Finally, the bill allows and establishes positive discrimination to encourage occupational integration of women and other minority groups, subject to constitutional requirements for positive discrimination. The observance of the Act would be monitored by the Ombudsman for Minorities who also attempts to promote good ethnic relations, and improve the status and rights of ethnic minorities.

France has already begun to transpose certain obligations enumerated in Directives 2000/43/EC and 2000/78/EC, with the adoption of the Act of 16 November 2001 on combating discrimination[17]. This Act extends the list of motives for discrimination in Articles L122-35 and L122-45 of the Labour Code

[11] *M.B.,* 26 July 2002. Article 7 of the Decree provides for the elaboration of an annual action plan defining the objectives and methods of evaluation in order to achieve proportional participation in the labour market for the different groups that have been identified (*kansengroepen*).

[12] The subjects concerned, however, remain governed by the Act of 4 August 1978 on economic reorientation, *M.B.,* 17 August 1978.

[13] Lov (1996:459) om forbud mod forskelsbehandling på arbejdsmarkedet [Act (1996:459) on the Prohibition of Differential Treatment on the Labour Market.

[14] On this Directive, see commentary on Article 23 of the Charter below.

[15] HE 269/2002 vp laiksi yhdenvertaisuuden turvaamisesta sekä eräiden siihen liittyvien lakien muuttamisesta. This proposal lapsed because of the end of the electoral term in February 2003 with a view to new elections in March 2003.

[16] As yet, cases of suspected discrimination have rarely been brought to court because under current legislation the victims have to prove that they have been treated unfairly. In 2000, there were only 12 cases in which a victim of discrimination was able to prove the case, and the perpetrator was punished. In the same year police received 79 complaints of racism, but most of these cases were either settled without trial, or the charges were dropped.

[17] Act no. 2001-1066 on combating discrimination, O.J. No. 267 of 17 November 2001 page 18311.

and 225-1 and -2 of the new Penal Code to include sexual orientation and age[18] (as well as physical appearance and name)[19]. It also introduces the prohibition of indirect discrimination in the Labour Code, although this had not been planned so far; it also extends the scope of the prohibition of discrimination to traineeships and vocational training in the company as well as to all work relations[20]. It makes it possible to reverse the burden of proof of discrimination, which in a certain sense is particularly favourable to the alleged victims, except to the detriment of public officials. It provides for the inclusion of a new Article L122-45-2 in the Labour Code, in order to protect an employee who has brought a lawsuit for discrimination against any dismissal which, having no real and serious reason, may be considered as actually constituting "a measure taken by the employer on account of the lawsuit". Finally, according to variable modalities, the Act enables trade union organizations and associations combating discrimination to take legal action in order to have violations of the law established.

Article 158 of the Social Modernization Act of 17 January 2002[21] extends the prohibition of discrimination to the area of housing and expressly states that no person may be refused the rental of accommodation "on account of his origin, name, physical appearance, sex, family situation, state of health, disability, customs, sexual orientation, political views, trade union activities, true or supposed association or not with a particular ethnic group, nation, race or religion."

In **Germany**, the Federal Ministry of Justice presented the draft of an act for preventing discriminations in civil law. However, in light of the public discussion that ensued, the Federal Government declared in September 2002 that further consultations should take place before the adoption of the necessary measures in the course of 2003.[22]

In **Ireland**, where the provision on equality of the 1937 Constitution (Article 40.1) has been found by the UN Committee on Economic, Social and Cultural Rights to offer a particularly weak protection[23] – although considerable improvements were made in the Employment Equality Act, 1998 and the Equal Status Act, 2000, with the exception of the room for positive action –, directives 2000/43/EC and 2000/78/EC probably will be not be implemented early. The Equality Authority is currently engaged in a consultation process on their implementation with various stakeholders. It has proposed, *inter alia*, that unified primary legislation as opposed to piecemeal secondary legislation be used to implement all three Equal Treatment Directives[24]; that the burden of proof should be the same for the gender and non-gender grounds covered by Irish equality legislation; that stronger legislative provision be made for positive action; and that the compensation ceilings for all nine grounds of prohibited discrimination be removed.

In **Italy**, Act No. 39/2002 of 1 March 2002, called the Community Act, empowers the Government to adopt legislative decrees in order to transpose Directives 2000/43/EC and 2000/78/EC. The decrees that will be passed on the basis of this Act must also reverse the burden of proof (in civil actions) in favour of the alleged victim of discrimination.

[18] France, however, has made use of the exception contained in Directive 2000/78/EC on age, since Article 3 of the Act of 16 November 2001 creates a new Article L122-45-3 in the Labour Code, which stipulates, "Differences in treatment based on age are not discrimination if they are objectively and reasonably justified by a legitimate objective, such as by employment policy objectives, and if the means to achieve this objective are appropriate and necessary". These differences may, for example, consist in "the prohibition of access to employment or putting in place special working conditions with a view to ensuring the protection of young and elderly workers"; "setting a maximum age for recruitment, based on the training required for the situation concerned or the necessity of a reasonable period of employment before retirement."

[19] The provisions in question already mention origin, sex, customs, family situation, association with an ethnic group, nation or race, political views, trade union or mutualistic activities and religious beliefs.

[20] See Article L122-45 of the Labour Code.

[21] Act no. 2002-73, JORF no. 15 of 18 January 2002, p. 1008.

[22] Letter of the the Federal Ministry of Justice from 20 Sep 2002 as an answer to a Kleine Anfrage in the Bundestag [Small question], Bundestags-Drucksache 14/9983. See as well the answer of the Parliamentary Permanent Secretary E. Pick from 17 Jun 2002 to the question of a Member of Parliament concerning the planned prohibition of discrimination because of religious affiliation.

[23] At par. 16.

[24] Including Directive 2002/73/EC.

The Council Directives 2000/43/EC and 2000/78/EC have not yet been implemented in the **Netherlands**, where it seems unlikely that the implementation deadline of 19 July 2003 will be met. It should be noted however, that Article 1 of the Constitution prohibits discrimination, and a fairly comprehensive legislation – the 1994 *Algemene Wet Gelijke Behandeling (AWGB)* [Dutch Equal Treatment Act] – elaborates on this norm. The AWGB prohibits discrimination in specific fields (employment, education and the provision of goods and services) on a limited number of grounds (religion, belief, political orientation, race, sex, nationality, sexual preference, marital status, working hours or temporary contract). The *Commissie gelijke behandeling* [Equal Treatment Commission] was set up to promote and monitor compliance with this Act, together with other specific non-discrimination and equal treatment legislation in the Netherlands[25].

In **Portugal**, no measures have been adopted yet to implement directives 2000/43/EC and 2000/78/EC. At present, there exists a legislative framework protecting from racial or ethnic discrimination, which should be amended, however, to comply with the former directive. Law No.134/99 of 28 August 1999 prohibits discrimination in the exercise of rights on the grounds of race, colour, nationality or ethnic origin. Racial discrimination is defined in Article 3 as a distinction, exclusion, restriction or preference based on race, colour, ancestry or ethnic or national origin with the intention or the result of preventing or restricting the equal recognition, enjoyment or exercise of rights, freedoms and guarantees or economic, social and cultural rights. Discriminatory practices are defined as actions or omissions, including attempted and negligent actions, carried out on the above-mentioned grounds. Article 4 of the law gives a detailed list of these practices, particularly in the area of employment, access to goods and services, the performance of an economic activity, the sale or rental of property, access to public buildings, health and education. These practices include actions by bodies, officials or employees of the direct or indirect administration of the state, autonomous regions or local authorities, which condition or limit the exercise of any right. They also cover official documents in which an individual or a legal entity makes a statement or conveys information, publicly or with the intention to disseminate, in which a group of persons is threatened, insulted or denigrated for motives of racial discrimination. Law No.134/99 makes provision for administrative sanctions, which may be applied both to public and to private individuals and legal entities[26]. Discriminatory acts are punished by means of a fine, without prejudice to the offender's civil liability or the application of other appropriate penalties. Under Article 10 of Law No.134/99 and Article 4 of Legislative Implementing Decree No. 111/2000, persons found guilty of discriminatory acts may be liable to ancillary penalties in addition to a fine depending on the seriousness of the offence. These penalties include *inter alia* the publication of the decision, withdrawal of public authorisation to carry out a profession or activities governed by this type of authorisation, a ban on competing for a public procurement contract, or withdrawal of a licence. If the offences in question are also liable to criminal sanctions, the offender is only given a criminal sentence.

In **Sweden**, the investigative Discrimination Commission with the task to propose how Directive 2000/43/EC and Directive 2000/78/EC shall be implemented in Swedish law, submitted its very comprehensive proposals on 2 May 2002[27]. It is expected that the proposed legal changes will enter into force on 1 July 2003. The introduction of three new acts is envisaged : an act on prohibition against discrimination on grounds of ethnic affiliation, religion or belief[28]; an act on prohibition against discrimination on grounds of disability[29]; and an act on prohibition against discrimination on grounds of sexual orientation[30]. These acts shall replace the current acts in the field of labour law, and shall apply to the other areas of society that are subject to the Directives. Four prohibitions against

[25] An evaluation of the Act resulted in a cabinet memorandum of July 2002, the overall conclusion of which was positive (*Kamerstukken II,* 2001-2002, 28 481, nr. 1).
[26] The decision to impose a fine and ancillary penalties lies with the High Commissioner for Immigration and Ethnic Minorities, who is advised by the Commission on Equality and Racial Discrimination. This decision is subject to an appeal before the ordinary court of the location where the offence was committed.
[27] SOU 2002:43, Ett utvidgat skydd mot diskriminering.
[28] Förslag till lag (2003:000) om förbud mot diskriminering på grund av etnisk tillhörighet, religion eller övertygelse.
[29] Förslag till lag (2003:000) om förbud mot diskriminering på grund av funktionshinder.
[30] Förslag till lag (2003:000) om förbud mot diskriminering på grund av sexuell läggning.

discrimination are foreseen, namely, prohibition against direct discrimination, prohibition against indirect discrimination, prohibition against harassment and prohibition against an order or an instruction to discriminate. A person who violates the prohibitions against discrimination and victimisation contained in the Acts shall, according to the proposal, pay damages both for the violation that the discrimination involves and for the financial loss that arises for the person discriminated against. The Swedish Ombudsmen have, however, expressed criticism with regard to some of the proposals, e.g., their too detailed structure and their minimalist approach.[31] The Government constituted in January 2002 a parliamentarian committee with the task to propose a more overall legislation on discrimination not later than 1 January 2004.[32] The objective is to move beyond a patchwork approach to antidiscrimination, the different pieces of legislation for instance do not present a coherent definition of the term "discrimination", or are inconsistent in the demands for action to be taken by employers or with regard to the role of the supervisors (the ombudsmen). This creates an unclear and insufficient legal situation for the victims or targets of discrimination and also omits important areas, in which discrimination can occur.

The procedural dimensions of the fight against discrimination

Two important aspects of Directives 2000/43/CE and 2000/78/CE concern the reversal of proof in discrimination cases – with respect to civil proceedings – and the obligation imposed on the Member States to allow organizations that have an interest therein to institute judicial or administrative proceedings in order to enforce compliance with the Directive, "on behalf or in support of the complainant, with his or her approval" (Article 7 §2 of Directive 2000/43/EC; Article 9 §2 of Directive 2000/78/EC). It seems appropriate to draw attention to two questions that have been raised during the period under scrutiny in connection with these aspects of the Directives based on Article 13 EC.

A judgment given on 11 June 2002 by the French Court of Cassation is worth citing. It settles a question that has been extensively debated in the context of the transposition of Directives 2000/43/EC and 2000/78/EC, namely that of the admissibility of the use of "situation tests" in order to prove discrimination committed by a particular person. The principle of the presumption of innocence and the lawfulness governing the penal subject make recourse to this kind of evidence in criminal procedure particularly delicate. Nevertheless, in the above-mentioned judgment which it delivered on an appeal by the association SOS-Racism, the French Court of Cassation quashed a judgment given on 5 June 2001 by the Court of Appeal in Montpellier. The latter judgment acquitted the persons accused of racial discrimination committed during the provision of a service on account of origin or ethnic group and nonsuited the party claiming damages, since the appeal court was of the opinion that the proof of discrimination had not been established according to a fair procedure: "the operation of "testing" by groups of prospective customers had been carried out unilaterally by the association, which had merely called upon its members or sympathizers, who had been duly informed that the object of the operation was not to enter "La Nuit", "Souleil" or "Toro Loko", but to prove the segregation that took place at the entrance of these establishments." An examination of the grounds for the judgment of the Appeal Court suggests that the fairness of the "testing" method had raised doubts in the mind of the Court, on account of the fact that, given their intention to expose a form of discrimination which they suspected and wanted to prove, the authors of these situation tests may have - by their behaviour or their dress - created the conditions for being denied access to the establishments concerned. The judgment has been quashed essentially on the basis of the consideration that by subordinating the admissibility of "testing" as a method for proving the challenged offence, the Appeal Court had disregarded Article 427 of the Code of Criminal Procedure, which enshrines the principle of freedom of penal proof.

[31] HomO, Yttrande över betänkandet *Ett utvidgat skydd mot diskriminering* (SOU 2002:43), 16 September 2002, pp. 3-7; A.Danielsson, *Diskrimineringslagarna räcker inte*, SvD, 10 October 2002, pp. 16-17; HO, Handikapp Ombudsmannen, *Betänkandet Ett utvidgat skydd mot diskriminering* (SOU 2002:43), Dnr 923/2002, 16 September 2002, pp. 1-9.
[32] Kommittédirektiv, Tilläggsdirektiv till Diskrimineringsutredningen 2001 (N 2001:01), Dir. 2002:12.

In **Finland**, a delicate question is raised by a proposal made by the SAK (Central Organisation of Finnish Trade Unions) on the *locus standi* of trade unions. While proposals were being made concerning the right of the labour organisations to file and pursue legal claims on behalf of the victims of ethnic discrimination has recently, a parallel proposal was that trade unions should have *locus standi* to defend employees whose rights have been infringed. However, this already happens in the sense that any trade union is free to assist any worker (even one who is not a union member) in pursuing a lawsuit, provided that the trade union secures the necessary authorisation from the worker concerned. In the SAK proposal however, the trade union should be entitled to pursue the matter even though the employee opposes the action. However, this last possibility is quite extraordinary, and may lead to some odd consequences. Opponents of these proposals are of the view that the proposals illustrate a certain tendency to paternalism where disadvantaged minorities are concerned. The argument is that migrant labour abuse and the unwillingness of victims to claim their rights are largely structural problems of empowerment which cannot be resolved through paternalist approaches. Instead of pursuing litigation that the injured party opposes, the essential question is to ask why the injured party prefers not to seek a remedy, and address this problem. Finally, many believe that the proposals – in particular SAK's proposal – are motivated less by concern for the migrant worker and more by the desire to stabilise the working conditions of Finnish workers so that these are not undermined by cheap foreign labour.[33]

Trend businesses (Tendenzbetriebe)

Although a difference of treatment based on religion or belief is normally a form of direct discrimination and therefore not justifiable, Directive 2000/78/EC provides for the maintenance of the exceptions stipulated in the domestic law of the Member States, which concern "the case of occupational activities within churches and other public or private organizations the ethos of which is based on religion or belief". The differences of treatment based on religion as practised by churches thus do not constitute discrimination where "a person's religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organization's ethos"[34]. It is in this sense that we may interpret the judgment given in **Germany** by the Federal Constitutional Court on 7 March 2002[35]. The applicant was employed as kindergarten manageress with a Protestant parish. The parish expressed an extraordinary dismissal because of the active function within the "Universal Parish" by the applicant. The Federal Labour Court declared the dismissal as legal. According to the Federal Constitutional Court, the Federal Labour Court adequately weighed the complainant's church's right of self-determination against the applicant's religious freedom was not to be objected.

In **Ireland**, religion is one of the nine prohibited grounds of discrimination covered by the Employment Equality Act, 1998 and the Equal Status Act, 2000. The Irish Constitution, 1937 also contains a detailed guarantee of religious freedom in Article 44 which has been interpreted purposively by the Irish courts[36]. Although religious discrimination is ostensibly prohibited by law, Section 37 of the Employment Equality Act, 1998 creates an exemption for institutional employers (in the areas of education, health and religion) with a religious ethos. It is this exemption which has been preserved by the Framework Employment Directive. However, concerns have been expressed by, among others, teachers' unions about this exemption. Although the measure has been defended as a protection for minority religions running institutions with a religious ethos the substantial majority of institutions to which the provision applies are run by the Roman Catholic Church.

Religion

Providing reasonable accommodation of diverse religious views in the workplace to avoid any indirect discrimination may sometimes be problematic, and create a conflict with other rights. In the

[33] Source: http://www.artto.kaapeli.fi/unions/T2003/g02
[34] Article 4 §2 of Directive 2000/78/EC.
[35] Chamber, -1 BvR 1962/01 - , Neue Jurist. Wochenschrift 2002, 2771.
[36] See generally: Casey, *Constitutional Law in Ireland* (3rd Edition), (Dublin: Round Hall Sweet & Maxwell, 2000), Chapter 19.

Netherlands, a case was brought before the *Commissie gelijke behandeling* [Equal Treatment Commission] after an Islamic applicant for a job in the reproduction department of a school was rejected because he refused to shake hand with women. Basing his refusal on religious grounds, he claimed to be the victim of discrimination. The Equal Treatment Commission rejected his complaint, considering that a distinction had been made, but that this was objectively justified. It was accepted that the school expected all its staff members to shake hands with people from both sexes, as an expression of the principle of equal treatment. Admittedly this policy affected those Muslims who refuse to shake hands with women, but it did not restrict their internal freedom to adhere to their creed[37].

Age

In the **Netherlands**, alleged age-based discrimination led to some interesting decisions during the period under scrutiny. A regulation provides that persons receiving social security benefits may only remain outside the country for 4 weeks per year. For recipients of over 57,5 years old, a more flexible rule applies: they may stay abroad for up to 13 weeks per year. A young recipient argued that this distinction was incompatible with Article 1 of the Constitution and Article 26 ICCPR since it amounted to discrimination on the basis of age. The *Rechtbank* [Court of First Instance] of Alkmaar rejected this argument, considering that the regulation aimed to secure the availability of recipients for the labour market, whereas older recipients do not have to make themselves available[38].

A few months earlier, the *Rechtbank* [Court of First Instance] of Amsterdam found that dismissal at the age of 62 was unjustified because it was based on general convictions rather than a concrete assessment of the employee's performance. The dismissal was found to be contrary to Article 1 of the Constitution and Article 26 ICCPR[39]. On the other hand, the *Hoge Raad* [Supreme Court] confirmed that dismissal at the age of 65 does not amount to discrimination on the ground of age. The applicant had argued that the existing case-law should be reconsidered so as to reflect present-day standards. The Supreme Court observed, however, that only in 2001 a bill had been tabled concerning equal treatment on the ground of age as regards labour – the bill, which should implement directive 2000/78/EC, was is still under discussion in Parliament at the end of 2002[40] –, which expressly provided for dismissal at 65. This implied that an reasonable and objective justification for compulsory retirement at that age must still be considered to exist[41].

A similar issue was raised in **Finland**, where a judgment of 27 November 2002 by the Vantaa District Court, *Leppänen v. Fazerin Leipomot*, ruled that Fazer Bakeries had no right to dismiss an employee who turned 65. The retirement age in Finland is 65 but the law does not say that people are obliged to retire at 65, and early retirement is seen as having to be discouraged[42]. The employee – the shop steward of the company – had wished to continue working as she had just been selected by the other employees to continue in the position of shop steward. In addition, her pension would have been quite small due to numerous years spent at home caring for her children. However, Fazer Bakeries decided to terminate her employment contract on the basis that the employee had reached the age of 65. The shop steward then sued the company in July 2001, arguing to be a victim of age discrimination. The Court agreed, underscoring that employees must be treated equally regardless of their age. The Court also observed that no law states that reaching a certain age would allow an employer to terminate an employment contract.

[37] *Commissie gelijke behandeling*, Oordeel 2002-22, 5 March 2002.
[38] *Rechtbank Alkmaar*, LJN-nr. AE6671, 15 August 2002.
[39] *Rechtbank Amsterdam, sector kanton*, JAR 2002, 173; 19 April 2002.
[40] *Kamerstukken II,* 2001/02, 28 170, nr. 1-2.
[41] *Hoge Raad*, LJN-nr. AE7356, 1 November 2002.
[42] Of the somewhat more than 50,000 persons who reached the age of 65 in 2002, about 7,200 are not yet retired. A couple of years ago only every tenth of each age group managed to cope with their work till the general retirement age of 65. Source : The Central Pension Security Institute, http://www.etk.fi/english/2/vvasiat2002eng.htm

Sexual orientation

During the period under scrutiny, several debates concerned the obligation of equal treatment regardless of sexual orientation, beyond the professional field to which the scope of Framework Directive 2000/78/EC of 27 November 2000 restricts itself (which only concerns employment, vocational guidance and vocational training, employment and working conditions, membership of and involvement in a professional organization). The question came up in connection with the demand to be able to start a family life without discrimination by access to adoption and parenthood. In **France**, the issue of adoption of a child by a homosexual couple was the subject of a major controversy. In a judgment of 5 June 2002, the Council of State upheld the possibility for the administrative authority responsible for consenting to adoption to base itself on "the absence of identificatory reference points due to the absence of a paternal referent" (absence of paternal image) to refuse such consent[43]. A few months earlier, the European Court of Human Rights considered, in the case of *Fretté v. France*[44], that in the absence of consensus at the European level, the refusal to give the necessary consent for the adoption of a child by a homosexual couple comes within the margin of discretion of the Member States and can therefore not be considered a violation of Article 8 of the European Convention on Human Rights in combination with the obligation of non-discrimination. This judgment, however, cannot be interpreted as meaning that the European Court of Human Rights concedes that the differences which the State parties make between categories of persons of different sexual orientation in the enjoyment of private or family life are not discriminatory. The *Fretté* judgment was passed by 4 votes to 3, and of the judges who made up the majority, 3 considered that an absence of violation had to be concluded for purely technical reasons, linked to the non-applicability - in their opinion - of Article 14 of the European Convention on Human Rights.

Caution is required when interpreting the lessons of the *Fretté* judgment, especially as the European Court of Human Rights has always been receptive to the growth in European consensus on certain issues. However, on the issue of the right of adoption for same-sex couples, notable changes have taken place or are under way. In **Sweden**, the Parliament approved on 5 June 2002 with a considerable majority (198 members of the Parliament voted in the affirmative, 38 voted against and 71 abstained from voting) the proposal[45] to modify the legislation according to which only married couples may adopt children jointly. According to the proposal, the legal differences regarding homosexual and heterosexual couples' abilities to adopt a child are no longer objectively justified[46]. The recent legislative developments, including the introduction of registered partnership[47], imply instead that registered partners, in the same way as married couples, are given the possibility of being jointly considered as adoptive parents. On the 24 October 2002 the Government decided that the Parliaments' decision to legally equalise hetero- and homosexual parenthood and the law reforms that were undertaken as a result of that decision shall enter into force on 1 February 2003.[48] The Minister of Justice, Thomas Bodström, has underlined, however, that even in the future each application for adoption shall be decided upon individually and that the child's best interests shall be the decisive consideration and not the sexual orientation of the applicants.[49] The Children's Ombudsman

[43] Council of State, 5 June 2002, Mlle B., application no. 230533 (refusal of consent to adoption for the homosexual applicant, who is cohabiting). See note AJDA, 2002, p. 615.
[44] Eur. Court H.R., *Fretté v. France* judgment of 26 February 2002.
[45] Government Bill, prop. 2001/2002:123, Partnerskap och adoption
[46] See the Report from the Commission on the Situation of Children in Homosexual Families, SOU 2001:10, Slutbetänkande av Kommittén om barn i homosexuella familjer SOU 2001:10.
[47] Lag om ändring i lagen (1994:1117) om registrerat partnerskap (SFS 2002:603); Lag om ändring i lagen (1987:813) om homosexuella sambor (SFS 2002:604); Lag om ändring i lagen (1987:813) om homosexuella sambor (SFS 2002:605); Lag om ändring i lagen (1947:529) om allmänna barnbidrag (SFS 2002:606)[47]; Lag om ändring i namnlagen (1982:670) (SFS 2002: 607); Lag om ändring i lagen (1996:1030) om underhållsstöd (SFS 2002:608) and Lag om ändring i lagen (1998:674) om inkomstgrundad ålderspension (SFS 2002:609).
[48] See Viktigare lagar & förordningar, 25 December 2002, p. 7. The investigative commission on international adoptions shall present its conclusions no later than 31 May 2003. Kommittédirektiv, Tilläggsdirektiv till Utredningen om internationella adoptioner (S 2001:08), Dir. 2002:121. As a consequence of these significant changes in legislation, the Swedish Government has withdrawn from the 1967 European Convention on the Adoption of Children, according to which a child may be adopted only by persons married to each other, or by one person.
[49] HomO, 02-11-08, Dnr. 372/02, p. 2.

(Barnombudsmannen) has expressed the opinion in this connection that it is neither appropriate nor necessary to have different criteria for homosexuals during the consideration of the suitability of the prospective adoptive parents. On the other hand, she is critical as to the fact that the main emphasis of the new legislation is put on the rights of the prospective parents instead of giving greater attention to the best interests of the child. Thus, the child's perspective has not been included into the considerations to an appropriate extent. Neither has the child perspective been included in the terms of reference of Governmental Commissions of inquiry. In her view, there is a right for children to have a parent/s and not a right of adults to have a child.[50]

In **Belgium**, the opening of marriage to same-sex couples[51] has been dissociated from all implications for parenthood as well as for the possibility of joint adoption. The two bills on adoption reform, currently submitted for parliamentary debate[52], opens adoption only to unmarried heterosexual couples, on condition that the partners are permanently and emotionally united and have been living together for at least three years at the time of initiating the legal adoption procedure. In **Spain**, with the support of the Community Youth Ombudsman, the Asturian Parliament adopted the Act on stable couples allowing same-sex couples to accommodate minors at risk of social exclusion[53]. However, the legislations of the Autonomous Communities on stable couples do not provide for any possibility of adoption, with the exception of the Act adopted by Navarra, which the government has referred to the Constitutional Court.

Other initiatives aimed at combating discrimination based on sexual orientation are also worth mentioning. In **Austria**, after the Constitutional Court had in a judgment of 21 June 2002 declared unconstitutional Article 209 of the Criminal Code (*Strafgesetzbuch*), which classed as an offence - liable to a prison sentence of up to five years - the fact of a man aged over 19 having a homosexual relationship with a man aged between 14 and 18, based on mutual consent, this clause was abolished by the legislator on 10 July 2002[54]. In a judgment in the case of *L. and V. v. Austria* of 9 January 2003, the European Court of Human Rights found that the clause in question constituted a discrimination prohibited by Articles 8 and 14 of the European Convention on Human Rights[55]. It noted in this respect, "Just like differences based on sex, (...), differences based on sexual orientation require particularly serious reasons by way of justification" (§ 45); the Austrian government was unable to offer any convincing justification for maintaining a difference in treatment between male homosexual relations and other sexual relations, with regard to the age of consent. The prejudice towards homosexuality cannot furnish such a justification: "To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour" (§ 52).

We may mention two decisions which show a tendency to consider that putting the situation of unmarried same-sex couples on an equal footing to that of married couples constitutes an obligation of equal treatment irrespective of sexual orientation. In the **United Kingdom**, it has been held that a legislative provision governing the entitlement of a spouse to succeed to a tenancy should be read as

[50] Remissvar Betänkande (SOU 2001:10) Barn i homosexuella familjer, 2 July 2001, p. 1. See also Remissvar, Synpunkter med anledning av hearing om registrerade partner och adoption, 21 December 2001 and remissvar departementspromemorian Föräldrars samtycke till adoption mm. (Ds. 2001:53), 28 March 2002. See in addition Barnombudsmannens yttrande över regeringens rapport 2002 till FN:s kommitté för barnets rättigheter, p. 24.

[51] See the commentary on Article 9 of the Charter.

[52] The Hague Convention of 29 May 1993 on protection of children and co-operation in respect of intercountry adoption has still not been ratified by **Belgium**, although it has already been approved by a Decree of the French-speaking Community of 31 March 1994 (*Mon. b.*, 19 May 1994). Two bills on adoption reform were approved by the Government on 22 June 2001 and have been pending since July 2001 before the House of Representatives (bills 1366/01 and 1367/01). They provide for an obligation for the parents to prepare for adoption where intercountry adoption is concerned, and entrust the Justice of the Peace with the authority to assess the qualifications and fitness of the prospective adoptive parents.

[53] *Terra. Actualidad*, 17 May 2002.

[54] The amendment, published in the Official Gazette (*Bundesgesetzblatt*) no. 134/2002, entered into force on 14 August 2002.

[55] European Court of Human Rights (1st section), *L. and V. v. Austria* (application no. 39392/98 and 39829/98) judgment of 9 January 2003.

covering a partner in a same-sex relationship[56]. A judgment given in **Spain** on 4 June 2002 by the social chamber of the High Court of Justice of Andalusia considered that the refusal to grant one of the couple a free travel ticket on account of the homosexuality of the couple is discrimination based on sexual orientation. Since the same benefit would have been given to a couple, even unmarried, if they were a man and woman, this assessment is perfectly justified. It should be noted that, although Directive 2000/78/EC does not claim to challenge "national laws on marital status and the benefits dependent thereon"[57], and therefore does not prohibit reserving certain benefits for married couples while refusing those same benefits to unmarried couples, it excludes in its scope all difference in treatment between heterosexual and homosexual couples: from the moment it is based solely on this difference in sexual orientation, such a difference of treatment should be considered as constituting a form of direct discrimination based on sexual orientation[58].

Fight against incitement to hatred or discrimination and blasphemy

When certain groups are protected against incitement to hatred or discrimination or - in the case of religious communities - against blasphemy, which is an attack on religious feelings, this protection must be granted without discrimination to all groups in a similar situation. In the *Wingrove* judgment, the European Court of Human Rights noted that the fact that English law suppresses blasphemy that is directed at the Christian faith but not when it is directed at other religious faiths constitutes an "anomaly"[59]. In the opinion of 30 November 2001 which it delivered on the **United Kingdom** (opinion published on 25 May 2002), the Advisory Committee of the Framework Convention for the protection of national minorities declared more clearly that it was "concerned by the need to reform the law on blasphemy, which in its current form only concerns Christians and does not protect other religions". It considers that this absence of effective equality, of which the ethnic minorities in particular are victims, is worrying from the point of view of Articles 8 and 4 of the Framework Convention. It is of the opinion that this law should be abolished or extended to other religions so as to ensure full and effective equality. The Committee is pleased to learn that according to Government statements that have appeared in the press the reform of blasphemy law has been placed on the agenda" (§60)[60]. In this respect, too, the situation observed in **Spain** by the Audiovisual Council of Catalonia when it adopted criteria regulating the treatment of religious subjects in entertainment programmes where often a lack of respect is shown towards religious faiths, seems problematic. The current law only protects the religious feelings of Catholics - under the terms of the Agreements concluded between Spain and the Vatican - but not those of other believers.

Article 4 of the International Convention of 21 December 1965 on the elimination of all forms of racial discrimination obliges the State parties to declare punishable by law all dissemination of ideas based on racial superiority or hatred, and to declare illegal and to ban organizations that incite and encourage racial discrimination. Nevertheless, several examples illustrate the difficulty experienced by the States in effectively combating anti-freedom movements that misuse freedom of expression and association to disseminate an ideology of incitement to hatred and national or ethnic discrimination.

In **Germany**, the Federal Government presented in May 2002 a detailed "Report about the current and planned measures and activities of the Federal Government against right-wing extremism, xenophobia,

[56] *Ghaidan v Mendoza* [2002] 4 All ER 1162.
[57] See point 22 of the Preamble.
[58] The judgment given on 17 February 1998 in case C-249/96, *L. Grant v. South-West Trains Ltd., ECR* I-636, in no way challenges the idea that the refusal to grant to the unmarried same-sex partner the benefit which would have been given to the unmarried partner if he had been of a different sex constitutes a form of direct discrimination based on sexual orientation. In this judgment, the Court only refused to conclude an infringement of the prohibition of discrimination imposed in Community law because the situation that was submitted to its scruntiny fell outside the scope of Community law. The adoption of Directive 2000/78/EC means that in future the same situation would no longer be admissible in Community law.
[59] European Court of Human Rights, *Wingrove v. United Kingdom* judgment of 25 November 1996, *Vol.* 1996-V, p. 1956.
[60] See also, insisting on the need to reform blasphemy laws, the Resolution adopted by the Committee of Ministers : *Resolution Res CMN (2002) 9 on the implementation of the Framework Convention for the Protection of National Minorities in the United Kingdom*, 13 June 2002.

anti-Semitism and violence"[61], which describes fight against right-wing extremism as one of the priorities of the Federal Government. The 2000 Report on the Protection of the Constitution states that there were at the time 144 extreme right-wing organisations and groups of people in Germany (1999: 134); the number of members as well as non-organised right-wing extremists of around 50,900 was slightly below the previous year's figure (1999: 51,400). Around 36,500 people are organised in the three extreme right-wing parties ("Nationaldemokratische Partei Deutschlands" (NPD), "Deutsche Volksunion" (DVU) and "Die Republikaner" (REP).

In **Portugal**, following a constitutional reform in 1997, Article 46.4 prohibits racist organisations or organisations with a fascist ideology. Law No. 64/78 specifically prohibits fascist organisations and Law No. 28/82 empowers the Constitutional Court to declare an organisation to be fascist and hence to strip it of its legal status. In principle, the above-mentioned statutory provisions only apply to fascist organisations and not to exclusively racist organisations. However, Portuguese criminal law contains a number of provisions aimed at combating racism and intolerance, covering incitement to racial hatred, defamation, insult and discriminatory practices. Article 239 of the Criminal Code defines and prohibits genocide, direct public incitement to commit genocide, and conspiracy to commit genocide. Article 240 of the Criminal Code punishes discrimination on grounds of race or religion. Paragraph 1 of this article makes it an offence to found or establish organisations or engage in organised propaganda activities, which incite or encourage racial or religious discrimination, hatred or violence. It also prohibits participation in or assistance, including financial assistance, to such organisations or such organised propaganda activities[62]. Paragraph 2 of Article 240 punishes anyone who, in a public meeting, in writing intended for dissemination, or by any other means of social communication, provokes acts of violence against an individual or group of individuals on grounds of their race, colour, or ethnic, national or religious origin with the intention of inciting to or encouraging racial or religious discrimination. Paragraph 2 also punishes anyone who, in a public meeting, in writing intended for dissemination, or by any other means of social communication, defames or insults an individual or group of individuals on grounds of their race, colour, or ethnic, national or religious origin, particularly by denying war crimes and crimes against peace or humanity, with the intention of inciting to or encouraging racial or religious discrimination. Since 2000, ten cases have been brought on the basis of this provision[63], but to date only three have been judged, because of the difficulty of proving the discriminatory intent[64]. To promote the application of the provisions of Article 240 and to provide awareness raising and initial and in-service training on these issues for all those involved in the criminal justice system, including the police, the prosecuting authorities and the judiciary seems to be a task to be fulfilled in the future, as well as the taking of more active measures to counter racially motivated crime and incitement to racial discrimination and violence. Under Article 132.2 f) of the Criminal Code on homicide, motives of racial, religious or political hatred are regarded as aggravating circumstances resulting in a heavier penalty. Such aggravating circumstances may also apply in cases of assault causing bodily harm under Article 146 of the Criminal Code. On the other hand, there is no general rule providing that racist motives constitute an aggravating circumstance for all offences. This means that, for other offences, it is left to the courts to decide, on a case-by-case basis, whether racial motives constitute an aggravating circumstance.

In the absence in **Sweden** of legislation outlawing organizations, which promote or incite racial hatred, there is an obvious need for the tackling of racist crimes within the police and the judicial system. The Prosecutor General (Riksåklagaren (RÅ)) has very recently distributed general guidelines to all prosecutors in the country encouraging a culture of zero tolerance towards "hate crimes" (defined as crimes with racist, xenophobic or homophobic motives). He also will put greater pressure on local

[61] Bundestags-Drucksache 14/9519 of 15 May 2002.
[62] Under Article 160.1 d) of the Constitution, members of parliament convicted by a court for membership of an organisation that is racist or follows a fascist ideology cease to hold office. This rule has never been applied.
[63] When a prosecution is brought for any of the above-mentioned racist or xenophobic offences, immigrant associations and anti-racist and human rights organisations are entitled, under Law No. 20/96, to join the proceedings as *assistente* without being requested to do so by the victim, except where he or she formally objects.
[64] In some cases, although the public prosecutor's department called for a conviction based on Article 240, judges have convicted offenders on other legal grounds than Article 240.

officials to prosecute that kind of crimes, which have increased considerably during the last five years (from 2002 to 4284 cases).[65] According to the Swedish Security Police Board (SÄPO), 940 out of these were committed by Swedish neo-Nazi groups.[66] The NGO community has, on numerous occasions, voiced concern about the non-sufficient application of the Criminal Code (BrB), which tackles racially motivated crimes.[67]

Belgium was criticized by the Committee for the Elimination of Racial Discrimination (CERD) in the final observations which it submitted in April 2002, namely for the ineffectiveness of the measures taken against political organizations that incite to racial discrimination. Introduced by the Act of 12 February 1999, Article 15c, §1, of the Act of 4 July 1989 on the restriction and monitoring of election expenses incurred for the purposes of the federal elections, and on the funding and open accounting of political parties[68] provides that "any political party which through its own doing or through its constituent parts, its lists, its candidates or its elected representatives, manifestly shows through various corroborating signs its hostility towards the human rights guaranteed by the European Convention safeguarding human rights and fundamental freedoms and its additional protocols in force in Belgium"[69]. So far, however, the penalties are still virtual, failing the adoption of the Royal Decree referred to in Article 15c, §3, of the Act of 4 July 1989. An extra difficulty lies in the fact that a simple decree may not suffice here, since the adoption of a law may be necessary owing to the nature of the changes to be made to the jurisdiction of the courts linked to the judicial control of the sanction consisting in the deprivation of public funding. But there are solutions. They may also deviate from the system initially provided for in the Act of 12 February 1999, for example by entrusting this control task to the Court of Arbitration, whose powers will then have to be altered[70]. In any case, it is important that, in this area, Belgium adopts the initiatives that are expected of it in order to comply with its international obligations.

Article 22. Cultural, religious and linguistic diversity

Two instruments elaborated in the Council of Europe guarantee the preservation of diversity in Europe. The Framework Convention for the Protection of National Minorities, opened to signature on 1 February 1995[71], became effective three years later. It contains no definition of "national minority". However, we should understand this notion as meaning - in accordance with the definition contained in the proposal for an Additional Protocol to the European Convention on Human Rights on persons belonging to national minorities, made by the Parliamentary Assembly of the Council of Europe on 1 February 1993[72] – "a group of persons in a State who: a. reside on the territory of that State and are citizens thereof, b. maintain longstanding, firm and lasting ties with that State, c. display distinctive

[65] See K. Lönnheden, *Hatbrott ger inte strängare straff*, Press Judicata, No. 5, November 2002, pp. 6-7; BRÅ, *Hatbrott. En uppföljning av rättsväsendets insatser*, www.bra.se and F.Engström, *RÅ kräver hårdare tag mot "hatbrott",* SvD 26 November 2002, p. 4.
[66] B.Gorlick, *Shifting Priorities, Attitudes, and Institutional Change*, in Refugees, Vol. 19, No. 5, May 2001.
[67] Alternative Report to the Human Rights Committee, p. 58.
[68] *M.B.,* 20 July 1989, p. 12715.
[69] For comments, see S. Depré, « Le financement public des partis politiques hostiles aux droits et libertés de l'homme », *Revue belge de dr. const.,* 1999, p. 287 ; Fr. Tulkens, « Le statut juridique et financier des partis politiques : vers la fin du non-droit ? », *Rev. de droit de l'ULB*, 1997/16, p. 7; F. Dejongen, "Artikel 15ter van de wet betreffende de beperking en de controle van de verkiezingsuitgaven voor de verkiezingen van federale kamers, de financiering en de open boekhouding van de politieke partijen. Voor een betere bescherming van democratie ?", *Jur. Falc*., 2000-2001, p. 591.
[70] See the draft declaration for a review of Section II of the Constitution, with a view to inserting an article making it possible to deprive anti-freedom movements of the benefit of subsidies, resources and offices granted to political, economic, social or cultural groups on account of the services they render to the community, submitted on 18 July 2001 by Marie Nagy, Jean Cornil, Myriam Vanlerberghe and Frans Lozie, *Doc. parl., Sénat,* n° 2-870/1; accompanied by the draft declaration for a review of Article 142 of the Constitution, with a view to adding a paragraph granting the Court of Arbitration the power to decide on the other cases provided for by the Constitution, submitted on 18 July 2001 by Marie Nagy, Jean Cornil, Myriam Vanlerberghe and Frans Lozie, *Doc. parl., Sénat*, n° 2-871/1.
[71] E.T.S., n° 157.
[72] Recomm. 1201 (1993). The definition is in keeping with that which is generally upheld in international public law: Fr. Capotorti, *Etudes des droits des personnes appartenant aux minorités ethniques, religieuses et linguistiques*, doc. UNO, A/CN4/Sub.2/384/Rev. 1, 1979, p. 102; or C.P.J.I., Advisory opinion of 31 July 1930*, Question des "communautés" gréco-bulgares*, Series B n°17, p. 21.

ethnic, cultural, religious or linguistic characteristics, d. are sufficiently representative, although smaller in number than the rest of the population of that State or of a region of that State, e. are motivated by a concern to preserve together that which constitutes their common identity, including their culture, their traditions, their religion or their language". Another relevant instrument is the European Charter for Regional or Minority Languages, opened to signature on 5 November 1992 and effective since 1 March 1998, and which according to its Preamble aims to guarantee "the right to use a regional or minority language in private and public life".

The state of ratification of these instruments gives a first indication of the willingness of the Member States to respect the right enshrined in Article 22 of the Charter. This examination, however, does not give any cause for optimism. **France** still has not signed the Framework Convention of the Council of Europe for the protection of national minorities, since it considers that the principle of unity and indivisibility of the French Republic as enshrined in the Constitution is incompatible with the recognition of the presence of national minorities on the French territory, as implied by the Framework Convention for the protection of national minorities. Four Member States who signed this instrument have still not ratified it: **Belgium**, **Greece**, **Luxembourg** and the **Netherlands**. These delays have occurred, although according to the criteria of Copenhagen, the ratification of the Framework Convention is a condition imposed on the States who have applied to join the European Union. Furthermore, they can all the less justify their position since the protection of national minorities is already partly assured by the European Convention on Human Rights[73]. All the Member States are parties to the International Pact on Civil and Political Rights, in which Article 27 stipulates the right of members of ethnic, religious or linguistic minorities "in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language". The European Charter for Regional or Minority Languages has only been ratified by eight Member States of the European Union; three other States have signed it (**France**, **Italy** and **Luxembourg**), but have yet to ratify it[74]; **Belgium**, **Greece**, **Ireland** and **Portugal** have not signed this treaty.

In its resolution 1301(2002)[75], the Parliamentary Assembly of the Council of Europe recommends that **Belgium** should ratify the Framework Convention for the protection of national minorities and Protocol no. 12 of the European Convention on Human Rights. It considers, in line with the opinion delivered by the Venice Commission[76], that the following should be considered as national minorities: "at state level, the German-speaking community; at regional level, the French-speakers in the Dutch-language region and in the German-language region, and the Dutch-speakers and German-speakers in the French-language region". Adopted on the basis of the report by Mrs Nabolhz-Haideger[77], resolution 1301(2002) should be seen in the light of the linguistic disagreements that were triggered off by "a growing tendency for the Flemish Government to restrict as far as the law will allow it the

[73] In particular through the right to respect for private life in Article 8 of the European Convention on Human Rights, which guarantees certain aspects of the rights of national minorities (see European Court of Human Rights, *Noack et al. v. Germany* (application no. 46346/99) decision of 25 May 2000; European Court of Human Rights (GC), *Chapman et al. v. United Kingdom* judgment of 18 January 2001); the freedom to manifest one's religion (Article 9 of the European Convention on Human Rights) also guarantees that a minority can practise its religion, which may constitute an aspect of its identity.

[74] In **Italy**, on 7 June 2002, the Government had presented to Parliament a bill concerning the ratification of the European Charter for Regional or Minority Languages. **France** refused to ratify the Charter for Regional or Minority Languages following the decision of the Constitutional Council of 15 June 1999. The Council considered that the combined clauses of the Charter, "in that they confer specific rights to 'groups' of speakers of regional or minority languages within the 'territories' in which these languages are spoken infringes the constitutional principles of indivisibility of the Republic, of equality before the law and the unity of the French people". They are also contrary to the first paragraph of Article 2 of the Constitution ("The language of the Republic is French") in that they seek to grant a right to speak another language than French, not only in private life but also in "public life", to which the Charter links the law, the administrative authorities and the public services. See commentary by R. Debbasch, JCP 10 November 1999, n° 45-46, pp. 2038 et seq. ; M. Verpeaux, RFDC, 1999, p. 594.

[75] Council of Europe, Resolution 1301 (2002), Protection of minorities in Belgium, 26 September 2002.

[76] European Commission for Democracy through Law, Opinion on the groups of persons to whom the Framework Convention for the Protection of National Minorities may apply in Belgium, Venice, 8 and 9 March 2002

[77] Council of Europe, Legal Affairs and Human Rights Committee, Report: Protection of minorities in Belgium, Doc. 9536, 5 September 2002

use of language facilities in order to reinforce the Flemish and Dutch-speaking character of the region"[78]. Belgium signed the Framework Convention for the Protection of National Minorities on 31 July 2001. However, it added a reservation concerning the linguistic regime in Belgium, of which the compatibility with the object and purpose of the Framework Convention - and therefore the validity in international law, with regard to the law of treaties - is doubtful[79]. Moreover, Belgium made its ratification of the Convention dependent on the outcome of a ministerial conference on foreign policy, which must agree, if not on a definition of "minorities" according to the interpretation which Belgium wishes to give to this notion, at least on the identification of the "minorities" which, in Belgium, are to be granted the rights enumerated in the Framework Convention. Such a situation is paradoxical, particularly bearing in mind the obligations which the States applying to join the European Union are being asked to assume by virtue of the criteria of Copenhagen, which here go beyond what the Member States of the European Union seem to want to impose on themselves.

Austria is finding it difficult to comply with the requirements which its own State Treaty imposes on it, according to the Constitutional Court, in the matter of the protection of minorities. On 13 December 2001, the Constitutional Court annulled[80] provisions in the Minority Peoples Act (*Volksgruppengesetz*) and in the implementing statutory instruments that provided for the mounting of bilingual topographic signs (such as plates indicating village names) only in administrative districts where the minority in question reached at least 25% of the population. Basing itself on an international comparative analysis of minority protection and the historical background of Article 7 of the Vienna State Treaty 1955, the Court found that the 25% prerequisite, being at the upper level of what is internationally practised, could not be reconciled with the spirit of the minority friendly State Treaty which was transformed into Austrian law at constitutional level. Instead the Court suggested introducing a new limit of about 10%. This ruling caused some political turmoil, especially in Carinthia where the case had initially emerged and would have the most impact, if implemented accordingly, due to the respectable size of the Slovene community in the Southern part of the province. So far all rounds of negotiations between Slovene representatives and officials of the provincial government have failed to produce an outcome that is politically acceptable for all participants. And on 31 December 2002 the one-year period set by the Constitutional Court for Parliament to pass legislation that is in conformity with the constitutional imperative of appropriate minority protection elapsed without any measures taken. As a consequence Article 7 of the State Treaty will be directly applicable from 1 January 2003, and Slovenes unsatisfied with the meagre results of the talks have announced to bring the matter before the courts again.

On 7 October 2002, the Supreme Court of **Spain** considered that there was an objective and reasonable justification for Catalan public television to broadcast programmes in Catalan only. It noted in this respect that several TV stations broadcast in Castilian on the territory of Catalonia, and that the promotion of the Catalan language by Catalan public television constitutes a measure for the promotion of a minority language, which does not violate the principle of equality.

Like **Belgium**, **France** and **Luxembourg**, **Greece** has not ratified the Framework Convention for the Protection of National Minorities, nor the Charter for Regional or Minority Languages. Yet in its report of 17 July 2002, the Commissioner for Human Rights of the Council of Europe gave a favourable assessment of the situation of the Muslim minority in Thrace. With regard to the right to identify oneself as one sees fit, after recalling that in the past Greek citizens belonging to groups defined by linguistic or cultural criteria experienced difficulties in exercising certain rights, Mr Alvaro Gil-Robles observed that there is a greater receptiveness by the Greek authorities to the phenomenon of diversity in the society.

[78] According to the report, "documents are supplied in French to residents of communes with linguistic facilities only if a person expressly so requests - and not automatically".
[79] See Article 19, c), of the Vienna Convention on the law of treaties (reservation incompatible with the object and purpose of the treaty is not valid).
[80] VfGH G 213/01 and B 2075/99, decisions of 13 December 2001

Roma/Gypsies

No minority is more under threat today in Europe than the Roma people. The exclusion which they suffer extends to all rights contained in the Charter of Fundamental Rights of the European Union - not only the right to maintain certain cultural traditions is at stake[81], but also the right to be safe from ill-treatment by the police, the right to education, the right of access to the courts, or the right to asylum. An improvement of the condition of the Roma people calls for a strategy which takes into account the structural nature of the discrimination suffered by the Roma people: the prohibition of individual discriminatory acts does not suffice, since a long history of exclusion covering all areas of economic, political and social life needs to be overcome. Finally, the specificity of the traditional way of life of the Roma - some of whom still tend to pursue a nomadic or semi-nomadic existence - involves an adaptation of existing regulations aimed at making it possible to preserve this way of life - for example by allowing the children to pursue their schooling at several successive establishments, or by facilitating the installation of caravans at specially arranged sites, rather than criminalizing the gypsy way of life in the name of compliance with the rules of town and country planning.

The European Roma Rights Center (Budapest) has established that Roma are the targets of racially motivated violence and police abuse, as well as of systematic racial discrimination in a number of European Union member states. Direct and indirect discrimination pervades all aspects of the relationship between the non-Romani majority and Roma in EU member states. The limited domestic protection against discrimination currently in place in most EU states is often not adequately enforced where Roma are concerned.

Police abuse against Roma and similar groups, such as Travellers, has been reported in a number of EU Member States, including **Austria**, **France**, **Greece**, **Ireland**, **Italy** and **Portugal**. Police action against Roma include physical abuse, abusive raids of Romani settlements characterized frequently by excessive use of force. In **Greece**, there have been at least three deaths of Roma due to excessive use of firearms by law enforcement officials in recent years. Ill-treatment of Romani individuals in custody is common. Authorities have failed to ensure that allegations of ill-treatment are promptly and impartially investigated, or that perpetrators are brought to justice and victims are provided with adequate redress. The ERRC and partner organisations have also documented racially motivated violence against Roma by non-state actors, such as nationalist-extremist groups, members of formal or informal racist "skinhead" groups (particularly in **Germany**), or even simply by their neighbours (particularly in **Portugal**, **Northern Ireland** and **Spain**). National and local authorities in many EU member states have frequently failed in practice to protect Roma from violence and discrimination, and have often blocked victims' access to effective remedies. Discrimination in the criminal justice system also has other facets. A study published in 2000 indicated that although Roma comprise approximately 1.5% of the total population of **Spain**, Romani women comprise approximately 25% of inmates in the Spanish women's prison system. Similar data for other EU member states is not available, but there are widespread allegations that racial discrimination infects the criminal justice systems of a number of EU member states.

Roma in the European Union are frequently blocked from realizing their right to adequate housing. Additionally, in some countries, such as **Italy**, **Greece**, **France**, **Germany**, **Spain** and **Portugal**, housing provisions for Roma are effectively segregated. Roma also frequently lack basic security of tenure and often fall victim to forced evictions, with no alternate housing being provided by the authorities. Moreover, living conditions in a number of official or informal housing arrangements for Roma are often inadequate in the extreme, with no basic infrastructure or services available to their occupants. In addition, some local authorities have refused to register factually residing Roma as

[81] In a judgment of 7 November 2002, the social chamber of the High Court of Justice of Madrid considered that a partner married according to the gypsy ritual is not entitled to a widower's pension since, although it is not against the law, such a marriage is not legally recognized in **Spain** in the same way as a civil marriage: couples married according to the gypsy ritual are therefore, legally, *de facto* couples.

resident, effectively precluding them from access to public services necessary for the realisation of a number of fundamental social and economic rights.
Romani children do not enjoy equal access to education in practice. In **Germany**, according to the Open Society Institute, Romani children are disproportionately represented among children attending schools for the mentally disabled or other forms of special education. In Portugal and Spain, many Romani children attend substandard "ghetto schools", while in **Greece** and **Italy**, an alarming number of Romani children simply are not in school at all. Some municipal and school authorities have actively hindered access of Romani children to education by refusing to register them in local schools. In **Spain**, a school official was filmed on hidden camera advising journalists posing as prospective managers of a kindergarten that they should do their best to avoid enrolling Gypsy children, but without actively refusing them entry "since that would be illegal." Instead, the school official stated, "Gypsy children should be kept indefinitely on a waiting list."

Unemployment rates among Roma in the EU are disproportionately high, reaching endemic proportions in some countries, such as **Greece** and **Italy**. Employers routinely discriminate against Romani applicants. The geographical isolation, educational segregation, and ghettoisation of the Romani population exacerbate the problem of unemployment.

A number of EU member states currently pursue very restrictive migration policies, policies which have steadily eroded fundamental rights. In a number of instances, policies have been either explicitly anti-Romani or have had a discriminatory impact on Roma. Roma have been precluded from access to real and substantive asylum procedures, even where serious concerns exist that they may suffer persecution in their country of origin. The arrival of several hundred Roma in a EU countries has repeatedly sparked hysteria leading directly to the violation of the fundamental human rights of Roma in a number of EU member states. In particular :

Germany has forcibly returned Roma to Kosovo even after extensive and widely available documentation indicated that the Romani community was targeted for ethnic cleansing from the province by ethnic Albanians beginning in June 1999. More recently, Germany has begun expelling large numbers of Roma from Kosovo to the Federal Republic of Yugoslavia (now Serbia and Montenegro), exploiting the administrative unclarity surrounding Kosovo's status.

The **United Kingdom** immigration system is currently centred on discriminatory border policies. Since April 2001, a Ministerial Authorisation instructs border officials to subject a number of groups, including Roma, to special procedures. U.K. liaison officers have been stationed at the Prague airport since 2001, implementing a policy of stopping Roma attempting to board aeroplanes bound for Britain. In addition, in September 2002, British officials took the unusual step of expelling a number of Czech Roma from Britain in the presence of members of the television media, apparently in an effort to humiliate them and to dissuade other Roma from coming to the U.K.

A number of EU member states, including **Belgium**, **Finland**, **France**, **Germany**, **Italy** and **Sweden** have engaged in collective expulsions of Roma, in violation of the explicit ban on collective expulsion of aliens provided under the European Convention on Human Rights[82]. **France** has recently expelled large numbers of Roma to Romania, and has put intense pressure on the Romanian government to ensure that Roma do not leave Romania; as a result, beginning in August 2002, Romanian border officials began stopping Roma from leaving Romania. The latter marks a race-based return to Soviet-era policies of stopping citizens from leaving their own country, policies now adopted under pressure by EU member states.

[82] Belgium was found in violation of the ECHR after collectively expelling a group of Slovak Roma (Eur. Ct. HR, *Conka v. Belgium* (Appl. n°51564/99), judgment of 5 February 2002); Italy settled out of court later in 2002 in connection with the collective expulsion of a group of Roma from Bosnia after the case was declared admissible before European Court of Human Rights (Eur. Ct. HR, *Sejdovic and Sulejmanovic v. Italy* (Appl. n° 57575/00), admissibility decision of 1 March 2002; and *Sulejmanovic and Sultanovic v. Italy* (Appl. n° 57574/00), admissibility decision of 14 March 2002).

The Declaration of 15 October 2002 by the Justice and Home Affairs Council of the European Union stating that from the day of signature of accession treaties the ten States due to join the EU in 2004 will be considered "safe countries of origin" and that applications for asylum from nationals from those countries will be considered "manifestly unfounded". However, a number of the states listed – in particular **Czech Republic**, **Hungary**, **Poland** and **Slovakia** – have extremely poor human rights records where Roma are concerned, and a number of Roma from these countries have been recognized as refugees in recent years.

It is true that several Member States have taken initiatives in the course of 2002 to improve the situation of the Roma minority. In **Italy**, the Government on 10 January 2002 presented to Parliament a bill on the recognition and protection of the Roma and Sinti people and the protection of their cultural identity. In **Greece**, the authorities continued to make efforts to improve the situation of Greek gypsies. In 2002, the government initiated the implementation of the "Comprehensive Action Programme for the Social Integration of the Greek Gypsies" (2002-2008). The priority areas of this programme are the improvement of the infrastructures and services (education and training, health, employment, culture, sport) intended for the gypsies. Particular importance is attached to the accommodation of the gypsies through the construction of new establishments, improvement of the existing housing and establishments, and setting up infrastructures at temporary installation sites. According to official sources, accommodation works have been completed or are still in progress in 31 municipalities; at the same time, new establishments have been created, comprising permanent or prefabricated housing. Between 1997 and 2002, prefab houses were used to rehouse more than 6000 gypsies living in sheds or in tents. According to the same sources, the education programme for gypsy children has already resulted in a fall in the dropout rate from 75% to 25%. Finally, the authorities have made the necessary arrangements to rehouse and help gypsies who were obliged to leave their sites in the vicinity of certain Olympic facilities.

In **Portugal**, to accommodate the Roma /Gypsie community, estimated to amount to a total of 50 000 to 60 000 persons, the authorities have introduced "sociocultural mediators" in schools, mainly to facilitate dialogue between teachers, pupils and parents. A number of these mediators, of Roma/Gypsy origin, have already been trained and assigned to a small number of schools. Under Law No. 105/2001, the scheme has been extended to social security and health care institutions, the Aliens and Frontiers Service and numerous public services at national and local level. These sociocultural mediators will be responsible for promoting intercultural dialogue, as a means of developing mutual respect and understanding. At present, however, the status of these mediators is not satisfactory, in particular in that the mediators do not have the pay that would allow them to devote themselves to the task full time.

A large number of initiatives at all levels of the education system to facilitate the integration of young Roma/Gypsies at school have also been launched. In what can be seen as an interesting attempt to accommodate the needs of the Gyspsy community and its nomadic lifestyle, there have been attempts at setting up a school network to enable a relatively small number of Roma/Gypsy children whose parents are nomadic or semi-nomadic to receive schooling all year round, firstly by designating a "parent school" which is responsible for sending them lessons, and secondly by issuing "school ID cards" enabling the children of travelling Roma/Gypsies to attend any school, since schools are obliged to admit them immediately at whatever level is indicated on their ID card. It appears, however, that this scheme is not widely known among the target communities.

These initiatives are still the exception. They in no way make up for the large-scale apartheid situation which continues to affect the Roma people in the Member States of the European Union. In **Ireland**, the discriminatory treatment of the Traveller Community in the areas of education, employment, accommodation, health and empowerment has been a primary source of concern for the ECRI in its Report on Ireland[83]. In the non-employment sphere over 70% of cases have been taken by members of the Traveller Community on the basis of the Equal Status Act 2000, especially against publicans and

[83] ECRI Report, 2002 at par. N.

hoteliers for refusal of service on discriminatory grounds[84]. However, there has been a strong resistance to such claims by the relevant interest associations. The Government are now considering proposals to remove such claims from the jurisdiction of the Equality Tribunals (ODEI) and transferring them to the ordinary District Courts which deal with general licensing matters. This would, in the view of many observers (including the Equality Authority), be a retrograde step undermining of the institutional framework for equality which is still in its infancy.

Since the Treaty of Amsterdam, the European Union has the power to take measures to combat discrimination based on ethnic origin. The time has come to use this power to address the special needs of the Roma. According to the ERRC, an initial priority for the European Union should be the development and speedy adoption of an EU Directive on Desegregation in Education. Policies should be created and implemented to address the worrying problem of racial segregation in the field of housing in some EU member states. EU institutions should play a leading role in ensuring full and equal access to adequate housing and quality education for all Roma factually residing on EU territory. The EU should remedy without delay failures to date to address the extreme harm of racial segregation arising in some member states as a result at least in part of EU institutions inactivity in addressing problems of racial segregation. The EU should also enjoin member states to enact proactive affirmative actions policies aimed at remedying the legacy of racial discrimination in sectoral fields such as education, housing, the provision of social aid and heath care, as well as in law-enforcement and the judiciary. Member states should act to prevent further discriminatory practices inter alia by proactively recruiting Roma for positions in these sectoral fields. These initiatives go beyond what is currently prescribed by Directive 2000/43/EC. They are nevertheless crucial, if we want to put an end to the entrenched discrimination – a social apartheid, in fact – of which Roma are victims, in Europe today.

Sámi

In October 2001, the governments of **Finland**, **Norway** and **Sweden** reached agreement with the Sámi Parliaments in the three countries about the establishment of a commission of experts that will prepare, by 2005, a proposal for a treaty between the three countries on the status and rights of the indigenous Sámi[85]. Indeed, the situation of the Sámi is not satisfactory in the current situation. A recent report by the Foreign Ministry of Sweden on human rights includes some observations on the question of minorities in **Finland**, especially on the situation of the Sámi. According to the report, Finland can be criticised for attitudes toward the rights of the Sámi to their traditional land and water areas, and refers to the recommendations made by the Council of Europe for the improvement of the position of the Sámi. On language rights, in turn, the Swedish report observes that it is sometimes difficult to use Sámi in legal and administrative contexts, even though speakers of those languages have a legal right to use their mother tongue in those situations.[86]

Article 23. Equality between men and women

The Convention on the elimination of all forms of discrimination against women (CEDAW) of 18 December 1979 is the most important international instrument in the matter of equal treatment between men and women. It was supplemented by an Additional Protocol of 5 October 1999, which was to contribute amply to reinforce its effectiveness through new powers which it conferred on the Committee for the elimination of discrimination against women. In 2002, **Germany**, **Greece**, the **Netherlands** and **Portugal** have ratified this additional protocol. These States have thus joined **Austria**, **Denmark**, **Spain**, **Finland**, **France**, **Ireland** and **Italy**. Four Member States have still not

[84] www.odei.ie.

[85] The Commission is composed of two experts and two alternates from each of the three countries so that one of the two national experts (and the alternate) was appointed upon proposal by the respective Sámi Parliament.

[86] The same applies to the other national language, Swedish, according to the report. See http://www.humanrights.gov.se/extra/page/ The report is only available in Swedish.

ratified it (**Belgium**, **Luxembourg**, **United Kingdom** and **Sweden**[87]); the **United Kingdom** has not signed the protocol yet.

Directive 2002/73/EC

Within the European Union, the most important instrument to be introduced recently is Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002 amending Council 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[88]. This Directive consolidates the progress that has been made by the case law of the European Court of Justice, notably by the definition of the notions of direct and indirect discrimination, by the inclusion in the definition of discrimination harassment and any behaviour consisting in obliging anyone to practise discrimination based on sex. One of its contributions in relation to earlier case law consists in the requirement of setting up an independent body to combat sex-based discrimination, following the example of what is done in the context of other discriminations by Directives 2000/43/EC and 2000/78/EC[89].

We may, however, formulate three regrets regarding the content of Directive 2002/73/EC[90]. Firstly, the notion of indirect discrimination departs from the definition given in Directive 97/80 of 15 December 1997 on the burden of proof in cases of discrimination based on sex[91]. Whereas the latter Directive stipulated that "indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex", Directive 2002/73/EC defines indirect discrimination - in line with Directives 2000/43/EC and 2000/78/EC - as "a situation where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary". The disproportionate impact of an apparently neutral measure therefore no longer suffices to describe it as indirectly discriminatory. Consequently, the scope of protection against discrimination is restricted[92].

Secondly, although point 14 of the Preamble of the Directive reads, "Member States may, under Article 141(4) of the Treaty, maintain or adopt measures providing for specific advantages, in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers. Given the current situation, and bearing in mind Declaration No 28 to the Amsterdam Treaty, Members States should, in the first instance, aim at improving the situation of women in working life", the appropriateness of adopting measures of positive action is left to the discretion of the Member States[93]. Taking into account the contrasting attitudes adopted on this

[87] In **Sweden**, a proposal was recently (7 November 2002) presented to the Parliament for the ratification of the optional Protocol to the UN Women's Convention (Government Bill, Prop. 2002/03:19, Konventionen mot kvinnodiskriminering och frågan om ett individuellt klagomålsförfarande; Ds 2002:28, Tilläggsprotokollet till kvinnokonventionen).

[88] OJ L 268 of 5/10/2002, p. 15.

[89] See new Article 8b of Directive 76/207/EEC, inserted by Directive 2002/73/EC. In Belgium, the "Institute for Equality of Men and Women" was set up to this end, whose powers are essentially those defined in Article 8b §2 of amended Directive 76/207/EC (Act of 16 December 2002 establishing the Institute for Equality of Men and Women, *Mon.b,*. 31 December 2002).

[90] Irrespective of the fact that, despite the legal basis which Article 13 EC may seem to be able to constitute since the Amsterdam Treaty became effective, Directive 2002/73/EC merely guarantees equal opportunity and treatment in employment and work. **Belgium** adopted the Act of 25 February 2003 extending the guarantee of equal treatment between men and women beyond these areas to cover any economic, social, cultural or political activity that is open to the public.

[91] OJ L 14 of 20/1/1998, p. 6.

[92] For a comparison between the two definitions, see O. De Schutter, *Discriminations et marché du travail. Liberté et égalité dans les rapports d'emploi*, cited above, pp. 129-132.

[93] During the period under scrutiny, the European Court of Justice conformed that Article 2 §§1 and 4 of Directive 76/207/EEC was no obstacle to the adoption by a Member State of certain measures of positive action insofar as they are actually aimed at eliminating or reducing inequalities that may exist in the reality of social life. It established the compatibility with this clause of a circular issued by a ministry "to tackle extensive under-representation of women within it under which, in a context characterised by a proven insufficiency of proper, affordable care facilities, a limited number of subsidised nursery places made available by the Ministry to its staff is reserved for female officials alone whilst male

issue by the States in the North and those in the South, we may regret the absence of harmonization in this area.

Thirdly, although according to the new Article 6 §2 of Directive 76/207, the Member States must introduce into their national legal systems "such measures as are necessary to ensure real and effective compensation or reparation as the Member States so determine for the loss and damage sustained by a person injured as a result of discrimination contrary to Article 3, in a way which is dissuasive and proportionate to the damage suffered", the nature and importance of the sanctions is essentially left to the discretion of each Member State. This may result in significant variations between Member States.

Developments in the Member States

In the Member States, the issue of equal treatment between men and women has still generated substantial case law during the period under scrutiny. This case law contains examples of situations where direct discrimination against women exists, including in the areas of employment and work where this is prohibited since the adoption of Directive 76/207/EEC. In **Greece**, Article 12 of Act no. 2713/1999 sets at 15% the maximum number of women who may be admitted to police college. The Council of State examined the compliance of this provision with the Constitution and with Community law, and considered that such a limitation of the number of women, which takes the form of a quota to the disadvantage of this category, is justified by reasons of general interest; the percentage of 15% corresponds to those police duties that do not call for greater muscular strength, which is said to be the prerogative of men, and was fixed according to objective and relevant criteria[94]. The European Committee of Social Rights, however, considered in its report that Article 12 of Act no. 2713/1999 was not compatible with Article 1 par. 2 of the European Social Charter. Moreover, contrary to what the Council of State seems to claim, this clause is clearly incompatible with Community law. It is therefore satisfying to learn that the Minister of Public Order decided to abolish the quota in question and to this end presented an amendment to Parliament in November 2002.

The issue of the sharing of responsibilities within the family and the establishment to this end of certain presumptions in domestic law has also given rise to several significant decisions. In **Germany**, the Federal Constitutional Court (*Bundesverfassungsgericht*) recognized the equivalence of domestic work and paid work outside the home for the calculation of the pensions ("aliments") due at the end of divorce proceedings[95]. In **Austria**, the Supreme Court was called upon to decide whether a specific presumption in the legal pension scheme was discriminatory of men.[96] The contended provisions presume that where both parents have spent time caring for their child it was the mother who has in fact had the main care and thus these times will count towards the mother's pension, unless refuted by the father. However, according to section 116a subs. 7 of the Social Security (Business Enterprises) Act this possibility of disproof ends with the administrative decree fixing the amount of the other parent's pension becoming final. Since there is no requirement to grant both parents legal standing in that proceedings the Supreme Court referred the case to the Constitutional Court for a ruling on the compatibility of that section with the right to a fair trial in the determination of one's civil rights. A similar case law exists in **France**, where in a judgment of 29 July 2002 the Council of State based itself on the principle of equal treatment between men and women to grant men one year's seniority bonus for each child, whether or not they raised them alone, in the calculation of the pensions of public servants, which so far had been a privilege reserved for women[97]. These decisions mark as

officials may have access to them only in cases of emergency, to be determined by the employer". However, it specified in accordance with its earlier case law (not. ECJ, 28 March 2000, Badeck e. a., C-158/97, ECR I-1875), that such conformity only applies "in so far, in particular, as the said exception in favour of male officials is construed as allowing those of them who take care of their children by themselves to have access to that nursery places scheme on the same conditions as female officials" (ECJ, 19 March 2002, Lommers, C-476/99, point 50).

[94] Council of State, judgments nos. 1850-1859/2002, of 25/6/2002.

[95] Judgment of 5 February 2002, 1 BvR 105/99 u.a. -, BVerfGE 105, 1.

[96] OGH 10 Ob S 235/01h, judgment of 19 March 2002.

[97] Council of State, 29 July 2002, M. Griesmar, not yet published. The Council of State examined the case of a retiring magistrate, M. Griesmar, father of 3 children whom he had raised together with his wife, and who claimed a seniority bonus per year and per child, like female public servants.

discriminatory any legal presumptions based on a traditional representation of the division of roles between the sexes. In this respect they may be compared with a series of cases involving the **United Kingdom** which led to friendly settlements before the European Court of Human Rights, involving the payment of the amounts that would have been received as bereavement benefit by a widower after a complaint that this was only available for widows[98]. The distinction had been removed by the entry into force of the Welfare Reform and Pensions Act 1999 in April 2001.

The comments below highlight two issues[99]. The first issue is that of the positive actions and incentive policies aimed at the vocational integration of women, a specific issue being that of the mechanisms aimed at enhancing the presence of women in decision-making positions. The second issue is that of the protection of women against all discrimination associated with pregnancy or maternity - other aspects of this topic will be studied in Article 33 of the Charter (family and professional life). These issues have been chosen on account of the wealth of lessons that can be learnt from the comparison of national experiences, although the margin of discretion of the States is considerably greater with respect to the first issue than the second.

Positive actions and initiatives aimed at stimulating the vocational integration of women

Even in Member States where the vocational integration of women is considered to have been most fully achieved, considerable differences in salary exist between men and women, while the latter are still significantly under-represented in a number of professions or on the higher hierarchical levels. In **Belgium**, although the Council of Equal Opportunity for Men and Women observes that 80% of women aged between 25 and 29 are participating in the labour market (compared with 50% in 1970), the mechanisms that regulate their participation remain unfavourable towards women, who account for 90% of part-time workers and also represent a large majority of ALE workers (precarious workers).[100] Moreover, women are still under-represented in certain professions or at certain influential levels[101]. In December 2002, the male unemployment rate was 9.9% (1.0% higher than in December 2001), that of women 14.0% (0.9% higher than in December 2001).[102] Pay inequalities still persist: in 2002, women earned on average only 84% of what men earned.[103] In **Finland**, data show that the wages of men in Finnish industry were 24 per cent higher than those of women in 2002[104]. The relative gender gap was equally large in the fourth quarter of 1998.[105] The worst gender discrimination is in demanding salaried jobs. The gap is smaller in low-pay and the very highest paid occupations. It thus seems that

[98] Eur.Ct. H.R., *Downie v. United Kingdom*, 21 May 2002, *Fielding v. United Kingdom* judgment of 29 January 2002, *Loffelman v. United Kingdom*, 26 March 2002, *Rice v. United Kingdom*, 1 October 2002 and *Sawden v. United Kingdom*, 12 March 2002.

[99] During the period under scrutiny, a number of measures were adopted by the Member States to transpose instruments of derived Community law guaranteeing equal treatment between men and women. In **Austria**, Directive 93/104/EC was implemented with effect of 31 July 2002, repealing the provisions on the prohibition of night work for women and giving definitions of the terms "night" and "night-worker". The EU Night Work Implementation Act (Federal Law Gazette (BGBl.) I No. 122/2002) also contains some special protective regulations for night-workers such as additional times of rest, regular free examinations of workers' health, the right to be permanently transferred to the day shift if the worker's health is at risk or at least temporarily as long as caretaking for children under the age of 12 so requires and the respective transfer is operationally feasible. In **Spain**, Act no. 33/2002 (BOE of 6 July 2002) amends Article 28 of the Act on the status of workers, with a view to transposing Directive 75/117/EEC guaranteeing equal pay as well as equality in fringe benefits. In **Greece**, Presidential Decree no. 87/2002 on the equal treatment of men and women in the vocational social security systems, harmonizing Greek legislation with Council Directives 86/378/EEC of 24 July 1986 and 96/97/EC of 20 December 1996, became effective.

[100] See Opinion no. 58 of 13 September 2002 of the Coucil of Equal Opportunity for Men and Women.

[101] See Opinion no. 59 of the Council of Equal Opportunity for Men and Women, recommending a balanced representation of male and female judges in the three highest courts of the country (Court of Arbitration (where there are no women yet), the Council of State and the Supreme Court). Opinion no. 55, finding that only 11% of diplomats are women, recommends the adoption of measures to facilitate the access of women to such jobs.

[102] This unemployment rate differs strongly from one region to another: in Flanders it is 7.6% (6.3% men and 9.3% women), in Wallonia 16.7% (13.7% men and 20.5% women) and in Brussels 20.3% (20.2% men and 20.4% women). See the figures of the Ministry of Employment and Labour, available *online.*

[103] See «Evaluation de la mise en œuvre du Plan national de lutte contre la violence à l'égard des femmes», Belgian Senate, session 2001-2002, 18 July 2002, *DOC 2-950/1,* p.6.

[104] Second quarter of 2002.

[105] Source : Palkkatyöläinen, 9/2002. See also http://www.artto.kaapeli.fi/unions/T2002/f28

the pay gap between men and women in Finland has persistently remained at an average of 25 to 30 per cent despite a huge number of studies, programmes, initiatives, seminars, task forces, negotiations and an ongoing struggle to reduce and abolish this differential. This failure can be explained in part by gender discrimination (in a survey published in 2001, about half of the gap was regarded as being due to gender discrimination).[106] The remainder consists of differences in background between men and women in such aspects as education and work experience. The number of women holding top executive positions in listed companies has increased very little during the past four years**.** According to the report, the number of women senior executives in Finland's major 52 listed companies stands at 8%. Four years ago, the figure was 6% On the other hand, back in 1998, only about half of all major corporations employed women at boardroom and senior executive level. Today, almost three-quarters of large companies include senior women executives.[107]

With respect to **Denmark**, the UN Committee on the Elimination of Discrimination against Women had to conclude after its session in June 2002 amongst others that[108]: " ..The Committee is concerned that the Convention has not been incorporated into domestic legislation [...] The Committee also notes that the Constitution does not contain a specific provision on discrimination against women. The Committee urges the State Party to develop policies and adopt proactive measures to accelerate the eradication of pay discrimination against women. [...] the Committee expresses concern that women's representation remains low in executive and decision-making positions in municipalities and counties as well as in the private economic sector. The Committee urges the State Party to take measures to increase the representation of women in decision-making positions in all sectors. [...] The Committee urges the State Party to adopt policies to ensure that women professors are not discriminated against with regard to access to professorships and senior positions, resources and research grants so as to increase the number of women in senior positions in universities. [...] The Committee calls upon the State party to take additional measures to eliminate stereotypical attitudes about the roles and responsibilities of women and men [...]". In Denmark, labour market participation of women is 75 %, however only 41 % of women from ethnic minorities are active in the labour market.

In the **Netherlands**, it appears from the conclusions published in July 2002 by the European Committee of Social Rights (ECSR) on the 14th report of the Netherlands of September 2001, that during the reference period (1999-2000), the labour-market situation regarding women improved in the same way as for men, with a rise in employment (from 59,8% in 1996 to 63,4% in 1999) - in particular an increase in part-time working - and a drop in unemployment (from 8,1% in 1996 to 3,8% in 1999). However, although over the period 1992-1999, the proportion of women employed in senior managerial posts in the private sector doubled (from 2 to 4%), it remained still very low. In 2000 it was estimated at 25% in the public sector[109].

In such a context, positive action should be seen as an indispensable element of a policy on equal opportunity. In **Belgium**, targets were set in 1997 to achieve a better representation of women in the highest echelons of the civil service. Vertical segregation remains considerable[110]: on average, 26% of women at the highest level and 73% at the lowest level. To this is added a horizontal segregation, since women are under-represented in certain positions. Finally, segmentation can be seen within the civil service, where 69% of contractual (not permanent) officers are women. In order to remedy this situation, it is recommended that closer attention be paid to the advertising of job vacancies, job profiles and recruitment channels favourable to women; that a balanced composition of examination boards be sought; that a detailed study be made of gender differences in the recruitment processes; or that a debate be initiated on part-time work in managerial positions.

---

[106] Source: Pirjo Pajunen, "Puolet palkkaerosta selittyy syrjinnällä" [half of pay differential explained by discrimination], Palkkatyöläinen [the newspaper of the Confederation of Finish Trade Unions – SAK] edition 3. See also 2001.http://www.kaapeli.fi/unions/2001/20010902.htm

[107] A survey carried out by the newspaper, Helsingin Sanomat**,** 6.1.2003.

[108] Para. 324-325.

[109] The ECSR noted that the Dutch Government has set itself targets of 20% more women in senior management in the private sector and 35% more in the public sector by 2010 (Conclusions XV-I, Volume 2, Chapter 13, July 2002).

[110] According to a summary report drawn up in the Ministry of Employment and Labour.

In **Spain**, Act no. 43/2002 of 30 December 2002 containing fiscal, administrative and social measures laid down the employment promotion programme for 2003. To the incentives already in place, this programme added benefits attached to the employment of victims of domestic violence. Act no. 45/2002 (validation of Decree no. 5/2002) set up an active income integration programme in order to promote the integration in the labour market of women facing particular difficulties through a personal integration scheme. Moreover, the employment promotion programme for 2002 provided for a 10% increase in the discounts on social security contributions which a business is entitled to when converting an employment contract of specified term into a contract of unspecified term if the worker in question is a woman.

In **Italy**, the National Committee for Equality and Equal Opportunity in Employment, set up with the Ministry of Labour, formulated on 23 May 2002 a programme aimed at promoting the presence of women among the middle and top managements of businesses and bringing the work organization closer to women.

In **Sweden**, the Minister for Gender Equality Affairs appointed after the general elections in September 2002 challenged some parts of the population by showing her preparedness to introduce a quota system for the election of women to sit on the boards of companies, enterprise etc.[111] Indeed, despite the reputation of Sweden as the country that has come furthest in terms of achieving equality between men and women, there is still a significant wage gap between women and men, in both private and public sectors.[112] According to well-established NGOs, the decisions of the Labour Court in cases concerning equal pay for equal work are distressing. And the wage span for identical work has not narrowed during the year of 2002. The discrimination in education and employment against immigrant, refugee and minority women, especially the Roma women, continues in Sweden.

Representation of women in decision-making bodies

According to the Human Rights Committee, "States must ensure that the law guarantees to women article 25 rights (political participation) on equal terms with men and take effective and positive measures to promote and ensure women's participation in the conduct of public affairs and in public office, including appropriate affirmative action"[113]. During the period under scrutiny, the following situations may be highlighted:

In **Belgium**, the Act of 21 February 2002[114] inserted Article 11b into the Constitution in order to guarantee equal access for men and women to all levels of power, public and elective offices, specifying that the Council of Ministers and the community and regional governments, as well as other bodies, must number persons of different sexes. Several laws have subsequently been adopted, aimed at guaranteeing women equal opportunity to be elected[115] or to become members of advisory bodies[116].

[111] J. Leijonhufvud, *Winberg förbereder kvoteringslag*, SvD 25 November 2002, p. 7; *Kvotering hotar bryta EU-lag*, SvD (Näringsliv), 26 November, p. 5; M.Wahlberg & S.Larsson, *Män dominerar i statliga bolag*, SvD (Näringsliv), 27 November 2002, p. 4.

[112] A.Thoursie, *Hur har vi det med kvinnors rättigheter i Sverige?*, in Mänskliga rättigheter-Kvinnors rättigheter, Om FNs kvinnokonvention, Rapport från seminariet Kvinnornas Grundlag i den vardagliga verkligheten i april 2002, Stockholm 2002, pp.19-27; SvD, *Mer ojämlika löner i offentlig sektor*, 14 January 2003, p. 6.

[113] General Comment n°28, Equality of Rights Between Men and Women, 29 mars 2000.

[114] *Mon.B.,* 26 February 2002.

[115] Act of 17 June 2002 guaranteeing equal representation of men and women on the lists of candidates for the European Parliament elections (*Mon.B.,* 28 August 2002); Act of 18 July 2002 guaranteeing equal representation of men and women on the lists of candidates for the elections of the Federal legislative chambers and the Council of the German-speaking Community (*Mon.B.,* 28 August 2002); Special Act of 18 July 2002 guaranteeing equal reopresentation of men and women on the lists of candidates for the elections of the Walloon Regional Council, the Flemish Regional Council and the Council of the Brussels Metropolitan Region (*Mon.B.,*13 September 2002).

[116] Decree of the French-speaking Community of 17 July 2002 promoting equal participation of men and women in the advisory bodies (*M.B.,* 13 September 2002). This Decree obliges the advisory bodies to put forward for each effective or deputy post the candidature of at least one man and one woman (Art. 2) and to number at least thirty-five percent of members of each sex (Art.3).

In **Spain**, despite the low presence of women in the political assemblies[117], the political parties do not make a priority of improving this situation. Only the United Left and the Socialist Party have declared themselves in favour of the principle of parity. The other parties seem to feel that the imposition of quotas to enhance the representation of women will risk being to the disadvantage of women themselves.

In **Greece**, during the municipal and prefecture elections of October 2002, Article 75 of Act 2910/2001 was applied for the first time. This clause provides that the lists of candidates for the municipal and prefecture councils must feature at least 1/3 of candidates of either sex. The fact that this "positive" measure has not led to major difficulties in the composition of the lists is very encouraging. Nearly twice as many women were elected as at the last elections, with an estimated 17.5% of the elected candidates. On the other hand, the percentage of women elected as mayors or presidents of municipal councils only reached 2.03%, which nevertheless is 40% more than at the last elections.

In the **United Kingdom**, The Sex Discrimination (Election Candidates) Act 2002 enables a political party, should it wish to do so, to adopt measures which regulate the selection of candidates for certain elections to reduce inequality in the numbers of men and women elected as candidates of the party.

Difference in treatment based on pregnancy or maternity

Article 2 §7 of Directive 76/207/EEC, as amended by Directive 2002/73/EC of the European Parliament and the Council of 23 September 2002, stipulates that "Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive". On 3 April 2002, the Swedish Labour Court[118] decided an important case for the understanding of the relationship between the prohibition of direct gender-based discrimination and pregnancy. A County Council announced a vacant position as a midwife at a care centre. Five women applied for the vacancy. One of them was pregnant. Subsequent to the employment of one of the women, there has arisen a dispute between the equal opportunities Ombudsman and the County Council as to whether the County Council is guilty of unlawful discrimination. The Swedish Labour Court has found that the pregnant woman was passed over even though she had better qualifications for the job than the woman who was employed. Further, the Court ruled that the actions taken by the County Council were not in breach with the Act on equal opportunities (Jämställdhetslagen (SFS 1991:433)) according to its substance before the 1 of January 2001, since only women applied for the position. However, the actions taken by the County Council were in breach with the aim and content of Directive 76/207/EC[119]. The Labour Court concluded on the basis of EC case law[120] that the relevant articles in the above Directive have direct effect as to the dispute. Thus, the County Council is, according to § 25 of the Act on equal opportunities[121] by analogy, obliged to pay damages to the woman who was passed over due to her pregnancy. The Labour Court has reasoned that pregnancy is, unlike every other situation, and so closely linked to the biological sex of a woman that an adverse treatment of a pregnant woman constitutes direct sex discrimination, without making a comparison with anyone else.

Decision n° 10/2002 of the Board on Gender Equality in **Denmark** is also worth mentioning in this respect. The decision agrees with the complainant that Directive 92/86/EEC (the so-called pregnancy-directive) is not incorporated into Danish Law to a satisfactory degree, because par. 25 in the Act

[117] Women account for 28% in the Congress and 24% in the Senate; they number on average 30% in the assemblies of the Autonomous Communities or among the Spanish members of the European Parliament; at the local level, they represent 12% of the mayors and 20% of the local councillors.
[118] Case no. 45, *Jämställdhetsombudsmannen Claes Borgström mot Landstinget Västmanland i Västerås*, dom 2002-04-03, målnr. A-69-2001 (The Equal Opportunities Ombudsman Claes Borgström v. Västmanland County Council in Västerås)
[119] See Case C-177/88, *Dekker,* (1990) ECR I-3941.
[120] Case C-152/84, *Marshall ./. Southampton and South-West Hampshire Area Health Authority*, (1986) ECR 723; Case C-222/84, *Johnston* (1986) ECR 1651.
[121] Jämställdhetslagen is in force since 1 January 2001, Prop. 1999/2000:143, pp. 33 et seq.

(2000:396) on Vacation[122] states that saving up holiday-allowances is not possible during maternity leave, if the person in question does not have the right to a complete pay during the leave. A majority of the board members found that both the pregnancy-directive and the Consolidated Act (2002:711) on Equal Treatment of Men and Women in connection with employment and maternity leave of absence[123] provide that women due to their pregnancy may not be put in a less favourable position than men, which makes para. 25 of the Act on Vacation incompatible with those instruments.

Article 8 of the European Social Charter concerns the right of female workers to protection of maternity. Article 8 §2 obliges the State parties that accepted this clause to "consider it as unlawful for an employer to give a woman notice of dismissal during her absence on maternity leave or to give her notice of dismissal at such a time that the notice would expire during such absence". This provision endorses Article 2 §7 of Directive 76/207/EEC, as amended by Directive 2002/73/EC. In its Conclusions XV-2 of 2001, the European Committee of Social Rights found that the current situation in **Belgium** was not in compliance with Article 8 §2 of the revised European Social Charter with regard to the consequences of an unlawful dismissal of a pregnant woman.[124] In Belgian law, reintegration is not the rule in case of unlawful dismissal of an employee for reasons connected with pregnancy or childbirth; on the other hand, the special indemnity provided for by Belgian law is not sufficiently dissuasive since it amounts to only six months' gross salary. Besides, the new national initiatives in this area have not strengthened the right to reintegration.

Article 24. The rights of the child

Article 24 of the Charter of Fundamental Rights of the European Union lists, under the heading "Rights of the child", certain rights that a child is recognized as having by the United Nations Convention on the Rights of the Child of 20 November 1989, which all the Member States have ratified[125]. Naturally this does not mean that the other guarantees mentioned in this Convention may be ignored[126]. But Article 24 of the Charter emphasizes certain original guarantees offered by the Convention of 20 November 1989, and which contribute to the specificity of the rights of the "child", that is to say, any human being aged under eighteen, unless domestic law provides that majority is reached sooner.

Taking the views of the child into consideration

One of the rights in the International Convention on the Rights of the Child which the Charter of Fundamental Rights underlines is the right of every child who is capable of forming his or her own views "to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child"[127]. In order to comply with this requirement, **Denmark** in 2002 amended the Act (2002:755) on Social Services[128]. The amendment

[122] Lov (2000:396) om Ferie.
[123] Lovbekendtgørelse (2002:711) om Ligebehandling af mænd og kvinder i forbindelse med beskæftigelse og barselsorlov.
[124] Conclusions, p.116.
[125] To the Convention of 20 November 1989 were added on 25 May 2000 an Optional Protocol on the involvement of children in armed conflict, as well as an Optional Protocol on the sale of children, child prostitution and child pornography, which were signed by all the Member States. Seven States had ratified the First Optional Protocol by 15 January 2003: **Austria**, **Belgium**, **Denmark**, **Spain**, **Finland**, **Ireland** and **Italy**, all during the course of 2002. On 25 April 2002, the government of **Sweden** submitted a proposal to Parliament for the ratification of the said Protocol. On the other hand, only two States - **Spain** and **Italy** - have ratified the second Optional Protocol.
[126] See Article 53 of the Charter.
[127] Article 12, §1, of the International Convention on the Rights of the Child. See Article 24, §1, of the Charter of Fundamental Rights. The European Convention on the Exercise of Children's Rights of 25 January 1996 (ETS, n° 160) – the object of which is "is, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority" (Art. 1 § 2) – seeks to develop, at the regional level, this requirement, as described more in detail in Art. 12 § 2 of the UN Convention on the Rights of the Child. However, this Convention has been ratified only by two Member States, **Germany** (on 10.4.2002) and **Greece** (on 11.9.1997); it has entered into force on 1.7.2000 (on 1.8.2002 with respect to **Germany**).
[128] Lov (2002:755) om Social Service.

lifts the pre-existing 12-year-old limit, meaning that the hearing and involvement of the child will take its point of departure in an evaluation of the child's maturity rather than in a formal age-limit. To ensure that children will benefit from a qualified and respectful involvement, DKK 60 million have been earmarked to implement this part of the proposal over a 4-years period, by in-service training and development of methods in relation to the considerations of cases.

According to the concluding observations of the Committee on the Rights of the Child concerning **Belgium** during the period under scrutiny, this State does not adequately guarantee the child's right to be heard in legal or administrative proceedings that concern him or her[129]. The Belgian courts have nevertheless sometimes agreed to directly apply the International Convention on the Rights of the Child, including its Article 12, in order to guarantee the minor's right to take part in the debates on all issues concerning him[130]. Furthermore, certain particularly remarkable initiatives have been taken in Belgium in order to improve the position of the minor in the context of legal proceedings. Thus it has been proposed[131] to amend the Judicial Code in order to allow a minor who is the victim of an offence to act as a party in the proceedings if the persons exercising parental authority fail to defend his rights or if there is a conflict of interest with them, or to have the benefit of an *ad hoc* representative in case he is incapable of forming an opinion, and to be able to bring a lawsuit personally from the age of 12. It has also been proposed[132] that the minor may be assisted by a specialized juvenile lawyer, whose fees and expenses shall be borne by the State in all legal or administrative proceedings in which he is a party or in which he intervenes, or for the purposes of his hearing, unless he forgoes this or chooses another lawyer.

In its Concluding Observations concerning the **United Kingdom**, the Committee on the Rights of the Child expressed its concern that the obligation under Article 12 of the Convention to give due weight to the views of the child has not been consistently incorporated in legislation, such as in private law procedures concerning divorce, adoption, education and protection. Furthermore it is concerned that the right of the child to independent representation in legal proceedings is not systematically exercised and that in education schoolchildren are not systematically consulted in matters that affect them[133].

The best interests of the child

"In all actions concerning children, (...) the best interests of the child shall be a primary consideration", says Article 3 §1 of the International Convention on the Rights of the Child. This guarantee is reiterated in Article 24 §2 of the Charter of Fundamental Rights. In order to comply with this, **Denmark** plans to amend the Act (1995:387) on Child Custody[134]. The proposal, made by the Social Peoples Party (SF), would imply a compulsory conversation with the child involved in divorce cases regardless of the age of the child, however still taking into consideration the maturity of the child. In its concluding observations concerning **Greece**, the Committee on the Rights of the Child (CRC) expressed its concern that in certain Muslim families, when the parents divorce, custody of the child is systematically given to the mother when the child is below a certain age and to the father when

[129] CRC/C/15/Add. 178 – concluding observations/Comments. Article 931 par. 3 and 4 of the Judicial Code provides, "in all proceedings concerning him, the minor who is capable of forming his own views, at his request or by a decision of the court, without prejudice to the legal provisions providing for his voluntary intervention and his consent, has the right to be heard, in the absence of the parties, by the judge or by the person whom the latter has designated to this end (...). The decision of the judge shall not be open to appeal. When the minor files such a request with the court hearing his case or with the public prosecutor, the hearing can only be prevented by a specially reasoned decision based on the minor's incapacity to formulate his own views. This decision shall not be open to appeal". The Committee on the Rights of the Child considers that, according to this wording, the right to be heard is too discretionary.
[130] Liège, 12 February 2002, *J.T.,* 2002, p. 407.
[131] Bill of 19 July 2002 granting minors access to courts, House of Representatives, ordinary session, 2001-2002, Doc. Parl., 1975/001.
[132] Bill of 19 July 2002 instituting juvenile lawyers, House of Representatives, ordinary session; 2001-2002, Doc. Parl., 1976/001.
[133] CR/C/15/Add.188, 9 October 2002, par. 29.
[134] Lov (1995:387) om Forældremyndighed og Samvær.

the child is above a certain age, without the best interests of the child or his views being taken into consideration[135].

In **Sweden**, in the context of discussions on the ratification of the 1996 European Convention on the Exercise of Children's Rights[136], changes in the relevant legislation were suggested (*inter alia* chapter 6 of the Children and Parents Code, Föräldrabalken (FB) (SFS 1998:319)[137]) which aim at increasing the respect for the child's opinions and wishes, as well as to strengthen the child's legal position, *e.g.*, the right of the child to be involved in, and the ability to influence decisions, concerning itself. The existing legislation does not contain any rules on the right of the child being a party to a process to receive all relevant information on the case, including information about the possible consequences/effects of its wishes and decision.[138] Furthermore, children who wish to express themselves on issues concerning themselves and who have attained a certain age of maturity are able to do so presently only to a limited extent. The legislation does not ensure that all children who wish to express themselves are given a realistic opportunity to be heard as a mandatory part of, for example, the social welfare investigation. The suggested legal adjustments are therefore welcomed.

In **France**, the new Article L.1111-5 of the Public Health Code (inserted in accordance with the Act of 4 March 2002 on patient rights and the quality of the healthcare system[139]) instituted a derogation from the principle of parental authority in medical acts. The doctor is not obliged to seek parental consent for a medical act that is "necessary to protect the health of a minor": the minor can therefore object to the persons exercising parental authority being consulted.

An independent monitoring mechanism of the Rights of the Child

During the period under scrutiny, the UN Committee on the Rights of the Child considered the first periodic report of the **Netherlands** Antilles[140]. The Committee was particularly concerned about the lack of adequate health care for children, the high level of illiteracy and the limited sports facilities. Another point of concern were the causes of child mortality : above the age of five the most important ones are traffic accidents and violence. A violence-related problem is the continuing use of corporate punishment in schools despite a legal ban. To improve the effective implementation of children's rights the Committee recommends to establish an independent body to which children on the Netherlands Antilles can turn to have violations of their rights remedied[141]. During the period under scrutiny, the Committee on the Rights of the Child also examined the second periodical report on **Belgium**[142]. In its concluding observations[143], it mentioned the absence of an independent mechanism (and of any mechanism for the German-speaking Community) to monitor and implement the Convention, authorized to receive and deal with complaints from children. In the view of the CRC, the Commissioner for the Rights of the Child in the Flemish Community, the general delegate for the rights of the child in the French-speaking Community, the Centre for Equality of opportunity and the Fight against Racism do not have the required independence[144]. The recommendation that independent

[135] CRC/C/15/Add. 170, of 2 April 2002.
[136] A proposal to that effect was put forward to the Parliament (Series of ministry reports - Departementsserien - Ds 2002:13, *Utövandet av barns rättigheter i familjerättsprocesser*). The 1996 Convention is foreseen to be applicable in Sweden in cases dealing with issues of custody, contacts, adoption and statutory care : the Children's' Ombudsman (Barnombudsmannen) has rightly questioned the reasons for excluding the implementation of the Convention within the area dealing with issues of maintenance, the right to a name, special legal representatives (in Swedish "god man"), etc. (BO, Remissvar, Utövande av barns rättigheter i familjerättsprocesser (Ju2002/3810/L2), 26 September 2002, p. 2).
[137] See generally, Å.Saldeen, *Barn och föräldrar*, Uppsala 2002.
[138] Swedish media has recently reported on the severe criticism expressed by practicing lawyers with respect to continuing ignorance of the children's right to be heard. B.Malmström, *Ingen hör vad barnen vill*, SvD 23 December 2002, p. 8.
[139] Cited above in the commentary on Article 8 of the Charter.
[140] UN Doc. CRC/C/61/Add.4.
[141] UN Doc. CRC/C/15/Add.186.
[142] CRC/C/83/Add. 2.
[143] CRC/C/15/Add. 178.
[144] See in this connection the Decree of 20 June 2002 instituting a general delegate of the French-speaking Community for the rights of the child (*M.B.*, 19 July 2002), with the task of ensuring the protection of the rights and interests of children, including the hearing of complaints.

human rights institutions be established to monitor, protect and promote all the rights of the Convention on the Rights of the Child for all children was also made by the Committee on the Rights of the Child with respect to the **United Kingdom**[145].

Article 25. The rights of the elderly

The right of elderly people to lead a dignified and independent life and to take part in social and cultural life as is recognized by the Charter, also includes the right of the elderly to adequate resources to allow them to lead a decent life and to take part in public life, their right to choose their lifestyle freely and to lead an independent existence in their familiar surroundings for as long as they wish and as long as it is possible, and the right of the elderly living in institutions to appropriate support, respect for their privacy as well as participation in decisions concerning living conditions in the institution[146].

As the report of the National Ombudsman (*Defensor del Pueblo*) in **Spain** clearly shows, these rights are particularly under threat today, especially with regard to the assistance of persons reaching the end of their lives and living conditions in homes[147]. This observation was made regularly in the past by the Ombudsman in **Ireland**, too. In **Portugal**, although there has been a considerable improvement in the articulation between state services and private operators, there still are many complaints. These complaints are mainly linked to the lack of conditions of some foster homes, both public and private. In particular, there appears to be a lack of regulation, inspection and punishment with respect to illegal private foster homes. Taking care of old people has become a business and in the last two years, there have been scandalous reports of ill treatment to elderly living in these "homes". Sometimes, it is difficult to identify these cases, as there is now a practice, which consists of receiving a limited number of old people in the house of a normal family, which is paid to take care of them. In this case, it is difficult to qualify this house as an illegal foster house and to show evidence of the business behind.

Moreover, the example of the Act (2002:755) on social services[148] in **Denmark** shows that it is often difficult to find the right balance between the obligation to offer assistance, namely by the adoption of protective measures towards the elderly - particularly in cases of senile dementia - and respect for the fundamental rights of the elderly, which may come under threat through, for example, restrictions to the freedom of movement by safety devices or, in extreme cases, the use of constraint.

The right of elderly persons to lead an independent life in their familiar surroundings for as long as possible is favoured by measures that enable their relatives to offer them the necessary assistance. In **Austria**, the Family Care Leave Act[149] entitles any employee to reduce working hours or to take unpaid leave upon written notice to the employer in order to care for close relatives. In case the employer disagrees, he is required to file an action with the labour court who would then finally decide the matter. Moreover, during the period of leave health insurance and contributions to the pension scheme are being continued and funded by the social security system of the unemployed.

Article 26. Integration of persons with disabilities

Persons with disabilities have a lot to teach us about the scope of the requirement of equality. We are seeing a transition towards an understanding of the disability as a problem for the disabled person, calling for social measures worked out by society aimed essentially at compensating for the disability and understanding the disability as showing the barriers which society has put up artificially to the full social and occupational integration of persons with disabilities[150]. This transformation invites us to ask

[145] CR/C/15/Add.188, 9 October 2002, par. 17.
[146] See Article 23 of the revised European Social Charter.
[147] El Defensor del Pueblo. Resumen del Informe a las Cortes Generales correspondiente a 2001, juin 2002, p. 5.
[148] Lov (2002:755) om Social Service.
[149] Federal Law Gazette I No. 89/2002
[150] See Communication from the Commission on Equality of Opportunity for People with Disabilities, COM(96) 406 final, Brussels, 30/7/1996.

the question not so much how to ensure the rehabilitation of the disabled or how to "treat" the disability as how to adapt the environment in order that it no longer has the effect of excluding the disabled. It is this question that characterizes the transition from a "medical" approach to the disability to a "social" approach: while the first approach is often characterised as locating the 'problem' of disability within the person, the social approach locates the problem of disability in the environment, which fails to accommodate people with disabilities"[151].

The notion of "reasonable accommodation" is the clearest expression of this trend[152]. This notion demands, in all areas of social life, the dismantling of the barriers which society has put up to the full participation of disabled persons. Refusal to do so is tantamount to discrimination. According to Directive 2000/78/EC, which is faithful in this respect to General Comment no. 5 (1994) of the United Nations Committee on Economic, Social and Cultural Rights[153], refusal by the employer to "take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer"[154]. There is therefore no more reason to accept the environment as it is, and to treat the disability as a disadvantage that may justify compensatory measures: on pain of committing discrimination against persons with disabilities, the environment needs to be rethought in such a way that the *disability* is no longer the source of a *handicap* or disadvantage.

Based on the idea, both simple and demanding, that persons with disabilities have rights that they want to assert and are not simply recipients of public welfare measures, this reversal of the situation is also discernible in the doctrine of the United Nations Committee on Economic, Social and Cultural Rights[155]. In its Concluding Observations concerning **Ireland** under the ICESCR for instance, the UN Committee on Economic, Social and Cultural Rights criticised the proposed Disabilities Bill, 2001 which had been dropped by the Irish Government in the early part of 2002 in response to trenchant criticisms by disability rights groups for failing to adopt a human rights-based approach as recommended in its previous Concluding Observations in respect of Ireland. In particular, it mentioned Section 47 of the Bill which would have rendered many of the rights contained therein non-justiciable. The Committee also raised concerns about the status of disabled persons working in "sheltered employment". It recommended the adoption of a human rights-based approach in any new Disabilities Bill, the removal of Section 47 and a complete and thorough review of "sheltered workshops".

From the "social welfare" model to the "civil rights" model

It is because they convey this renewed concept of the necessity of combating discrimination against persons with disabilities that several initiatives that have been taken during the period under scrutiny merit our closer attention[156]. In **France**, in a way that can be deemed illustrative of the transformation taking place, Article 53 of the Act of 17 January 2002 on social modernization[157] amends Article

[151] Communication from the Commission to the Council and the European Parliament, Towards a United Nations legally binding instrument to promote and protect the rights and dignity of persons with disabilities, COM(2003) 16 final, Brussels, 24/1/2003, p. 8.
[152] See L. Waddington & A. Hendriks, "The Expanding Concept of Employment Discrimination in Europe: From Direct and Indirect Discrimination to Reasonable Accommodation Discrimination", *Int. J. of Comp. Labour Law and Indus. Relations,* vol. 18, 2002, p. 403.
[153] UN Committee on Economic, Social and Cultural Rights, General Comment No. 5 (1994), Persons with Disabilities, defining "disability based discrimination" as "any distinction, exclusion or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights" (par. 15).
[154] Article 5 of Directive 2000/78/EC.
[155] See in general, on the rights of people with disabilities in the UN human rights system, G. Quinn & Th. Degener, *Human Rights and Disability. The current use and future potential of United Nations human rights instruments in the context of disability*, February 2002, 297 pp.
[156] On the status of the transposition of Directive 2000/78/EC, we refer to the commentary on Article 21 of the Charter, above.
[157] Act no. 2002-73, JORF of 18 January 2002, p.1008.

L.114-1 of the Code of Social Action and Family Life, which now explicitly refers to the equal enjoyment of fundamental rights ("access of minor or adult persons with a physical, sensory or mental disability to the fundamental rights that are enjoyed by every citizen, namely the rights to healthcare, education, vocational training and guidance, employment, the guarantee of a minimum of appropriate resources, social integration, freedom of travel and movement, legal protection, sport, leisure, tourism and culture, constitutes a national obligation"). In **Germany**, the *Behindertengleichstellungsgesetz*[158] seeks to realize the constitutional promise of Art. 3 (3), second sentence, of the Basic Law ("No person shall be disfavored because of disability"), which was introduced in 1994, and to implement Directive 2000/78/EC. The act aims to guarantee the participation of disabled persons in social life having equal rights and to enable them to lead a self-determined life (section 1). For instance, the act acknowledges the use of sign language in legal relations, and it facilitates the vote of partially sighted persons. Unions are granted a right to sue (Verbandsklagerecht) for violations of certain Federal Law regulations described at greater detail. The Act for the Equalization of Disabled Persons is complemented by three decrees. The Decree concerning Communication Aids,[159] the Decree about Barrier-free Documents in the Federal Administrative Authority[160] and the Decree for Barrier-free Information Technology.[161] The last-mentioned decree regulates in detail how to design internet offers so that they may be used by disabled persons without meeting additional conditions.

In **Belgium**, the Act of 25 February 2003 on combating discrimination and amending the Act of 15 February 1993 setting up a Centre for Equality of opportunity and the Fight against Racism - which transposes into Belgian law Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation - should help to stimulate the transition from a policy of social and occupational integration of persons with disabilities based on the model of rehabilitation and insurance (*social welfare model*) to a policy based on non-discrimination (*civil rights model*). The Act prohibits direct and indirect discrimination in any form, based on the "current or future condition, disability or physical trait". During the course of the parliamentary proceedings, the government has achieved that the notion of discrimination be defined so as to include in its definition the absence of reasonable accommodation for persons with disabilities (see Article 2 §3 of the Act)[162].

Parallel to this development at the Federal level, the Flemish Community (*Vlaamse Gemeenschap*) adopted a decree on equal participation in the labour market[163]. Strongly inspired by the Canadian *Employment Equity Act* of 1995 as well as by the *Wet stimulering arbeidsdeelname minderheden (SAMEN)* adopted by the Netherlands in 1998, this decree aims to improve the opportunities on the

[158] Gesetz zur Gleichstellung behinderter Menschen [Act for the Equalization of Disabled Persons] of 27 April 2002 (BGBl. 2002 I p.1468).

[159] Verordnung zur Verwendung von Gebärdensprache und anderen Kommunikationshilfen im Verwaltungsverfahren nach dem Behindertengleichstellungsgesetz [Decree concerning the Use of Sign Language and other Communication Aids in Administrative Procedures according to the Act for the Equalization of Disabled Persons] of 17 July 2002 (BGBl, 2002 I p.2650).

[160] Verordnung zur Zugänglichmachung von Dokumenten für blinde und sehbehinderte Menschen im Verwaltungsverfahren nach dem Behindertengleichstellungsgesetz [Decree concerning the Accessibility of Documents to Blind and Partially Sighted Persons in Administrative Procedures according to the Act for the Equalization of Disabled Persons] of 17 July 2002 (BGBl. 2002 I p. 2652).

[161] Verordnung zur Schaffung barrierefreier Informationstechnik nach dem Behindertengleichstellungsgesetz [Decree concerning the Creation of Barrier-free Information Technology according to the Act for the Equalization of Disabled Persons] of 17 Jul 2002 (BGBl. 2002 I p. 2654).

[162] In accordance with Directive 2000/78/EC, reasonable accomodation is defined as "accommodation which does not represent a disproportionate burden, or of which the burden is sufficiently offset by existing measures". When it introduced this amendment to the law in preparation, the government noted that "'accommodation' shall mean, among other things, architectural adjustments ensuring access for wheelchairs, technical facilities allowing the deaf and the blind to communicate, use of a simplified language for persons with a mental disability, reorganization of the division of tasks, giving assistance to persons with disabilities, in short: all practical measures necessary that are likely to reasonably help ensure that persons with disabilities are not prejudiced by environmental factors." (Bill to combat discrimination and amending the Act of 15 February 1993 setting up a Centre for Equality of Opportunity and the Fight against Racism, *House of Representatives*, sess. 2001-2002, 22 May 2002, Government Amendment no. 3). So it is a relatively broad interpretation of this notion that is intended here, which goes beyond the mere adjustment of the workstation, even if it remaions proper to the occupational environment.

[163] *Decreet houdende evenredige participatie op de arbeidsmarkt*, enacted on 8 May 2002 (*Mon. b.,* 26/7/2002, p. 33262).

labour market for a number of target groups (kansengroepen), including persons with disabilities. This is based on two principles: that of equal participation in the labour market (*evenredige participatie in de arbeidsmarkt*) and that of equal treatment (*gelijke behandeling*). The decree applies to all employers in the Flemish Region with regard to the occupational integration of persons with disabilities, although its scope is largely restricted to the authority of the Flemish legislator - for the other categories covered, the decree does not apply to the intermediaries on the labour market and to the civil service of the Flemish Region and Community. It is regrettable that neither the Brussels Metropolitan Region nor the German-speaking Community (which has exercised the powers of the Walloon Region for the German-speaking community since 1999) has so far deemed it useful to follow this example.

In **France**, several clauses favourable to persons with disabilities which the Social Modernization Act of 17 January 2002 introduced[164] concern access to employment. The Act creates three mechanisms in this respect. Firstly, it extends the group of persons considered as included in the annual workforce of workers with disabilities. Secondly, employers can now partially discharge their obligation to employ persons with disabilities by accepting disabled persons for traineeships. Thirdly, the employment plan in an ordinary environment (specific to persons with disabilities) must mandatorily form part of the annual or long-term plan in favour of workers with disabilities, a programme contained in a collective agreement, the application of which is one of the ways in which employers can discharge their obligation to hire persons with disabilities.

In **Ireland**, although both the Employment Equality Act, 1998 and the Equal Status Act, 2000 make provision for a form of mandatory reasonable accommodation for persons with disabilities, this applies at present only if employers or service-providers do not incur a cost "other than a nominal cost" arising from the discharge of that obligation. This qualification was introduced in response to a Supreme Court finding that the legislation as originally drafted was an incursion on the constitutional right to private property of private parties affected by the legislation. The implementation of the Framework Employment Directive will only partially solve this problem: indeed, in the non-employment situations covered by the Equal Status Act, 2000, the nominal costs proviso will continue to apply.

In **Portugal**, although a number of legislative measures have been adopted since the late 1980s to improve the professional integration of persons with disabilities[165], including subsidies to the employer for the adaptation of the working post, to compensate for loss in profitability, for personalised hosting[166], for the elimination of architectural barriers, these measures have has at yet a limited effect. The integration of persons with disabilities remains extremely low.

Quotas in employment[167]

In **Germany**, the Law of 26 August 1986 had imposed a quota of 6 % of the working positions to be occupied by persons with disabilities, under the threat of a tax of 200 DM/month/post which is not occupied by a disabled person when the quota is not met. The *Gesetz zur Bekämpfung der*

[164] For a detailed presentation, see the column by F. Bocquillon, «Les personnes handicapées», Revue du droit sanitaire et social, July-September 2002, p.583.
[165] Law 8/89 concerning the prevention, rehabilitation and integration of disable people; Decree of Law 40/83, concerning "protected and secure employment" and Decree of law 297/86, aimed at conceding fiscal incentives to employers willing to take disabled people.
[166] E.g., if two deaf people are taken, hiring a special monitor for them may be partially covered.
[167] The measures taken in order to stimulate the occupational integration of persons with disabilities by granting special benefits imply first of all that the person in question is classed as disabled, which may be difficult bearing in mind the diversity of handicaps (mental, physical or sensory deficiencies) and the highly variable degrees in existing handicaps. The introduction of a certain degree of flexibility is therefore advisable when setting up these mechanisms. In **Luxembourg**, the Act of 25 July 2002 on incapacity for work and occupational reintegration (Mém. A, 2002, 1668) now makes it possible to reclassify within the company or on the labour market any salaried worker who was not recognized as disabled but who as a result of chronic illness, infirmity or wear has become incapacitated to carry out his last job.

Arbeitlosigkeit Schwerbehinderter of 29 September 2000[168], later revised in April 2001, provided for diverse forms of assistance to disabled employees (*Arbeitsassistenz*), thus diminishing the burden on the employer to impose the accommodation of the working environment; and it revised the quota system, lowered from 6 % to 5 % but in combination with a substantial rise in the penalties imposed on employers not complying with the quota scheme. These measures produced the intended effect. According to a notification of the Federal Ministry for Economy and Labour there have been 144,292 unemployed severely handicapped persons in October 2002 against 189,766 in 1999. This decrease of 24% may be seen as the result of the *Gesetz zur Bekämpfung der Arbeitlosigkeit Schwerbehinderter*.

In **Austria**, a Parliamentary query to all ministers and accountable branches of the executive on the implementation of the statutory duty to achieve a quota of one person with disabilities in 25 employees in public service and enterprises led to a fairly mixed picture of achievements with especially the employment structure of the provinces lacking behind the requirements of the law.[169]

Spain has the lowest level of employment of persons with disabilities in the Union: only 20% of disabled persons aged between 16 and 31 have a source of income. It is therefore particularly welcome that measures have been adopted during the period under scrutiny: the Community of Castilla la Mancha adopted Act no. 12/2002, which reserves 5% of civil service posts for persons with disabilities in the context of the next recruitment competition[170]; the Community of Navarra set up a similar mechanism by Act no. 16/2002[171]; and the Ministry of Health and Consumer Affairs issued a circular on the selection criteria of tenderers for procurement contracts, stipulating that one of the criteria for awarding a contract will be the number of persons with disabilities working for the company or the undertaking to do so for the purposes of the contract in question[172].

Right to education

Access to education for persons with disabilities is, together with access to employment, a crucial factor in the general social integration of persons with disabilities. This issue has given rise to major debates in **Ireland**, where the Education for Persons with Disabilities Bill, 2002 was published during the period under scrutiny. It makes provision for the integration of persons with disabilities into mainstream education, needs assessment, special education and appeals procedures. A consultation process on how best to proceed with rights-based legislation is currently being facilitated by the statutory body, the National Disability Authority. In **Portugal**, some measures of positive discrimination were adopted in the field of education to improve the integration of persons with disabilities, with the set up of special secondary education and the establishment of system of quotas, aimed at keeping disabled people apart from the very fierce competition generated by the filter of *numerus clauses.*

In the **United Kingdom**, the Educational Needs and Disability Act 2001 entered into force in September 2002, imposing an obligation on schools, colleges and universities not to treat disabled pupils and students less favourably when applying for places at them. Furthermore providers of education must make reasonable adjustments to ensure that disabled pupils and students are not disadvantaged in any aspect of school, college and university life. This thus covers not only teaching and learning but also after-school clubs and extra-curricula activities. There will be a need to increase access to buildings and make adjustments such as induction loops for those with hearing impairment and supply information in large print for a visually impaired student. The introduction of the this

[168] BGBl. 2000 I p. 1394.
[169] Cf. Parliamentary Materials on http://www.parlinkom.at , keyword search: “Behinderte”(German)
[170] Ley 12/2002, de 29 de noviembre de 2001, que regula el acceso de las personas con discapacidad a la funcion publica de la Administracion de la Junta de Comunidades, BOE, 8 février 2002.
[171] Ley Foral de la Comunidad de Navarra 16/2002, de 31 de mayo de 2002, reguladora de determinados aspectos de acceso al empleo de las personas con discapacidad en la Comunidad Foral de Navarra, BOE, 27 juin 2002.
[172] Orden de 17 diciembre 2001 del Ministerio de Sanidad y Consumo que aprueba la instrucción sobre el establecimiento de criterios de preferencia en la adjudicación de contratos sobre la base de la integración de las personas con discapacidad en las plantillas de las empresas licitadoras. BOE, 5 January 2002. A representation of at least 2% of persons with disabilities in the company is the criterion required.

obligation has been backed up by an 'Educating for Equality' campaign by the Disability Rights Commission to ensure that teachers and lecturers, schools, colleges and universities provide the appropriate support for disabled pupils and students. This will provide a confidential help line, an conciliation service to resolve disputes amicably, speedily and at low cost, providing materials on the scope of the duties and supporting legal cases where discrimination occurs.

Clarifications on the extent of the positive obligations of the authorities to ensure the social and occupational integration of persons with disabilities could soon emerge from the European Committee of Social Rights. On 26 July 2002, complaint no. 13/2002 *Autisme-Europe v. France* was registered. This complaint concerns Article 15 (right of persons with disabilities), Article 17 (right of children and young persons to social, legal and economic protection) and Article E (non-discrimination) of the Revised European Social Charter of 3 May 1996. It claims that **France** does not comply with these provisions on account of the inadequacies in the educational care of autistic persons.

Beyond work and education

It is to be hoped that the discussions surrounding the implementation of directive 2000/78/EC with respect to persons with disabilities will envisage the need to address equal treatment in the areas of public transport, sports and accessibility of public buildings – and go beyond the scope of the directive, which is limited to employment and education. The principles of subsidiarity and proportionality which should be respected by any Community initiative would not seem in fact to exclude such an extended use of Article 13 EC. Indeed, such has been the reading of the requirements of subsidiarity with respect to race and ethnic origin. And the implementation of equal treatment in work and employment obviously cannot be separated from the other spheres, which are connected to the effective possibility of professional integration. As the Committee on Economic, Social and Cultural Rights noted in its General Comment no. 5, which refers here to the doctrine of the International Labour Organization[173], "it is very often the physical barriers that society has erected in areas such as transport, housing and the workplace which are then cited as the reason why persons with disabilities cannot be employed"[174]. If an increase in the level of employment of persons with disabilities justifies the exercise of Community authority with regard to the subsidiarity principle, the elimination of the barriers which society erects to access to employment: "the failure of Governments to ensure that modes of transportation are accessible to persons with disabilities greatly reduces the chances of such persons finding suitable, integrated jobs, taking advantage of educational and vocational training, or commuting to facilities of all types. Indeed, the provision of access to appropriate and, where necessary, specially tailored forms of transportation is crucial to the realization by persons with disabilities of virtually all the rights recognized in the Covenant"[175].

In the **Netherlands**, the first Parliamentary debates concerning the bill *Gelijke behandeling op grond van handicap of chronische ziekte* [Equal treatment on account of handicap or chronic disease] (28 169) do appear to go in that direction[176]. The right of persons with disabilities not to be discriminated against is not to be limited to the sphere of work, or even of economic relationships. In **Germany**, a decision of the Federal Social Court[177] agreed with the plaintiff, born in 1989 with a false position of the foot and a partial paralysis of the legs, who was denied by the statutory health insurance administration a tricycle suitable for disabled persons which he requested. The Federal Social Court agreed that a child should be able to take part in the usual life of children the same age. In **Austria**, a proposed amendment to the Copyright Act (*Urheberrechtsgesetz*) intended to implement Directive 2001/29/EC[178] was recently introduced to Parliament. It proposes that people with disabilities will get free use of copyright protected works (thus giving them the right to have a book transformed into a

[173] A/CONF.157/PC/61/Add.10, p. 13.
[174] General Comment no. 5 (1994), above, § 22.
[175] Id., § 23.
[176] *Handelingen II*, 2001-2002, pp. 5075-5080.
[177] Judgment, 23 July 2002 – B 3 KR 3/02 R -
[178] Directive 2001/29/EC of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167 of 22/6/2001.

digital format in order to meet their special needs) in return for an additional remuneration for the holder of the right. In the same Member State, NGO's have strongly advocated a federal equal Opportunities (Disabled People) Act (*Behindertengleichstellungsgesetz*) which is hoped to function as a vehicle to remove existing barriers in connection with public transport and road traffic, access to medical care at hospitals and established practitioners, public events and cultural activities, and so forth. Under the Copyright (Visually Impaired Persons) Act 2002 provision is made in the **United Kingdom** to permit, without infringement of copyright, the transfer of copyright works to formats accessible to visually impaired persons. Moreover, still in the UK, the Private Hire Vehicles (Carriage of Guide Dogs etc) Act 2002 extends to the operators and drivers of such vehicles the duty already applicable to licensed taxis to carry disabled people at no additional charge when they are accompanied by guide dogs, hearings dogs or other assistance dogs. Perhaps these evolutions announce a ripple-effect of directive 2000/78/CE, as it has clearly had, for instance, in **Belgium**, where the Law of 6 January 2003 implementing directive 2000/78/CE clearly goes beyond its intended scope of application.

It is true that, particularly with regard to the obligation of ensuring reasonable accommodation, there is also a budgetary aspect to this issue. However, there are several indications that the public authorities are aware of the need to act in order to achieve equal rights for persons with disabilities. In **Sweden**, the 2000 National Action Plan for Disability Policy[179] has led the government to take various measures to enable such persons to participate in the life of the community, including (since the 1 April 2002) the attribution of financial aid to local municipalities for the development of special programs for adult education of mentally retarded persons[180]. In the **Netherlands**, the *Invoeringswet structuur uitvoeringsorganisatie werk en inkomen (Invoeringswet SUWI)* [Work and Income (Implementation Structure) Act] entered into force on 1 January 2002[181]. One of the changes introduced by the new act is an extension of the possibilities for a *persoonsgebonden reïntegratiebudget (prb)* [personal re-integration budget]. Another measure that is likely to benefit persons with disabilities, the *Wet leerling gebonden financiering* [Act concerning pupil-oriented budgets], will probably enter into force in August 2003. The new scheme will make an individual budget available to pupils who qualify for special types of education. This will enable the pupils (or their parents) to select the school that will fit their needs best.

It cannot be ruled out that, gradually, the obligation of reasonable accommodation will be extended, notably through Article 15 of the European Social Charter and Article 8 of the European Convention on Human Rights. Certain attempts to rely on these provisions may be noted. In the **Netherlands**, the *Centrale Raad van Beroep* [Central Appeals Tribunal] addressed the scope of positive obligations under Article 8 ECHR on two occasions. In January it decided that a seriously handicapped man could not derive an entitlement to a 'robot arm' from Article 8. The Tribunal considered that the authorities, when balancing the general interest and the interests of the individual, could reasonably decide not to make robot arms available through the system of health services. The Tribunal observed that the authorities are entitled a to a wide margin of appreciation in this area[182]. In a similar vein it decided that a health insurance company is not obliged, on the basis of Article 8 ECHR, to offer a PC with internet connection to an autistic man. The man had argued that, because of his poor means of communication, the absence of the equipment made a direct and immediate interference with his right to private life within the meaning of Article 8[183].

[179] Prop. 1999/2000:79 *Nationell handlingsplan för handikappolitiken.*
[180] Förordning om statligt stöd för utveckling av vuxenutbildning för utvecklingsstörda, (SFS 2002:82).
[181] *Stb.* 2001, 625.
[182] *Centrale Raad van Beroep,* LJN-nr. AE0506, 22 February 2002.
[183] *Centrale Raad van Beroep, USZ* 2002, no 326, 1 October 2002.

CHAPTER IV. SOLIDARITY

Article 27. Worker's right to information and consultation within the undertaking

The employees' right to information and consultation is guaranteed by Article 21 of the revised European Social Charter of 3 May 1996. Among the five Member States of the European Union where this instrument is in force (**Finland**, **France**, **Ireland**, **Italy**, **Portugal** and **Sweden**), only **Ireland** has not agreed to be bound by this provision. The employee's right to information and consultation also appears in Article 2 of the Additional Protocol to the European Social Charter[1], drawn up for signature on 5 May 1988 and in force from 4 September 1992, which adds 4 rights to the rights listed in the European Social Charter of 18 October 1961. The **Netherlands**, which is a party to the Additional Protocol but which has not yet ratified the revised European Social Charter, has agreed to be bound by the said Article[2]. The correspondence between Article 21 of the revised European Social Charter and Article 2 of the Additional Protocol of the European Social Charter of 5 May 1988 is, however, not yet perfect, since the latter provides for the States to be able to exclude those companies from the scope of this guarantee[2], whose staff numbers are less than the minimum defined by national law or practice.

Directive 2002/14/EC

Directive 2002/14/EC of the European Parliament and of 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[3]. The adoption of this instrument undeniably represents the most important event during the period under consideration, concerning the right laid down in Article 27 of the Charter of Fundamental Rights[4]. The scope of the directive is limited to companies employing at least 50 workers, or to establishments employing at least 20 workers, according to the decision of the Member State[5]. This restriction, justified by the wish to "avoid any administrative, financial and legal constraints that would hinder the creation and development of small and medium-sised undertakings"[6], cannot be used as a pretext by the States to limit the scope of their obligations imposed by other international rules, particularly Article 21 of the revised European Social Charter; in fact, the directive sets only minimum requirements[7], and "the implementation of this Directive should not be sufficient grounds for a reduction in the general level of protection of workers" in the field it covers[8].

The principle of collective discussion in the field of personal data protection

The hope may be expressed that when the Community initiative on the protection of employees' personal data has been adopted, this directive will be improved to include the principle of collective discussion. This principle is considered an essential guarantee of any processing of employees' personal data, given both the need to carry out the processing in a transparent and public way, which assumes information on organisations representing workers and if applicable, to allow the discussion between the employer and employees' representatives to identify alternatives to the proposed processing of data, (for example, the introduction of in-company video surveillance or the automation of certain types of assessment of workers) to limit interference in the workers' private lives as much as

[1] *S.T.E.*, n°128.
[2] To the exclusion of Aruba and the Dutch West Indies.
[3] *OJ.* n° L 80 of 23.3.2002, p. 29.
[4] In addition, Directive 2002/74/EC of the European Parliament and the Council of 23 September 2002 amending Council Directive 80/987/EEC approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ L 270 of 8.10.2002. See the comment on Article 30 of the Charter below.
[5] Article 3 § 1 of the Directive.
[6] Preamble, 19th ground.
[7] Article 1 § 1 of Directive 2002/14/CE.
[8] Preamble, 31st ground.

possible. Thus, according to Recommendation N° R(89) 2 sent by the Committee of Ministers to the member States of the Council of Europe on 18 January 1989 concerning the protection of personal data used for employment purposes, "employers should fully inform or consult their employees or their representatives in advance about the introduction or adaptation of automated systems for the collection and use of employees' personal data". This principle also applies to the introduction or the modification of technical processes intended to monitor the movements or the productivity of employees (principle 3.1).

Directive 2002/14/EC provides for information or consultation to deal particularly with "decisions apt to lead to substantial changes in the organisation of work or in contractual relationships" (...)"[9]. However, all situations where the introduction or modification of: a) automated systems making possible the processing of employees' personal data, b) any technical device which can be used for the supervision/ monitoring of employees in the workplace and c) questionnaires and tests of any kind, including medical, genetic and personality tests used at the time of recruitment, or during the period of employment, should be targeted more specifically[10].

Member States

Concerning Member States, there is only one significant development, which merits a mention in respect of the period under consideration. In **France**, Article 1 of the Law No. 2003-6 of 3 January 2003 on "relaunch collective bargaining on economy-related dismissals", provisionally suspends the application of a certain number of provisions resulting from the Law No. 2002-73 of 17 January 2002, called the social modernisation law, adopted by the then socialist majority. It also reestablishes a certain number of Articles in their wording prior to the coming into force of the social modernisation law. The consequence of these modifications is to suspend works council's new prerogatives (alternative proposals, right to oppose) recognised by the modernisation law. Furthermore, law No. 2003-6 sets up an experimental waiver-based system of bargaining on company level, concerning information and consultation procedures of works councils, when an employer is considering dismissals on economic grounds. This provision puts a question mark over a certain number of public policy provisions of the Employment Code, since it allows waivers of standards intended to ensure minimum protection of employees. The validity of these waiver-related agreements is subject to consultation with works councils and countersigning by one or several representative majority trade union organisations. These guarantees do not appear to be sufficient for guaranteeing the employees' right to information and consultation.

Article 28 Right of collective bargaining and action

Collective bargaining

On international level, the right to collective bargaining is, in particular, guaranteed by three agreements concluded within the ILO, namely, the agreement (No. 98) of 1 July 1949 concerning the application of the principles of the right to collective organisation and bargaining, which was ratified by all of the Member States of the European Union, the ILO agreement (No. 135) of 23 June 1971 concerning protection and facilities to be granted to workers' representatives in the undertaking, which was ratified by all Member States of the European Union except **Belgium** and **Ireland** and ILO agreement (No. 154) of 19 June 1981 concerning the promotion of collective bargaining. This convention is in force in only a minority of Member States of the European Union. It has only been ratified by **Belgium**, **Spain**, **Finland**, **Greece**, the **Netherlands** and **Sweden**.

The first three paragraphs of Article 6 of the revised European Social Charter, guarantees the right to collective bargaining. This right appears in the Articles in the "hard core" of the Charter[11]. All Member

[9] Article 4 § 2, c) of Directive 2002/14/CE.
[10] Document submitted by the European Commission for the *Second consultation phase of the social partners on workers' personal data*, 31 October 2002, p. 11.
[11] Article 20 § 1 b), of the European Social Charter; article A § 1, b), of the revised European Social Charter.

States have agreed to comply with the provisions of the European Social Charter except for **Greece**; moreover, **Germany** accompanied its acceptance of these paragraphs by a declaration interpreting them as excluding *Beamte* (civil servants) from the benefit of these provisions[12].

Although it has agreed to be bound by Article 6, paragraphs 1 to 3 of the European Social Charter, **Ireland** has not ratified ILO convention No. 135 nor No. 154. Now, the right to collective bargaining in that State is particularly threatened. . In its Concluding Observations on **Ireland** under the ICESCR the UN Committee on Economic, Social and Cultural Rights expressed concern about the continued impediments imposed by the State with respect to obtaining collective bargaining licences for trade unions and possible dismissal consequences thereof for members of non-authorised trade unions (at para. 18)[13]. Moreover, **Ireland** is unique in Europe in not providing a legal right of representation for workers. Existing voluntary provisions for resolution of disputes relating to negotiation and collective bargaining agreements under the Code of Practice on Voluntary Dispute Resolution (Statutory Instrument 145 of 2000) have, according to the ICTU, failed. Of 71 disputes referred to the Labour Relations Commission under the Code only one or two have been resolved. As a result of this no decisions have been made by the Labour Court under the Industrial Relations (Amendment) Act, 2001 and only two disputes have so far formed the subject of recommendations[14]. In the opinion of ICTU, a number of industrial disputes have occurred which would have been avoided if a legal mechanism for resolving recognition disputes were in place. The question of Union recognition will now be re-considered by the social partners and Government at the highest level subject to the adoption of a new national pay agreement to succeed the last agreement, the *Programme for Prosperity & Fairness* (PPF).

Collective action

The right of workers and employers to have recourse to collective actions in the defence of their interests in cases of a conflict of interest, is explicitly recognised in Article 6 § 4 of the European Social Charter.[15] This provision of the revised European Social Charter has been accepted by **Denmark**, **Finland**, **France**, **Ireland**, **Italy**, **Portugal**[16], **Sweden** all being Member States in which the revised European Social Charter is in force and by other Member States, **Belgium**, **Germany**, **Spain** and the **Netherlands** (except for civil servants) and by the **United Kingdom**. On the other hand, **Austria**, **Greece** and **Luxembourg** do not consider themselves bound by this paragraph of the European Social Charter.

Like Article 28 of the Charter of Fundamental Rights, Article 6 § 4 of the European Social Charter, although it explicitly mentions only strikes among the forms of collective actions – in 1961 this was the first recognition of the right to strike in an international instrument – it implicitly also recognises the employers' right to use lockouts, an interpretation which the Committee, then called the Committee of Independent Experts, justified by stating that a lockout was the main, if not the sole, collective action available to employers in defense of their interests[17]. In **Portugal**, lockouts are nevertheless

[12] **Portugal** declared that it does not apply Article 6 § 2 of the Charter to contracts of a currency of less than one month, to those that provide for a normal workweek of less than eight hours, or to those having an occasional or special nature.
[13] In this regard it reiterated its previously expressed concern in its report of 1999 (at para.19).
[14] In any event, the 1991 Act does not permit disputes about union representation for the purpose of collective bargaining to be the subject of a determination by the Labour Court.
[15] In **Spain**, the right to strike is protected by the Constitution (Article 28 § 2 of the Constitution of 27 December 1978). See for example judgment n° 66/2002 given on 21 March 2002 by the Constitutional Court, which ruled that an infringement of the right to strike occurred when participation in a strike which had been recognized led to dismissal: Recurso de amparo 2331/1998, Asunto Juan Antonio Postigo contra el Tribunal Superior de Justicia de Castilla y Leon. This is also the case in **Greece** (Article 23 § 2 of the Constitution of 2001), in **France** (Preamble of the Constitution of 27 October 1946, point 6), in **Italy** (Article 40 of the Constitution of 27 December 1947), in **Portugal** (Article 57, §§ 1 to 3 of the Constitution of 2 April 1976), and in **Sweden** (Article 17 of the Constitution of 27 February 1994). Only the Constitutions of the Kingdom of **Spain** (Article 37 § 2) and of the Kingdom of **Sweden** (Article 17) guarantee to *employers* as well as to workers the right to use collective action in the defense of their interests.
[16] Except for the reservation on lockouts, mentioned below.
[17] Conclusions I, p. 39. Of course, these rights to have access to collective actions can be subject to restrictions, in keeping with Article 31 of the European Social Charter or Article 5 of the revised European Social Charter.

expressly prohibited by Article 57 § 4 of the Constitution[18], which led that State to include a reservation in its ratification of the revised European Social Charter on 30 May 2002. In the other States, recourse to lockouts, if they are legal, does not appear to be used frequently by employers, although in **Denmark** it is not unusual for small employers to choose temporarily to suspend business activity of the company to the resulting detriment of all workers as a reaction to a strike, even if it is engaged in by only a few employees.

In contrast with the European Social Charter, Article 11 of the European Convention on Human Rights does not expressly include either a right to strike or the right of *lockout* by employers, or an obligation by employers to engage in collective bargaining. During the period under review, the right to strike was nevertheless the subject of two cases brought by trade unions before the European Court of Human Rights[19]. In fact, the Court stated that Article 11 might be regarded as q safeguard of the freedom of trade unions to protect the employment interests of their members and the Court was therefore prepared to agree in both cases that the prohibition of the strike had to be regarded as a restriction on the freedom of association. Assessing the facts of each case, the Court found that these restrictions were in compliance with the requirements of Article 11 § 2 of the Convention.

Thus, in the case of *UNISON* (where a trade union opposed plans to privatise parts of a hospital) the Court considered that the impact of the restriction on the union's ability to take strike action did not place its members at any real or immediate risk of detriment or of being left defenceless against future attempts to downgrade pay or conditions. In the case of *OFS* (concerning an industrial conflict in the Norwegian offshore oil and gas industry) the Court stated that various means of safeguarding the Article 11 rights of the trade union members had been respected. Although the duration of an initial strike was relatively short – 36 hours – it appeared that this had already generated significant losses. The pressure thereby created must have been considerable. Had the strike been allowed to continue, it would have led to the suspension of all oil and gas production on the Norwegian Continental Shelf. This would have resulted not only in a very substantial drop in production revenues of both private and State companies, but would also adversely have affected energy supply to industries and households in EU countries and Norway's credibility as a gas supplier to the EU. Thus, in the view of the Court, specific and exceptional circumstances existed in that case. The Court concluded that the imposition of compulsory arbitration was not disproportionate.

In **Belgium**, the main difficulties are due to the intervention of judges in collective labour disputes. In the absence of a legal framework in national law, case law in fact defines the rule of the exercise of the right to strike. In its conclusions XVI-1 (vol 1) submitted in 2002, the European Committee of Social Rights concluded that **Belgium** did not comply with Article 6 § 4 of the European Social Charter; having analysed Belgian case law concerning collective labour conflicts, the ECSR stated that "the vast majority of judges sitting in Chambers accept their authority to rule, based mainly on Article 6 of the European Convention on Human Rights, and apply penalties also in cases where pickets remain peaceful and do not involve any act of physical violence, threat or intimidation" and that "use of the concept of abuse of rights or the proportionality criterion is leading the courts to act as arbiters of the appropriateness of strikes and hence of their lawfulness. Thus, if a judge considers that the harmful effects of the strike are disproportionate or that the strike could be organised in a less damaging way without losing its effectiveness, a ban will be imposed"[20]. From its analysis, the ECSR concluded that the restrictions on the right to strike in **Belgium** exceed that which would be applicable under Article 31 of the European Social Charter, which only accepts restrictions to the rights and principles of the Charter if they are a necessity in a democratic society.

[18] CANOTILHO/MOREIRA, *Constituição da República Portuguesa Anotada,* 3ª Edição, 1993, pp. 302 and ff.
[19] Eur. Ct. H.R., *UNISON v. the **UK*** (decision), no. 53574/99, 10 January 2002, and *Federation of Offshore Workers' Trade Unions v. Norway* (decision), no. 38190/97, 27 June 2002.
[20] See Civ. Hasselt (ref.), 1 December 1999, *Chron. D.S.* 2000, 443 ; Civ. Tongres (ref.), 1 December 1999, *Chron. D.S.* 2000, 439; also see Labour Court. Mons, 7 May 2002*, J.T.T.*, 2002, pp. 481-483 for a more liberal attitude with regard to the right to strick

The intervention of judges sitting in Chambers to prohibit certain collective actions or order them to be terminated, is at times founded on concern for the protection of the employer's property rights and freedom of enterprise, which at times has led the judges to conclude that in these circumstances, the employer has the right to continue with his activities and to pursue them normally, even during collective disputes, which, in particular assumes that non-striking personnel shall not be prevented from gaining access to facilities[21].

Lastly,, we can only report the concern expressed by the European Committee of Social Rights[22] with regard to the existence of "a branch of litigation concerning dismissals on serious grounds, the lawfulness of which is assessed by examining certain features and operational arrangements of strikes which go beyond normal strike practices and which also depend on the employers personal behaviour". Although case law states that workers are not prohibited from taking part in strikes solely on the grounds that the strike is not recognised by a workers' representative organisation[23], labour courts do not exclude the principle that the personal behaviour of an employee in the context of collective action, notably an improper exercise of the right to strike, can constitute grounds for terminating the employment contract[24].

A rather similar problem exists with respect to **the Netherlands**. Following repeated complaints by the Dutch trade union *FNV* concerning judicial review of strikes, the Committee stated in its July 2002 comments on the 14th report of **the Netherlands**, that Dutch courts have recourse to the criterion of proportionality. As the courts also have the power to decide, whether a strike is premature, they are also led to pass judgment on whether a strike is appropriate and lawful. The Committee considered that the judicial practices in question restrict by their nature the right to strike and that they go beyond restrictions admissible under Article 31 ESC Charter[25]. It should however be noted that the Dutch Courts have demonstrated extraordinary willingness to take into account in their decisions the European Social Charter. Thus, for example, the *Rechtbank* [Court of First Instance] of Utrecht found in favour the Dutch trade union *FNV* on a claim for damages following a strike. The claim was brought by a company, which had organised a trade fair in Utrecht. The number of visitors was lower than expected, which according to the organisers was due to a strike of the Dutch railways. The Court ruled that the right to strike was protected by Article 6 (4) ESC and in principle, that it had to be tolerated. It found that *FNV* was not under an obligation to opt for another, less intrusive form of action, and that the strike had been announced well in advance. In addition, the injury suffered was not of such a magnitude that it surpassed the generally acceptable limits[26].

Collective actions in the civil service

Article 11 § 2 of the European Convention of Human Rights stipulates that this provision, which in particular guarantees freedom of trade union association, "shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the State administration". Article 6 § 4 of the European Social Charter cited above, does not contain this kind of restriction[27], but the Committee of Independent Experts felt that under Article 31 of the European Social Charter (Article G of the revised European Social Charter), the suppression on the right to strike by persons employed in crucial public services could be consistent with the Charter[28]. Moreover,

[21] Civ. Charleroi (réf.), 11 December 2001, *J.T.T.,* 2002, p. 68.
[22] Concl. XVI-1 (vol. 1)(2002).
[23] Cass., 21 December 1981, *Pas.,* 1982, I, 531.
[24] Participation on a picket line cannot in itself justify terminating an employment contract: Labour Court of. Mons (1ière ch.), 7 May 2002, *J.T.T.,* 2002, p. 481.
[25] Conclusions XV-I, Volume 2, Chapter 13, July 2002.
[26] *Rechtbank Utrecht*, SMA 2002, p. 428; 1 May 2002.
[27] With regard to the guarantee of trade union rights, a provision which corresponds more precisely to Article 11 of the European Convention of Human Rights, Article 5 of the (revised) European Social Charter provides " The extent to which the guarantees provided for in this article shall apply to the police shall be determined by national laws or regulations."
[28] Conclusions I, p. 39. The same conclusions mention that the restrictions which can be applied to the rights in the European Social Charter can also justify the mandatory settlement of conflicts of interest that could seriously jeopardise the national economy..

the constitutions of several Member States provide for this restriction of the right to strike. This is, for example, the case in **Greece**, **Spain** and **Portugal**: Article 23 of the Constitution of the Hellenic Republic mentions administrations or undertakings, whose operation is of vital importance for meeting the basic needs of the social body; Article 28 § 2 of the Spanish Constitution refers to restrictions on the right to strike, needed to insure the operation (mantenimiento) of essential community services; Article 57 § 3 of the Portuguese Constitution specifies that the law defines the conditions during strikes, of the provision of services necessary to the safety and maintenance of equipment and installations and the minimum essential services to meet imperative social needs". Although it is aware that such restrictions may be needed, the European Committee of Social Rights nevertheless considered that eliminating the right to strike by all public servants could be justified under the Charter. On several occasions, and most recently at the 101st session of the European Committee of Social Rights in September 2002, a complaint was made about **Germany** for maintaining in its legislation, the prohibition of strikes in the civil service[29].

Prohibiting strikes when important aspects of the economic and social life of the nation are at stake, justifying the requisition and mobilisation of civilians, contradicts Article 1 § 2 of the European Social Charter, if the conditions in which that mobilisation can be imposed are not adequate and accurately defined. This question arose with regard to **Greece**, after the government had decreed civil mobilisation of merchant marine crews on 21 June 2002, following a strike which had paralysed shipping (but also tourism during the Pentecost weekend). The government decree was based on the fact that the strike by the crews caused serious disruption of the economic and social life of the State in general and in particular of the islands, which were cut off from the mainland. The Greek Sailors' Federation announced the decision before ILO Committee of Trade Union Freedom, arguing, among other things, an infringement of the ILO agreements Nos. 87 and 105 and instituted an action before the Council of State. The Government rescinded the mobilisation decree on 25 September 2002; at the same time, it met the sailors' claims that had led them to strike. With regard to the conditions under which a civil mobilisation can be decreed, the European Committee of Social Rights considered, in its report on **Greece** published in 2002, that in a new legislative provision adopted in 2001, the concept of a state of emergency justifying civil mobilisation was now defined sufficiently precisely and that accordingly the infringement of Article 1 § 2 of the European Social Charter had been corrected.

In **Portugal**, the right to strike is governed by Law 65/77, which also defines the concept of services which respond to pressing social needs[30]; these are telecommunications and post offices, hospitals and health services, public hygiene services, energy, water, fire services and transport. However, after the country faced long periods of strikes by workers of the industrial sector, transport, but most importantly by civil servants, whose grievances were based on the fact that their link to the State was merely temporary and precarious, but continued without the corresponding social benefits and the stability a career in the public service ought to provide, the question of this definition was again raised; the new *Proposta de Código do Trabalho* attempts a better definition of what “required minimum services” in this area should be during a strike.

Collective action and the free movement of goods

The obligation of Member States to take positive measures to ensure that goods may circulate freely within the EC, may lead them to impose restrictions on the right to take collective action. In July 2002,

[29] On 28 September 1961, **Germany** made the following declaration about Article 6 of the European Social Charter; "In the Federal Republic of **Germany**, civil servants (*Beamte*), judges and soldiers entitled to a pension are subject by law to special conditions of service and loyalty based, in each case, on an act of sovereign power. According to the legal system of the Federal Republic of **Germany**, these persons cannot, for reasons of public order and safety of State, take part in strikes, or organise other forms of collective action in the event of conflicts of interest. Nor are they entitled to take part in collective bargaining, given that the settlement of their rights and obligations with regard to their employers falls under the competence of freely elected legislative bodies. Consequently, with reference to the provisions of points 2 and 4 of Article 6 of the Social Charter (part II), the Permanent Representative of the Federal Republic of **Germany** to the Council of Europe feels that he must observe that, in the opinion of the Government of the Federal Republic, these provisions do not apply to the persons mentioned above."

[30] In accordance with Article 56 § 3 of the Portuguese Constitution.

Advocate General Jacobs delivered his opinion on the pending *Schmidberger* case[31], which raises the interesting issue of striking a fair balance between the free movement of goods and the fundamental rights of assembly and freedom of expression. The main question was, whether the **Austrian** authorities were in breach of the Community law obligation to ensure free traffic on the Brenner route in allowing a two-day political demonstration to go ahead on that motorway, possibly triggering State liability for the resulting economic losses. While finding a *prima facie* breach of Article 28 EC, the Advocate General considered this to be justified by the fact that by invoking the protection of fundamental rights of individuals, the authorities pursued a legitimate aim and that given the limited duration of the demonstration and the comparatively small disruption of the traffic, the authorisation of the demonstration did not constitute an excessive use of the margin of discretion within the meaning of the *Brasserie du Pêcheur* case-law.

Article 29. Right of access to placement services

Article 29 of the Charter of Fundamental Rights of the European Union was directly inspired by Article 1 § 3 of the European Social Charter law, which is binding on the parties "with a view to ensuring the effective exercise of the right to work", "to establish or maintain free employment services for all workers". The right of access to a free placement service must therefore be considered as a provision within the policy aiming at full employment. The effectiveness of this right of access to placement services assumes that they effectively fulfill their mission of matching supply and demand in the labour market, and have adequate resources to carry out their assignment. In **Germany**, the recommendations of **"**Commission Modern Services in the Jobs Market" (so called Harts-Commission) set up in 2001, led to the adoption of two Acts concerning the Jobs Market[32], which entered into force on 1 January 2003, and are a continuation of the Job-AQTIV Act[33], which entered into force on 1 January 2002. These Acts contain a sheaf of measures for improving the situation on the job market. Above all, there is the development of new employment opportunities, the tightening up of the regulations on reasonable jobs for unemployed persons, the improvement of quality and rapidity of employment agencies, the new orientation of ongoing vocational training, as well as the strengthening of the services character of the Federal Labour Office among others. In Austria, in order to combat rising unemployment of people aged under 25, a special emphasis has been placed within the National Action Plan on programmes promoting youth at work and finding suitable apprenticeships. These measures will become effective in 2003 and are being allocated a far higher per capita proportion of funds than other groups of the unemployed. The overall budget of the national placement service AMS for training and qualification measures has risen from 586.9 million Euros in 2001 to 617.7 million Euros in 2002, with a further increase in funds for 2003 to a total of 691.6 million Euros.[34] Although there is no legal right to being accepted for such training courses, the costs of those unemployed allowed to participate are fully covered by the AMS.

In its conclusions concerning the 14th report of **the Netherlands**, the European Committee of Social Rights stated that employment services continued to be available to all job-seekers and employers. Basic placement services are provided free of charge, with certain specialised services being offered on a commercial basis, mainly to employers. The Committee previously found the situation as regards fee-charging as not necessarily being contrary to the Charter. In its comments on the report, the **Netherlands'** Trade Union Confederation, *FNV*, had expressed concern that guidance services tend to become reduced to mere electronic databank facilities. However, the Committee limited itself to stating that the Government had denied that this was the case and that it referred to the existence of a customer service for job seekers requiring support. Pending receipt of the information requested, the

[31] Case C-112/00, *Schmidberger v. **Austria***, opinion of 11 July 2002.
[32] Erstes und Sweites Gesetz für moderne Dienstleistungen am Arbeitsmarkt [First and Second Act for Modern Services on the Job Market, both of 23 Dec 2002 (BGBl. 2002 I p. 4607 and 4621).
[33] Gesetz sur Reform der arbeitsmarktpolitischen Instrumente (Job-AQITIV-Gesets) [Act for the Reform of job-political Instruments] of 10 Dec 2001 (BGBl. 2001 p. 3443).
[34] Figures from AMS Österreich, Arbeitsmarktbeobachtung u. Statistik

Committee concluded that the situation in **the Netherlands** was in conformity with Article 1 § 3 of the Charter[35].

The placement services must fulfill their task efficiently; this does not mean that they can in all cases match, unassisted, the supply and demand in the labour market. In its conclusions concerning **Belgium** in the context of a control cycle XVI-1 2002, the European Committee of Social Rights (ECSR) made certain observations with regard to the compliance with this provision by the **Belgium** authorities[36]. The Belgian report on the results obtained in Flanders with regard to the performance of employment services showed that the number of job openings reported to the Flemish Community Office in charge employment services (VDAB) during the reference period had increased by 9 percent, whilst placement rates fell from 82.7 percent in 1999 to 77 percent in 2000. The average time required to fill a vacancy rose from 39 days in 1998, to 44 days in 2000. The Committee then pointed to certain information concerning shortages of workers; thus, in 2000, the number of job offered and not filled represented approximately 1.3 percent of job openings for all **Belgium** (1.9 percent in Flanders, 0.5 percent in Wallonia and 0.7 percent in Brussels). There was apparently in particular a lack of correspondence between the supply and demand for labour.

Article 30. Protection in the event of unjustified dismissal

The ILO agreement (No. 158) reached on 22 June 1982 at the 68th International Labour Conference concerning termination of work relationships on the employers' initiative, is based on the principle 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 (right of appeal according to Articles 8 to 10). The ILO agreement (n° 158) concerning the termination of working relationships on the employers' initiative has been ratified by six Member States of the Union **Spain**, **Finland**, **France**, **Luxembourg**, **Portugal** and **Sweden**.

Article 24 of the revised European Social Charter of 3 May 1996 provides for the Parties to undertake to recognise "the employee's right not to be dismissed without valid grounds connected with his ability or conduct, or based on the operational requirements of the undertaking, establishment, or service"[37]. Among the States which have ratified the revised European Social Charter , this provision has been agreed by **Finland**, **France**, **Ireland** and **Italy**. On the other hand, it has not been agreed by **Sweden** and **Denmark**.[38]

[35] Conclusions XV-I, Volume 2, Chapter 13, July 2002.

[36] Conclusions XVI-1 of the European Committee of Social Rights, vol. 1, 2002, p. 99 (the period particularly concerned the year 2000).

[37] Article 24, b), of the European Social Charter also guarantees "the right of workers whose employment is terminated without a valid reason to adequate compensation or other appropriate relief." This provision does not require reinstatement of a wrongfully dismissed employee into the undertaking although this consequence has been deduced by the European Committee of Social Rights from Article 8 § 3 of the European Social Charter concerning dismissal on grounds of maternity (see the comment on Article 33 of the Charter below). In Italy, one of the main grounds for a dispute between the Government and the main trade unions was the government's proposal to rescind, and then to apply Article 18 of the employee statute which provides for the right of an employee dismissed without just cause to return to his place at work and to receive compensation. In 2002, the Government submitted two draft laws to Parliament on the reform of labour legislation and on the organisation of the labour market. One of these proposals (n° 848) now being considered by the Senate, includes a provision according to which an employed employee will be entitled to compensation, in the case of unfair dismissal, but not, as under current law, to return to his employment.

[38] It appears that in this State, there is a particular problem resulting from the fact that some workers are not covered by legislation prohibiting unjustified dismissal (particularly the law on relations between employers and employees of 2002 Lovbekendtgørelse (2002:691) om forholdet mellem arbejdsgivere og funktionærer [Consolidated Act (2002:691) on the Relationship among Employers and White Collar Employees]) nor by collective agreements offering this protection. The Danish system apparently has a loophole from the standpoint of the application, *ratione materiae*, of the protection it provides in law.

Dismissal based on aspects of an employee's private life

A first question that arises in this provision of the Charter is to know what grounds can justify dismissal under the labour legislation of each Member State of the European Union[39].

In **Sweden** for example, a Labour Court (Arbetsdomstolen (AD)) dealt in the case *Polisförbundet mot Staten genom Rikspolisstyrelsen* no. 80[40] with the question whether a dismissal of a policeman who has been convicted of possessing child pornography is in accordance with the Swedish law provisions, which guarantee employment protection under certain circumstances. In the view of the court, the possession of child pornography contradicts the demands on the public confidence that is put on police officers. The Labour Court came to the conclusion in its judgment of 26 June 2002 that the policeman through his actions had consumed the confidence that the public needs to have for the police force and, therefore, his dismissal was to be considered in accordance with Swedish law[41] and justifiable on the grounds mentioned above.

This kind of case poses the question of the borderline between private and professional life, meaning the identification of circumstances which, although apparently they do not have a close connection with employment, could nevertheless affect the employment relationship because of to the particular nature of the function being exercised. What is in question here, is, on the one hand, the relevance of aspects of private life to the making of decisions in the context of employment context; any decision made in this context, particularly a decision of dismissal which has no relation to the nature of the function being exercised, would be unjustified. On the other hand, there is the question of interference in private life resulting from processes used to collect information on which the employer would base the decision of dismissal. In **Belgium**, several case law-based decisions have confirmed the inadmissibility of evidence gathered by violating the respect, which is due to the private life and the employee's personal data, particularly in the context of the growing number of new technologies in work environment. Accordingly, dismissal on serious ground is not justified, when the evidence has been gathered illegally. For example, the Labour Court of Verviers ruled that an employer who examined the electronic mail of an employee on a computer made available to that employee was in breach of Article 22 of the Belgian Constitution and of Article 8 of the European Convention on Human Rights, and the employer could not use this process to submit evidence that his employee was exercising a competitive activity in the context of his employment.[42]

Restrictions on dismissals on economic grounds

Another question that arises concerning Article 30 of the Charter is, however, the protection that the State should provide to the employee; to what extent should the State regulate dismissal the employer, in order to comply with this provision of the Charter. In principle, dismissal based on company needs is not unjustified, subject to the condition that an independent authority, usually a court, can determine the authenticity of these grounds[43]. In **France**, Law No. 2002-73 of 17 January 2002[44], called the social

[39] Dismissal based on grounds of discrimination would naturally be considered unjustified. Refer to the comments under Article 21 and concerning dismissal during pregnancy or maternity, article 33 of the Charter of Fundamental Rights. Also see Article 5 of ILO Convention (n° 158) concerning termination of employment at the initiative of the employer, referred to above, which excludes certain grounds of dismissal as being discriminatory, including absence from work during maternity leave.

[40] The Swedish Policemen's Union v. The State through the National Swedish Police Board (målnummer A-17-2001).

[41] Lagen om anställningsskydd (SFS 1982:80) (§ 18) (The Act on employment protection).

[42] Labour Court. Verviers, 20 March 2002, *J.T.T.*, 2002, p. 183. Along the same lines: Labour Court Brussels, 27 June 2002, *J.T.T.*, 2002, p. 47 (Supervision of a public place, in this case a bakery, by cameras, the existence of which is known to workers, is licit. This being the case, the proof of theft given by means of the camera records is licit and can justify dismissal for serious misconduct).; Arbeidshof Gent, 22 October 2001, *J.T.T.,* 2002, p. 41 (proof of private use of a portable telephone by producing invoices and names of persons called); Labour Court. Liege, 21 May 2001, *J.T.T.,* 2002, p. 180 (Searching a worker or his/her property can only constitute licit proof it is was done with his/her consent or with the intervention of the police); Labour Court. Nivelles, 8 February 2002, *J.T.T.,* 2002, p. 181 (same hypothesis).

[43] See. l'article 9 § 3 of ILO Convention (n°158) concerning termination of employment at the initiative of the employer: " In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons ".

modernisation law, strictly monitors the grounds of economy-related dismissal. In decision 2001-455 DC of 12 January 2002, the Constitutional Council nevertheless considered that Article 107 of the social modernisation law in the version passed by Parliament on 19 December 2001 which amended Article L 132-1 of the Labour Code to give a more restrictive definition of the concept of "economic dismissal"[45] with a view to avoiding so-called "stock market" dismissals which, without being indispensable to the survival of the company and likely to increase the shareholders' profits, were contrary to the freedom of enterprise. According to the Constitutional Council, the three possibilities of economy-related dismissal referred to by the law were sufficiently wide, particularly because in blocking a dismissal needed to safeguard the competitive position of the company, the law "prevents the company from anticipating economic difficulties in the future by taking measures that could avoid subsequent, more numerous dismissals".

Protection of employees in the event of an employer's insolvency

The principle, first laid down by Directive 80/987/EEC of 20 October 1980, on the convergence of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer[46], was reiterated in ILO agreement (No. 173) of 23 June 1992 concerning the protection of employees' claims in a case of insolvency of their employer, and in Article 25 of the revised European Social Charter of 3 May 1996[47]. During the period under consideration, Directive 2002/74/EEC of the European Parliament and of the Council was issued on 23 September 2002, amending Directive 80/987/EEC on the protection of employees in the event of the insolvency of their employer[48]. In particular, the amendment seeks to guarantee the applicability of the Directive and the minimum guarantees which it contains to part-time employees within the meaning of Directive 97/81/D.C., to employees holding a contract of employment valid for a specific period within the meaning of Directive 1999/70/EEC, and to employees who are in a temporary work relationship within the meaning of Article 1 item 2, of Directive 91/383/EEC. A section IIIb has also been added to Directive 80/987/EEC, which contains specific provisions for cross-border situations, particularly in order the better to coordinate the intervention of public administrations and guarantee institutions involved in the insolvency.

Article 31. Fair and just working conditions

In international law, ILO Convention No. 155 on employees' health and safety and the work environment, reached on 22 June 1981, which entered into force on 11 August 1983, constitutes an instrument more specifically adapted to ensuring fair and equitable working conditions. The object of this agreement is that of imposing on signatory States the definition of a "coherent national policy with regard to employees' health and work environment" aimed at "preventing accidents and injury to health resulting from work, related to work or occurring during work, by reducing the clauses of the risks inherent in the work environment to a minimum, where this is reasonable and practical". ILO agreement No. 155 is in force in the following Member States of the EEC, **Denmark**, **Spain**, **Finland**, **Ireland**, **Luxembourg**, **the Netherlands**, **Portugal** and **Sweden**.

Legislative activity of the Member States in the implementation of the law is greatly encouraged by important directives issued by the European Community, in particular Directive 89/391/EEC of 12 June 1989, concerning the taking of steps to encourage improvements in the safety and health at work

[44] Law n°2002-73 , JORF n°15 of 18 January 2002, p. 1008.
[45] According to the proposed new definition, dismissals by an employer on one or several grounds, not specific to the employee, resulting from suppression or transformation of the job or an amendment of the employment contract, to either serious economic difficulties that could not be overcome by other means, or to new technology changes threatening the life of the company, or a reorganisation required to safeguard the company's activity are dismissal for economic grounds.
[46] OJ L 283 of 20.10.1980.
[47] This provision has been accepted by **Denmark**, **Finland France**, **Ireland**, **Portugal** and **Sweden**. Conversely, **Italy** declared at the time of the submission of its instrument for ratification of the revised European Social Charter on 5 July 1999, that it is not bound by this provision.
[48] OJ L 270 of 8.10.2002. The title is that of Directive 80/987/EEC as renamed by Directive 2002/74/EC.

of employees[49], Directive 89/654 of 30 November 1989 concerning the minimum safety and health requirements in the workplace[50], Directive 93/383/EEC supplementing the steps for encouraging improvements in safety and health at work of employees with a fixed-term or a temporary work relationship[51], Directive 93/104/EEC of 23 November 1993 concerning certain aspects of the organisation of work times[52], supplemented by Directive 2000/34/EC of 22 June 2000 of the European Parliament and of the Council, amending Directive 93/104/EC to cover sectors and activities excluded from the Directive, Directive 97/81/EEC of 15 December 1997 concerning the Framework Agreement on part-time work, concluded by UNICE, CEEP and the ETUC[53], Directive 98/24/EEC of 7 April 1998 on the protection of employee health and safety against the risks at work resulting from chemical agents at[54] and Directive 1999/70/EEC of 28 June 1999 concerning the framework agreement on fixed-term work relationships, concluded by ETUC, UNICE and CEEP[55].

One way of trying to ensuring compliance with this law during the period in question consists in studying the progress made in several States during the said period on the implementation of these directives. In **Denmark**, two laws were enacted during this period, respectively implementing Directive 93/104/EEC, concerning certain aspects of the organization of work time[56] and Directive 97/81/EEC including the framework agreement on part-time working, concluded through the Community social dialogue[57]. In **Italy**, the legislative decree of 2 February 2002, No. 25 incorporated into Italian law, Directive 98/24/EEC on the protection of the health and safety of employees against risks due to chemical agents at work. **Luxembourg** passed Grand Duchy regulation of 30 July 2002 on protection of health and safety of employees against risks associated with chemical agents in the workplace[58] and Grand Duchy regulation of 30 July 2002 on the protection of employees against risks of exposure to carcinogenic or mutagenic agents at work[59]. In **Sweden** the Labour Act was adjusted as from 1 August 2002[60] to ensure the implementation of Directive 89/391/EEC. The purpose of the legislative change is to strengthen the situation of employees as regards working hours, i.e., all employees shall have at least eleven hours rest during a 24-hour period. The average weekly working time is now limited to a maximum of 48 hours within a period of four months. In the **Netherlands**, the *Wet verbod onderscheid bepaalde en onbepaalde tijd (WOBOT)* [Act prohibiting a distinction between fixed-term and open-ended contracts] entered into force on 22 November 2002[61]. The Act serves to implement Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

In **Finland**, the new Occupational Safety and Health Act[62] – which repeals the Occupational Safety and Health Act (299/1958), as amended – implements a number of these directives[63]. In addition to the prevention of accidents and occupational diseases, the new Act pays attention to the guarantees for a good and healthy working environment in general, taking into account issues such as the strain of the work, ergonomics, display screen work and the prevention of violence and harassment at work. The employer has a more specific duty to identify and assess the dangers at work and to ensure the safety and health of workers. There are also provisions on the duty of workers to obey the safety instructions

[49] OJ L 183 of 29.6.1989.
[50] OJ L 393 of 30.12.1989.
[51] OJ L 206 of 29.7.1991.
[52] OJ L 307 of 13.12.1993.
[53] OJ L 14 of 20.1.1998.
[54] OJ L 131 of 5.5.1998.
[55] OJ L 175 of 10.7.1999.
[56] Lov (2002:248) om gennemførelse af arbejdstidsdirektivet [Act (2002:248) on Implementation of EC Directive 93/104 on Working Hours].
[57] Lovbekendtgørelse (2002:815) om deltid [Consolidated Act (2002:815) on Part Time Work].
[58] *Mém*. A. 2002, 1948.
[59] *Mém*. A. 2002, 1957.
[60] Prop. 2001/02:145 Ändringar i arbetsmiljölagen : Lag om ändring i arbetsmiljölagen (1977:1160) (SFS 2002:585)) (Law on the Change of the Act on environment at work SFS 2002:585).
[61] *Stb*. 2002, 560.
[62] Työturvallisuuslaki, Act No 738 of 2002, date of entry into force 1.1.2003.
[63] Council Directive 89/391/EEC, Council Directive 91/383/EEC, Council Directive 98/24/EC; Council Directive 93/103/EC, Council Directive 97/81/EC, Directive 2000/34/EC, amending Council Directive 93/104/EC.

given by their employer, to exercise order and caution as required by the working conditions and to take care of their own safety and health and that of other workers. They shall also avoid harassment and impertinent treatment of their fellow workers. The Act also contains obligations for other persons who may affect occupational safety, such as manufacturers, importers and deliverers of machines and equipment, dispatchers of a package, real estate owners and shipowners, among others. Moreover, there are provisions on the structures of and conditions at working premises, safety of machinery and equipment as well as chemical, physical and biological agents and dangerous substances.

In **France**, five decrees of 6 December 2002 (No. 1421 to No. 1425) incorporate into French law Directive 2000/3/EC of the European Parliament and of the Council on certain aspects of the organisation of work time. Formerly, order No. 2001-175 of 22 February 2001 on the incorporation into French law of Directive 89/391, following earlier measures of incorporation into French law by sector of activity, and completed in 2002 via several decrees on public service and the provisions of Law No. 2002-73 on social modernisation, incorporated Directive 93/104/EC concerning certain aspects of the organisation of working time in **France**[64]. Moreover, **France** incorporated into French law Directive 89/391/EEC, concerning the introduction of measures to encourage improvements employees' safety and health at work, as well as Directive 93/383/EEC supplementing the measures to encourage improvements in safety and health at work of employees in a fixed-term employment or a temporary employment relationship. **France** has not, however, as yet incorporated into French law Directive 98/24/EEC of 7 April 1998 on the protection of employees' the health and safety against risks of chemical agents at work, notwithstanding the incorporation into national law deadline of 5 May 2001.[65]

In same State, a draft law on salaries, work time and sustainable development of employment (Fillon draft law)[66] proposes greater flexibility of the 35-hour working week (the legal working week) which results in overtime payment, rather than in time off. The legal working week may therefore be questioned[67]. The government had already urgently decreed (n° 2002 - 1257) the ability of employers to increase the number of overtime hours, which can be worked[68]. These measures are intended to weaken the Aubry law enacted by the Socialist government in 1998, which reduced the legal working week to 35 hours; which has been widely criticised by employers.

The effectiveness of regulations on health and safety at work are contingent on providing the labour inspection service with sufficient resources to make it possible to increase the number of on-site checks
In **Greece**, in particular concern was voiced about the effective application of existing laws because of an increase in the number of occupational accidents[69]. The circular dated 31 October 2002 drew the attention of prosecutors of the Court of Appeal and of the courts of first instance to certain breaches of labour law (the non-payment of salaries owed, non-compliance with conditions of health and safety at work) of both immigrant and national workers, and asked them to increase their efforts to prevent and to suppress these phenomena. In **Sweden**, the Prosecutor General (RÅ) distributed general guidelines to all prosecutor offices in **Sweden** implying, among other things, that from 1 December 2002 there will be prosecutors (about 20) within each office with special knowledge about work environment.[70]

[64] Several provisions were contained in the Labour Code before the adoption of the Directive, and were supplemented by the Aubry laws of 1998 and 2000 (see in particular, Articles L220-1 and 220-2 on daily rest).
[65] There is a general provision for prevention of accidents at work in the Labour Code (Articles L 230-1 et seq) and specific provisions for chemical risks (since 1979 and amended on several occasions).
[66] National Assembly: text n° 65 adopted on 19 December 2002.
[67] Public communiqué of the Socialist Party of 18 September 2002; for the right, this is a waste of time that does not significantly change the situation. See: www.udf.org/presse/interviews .
[68] JORF of 16 October 2002, p. 17082.
[69] Certain accidents took place in the construction site of the "Olympic Village"; to cope with this situation, the authorities took steps such as placing labour inspectors on a site or stopping the work in case of repeated offences. During the first half of 2002, 260 checks were made, fines were imposed on 40 occasions and work was stopped in 7 cases.
[70] B.Malmström, *Åklagare tar krafttag mot arbetsmiljöbrott*, SvD 25 November 2002, p. 4.

In **Finland**, trade unions have put forward a study revealing that inspection of hired labour coming from abroad and of employees sent by foreign subcontractors is much less rigorous in **Finland** than in the other EU Member States.[71] The study reinforces the currently held view that social dumping from abroad is the most important threat on working conditions being maintained at their current level. The three SAK unions organising engineering, construction and private service workers are demanding legal reforms to prevent pay and social dumping in the enlarged EU. In a letter to the government and Parliament of **Finland** these organisations stress that Finnish legislation leaves room for abuses when an enterprise based in another EU Member State offers hired labour or subcontracting services.

Harassment

During the period in question, directive 2002/73/CE of the European Parliament and Council of September 23rd 2002[72] expanded the definition of the principle of equality of treatment mentioned in directive 76/207/CEE of the Council relative to the implementation of the principle of equality of treatment between men and women with regard to access to employment, training and professional promotion, and working conditions, notably specifying that harassment (unwanted behaviour linked to the sex of a person) and sexual harassment (unwanted behaviour with sexual connotations, expressed physically, verbally or non-verbally) linked to behaviour having "the object or effect of undermining a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment", constitute forms of discrimination (new clause 2 § 3 of directive 76/207/CEE). This evolution follows the adoption of the Council's resolution of May 29th 1990 with regard to the protection of the dignity of men and women at work, as well as that of Recommendation 92/131/CEE of the Commission[73] of November 27th 1991 on the protection of the dignity of men and women at work, and the declaration of December 19th 1991 of the Council relative to the implementation of this recommendation and the accompanying code of behaviour. In addition, directives 2000/43/CE and 2000/78/CE, that this report mentions under clause 21 of the Charter, include harassment among the prohibited forms of discrimination (clauses 2 § 3 of each of the directives). The national reports don't however put the emphasis on harassment linked to sex or sexual harassment as such, but rather on harassment in general, which is not linked to any determined characteristic.

According to a survey in 2000 by the European Foundation of the improvement of living and working conditions during the preceding 12 months, 2 % (3 million) of employees had been subjected to physical violence by people at their workplace, 4 % (6 million) of employees were purportedly subjected to physical violence by people belonging to their workplace, 2% (3 million) of employees were said to have become victims of sexual harassment and 9 % (13 million) victims of intimidation or moral harassment.

A survey carried out in **Belgium** identified moral harassment as being concentrated in Brussels, in the public sector and in large companies or large administrations[74]. The Belgian legislature reacted to this by the enacting the Law of 11 June 2002 on protection against violence and moral or sexual harassment at work[75]. This law adds a chapter Vb to Law 04 August 1996 on the welfare of employers carrying out their work. It is supplemented by a Royal Decree of 11 July 2002[76], giving details of the obligations appearing in the law and of the internal procedures for dealing with complaints[77].

[71] Source : Trade Union News from **Finland**, http://www.kaapeli.fi/unions/2002/20020316.htm. The study is by labour law expert Jari Hellsten. It was published in November 2001.
[72] JO L 269 of 5.10.2002, p. 15.
[73] JO L 49 of 24.2.1992.
[74] A. Garcia, "Une recherche nationale sur les violences au travail", in Acts of the conference "Violence, harcèlement moral et sexuel au travail : la loi, les risques et la prévention", Ministère de l'Emploi et du Travail, Bruxelles, 17 September 2002, p. 8.

[75] Belgian *Monitor* of 22 June 2002.
[76] Belgian *Monitor* of 18 July 2002.
[77] See. S. van Wassenhove and P. Brasseur, "De nouvelles mesures contre le harcèlement et la violence au travail", *J.T.*, 2002, p. 801; J.-Ph. Cordier, "La loi du 11 juin 2002 relative à la protection contre la violence et le harcèlement moral ou

These regulations protect persons in the place where he/she carries out his/her work from harassment perpetrated by "any person who comes into contact with the employees during the execution of their work, not only the employer but also customers, suppliers, service providers, students, and recipients of allowances" (Article 2, 3° of the Royal Decree). The offences include violence at work (persecution, psychological or physical threats or aggression), moral harassment at work (improper or repetitive conduct with the object of harming the person, dignity or the physical or psychological integrity of the victims, endangering his/her job or creating a hostile, degrading, humiliating or offensive environment), sexual harassment at work (any form of verbal, non-verbal or physical behavior of a sexual nature, such the person guilty such behaviour is or should be aware of the effect on the dignity of women and men at the workplace) (Article 32ter of the law 04 August 1996). The definition of moral harassment closely follows that appearing in Directives 2000/43/EEC and 2000/78/DC., although the law only targets "repetitive" behaviour, introducing a restriction on the European Directives.

To provide protection against violence or moral harassment at work, the Law 04 August 1996 amended by the law of 11 June 2002 provides for the introduction of several preventive measures based on an analysis of risks in the company or institution, including the appointment of a specialist counselor on prevention. It also provides for a complaint mechanism, via this counselor on prevention who can place the matter before the labour inspection if the employer does not take adequate measures suggested by the counselor. This "internal" procedure does not exclude the making of a reasoned complaint by an employee to the medical inspector, if the employee feels that he/she is the victim of harassment. Lastly, the Law 04 August 1996 provides for the possibility of action by the Labour Court to enforce compliance with the provisions of Chapter Vb of the law. The action can be triggered not only by the victim of harassment, but also, with the victim's consent, by a trade union organisation or associations, whose statutory object is that of combating violence or moral or sexual harassment at work.

In **France**, the law of social modernisation of 17 January 2002[78] partially supplements the Law of 16 November 2001 on the struggle against discrimination[79]. It prohibits moral harassment at work into the Criminal Code (Article 222-33-2), the Labour Code (Article L. 122-49) and into the text on the rights and obligations of civil servants. This mechanism was inspired by that used for combating sexual harassment. Harassment is defined as a "repetitive action, the object or the effect of which is a deterioration of working conditions which could prove detrimental to the rights and dignity, alter the physical or mental health or compromise the professional future of an employee"; this includes insults, constraints or physical and psychological pressures. This is prohibited in the private and in the public sector. The prohibition applies to both employers and colleagues and therefore makes it possible to denounce a climate of collective hostility or behaviour of colleagues, which the employer does not necessarily support.[80]

In **Ireland**, the protection of workers from harassment was improved during the period under review. The Equality Authority Code of Practice on Harassment in the Workplace was given greater legal effect by means of a statutory instrument (i.e. secondary legislation). The Health & Safety Authority published a (non-binding) Code of Practice on the Prevention of Workplace Bullying in March 2002. Harassment in the workplace is moreover prohibited on the nine grounds covered by the Employment Equality Act, 1998. Provision is made for the vicarious liability of employers for harassment by fellow workers and by clients, customers or other business contacts of the employer[81].

sexuel au travail", *Formation permanente C.U.P. – Droit social*, vol. 56, September 2002, p. 448; J. Jacqmain, "La loi relative à la protection contre la violence et le harcèlement moral ou sexuel au travail", *Bull. soc.,* n° 137, 2002/8, p. 6

[78] Law n°2002-73, JORF n°15 of 18 January 2002, p. 1008.

[79] Mentioned in the comment on Article 21 of the Charter.

[80] In addition, it establishes the concept of sexual harassment in relations between colleagues whereas to date, this entailed a relation of authority.

[81] See generally: O'Connell, *Equality NOW: The SIPTU Guide to the Employment Equality Act, 1998*, (Dublin: SIPTU Publications, 1999).

Following 11 September 2001, a significant rise of xenophobic (and especially anti-Islamic) incidents occurred, many of them labour related. In the **Netherlands**[82], a number of 'post-11 September complaints' were brought before the *Commissie gelijke behandeling (CGB)* [Equal Treatment Commission] by Muslim employees who complained of harassment by their colleagues and a lack ../... of protection from their employers. In each of the three cases decided in 2002, the *CGB* found in favour of the applicant[83].

In **Austria**, it may be said that one of the main innovations of the Working Conditions (Reform) Act which entered into force on 1 January 2002 is in the final acknowledgment of psychic strain as one of the main factors jeopardising health at work, which can be seen by the provision that in workplaces with more than 50 employers a labour psychologist is required to be engaged for at least 25% of the so-called preventive time with a view to obviating psychically detrimental working conditions. This prevention time is calculated with at least 1.5 hours per worker per calendar year and supposed to be flexibly spent with technical safety inspections, medical care and labour psychological inspections, just so as to meet best the special requirements of each workplace[84].

Article 32. Prohibition of child labour and protection of young people at work

All Member States of the European Union are bound by the main provisions of international law concerning human rights which guarantee the prohibition of child labour and give protection to young people at work; Article 10 § 3 of the International Covenant on Economic, Social and Cultural Rights, Article 43 of the Convention on the Rights of the Child of 20 November 1989, ILO agreement No. 138 of 26 June 1973 concerning the minimum age for admission to employment and ILO agreement No. 182 of 17 June 1999 on the worst forms of child labour.[85]

Article 7 of the European Social Charter included without any changes other than purely formal modifications in the revised European Social Charter. guarantees the right of children and adolescents to protection. Most of the paragraphs of this Article, which provides specific guarantees in as many paragraphs, have been accepted by all Member States of the European Union. Nevertheless, **Austria**, did not agree to be bound by paragraphs 1 and 6 of Article 7 of the European Social Charter, providing respectively for a minimum age of admission to employment of 15 and for the hours spent by adolescents in professional training during normal working hours would be deemed to be included in the working day. This latter provision was not accepted by **Finland** in the context of the revised European Social Charter. That State also elected not to be bound by Article 7 § 10 of the European Social Charter, which stipulates that workers under 18 in certain jobs specified by national regulations should be subject to regular medical supervision. In the context of the European Social Charter, **Germany** does not consider itself bound by paragraph 1 of Article 7,while it agrees to be bound by the other paragraphs of that article. **Sweden**, does not consider itself bound by paragraphs 5 and 6 of Article 7 of the revised European Social Charter (paragraph 5 concerns the right of young workers and apprentices to fair wages, or an appropriate allowance). Lastly, the **United Kingdom** does not consider itself bound by paragraph 1 Article 7 of the European Social Charter or by paragraph 7 and 8, respectively, concerning the setting of a minimum duration of annual paid holidays of workers under 18 at four weeks and prohibiting, barring exceptions of particular jobs, the employment of workers under 18 on night work.

[82] Over 80 incidents were recorded in **the Netherlands** the by the Dutch Monitoring Centre on Racism and Xenophobia (DUMC). It would seem that the number of incidents dropped after a few months, but the statistics for 2002 are not yet available. Remarkably, there was a decline of reported right-wing extremist violence in 2001 (317 incidents, as opposed to 406 incidents in 2000), according to the *Monitor Racisme en Extreem Rechts* (vijfde rapportage, January 2003, p. 176). Here again statistics on 2002 are not yet available.

[83] See, e.g., *Commissie gelijke behandeling*, Oordeel 2002/127, 15 August 2002.

[84] However, even though the new regulations have been in place for several months the inspection authorities have failed so far to name a competent contact person that would facilitate the practical implementation of the legislation.

[85] See Commission Recommendation 2000/581/13 of 15 September 2000 on ratification of ILO Convention n° 182 of 17 June on the worst forms of child labour and immediate action to eliminate them. OJ L 243 of 28.9.2000.

A few major changes have taken place during the period under consideration. In **Portugal**, where the question of child labour has been particularly debated during the past years[86], Decree of Law 58/2002 (Article 122) abolished a number of exceptions to the age of 16 rule[87]. In case of breach, fines can be imposed on the employers entities, but enforcement by the Inspectorate General remains very weak, against, for example, the exploitation of child labour by shoe manufacturers, in the Northern part of the country, where underpaid young children perform their tasks at home. Judicial litigation for deciding upon such fines is extremely rare. In 2002, a discussion of a new Reform of Labour Law, *Proposta de Código do Trabalho,* has been launched, which provides for a broader protection of minors at work. Under the dependency of the Secretary of State for Labour, a *Plan for the Elimination of all forms of exploitation of child labour* has been launched, with the intent to lower the figures concerning precocious abandonment of school and of providing training for those adolescents illegally at work, who refuse to go back to school.

In **Italy**, according to a survey carried out by Istat (the national statistical institute) at the request of the Ministry of Labour and published on 12 June 2002, the number of children engaged in active work in various parts of **Italy** in 2002 was 144,215, 31,500 of whom could be considered "exploited". This figure corresponds to 0.66 % of children between 7 and 14.

Article 33. Family and professional life

Two complementary strategies can facilitate the harmonisation of family and working life and thereby contribute to encouraging the integration of women of the labour market and a greater involvement of men in family and household work, and in the education of children. These strategies only partially comply with the two paragraphs of Article 33 of the Charter Fundamental Rights. The extension of advantages to reconcile family life with professional life creates the risk that in order not to have to grant these advantages that he/she may perceive as expensive or harmful to the correct operation of the company, an employer may be tempted to dismiss or to remove certain advantages which are linked to the said employment from people who are entitled to the said advantages by reason of their family situation. For this reason, the extension of these advantages, in order to create the conditions for harmonising family and working life, must be combined with effective protection against discrimination.

To avoid the temptation to practice discrimination against women, making their access to the labour market more difficult, Member States are encouraged to introduce measures which benefit women as well as men, without imposing additional constraints on the employer and which, on the contrary, facilitate the harmonisation of family and working life for both parents and which is, in particular, favourable to bringing about an increase in the rate of employment of women. This is particularly so for the strengthening of child care services. The Barcelona European Council session on 15-16 March 2002 set a quantified objective, namely that in 2010, at least 90 % of children between three years old and the compulsory age of school attendance and at least 33 % of children under 3 should be able to benefit from childcare services. In its communication to the Council which contains the "joint draft employment report 2002", the Commission observed that "adequate, high quality and affordable *child care services* are still not sufficiently accessible to reach the targets set by the Barcelona European Council"[88]. For a comparison of national situations as defined in the national action plans (NAP) 2002, reference should be made to table 6 which appears in this Communication (p. 56) and contains showing information on child care and on care for the aged in respect of each State, and identifies objectives set in the NAP 2002.

[86] Article 69 § 3 of the Constitution prohibits the work of minors at school age ("Le travail des mineurs en âge scolaire est intedit, conformément à la loi"). However, Article 152 of the Penal Code punishes the person who employs a minor in "dangerous, inhuman or forbidden activities"; the sanction suffers an aggravation when these acts results in the injury or death of the minor. Thus, the exploitation of child labour *per se* does not constitute a crime.
[87] Decree/Law 396/91 of 16 October 1991 introduced a new minimum employment age, in accordance with the Basic Law of the Educational System, fixed at 16 years of age (Article 122, of DL 49408, with a new wording).
[88] COM((2002) 621 final, du 13.1..2002, p. 55.

Measures that tend to facilitate the harmonisation of family and working life should benefit men and women, not only in order to break away from the traditional the division of the parts played in the family, but also because this appears to be a requirement of the Community rules on the equal treatment of the sexes[89]. This implies that protection from discrimination not only prohibits any discrimination based on sex, but also any discrimination based on family situation, particularly including discrimination against men with young children.

In the Communication of 13 November 2002 referred to above, the Commission pinpoints the dangers associated with increasing the length of maternity leave; " There is a danger that long periods of maternity leave may have a harmful impact on the participation rate of women, widen sex-based pay differentials and increase the segregation of the sexes. Only a few countries have taken initiatives to encourage men to use paternity leave schemes (**Finland**, **France**, **Sweden**, **Denmark** and **Luxembourg**). On the other hand, a beneficial development is that more countries now address the issue of encouraging men to take greater responsibility for family tasks (**Belgium**, **Luxembourg**, **Germany**, the **United Kingdom**, **Spain**, **Portugal** and **Austria**)." In fact, the same paternity or maternity leave granted to the father or to the mother, according to the parents' wishes, could have a harmful effect on the participation of women in the labour market, because in the large majority of cases, maternity leave is still being taken.

The example of **Portugal** illustrates the dangers associated with adopting measures for the harmonisation of family and working life which either benefit only women (maternity leave) or which can benefit either parent, according to the family's wishes. Decree of Law 70/2000, the period of maternal leave was enlarged to 120 consecutive days[90], and fathers were given the right to 5 days in the first month after the child was born or for the same period the mother would enjoy in the case of death, inability or joint decision of the couple; a special regime of absence for medical assistance, excuse from night shifts, during pregnancy and after birth is also provided for. This framework is set to effectively provide parents with protection and the means to carry out their carriers, and combining them with family life. In practice however, endemic discrimination by employers towards women, allegedly on grounds of the higher cost they represent continues and refusal to hire women in some sectors is accompanied by discouraging men from enjoying their new right to five days of leave[91]. Because the level of salaries is also extremely low, many women take up more than one job, when they have a child and, therefore they are, in Europe, the women that spend less hours pro day with their children. An important growth in the offer of day care centres happened in the last few years, under the aegis of municipalities, however, the offer of pre-primary schools remains insufficient and too costly to respond to the needs of a working female population.

Improvement of conditions for harmonising family and work life

Two strategies must be combined for that purpose. The first strategy consists in creating the material conditions which facilitate the harmonisation of family and working life, for example by developing day-care centres, by adapting the rules on parental leave on the birth or adoption of a child, or by facilitating the adaptation of the professional career to the need for the said harmonisation. Article 8 of the European Social Charter on "employees' rights to maternity protection" can be associated with this strategy. Article 16 of the revised European Social Charter amends several points of this Article, raising the minimum maternity leave from 12 to 14 weeks, whilst the protection women from night work or from work of a dangerous, unhealthy or arduous nature is now limited to pregnant women, women who have recently given birth and nursing women.

[89] See the comment on the *Lommers* case below, for which the European Court of Justice made a decision in reply to a request for a preliminary ruling from a Dutch judge.
[90] In case of adoption, the period is shorter, of 100 days only.
[91] Law 9/2001 of the 21 May 2001 has sought to reinforce mechanisms for monitoring, controlling and eliminating the improper and unlawful practices of both direct and indirect discrimination by the Inspectorate General in conjunction with improving the link between this government agency and the advice issued by the Commission for the Equality in Work and Employment.

Article 6 of the European Social Charter, which guarantees the right of the family to social, legal and economic protection also corresponds to this strategy. This provision is directly inspired from the wording of Article 33 § 10 of the Charter Fundamental Rights. . In its conclusions concerning the 14th report of the **Netherlands**, the European Committee of Social Rights (ECSR) noted that the level of family benefit in the **Netherlands** meets that required by the European Code of Social Security[92]. Consequently, this constitutes adequate economic protection of the family for the purpose of Article 16 ESC. The Committee also noted that, according to the Dutch report, the number of childcare places available to pre-school children as well as school-age children continues to increase. In 1999, capacity for these groups increased by 11% and 14%. The Committee noted in particular that employers may obtain tax relief where they provide childcare for their employees. The figures included in the report indicate that the number of company places increased steadily throughout the 1990s. The Committee considered that this strategy makes a significant contribution to the social protection of the family[93].

Several initiatives taken during the period under review, illustrate this first strategy. In **Austria**, the opposition parties have claimed that the regulations contained in the new Child Care Allowance Act (treated in more detail under Article 34 below) together with the chronic lack of sufficient kindergarten places would increasingly force women to stay at home with their children instead of pursuing an employment, a consequence that is said to be intentional. In **Belgium**, the protection of employees with fixed-term contracts of employment has been strengthened by the Law of 5 June 2002. This law provides, in particular, that the terms of employment shall calculate seniority of employees workers with fixed-term contracts using the same criteria as those used for employees with an employment contract of indeterminate duration, except when different periods of seniority are justified by objective reasons[94]. Again in **Belgium**, since 1 January 2002 the provisions on the Law on the harmonisation of employment and the quality of life are applicable, in particular by including 4/5th time and a time credit for one year. Provisions limiting the working week to a maximum of 38 hours (or limiting the duration of work in an equivalent way on a basis other than a weekly one) also stipulated by this Law, will come into force on 1 January 2003. Parents who choose to work part-time also benefit from greater legal protection since the introduction of the aforementioned Law of 5 March 2002 The Law on harmonising employment and the quality of life also stipulates that employees should benefit from ten days paternity eave (rather than three as before) to be chosen during the first 30 days as from the date of the birth or, in the case of adoption, the date of registration of the child with the municipal authorities[95]. Finally, although the European Committee of Social Rights stated in its 2001 report that the position of **Belgium** did not comply with Article 8 § 3 of the European Social Charter in that employers were not legally required to pay employees' free time for nursing during working hours[96], various provisions in that direction were finally made in 2002; in both the private and public sector, partially paid nursing breaks are given up to half an hour, renewable in accordance with the daily working hours for up to seven months after birth[97].

---

[92] Code européen de sécurité sociale (European Code of Social Security), signé le 16 avril 1964 et entré en vigueur le 17 mars 1968.

[93] Concl. XV-I, Volume 2, Chapter 13, July 2002.

[94] See Article 4 of the Law of 5 June 2002 on the principle of non-discrimination for workers with a fixed-term employment contract. *B.M.* 26 June 2002. The law defines the full-time employee in a position comparable with that of a full-time employee a) in the same type of employment contract and doing the same or a similar type of work, or exercising an occupation of the sales or a similar type of profession; b) and employed in the same type of company, or in the absence of a company or the absence of full time employees in a comparable situation in the company and in the same branch of activity as the part time employee in question.

[95] See the Law of 10 August 2001 on reconciling employment and quality of living, *Moniteur Belge*, 15 September 2001, Article 27, 29. Also see Circular n° 528 on Paternity leave and the introduction o f the right to time off for nursing for members of the federal statutory and contractual personnel, 25 July 2002, *Moniteur Belge I*31 July 2002.

[96] Concl. XV-2 2002 (vol. 2)

[97] For the private sector, see the Collective agreement n° 80 of 27 November 201 establishing a right to time off for nursing taking effect as from 1 July 2002 (made mandatory by royal Decree of 21 January 2002, B.M. 12 February 2002). With regard to time off for nursing, the Royal Decree of 5 November 2002 amends the Royal Decree of 3 July 1996 implementing the law on mandatory healthcare insurance, the Royal Decree implementing the law on mandatory healthcare insurance coordinated on 14 July 1994 (B.M. 20 November 2002) provides that female employees are entitled to compensation for time off for nursing equal to 82% of the gross remuneration lost that would have been due for the hours or half-hours of the time off for nursing. As concerns the *public sector* see circular n° 528 on paternity leave (and the introduction of the right to breaks for nursing for members of the federal statutory and contractual personnel, 25 July 2002, *Moniteur Belge I*31 July

In **Finland**, the Act amending the Sickness Insurance Act[98] entered into force on 1 January 2003. The amendment has extended *paternity* leave to 30 weekdays (previously it was limited to 18 weekdays), following the birth of an infant. The reform also introduced greater flexibility in parental leave for families with more than one child, as well as to transfer entitlement to maternity leave to the father should the mother suffer serious illness. The hope is that this new alternative will increase the willingness of men to share parental leave with their partners. The impact may remain limited, however, because the employer will have to agree on its use in each individual case. Prior to the reform of the paternity leave, about 60 per cent of fathers exercised the right to 18 weekdays of paternal leave, while almost all mothers take the 105 weekdays of maternity leave to which they are entitled. The gender gap was wider for *parental leave*, which was 158 weekdays and may be taken either by the father or the mother or shared between them. Only three per cent of men exercise this right. The major reasons for low participation rate by men in the parental leave system[99] appears to be : (i)the tradition leaving parental responsibility for baby care mainly to mothers; (ii) the family income question, with women earning less than 80 per cent of men's income on average; and (iii) the tendency, based on conservative thinking, to give priority to men in appointments at work that minimise the risk of not being promoted in due order.

Positive action steps taken to encourage women to exercise an occupation in sectors where they are underrepresented up to the limits of Article 141 § 4 EC, can be considered as contributing to the harmonisation of family and working life. In the case of *Lommers* the ECJ gave a preliminary ruling on the interpretation of Article 2(1) and (4) of Council Directive 76/207/EEC of 9 February 1976 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[100]. The case originated in a refusal of the **Netherlands** Ministry of Agriculture to give Mr Lommers' child access to the Ministry's subsidised nursery scheme on the ground that access is in principle reserved only for female officials of that Ministry. Mr Lommers argued that this policy was discriminatory. The ECJ accepted that a measure such as that at issue, whose purported aim is to abolish a *de facto* inequality, might nevertheless also help to perpetuate a traditional division of roles between men and women. However, the ECJ noted that the employment situation within the Ministry of Agriculture was characterised by a significant under-representation of women, both in terms of the number of women working there and their occupation of higher grades. In addition it was noted that a proven insufficiency of suitable and affordable nursery facilities is likely to induce more particularly female employees to give up their jobs. The ECJ added that due regard must be had to the principle of proportionality, which requires that derogations must remain within the limits of what is appropriate and necessary in order to achieve the aim in view and that the principle of equal treatment be reconciled as far as possible with the requirements of the aim thus pursued[101].

A specific guarantee mentioned in Article 33 § 2 of the Charter of Fundamental Rights concerns the prohibition of dismissal for pregnancy, and the Court Justice of the European Communities has ruled that such a dismissal constitutes direct discrimination based on sex, a ruling which Directive 2002/73/EEC has now incorporated into Directive 76/207/EEC[102]. Article 8 § 20 of the European Social Charter requires parties to "consider it illegal for an employer to dismiss a woman during the

---

2002, and Circular GPI 3O of 20 December 2002 on time off for nursing in favour of statutory or contractual personnel of the police. M.B. 15 January 2003. Two proposals for a law concerning the police and the armed forces have also been lodged to reinforce their rights.

[98] Laki sairasvakuutuslain muuttamisesta, No 1075 of 2002.

[99] The Ministry of Social Affairs and Health has started a campaign for increasing the participation by fathers: see press release 251/2002. See also http://193.209.217.5/in/internet/suomi.nsf/NET/300902131559HN?openDocument

[100] OJ 1976 L 39, p. 40. Voy. ci-dessus, le commentaire de l'article 23 de la Charte.

[101] ECJ, *Lommers* (preliminary ruling), Case C-476/99, 19 March 2002.

[102] Article 2 § 7 of Directive 76/207/EEC ("Less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC shall constitute discrimination within the meaning of this Directive") as amended by 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 of men and women, 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, JO L 260 of 5.10.2002, p. 15.

period between the time she notified her pregnancy to her employer and the end of maternity leave, or before the date of expiry of the notice".

In its conclusions on the application of the European Social Charter by **Belgium** which it published in 2002, the European Committee for Social Rights stated that the provisions on maternity leave (Law of 16 March 1971 in employment, amended by Law of 3 April 1995 and Royal Decree of 2 May 1999) comply with Article 8 § 2 of the European Social Charter making illegal dismissal during maternity leave. On the other hand, the Committee ruled that there was a lack of compliance owing to an absence of an obligation by an employer to reinstate in her employment a female employee whom he had illegally dismissed on the grounds of her pregnancy or her giving birth. The object of Article 8 § 2 is in fact, not only that of ensuring the financial security of the employee in the case of maternity, but also that of safeguarding her employment. Payment of compensation is only permitted in exceptional circumstances where reinstatement is not possible, or not desired by the employee. In such a case, the committee will verify whether the compensation represents a sufficient deterrent to the employer and sufficiently beneficial for the employee. It should be noted that this requirement is worded more specifically than is the case in Article 6 § 2 of Directive 76/207/DEC, as amended by Directive 202/73/EC, since this provision requires Member States to " introduce into their national legislation such measures as are needed to provide such real and effective indemnity or reparation as the Member States shall determine, for the loss and damage sustained by a person as a result of discrimination contrary to Article 3, in a way which is deterrent and proportional to the damage sustained...)".

The prohibition of dismissal on any grounds related to maternity is specifically stated in Article 33 § 1 of the Charter. Legal protection of the family (Article 33 § 1 of the Charter) can also be strenghtened by prohibiting any dismissal based on the exercise of any kind of family responsibility including the case of parents. In **Austria**, as an accompanying measure to the possibility of taking leave in order to care for dying relatives a special protection from dismissal was established, which is effective upon notice of the intended leave till four weeks after the end of the leave.[103]

Prohibition of any discrimination based on the family situation

The second strategy consists in prohibiting any discrimination in the area of employment and work based on civil status, which includes marital or family situation. The idea here it is to prevent an employee or an applicant for employment from becoming the victim of a difference in treatment by an employer who fears that because of the employee's or applicant's family situation, he/she is or would be less available or less flexible in the employer's organisation and would consequently refuse to employ that person or to grant certain advantages to them. This strategy was used in **Belgium** for the adoption of the law of 6 January 2003 to combat discrimination. This law prohibits any direct or indirect discrimination based on civil status, when it concerns: access to work for a salary or wage, or to self-employment, including selection criteria and conditions of recruitment, whatever the field of activity and at all levels of the occupational hierarchy, including promotion, employment and working conditions, conditions of dismissal and remuneration in both the private and public sector; the appointment or promotion of civil servants, or the assignment of civil servants to a department, the access to, participation in, or any other exercise of economic activity[104].

Article 34. Social security and social assistance

The main changes identified in Member States during the period under review, which concern the guarantees listed in Article 34 of the Charter of Fundamental Rights, break down into three paragraphs, namely, social protection; movement within the Union, social security and social benefits; social exclusion and poverty. Although the first paragraph is only justified by the major legislative

[103] See section 15a, introduced into the Labour Contract Law (Adaptation) Act (*Arbeitsvertragsrechts-Anpassungsgesets*) by Federal Law Gasette (BGBl.) I No. 89/2002

[104] See §§ 1, 2 and 4 of Article 2 of the Law of 6 January 2003 to combat discrimination and amending Law of 15 February 1993 creating a Centre of Equal Opportunity and the fight against racism, commented at greater length under Article 21 of the Charter.

initiatives taken in **Austria**, the two other paragraphs have been the subject of more significant developments, since changes in several Member States should be mentioned. In looking at the measures adopted by the Member States in an effort to combat social exclusion and poverty, emphasis can be placed on measures adopted to ensure protection of the most disadvantaged categories of the population, particularly the aged and the homeless. Lastly, a paragraph is devoted to the question of granting social assistance to illegal foreign immigrants in one State, **Belgium**, where the problem has been particularly widely discussed. This question merits more detailed comparative examination in the future[105].

Social protection

In **Austria**, social partners agreed on a new redundancy/severance payment scheme, which was later approved by the government and entered into force on 1 January 2003. The old regulations provide for the payment of up to a yearly income depending on the number of years an employee stayed in one and the same company both in the event of dismissal and retirement. The most important of the effected changes can be described as follows : Employers are obliged to make contributions at a fixed statutory rate of 1.53 % of the total salary to a so-called employees saving fund managed by a private insurance company to be chosen for all employees that are covered by the new system. Thus future payments are gradually built up of the said contributions plus interest gains from the investment. Importantly, notice of termination by the employee will no longer result in loss of expectancies, and the requirement of a 3-year minimum company affiliation was also dropped, thereby securing payments also for season workers in tourist regions and construction workers. In case of a job change the employee concerned may choose between an at once cash payment or a monthly additional pension after retirement. With the new system far more people will benefit from redundancy payments but on the other hand it will take much longer – about 35 to 40 years instead of 25 – to receive as much as a full yearly income.

For all children born after 1 January 2002 a new allowance regime is in place that is no longer linked to one of the parents taking leave. Following an application under the Children Allowance Act[106] (*Kinderbetreuungsgeldgesets*) the state pays a sum of 14.53 euros per day for each child untill it reaches the age of 30 months, a period that may be extended to a maximum of 36 months if both parents alternately take care. However, the taxable yearly income of the parent receiving the allowance may not exceed the amount of 14.600 euros lest the financial aid is lost. One big lacuna can be seen in the difference between the period of entitlement to leave vis-à-vis the employer, which ends with the child's second birthday, and the 2.5 to 3-years child care allowance time. Any extension of leave beyond the legally enforceable 2-years period necessitates the employer's consent. If the employer refuses an individual agreement, the employee still has the right to return into his job under the same conditions as before the child care leave. Since the entitled person retains the claim to child care allowance for at least another 6 months, it may happen that such person exceeds the permissible amount of supplemental earnings, leading to the complete and retro-effective loss of the allowance for the current calendar year.

Movement within the Union, social security and social benefits

Article 34 § 2 of the Charter has taken its inspiration in particular from Article 13 § 4 of the European Social Charter, but is also based on Regulation EEC No. 1408/71 of 14 June 1971 on the application of social security plans to employed persons and their families moving within the Community[107]. During the period in question, the European Court of Justice has found non-compliance by

[105] Nevertheless, refer to the comments on Article 35 of the Charter below (protection of health) concerning **France**.
[106] Federal Law Gasette (BGBl.) I No. 103/2001
[107] OPJ L 149 of 5.7.1971. Now in a version consolidated by Regulation 119/97 of 2 December 1996 (OJ L 28). In addition, the Community Charter of Fundamental Social Rights adopted by the Heads of State and of Government of eleven Members States on 9 September 1989 provides that "the right to freedom of movement shall enable any employee to engage in any occupation or profession within the Community, in accordance to the principle of equal treatment regarding access to employment, working conditions and social protection in the host country."

Luxembourg with Article 7 § 2 of this instrument, because that State has retained a condition of length of residence in its territory for the grant of the minimum guaranteed income stipulated by its legislation[108]. This situation also contradicts the principle of Article 13 § 1 of the European Social Charter which stipulates in the context of the right to social and medical assistance that "..any person without adequate resources and unable to obtain such resources either by his own efforts, or from other sources, in particular from benefits under a social security scheme, (shall) be granted adequate assistance, and in case of sickness, the care necessitated by his condition"; the European Committee of Social Rights concluded that the current situation in **Spain** did not comply with this stipulation, both because the payment of a minimum integration income is subject to a condition of the length of residence in a region, and because, in most autonomous communities, it is subject to a condition of a minimum age of 25. In the statement concerning **Italy** during the period from 1 September 1999 to the end of 2001, the European Committee of Social Rights stated that **Italy** did not comply with the revised European Social Charter, specifically because of the criteria of the length of residence of three years, which nationals of the 7 signatory States of the revised Charter must meet, in order to receive a minimum integration income[109].

In addition, Article 2 § 4 of the European Social Charter stipulates that Parties which have accepted this provision undertake to ensure "equal treatment with that given to their own nationals or the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may make among the territories of the Parties" and "the grant, maintenance and of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties". In the ruling which it gave after examining the eighth Belgian report on the application of the European Social Charter, the European Committee on Social Rights concluded[110] that **Belgium** was in breach of this provision, in that the payment of family allowances was made subject to the condition that the children of the beneficiary resided in **Belgium**, the payment of guaranteed family allowances is subject to a condition of residence of five years, the payment of disability allowances to the condition that the beneficiaries had received additional family allowances for disability before the age of 21; Belgian legislation does not provide for the export of rights acquired under Belgian social security legislation by nationals of the Contracting Parties, who are not covered by Community regulations or by bilateral or multilateral agreements other than the European Social Charter. **Spain** was the subject of a non-compliance ruling of the European Committee of Social Rights on the same grounds, in that the payment of family allowances is in principle subject to the condition that the children of the beneficiary should reside in **Spain**[111]. Finally, the European Committee on Social Rights found that the situation in the **Netherlands** is not in conformity with Article 12 § 4 ESC : nationals of Contracting Parties who leave the **Netherlands** and take up residence in states which are neither members of the European Union nor parties to the European Economic Area are not entitled to export social security rights accrued under Dutch legislation Charter[112].

The European Court of Justice stated that the Community aim is opposition to a Member State refusal to grant redundancy pay (allocation d'attente) solely on the grounds that a student had finished his/her

[108] ECJ, 20 June 2002, Commission v. **Luxembourg**, C-299/01. This situation constitutes a violation of Article 43 EC (right of establishment). For the condition of residence of children imposed in **Finland** for the payment of an allowance for babysitting, see also ECJ 7 November 2002? Maaheimo, C-333/00 (the babysitting allowance is a family benefit in the meaning of Article 4 § 1, h, of Regulation 1408/71 and Article 73 of that regulation stipulates that employees who are subject to the legislation of a Member State are entitled, for the members of their families who reside in the territory of another Member State, to the family benefits provided by the legislation of the first State, as if they resided in the territory of that State; the Court ruled that the condition of residence referred to above imposed by Finnish law, had to be considered as being met, when the child resides in the territory of another Member State.

[109] The ECSR also concluded that **Italy** did not comply because a) the Italian authorities have not yet given proof of the existence throughout Italian territory of an individual right to social assistance accompanied by a right to bring an action before a Court or an independent authority; b) because of the non-adjustment of minimum retirement pensions following a reassessment of the basic minimum.

[110] Concl. XVI-1 2002, p. 102 to 104 (on the eighth report submitted by the Belgian government in application of the European Social Charter for the period from 1 January 1999 to 31 December 2000, Articles 2, 3, 4, 9, 10 and 15).

[111] Concl. XVII.

[112] Concl. XV-I, Volume 2, Chapter 13, July 2002.

secondary studies in another Member State[113]. **Belgium** must modify its legislation as a result of this Court ruling.

Social exclusion and poverty

Several reports on national developments mentioned a deterioration of the situation of categories of population with the lowest incomes. **Ireland**'s total take from tax and social insurance remains one of the lowest in the European Union. Consequently, the Government does not have the resources to address poverty issues properly even though **Ireland**'s *per capita* income is substantially above the EU average. The *Living in **Ireland** Survey*, published by the Economic and Social Research Institute (ESRI) in 2002 showed that the numbers living in relative income poverty had risen and that the composition of that group had changed dramatically. Six out of every ten people in relative income poverty now live in households headed by someone who is not in the labour force. This underscores the importance of welfare provision at a time of apparent wealth. However, in its Concluding Observations under the ICESCR which appeared during the period under review, the UN Committee on Economic, Social and Cultural Rights, while welcoming the introduction of a minimum wage in April 2000 and the revised National Anti-Poverty Strategy (NAPS), *Building an Inclusive Society*, which was concluded in February 2002, had to express its concern at the inadequacy of the minimum wage and welfare payment levels set by the State[114].

During the period under review, **Belgium** adopted the law of 26 May 2002 on the right to social integration[115], to which reference has already been made[116]. The right to social integration created by this law, replaces the right to a subsistence allowance which was guaranteed by the Law of 7 August 1974, rescinded by the new legislation. Unlike the minimum income appointed by the 1974 law, the "integration" income created by the law of 26 May 2002 is not unconditional, since the beneficiary may lose the right to a minimum income if he/she refuses a job that is being offered. An action has been instituted against the Law of 26 May 2002 and therefore the Court of Arbitration must decide whether this legislative modification is acceptable in the light of the "standstill" obligation. This question is particularly important in that the essential nature of the social assistance to live a life consistent with human dignity is recognised in Belgian case law, which holds, in particular that the amount paid either as social assistance, or as minimum means of existence formerly guaranteed by the law of 7 August 1974, cannot be seised[117].

A comparison with the situation of **Portugal** may in this respect prove instructive. In 1996, Law nº 19-A/96 had instituted for the very first time in **Portugal** the *Rendimento Mínimo Garantido*, a minimum guaranteed amount of money to everybody, especially designed at protecting people in extreme conditions of poverty and deprivation of basic goods. In 2002, Parliament sought to suppress the possibility to benefit from the *RMG*, now renamed *Rendimento Mínimo de Inserção[118],* for people under the age of 25, as it was though to be detrimental to all the diligences a person of such age ought to do in order to get a job. The President required the Constitutional Court to rule on the conformity of such suppression to the Constitution and, namely, whether the change did not affect already acquired rights of some in the past and did not violate the principle of equality for the future, in general terms. In a historical decision, by 8 votes against 5, the Court decided the State could never abstain from ensuring to everybody a minimum of subsistence, as this was critical for the respect for human dignity.

[113] ECJ, 11 July 2002, D'Hoop v./ONEM, C-24/98, J.T.T. 2002, p. 443.
[114] The Committee also expressed concern about the fact that a human rights-based approach has not been incorporated into NAPS, as previously recommended by it in 1999.
[115] B.M. of 31 July 2002.
[116] On Article 15 § 1 of the Charter.
[117] Labour Court Liege, J.D.J. N° 216, June 2002, p. 41. It should be noted that during the period in question, the Italian Constitutional Court, in a judgement of 4 December 2002, n° 506, declared to be unconstitutional the standards authorising a seizure of that part of pensions and benefits paid by social security, exceeding the amount needed to meet basic requirements, and thus prevents any seizure of pensions and benefits paid by social security.
[118] The adjective "guaranteed" was suppressed.

The suppression further constituted a violation of the principle of equality as the reasons giving cause for granting the revenue applied, *in casu*, equally, independently of the age of the person in question[119].

Several initiatives during the period under review aimed to protect particularly vulnerable categories of the population from social exclusion. In **Belgium** the homeless long had no access to a minimum income, because the public social assistance centres refused to pay this income where an applicant did not have a reference address relevant to the responsibility of the centre to which the application was being made. Two draft laws attempt to find an answer to this situation; they provide for the temporary intervention of an institution appointed by the responsible Minister and for particularly speedy procedure for giving the assistance [120]. In **Germany**, the responsible federal ministries as well as the competent authorities in the Länder and municipalities prepared the coming into force of the Act concerning the Basic Security[121] on 1 January 2003. The act shall interfere with hidden old-age poverty. Persons above 65 years of age and persons who are continually and fully reduced in their earning capacity because of medical reasons and with a low pension receive contributions that grant them (together with their other income) a basic security to the amount of the social security. In **Finland**, the Act on Social Lending[122] codifies the grant of social loans by local authorities, with the purpose of enabling people hit by poverty and heavy debts to get a financial foothold to ease their situation[123]. In its Concluding Observations concerning **Ireland**, the UN Committee on Social, Economic and Cultural Rights expressed its concern that many new households could not secure adequate and affordable housing and at the precarious accommodation situation of 1,200 Traveller Community families[124]. However, the Housing (Miscellaneous Provisions) Act (No.9) was passed in 2002, making provision for social and affordable housing. At the same time, the Act also amends the Public Order Act, 1994 (in Section 24) in relation to Traveller encampments on certain lands[125].

On the other hand, the condition of residence for social assistance in **Denmark** results in a disadvantage to nationals of third-country States, which contributes to rendering their situation more precarious. Indeed, the Act on an Active Social Policy and the Act on Integration was amended by Act No. 361 of 6 June 2002 in order to form the legal basis for the introduction of a new payment, the so called "start payment". The payment is granted to persons who do not meet the requirement for ordinary cash subsidies, i.e. legal residence in **Denmark** for a total period of 7 out of the past 8 years. The start payment is considerably lower than subsidies measured out within other subsidy schemes, but is equivalent to the so called introduction subsidy scheme.

The Act has implications not only for foreigners but also for Danish citizens. However, citizens from the Nordic countries and from the EU and EEA member states are entitled to the ordinary cash benefit, irrespective of fulfilment of the residence criteria. Therefore, the Amendment will especially impact upon newly-arrived foreigners, including refugees. It is doubtful that this can be reconciled with Article 23 of the 28 July 1951 Geneva Convention, according to which the State must treat equally all the persons legally residing within its territory.

---

[119] See, Acórdão 509/02.

[120] The House of Representatives, Proposal for a law amending the law of 26 May 2002 on the right to social integration and the law of 2 April 1965 on bearing the costs of aid granted by public social assistance centres to ensure the fundamental rights of persons benefiting from a public social assistance centre and particularly the homeless, session 2002-2003, doc. 50-2134/001, 21 November 2002; House of Representatives, Proposal for a law with regard to social assistance granted to the homeless amending the law of 8 July 1976 organising the social assistance centres and the law of 2 April 1965 on bearing the costs of aid granted by public social assistance centres session 2002-2003, doc. 50-2138/001, 21 November 2002

[121] Gesets über eine bedarfsorientierte Grundsicherung im Alter und bei Erwerbsminderung [Act on Need-related Basic Security in Old Age and in the Case of Reduced Earning Capacity] of 26 Jun 2001 (BGBl. 2001 I p.1310,1335), modified by Law of 27 Apr 2002 (BGBl. 2002 I p. 1462).

[122] Laki sosiaalisesta luototuksesta, Act No 1133 of 2002.

[123] The 3-year experiment on which the Act is based displayed that most of those who applied to a social loan did so to help with the household economy, or to alleviate debts. During the trial period, sixty five percent of the loans were granted for servicing debts and 35 per cent were for various acquisitions.

[124] Para. 20 of its Concluding Observations.

[125] This aspect of the legislation, which was characterised as criminalising trespass, was very controversial.

Illegal foreign immigrants

In **Belgium**, the question of granting social assistance to illegal foreign immigrants in its territory has given rise to a considerable body of case law, which has led to contradictory answers. Since the changes introduced by Laws of 28 June 1984 and 30 December 1992 to the Law of 8 July 1976 setting up the public social assistance centres, Article 57 § 2 of this law has limited social assistance to illegal foreign immigrants and to asylum seekers whose application for asylum was refused and who have been ordered to leave Belgian territory, to "strictly essential aid to enable them leave the country" and to "emergency medical aid". In principle, applicants on the basis of the law of 22 December 1999 on the ratification of residence for certain categories of immigrants resident on the territory of the Kingdom[126], legislation which stipulates that for a period of three weeks beginning on 10 January 2000, certain categories of illegal foreign immigrants who have resided in **Belgium** since 1 October 1999 can request the ratification of their residence (the so-called "one shot" ratification), suffered from the consequences of this restriction on social assistance, since the simple fact of submitting an application for ratification did not change their residential status[127]. Nevertheless, since Article 14 of the law of 22 December 1999 stipulates that applicants for ratification are protected from deportation until the date on which the decision is made on the application[128], Belgian labour courts have for the most part held that the application of Article 57 § 2 of the law 8 July 1976 had to be waived to the benefit of this category foreigners in illegal situation.

In a judgment of 17 June 2002, the *Supreme Court of Appeal* approved this ruling[129]. In a subsequent judgment[130], that Court nevertheless refused to go any further and to extend the award of social assistance to illegal foreign immigrants, who had submitted applications based on Article 9, paragraph 3 of the Law of 15 December 1980 on access to, residence in and deportation from, of foreign immigrants, rather than under the Law of 22 December 1999. In fact, this ruling from which any foreigner in an illegal situation can benefit without a time limit, provides that although, in principle, an application for a residence permit of more than three months must be submitted by foreigner to a Belgian diplomatic or consular mission outside the country if certain "exceptional circumstances" exist, the said residence permit can be applied for from the place in **Belgium** where the immigrant is residing. In practice, this was intended to deal with humanitarian cases where it was impossible for the immigrant to return to his/her country of origin to submit an application for a residence permit in **Belgium**. However, the request for "ratification" based on Article 9 paragraph 3 of the Law of 15 December 1980 does not confer a right to residence, even temporary residence. In contrast to the provisions of Article 14 of the Law of 22 December 1999 made for the benefit of foreigners who took advantage of the "one shot" ratification scheme in January 2000, immigrants who submitted an application on the basis of the "humanitarian" clause of Article 9 paragraph 3 of the Law of 15 December 1980 are only protected from deportation from the territory by reason of administrative practice[131]. At this point, the question arises as to whether the possibility given by this provision of the law of 15 December 1980 should be accompanied by the possibility of living under conditions complying with human dignity, which excludes being forced to beg if he/she is not able to meet his/her needs and therefore benefit from social assistance[132]; and whether it is justifiable to give different treatment respectively to applicants for ratification on the basis of the Law of 22 December

[126] B.M. 10 January 2000, see J.-Y. Carlier "Loi relative à la régularisation des étrangers", *J.T.,* 2000, p. 77; and S. Saroléa, "La loi relative à la régularisation des sans-papiers", *Journ. Procès*, 2000, n° 1.

[126] On this, see jurisprudence of the Belgian Cour d'arbitrage, especially Judgment n°131/2001 of 30 October 2001 and Jugments n° 14 to 17/2001 of 17 January 2002.

[127] On this question, see several decisions of the Court of Arbitration, particularly ruling n° 131/2001 of 20 October 2001 and rulings N° 14 to 17/2001 of 17 January 2002.

[128] On the ambiguity of the resulting status, see particularly S. Saroléa, "Les étrangers en procédure de regularisation: vrais faux légaux ou faux vrais illégaux?", R.D.E., 2000, p. 648

[129] *R.D.E.,* n° 118, 2002, p. 233 *and J.D.J.*, n° 219 November 2002, p. 59.

[130] Cass, 7 October 2002, *C.P.A.S. de Huy v. B.N. and H.R.,* not yet published

[131] Circular of 15 December 1998 on the application of Article 9, par. 3 of the law of 15 December 1980 on access to the territory, residence, establishment and deportation of foreigners and the regularisation of special situations, *B.M.* 19 December 1998.

[132] For an affirmative answer, see Labour Court Brussels, 23 October 2002, *J.D.J.*, n° 221 January 2003.

1999, and to applicants for ratification under "common law" based on Article 9 paragraph 8 of 15 December 1980 from the point of view of the social assistance to which these two categories are entitled.

Article 35. Health care

Article11 of the European Social Charter guarantees the right to the protection of health. All Member States of the European Union have agreed to become bound by the three paragraphs that comprise this Article of the European Social Charter or of the revised European Social Charter, as applicable. The first sentence of Article 35 of the Charter of Fundamental Rights should be interpreted in the light of this provision.

In the period under review, the European Committee for Social Rights specifically stated in its conclusions on the application of the European Social Charter[133] that healthcare in **Belgium** was accessible to the largest number in line with Article 11 § 1 of the Charter. It was nevertheless emphasised that the degree of participation of patients in the costs had increased since 1980 and that the rate of reimbursement of general medical care and the cost of drugs was one of the lowest among the countries of the European Union and the European Economic Area. It is thought that this situation is being partly compensated for by the adoption of measures aiming to reduce the effect on disadvantaged categories of the population[134]. Moreover, during the period under review, a law was enacted setting the maximum to be charged for healthcare insurance[135]. This law imposes a ceiling on healthcare expenditure in terms of the social category of the beneficiary, or the income of the beneficiary's household in the light all the personal interventions, the cost of which is in fact being defrayed. It undeniably improves access to healthcare of the most disadvantaged.

Among the particularly endangered categories are the aged. Although, on the one hand, **Belgium** has adopted legislation in the period under review, which aims to ensure that these persons will not be subjected to economic pressure, particularly in the context of the end of life[136] and on the other hand, hospital institutions are subject to constraints and a type of supervision which appears to have inevitable repercussions on patients. The Belgian Bio-ethical Advisory Committee has stated that the current system of RCM (résumé clinique minimum)[137] encourages financial managers of hospitals to reduce the term of hospitalisation to a minimum, regardless of the improvement of the patient's state of health, so as to be certain of obtaining as large as possible a financial reimbursement from INAMI (Institut National d'Assurance Maladie Invalidité). The pressure so exerted on the medical sector and on the hospitals in general could place doctors in an ethical dilemma of having to suit the duration of hospitalisation to the economic and statistical constraints, rather than to the patient's needs. The committee also stated that the duration of hospitalisation has decreased to an extent bringing about a critical situation. The aged, who are often alone and unable to face the cost of home care, are the first victims of this situation.[138]

[133] Conclusions XVI-2. 2002, p. 119.
[134] Widows, disabled, pensioners and orphans, and the beneficiaries of various social benefits and their dependants are entitled, if their income is less than a certain ceiling, to a larger insurance contribution equal to 85 or 90%. They are also entitled to exemption of the "ticket modérateur" when they have borne the cost of total inventions of 15,000 Belgian francs per year. In addition, all insured parties are entitled to a tax deduction for the "ticket modérateur" at a cut off point that depends on the gross taxable income of the household. In all, the average level of the "ticket modérateur" for all categories is 27.27% The Committee also noted that no participation in the cost of pharmaceutical products is required in the case of a serious, long-lasting illness". (Conclusions op.cit. p. 119).
[135] Law of 5 June 2002 on the maximum to be invoiced for health-care insurance.
[136] See the law of 14 June 2002 on palliative care. B.M. 26 October 2002. This law was been mentioned above I the comment on Article 2 of the Charter. The Law of 22 August 2002 on patient's rights, M. B. 26 September 2002, can also be mentioned. Reference has been made to this law under the comment on Article 3 of the Charter.
[137] The RCM is an tool used to compare the length of hospitalisation per type of pathology in various institutions. It uses the national average per type of pathology as a reference, but does not take account of the results obtained for the health of the patient. It is part of the rationalisation systems established to maintain health care costs within a budget that is acceptable for the population.
[138] Bioethical advisory committee, Opinion n° 15 of 18 February 2002 on ethical questions related to the impace of the "RCM (résumé clinique minimum)" on the number of days of hospitalisation of a patient.

Another particularly vulnerable category of healthcare beneficiaries is that of illegal foreign immigrants. In **France**, the draft finance law for 2003 modifies free access to medical care for the poorest persons. According to this draft, medical assistance would no longer cover all medical costs, with a proportion, called "ticket modérateur" becoming payable by the patient[139]. This drafty penalises, in particular, foreigners without a residence permit and would make it impossible to ensure a high level of preventive healthcare. It should be recalled that according to the General Comment No. 14 by the Committee of economic, social and cultural rights on Article 12 of the International Covenant on Economic, Social and Cultural Rights (right to the best attainable state of health); States are bound by the obligation to "*respect* the right to health by, *inter alia*, refraining from denying or limiting equal access by all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services and abstaining from imposing discriminatory practices as State policy"; (par. 34).

In **Austria**, in an attempt to distract patients from going to hospital health care centres instead of visiting established general practitioners and specialists a steering tax was introduced by inserting section 135a in an amendment to the General Health Care Act (*Allgemeines Sosialversicherungsgesets*).[140] Accordingly 18.17 euros are due for each treatment in a health care centre, and 10.90 euros if the patient can present a referral from a general practitioner; however the maximum fee per person per calendar year is confined to 72.62 euros. The list of exemptions from this mandatory contribution, already contained in the initial Act of 2001, was slightly extended in a further amendment this year[141] after fierce criticism from labour and health organisations as well as hospital staff : it now includes cases where a patient would have to accept an unreasonable travelling distance to get adequate and sufficient treatment. Additionally, the health care service was authorised to defer payment in cases of hardship on the respective patient's application. Nevertheless criticism of section 135a has continued, and an action against the clause is pending before the Constitutional Court.

Still in 2002, the Belgian advisory committee on bioethics considered the ethical aspects of the possible introduction on the Belgian market of self-administered AIDS detection tests[142]. The Royal Decree which incorporates Directive of 28 October 1998 on *in vitro* diagnostic medical devices into Belgian law, authorises the Minister of Public Health to impose special conditions on the distribution and delivery of medical devices for a particular *in vitro* diagnosis intended for self-diagnosis, or even to prohibit them on the ground of public health[143]. A draft decree that makes these self-diagnosis HIV tests to be obtainable only on prescription and reserves distribution to pharmacists, has been submitted the Council of State for its opinion on 10 June 2002. These regulations are less restrictive than previous proposals on the same subject: in 1996[144] and 1999[145]. **Belgium** first opted for prohibiting the marketing of self-diagnosis tests, but the proposal foundered the principle of the free movement of goods.

In its opinion delivered on 18 February 2002, the Committee recognised the crucial importance of an adequate policy for early detection of HIV and accepted that making these tests available would improve patients' self-sufficiency, enabling a rapid diagnosis, and decreasing the risk of stigmatisation, inherent in the involvement of a third party in the test. Nevertheless, it listed a certain

[139] See www.gisti.org and the communiqué from the Human Rights League of 23.12.2002 asking the Presidents of the social groups at the National Assembly and the Senate to put a question to the Constitutional Council on the conditions of adoption of Article 31A of the corrected finance law for 2002, and the constitutionality of this measure with regard to equal healthcare for all. This measure could have particularly serious consequences, particularly for foreigners in an irregular situation, and in general on public health.
[140] Federal Law Gasette (BGBl.) I No. 35/2001
[141] Federal Law Gasette (BGBl.) I No. 155/2002
[142] This is an early detection for AIDS requested and administered by the consumer him/herself on his/her own initiative, without the help of a doctor or other qualified person, the results of which will be known to him/her only. Not yet marketed in **Belgium**. They are said to be available on Internet.
[143] Royal Decree of 14 November 2001 on medical devices for in vitro diagnostics, *B. M.* 12 December 2001.
[144] Proposal for a Royal Decree of 7 August 1996 for the general prohibition of self-tests, which the European Commission considered contrary to the free movement of goods.
[145] Proposal for a Royal Decree for the prohibition of distribution of HIV self-tests to the public, a prohibition considered disproportionate by the Council of State, which recommended distribution under strict conditions.

number of arguments against the introduction of these tests, which certain members felt could even justify the prohibition of the self-diagnosis tests in **Belgium**, including the high rate of "false positives", the absence of supervision during performance which could give rise to dramatic emotional reactions, the risk of improper use by the armed forces, employers, insurers etc., the exploitation of fear and a large loss of epidemiological data. Others argued for setting the exact conditions for the responsible use of the self-diagnosis tests and insisted, in particular, on the best possible supervision to be provided to users.

Article 36: Access to services of general economic interest

Article 36 of the Charter does not affirm a right of access to services of general economic interest as such, nor, *a fortiori*, the right to a certain level of services of general economic interest[146]. In stating that "…the Union recognises and respects access to services of general economic interest as stipulated 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", this stipulation simply presents this guarantee as an option for the Member States to entrust certain economic agents with public service tasks by exempting them from the application of the rules of the EEC treaty concerning competition, State aids or the freedom of movement, where this is necessary for the said assignments[147]. In addition, Article 36 of the Charter does not add anything of a legal nature to Article 16EC, a provision introduced by the Treaty of Amsterdam into the treaty establishing the European Community, which already recognised "… the place occupied by services of general economic interest among the shared values of the Union, as well as the part played by them in promoting social and territorial cohesion".[148]

Anchor of the right of access to services of general economic interest as a fundamental right

It is particularly important in these conditions that reflections on the place and status occupied by services of general economic interest in the Union should take into account the requirements of European and international law on human rights in this area[149]. Article 31 of the revised European Social Charter, which commits States "… to promote access to housing of adequate standard", is particularly important on this context. Among Member States, which have ratified the European Social Charter, this provision has been accepted by **Denmark**, **Finland**, **France**, **Italy**, **Portugal** and **Sweden**. **Ireland** does not exclude the acceptance of this provision at a later date; the refusal to be bound by this provision being justified in the declaration attached to the ratification instrument submitted on 4 November 2000 by the general nature of this Article and the doubts which attend its interpretation. Special attention should also be paid to the General Comment No. 4 *The right to adequate housing*, 1991, issued by the United Nations Committee for Economic, Social and Cultural rights on Article 11 of the International Covenant concerning Economic, Social and Cultural Rights. The committee stated (§8) that

suitable housing should include certain facilities which are essential to health, safety, comfort and nutrition. All beneficiaries of the right to suitable housing should have ongoing access to natural and common resources such as drinking water, energy for cooking, heating and lighting, sanitary and washing facilities, means of preserving food, a waste removal system, drainage and emergency services (...). The financial cost of housing for individuals or households should be at a level, which does not threaten or compromise the satisfaction of other basic needs. The States who are parties to this agreement should take measures such speaking generally, the percentage of costs incurred for housing is not out of proportion to income. The States concerned should provide housing allowances

[146] This is even clearer on recalling that, among the proposals of the Convention to draft the Charter of Fundamental Rights of the European Union, the following clause had been considered "The Union guarantees everyone free and equal access to services in the general economic interest" (Proposal for Article 39, Charter 4401/00, contri. 258, p. 5.).
[147] See Article 86 § 2 EC.
[148] See: L. Grard, "Les services d'intérêt économique général et le traité d'Amsterdam", *Rev. des affaires européennes*, n°2, 1999 on the scope of this provision.
[149] On these developments, see: O. De Schutter, "Le droit d'accès aux services d'intérêt économique général comme instrument de promotion des droits sociaux dans le cadre du marché intérieur", GEPE/TEPSA, Brussels.

for those, who do not have the means of paying for housing, as well as procedures and levels of financing of housing which accurately reflect needs in this area (...). Suitable housing should be located in places where there are job opportunities, healthcare services, schools, childcare centres and other social services. This is particularly true of large towns and rural areas, where travelling costs (in terms of time and money) could be excessive for the budgets of poor households to bear.

Lastly, the requirement of non-discrimination, which guarantees of the universal supply of services, must be understood to include the requirement of a reasonable settlement of the position of the disabled. It should be recalled that the United Nations Committee on Economic Social and Cultural Rights stated in its General Comment No. 5 (§ 8) concerning persons suffering from a disability (1994) that

> in the light of an increasing commitment of Governments throughout the world to market-based policies, it is appropriate to emphasise certain aspects of the obligations of the States concerned. One of the these aspects is that of ensuring that not only the public, but also the private sector are, within appropriate limits, subject to regulation to ensure the equitable treatment of persons with disabilities. In a context in which arrangements for the provision of public services are increasingly being privatised and in which the free market is being relied on to an ever increasing extent, it is essential that private employers, private suppliers of goods and services, and other non-public bodies should be subject to both non-discrimination and equality standards in relation to persons with disabilities. In circumstances where such protection does not extend beyond the public domain, the ability of persons with disabilities to participate in the mainstream of community activities and to realise their full potential as active members of society, will be severely and often arbitrarily impaired.

During the period under review, institutions of the Union took several initiatives in sectors related to services of general economic interest[150]. The draft directive of the European Parliament amending Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on joint rules for the development of the internal market of Community postal services and the improvement in the quality of service, was adopted in June 2002[151]. The object of this Directive is to continue to deregulate postal services in the internal market, while maintaining the Union's objectives of ensuring a quality universal service. The draft Directive of the European Parliament and the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services, has become directive 2002/22/EC of the European Parliament and the Council (the so-called "universal service" directive)[152]. The Directive aims to ensure the availability of a set of minimum good quality services, accessible to all-end users at an affordable price, without distortion of competition. It also aims to introduce obligations to supply of a certain number of mandatory services (such as retail rented lines), and to establish the rights of end-users and obligations which ensue for companies which supply electronic communication networks and services accessible to the public. On 25 November 2002, a policy agreement was reached by the Council on a modified version of the draft directive of the European Parliament and the Council amending Directives 96/62/EC and 98/30/EC containing

[150] Note should also be taken of the contribution of the European Court of Justice to the question of services in the general economic interest in the judgment made on 4 June 2002. It rejects proceedings lodged by the European Commission against the Belgium for failure to meet obligations (Case C-503/99). The Commission considered that the Royal Decree of 10 June 1994 creating a specific share for the State in the Société nationale de transport par canalisations (B.M. 28 June 1994) was in infringement of the principal of free movement of capital due to the intervention of the State on the market ("Golden share"). The Court considered that the requirements of public safety can justify a derogation -- strictly interpreted -- to the principle of free movement of capital. This system of shares with preferential rights, acting as a scheme for supervising a given market, thus seems to be validated under certain conditions. Parliament adopted a proposal for a law on organising the electricity market (House of Representatives, proposal for law amending the law of 29 April 1999 on the organisation of the electricity market, section 2002-2003, document 50-20500/041-05, 8 October and 5 December 2002, was adopted by the Senate on 19 December 2002). It provides for the creation of the same sort of share system with special rights in favour of the Communities and/or the State, to ensure the supply of energy and to guarantee rates for this service in the general economic interest. For example, in the case of subcontracting, those costs cannot be passed on to the users and, if applicable, the Golden shareholder (the State or the Communities) can cancel any increase in prices.

[151] Directive 2002/39/CE of 10 June 2002, OJ L 176 of 10.06.2002.

[152] OJ L 108 of 24.4.2002.

joint rules for the internal market of electricity and natural gas[153]. It should be noted that this draft expressly mentions the Charter of Fundamental Rights as a reference for the rights and principles, which must be observed by the future directive.

A framework instrument for services of general interest

For the future, the issue concerns the adoption of a framework instrument on services of general interest. The above elements give some idea of the advantage of keeping fundamental social rights in the foreground of the discussion on the development of a framework directive, defining the general characteristics of services of general interest for the whole of the European Union[154]. This discussion should not focus exclusively on an adequate legal basis for the adoption of this framework directive, or on codifying certain typical principles of the concept of public service such as equal access, universality, continuity, participation, transparency, quality, adaptability, assessment[155].

No one would question the importance of these guarantees, but they have two limitations. Firstly, they are not in themselves sufficient to create a guarantee of a minimum service to the citizen, including essential services, which must be provided for all, in particular for members of the most disadvantaged groups of the population, insofar as access to services such as light, heat, communications or drinking water defines the membership of the community[156]. The accessibility of services of general interest is not limited to non-discrimination or to universality, but includes the concepts of physical accessibility (particularly for the disabled), affordability, and acceptability (services must be supplied whilst observing the traditional cultures of all groups within the community and particularly those of minorities).

Next, they do not contain a dynamic requirement of continual improvement of services provided on a universal basis and therefore a gradual strengthening of citizenship by means of access to services of general interest. The reference to fundamental social rights can contribute to mitigate the current points of weakness in the European system of services of general economic interest. This reference is needed at a time when the Charter of Fundamental Rights has identified a set of common values within the European Union, which include the values, which services of general economic interest actually represent.

Extension of services of general economic interest

Making the right of access to services of general economic interest a part of fundamental rights would have the additional advantage of examining whether the right of access should not extend beyond the so-called network economies such as electricity, gas, water, telecommunications, transport and the traditional public services, particularly the Post Office. It is necessary to consider whether financial

[153] COM(2001) 125 final, OJ C 240 E of 28.08.2001.

[154] The conclusions of the Interior Market Council of 26 November 2001 noted that the Commission is examining the timeliness of consolidating and specifying the principles of services in the general interest underlying Article 16 of the Treaty in a framework directive, taking account of the specific aspects of the various sectors concerned. In its progress report on the examination of a proposal for a framework directive on services in the general interest (COM(2002) 689 final, of 04.12.2002) the Commission envisages the publication of a Green Paper on services in the general interest for the first quarter of 2003. This Green Paper should give the Commission the chance to examine the question of a proposal for framework directive and study, in depth, the role of the European Union in supplying high-quality services in the general interest for consumers and companies in Europe.

[155] In the Resolution adopted on 13 November 2001 on the Commission communication on "Services in the general interest in Europe" (COM(2000) 580 - C5-0399/2001 - 2001/2157(COS)) (A5-0361/2001), the European Parliament underlined the services in the general economic interest must ensure equal access, security of supply, continuity, high quality and democratic responsibility (.4), and said it expected the Commission to have the framework directive set the Community principles on which the services in the general interest are based, at an appropriate level of subsidiary, describe and define the Community principles for democratic regulation and transparency, ensure active citizen and user participation in the process of defining, evaluating and assessing the missions and that it should lay down a common procedure and a multiple assessment. (item 7).

[156] *Services publics. Question d'avenir*, rapport de la commission présidée par Christian Stoffaës, Commissariat général du Plan, éd. Odile Jacob - La documentation française, Paris, 1995, p. 235.

services provided in particular, by banks and insurance companies which offer services indispensable to the exercise of citizenship and economic activity, should not be universal services. A survey carried out by the European Commission following the European Council's declaration on services of general economic interest provided by credit institutions[157], showed that with the exception of **Austria** and **Germany**, no Member State referred to the provision of banking services to disadvantaged populations as a service of general economic interest. In **Belgium**, a law establishing a basic banking service was unanimously passed on 5 December 2002 by the House of Representatives, approved by the relevant Senate committee and now awaits final approval by the Senate[158]. This law is intended to provide an answer to the phenomenon of banking exclusion. It requires every credit institution to offer a basic banking service on pain of financial sanctions. Under this legislation, a genuine right to open and maintain a current account and to use it effectively (transfers, bank statements) is given to any person with his/her main residence in **Belgium** for a minimal fee, which shall not exceed 12 euros per year. Disputes resulting from the application of this law will be dealt with as extra-judicial actions by an independent body to be created at the earliest within two years of the entry into force of this legislation. Thus, a "new" service of general economic interest has been which is essential to individual social integration has been created. Nevertheless, in order to respond fully to the complexity of the phenomenon of banking exclusion, the effective application of this new legislation must be monitored and should be supplemented by in-depth thinking on the subject of a genuine and universal banking service, accessible to all, in the context of the rationalisation of the sector by closing down local branches, increasing the number of electronic cash points and redirecting services which aim to be profitable to the public.

Article 37. Environmental protection

Protection on the environment as a fundamental right of the individual

Although Article 37 of the Charter of Fundamental Rights of the European Union presents environmental protection as a principle whose requirements must be incorporated into the definition and implementation of Union policies and actions[159], its provision must actually be interpreted from the viewpoint of the fundamental right of the individual to the protection of his/her environment from damage. Environmental pollution can lead to endangering the private or family life of the individual, or the respect for his/her home[160]; the European Court for Human Rights also held in its judgment *Oneryildis v. Turkey* of 18 June 2002 which concerned the detrimental consequences on the health for the inhabitants of a slum near a refuse dump, that since the authorities "knew or should have known that the lives and physical integrity of the inhabitants of certain neighbourhoods (..) were genuinely threatened as a result of the defects of the municipal refuse dump", but did not correct the said defects or inform the inhabitants of the risks they were exposed to, Article 2 of the Convention (right to life) was being breached [161].

Alongside the substantive obligation of not endangering the health of individuals through damaging the environment, the European Convention of Human Rights imposes procedural obligations on signatory States. Firstly, the European Court for Human Rights states that Article 8 of the European Convention for Human Rights requires the furnishing of information on environmental measures to individuals, who must be able to assess the risks to their health, which could result from a decision to continue to live near a source of pollution, or, in general, of being exposed to certain types of

[157] Amsterdam European Council, 18 June 1997.
[158] House of Representatives, proposal for a law instituting a basic banking service, session 2002-2003, doc. 50-1370/012 of 5 December 2002. For the Senate, the text was adopted by the Committee without amendments on 29 January 2003.
[159] See particularly Article 6 EC.
[160] Eur. Court of H.R., judgement *Lopes Ostras v.* ***Spain*** of 9 December 1994.
[161] Eur. Court of H.R., (1st section) judgment *Oneryildis v. Turkey* (case n° 48939/99) of 18 June 2002, §§ 87-88. A purely hypothetical risk of danger to health, when the fears expressed are not based on any scientifically proved evidence, cannot constitute an obstacle for the realisation of certain projects. See, for the period under consideration for **Germany**, the judgment given by the Federal Constitutional Court on 28 February 2002 (installation, in compliance with legal regulations, an antenna for mobile communications: 1 BvR 1676/01 (Neue Jurist. Wochenschrift 2002, 1638).

environmental pollution[162]. Secondly, it stated that the States must carefully assess the impact on the environment and on health of individuals, of any project that could be detrimental; the abstract or exclusive argument that the project in question is beneficial to economic welfare that cannot justify the implementation of such a project. In its judgment in the case of *Hatton v. the* ***United Kingdom*** on 2 October 2001, which has meanwhile been referred to the Grand Chamber of the Court, a section of the Court stated on the subject of sound pollution associated with night flights in the area of Heathrow airport, that States are required to minimise as far as possible any infringement of rights by trying to find alternative solutions and, in general, to attain their objectives by means less injurious to human rights. For that purpose, a complete examination and study to find the best solution should be carried out before any implementation of the project in question[163].

These procedural aspects of the right to environmental protection are specifically defined by the Community's secondary legislation. After recalling achievements to date, the report describes the main developments identified in 2002 in terms of the instruments on which the environmental protection guarantee is based, namely, constitutional law, criminal law or market promotion mechanisms. This report which is justified by the nature of the period under review must not lead to underestimating the importance of other instruments available to ensure environmental protection and particularly classical instruments, such as administration law, or, in civil law, actions for damage caused by injury to the environment.

Right to access to information and participatory rights in environmental matters

The objective of Council Directive 90/313/EC of 7 June 1990 on the freedom of access to information concerning the environment[164] is that of ensuring freedom of access to and dissemination of, information on the environment by the public authorities and of fixing the basic conditions under which this information must be made accessible. The draft Directive of the European Parliament and of the Council submitted on 29 June 2002[165], attempts to correct the defects of this directive noted in the Commission report based on reports by Member States and NGOs on experience gained. The aim of this review is that of correcting defects which emerged in the implementation of Directive 90/313/EC, to align Community legislation on the Aarhus Convention[166] to allow ratification of this convention, which the European Communities signed on 25 June 1998 and finally, to adapt the rules of access to information in environmental matters to the technological developments which influence the means of collection, storage and transmission of that information. Since the joint decision procedure is applicable to this proposal, one must wait until 18 December 2002 to enable the European Parliament finally to approve the project proposed following a meeting of the Conciliation Committee.

The draft Directive of the European Parliament and on the Council on public participation in the drawing up of certain plans and programmes concerning the environment and amending Directive 85/337/EC and 96/61/EC[167] aims at increasing public awareness of environmental concerns, by promoting access to information and participation in the decision-making process[168]. The Conciliation Committee meeting on 10 December 2002 was able to reach agreement on the joint project passed to the Council for adoption.

---

[162] See records of the Eur Court of H.R., judgement *Guerra et al. c. Italie* of 19 February 1998 (and S. Maljean-Dubois, "La Convention européenne des droits de l'homme et le droit à l'information en matière d'environnement", *Rev. gén. dr. inter. public*, 1998-4, p. 995); judgment *McGinley and Egan v.* ***United Kingdom*** of 9 June 1998.

[163] Eur Court of H.R judgement *Hatton et al. v.* ***United Kingdom*** of 2 October 2001, § 97.

[164] OJ L 158 of 23.6.1990.

[165] COM(2000) 402 final, OJ C 337 of 28.11.2000.

[166] Convention on access to information, public participation in the decision-taking process and access to jusice in environmental matters of 25 June 1998.

[167] Council Directive 85/337/CEE of 27 June 1985 concernant l'évaluation des incidences de certains projets publics et privés sur l'environnement, JO L 175 du 5.7.1985; et Directive 96/61/CE du Conseil du 24 septembre 1996 relative à la prévention et à la réduction intégrées de la pollution, JO L 257 du 10.10.1996

[168] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175 of 5.7.1985; and of 24 September 1996 concerning integrated pollution prevention and control. OJ L 257 of 10.10.1996.

Protection of the environment by constitutional law

Article 20 of the Finnish constitution of 1 June 1999 provides that "Nature and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment.") On the basis of this provision, the Finnish Supreme Administrative Court handed down a judgment on 18 December 2002 which effectively prohibited the construction of a dam and reservoir in Vuotos in Finnish Lapland.[169] The judgment put an end to the Vuotos reservoir affair, for the affair has been a topic of heated debate for over thirty years. In its judgment, the Supreme Administrative Court found that the 242 square kilometres that the reservoir would have covered contain valuable swamp, river and water habitats. 88 endangered species have also been found in the area. The Supreme Administrative Court concluded that the reservoir would have caused considerable environmental damage to the area, thereby deciding that the dam must not be built.

In **Greece**, too, a provision of the Constitution of 2001 (article 24) devoted a provision for the protection of the "natural and cultural environment, which according to Article 24 for the Constitution, constitutes an obligation of the State. To safeguard the environment, the State is required to take special, preventive or repressive measures (...). The Council of State has specified the method, which it intends using for the application of the right laid down in Article 24 of the Constitution. The role of the judge in this matter is mainly that of ascertaining whether the environmental impact study used by the administration is sufficient and complies with the requirements of the law. The appeal judge controls directly any breaches of the principle of sustainable development only if, in the light of "common experience", the file of the case shows that the damage done to the environment is irreversible, or if it is clearly disproportionate to any benefit to be expected[170].

In addition to **Greece** and **Finland**, other national constitutions mention the right to environmental protection. Since the adoption of the Constitution of 17 February 1994, **Belgium** has recognised "the right to protection of a healthy environment" in Article 23. Article 45 of the Constitution of the Kingdom of **Spain** of 27 December 1978 also contains a similar clause. In **Portugal**, Article 2 of the Constitution of 2 April 1976 lists the protection of nature and of the environment and the conservation of natural resources among the fundamental tasks of the State and Article 66 provides to everyone the right to a healthy environment. In addition, Article 52 of the Constitution provides for a form of collective action and a means of bringing the matter to court, which can be particularly useful in environmental matters. The **Swedish** Constitution was amended by a parliamentary decision on 13 November 2002 as to include a new provision of mainly policy character, with the aim to promote a sustainable development, where present and future generations are to be ensured a healthy and good environment. The new provision is in force since 1 January 2003.[171]

Protection of the environment by criminal law

A draft Directive of the European Parliament and of the Council on environmental protection by criminal law aims to ensure the effective application of the rules of Community law in the area of protection of the environment and to define a minimum number of criminal offences[172]. Following the adoption by the European Commission of an amended draft, taking account of the Parliament's amendments[173], the text of this draft Directive has been passed to the Council and the Parliament.

The extension of certain environmental offences does appear to call for some form of repressive response. In January 2003, the Lega Ambiente association published its file on illicit waste traffic in **Italy**. Since the decree introducing the offence of organising waste traffic into Italian criminal law

[169] KHO 2002:86.
[170] Council of State (plenary), decision no 613/2002, of 1.3.2002.
[171] Prop. 2001/02:72 Ändringar i regeringsformen, p. 21; Viktigare lagar & förordningar, 25 December 2002, p. 8.
[172] COM(2001) 139 of 13 March 2001, OJ C 180 of 26.6.2001.
[173] COM(2002) 544 of 30 September 2002.

came into force in April 2001, 49 preventive detention steps have been taken, 177 people have been charged, 36 companies shown to be involved in the illicit transport of waste. Criminal investigations are taking place in 12 of the 21 Italian regions. Most of the waste involved in this traffic is highly toxic and dangerous to health.[174]

Protection of the environment by an incentives mechanisms

Together with interventions and regulations on environmental protection, market incentive mechanisms can also be used to try to attain this objective. The establishment of an ecotax is one such mechanisms. *The Gesetz zur Fortenwicklung der ökologischen Steuerreform* [Act for Continuing the Ecological Tax Reform] of 23 December 2002[175] follows the aim of a further ecological development of the tax system in **Germany** through modifications with energy taxes.

Another incentive mechanisms can consist of introducing environmental clauses into the notification of public supply contracts[176]. In its judgment of 17 September 2002 in the case of *Concordia Bus **Finland*** – where a Finnish municipality took into account the environmental performances which could be satisfied in the execution of the contract to be awarded –, the European Court of Justice considered that "where the contracting authority decides to award a contract to the tenderer who submits the economically most advantageous tender, in accordance with Article 36(1)(a) of Directive 92/50[[177]], it may take criteria relating to the preservation of the environment into consideration, provided that they are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination"[178].

Article 38. Consumer protection

The principle in Article 38 of the Charter of Fundamental Rights contains an original guarantee which in essence has no counterpart among international or European instruments for the protection of Human Rights. Paragraph 1 of Article 153 EC, which is its source of inspiration, states that "…in order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to the protection of the health, safety and economic interests of consumers, as well as to the promotion of their right to information, education and to organising themselves in order to safeguard their interests". This provision gives information on the directions which the principle of consumer protection might take and in the language of fundamental rights, about the principle of consumer protection whose requirements, again according to Article 153 EC, stating that "consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities" (Article 153 § 2 EC). The consumers' right to protection has a clear relationship with, in particular, the right to the protection of health (Article 35 of the Charter), the safety of food having, in particular, attracted attention in recent years, in particular as

[174] Lega Ambiente has also denounced the danger associated with the announcement made by Government representatives of a possible amnesty of all irregularities in the field of urban planning. This could particularly encourage Mafia organisations to accelerate the construction of abusive buildings. According to Lega Ambiente, since the amnesty announced in 1994 by the first Berlusconi government, 331,855 buildings were allegedly constructed in **Italy** for a value estimated at 23 million euros. More than half of these buildings were said to be erected in the four Italian regions where the Mafia is most active (Campania, Puglia, Calabria, Sicilia).
[175] BGBl. 2002 I p. 4602.
[176] See the Communication of the Commission on the introduction of environmental considerations into public procurement, COM(2001) 274 final of 4.7.2001.
[177] Article 36(1) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1) (defining the criteria on which the contracting authority may base the award of contracts where the award is made to the "economically most advantageous tender", as "various criteria relating to the contract: for example, quality, technical merit, aesthetic and functional characteristics, technical assistance and after-sales service, delivery date, delivery period or period of completion, price").
[178] Case C-513/99, Concordia Bus **Finland** Oy Ab (previously Stagecoach **Finland**) v. Helsingin kaupunki et HKL-Bussiliikenne, nyr, Recital 64 (judgment of 17 September 2002).

a result of the crisis caused by the epidemic of Bovine Encephalopathy spongiform (BES)[179] and discussions due to the introduction of the genetically modified organisms (GMO)[180] and with the right to access to justice (article 47 of the Charter), in particular by means of encouraging the extra-judicial settlement of disputes on matters of consumption and the development of the right of organisations defending consumer rights -- to file suit in court.

During the period under review, two particularly noteworthy initiatives were taken by the European Commission concerning the implementation of this right. The Commission published a "follow-up on the Green paper on Consumer Protection in the European Union" on 11 June 2002[181]. The consultation launched in 2001 showed a broad consensus on the need to reform consumer protection within the European Union. Preference was expressed for the adoption of a framework directive dealing with fair business practices. The Commission envisages the adoption of a legal instrument of cooperation among national bodies responsible for applying the consumer protection rules. The Council asked the Commission to pay particular attention to the follow-up of the green paper. Thus, the consultation will continue in detail, before the draft of the framework directive is developed. This communication was transmitted to the Council where it was discussed on 14 November 2002 (item "B" on the agenda).

The Commission's communication to the European Parliament, to the Council, to the Economic and Social Committee and to the Committee of Regions calling for "a consumer policy strategy 2002-2006"[182], defines three medium-term objectives. The first is a high level of consumer protection, next the effective application of consumer protection rules and lastly the participation of consumer organisations in Community policies. As far as the Commission is concerned, "consumer policy" in this communication covers consumer safety, as well as the economic and legal aspects of the market of interest to consumers, particularly consumer information and education.

In the *Heininger* decree of December 13th 2001[183], the Court of Justice notably judged that the directive on door-to-door selling[184] should be interpreted in the same way as a mortgage contract, such that the consumer who has signed a contract of this type in one of the scenarios specified in the 1st clause has the right to cancel set out in clause 5. **Germany** had drawn the consequences of this judgment by the adoption of an Act of 23 July 2002[185]. Art. 25 of the said Act contains modifications of consumer legal regulations in the Civil Code (BGB) and in other acts. As a result, the regulations for withdrawing front-door trades in future are valid for real estate loan agreements as well. On certification of consumer contracts, the notary shall work towards the consumer having sufficient opportunity to deal with the object.

A specific dimension of consumer protection to which public debate has drawn attention in 2002 should be emphasised; this is correct consumer information concerning compliance by companies with certain social or ethical standards, as defined respectively by international labour law and the international law on human rights. In **Belgium**, the law of 27 February 2002 to promote socially responsible production, came into force on 1 September 2002[186]. It stipulates that any company, which

[179] See the white paper on food safety, COM(1999) 719 of 12 January 2000, and, during the period under consideration, Regulation (EC) n°178/2002 of the European Parliament and of the Council on the general principles and requirements of food law, procedures in matters of food safety and on the establishment of the European Food Safety Authority. OJ L 31 of 1.2.2002.

[180] A political agreement was reached on 9 December 2002 on a proposal for a Regulation of the European Parliament and of the Council on traceability and labelling of genetically modified organisms and traceability of products intended for human or animal consumption based on genetically modified organisms and amending Directive 2001/18/EC JO L 31 du 1.2.2002.

[181] COM(2002) 289 final (follow-up on the Green paper on Consumer Protection in the European Union (COM (2001) 531).

[182] COM(2002)208 final, OJ C 137 of 08.06.2002.

[183] Affair C-481/99.

[184] Directive 85/577/CEE of the Council of December 20th 1985 concerning the protection of consumers in the event of contracts negotiated outside of commercial establishments (JO L 372, p. 31).

[185] Gesetz zur Änderung des Rechts der Vertretung durch Rechtsanwälte vor den Oberlandesgerichten [Act concerning the Modification of the Right of Representation by a Lawyer before the Higher Regional Courts] of 23 Jul 2002 (BGBl. 2002 I p. 2850).

[186] B.M. 6 March 2002.

serves the Belgian market, can apply for the award of a social label. This is granted by the Minister of Economic Affairs on the basis of a binding opinion of the socially responsible production committee[187], subject to the condition that the company complies with the standards and criteria defined in the conventions of the International Labour Organisation, namely, the prohibition of forced labour, the right to free trade unions, the right to collective organisation and bargaining, the prohibition of any discrimination in matters of work and pay, a minimum age set for child labour and the prohibition of the worst forms of child labour.

[187] See the Royal Decree of 6 June 2002 on the appointment of members of the committee for social responsible production.

CHAPTER V. CITIZENSHIP

Article 39. Right to vote and to stand as a candidate at elections to the European Parliament

During the period under examination, the Council adopted Decision 2002/772/EC, Euratom of 25 June 2002 and 23 September 2002, amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annexed to decision 76/787/ECSC, EEC, Euratom[1]. The text harmonises some parts of the electoral procedure, in particular by generalising the principle of proportional representation, by affirming the incompatibility between national member of parliament status and European member of parliament status, by fixing a ceiling for electoral campaign expenses and by promoting the principle of creating constituency boundaries which respect the principle of proportional representation. The decision is accompanied by a declaration from the United Kingdom which guarantees the participation of Gibraltar residents in European Parliament elections, their exclusion from this vote having resulted in the United Kingdom being judged by the European Court of Human Rights to have violated article 3 of the First Additional Protocol to the Convention (the right to free elections)[2].

The lack of interest that citizens of the European Union have shown in elections to the European Parliament, which the latter is rightly worried about, must be overcome by State-specific initiatives designed to recreate the link between the European debate and issues of daily life. In **Ireland**, the European Union (Scrutiny) Act, 2002 (No.25) was passed during the period under examination. It provides, *inter alia*, for reporting by Government Ministers with Parliament regarding proposals for EU Directives and other measures. This aspect of the Act is intended to increase the relevance of the EU legislative process in the national parliament and, consequently, in the country.

Article 40. Right to vote and to stand as a candidate at municipal elections

The detailed arrangements of this right are defined in Directive 94/80/EC of 19 December 1994 which sets out the detailed arrangements of the right to vote and stand as a candidate in municipal elections for those citizens of the Union residing in a Member State of which they are not nationals[3]. However, like the previous provision of the Charter, the principal problem encountered in this respect is the lack of interest that citizens of the Union have shown in exercising this right, when they are resident in the territory of a Member State other than the one in which they are nationals[4]. In **Greece**, in anticipation of the local and prefectural elections of 13 and 20 October 2002, the Government conducted an information campaign in order to promote the participation of citizens from other Member States of the Union. In February 2002, the Minister of the Interior sent a circular to all town halls and village councils in the country on the procedure to be followed for registration of citizens of the Union on electoral rolls; it also reminded them that the condition of residence of at least two years had been repealed[5]. The number of citizens registered on electoral rolls who were from the Union but not Greek nationals reached 2,948 (out of some 65,000 citizens of the Union living in Greece), which represents an increase of approximately 100% compared to the number of registrations during the previous elections in 1998.

[1] OJ L 283 of 21.10.2002.
[2] Eur. Court H.R., Matthews v. United Kingdom judgement of 18 February 1999.
[3] OJ L 368 of 31.12.1994.
[4] See the report published in May 2002 by the Commission on this question: COM(2002) 260.
[5] Articles published in the press, however, noted a certain amount of confusion and lack of information in a number of municipalities (K. Tzilivakis, "Indifference, red tape or sheer lack of info?", Athens News, 20.9.2002, p. A12, idem, "EU citizens finding it hard to cast their ballot", Athens News, 14.6.2002, p. A12).

Participation of nationals from third countries in local elections

In its opinion of 5 February 2002 concerning the proposed directive on the status of long-term resident nationals from third countries, the European Parliament suggested that the beneficiaries of this status could be given the right to vote in local and European elections. This suggestion is in line with other initiatives moving in this direction. The Vienna City Government also proposed to open elections for third country nationals. Accordingly, foreigners who have been resident in Vienna for more than five years would be granted the right to vote in municipal elections but also be able to stand as a candidate. The only public functions that would remain barred are that of the district head administrator (*Bezirksvorsteher*) and membership to the district building committees, which are reserved for citizens of an EU Member State.

In this respect, the Convention on the Participation of Foreigners in Local Public Life, opened for signature in the Council of Europe on 5 February 1992[6], stipulates that States party to this instrument undertake in principle "to grant all foreign residents the right to vote and to stand as candidates in local elections, provided that they fulfil the same conditions as those which apply to national citizens and, in addition, have resided legally and regularly in the State in question during the five years preceding the elections" (article 6, § 1). This convention is in force in five Member States: **Denmark** (which ratified it on 6 April 2000), **Finland** (12 January 2001), **Italy** (26 May 1994), **Netherlands** (28 January 1997), and **Sweden** (12 February 1993); the **United Kingdom** signed the convention on 5 February 1992, but has not ratified it. This instrument is also important because of the guarantees that it gives foreigners residing legally in the territory of participating States (article 2) to benefit in particular from freedom of opinion, assembly and association, and the right to create consultative bodies, which encourage active participation in local political life. In this respect, it is also of relevance to citizens of the European Union, whose right to participate in local elections in a Member State of which they are not nationals is guaranteed in article 19 § 1 EC.

Article 41. Right to good administration

This provision of the Charter would not justify particular attention from this report, were it not for the spectacular use made of it in the first decision of the community Judge whose reasoning was explicitly based on the Charter of Fundamental Rights. In a ruling issued on 30 January 2002 in the case *max.mobil Telekommunikation Service GmbH*, the Court of First Instance of the European Communities allowed the admissibility of action for annulment of a decision made by the European Commission to partially reject a complaint by the applicant company after the latter had requested it to make use of the powers that article 86 § 3 EC (then article 90 § 3 of the EC Treaty) conferred on it with a view to ensuring that public companies or ones to which States grant special or exclusive rights comply with the rules of the Treaty. The ruling firstly makes reference to the Charter in order to confirm the existence, on the part of the Commission, of an obligation to ensure diligent and impartial handling of the complaint introduced to it: such an obligation "is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States", which, according to the Court, article 41 § 1 of the Charter confirmed[7]; the reference to the Charter is then used by the Court to support its preamble in which "in so far as the Commission is required to undertake such an

[6] E.T.S., n° 144. The Convention came into force on 1st May 1997, after the minimum number of ratifications were reached.

[7] See C.F.I., 30 January 2002, max.mobil Telekommunikation Service GmbH v. E.C. Commission, T-54/99: "Since the present action is directed against a measure rejecting a complaint, it must be emphasised at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. Article 41, paragraph 1, of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1) confirms that '[e]very 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'. It is appropriate to consider, first of all, the nature and scope both of that right and of the administration's concomitant obligations in the specific context of the application of Community competition law to an individual case, as called for in this instance by the applicant" (point 48).

examination [of the applicant's complaint], the fulfilment of that obligation must be amenable to judicial review"[8].

Article 41 § 3 of the Charter of Fundamental Rights raises to the status of a "fundamental right" the right of any person 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". This right was already enshrined in article 288 EC. During the period under examination, the Court of First Instance of the European Communities issued two rulings in this respect which should be mentioned. In the case *Forde-Reederei Gmbh*, it examined the question of whether the abolition of "tax-free" arrangements in itself incurred the non-contractual liability of the Community in terms of unlawful behaviour. It concluded in the negative as the implementation, by acts of a legislative nature such as the Directive and the Regulation, of that general provision of primary law manifestly falls within the ambit of economic policy choices and of the Community institutions' wide discretion, which corresponds to the political responsibilities which the Treaty confers on the Community legislature. In this context, the liability of the Community can be incurred only if it is found that there has been a clear, that is to say, a manifest and serious, breach of a higher-ranking rule of law for the protection of individuals. The Court did not note the existence of such a breach in the particular case submitted to it[9]. Secondly, the Court of First Instance judged admissible the application for compensation introduced by a citizen of the Union against the European Ombudsman, considering that, the latter not having a legal personality, the demand was in fact addressed to the Community of which the Ombudsman is a body, and that it could not exclude the possibility that the Ombudsman could commit a fault violating the right of citizens to have the Ombudsman find an extrajudicial settlement to a case of maladministration affecting them, a fault which may result in damage ("the hypothesis cannot be excluded that, under wholly exceptional circumstances, a citizen could demonstrate that the Ombudsman had committed a manifest breach in the exercise of its duties so as to cause damage to the citizen concerned"). The C.F.I. however concluded that the proceedings for compensation were unfounded, as the applicant was not able to prove the existence of a breach of service on the part of the Ombudsman[10].

Article 42. Right of access to documents

Under the terms of article 255 § 1 EC "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, subject to the principles and conditions which will be defined in accordance with paragraphs 2 and 3". Article 255 § 2 EC making it an obligation of the Council to determine the general principles and limits governing exercise of this right of access within two years using the co-decision procedure, the European Parliament and Council adopted Regulation 1049/2001 on 30 May 2001 on public access to the documents of the European Parliament, Council and Commission[11]. In accordance with article 18 of this Regulation, each of the institutions concerned have adopted their rules of procedure to the principles of Regulation 1049/2001[12].

Proportionality of refusal of access to documents and partial access

In the *Hautala* affair, in particular given "the importance of the public's right of access to documents held by the public authorities", and given the declaration (n° 17) concerning the right of access to

[8] C.F.I., 30 January 2002, max.mobil Telekommunikation Service GmbH, cited above, point 56. The Court added that "Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal" (point 57).
[9] C.F.I., 20 February 2002, T-170/00, Förde-Reederei Gmbh.
[10] C.F.I., 10 April 2002, Lamberts v. European Ombudsman, T-209/00.
[11] OJ L 145 of 31.5.2001, p. 43.
[12] Decision of the Council of 5 December 2001 modifying its rules of procedure, OJ L 345, p. 94, and decision of 22 July 2002 on adoption of its rules of procedure, OJ L 230, p. 7; Decision of the Commission of 23 January 2002 modifying its rules of procedure, OJ L 21, p. 23; Decision of the European Parliament of 13 November 2002.

information annexed to the European Union Treaty of 7 February 1992 connecting the right of access to documents with the "democratic nature of the institutions", the Court of First Instance of the European Communities[13], approved by the European Court of Justice [14], accepted the request of the applicant to have partial access to the report of a Council working group, by providing as generous an interpretation as possible of this right of access to information, through a strict reading of any exception made to this right[15]. Article 4 § 6 of Regulation 1049/2001 enshrines this case law by specifying that if only parts of the requested document are covered by any of the exceptions to the principle of right of access, partial right of access must be recognised for the remaining parts of the document. In the *Hautala* affair, the Court of First Instance of the E.C. and the European Court of Justice felt that it could, however, be justified to find a balance between the interests of the public in having partial access to the document, on the one hand, and of the burden of work that provision of such partial access represented, on the other. This restriction does not appear in Regulation 1049/2001. One author has deduced from this that "it is incumbent upon the institutions to take appropriate measures to allow such access and, if necessary, for the budgetary authority to vote credits allowing the allocation of the resources necessary to this end. It would appear that the principle of proportionality can now only be invoked in cases where the administrative burden would be manifestly disproportionate and would obviously conflict with sound administration"[16].

Right of access to documents and protection of personal data

Particular attention should be drawn to the type of conflict which can arise, in certain cases, between on the one hand, the principle of right of access to documents held by the institutions – a principle which includes all areas of the European Union's activity (article 2 § 3 of Regulation 1049/2001) – and on the other hand, the right of individuals to protection with respect to the processing of personal data concerning them[17]. In a letter to Mr. Prodi of 30 September 2002, the *European Ombudsman* has called on the Commission to clarify data protection rules in this respect[18]. According to the European Ombudsman, clarification of the Community rules on data protection is needed to emphasise that these rules do not limit the principle of openness and the right of access to official documents. The Ombudsman is also concerned that data protection rules are being misinterpreted as implying the existence of a general right to participate anonymously in public activities, for this misinterpretation "risks subverting the principle of openness and the public's right of access to documents, both at the level of the Union and in the Member States".[19] The Ombudsman has also produced a report on this point intended for the European Parliament, which has adopted a resolution approving this position[20].

[13] C.F.I., 19 July 1999, Hautala v. Council, T-14/98, ECR p. II-2489. In point 82 of its judgement, the Court made reference to the considerations put forward by the Advocate General in his conclusions preceding the Netherlands v. Council ruling given by the European Court of Justice on 30 April 1996 (C-58/94, ECR, p. I-2169 (dismissal of the action for annulment submitted by the Netherlands against decision 93/731 of the Council and the annexed code of conduct)): according to the Advocate General, the subjective right to information has its basis "in the democratic principle, which constitutes one of the cornerstones of the Community edifice, as enshrined now in the Preamble to the Maastricht Treaty and Article F [of the Treaty on European Union, now, after amendment, Article 6 EU]".

[14] ECJ, 6 December 2001, Council v. Hautala, C-353/99 P, ECR, p. I-9565, spec. points 24 to 26.

[15] The conclusions presented by the Advocate General Ph. Léger on 10 July 2001 supported this interpretation: regarding Article 42 of the Charter (right of access to the documents of the institutions), a regulation which restates the essential content of Article 255 EC, Mr. Léger noted that: "The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States. (...). As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is a source of guidance as to the true nature of the Community rules of positive law".

[16] M. Schauss, "L'accès du citoyen aux documents des institutions communautaires", J.T.D.E., 2003, p. 1, here p. 3.

[17] Regulation (EC) 45/2001 of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8, p. 1.

[18] http://www.euro-ombudsman.eu.int/letters/pdf/en/20020930-1.pdf

[19] The European Ombudsman Press Release No. 25/2002. In a paper entitled "The misuse of data protection rules in the European Union", the Ombudsman has provided more concrete examples of this misinterpretation. The Ombudsman proposed the changes in a letter to Commission President Prodi where he stated that "the current review of the Community's data protection rules offers the possibility to promote their correct interpretation and application".

[20] Doc. A5-423/2001.

This reading does not seem to be justified, insofar as the solution proposed by the Ombudsman unduly privileges one rule – the right of access to documents held by EU institutions – over another – the right of the individual to respect for his private life –, whilst both these rights are fundamental. It should be remembered that the right to privacy also protects the individual with respect to the processing of personal data, including when these data are related to the public activities of the individual, that is, they are not confidential[21]. It is this notion of privacy which has guided interpretation of Regulation 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[22]. Regulation 1049/2001 stipulates that "the institutions shall refuse access to a document where disclosure would undermine the protection (...) of the privacy and integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data" (article 4, § 1, b), of the Regulation). Of course this exception should be interpreted so as not to disproportionately hinder the right of access to documents. Total or partial refusal of access should not, however, be considered unjustified when its effective purpose is to protect the privacy of the people concerned, that is, when in allowing the request for access, the institution would be violating the right to privacy.

To the extent that Article 5, b, of Regulation 45/2001, of 18 December 2000, on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, allows the processing of personal data which are necessary to comply with a legal obligation which the person responsible for processing is subject to, it is necessary, whenever the request for access relates to documents whose disclosure can be considered to involve the processing of personal data, to balance the interests of the applicant with those of the person affected by the processing of such data: while taking into account the possibility of granting only partial access to certain documents[23], it is essential that the Community institution does not grant right of access to documents when the interests of the applicant do not have any reasonable relationship of proportionality with the resulting violation of the right of the person concerned to protect his privacy regarding the processing of personal data. Any solution resulting in *a priori* sacrifice of one interest to the detriment of the other is not recommended, an appreciation of the respective weight of the interests concerned only being possible in each specific case[24].

Article 43. Ombudsman

During the period under examination, the Ombudsman received 2211 complaints and opened 2 enquiries automatically. Only 28% (653) of these complaints concerned the mandate of the Ombudsman. 331 of the complaints were considered admissible. The Ombudsman opened an enquiry for 222 of these. 75% of the enquiries concerned the European Commission, 9% the Parliament, 5% the Council of the European Union and 11% the other institutions.

The grounds cited by plaintiffs were: a lack of transparency or refusal to supply information (27%), the time taken to receive a response (15%), abuse of power (13%), errors of procedure or violation of

[21] Eur. Court H.R., *Rotaru v. Romania* judgement of 4 May 2000, Rev. trim. dr. h., 2001, p. 137, and obs. O. De Schutter, "Vie privée et protection de l'individu vis-à-vis des traitements de données à caractère personnel".

[22] Or, before this Regulation came into force, of Directive 95/46/EC of the European Parliament and 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, cited above, that Article 286 EC made applicable to the acts of the institutions and bodies of the European Community.

[23] See during the period under examination, confirming the aforementioned Hautala case law, C.F.I., 7 February 2002, *Kuijer v. Council*, T-211/00, ERC, p. II-485, point 57.

[24] See the methodology followed by the European Court of Justice in order to achieve such a balance, ECJ, 14 October 1999, *Adidas*, C-223/98, ERC, p. I-7081. In this sense, M. Schauss, "L'accès du citoyen aux documents des institutions communautaires", cited above. In Portugal, the same solution appears to have been behind combining Law 67/98 of 26 October 1998 on data protection and Law 65/93 of 26 August 1993 on access to administrative documents, the latter legislation being subject to the control of the Comissão de Acesso aos Documentos Administrativos (CADA). See, e.g., the Portuguese Data Protection Authority opinion denying general/free access (e.g. for marketing purposes) to the addresses registered on the National Electoral Database (Opinion 22/2001, on www.cnpd.pt). See also the decision of the Portuguese Authority on Access to Administrative Documents, giving access to some documents containing information on addresses (Opinion 30/2000; Opinion 87/2000, on www.cada.pt), or considering that the issue must be decided by the Portuguese Data Protection Authority (Opinion 177/2002, on www.cada.pt).

rights of defence (11%), negligence (10%), discrimination (8%), errors of a legal nature, failure to ensure compliance with obligations (art. 226) (2%) and other acts of maladministration (8%).

During the period under examination, 248 enquiries were closed by a reasoned decision. In 128 cases, the Ombudsman did not note any act of maladministration. 29 cases were concluded with a critical comment addressed to the institution concerned. 66 cases were settled by the institution concerned. In 6 cases, the parties came to an amicable settlement. In 10 cases, the Ombudsman cited recommendations which were accepted by the institution concerned. The Ombudsman also presented 2 special reports to the European Parliament.

Article 44. Right to petition

During the period from 13 March 2001 to 11 March 2002 – the latest period for which data are available[25] –, the Commission on Petitions of the European Parliament received 1283 petitions. 744 of these petitions were considered admissible. During the same period, examination of 506 petitions was closed. The Committee was asked to provide information on 543 new petitions, and additional information on 152 petitions under examination. 7 petitions were transferred to other committees and delegations for advice, 3 for further action and 161 for information. 2 petitions were transferred to the European Ombudsman so that they could be dealt with as complaints; conversely, 9 complaints were transferred by the European Ombudsman so that they could be dealt with as petitions. A large number of petitions concerned the difficulties that European citizens encountered in social matters (190: transfer of pension rights, double taxation, access to health care, etc.). Others related to non-compliance with or the incorrect application of directives on the environmental impact of public or private projects (162). Another subject concerned the difficulties encountered by citizens regarding effective recognition of their qualifications, when they wanted to make use of them in a professional or academic context (43). A large number of petitions alleged infringement of the right of residence (27).

Article 45. Freedom of movement and of residence

At the time of writing this report, several important legislative initiatives, likely to affect or develop the content of the rights enshrined in Article 45 of the Charter, were still in progress[26]. We have decided it was not desirable to examine these projects here, but to wait until these procedures have been completed.

Freedom of movement and of residence for citizens of the Union from one Member State to another

Given the wealth of case law created by the European Court of Justice on this question during the period under investigation, our comments will be limited to questions raised by the interpretation of such case law with regard to the requirements of fundamental rights. In 2002, the Court repeated[27] that "[the] status of Union citizenship was destined to be the fundamental status of nationals of the Member States, enabling those who found themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to some exceptions as were expressly provided for"[28]. It deducted from this, in the *D'Hoop* judgement given on the refusal of the Belgian National Employment Office to grant the plaintiff the principal of tideover allowances on the grounds that she had completed her secondary education in France, that "Community law precludes a Member State from refusing to grant the tideover allowance to one of its nationals, a student seeking her first employment, on the sole ground that that student completed her secondary education in another Member State". Such a condition is in fact disproportionate in relation to the objective that it claims to

[25] Koukiadis Report, approved 17 July 2002.
[26] See Communication from the Commission to the Council and European Parliament, Bi-annual updating of the scoreboard to assess progress made on the development of an area of "freedom, security and justice" in the European Union, COM(2002) 738 final, 16.12.2002.
[27] See ECJ, 20 September 2001, Grzelczyk, C-184/99, ERC, p. I-6193, point 82.
[28] ECJ, 11 July 2002, D'Hoop, C-224/98, ERC, p. I-6191, point 28.

pursue, which is to ensure the existence of a real link between the person applying for tideover allowances and the geographical labour market concerned (point 38). The reference to the status of Union citizen is made here in order to justify that imposition of the contested condition be checked with regard to Community law: while Mrs D'Hoop could not claim the status of a worker, Community law precludes that a condition could be imposed in relation to the granting of tideover allowances which is not based on "objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions" since having exercised her freedom of movement and residence in the territory of another Member State, the person concerned falls within the scope *ratione materiae* of Community law.

Even more decisive is the judgment issued on 17 September 2002 in the case *Baumbast and R. v. Secretary of State for the Home Department*.[29] The cases giving rise to this ruling concerned in each instance the right of residence of the wife, a national of a third State, and of the children of a national from another Member State who could either no longer be considered a worker having held a job in the United Kingdom (*Baumbast*), or who was divorced from his wife after having held a job there and benefited from the right to family reunification there (*R.*). The Court recognised in its judgement of 17 September 2002 that "Children of a citizen of the European Union who have installed themselves in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses there, pursuant to Article 12 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community. The fact that the parents of the children concerned have meanwhile divorced, the fact that only one parent is a citizen of the Union and that parent has ceased to be a migrant worker in the host Member State and the fact that the children are not themselves citizens of the Union are irrelevant in this regard" (pronouncement). Right of residence in the host Member State is therefore recognised for the child so that it can continue its studies there, even though this right was originally derived from the right of the parent to hold a job in another Member State. The Court also recognised the right of the parent caring for the child to stay with it in the territory of the host State, independently of the nationality of the guardian parent: this is required by the principle of effectiveness which the right of residence of the child continuing its studies should demonstrate. Finally, the Court judged – regarding the other parent, who is a citizen of the Union but who is not the child's primary carer – that "A citizen of the European Union who no longer enjoys a right of residence as a migrant worker in the host Member State can, as a citizen of the Union, enjoy there a right of residence by direct application of Article 18, para. 1, EC. The exercise of that right is subject to the limitations and conditions referred to in that provision, but the competent authorities and, where necessary, the national courts must ensure that those limitations and conditions are applied in compliance with the general principles of Community law and, in particular, the principle of proportionality" (pronouncement). The *Baumbast, R.* judgement is thus based on article 18 EC, which it recognises can be directly invoked to guarantee the right of residence based on the criterion of Union citizenship, independently of the economic status of the person claiming residency: any restriction on freedom of movement and residence of Union citizens is not excluded, but can only be admitted within the limits of the criterion of proportionality.

In the *Baumbast* case, such an extension appeared to be governed by the right to respect for family life, which must be pursuable for each of the parents, even the one which – in the case of separation or divorce – has not been granted care of the child[30]: "from the moment that the children of the Baumbast family had their right of residence in the United Kingdom recognised, it would have to be possible for them to conduct their family life in that country"[31]. The right to respect for family life requires that any person who falls within the scope *ratione materiae* of Community law through the exercise of a fundamental freedom that the EC Treaty recognises can continue that family life, without it being imposed on him or her to have to choose between the pursuit of family life and the exercise of that freedom. The same applies to the provider of services to persons in other Member States, even if he or

[29] ECJ, 17 September 2002, *Baumbast, R v. Secretary of State for the Home Department*, C-413/99.
[30] See Eur. Court H.R., *Berrehab v. The Netherlands* ruling of 21 June 1988, Series A n°138.
[31] J.-Y. Carlier, "La libre circulation des personnes dans l'Union européenne", J.T.D.E., 2003, p. XXX.

she continues to reside in the Member State of which he or she is a national, as in the case of the national of a Member State who exercises his or her freedom of movement or of residence in another Member State[32].

Freedom of movement and free choice of residence within a Member State

As defined under Article 39 EC, the free movement of Community workers includes the right to look for and hold a job in another Member State "subject to limitations justified on grounds of public policy, public security and public health" (article 49 § 3 EC). In the use that they make of this exception, the Member States have to comply with the observation of fundamental rights, particularly those cited by the Charter of Fundamental Rights and the European Convention on Human Rights[33]. During the period under examination, the European Court of Justice rigorously defined the possibility of a State imposing certain limitations regarding freedom of movement and free choice of residence of nationals from another Member State allowed to reside in the territory of the host State[34]. It limited the possibility of a State imposing such restrictions on the sole assumption that – by reason of the seriousness of the reasons used to justify it – a pure and simple prohibition order or banishment would have been admissible.

This case law of the European Court of Justice guarantees free movement and free choice of residence above and beyond the stipulations of Article 2 of Additional Protocol n° 4 to the European Convention on Human Rights. The first paragraph of this provision stipulates that "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence". During the period under examination, this provision has been interpreted by the European Court of Human Rights in a way that allows a certain amount of room for manoeuvre in each State's assessment. In the cases of *Landvreugd* and *Olivieira* the European Court of Human Rights reviewed the *verwijderingsbevelen* [prohibition orders] which had been imposed in the **Netherlands** by the *Burgemeester* [Burgomaster] of Amsterdam, after the applicants had been found in possession of hard drugs or openly using the drugs. The applicants were banned for 14 days from designated emergency areas. Neither applicant lived or worked in the area concerned. Both were convicted and sentenced for failing to comply with their prohibition orders. In each case, the European Court of Human Rights held, by four votes to three, that there had been no violation of Article 2 of Protocol No. 4 of the European Convention on Human Rights (freedom of movement)[35].

Freedom to leave one's country

Article 2 of Additional Protocol n° 4 to the European Convention on Human Rights stipulates that "Everyone shall be free to leave any country, including his own". Whether this freedom is exercised in order to look for work, set up as a freelance worker, or to offer or benefit from services in another Member State, including as a tourist, its guarantee strengthens the requirements of Community law. During the period under examination, an example of this is found in the adoption of the Football (Disorder) (Amendment) Act 2002 in the **United Kingdom**. This Act renews for five years powers to making banning orders, under which a person can be prevented from attending football matches in England and Wales and be required to report to a police station on the occasion of matches outside them, as well as a power to prevent someone leaving the country before such an order is made. A banning order can be made where the person concerned has previously caused or contributed to violence or disorder in the United Kingdom or elsewhere and such an order would help prevent football related violence or disorder. However, it has been held that the necessity for the exercise of the power to ban persons going abroad in order to prevent them taking part in violence and disorder in connection with football matches should be strictly demonstrated and that the power should not be used where a person had a reason for going abroad other than to attend a prescribed match[36]. Given

[32] ECJ, 11 July 2002, *Carpenter*, C-60/00, ERC, p. I-6279.
[33] ECJ, 28 October 1975, *Rutili*, 36/75, ERC, p. 1219.
[34] ECJ, 26 November 2002, *Oteiza Olazabal*, C-100/01.
[35] Eur. Court H.R., *Olivieira and Landvreugd v. The Netherlands* (judgements), no. 37331/97 and 33129/96, 4 June 2002.
[36] Gough and another v. Chief Constable of the Derbyshire Constabulary [2002] 2 All ER 984.

this restriction on the power of authorities to ban persons going abroad, it would not appear that this situation poses a difficulty with respect to Community law.

Freedom of movement and of residence for nationals from third countries

In accordance with the decision taken not to examine legislative projects currently under discussion in the European Union, reference is simply made, on this point, to the proposal of the Commission on a directive related to the status of third-country nationals who are long-term residents[37]. During the period under examination, Regulation 1030/2002 of 13 June 2002 was adopted establishing a uniform residence permit model for nationals from third countries[38].

Article 46. Diplomatic and consular protection

Article 20 EC stipulates that Member States shall establish the necessary rules among themselves and start the international negotiations required to ensure that citizens of the Union, "in the territory of a third country in which the Member State of which he 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 State". This provision has been implemented through the qualified decision of Directive 95/553/EC of 19 December 1995, concerning the protection of citizens of the European Union by diplomatic and consular representations, and by Decision 96/409/CFSP of 16 July 1996, on the establishment of an emergency travel document which may be issued under certain circumstances by the diplomatic or consular authorities of the Member States for the benefit of citizens of the Union, in principle for a single journey to the applicant's Member State of origin or country of permanent residence.

The Member States have acted in varying ways to implement these decisions, the practice of diplomatic or consular representations abroad having anticipated, in several cases, the legislative or statutory adaptations required. Some examples can be given. In **Austria**, Directive 95/553/EC was publicly announced in Federal Law Gazette (BGBl.) III No. 254/2002 and has been in force since 3 May 2002 after the last outstanding notification was deposited with the Secretary General of the Council of the European Union.[39] As regards the issue of an emergency travel document for unrepresented EU nationals in third states, specific regulations to that end can be found in section 87 of the Immigration Act (*Fremdengesetz*), which was already law in 1998[40]. Both the Directive 95/553/EC and the Decision 96/409/CSFP have been implemented in **Denmark**. **Finland** implemented Directive 95/553/EC in 2002. In practice, Finland had applied the Directive since 1995. No domestic measures have been adopted for the purpose of implementing the Decision 96/409/CSFP in Finland. However, Finland has *de facto* applied the Decision since the year 1996, according to the Ministry for Foreign Affairs.[41] The decision referred to as Directive 95/553/EC has been implemented administratively in **Ireland**. No national measures were adopted to implement Decision 96/409/CSFP of 1996[42]. In **Italy**, neither Directive 95/553/EC nor Decision 96/409/CFSP have been the subject of a formal transposition. However, according to the information supplied by the Ministry for Foreign Affairs, in 1993 the Directorate-General for Emigration and Social Affairs, through circular no. 9 of 8 June 1993, had already recommended to all diplomatic and consular representations to grant diplomatic protection to citizens from the other States of the European Union finding themselves in a third State where their country had no representation. In the **Netherlands**, Directive 95/553/EC has

[37] COM(2001) 127 of 13.3.2001.
[38] OJ L 157.
[39] The Austrian notification dates from 4 November 1996.
[40] In 2002, section 87a was added which makes it possible to also issue a similar one-way document in the case of third country nationals without passports in Austria in order to effect a legally enforceable deportation order or residence ban (Federal Law Gazette (BGBl.) I No. 126/2002).
[41] Source: Pekka Hyvönen, Ministry for Foreign Affairs.
[42] It is argued that the Union cannot guarantee that third countries will accept the right of an EU Member State to provide consular assistance to an individual who is not one of their own nationals – see: Kingston, "Citizenship of the European Union", in J. P. Gardner (ed), *Citizenship: The White Paper*, (London: British Institute of International and Comparative Law, 1997).

been implemented through various consular directives. Decision 96/409/CFSP on the establishment of an emergency travel document is in the process of being implemented.

CHAPTER VI. JUSTICE

Article 47.Right to an effective remedy and to a fair trial

Effective remedy

The concept of an effective remedy stipulated in Article 47 of the Charter of Fundamental Rights has a wider field of applicability than the corresponding clauses, particularly of the European Convention of Human Rights (Article 13) and in the International Covenant on Civil and Political Rights (Article § 3): the effective remedy must be available not only when rights recognized in the Charter are breached, but also when "the rights and liberties guaranteed by the laws of the Union" are breached, whatever the source of the said rights (primary law, secondary law, general legal principles of the Union). The requirements of Article 47 of the Charter also take precedence over the provisions mentioned above in the European Convention of Human Rights and in the International Covenant on Civil and Political Rights, since the Charter not only requires "effective" or "useful" remedies to be made available; even when they are exercised before an authority other than a Court, but it must be possible to obtain a remedy "in a Court of law" which means that for any right granted to an individual by the legal order of the European Union, the right of access to a Court must be recognized in the case of a dispute concerning the existence of the said right or its extent.

It was pointed out in this report that in respect of the deportation of foreigners, the effectiveness of a remedy implies that it must be suspensive[1]. In the *Conka* judgment of 5 February 2002 concerning members of a family of Slovak asylum seekers of gipsy origin, who were subject to a collective deportation order dated 5 October 1999, the European Court of Human Rights ruled that **Belgium** had breached Article 13 of the Convention, since the persons concerned were not able to exercise a suspensive legal remedy against the deportation order: the Court held that with regard to the deportation of foreigners, the requirement of an effective remedy prohibited this kind of deportation prior to the conclusion of an investigation by the national authorities on its compatibility with the Convention (§79). On 19 July 2002, the Belgian Council of Ministers decided on the subject of the implementation of the *Conka* judgment, that the Minister of the Interior would issue a binding directive to the relevant department (Office for Foreigners) stipulating that in the case of emergency procedure for suspension which was instituted at the Council of State, the order to leave Belgian territory made against an unsuccessful asylum seeker should not be implemented pending the Council of State has arriving at a decision on the emergency suspension procedure.

It may be thought that the scope of this directive of 19 July 2002 is too restrictive. The position taken up by the European Court of Human Rights did not, in fact, concern only asylum seekers whose application was refused after review by the relevant authorities, but also foreigners pronounced at the frontier to be incapable of being admitted and foreigners subject to a measure of deportation (an order to leave the country, an expulsion or a deportation order). In addition, the Directive was not subject to official publication, which could prevent persons whom it is intended to protect from using it as an argument. This is an important question, given the reluctance shown by the relevant department (Office for Foreigners responsible to the Minister of the Interior) to cooperate genuinely with the responsible magistrate (Council of State)[2].

Fair trial

According to the European Court of Human Rights, although in civil matters the legislature is able to regulate the rights flowing from the laws in force by means of new and retroactive provisions, the

[1] See the comment on Article 18 of the Charter.
[2] See the following judgments: C.E., 18 January 2002, n°102.683; 22 January 2002, n°102.784; 4 February 2002, n°103.144); 25 July 2001, n° 97.954, *J.T.,* 2001, p. 614.

principle of the rule of law and the concept of a fair trial are, except where compelling contrary reasons of general interest exist, opposed to any interference by the legislature with the administration of justice, with the object of influencing the judicial solution of a dispute[3]. In Belgium, a controversy concerning the legitimacy of a draft law to interpret Article 7 (1) of the law of 16 June 1993 on the elimination of serious breaches of international humanitarian law[4] due to suspicions entertained by certain members of the judiciary and the legislature about the intentions of some senators who produced the draft, to interfere with the judicial process. In fact, when the indictment division of the Court of Appeal of Brussels decided that prosecution for the infringements stipulated by the Law of 16 June 1993 on the elimination of serious breaches of international humanitarian law, could only take place, if the accused was "found" in Belgium[5], a draft of an "interpretative" Law rejecting this condition was submitted to the Senate following a Court ruling. When the question was brought before the legislature section of the Council of State, that body favoured an amendment, rather than an interpretative law, which would not apply retroactively, or to proceedings in progress[6]. Despite this disagreement, the draft of the interpretative law was passed by the Senate on 30 January 2003. In its judgment of Zielinsky, Pradal, Gonzales and others, the European Court of Human Rights agreed that a legislative intervention could be justified in cases in progress, when the judicial interpretation resulted in a distorting the legislators' clearly expressed original intention; but that in criminal matters, great prudence was needed by reason of the overriding principle of legality.

In **Italy**, Parliament approved two legal texts which, although they are of general application, could influence the result of several current criminal proceedings, in which one of the accused is the President of the Council of Ministers and the other accused are frequently members of Parliament. These proceedings had already begun at the time of the election of the current Parliament. The two laws concern the reduction of penalties for company law offences (Legislative Decree of 11 April 2002, No. 61) and the reintroduction of legitimate suspicion as a ground for sending a case from one Court to another (Law of 7 November 2002, No. 248).

Reasonable delay

Exceeding a reasonable time before delivering a judgement in both civil and criminal cases, is the main source of breach found by the European Court of Human Rights. No State escapes criticism in this regard. For several years, it has, in particular, affected Italy, as statistics clearly show[7]; in 2002, the European Court of Human Rights found a breach by that State in nearly 350 cases in this category[8]. On 13 February 2003, after receiving the second annual report from the Italian authorities

[3] ECHR., judgment *Zielinsky et Pradal & Gonzales and autres v. France* of 28 October1999, § 57; judgment *Agoudimos and Cecallonian Sky Shipping Co. v. Greece* of 28 June 2001, § 30.

[4]Proposal for a law interpreting Article 7(1) of the law of 16 June 1993 on repression of serious violations of international humanitarian law on, Senate, section 2001-2002, doc; 2-1255/1, submitted to the Senate on 18 July 2002 (and adopted by the Senate on 30 January 2003).

[5] For the exact reference of the judgments and their consequences on the current judicial proceedings, see the analysis of Article 4 of the Charter in this report.

[6] See Council of State (legis. section (both chambers), Opinion 34.153/VR on a proposal for a law interpreting Article 7(1) of the law of 16 June 1993 on repression of serious violations of international humanitarian law, Senate doc; 2-1255/1, section 2001-2002) 12 December 2002: in order to re-establish legal security and coherence in the applicable text, it would be preferable for the lawmaker to readapt the wording of the law of 16 June 1993, referred to above, by means of an amending law, along with Articles 12 (1) and 12bis of the Preliminary Title of the Criminal Procedure Code. The use of an interpreting law to disclose the exact meeting of Article 7 (1) of the law of 16 June 1993 referred to above can only be considered for part of the scope of this provision since the adoption of the law of 18 July 2001. In fact, by adding Article 12bis in Chapter 2 of the Preliminary Title of the Criminal Procedure Code - which must necessarily be combined with Article 12 in the same chapter – this law of 18 July 2001 has deeply modified the scope of Article 7 (1) of the law of 16 June 1993 (...)

[7] Since the 28 July 1999, the European Court of Human Rights has identified a "practice" that makes it possible to pursue violations of Article 6 § 1 on the European Convention of Human Rights; see the European Court of H.R., judgment ECHR., judgment *Di Mauro v. Italy* (req. n° 34256/96) of 28 July 1999; judgment *Bottazzi v. Italy*(req. n° 34884/97) of 28 July 1999; et l'judgment *A. P. et Ferrari v. Italy*(req. n° 35256/97 et n° 33440/96) of 28 July 1999.

[8] The "Pinto" Law was adopted in 1999 to try to clear up this situation. By the decree-law on 11 September 2002, the procedure provided by the Pinto law has been changed: the parties must necessarily try to find an amicable settlement before taking a case to the Court of Appeal. If an agreement is not included within a period of three months, the parties can then addressed the court. During this period, the time for bringing the matter before the Court, which is initially set at six months

on the general measures taken by Italy to reduce the excessive length of court cases, the Committee of Ministers of the Council of Europe was forced to note that the encouraging trend found in its first annual report had slowed down, or in certain cases had even been reversed. It therefore insisted on the Italian authorities' pursuing and intensifying their efforts[9]. New case law of the Supreme Court of Appeal provides that the alleged victim of a breach of his right to trial within a reasonable time, shall give proof of the existence of a causal relationship between the length of the trial and the prejudiced sustained if the victim claims compensation, since according to Italian law, moral injury is not a part of res ipsa. The Committee of Ministers expressed its concern about this development.

In Belgium, the judicial backlog has assumed such alarming proportions, particularly before the Court of First Instance and the Court of Appeal of Brussels that the position of the people with cases pending before these Courts approaches a situation of denial of justice. In ten judgments of 15 November 2002, the European Court of Human Rights ruled that exceeding a reasonable delay before civil courts in the catchment area of the Court of Appeal of Brussels, constituted a breach of Article 6 § 1 of the European Convention of Human Rights[10]. As to the argument that these delays are due to an overload of the case list of the Courts in question, the Court ruled that a chronic overload of a Court case list was not a valid explanation (see the Probstmeier v. Germany, decision of 1 July 1997, Record of judgment and decisions, 1997-IV, p; 1136, § 64). In fact, Article 6 § 1 requires the contracting States so to organize their judicial system that all Courts can meet requirements placed on them, particularly concerning reasonable times needed for hearing cases (see Portington v. Grèce of 23 September 1998, Record 1998-VI, p. 2633, § 33). A delay in hearing a case. even one that is relatively unimportant in absolute terms, can result in exceeding what is reasonable within the meaning of Article 6 § 1 of the European Convention of Human Rights, when what is at stake for the petitioners, justifies particular diligence. In cases concerning the situation of specific persons, particular diligence is required in view of the consequences, which excessively slowness might have on their enjoyment of the right to respect of family life. Thus, in the case of *Boca v. Belgium* of 15 November 2002 (petition number 50615/99) the European Court of Human Rights found an infringement of Article 6 § 1 of the Convention where a process in Chambers for an interim decision aiming for a temporary settlement of the custody of children in a divorce case, had lasted two years and three months before two instances.

This situation is in particular, the result of the Law of 15 June 1935 on the use of languages in judicial matters[11], and the strict requirement, which the Council of State has deduced therefrom[12]. Since Article 43 § 5 of the said law requires that two-thirds of the judges in the Court of First Instance of Brussels should be bilingual, and since, on the one hand, too small a number of French-speaking applicants is able to meet this requirement and on the other hand, the Law of 11 July 1994 prohibits judges from presiding over proceedings conducted in a language other than that in which they had sat for their degrees (Article 43 § 5, point 2 of Law of 15 June 1935), there are ongoing vacancies in the judiciary, due to a shortage of eligible French-speaking applicants, while there is a considerable disproportion between cases before the Courts to be respectively conducted in French and in Flemish. The result is this backlog, which is a source of considerable delays in hearing cases, which the European Court of Human Rights condemned in its judgment of 15 November 2002[13]. In three judgments of 4 July 2002, the Court of Appeal of Brussels (second chamber) moreover held that this situation was the fault of the Belgian Government and could render it liable on the basis of common law of civil liability; according to the Court of Appeal, the State is guilty of a fault in neglecting legislative measures to ensure compliance with the terms of Article 6 § 1 of the European Convention of Human Rights, and in particular, where these faults result in depriving the Courts of adequate resources to enable them to

---

as from the final decision, is suspended. The provisions of this decree-law concerning the Pinto law have not yet been set down in the law.

[9] In keeping with the interim Resolution ResDH(2000)135.

[10] One of these cases was finally struck from the case list.

[11] *M. B.*, 22 June 1935.

[12] C.E., *Delvaux*, 9 October 1996, J.T., 1997, p. 45.

[13] This diagnosis was given by a committee of experts set up in 1999 to study the situation of the courts and tribunals in Brussels, that submitted its report on 9 December 1999, and that of the High Council of Justice in a report of 21 May 2001 (p. 55, 7.4.1).

deal with the cases which are laid before them within a reasonable time[14]. Community case law, which states that a State can be deemed to be liable for any systematic breach of Community law, including cases where the fault in question is due to a failure of the legislature to take action[15], exercises a decisive influence on this development, which tends to consider that the State can be held liable for the acts of the legislature. In Portugal, too, the same trend can be discerned towards the affirmation of civil liability of the State for the acts of its Courts, including excessive delays by the said Courts[16].

Belgium is naturally aware of the seriousness of this situation and by means of the Law of 10 February 1998, it appointed supplementary judges not subject to the requirements of the law on the use of languages in judicial processes, since they are not part of the establishment of the Court of First Instance of Brussels. A Law of 18 July 2002 on the use of languages in court cases[17] amends Article 43 (5) of the Law of 15 June 1935, adapting the rules of bilingualism to judicial realities, by introducing different types of language examinations, depending on whether the function in question does or does not imply the written knowledge of the language. Today, the question of amending the Judicial Code has been raised to improve the time needed to deal with disputes, particularly by means of giving judges wider powers in the conduct of civil processes in order to speed them up[18].

It flows from Article 13 of the European Convention of Human Rights when read in conjunction with the guarantee of a reasonable time lapse pending a judgement that States must provide, in their national legal system, a remedy affording effective protection against unreasonable delays to the persons under that jurisdiction[19]. In 2002, France, for example, was criticised on two occasions for not having provided an effective remedy for unreasonable delays to persons under French jurisdiction[20]. In Greece, a law, which finally came into force in 2002, attempts to deal with this problem in civil cases[21], the problem is nevertheless equally serious in criminal cases, and particularly in administrative cases.

When, this notwithstanding, a reasonable delay has been exceeded, States must provide adequate indemnity in, for example, criminal cases, by declaring a prosecution inadmissible, or by pronouncing a sentence below the legal minimum or, in civil cases, by offering an equivalent indemnity. The Committee for Human Rights, ruling on a breach by Spain of Article 9 § 3 of the International Covenant on civil and political rights in the form of exceeding a reasonable delay of judgment, found that Spain did not pay adequate compensation in the event of the victim of the unreasonable delay being compelled to institute a new action to claim compensation for the damage sustained by him[22].

Generally speaking, procedural law is adapting to the need dealing more rapidly with disputes, so as to reduce the accumulation the Court backlog. This is the case in both civil and criminal cases. To reduce the length of civil procedure, Finland has amended its Code of Judicial Procedure (Laki

[14] *Journ. Procès*, n°441, 6 September 2002, p. 23.
[15] ECJ, 19 November 1991, *Francovich*, joined cases C-6/90 and C-9/90, ECR*.,* p. I-5357.
[16] João Aveiro Pereira, *A Responsabilidade Civil por Actos Jurisdicionais*, Coimbra, Coimbra Editora, 2001, pp. 195-202. See, e.g., the Judgment of *Supremo Tribunal Administrativo* (Administrative Supreme Court), of 1 February 2001, [2001] *Justiça Administrativa*, March/ April. No. 26, 77. *M. B.,* 22 August 2002.
[17] *M. B.,* 22 August 2002.
[18] On 9 October 2002, the High Council of Justice gave an opinion on a preliminary proposal for of a law amending the Judicial Code (see J.T., 2002, p. 741) in which it notes that measures attempting to accelerate the processing of cases, if they do not go hand-in-hand with increased capacity to the set the date of the pleas, would have the effective of considerably increasing the number of cases that are ready, but all waiting for a date to be pleaded. With regard to another provision of the preliminary project on the introduction of a mandate for a mediating judge to promote an amicable settlement of disputes, both before and during the procedure, on all questions where the parties can reach a transaction, a High Council of Justice considered that, although the judge could effectively reconcile parties coming before him, the mediation function as such, as an alternative means is settling disputes outside the judicial institutions, could not be entrusted to a magistrate.
[19] ECHR., judgment *Kudla v. Pologne* of 26 October2000.
[20] ECHR., judgment *Lutz v. France* of 26 March 2002; and judgment *Nouhaud v. France* of 9 July 2002.
[21] Νόμος 2915/2001 "Επιτάχυνση της τακτικής διαδικασίας ενώπιον των πολιτικών δικαστηρίων και λοιπές δικονομικές και συναφείς ρυθμίσεις" [Law no 2915/2001 "Acceleration of the ordinary procedure before civil courts and other procedural and related provisions "].
[22] HRC., communication n° 864/1999 of 29 November 2002 (CCPR/C76/D/864/1999). See the Ley Organica 8/2002 and the Ley 38/2002.

oikeudenkäymiskaaren muuttamisesta, Act No 768 of 2002) by means of law No. 768 which came into force on 1 January 2003. The modifications aim at simplifying the procedure, limiting the number of stages, and favouring the use of a single judge.

In **Ireland**, the Government has signalled its intention to establish a Personal Injuries Assessment Board to deal with claims for personal injuries which are currently dealt with as civil actions before the ordinary courts. This initiative is motivated as much by concerns as to cost as by concerns about delay. In **Sweden**, legislative adjustments, designed to improve the efficiency and quality of the judicial system, e.g., accelerated procedures in criminal matters, were introduced in 2002. It has been proposed that the experimental work in this area shall be carried out at the District Court in Stockholm and beginning on 1 July 2003.[23]

Independence and impartiality

During the period under review, the European Court of Human Rights ruled that Spain had breached the requirement of impartiality laid down in Article 6 § 1 of the European Convention of Human Rights, in a case where a professional soldier, accused of having revealed secrets or information concerning national security, was sentenced to a prison term and dismissed from the Armed Forces by a central military tribunal, whilst two members of the Court were judges who had rejected an appeal lodged by the accused during the investigation. The Court ruled that in such circumstances the impartiality of the group of judges can give rise to serious doubts, the apprehensions of the petitioner then being objectively justified[24]. The United Kingdom was criticised because of the composition of a court-martial, which the Court for Human Rights ruled as not guaranteeing the independence required of a "Court" by Article 6 § 1 of the Convention[25]. The European Court of Human Rights also found a breach of the requirement of objective impartiality by that State in a case where the revocation of a person's gaming licence in circumstances where the decision could only be taken by a body which had previously stated that he was not a fit and proper person to hold one[26].

During the period under review on 27 November 2002, the Grand Chamber the European Court of Human Rights also held a hearing on the situation in the Netherlands resulting from the combination of legislative and jurisdictional functions of the Raad van State [Council of State][27], which the applicant complains is incompatible with Article 6 ECHR[28]. The judgment of the Strasbourg Court is expected early 2003.

In **France**, the creation of a "neighbourhood jurisdiction" by the law of orientation and programming of justice[29] raised concerns from the standpoint of impartiality. To respond to the need for justice, which is more accessible and able to solve disputes in daily life more effectively, the law introduced Articles L.331-1 to L.331-9 into the Code of Judicial Organization, which specifies the organisational and operational rules of these new courts. The said courts presided over by a single judge, will be able to try both civil and criminal cases. In civil cases, they will be able to give a final decision on disputes concerning sums of less than 1500 Euros and will have the duty to try and reconcile the parties who will be able to plead directly rather than through an attorney.. In criminal cases, they will be able to rule on offences in the first four classes. The Council of the Judiciary expressed doubts concerning the qualifications and the impartiality of these new judges. They will not, in fact, be professional judges,

[23] SOU 2002:44 Snabbare lagföring 3-snatteribrott; SOU 2002:45 Snabbare lagföring 4-ett snabbförfarande för brottmål.
[24] ECHR., judgment *Perote Pellon v. Espagne* (req. n° 45238/99) of 25 July 2002.
[25] Eur. Ct. H.R., *Morris v United Kingdom*, 26 February 2002. However, United Kingdom courts have found, also during the period under scrutiny, that the military officers appointed as permanent presidents in courts-martial had no effective hope of promotion and no effective fear of removal so that these courts have been held not to lack the independence and impartiality required of tribunals. Furthermore the rules governing the role of junior officers as members of courts-martial have been found in practice effectively to protect the accused against the risk that they might be subject to external army influence : *R v Spear* [2002] 3 All ER 1074.
[26] Eur. Ct. H.R., *Kingsley v. United Kingdom*, 28 May 2002.
[27] The Council advises the Government on draft legislation, and is the highest court in administrative matters.
[28] *Kleyn a.o. v. the Netherlands* (Appl. No. 39343/98 a.o.)
[29] Law n° 2002-1138 of 9 September 2002 on the orientation and programming Justice.

but people who have relevant or professional experience qualifying them to exercise judicial functions. The method of recruiting neighbourhood judges differs from that of recruiting presiding magistrates. In addition, they exercise their duties part-time and can combine their judicial functions with a professional activity of an indeterminate nature. The draft law admittedly provides a certain number of guarantees (for example, their non-judicial activities must, in particular, be exercised outside of the territorial jurisdiction of the Regional Court to which the judges are attached), but the definition of these guarantees is still vague.

The institution of monitoring the observance of impartiality and independence by magistrates is worthy of mention. In the **United Kingdom** under the Justice (Northern Ireland) Act 2002 provision is made for the establishment of a Judicial Appointments Commission which will select or recommend people for appointment as judges and it also provides for their removal only upon the recommendation of a tribunal. In addition it makes provision for a code of practice on the handling of complaints against persons holding judicial office and the creation of a Chief Inspector of Criminal Justice with responsibility for inspecting all aspects of the criminal justice system other than courts. In the **Netherlands**, a study on the impartiality of Dutch judges was carried by the Wetenschappelijk Onderzoeks- en Documentatie Centrum (WODC) [Centre for Scientific Research and Documentation], which is attached to the Ministry of Justice. The study, which was performed at the request of the Nederlandse Vereniging voor Rechtspraak [Dutch Association of Judges], examined inter alia how many judges were challenged or excused themselves, and under which circumstances this happened[30]. The report also mentioned large support among judges and lawyers for a code of conduct for judges, as well as the acceptability of a combination of functions. Most problems were felt where judges also have political functions, or where they combine their judicial function with an position within the Openbaar Ministerie [Public Prosecutors Office].

Adversarial system

The European Court of Human Rights has found that France breached Article 6 § 1 of the European Convention of Human Rights in the case *Meftah et al,* which resulted in a judgment on 26 July 2006. The Court in fact found that the petitioner, who had elected to defend himself in a criminal case without the help of an attorney before the Supreme Court of Appeal, was unable to avail himself of the practice reserved until then to lawyers of the Supreme Court of Appeal which gives the parties the option of being informed of the pleadings of the Advocate-General and of commenting on them under satisfactory conditions. It consequently decided that taking into account what is at stake for the party in question in the procedure and the nature of the pleadings of the Advocate-General, the inability of the petitioner to reply to these pleadings before the Supreme Court of Appeal has rejected his plea, fails to recognise his right to an adversarial procedure[31]. During the period under review, France was also criticised for the participation of the government commissioner in deliberations on administrative jurisdictions, which is breaches the principle of equality of weapons[32]. Austria was criticised on two occasions for not having observed the adversarial system principle under circumstances similar to those of the *Meftah* case. In the case of *Josef Fischer v. Austria*[33] the applicant alleged, in particular, that, in criminal proceedings against him, written observations of the Procurator General on his plea of nullity to the Supreme Court had not been communicated to him. Even though the Government contended that the Procurator General could not be considered an office of the public prosecution but rather was a party *sui generis* to the proceedings, the Strasbourg Court held that any observations

[30] According to the report, 139 times a judges was challenged in the reference period (October 2000 – October 2001; in this period approximately 1 million cases were heard by Dutch courts). Most challenges occurred because a judge had been involved in the same case at an earlier stage. In 94% of the cases the challenge was rejected.
[31] ECHR., judgment *Meftah and others v. France* of 26 July 2002. Also see ECHR judgment *Fretté v. France* of 26 February 2002.
[32] ECHR., judgment *Immeubles groupe Kosser v. France* and judgment *APBP v. France* of 21 March 2002, ECHR., judgment *Theraube v. France* of 10 October 2002.
[33] App.no.33382/96, *Josef Fischer v. Austria*, judgement of 17 January 2002.

whatsoever that might have an impact on the proceedings had to be served on the defendant. Moreover, it is always for the defence to decide whether or not a submission deserves a reaction[34].

Public conduct of proceedings and rendering of the verdict

A case ruled on by the Supreme Court of Finland[35] during the period under review is an interesting example of the manner in the requirement for publicity is combined with that of equality of weapons. In a murder case before a court of first instance, two of the three defendants were minors. The case contained sensitive information on the private life of the persons concerned. For these reasons, the court tried the case in camera, except for the prosecutor's application for a summons which was dealt with in an open hearing to the extent it concerned the summary penal order and the description of the acts charged, not including, however, the identity of the victim. One of the defendants, A, appealed against this decision and asked that his/her response to the prosecutor's application for a summons should be made public, arguing that as a defendant he/she had not been treated equally with the prosecutor and had not been given the possibility to defend himself/herself in public. The Supreme Court agreed. It referred to the grounds for declaring trial documents secret as provided for in the Act on the publicity of court proceedings and the Act on the Openness of Government Activities. It noted that in interpreting these secrecy provisions, a court must take into account the provisions concerning fair trial included in the Constitution Act, the ECHR and the ICCPR. In restricting the publicity of court proceedings, the parties to a case must be treated on an equal basis if possible considering the interests protected by the secrecy provisions. The court noted that A's response to the application for a summons did not contain any information about the other minor defendant nor any new and sensitive information about the victim which had not already been included in the application for a summons. As the application for a summons had been made public, there were no grounds, according to the Supreme Court, not to make A's response public as well. The Supreme Court changed the decisions of the lower courts so that A's response was declared public, except for information concerning the identity of the victim and the annexes to the response.

The right to the enforcements of court rulings

Since judgement of Hornsby v. Greece judgment of 19 March 1997, the European Court of Human Rights held that the right of access to a court is illusory if the national legal system of a contracting State allows a final and mandatory decision to remain inoperative to the detriment of a party. The enforcement of a judgment by whatever jurisdiction, must be regarded as an integral part of the "trial" within the meaning of Article 6 of the European Convention of Human Rights. During the period under review, Greece was criticised on several occasions for the refusal of the government to comply with the ruling of the Court of Auditors[36] or by the Council of State[37]. This kind of criticism should in future become increasingly rare. The Parliament has enacted law No. 3068/2002[38] the object of which is that of rendering legislation on the enforcement of the rulings of the Greek Courts compliant with the revised provisions of Article 94 (4) and 95 (5) of the Convention.

Legal aid

The expression "legal aid" in Article 47 (3) of the Charter of Fundamental Rights actually refers to the right to both legal advice or legal assistance, the right to legal advice, with a view to representation in court if applicable and to the right to legal assistance, the exemption from all or a part, of Court costs of bringing an action.

[34] See also ECHR., judgment *Lanz v. Austria* (Appl. . 24430/94) of 31 January 2002.
[35] KKO 2002:28.
[36] ECHR., judgment *Vasilopoulou v. Greece* of 21 March 2002.
[37] ECHR., judgment *Katsaros v. Greece* of 6 June 2002.
[38] Νόμος 3068/2002 «Συμμόρφωση της Διοίκησης προς τις δικαστικές αποφάσεις και προαγωγή των δικαστών των τακτικών διοικητικών δικαστηρίων στο βαθμό του συμβούλου Επικρατείας» (Law No. 3068/2002. "Execution of the Treaties by the administration and other provisions"). We can point out that the law in question took account of proposals contained in an opinion of the National Committee of Human Rights.

During the period under review, two preliminary draft laws were introduced in Belgium in order to improve the right to legal assistance, where this is currently governed by the law of 23 November 1998 on legal aid[39]. The preliminary draft law amending certain provisions of the Judicial Code on legal advice and legal assistance (amending the text of the Law of 23 November 1998)[40] eliminates any financial participation for first line assistance (legal opinion), and concerning the second line assistance (representation at Court hearings), it increases the income ceilings for wholly free assistance to the levels which currently apply to partially free assistance. Nevertheless, outside the ceilings set by law, the person involved in a Court process will not receive any assistance, even partial, despite the fact that the cost of a Court action can be high even for persons with an average income. A progressive scheme is preferred by a certain number of players in the judicial and associative world, covering a wider range of incomes and tending to impose cost-sharing, which can be high, on those who receive partially free legal assistance.

In **Finland**, the Act on legal aid (Oikeusapulaki (Act No 257 of 2002) entered into force on 1 June 2002. The new Act combines the two previous and partially overlapping systems of public legal aid and cost-free trials[41] and provides for a system of legal aid partially or fully paid for by the state. Legal aid is granted by state legal aid offices. It consists of assistance in court proceedings and in other legal matters. Legal aid is provided by legal aid attorneys. In court cases, the client may also choose an advocate or other private lawyer, instead of an attorney at the legal aid office. The new Act extended the right of advocates and private lawyers to provide for legal aid at the expense of the state from general and administrative courts to all special courts as well. Legal aid is granted on the basis of the applicant's income and assets. The new Act amended to some extent the criteria for evaluating the applicant's financial means to the effect that more people now have the possibility to receive legal aid at the expense of the state. If an application for legal aid is rejected by the legal aid office, the applicant may submit the application to the relevant court for a hearing.

As civil parties in certain cases benefit from the guarantees of Article 6 § 1 of the European Convention of Human Rights, there is no a priori reason for not extending the benefit of legal aid. In France, the Minister of Justice submitted on 18 September 2002 an action plan to strengthen assistance to the victims, who are offered an attorney appointed by the authorities as soon as an action is instituted and in the case of more serious offences, legal assistance without any condition of available resources. In the same State, decree No. 2002-366 of 18 March 2002[42] grants legal aid to detainees subject to disciplinary proceedings: this guarantee is necessary since, according to the European Court of Human Rights, disciplinary sanctions imposed on detainees can constitute criminal sanctions with in the meaning of Article 6 § 1 of the Convention, which justifies the application of this provision.

Article 48. Presumption of innocence and rights of defence

Presumption of innocence

Several noteworthy decisions of the European Court of Human Rights found breaches by Member States of the principle of presumption of innocence. The *Böhmer* judgement of 3 October 2002 was held to represent a breach by Germany of this principle, the German Courts having revoked the suspension of a prison sentence, holding that the petitioner had committed certain offences during his

[39] B.M. 22.12.1998. Royal Decree of 23 April 2002 sets at € 642.84 the amount of net monthly income under which a single person can benefit from free legal aid and legal assistance. As from 1 January 2003, the cutoff point for legal aid will be set at € 666 for a single person. Also see Royal Decree of 23 April 2002 amending the Royal Decree of 10 July 2001 determining the conditions for the free benefit of first-line legal aid and partially free aid for second-line legal aid and legal assistance, B.M., 28.5.2002.

[40] Another preliminary proposal for a law, that has now been abandoned, targets introducing legal protection insurance contract to promote access to justice. It would make the insertion of legal protection cover mandatory in all insurance contracts for non-contractual civil liability in family matters, in exchange for an increase in the premium charged to the insured.

[41] The Act on Public Legal Aid (104/1998) and the Act on cost-free trials (87/1973) were repealed.

[42] *J. off. Rép. fr.* of 20 March 2002, p. 4954.

probationary period, without these breaches giving rise to a final condemnation[43]. In the cases of *Vostic*[44] and *Demir*[45] both against **Austria**, the applicants were denied compensation for the period they were kept in detention on remand with the argument that they did not qualify under section 2(1)(b) of the Compensation (Criminal Proceedings) Act 1969 (*Strafrechtsentschädigungsgesetz*), since they were only acquitted of the accusations under the benefit of doubt and thus the suspicion against them had not been fully cleared. Following its previous case law the Court declared inadmissible the voicing of suspicion after a final acquittal including any distinction between an acquittal *in dubio* and an acquittal on the basis of evidence for the purposes of a compensation claim.

The legal precedent of the European Court of Human Rights does not appear to exclude the possibility that a breach of the principle of presumption of innocence can be the result of the problem of media coverage of a case, or the representation of a person as guilty in the press, although, in principle, journalists' freedom of speech and the public's right to information imply that a breach of the principle of presumption of innocence can only be found in exceptional circumstances[46]. In Greece, the legislature has attempted to ensure an observance of the principle of presumption of innocence by providing that broadcasting on television, recording or taking of photographs of a case before a judge, a prosecutor, the police or any other authority, is prohibited, and punished by imprisonment for a fine[47].

The rights of the defence

The right of the accused to remain silent: inquiries on cases of competition

Article 18 of Regulation No. 1/2003 (EC) of 16 December 2002 on the implementation of the rules on competition appearing in Articles 81 and 82 of the Treaty[48] and on information from companies and associations of companies concerning investigations of competition, which the Commission may call for. This information is called by a simple request or by means of a ruling. Article 23 of the said Regulation stipulates that in case of inexact or misleading answer, or in the case of the request made by means of a ruling, an incomplete or late answer, the Commission can fine the companies or associations of companies up to one percent of their total turnover during the preceding financial year.

In the judgment if the case *Mannesmannröhren-Werke AG* of 20 February 2001, the Court of First Instance of the European Communities stated that …"the Commission is entitled to compel a company to provide all necessary information concerning such facts as may be familiar to it and to make available such relevant documents as may be in its possession, even if the latter can be used to establish the existence of anti-competitive conduct by it or another company" (Orken judgment, point 34 of the Court session on 18 October 1989, Solvay/Commission, 27/88, ECR. p. 3355, summary publication and Société Générale, point 74). The existence of an absolute right to silence, as claimed by the petitioner, would go beyond what is necessary in order to protect companies' rights of defence, and would constitute an unjustified obstacle to the Commission's performance of its duties under Article 89 of the EC Treaty (now, following amendment, Article 85 EC) to ensure that the rules on competition within the common market are observed[49]. Relying on the legal precedent of the *Orkem* case law of the Court of Justice of European Communities, the Court ruled that: "a company which has received a request for information pursuant to Article 11(5) of Regulation No 17 can be acknowledged as possessing a right to silence only to the extent that it would be compelled to provide

[43] ECHR. (3ième section), judgment *Böhmer v. Germany* (req. n° 37568/97) of 3 October 2002.
[44] App.no. 38549/97, *Vostic v. Austria*, judgment of 17 October 2002
[45] App.no. 35437/97, *Demir v. Austria*, judgment of 5 November 2002
[46] See ECHR., Dec. *H. Daktaras c. Lithuanie* (req. n° 42095/98) of 11 January 2000.
[47] Article 8 al. 2 of Law 3090/2002 (Νόμος 3090/2002 «Σύσταση Σώματος Επιθεώρησης και Ελέγχου των Καταστημάτων Κράτησης και άλλες διατάξεις» (Law No. 30900/2002 "Establishment of an inspection and control corps for prison establishments and other provisions").
[48] OJ L1 of 4.1.2003, p. 1.
[49] C.F.I., 20 February 2001, *Mannesmannröhren-Werke AG*, T-112/98, *ECR.* 2001 p. II-729 (points 65 and 66).

answers which might involve an admission on its part of the existence of a breach which it behoves the Commission to prove" (point 67).

Conversely a company or an association of companies is still required to meet requests "for purely factual information and the production of documents already in existence" (point 70).
Actually, "the mere fact of being obliged to answer purely factual questions put by the Commission and to comply with its requests for the handing over of pre-existing documents, cannot constitute a breach of the principle of observance of the rights of defence, or impair the right to fair legal process. There is nothing to prevent the recipient of such questions or requests from showing, either later during the administrative process or in during the process before the Community Courts whilst exercising his rights of defence, that the facts set out in his replies or the documents handed over by him have a meaning different from that ascribed to them by the Commission." (point 78).

Particular attention should be given to this case-law, since Articles 18 and 23 of Regulation 1/2003 do not explicitly take it into account. The only reference to it appears in the preamble to article 23 the Regulation, which specifies that "..when complying with a ruling by the Commission, companies cannot be compelled to admit having committed a breach, but they are in any event obliged to answer questions concerning facts and to provide documents, even if such information may be used to establish the existence of a breach committed by them or by another company." Now, as the Court of First Instance itself found in the aforementioned case of *Mannesmannröhren-Werke AG*, the European Court of Human Rights did not draw a distinction between individuals and legal persons on the subject of to the extent of the right to remain silent; on the contrary, the tendency of the rules of precedent of the European Court of Human Rights is rather to deal with these situations as similar[50]. A basic distinction is to be made between providing information on facts, the existence of which is outside the control of the accused, so that there is no risk that pressure exerted on the accused could distort the quality of the evidence; and requests on the subject of certain meetings, where, for example, the risk of sanctions in the case of refusal to answer of the request for such information were permitted, could cast doubt on the quality of the information provided by the accused person.[51]

It must in any case be borne in mind that the rights of defence guaranteed to the accused by Article 48 § 2, the Charter of Fundamental Rights, and particularly by Article 6 § 3 of the European Convention of Human Rights, are applicable even before the judicial phase of the indictment procedure. From 1993, this has been established in the rules of precedent of the European Court of Human Rights[52]. In two judgments of 21 December 2000 made with reference to **Ireland**, the European Court Human Rights found a breach of Articles 6 §§ 1 and 2 of the Convention of Human Rights, due to the fact that Article 52 of the law of 1939 on offences against the State obliged the persons involved to chose between supplying the information requested concerning details of their movements at the time all of the offence in question and risking a prison sentence[53]. The legislative reform needed for Ireland to comply with this legal precedent is still outstanding. In **Belgium**, the Supreme Court of Appeal held that Article 6 § 3a of the European Convention of Human Rights which states that anyone charged with a criminal offence is entitled to be informed promptly, in detail and in a language he understands,

[50] Also see ECHR judgment -- (taken off the case list after an amicable settlement, but the opinion of the European Committee of Human Rights was favourable to the possibility of invoking Article 6 of the European Convention of Human Rights against the Company).
[51] The European Court of Human Rights noted in judgment *J.B. v. Suisse* of 3 May 2001 : " The right not to incriminate oneself in particular presupposes that the authorities seek to prove their case without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged". By providing the accused with protection against improper compulsion by the authorities, these immunities contribute to avoiding miscarriages of justice and securing the aims of article 6. (see Funke judgment[c. France of 25 February 1993, series A, n° 256-A], and the judgments John Murray v. United Kingdom of 8 February 1996, *ECR* 1996-I, p. 49, § 45, Saunders v. United Kingdom of 17 December 1996, *ECR* 1996-VI, pp. 2064-2065, §§ 68-69, and Servès v. France of 20 October1997, *ECR* 1997-VI, pp. 2173-2174, § 46)".
[52] ECHR., judgment *Imbrioscia c. Switzerland* of 24 November 1993, Series A n° 275. See more recently, ECHR., judgment *Brennan c. United Kingdom* of 16 October 2001, § 45.
[53] ECHR. (4ième section), judgments *Heaney and McGuiness c. Irlande* (req. n° 34720/97) and *Quinn c. Irlande* (req. n° 36887/97) of 21 December 2000.

of the nature of and grounds for the accusation against him, did not apply to hearings carried out by the police during a criminal investigation[54], or to rulings of investigating magistrates in the context of the procedural regulation[55]; the provision is considered to concern solely the rights of the defence before a judge in Court trying the case. This interpretation of the field of application of Article 6 of the European Convention of Human Rights has no foundation in European legal precedent.

In **France**, the law of 15 June 2000 on the presumption of innocence and the protection of victims provided a number of guarantees, particularly to for the accused. One year after the law had come into force and due to concerns expressed by certain practitioners, the legislature wished to adjust certain aspects on technical questions, without changing the basic guidelines and without retaining the draft amendments that would have reduced the guarantees for the accused. These drafts concerned, in particular, the delayed notification of police detention to the State prosecutor and the conditions of placing in pre-trial detention[56].

Illegally obtained evidence

In a much-publicised judgment in the **Netherlands**, the Rechtbank [Court of First Instance] of Rotterdam acquitted four persons suspected of terrorist offences and ordered their release. The four had been arrested following a search of their house, during which inter alia false passports had been found. The search had been ordered on the basis of evidence gathered by the Binnenlandse Veiligheidsdienst (BVD) [Internal Security Service]. The Court observed that it is the BVD's task to protect national security, not to investigate criminality. If the BVD finds evidence pointing to criminal acts, it should inform the Public Prosecutor's office which can start investigations. The person concerned cannot, however, at that stage be considered a 'suspect', since it was only the BVD that has carried out investigations vis-à-vis this person. Since one can only search houses if there is a 'suspect' and since in the instant case the search had been ordered solely on the basis of evidence gathered by the BVD, the Court found that the information against the persons had been unlawfully obtained[57].

In **Belgium**, the same logic consisting of refusing illegally obtained evidence in criminal trials, led the Courts of First Instance of Brussels and Dinant, sitting on criminal cases, to rule evidence brought by the plaintiff as inadmissible (it had submitted films taken by a hidden camera showing mistreatment of animals in a livestock market), because of the means used to gather it (substitution of legally constituted authorities and unfairness) and the consequences that result (in particular the impossibility of verifying the authenticity and completeness of the images, the absence of an effort to find exculpatory evidence, the difficulty for the defence to argue points of exculpatory evidence). [58]

Refusal to admit illegally gathered evidence into criminal proceedings may not necessarily be absolute. In a judgment on the May 2002[59], the Belgian Court of Arbitration annulled the provisions in Articles 131, § 2 and 235b, § 6 of the Code of criminal investigation Code, the effect of which was to prohibit absolutely the use of documents of the investigation, annulled because of their irregular provenance, by the accused in criminal proceedings. The Court held that the absolute nature of this prohibition, which extended to cases where the annulled documents contained elements which could be used by the accused to establish his innocence, was disproportionate; it should be possible for the judge to assess to what extent compliance with the rights of defence requires that a party can use documents declared void, taking care not to injure the rights of the other parties.

[54] Cass. (2nd ch.), 13 February 2002, *J.T.*, 2002, p. 475
[55] Cass. (2nd ch.), R.G. P020954F, 25 September 2002 ; Cass. (2nd ch.), RG P020996F, 2 October 2002. Contra : Corr. Dinant, 18 April 2002, *J.P.*, n°436, p. 24 et s. (Inadmissibility of prosecution against a detainee, pursuant to Article 6.3. of the ECHR, after observing failure to comply with a substantial "right creating" formality, that being an indictment, when the investigating judge concluded that serious indications of guilt existed against the suspect).
[56] Law of 4 March 2002 No. 2002-307 completing the law of 15 June 2000 on the assumption of innocence and protection of victims. *J. off. Rép. fr.* of 5 March 2002, p. 4169. For comments, see F. Le Guhenec, *JCP*, éd. générale, n°19-20, 8 May 2002, p. 857
[57] *Rechtbank Rotterdam*, LJN AF2141, 18 December 2002.
[58] Corr. Bruxelles, 14 January 2002, *J.P.*, n°430, p. 29 et s. ; Corr. Dinant, 14 November 2002, *J.P.*, n° 447, p. 26 et s.)
[59] C.A., judgment n° 86/2002, *J.T.,* 2002, p. 515.

Representation in the context of a process in absentia

During the period under review, the European Court of Human Rights criticised **France** in the case of *Karata*s and *Saric* for a breach of Article 6 § 3 of the Convention. The accused had fled the during the trial investigation; they were condemned in by trial in absentia at which their lawyers were not heard. The Court held that the fact that the accused did not appear, although they had been duly summoned, did not justify depriving them of the right to assistance by counsel, laid down in Article 6 § 3 of the Convention, even when they are absent. As early as the judgement in the case of Van Geyseghem on 21 January 1999 made in respect of Belgium, the European Court of Human Rights held that an attorney who obviously appears at a hearing to represent his absent clients, must be able to do so. The absence of the accused at the trial does not deprive him of his right to legal assistance[60]. In order to comply with the Van Geyseghem judgment, a draft law has been submitted to permit the accused to appear by an attorney before police and criminal Courts[61]. It should be noted that during the period under review, United Kingdom jurisdiction nevertheless put forward a restrictive interpretation of this guarantee, when they held that a defendant of full age and sound mind could be tried where his or her absence was voluntary and, although it was generally desirable that such a person should still be legally represented, no grounds for complaint about the absence of this existed where he or she had shown complete indifference as to what might happen[62].

Anonymous witnesses

Although Article 6 § 3 d of the European Convention of Human Rights includes "the right to examine or have examined witnesses against the accused and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him", the Court of Human Rights agreed that "…it may be legitimate for the police authorities to want to preserve the anonymity of an agent employed in undercover activities, for his own or his family's protection and so as not to impair his usefulness for future operations"[63], particularly in the context of the fight against organized crime whose specificity it recognizes[64]. While noting that no doubt that "…the cooperation of the public is of great importance to the police in the fight against crime, the Court held that, although the Convention did not prevent the use resources such as undercover agents for support in the preparatory investigation, their subsequent use by the judge trying the case to justify a verdict raised a very different problem"[65]. The requirements of a fair trial nevertheless were that "…in appropriate cases, the interest on the defence must be balanced against that of the witnesses or the victims who are called upon to testify. This implies three things[66]: firstly that the use of the anonymous witnesses is tantamount to a restriction of the rights of defence, and is only admissible if it is absolutely necessary for purposes that justifies it, namely, the protection of witnesses, whose fears must be objectively verifiable[67], or the maintenance by the police of the secrecy of its methods or the option of using an undercover agent in the future[68]. Next, a condemnation cannot be based exclusively, nor in to a

[60] La Cour de cassation of Belgium immediately drew lessons from the *Van Geyseghem* judgment: Cass., 16 March 1999, *J.T.*, 2000, p. 124 ; Cass., 8 June 1999, *Bull.*, p. 805.
[61] Proposal for a amending the criminal inquiry code as concerns default and rescinding Article 421 of the criminal inquiry code (adopted by the Senate Justice Committee on 8 January 2003).
[62] *R v Jones* [2002] 2 All ER 113.
[63] ECHR., judgment *Van Mechelen v. Netherlands* of 23 April 1997, *Rec.* 1997-III, § 57.
[64] ECHR., judgment *Ciulla v. Italy* of 22 February 1989, Series A n° 148, § 41; ECHR., judgment *Kostovski v. Netherlands* of 20 November 1989, Series A n° 166, § 44; ECHR., judgment *Saïdi v. France* of 29 September 1993, Series A n°261-C, § 44. for a comment of the *Kostovski* judgment, the interest of which greatly exceeds this episode. See J. CALLEWAERT, "Témoignages anonymes et droits de la défense", *Rev. trim. dr. h.*, 1990, p. 267. Egalement R. LAWSON, "De woekeraar, de dealer en hun ongehoorde getuigen", *NJCM-Bull*., vol. 19, 1994, p. 379.
[65] ECHR., judgment *Windisch v. Autriche* of 27 September 1990, Series A n°186, § 30.
[66] In the case law of the European Court of Human Rights on 1 November 1998, see for example ECHR. (2nd section), Dec. of 21 September 1999, *F. Perre v. Italy* (req. n° 32387/96) (inadmissibility); ECHR. (1st section), Dec. of 4 July 2000, *R.M. Kok v. Netherlands* (req. n° 43149/98) (inadmissibility); or ECHR. (2nd section), Dec. of 3 May 2001, *Can v. Belgique* (req. n° 43913/98) (inadmissibility).
[67] ECHR. (1st section), Dec. of 4 July 2000, *R.M. Kok v. Netherlands*(req. n° 43149/98) (inadmissibility).
[68] ECHR., judgment *Van Mechelen v. Netherlands* of 23 April 1997, § 58.

determining extent, on anonymous declarations[69], *a fortiori* if these declarations are made by a policeman having relations with the prosecuting authorities and whose duties include testifying at public hearings[70], particularly by policemen who have powers of arrest. Lastly, the procedure used must include aspects to counterbalance the anonymous testimony; the procedure used must adequately offset the obstacles encountered by the defence[71]. In principle, these conditions are cumulative, but they can also be assessed against one another, the extent of the measures to counterbalance the restriction of the rights of the defence by an anonymous witness having to be proportional to the importance of this testimony witness in the prosecution's dossier.

The lack of respect for the first of these three conditions led the European Court of Human Rights to a finding of violation by the **Netherlands** during the period under scrutiny. Mr Visser was convicted on the basis of a statement from an anonymous witness. He complained that the use of the anonymous witness's statement was in breach of Article 6 §§ 1 and 3 (d) ECHR. The European Court of Human Rights observed that the witness had told the investigating judge that s/he did not know Mr Visser but was afraid of reprisals because one of his co-accused had a reputation for being violent and because the offence in itself concerned an act of revenge. The investigating judge had apparently taken into account the reputation of the co-accused in general, but his report had not shown how he assessed the reasonableness of the personal fear of the witness. Neither did the Court of Appeal carry out such an examination into the seriousness and well-foundedness of the reasons for the anonymity of the witness when it decided to use the statement made before the investigating judge in evidence against Mr Visser. The Court was therefore not satisfied that the interest of the witness in remaining anonymous could justify limiting the rights of the defence to the extent that they were limited. Since Mr Visser's conviction was to a decisive extent based on the anonymous testimony, the Court concluded unanimously that the proceedings as a whole were not fair[72]. The Court's impact on legal practice was very limited since the law concerning the use of anonymous witnesses had changed in the meantime, and the situation reviewed by the Court would not normally occur under the new rules.

In **France**, the requirements of the European legal precedent, which are referred to earlier, guided the authors of the Law of 15 November 2001 on the day-to-day security, one of the objectives of which was to add a new title into the code of criminal procedure entitled "Concerning the protection of witnesses"[73]. In the context of procedures on particularly serious crimes or offences, the judge ruling on liberty and detention can authorize the inclusion of a testimony by a witness in the trial dossier without disclosing his identity, when his interrogation could seriously endanger the life or physical integrity of the said witness, or members of his family or friends[74]. In any event, the sentence cannot be based exclusively on declarations made under conditions, which safeguard the anonymity of the witness[75]. Lastly, three measures are stipulated in favour of the accused, which to a certain extent counterbalance the restriction of the rights of the defence, namely, the judge ruling on liberty and detention can decide to hear the witness himself[76]; the person being investigated can challenge the use of anonymity[77], and the President of the Chamber of Investigation can decide whether anonymity is justified[78]; lastly, the person concerned can ask to be confronted with the witness who gave anonymous evidence, using certain technical schemes which render such a confrontation possible without revealing the identity of the witness. These arrangements comply with the requirements of the

[69] ECHR., *judgment Unterpertinger v. Autriche* of 24 November 1986, Series A n° 110, §§ 31-33; ECHR., judgment *Saïdi v. France* of 20 September 1993, Series A n° 261-C, §§ 43-44.
[70] ECHR., judgment *Van Mechelen v. Netherlands*of 23 April 1997, § 56.
[71] ECHR., judgment *Doorson v. Netherlands*of 26 March 1996, *Rec.* 1996-II, §§ 70, 72 and 76.
[72] Eur. Ct. H.R., *Visser v. the Netherlands* (judgment) no. 26668/95, 14 February 2002.
[73] Law No. 2001-1062 of 15 November 2001 on everyday security, O.J. note 6 of 60 November 2001, p. 18215. Art. 57 of this law, that contains the new title XXI of the Criminal Procedure Code, is given in chapter VIII ("other provisions") of the Law, and not in the chapter that more specifically considers the fight against terrorism (Chapter V: "Provisions reinforcing the fight against terrorism").
[74] New article 706-58 of Criminal Procedure Code (CPP).
[75] New article 706-62 CPP.
[76] New article 706-58 CPP.
[77] New article 706-60 CPP.
[78] New article 706-61 CPP.

European Convention. Nevertheless, they are in a sense still by definition unsatisfactory, since an anonymous witness means that the defence is unaware of the identity of the person concerned and is thus deprived of information, which would allow it to show that the witness in question is prejudiced, hostile to the defence or untrustworthy. It can neither verify the credibility of witness, nor cast doubt on that credibility[79].

This same logic guided the legal precedent of European Court of Human Rights in dealing with the more general question of knowing whether the prosecution can be based on evidence not subjected to the adversarial system in the context of criminal proceedings. The Court admits that this restriction on the right of an adversarial criminal trial [80]can be justified by the authorities' concern to continue safeguarding conflicting interests (such as national security or the need to protect witnesses threatened with revenge, or to maintain the secrecy of the police methods of investigating offences), which must then be balanced against the rights of the accused[81]. Here, too, the only measures restricting the rights of defence, which are legitimate in relation to Article 6 § 1, are those, which are absolutely necessary. In addition, all difficulties caused to the defence by a restriction on its rights, must be adequately counterbalanced by the procedure followed before the judicial authorities[82].

In **Belgium**, the law of 8 April 2002 on anonymous witnesses[83] provides for the option of the investigating judge and the criminal court or its president, not to mention certain data concerning the witness in the reports on the testimony for the hearing, or not to reveal them in the testimony, provided there is a reasonable presumption that the witness, or persons in his entourage could be seriously endangered as a result of the disclosure of this information and his testimony (new Article 75b, 155b and 317b, added to the Code of criminal investigation)[84]. As well as this partial witness anonymity, the law provides for the option of full witness anonymity, but only a) for certain types of offence (offences for which tapping private communication or telephone calls is permitted by under Article 90c of the Code of criminal investigation, incorporated into the context of organized crime within the meaning of Article 324b of the Criminal Code, or serious international crimes against humanity covered by the Law of 16 June 1993, b) if the inquiry into this evidence so requires and other means of investigation do not appear to suffice to discover the truth and c) on condition that the witness or person in his entourage can reasonably feel seriously physically threatened because of the testimony and that the witness has stated his intention not to testify because of that threat, or if there are specific and serious indications that the witness or a person in his entourage is threatened. if the witness is a Court police officer or agent (new Article 86b added to the Code of criminal investigation). The restriction on the rights of the defence resulting from this anonymous testimony of the witness is offset by an invitation to the prosecution, the accused, third parties intervening in the case and their counsel, to attend the hearing of the witness by the investigating judge, if appropriate, on premises other than those where that hearing takes place, if this is necessary to maintain the anonymity of the witness (in which case a telecommunications system is used to make exchanges possible); these parties can submit questions which they wish to ask to the investigating judge before and during the hearing of the witness. The

[79] ECHR., judgment *Kostovski v. Netherlands* of 20 November 1989, ref. above, § 41.
[80] The right to an adversarial criminal trial normally requires that the prosecution and defense can consult all the evidence produced by the other party: see ECHR., judgment *Brandstetter v. Autriche* of 28 August 1991, Series A n°211, §§ 66-67; ou ECHR., judgment *Edwards v. United Kingdom* of 16 December 1992, Series A n° 247-B, § 36.
[81] ECHR., judgment *Rowe and Davies v. United Kingdom* of 16 February 2000, ECHR 2000-II, § 61
[82] ECHR., judgment *Rowe and Davies v. United Kingdom* of 16 February 2000, § 61; ECHR., judgment *P.G. et J.H. v. United Kingdom* of 25 September 2001, § 68.
[83] *M. B.*, 31 May 2002.
[84] During the period under consideration, two other laws were also adopted to protect threatened witnesses. See the law of 7 July 2002 containing rules on the protection of threatened witnesses and other provisions (B.M., 10 August 2002); and Law of 2 August 2002 on the reception of testimony by means of audiovisual media (B.M. 12 September 2002). The law of 7 July 2002 is particularly important, in that it creates the Committee for the protection of witnesses competent for granting, amending or withdrawing protective measures and financial assistance measures to the benefit of threatened witnesses, that the law defines as "a person endangered further to declarations made or to be made in the context of a criminal case during the inquiry or the investigation, either in Belgium or before an international court, or in a foreign country when reciprocal measures are provided and that country is willing to confirm those declarations on request after the hearing" (new article 102 of the Criminal Investigation Code, in Chapter VIIter added to the Code by the Law containing rules on the protection of threatened witnesses and other provisions).

investigating judge prevents the witness from answering any question, which could lead to a disclosure of his identity (new Article 86c added to the Code of criminal investigation). Lastly, the law explicitly provides that a person cannot be condemned solely on the basis or to a determining extent, of an anonymous testimony, that testimony having to be corroborated to a determining extent by evidence gathered by other means (new Article 189b added to the Code of criminal investigation).

A judgment by the Supreme Court of **Denmark** illustrates the difficulty which the application of Article 6 § 3, d) of the European Convention on Human Rights can pose, a guarantee to which Article 48 § 2 of the Charter of Fundamental Rights of the European Union refers in cases which require the cooperation of the authorities of several States. T and A were placed in provisional detention in Denmark and in Austria respectively, for having imported large quantities of the drug "ecstasy". The prosecuting authorities in Denmark asked to be able to question A, so that the explanations he provided could be used in the prosecution of T. Despite the objection made to this approach by T's defence, the Supreme Court held that these proceedings were not in contradiction of the rights laid down in Article 6 § 3 of the Convention[85].

Criminal turned informer

In **Belgium**, a draft law was submitted to the House of Representatives on 21 February 2002, creating regulations for criminals cooperating with justice (Doc. 50 1645/001). This draft of a law[86], following a preliminary draft submitted by the government, which introduces rules on criminals turned informers, essentially provides for a series of promises to persons who have been indicted, declared guilty or are serving a sentence, who decide to provide information to the authorities on certain crimes (crimes committed in the context of a criminal organization or crimes under the law of 16 June 1993 on the elimination of serious breaches of international law on crimes against humanity). This is a means of rewarding persons who were charged or condemned, depending on the status of the proceedings, by the abandonment of the prosecution against them, the application of an pardon clause for those who were sentenced, or of an adjustment in the implementation of the sentence.

This initiative corresponds to a trend encouraged within the European Union[87]. Moreover, clause 6 of the Framework Decision of the Council of June 13th 2002 relative to the fight against terrorism[88] is specifically devoted to this, with this measure authorising the Member States to reduce the sentences punishing terrorist crimes where the perpetrator of the crime renounces his terrorist activities and cooperates with the legal system. It should nevertheless be contemplated with prudence. The League of Human Rights has expressed its concern about the formal introduction of this scheme in Belgium, in particular with regard to the respect due to the right of the accused to remain silent. From the grant of a reduction of a sentence to someone who agrees to cooperate with justice, it does in fact appear that attitudes, as well as legal practices, could move in the direction of a form of penalty for refusing to cooperate and in that of a more severe sentence for someone who does not agree to cooperate.[89] For its part, the European Court of Human Rights whilst it has not condemned the principle of using criminals turned informers, has nevertheless stressed that the use of their declarations poses a certain number of delicate problems, because, by their very nature, these declarations may well be the result of manipulation, or have the sole object of securing the benefit which the law gives to informers, or

[85] High Court, U.2002.468 Ø.
[86] Based on university research project: T. De Meester et Ph. Traest, *Rapport de recherche concernant les repentis, l'encouragement et la facilitation du témoignage dans le cadre de la procédure pénale et le renversement de la charge de la preuve concernant l'origine des biens dont on soupçonne qu'ils sont le produit d'une activité liée au crime organisé* done at the request of the Ministry of Justice, 1996-1997, 331 pp. also G. Vermeulen, B. De Ruyver, Ph. Traest, N. Siron, A. Van Cauwenberge, *Bescherming van en samenwerking met getuigen*, drafted at the request of the Ministry of Justice, 2000, Maklu, 188 pp.
[87] Resolution of the Council of the European Union of 20 December 1996 on persons collaborating with the action de la justice (OJ C 010 of 11.01.1997, p. 1).
[88] OJ L 164 of 22.6.2002, p. 3.
[89] Press release of the League of Human Rights (French-speaking Belgium), 18 January 2002 www.liguedh.org/justice

again, to carry out a personal revenge[90]. Three consequences appear clear[91], firstly, it would be contrary to a fair trial if the informers remained anonymous, and their testimony could not be discussed openly during criminal proceedings, secondly, a criminal sentence cannot be based solely or principally on the testimony of an informer, which must be corroborated by other evidence and thirdly, it would be questionable to keep someone in preventive custody, as a person suspected of having committed an offence, if the progress of the investigation does not rapidly corroborate the declarations by an informer.[92]

Article 49. Principles of legality and proportionality of criminal offecnces and penalties

The main concerns expressed in the national reports with regard to this principle, concern the creation of a difference in dealing respectively with certain crimes described as "terrorist" or associated with forms of "organized crime", both from the standpoint of the criminal proceedings and that of the sentences, and with comparable offences, whereas the definition of the concept of "terrorism" or "organized crime" is not always satisfactory from the standpoint of legality. On these points, refer to the thematic observation appended to the present report, which concerns the implementation of the balance between freedom and security in the measures adopted by the European Union and by the Member States during the period under review.

The contribution of the **German** Federal Constitutional Court to the understanding of the requirements of the principle of legality in criminal matters will however be put forward, in particular with regard to the determination of the sentence (nulla poena sine lege). Clause 103(2) of the German Constitution (Grundgesetz) states this principle. And yet, since 1992, the German Criminal Code has included a clause (“Peine de propriété”, “Wealth (property) punishment” : Vermögensstrafe) – section 43a – to which other measures of the Criminal Code can refer, authorising the criminal judge to pronounce, on top of other penalties that the offence may give rise to, a pecuniary fine within the limits of the condemned person’s property (the amount being restricted by the value of the culprit’s property). In a decree of March 20th 2002[93], the German Constitutional Court judged by five votes against three that the freedom of assessment of the judge in the determination of this pecuniary fine was too great, so much so that the principal of the legality of the fines was contravened. This precedent illustrates the limits to the individualisation of the penalty that the requirement for criminal legality may impose.

Article 50. The right not to be tried or punished twice in criminal proceedings for the same criminal offence

Article 54 of the Convention on the application of the Schengen agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual elimination of controls at shared frontiers[94] of 19 June 1990, provides that a person who has been finally judged by one of the Contracting Parties cannot be prosecuted by another Contracting Party for the same offence, subject to the condition that, in case of condemnation, the imprisonment which has been served, is currently being served or can no longer be imposed under the laws of the Contracting Party that sentenced the said person. Art. 55 provides that the Contracting States can declare that they are not bound by this provision and in certain cases are listed exhaustively. Under the protocol incorporating the Schengen agreement into the context of the European Union appended to the Treaty on the European Union and the Treaty establishing the European Community in the Treaty of Amsterdam, the Council identified Articles 34 and 31 of the

[90] Eur Court H.R. (GC) judgment Labita v. Italy of 6 April 2000, § 157. The European Committee for Human Rights has already considered that the use of testimony during a trial obtained from an accomplice in exchange for a promise not to prosecute that accomplice could throw doubt on the nature of a fair trial against the accused and therefore pose problems from the standpoint of Article 6 § 1 of the Convention. (European Committee of Human Rights, report of 10 June 1997 *Contrada v. Italy*, req. n° 27143/95, § 52; Eur.Com.HR, report. of 29 October 1998, *Labita v. Italy*, req. n° 26772/95, § 147).
[91] M.-A. Beernaert, “Mafia, maltraitance en prison et repentis”, *Rev. trim. dr. h.,* 2001, p. 124.
[92] ECHR., judgment *Labita v. Italie*, ref. above, § 158.
[93] 2 BvR 749/95 -. BVerfGE 105, 135.
[94] OJ 2000, L 239, p. 19.

Treaty on European Union as the legal basis of Articles 54 to 58 of the Convention of application of the Schengen agreement[95]. The European Court of Justice gave an important judgment on 11 February 2003 in which it interprets Article 54 of Convention of application of the Schengen agreement in the light of the principle of mutual confidence, which should govern judicial cooperation in criminal cases in an area of freedom, security and justice[96]. In the main cases, the public prosecution had been stopped by the conclusion of an amicable agreement proposed by the prosecution, in the first case the Dutch prosecution and in the second German prosecution without the approval of qualified court, in one case under the Dutch criminal code, and in the other under the German criminal code. The Court held that when procedures such as those in question are used in the main cases, the prosecution is definitively closed; the person in question must be deemed to have been definitively judged in respect of the charges against him within the meeting of Article 54 of the Convention of application of the Schengen agreement. In addition, when the accused has been judged, the sanction incurred under the procedure of ending the public action must be deemed to have been performed within the meaning of the said provision (point 30), the Court bases this ruling more particularly on "the principle of *non bis in idem*, in Article 54 of Convention on the application of the Schengen agreement to procedures for closing the prosecution with or without the intervention of a Court or of judgments, necessarily implies mutual confidence of the Member States in their respective criminal systems of justice and that each of them accepts the application of the criminal law in force in the other Member Sates, even in a case where the implementation of its own national law would lead to a different solution (point 33).

Given the fact that this judgment was made after the period under review by this report, its implications will be considered in greater depth later on. Among other things, the corresponding normative developments will be taken into account; Greece has submitted a proposal for the adoption of a framework decision on this question at the beginning of its Presidency of the European Union.

[95] Council Decision 1999/436/EC determining the legal basis of each of the provisions or decisions constituting the "acquis" of the Schengen Convention in keeping with pertinent provisions of the Treaty instituting the European Community and the Treaty of European Union

[96] ECJ, 11 February 2003, *Gözütok et Brügge*, joined cases C-187/01 and C-385/01.

ANNEXE

UNITED NATIONS MAIN INSTRUMENTS

(Status of Ratifications up to 15 janvier 2003)

- International Convention on the Elimination of All Forms of Racial Discrimination, 21st December 1965 (CERD)
- International Covenant on Economic, Social and Cultural Rights, 16th December 1966 (ICESCR)
- 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)
- Convention on the Elimination of All Forms of Discrimination against Women, 18th December 1979 (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10th December 1984 (CAT)
- Convention on the Rigths of the Child, 20th November 1989 (CRC)
- 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 Protection of the Rights of All Migrant Workers and Members of Their Families, 18th December 1990 (MWC)
- Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6th October 1999 (CEDAW-P)
- 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)
- Rome Statute of the International Criminal Court, 18th July1998 (ICC)

	ICESCR	CCPR	CCPR-P1	CCPR-P2	CERD	CEDAW	CEDAW-P	CAT	CRC	CRC-P1	CRC-P2	MWC	ICC
Germany	17/12/73	17/12/73[1]	25/08/93[2]	18/08/92	16/05/69[3]	10/07/85[4]	15/01/02	01/10/90[5]	06/03/92[6]	*s. 09/00*	*s. 09/00*	-	11/12/00[7]
Austria	10/09/78	10/09/78[8]	10/12/87[9]	02/03/93	09/05/72[10]	31/03/82[11]	07/09/00	29/07/87[12]	06/08/92[13]	01/02/02	*s. 09/00*	-	28/12/00[14]
Belgium	21/04/83[15]	21/04/83[16]	17/05/94	08/12/98	07/08/75[17]	10/07/85[18]	*s. 12/99*	25/06/99[19]	16/12/91[20]	06/05/02	*s. 09/00*	-	28/06/00[21]
Denmark	06/01/72[22]	06/01/72[23]	06/01/72[24]	24/02/94	09/12/71[25]	21/04/83	31/05/00	27/05/87[26]	19/07/91[27]	28/08/02	*s. 09/00*	-	21/06/01[28]
Spain	27/04/77	27/04/77[29]	25/01/85[30]	11/04/91	13/09/68[31]	05/01/84[32]	06/07/01	21/10/87[33]	06/12/90[34]	08/03/02	18/12/01	-	24/10/00[35]
Finland	19/08/75	19/08/75[36]	19/08/75	04/04/91	14/07/70[37]	04/09/86	29/12/00	30/08/89[38]	21/06/91	11/04/02	*s. 09/00*	-	29/12/00[39]
France	04/11/80[40]	04/11/80[41]	17/02/84[42]	-	28/07/71[43]	14/12/83[44]	09/06/00	18/02/86[45]	08/08/90[46]	*s. 09/00*	*s. 09/00*	-	09/06/00[47]
Greece	16/05/85	05/05/97	05/05/97	05/05/97[48]	18/06/70	07/06/83	24/01/02	06/10/88[49]	11/05/93	*s. 09/00*	*s. 09/00*	-	*s.07/98*
Ireland	08/12/89[50]	08/12/89[51]	08/12/89[52]	18/06/93	29/12/00[53]	23/12/85[54]	08/09/00	11/04/02	28/09/92	18/11/02	*s. 09/00*	-	*s. 07/98*
Italy	15/09/78	15/09/78[55]	15/09/78[56]	14/02/95	05/01/76[57]	10/06/85	22/09/00	12/01/89[58]	05/09/91	10/05/02	10/05/02	-	26/07/99
Luxembg	18/08/83	18/08/83[59]	18/08/83[60]	12/02/92	01/05/78[61]	02/02/89[62]	*s. 12/99*	29/09/87[63]	07/03/94[64]	*s. 09/00*	*s. 09/00*	-	08/09/00
Netherlands	11/12/78[65]	11/12/78[66]	11/12/78	26/03/91	10/12/71[67]	23/07/91[68]	22/05/02	21/12/88[69]	06/02/95[70]	*s. 09/00*	*s. 09/00*	-	17/07/01
Portugal	31/07/78	15/06/78	03/05/83	17/10/90	24/08/82[71]	30/07/80	26/04/02	09/02/89[72]	21/09/90	*s. 09/00*	*s. 09/00*	-	*s. 10/98*
UK	20/05/76[73]	20/05/76[74]	-	10/12/99	07/03/69[75]	07/04/86[76]	-	08/12/88[77]	16/12/91[78]	*s. 09/00*	*s. 09/00*	-	04/10/01[79]
Sweden	06/12/71[80]	06/12/71[81]	06/12/71[82]	11/05/90	06/12/71[83]	02/07/80	*s. 12/99*	08/01/86[84]	29/06/90	*s. 06/00*	*s. 06/00*	-	28/06/01[85]
Cyprus	02/04/69	02/04/69	15/04/92	10/09/99[86]	21/04/67[87]	23/07/85	26/04/02	18/07/91[88]	07/02/91	-	*s. 02/01*	-	*s. 10/98*
Estonia	21/10/91	21/10/91	21/10/91	-	21/10/91	21/10/91	-	21/10/91	21/10/91	-	-	-	*s.12/99*
Hungary	17/01/74[89]	17/01/74[90]	07/09/88	24/02/94	01/05/67[91]	22/12/80	22/12/00	15/04/87[92]	08/10/91	-	-	-	30/11/01[93]
Latvia	14/04/92	14/04/92	22/06/94	-	14/04/92	15/04/92	-	14/04/92	15/04/92	*s. 02/02*	*s. 02/02*	-	*s. 04/99*
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	*s. 02/02*	-	-	*s. 12/98*
Malta	13/09/90[94]	13/09/90[95]	13/09/90[96]	24/12/94	27/05/71[97]	08/03/91[98]	-	13/09/90[99]	30/09/90[100]	10/05/02	*s.09/00*	-	*s. 07/98*
Poland	18/03/77	18/03/77[101]	07/11/91[102]	*s. 03/00*	05/12/68[103]	30/07/80	-	26/07/89[104]	07/06/91[105]	*s. 02/02*	*s. 02/02*	-	12/11/01[106]
Czech R.	01/01/93[107]	22/02/93[108]	22/02/93	-	22/02/93[109]	22/02/93	27/02/01	01/01/93[110]	22/02/93[111]	30/11/01[112]	-	-	*s. 04/99*
Slovakia	28/05/93[113]	28/05/93[114]	28/05/93	22/06/99	28/05/93[115]	28/05/93	17/11/00	28/05/93[116]	28/05/93[117]	-	*s. 11/01*	-	*s. 12/98*
Slovenia	06/07/92	06/07/92[118]	16/07/93[119]	10/03/94	06/07/92[120]	06/07/92	*s. 12/99*	16/07/93[121]	06/07/92[122]	*s. 09/00*	*s. 09/00*	-	31/12/01

ANNEXE

MAIN INSTRUMENTS OF THE INTERNATIONAL LABOUR ORGANIZATION

(Status of Ratifications up to 15/01/2003)

- 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

ANNEXE

	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[cxxiii]	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	-
Luxembourg	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	-
UK	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	-	-	24/09/01	-	-
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	-	-	-
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 MAIN INSTRUMENTS

(Status of Ratifications up to 15/01/2003)

- 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 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 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)
- 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 the Death Penalty in All Circumstances, 3rd May 2002 (not in force) (STE187)

	STE005	STE009	STE035	STE046	STE108	STE114	STE117	STE126	STE128	STE142	STE148	STE157	STE158
Germany	05/12/52[124]	13/02/57[125]	27/01/65[126]	01/06/68[127]	19/06/85[128]	05/07/89[129]	*s. 03/85*[130]	21/02/90[131]	*s. 05/88*	-	16/09/98[132]	10/09/97[133]	-
Austria	03/09/58[134]	03/09/58[135]	29/10/69[136]	18/09/69[137]	30/03/88[138]	05/01/84	14/05/86[139]	06/01/89	*s. 12/90*	13/07/95[140]	28/06/01[141]	31/03/98[142]	*s. 05/99*
Belgium	14/06/55	14/06/55	16/10/90[143]	21/09/70	28/05/93[144]	10/12/98	-	23/07/91	*s. 05/92*	21/09/00	-	*s. 07/01*[145]	*s. 05/96*
Denmark	13/04/53	13/04/53	03/03/65[146]	30/09/64	23/10/89[147]	01/12/83	18/08/88[148]	02/05/89	27/08/96[149]	-	08/09/00[150]	22/09/97[151]	*s. 11/95*
Spain	04/10/79[152]	27/11/90[153]	06/05/80[154]	*s. 02/78*	31/01/84[155]	14/01/85	*s.11/84*	02/05/89	24/01/00	24/01/00	09/04/01[156]	01/09/95	-
Finland	10/05/90[157]	10/05/90	29/04/91[158]	10/05/90	02/12/91[159]	10/05/90	10/05/90	20/12/90	29/04/91[160]	18/08/94	09/11/94[161]	03/10/97	17/07/98[162]
France	03/05/74[163]	03/05/74[164]	09/03/73[165]	03/05/74[166]	24/03/83[167]	17/02/86	17/02/86[168]	09/01/89	*s. 06/89*[169]	24/05/95	*s. 05/99*[170]	-	07/05/99
Greece	28/11/74	28/11/74[171]	06/06/84[172]	-	11/08/95	08/09/98	29/10/87	02/08/91	18/06/98	12/09/96	-	*s. 09/97*	18/06/98
Ireland	25/02/53[173]	25/02/53[174]	07/10/64[175]	29/10/68[176]	25/04/90[177]	24/06/94	03/08/01	14/03/88	-	14/05/97	-	07/05/99	04/11/00
Italy	26/10/55	26/10/55	22/10/65[178]	27/05/82[179]	29/03/97[180]	29/12/88	07/11/91[181]	29/12/88[182]	26/05/94[183]	27/01/95	*s. 06/00*	03/11/97	03/11/97
Luxembg	03/09/53	03/09/53[184]	10/10/91[185]	02/05/68	10/02/88[186]	19/02/85	19/04/89[187]	06/09/88	*s. 05/88*	*s. 10/91*	*s. 11/92*	*s. 07/95*[188]	-
Netherlands	31/08/54[189]	31/08/54[190]	22/04/80[191]	23/06/82[192]	24/08/93[193]	25/04/86[194]	*s. 11/84*[195]	12/10/88[196]	05/08/92[197]	01/06/93[198]	02/05/96[199]	*s. 02/95*	-
Portugal	09/11/78[200]	09/11/78[201]	30/09/91[202]	09/11/78	02/09/93[203]	02/10/86	*s. 11/84*	29/03/90	-	08/03/93	-	07/05/02	20/03/98
UK	08/03/51[204]	03/11/52[205]	11/07/62[206]	*s. 09/63*	26/08/87[207]	20/05/99[208]	-	24/06/88[209]	-	*s. 10/91*	27/03/01[210]	15/01/98	-
Sweden	04/02/52	22/06/53[211]	17/12/62[212]	13/06/64	29/09/82[213]	09/02/84	08/11/85[214]	21/06/88	05/05/89	18/03/92	09/02/00[215]	09/02/00[216]	29/05/98
Cyprus	06/10/62	06/10/62	07/03/68[217]	03/10/89[218]	21/02/02[219]	19/01/00	15/09/00	03/04/89	*s. 05/88*	01/06/93	26/08/02[220]	04/06/96	06/08/96
Estonia	16/04/96[221]	16/04/96[222]	-	16/04/96	14/11/01[223]	17/04/98	16/04/96	06/11/96	-	-	-	06/01/97[224]	-
Hungary	05/11/92	05/11/92	08/07/99[225]	05/11/92	08/10/97[226]	05/11/92	05/11/92	04/11/93	-	*s. 12/91*	26/04/95[227]	25/09/95	-
Latvia	27/06/97	27/06/97[228]	31/01/02[229]	27/06/97	30/05/01[230]	07/05/99	27/06/97	10/02/98	*s. 05/97*	*s. 05/97*	-	*s. 05/95*	-
Lithuania	20/06/95[231]	24/05/96	-	20/06/95	01/06/01[232]	08/07/99	20/06/95	26/11/98	-	-	-	23/03/00	-
Malta	23/01/67[233]	23/01/67[234]	04/10/88[235]	05/06/02	*s. 01/03*	26/03/91	15/01/03	07/03/88	-	16/02/94	*s. 11/92*	10/02/98[236]	-
Poland	19/01/93	10/10/94	25/06/97[237]	10/10/94	23/05/02	30/10/00	04/12/02	10/10/94	-	25/06/97	-	20/12/00[238]	-
Czech R.	18/03/92[239]	18/03/92	03/11/99[240]	18/03/92	09/07/01[241]	18/03/92	18/03/92	07/09/95	17/11/99[242]	17/11/99	*s.11/00*	18/12/97	*s. 02/02*
Slovakia	18/03/92[243]	18/03/92	22/06/98[244]	18/03/92	13/09/00[245]	18/03/92	18/03/92	11/05/94	22/06/98	22/06/98	05/09/01[246]	14/09/95	*s. 11/99*
Slovenia	28/06/94	28/06/94	*s. 10/97*	28/06/94	27/05/94[247]	28/06/94	28/06/94	02/02/94	*s. 10/97*	*s. 10/97*	04/10/00[248]	25/03/98[249]	*s. 10/97*

	STE163	STE164	STE168	STE177	STE185	STE186	STE187
Germany	-	-	-	*s. 11/00*	*s. 11/01*	-	*s. 05/02*
Austria	*s. 05/99*	-	-	*s. 11/00*	*s. 11/01*	-	*s. 05/02*
Belgium	*s. 05/96*	-	-	*s. 11/00*	*s. 11/01*	-	*s. 05/02*
Denmark	*s. 05/96*[250]	10/08/99[251]	*s. 01/98*	-	-	-	28/11/02[252]
Spain	*s. 10/00*	01/09/99	24/01/00	-	*s. 11/01*	-	*s. 05/02*
Finland	21/06/02[253]	*s. 04/97*	*s. 01/98*	*s. 11/00*	*s. 11/01*	-	*s. 05/02*
France	07/05/99	*s. 04/97*	*s. 01/98*	-	*s. 11/01*	-	*s. 05/02*
Greece	*s. 05/96*	06/10/98	22/12/98	*s. 11/00*	*s. 11/01*	*s. 01/02*	*s. 05/02*
Ireland	04/11/00[254]	-	-	*s. 11/00*	*s. 02/02*	-	*s. 05/02*
Italy	05/07/99[255]	*s. 04/97*	*s. 01/98*	*s. 11/00*	*s. 11/01*	*s. 02/02*	*s. 05/02*
Luxembg	*s. 02/98*	*s. 04/97*	*s. 01/98*	*s. 11/00*	-	*s. 01/02*	*s. 05/02*
Netherlands	-	*s. 04/97*	*s. 05/98*[256]	*s. 11/00*	*s. 11/01*	*s. 02/02*	*s. 05/02*
Portugal	30/05/02[257]	13/08/01	13/08/01	*s. 11/00*	*s. 11/01*	*s. 02/02*	*s. 05/02*
UK	*s. 11/97*	-	-	-	*s. 11/01*	-	*s. 05/02*
Sweden	29/05/98[258]	*s. 04/97*	*s. 01/98*	-	*s. 11/01*	-	*s. 05/02*
Cyprus	27/09/00[259]	20/03/02	20/03/02	30/04/02	*s. 11/01*	-	*s. 05/02*
Estonia	11/09/00[260]	08/02/02	08/02/02	*s. 11/00*	*s. 11/01*	*s. 01/02*	*s. 05/02*
Hungary	-	09/01/02	09/01/02	*s. 11/00*	*s. 11/01*	-	*s. 05/02*
Latvia	-	*s. 04/97*	*s. 01/98*	*s. 11/00*	-	-	*s. 05/02*
Lithuania	29/06/01[261]	17/10/02	17/10/02	-	-	-	*s. 05/02*
Malta	-	-	-	-	*s. 01/02*	-	03/05/02
Poland	-	*s. 05/99*	*s. 05/99*	-	*s. 11/01*	-	*s. 05/02*
Czech R.	*s. 11/00*	22/06/01	22/06/01	*s. 11/00*	-	-	*s. 05/02*
Slovakia	*s. 11/99*	15/01/98	22/10/98	*s. 11/00*	-	-	*s. 07/02*
Slovenia	07/05/99[262]	05/11/98	05/11/98	*s. 03/01*	*s. 07/02*	*s. 01/02*	*s. 05/02*

[11] Reservations : art. 2(1), 14(3)(d), 14(5), 15(1), 19, 21 and 22 ; Declaration : art. 41
[2] Reservation : art. 5(2)(a)
[3] Declaration : art. 14
[4] Reservations : §11 of the Preamble, art. 7(b)
[5] Reservations : art. 3, 21 and 22
[6] Reservations : art. 18(1), 38(2), 40(2)(b)(ii) and (v)
[7] Reservation : art. 87
[8] Reservations : art. 9, 10(3), 12(4), 14, 19, 21, 22 and 26 ; Declaration : art. 41
[9] Reservation : art. 5(2)
[10] Reservations : art. 4(a), 4(b) and 4(c)
[11] Reservation : art. 11
[12] Reservations : art. 5(1)(c) and 15 ; Declarations : art. 21 and 22
[13] Reservations : art. 13, 15,17, 38(2), 38(3)
[14] Reservation : art. 87(2)
[15] Reservations : art. 2(2) and (3)
[16] Reservations : art. 10(2)(a), 10(3), 14(1), 14(5), 19, 20, 21, 22 and 23(2) ; Declaration : art. 41
[17] Reservation: art. 4 ; Declaration : art. 14
[18] Reservations : art.15(2) and (3)
[19] Reservations : art. 21 and 22
[20] Reservations : art. 2(1), 13, 14(1), 15 and 40(2)(b)(v)
[21] Reservations : art. 31(1)(e), 21(1)(b)(c), 87
[22] Reservation : art. 7(d)
[23] Reservations : art. 10(3), 14(1), 14(5), 14(7) and 20(1) ; Declaration : art. 41
[24] Reservation : art. 5(2)(a)
[25] Declaration : art. 14
[26] Declarations : art. 21 and 22
[27] Reservation : art. 40(2)(b)(v)
[28] Reservation : art. 87
[29] Declaration : art. 41
[30] Reservation : art. 5(2)
[31] Declaration : art. 14
[32] General Declaration
[33] Declarations : art. 21 and 22
[34] Reservations : art. 21(d), 38(2) and 38(3)
[35] Reservations : art. 87 and 103
[36] Reservations : art. 10(2)(b), 10(3), 14(7) and 20(1) ; Declaration : art. 41
[37] Declaration : art. 14
[38] Declarations : art. 21 and 22
[39] Reservation : art. 87
[40] Reservations : art. 6, 8, 9, 11, 13
[41] Reservations : art. 4(1), 9, 13, 14, 20(1), 21, 22 and 27
[42] Reservations : art. 1, 5(2)(a) and 7
[43] Reservations : art. 4, 6 and 15 ; Declaration : art. 14
[44] Reservations : §11 of the Preamble, art. 5(b), 9, 14(2)(c), 14(2)(h), 16(1)(d), 16(1)(g) and 29(1)
[45] Reservation : art. 30(2) ; Declarations : art. 21 and 22
[46] Reservations : art. 6, 30 and 40(2)(b)(v)
[47] Reservations : art. 8, 87 and 124 ; General Declaration
[48] Reservation : art. 2
[49] Declarations : 21 and 22
[50] Reservations : art. 2(2) and 13(2)(a)
[51] Reservations : art. 10(2), 14, 14(7), 19(2) and 20(1) ; Declaration : art. 41
[52] Reservation : art. 5(2)
[53] Reservations : art. 4(a), (b), (c) ; Declaration : art. 14
[54] Reservations : art. 13(b), 13(c), 16(1)(d) and 16(1)(f)
[55] Reservations : art. 9(5), 12(4), 14(3), 14(5), 15(1) and 19(3) ; Declaration : art. 41
[56] Reservation : art. 5(2)
[57] Reservations : art. 4(a), 4(b) and 6 ; Declaration : art. 14
[58] Declarations : art. 21 and 22
[59] Reservations : art. 10(3), 14(3), 14(5), 19(2) and 20 ; Declaration : art. 41
[60] Reservation : art. 5(2)
[61] Declaration : art. 14
[62] Reservation : art. 7 and 16(1)(g)
[63] Reservation : art. 1(1) ; Declarations : art. 21 and 22
[64] Reservation : art. 3, 6, 7 and 15
[65] Reservation : art. 8(1)(d)

[66] 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
[67] Declaration : art. 14
[68] Reservations : § 10 and 11 of the Preamble
[69] Reservation : art. 1(1) ; Declarations : art. 21 and 22
[70] Reservations : art. 14, 22, 26, 37, 38, 40
[71] Declaration : art. 14
[72] Declarations : art. 21 and 22
[73] Reservations : art. 1, 2(3), 6, 7(a)(i), 9, 10(2), 13(2)(a) and 14
[74] 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
[75] Reservations : art. 1(1), 4(a)(b) and (c), 6, 15 and 20
[76] Reservations : art. 2, 4(1), 9, 11(2), 15(3) and 15(4), 16(1)(f) ; General Declaration
[77] General Declaration ; Declaration : art. 21
[78] Reservations : art. 22 and 37(c) ; General Declaration
[79] Reservations : art. 8 and 87
[80] Reservation : art. 7(d)
[81] Reservations : art. 10(3), 14(7) and 20(1) ; Declaration : art. 41
[82] Reservation : art. 5(2)
[83] Declaration : art. 14
[84] Declarations : art. 21 and 22
[85] Reservation : art. 8 and 87
[86] Reservation : art. 2(1)
[87] Declaration : art. 14
[88] Declarations : art. 21 and 22
[89] Reservations : art. 26(1) and 26(3)
[90] Reservations : art. 48(1) and 48(3) ; Declaration : art.41
[91] Reservations : art. 17(1) and 18(1) ; Declaration :art. 14
[92] Declarations : art. 21 and 22
[93] Reservation : art. 87
[94] Reservation : art. 13
[95] Reservations : art. 13, 14(2), 14(6), 19, 20 and 22 ; Declaration : art. 41
[96] Reservations : art. 1 and 5(2)
[97] Reservations : art. 4 and 6
[98] Reservations : art. 11, 13, 15 and 16
[99] Declarations : art. 21 and 22
[100] Reservations : art. 26
[101] Declaration : art. 41
[102] Reservation : art. 5(2)(a)
[103] Reservations : art. 17(1) and 18(1) ; Declaration : art. 14
[104] Reservations : art. 20 and 30(1) ; Declaration : art. 21 and 22
[105] Reservations : art. 7, 12 à 16, 24(2)(f) and 38
[106] Reservation : art. 87(2)
[107] Reservation : art. 26
[108] Reservation : art. 48 ; Declaration : art. 41
[109] Reservation : art. 17 ; Declaration : art. 14
[110] Declarations : art. 21 and 22
[111] Reservation : art. 7(1)
[112] Reservation : art. 3(2)
[113] Reservation : art. 26
[114] Reservation : art. 48 ; Declaration : art. 41
[115] Reservation : art. 17 ; Declaration : art. 14
[116] Declarations : art. 21 and 22
[117] Reservation : art. 7(1)
[118] Declaration : art. 41
[119] Reservations : art. 1 and 5(2)(a)
[120] Declaration : art. 14
[121] Declarations : art. 21 and 22
[122] Reservation : art. 9(1)
[123] 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.
[124] Reservation : art. 7 ; Declaration : art. 56
[125] Declarations : art. 1, 2 and 4
[126] Declarations : art. 6, 20 and 34
[127] Declaration : art. 5
[128] Declarations : art. 8, 12, 13, 24
[129] General Declarations

[130] Declarations : art. 2, 3, 4
[131] Declaration : art. 20
[132] Declarations : art. 2, 3, 7, 8, 9, 10, 11, 12, 13, 14
[133] Declaration
[134] Reservations : art. 5 and 6
[135] Reservation : art. 1
[136] Declaration : art. 20
[137] Reservation : art. 3
[138] Declarations : art. 2, 3, 5, 9 and 13
[139] Declarations : art. 2, 3, 4
[140] Declaration : art. 4
[141] Declarations : art. 2 and 3
[142] Declaration
[143] Declaration : art. 20
[144] Declarations : art. 3, 13 and 14
[145] Reservation
[146] Declarations : art. 20 and 34
[147] Declarations : art. 13 and 24
[148] Reservation : art. 2 ; Declarations : art. 2 and 6
[149] Declaration : art. 9
[150] Declarations : art. 2, 3, 4 and 15
[151] Declaration
[152] Reservation : art. 17 ; Declarations : art. 5, 6, 10 and 15
[153] Reservation : art. 1
[154] Declaration : art. 31 and 37
[155] Declaration : art. 13
[156] Declarations : art. 2, 3, 7
[157] Reservation : art. 6
[158] Declaration : art. 20
[159] Declaration : art. 13
[160] Declaration : art. 5
[161] Declarations : art. 2, 3, 7, 8, 9, 10, 11, 13, 14
[162] Declaration : art. 2
[163] Reservations : art. 5, 6 and 15 ; Declarations : art. 10 and 56
[164] Declarations : art. 1 and 4
[165] Reservations : art. 2 and 13 ; Declarations : art. 12 and 20
[166] Declaration : art. 5
[167] Declarations : art. 3, 9, 13
[168] Reservations : art. 2, 3, 4, 5, 6 ; Declaration : art. 2
[169] Reservation : art. 9 ; General Declaration
[170] Declarations : art. 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 14
[171] Reservation : art. 2
[172] Declaration : art. 20
[173] Reservation : art. 6
[174] Declaration : art. 2
[175] Declaration : art. 20
[176] Declaration : art. 3
[177] Declarations : art. 3 and 13
[178] Declaration : art. 20
[179] Reservation : art. 3
[180] Declarations : art. 3 and 13
[181] Declarations : art. 2, 3, 4
[182] Declaration : art. 16
[183] General Declaration
[184] Reservation : art. 1
[185] Declaration : art. 20
[186] Declarations : art. 3 and 13
[187] Reservation : art. 5
[188] Declaration
[189] Declaration : art. 56
[190] Declarations : art. 2 and 4
[191] Declarations : art. 20 and 34
[192] Declarations : art. 3 and 5
[193] Declarations : art. 3, 13 and 24
[194] Declarations: générale , art. 2
[195] Declaration : art. 2

[196] Declaration : art. 20
[197] Declarations : art. 9
[198] General Declaration
[199] Declarations : general, art. 2 3, 7, 8, 9, 10, 11, 12, 13, 14
[200] Reservations : art. 5 and 7
[201] Reservations : art. 1 and 2
[202] Declarations : art. 6 and 20
[203] Declaration : art. 13
[204] Declarations : art. 5 and 6
[205] Reservations : art. 2 and 4 ; General Declarations and art. 1
[206] Declarations : art. 20, 34 and 37
[207] Declarations : art. 3, 13 and 24
[208] Declaration générale
[209] Declarations : art. 20
[210] Declarations : art. 1, 2, 3
[211] Reservation : art. 2
[212] Declaration : art. 20
[213] Declaration : art. 13
[214] Declaration : art. 1
[215] Declarations : art. 2, 8, 9, 10, 11, 12, 13, 14
[216] Declaration
[217] Declarations : art. 2, 7, 20, 37
[218] Declaration : art. 4
[219] Declaration : art. 13
[220] Declarations : art. 1 and 7
[221] Reservation : art. 6
[222] Reservation and Declaration : art. 1
[223] Declarations : art. 3 and 13
[224] Declaration
[225] Declaration : art. 20
[226] Declarations : art. 3 and 13
[227] Declarations : art. 2, 3, 8, 9, 10, 11, 12, 13
[228] Reservation : art. 1
[229] Declaration : art. 20
[230] Declarations : art. 3 and 13
[231] Reservation : art. 5
[232] Declaration : art. 13
[233] Reservation : art. 10 ; Declaration : art. 6
[234] Declaration : art. 2
[235] Declaration : art. 20
[236] Reservation : art. 15 ; Declarations : art. 24 and 25
[237] Declaration : art. 20
[238] General Declarations and art. 18
[239] Reservations : art. 5 and 6
[240] Declaration : art. 20
[241] Declaration : art. 13
[242] Declaration : art. 5
[243] Reservations : art. 5 and 6
[244] Declaration : art. 20
[245] Declaration : art. 13
[246] Declarations : general, art. 1, 2, 3, 8, 10, 12, 13
[247] Declaration : art. 13
[248] Declarations : art. 2 and 7
[249] Declaration
[250] Declaration : art. A
[251] Reservation : art. 10§2 ; Declarations : art. 20§2ii and 35
[252] Declaration : art. 4
[253] Declaration : art. A
[254] Declaration : art. A
[255] Declaration : art. A
[256] Declaration : art. 1
[257] Reservations : art. 2§6 and 6
[258] Declaration : art. A
[259] Declaration : art. A
[260] Declaration : art. A
[261] Declaration : art. A

[262] Declaration : art. A